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**APPEAL TRIBUNAL DECISION**

**Docket number:** 20 0288 **Hearing date:** April 17, 2020

**CLAIMANT: DETS:**

JORY PRITCHETT BENEFIT PAYMENT CONTROL UNIT

**CLAIMANT APPEARANCES: DETS APPEARANCES:**

Jory Pritchett Taylor West

 **CASE HISTORY**

The claimant timely appealed a March 17, 2020 determination which denied benefits under AS 23.20.378 and AS 23.20.387, and held the claimant liable for the repayment of benefits and the payment of a penalty under AS 23.20.390.

The issues before the Tribunal are whether the claimant:

* was available for work during periods of travel;
* knowingly made a false statement or misrepresentation in connection with the claim; and
* is liable for the repayment of benefits and the payment of a penalty.

**FINDINGS OF FACT**

The claimant established a claim for unemployment insurance benefits effective January 15, 2014. He established a new claim for benefits each January thereafter through 2020. The claimant works seasonally on road construction projects. He is a member of and is dispatched to work by Operators Union Local 302. The claimant works in many locations throughout the state, and he maintains a residence in Wasilla, Alaska. He provided a mailing and residence address in Wasilla on each unemployment claim application. The claimant was paid benefits for weeks for which he submitted bi-weekly certifications. The claimant filed the certifications using a form provided on the Division’s website, with the exception of certifications for the weeks ending December 13, 2014 and December 20, 2014, which he filed by phone with the assistance of a claim center representative.

In a routine audit of the claimant’s unemployment insurance claims, a Division investigator noted the claimant’s bi-weekly certifications showed evidence of having been filed from a computer with an internet service provider located outside the State of Alaska. The Division obtained the records of the bank account in which the claimant’s unemployment insurance benefits were deposited. The claimant’s bank records showed transactions in areas that corresponded with the computer location information associated with the claimant’s certifications. The claimant’s bi-weekly certifications did not indicate that he had reported traveling during periods when he collected benefits. The investigator noted the claimant had not reported travel while he was claiming benefits since he had been denied benefits while traveling on a previous claim filed in 2010, before the period under review.

The Division’s investigator contacted the claimant by phone and asked if he had had traveled while collecting benefits, since 2010. The claimant reported that he had not traveled while claiming benefits. When the investigator advised the claimant of the evidence he had obtained, the claimant admitted he had traveled for the purposes of work-required training, to provide care for his terminally ill father, to visit his father, and for personal vacation purposes. He admitted to having traveled in additional weeks when he had claimed benefits that the investigator was unaware of.

The claimant was offered time to obtain travel records that might indicate he was in his area of residence during any of the weeks under review, but this proved difficult due to the airline office being busy with calls related to the COVID-19 pandemic. The claimant declined to pursue the records further and the Division’s determination was issued based on the information obtained.

The investigator determined the claimant was eligible for a waiver of the requirement to be available while he was traveling to obtain vocational training required to keep his certification in the weeks ending February 28, 2015, January 23, 2016, January 30, 2016, February 18, 2017 and March 4, 2017.

The investigator found the claimant was available for work in his area of residence for at least five days despite his travel in the weeks ending December 13, 2014, January 10, 2015, March 21, 2015, November 11, 2017, January 4, 2020, January 11, 2020 and January 18, 2020.

The claimant traveled to Seattle, Washington to provide care for his father, who was terminally ill, January 9, 2017 through January 25, 2017 and December 25, 2017 through February 3, 2018. The claimant traveled to visit his father in Washington or in Arizona where his father received medical care in the weeks ending December 20, 2014 through January 3, 2015, January 17, 2015 through January 31, 2015, January 2, 2016 through January 16, 2016, November 26, 2016 through January 7, 2017, November 18, 2017, November 25, 2017 and December 28, 2019. The claimant traveled to Fairbanks, a 5 hour

drive from Wasilla, and to Seward, a 3 hour drive from Wasilla, in the week ending March 14, 2015, for personal vacation.

The claimant was required to answer the question, “Did you travel?” for each week being claimed. The claimant answered, “No” to this question for each of the weeks under review. The claimant answered “No” in the week ending March 14, 2015 because he had not left the state and since he works all over the state, he did not consider himself to be traveling. He answered “No” for weeks in which he traveled outside the state because he believed his benefits would be denied if he reported his travel and he required the benefits to get by because of his seasonal work. The claimant certified that his answers were true and correct on each bi-weekly certification.

The Division mailed the claimant an Unemployment Insurance Claimant Handbook each year when he established his benefit claim years. The claimant received the handbooks, but he did not recall that he ever read the handbooks. The Division’s handbooks advise claimants to report all travel. The handbooks advise claimants that they are in travel status any time they leave their area of residence. The handbook lists reasons for which travel may be allowed.

**PROVISIONS OF LAW**

**AS 23.20.378: Able to work and available for suitable work.**

1. An insured worker is entitled to receive waiting-week credit or benefits for a week of unemployment if for that week the insured worker is able to work and available for suitable work …

**8 AAC 85.350: Able to work and available for suitable work: general provisions.**

(a) A claimant is considered able to work if the claimant is physically and mentally capable of performing work under the usual conditions of employment in the claimant's principal occupation or other occupations for which the claimant is reasonably fitted by training and experience.

(b) A claimant is considered available for suitable work for a week if the claimant

(1) registers for work as required under 8 AAC 85.351;

(2) makes independent efforts to find work as directed under 8 AAC 85.352 and 8 AAC 85.355;

(3) meets the requirements of 8 AAC 85.353 during periods of travel;

(4) meets the requirements of 8 AAC 85.356 while in training;

(5) is willing to accept and perform suitable work which the claimant does not have good cause to refuse;

(6) is available, for at least five working days in the week, to respond promptly to an offer of suitable work; and

(7) is available for a substantial amount of full-time employment.

**8 AAC 85.353: Able to work and available for suitable work: travel claims.**

(a) The requirements of this section apply to any period during which a claimant travels outside the customary commutable area in which the claimant resides, unless the claimant travels while exempted from availability requirements under AS 23.20.378(a) or in connection with training approved under AS 23.20.382. For purposes of this section, a customary commutable area means an area where a claimant customarily commutes to and from work each day.

(b) A claimant is available for work each week while traveling only if the claimant is traveling to

(1) search for work and is legally eligible to accept work in the area of travel;

(2) accept an offer of work that begins no later than 14 days after the claimant's departure; or

(3) establish or return to a residence immediately following the claimant's discharge from the armed forces.

(c) A claimant who travels in search of work must be legally eligible to accept work and make reasonable efforts to find work each week in the area of the claimant's travel, by

(1) contacting in person an employment office;

(2) making at least two in-person employer contacts;

(3) registering in person with the local chapter of the claimant's union that has jurisdiction over the area of the claimant's travel; a claimant who has previously registered with the local union that has jurisdiction over the area of the travel is available for work if the claimant makes contacts as required by the union to be eligible for dispatch in the area of the travel; or

(4) attending in person a pre-arranged job interview.

(d) A claimant is not available for work after the claimant travels for more than four consecutive calendar weeks to search for work. A claimant is not available for work after the claimant travels for more than seven days if traveling to

(1) accept an offer of work that begins 14 days after the claimant's departure; or

(2) establish or return to a residence immediately following the claimant's discharge from the armed forces.

**AS 23.20.387. Disqualification for misrepresentation.**

(a) An insured worker is disqualified for benefits for the week with respect to which the false statement or misrepresentation was made and for an additional period of not less than six weeks or more than 52 weeks if the department determines that the insured worker has knowingly made a false statement or misrepresentation of a material fact or knowingly failed to report a material fact with intent to obtain or increase benefits under this chapter. The length of the additional disqualification and the beginning date of that disqualification shall be determined by the department according to the circumstances in each case.

(b) A person may not be disqualified from receiving benefits under this section unless there is documented evidence that the person has made a false statement or a misrepresentation as to a material fact or has failed to disclose a material fact. Before a determination of fraudulent misrepresentation or nondisclosure may be made, there must be a preponderance of evidence of an intention to defraud, and the false statement or misrepresentation must be shown to be knowing and to involve a material fact.

**AS 23.20.390. Recovery of improper payments; penalty.**

(a) An individual who receives a sum as benefits from the unemployment compensation fund when not entitled to it under this chapter is liable to the fund for the sum improperly paid to the individual.

(f) In addition to the liability under (a) of this section for the amount of benefits improperly paid, an individual who is disqualified from receipt of benefits under AS 23.20.387 is liable to the department for a penalty in an amount equal to 50 percent of the benefits that were obtained by knowingly making a false statement or misrepresenting a material fact, or knowingly failing to report a material fact, with the intent to obtain or increase benefits under this chapter. The department may, under regulations adopted under this chapter, waive the collection of a penalty under this section. The department shall deposit into the general fund the penalty that it collects.

# CONCLUSION

The first issue is whether the claimant was available for work during a period of travel. 8 AAC 85.353(a) provides that the requirements of this section apply to any period during which a claimant travels outside the area in which the claimant resides. The claimant argued that he did not consider driving to Fairbanks and to Seward to be travel. By driving five hours to Anchorage and three hours to Seward, areas to which a person would not reasonably commute daily for work, the Tribunal finds that the claimant did travel outside the area in which he resides in the ending March 14, 2015, as well as in all the other weeks under review.

8 AAC 85.353(b) provides that a claimant who travels away from their area of residence during their customary workweek is considered available for work only if they travel for one of the allowable reasons stated in section (c). Traveling to provide care for his ill father or to visit him are not allowable reasons for travel, nor is personal vacation or in-state travel.

The claimant argued that he is available for work no matter where he is located because he can respond to a call from his union in 24-48 hours, which is permissible by the union. While regulations do provide exceptions to union members by not requiring them to post a résumé online or report work search efforts, unions members are not exempted from the requirement to be available for work while outside their area of residence.

*Neither the Appeal Tribunal nor I have any jurisdiction to hold contrary to the clear wordage of the law. Scott, Com. Dec. 87H-EB-162, June 18, 1987.*

The Tribunal finds the claimant was not available for work in the weeks under review, except the weeks where it was determined he was in his area of residence for at least five days of the week and the weeks he traveled for vocational training.

The second issue is whether the claimant knowingly made a false statement or misrepresentation in connection with the claim.

*A presumption of intent to defraud arises on the basis of a falsified claim instrument itself. The division's claim form has but one purpose. It is the instrument executed by an individual desirous of receiving unemployment insurance benefits for a specific week. To this end, it contains clear and unambiguous language detailing the material factors upon which the division will base its decision to pay or not to pay. In addition, the individual completing the form certifies as to the truth of the answers and as to his understanding that legal penalties otherwise apply. Thus, once established that a claim instrument has been falsified, the burden of proof shifts to the individual [to establish there was no intent to defraud.] Morton, Com. Dec. 79H-149, 9/14/79.*

The claimant admitted that he did not report his travel because he believed his benefits would be denied and he needed the money. The claimant knowingly provided false information in each of the weeks under review in order to receive benefits.

The claimant’s benefits would have been allowed in some of the weeks, had he reported the travel to the Division. The Commissioner of the Department of Labor and Workforce Development has held that the legislature intended to deny benefits to claimants who falsified material facts, regardless of whether the claimants would have received benefits if they gave accurate information. The statute would otherwise have no real purpose, and the legislature has acted to remove any ambiguity by enacting AS 23.20.387.

In Thies, Com. Dec. 99 1118, August 26, 1999, the Commissioner cited the Alaska Supreme Court in confirming Department policy toward questions of fraudulent claims. The Commissioner held:

 *In ESD v. Marsha Spafard and Jeffrey Krum, Op. No. 89, (Alaska July 2, 1981) 1C CCH (Unemp. Ins. Repts.) AK ¶ 8083, the Alaska Supreme Court reversed the Superior Court and reinstated a Department decision that provides false statements of material facts on claim forms mandate imposition of fraud penalties even if the claimant would suffer no penalty if she had truthfully answered the questions on her claim forms. The Supreme Court held:*

*We hold that the legislature intended to deny benefits to claimants who falsified material facts, regardless of whether the claimants would have received benefits if they gave accurate information. The statute would otherwise have no real purpose, and the legislature has acted to remove any ambiguity by enacting AS 23.20.387.*

The Tribunal finds the claimant intentionally misrepresented his eligibility in all of the weeks under review. The penalties of AS 23.20.387 are appropriate in this case.

AS 23.20.390 states an individual who receives a sum as benefits from the unemployment compensation fund when not entitled to it under this chapter is liable to the fund for the sum improperly paid to the individual. In addition to the liability under (a) of this section for the amount of benefits improperly paid, an individual who is disqualified from receipt of benefits under AS 23.20.387 is liable to the department for a penalty in an amount equal to 50 percent of the benefits that were obtained by knowingly making a false statement or misrepresenting a material fact, or knowingly failing to report a material fact, with the intent to obtain or increase benefits.

The evidence presented shows that the claimant received benefits to which he was not entitled and that he intentionally misrepresented his eligibility in order to receive benefits to which he was not entitled. The Tribunal holds that the claimant is liable to the fund the amount of benefits he received to which he was not entitled and the payment of a penalty under AS 23.20.387.

 **DECISION**

The notice of determination and determination of liability issued in this matter on March 17, 2020 is **AFFIRMED**.

* That portion of the determination holding that the claimant was not available for work during a period of travel is **AFFIRMED**. Benefits remain reduced under AS 23.20.378 for the weeks ending December 20, 2014 through January 3, 2015, January 17, 2015 through January 31, 2015, March 14, 2015, January 2, 2016 through January 16, 2016, November 26, 2016 through December 10, 2016, December 31, 2016 through January 28, 2017, November 18, 2017 through November 25, 2017, December 30, 2017, January 13, 2018 through February 3, 2018, and December 28, 2019.
* That portion of the determination holding that the claimant committed fraud or intentional misrepresentation is **AFFIRMED**. A disqualification under AS 23.20.387 is imposed, and benefits are denied for the week ending December 13, 2014 through January 31, 2015, February 28, 2015 through March 21, 2015, January 2, 2016 through January 30, 2016, November 26, 2016 through December 10, 2016, December 31, 2016 through January 28, 2017, February 18, 2017, March 4, 2017, November 11, 2017 through November 25, 2017, December 30, 2017, January 13, 2018 through February 3, 2018, December 28, 2019 through January 18, 2020, and March 21, 2020 through March 13, 2021.
* That portion of the determination holding that the claimant is liable for the repayment of benefits and for the payment of a penalty is **AFFIRMED**. The claimant remains liable to the fund for benefits he received to which he is not entitled and the payment of the assessed penalty.

 **APPEAL RIGHTS**

This decision is final unless an appeal is filed in writing to the Commissioner of Labor and Workforce Development **within 30 days** after the decision is mailed to each party. The appeal period may be extended only if the appeal is delayed for circumstances beyond the party’s control. A statement of rights and procedures is enclosed.

Dated and mailed on April 20, 2020.

 Rhonda Buness, Appeals Officer