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**APPEAL TRIBUNAL DECISION**

**Docket number:** 20 1422 **Hearing date:** January 11, 2021

 January 15, 2021

**CLAIMANT: DETS:**

ASHLEE HINER BENEFIT PAYMENT CONTROL UNIT

**CLAIMANT APPEARANCES: DETS APPEARANCES:**

Ashlee Hiner Renee Carter

 **CASE HISTORY**

The claimant timely appealed a July 31, 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 Division also denied the claimant’s benefits in a separate determination issued July 29, 2020 that holds the claimant was not available for work beginning June 28, 2020 and continuing until the claimant is again able to work. The Tribunal takes this determination under review.

The issues before the Tribunal are whether the claimant:

* is able to work and is available for full-time work;
* 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 had last worked in January 2020 when she left work on an approved leave of absence to attend in-patient alcohol rehabilitation treatment. She returned home after the the treatment and was set to return to work in February, after taking some additional time off. She relapsed before she returned to work, and she returned to in-patient treatment in February. The claimant left that treatment before it was complete in mid-March because she was concerned about the COVID-19 pandemic and wanted to be closer to her family.

When the claimant returned to Kodiak in mid-March, she spoke to her employer about returning to work at that point, and the employer requested a doctor’s note. The claimant was not able to provide a doctor’s note because she had not completed the treatment program. The claimant was on a waiting list for outpatient treatment, had completed initial evaluations, and then relapsed before starting any outpatient treatment.

The claimant established her claim for unemployment insurance benefits effective April 26, 2020, while at her residence in Kodiak. The claimant was required to check a box signifying that she had read and understood the following advisory on her application and on each certification form to claim benefits:

*Alaska Law provides severe penalties for collecting or attempting to collect UI Benefits that you are not entitled to. UI fraud is KNOWLINGLY making a false statement, misrepresenting a material factor withholding information to obtain benefits. All fraud cases are subject to criminal prosecution, fines and imprisonment.*

When the claimant completed her application for benefits, she answered “Yes” to the questions: “Are you physically and mentally able to accept full-time work immediately?” and “Are you available to accept and begin full-time work immediately?” The claimant believed she was able to work full-time for another employer, she just could not return to work for the agency that she still considered to be her employer at that time because she could not provide a medical release. She did not apply for any other work, because she planned to return to work for her previous employer after completing treatment.

On June 30, 2020, the claimant traveled to Oregon to begin in-patient treatment. The claimant filed a certification on the Division’s website to claim benefits for the week ending July 4, 2020. She answered “No” to the question, “Did you travel?” for that week. The claimant believes she did not actually read the questions when she filed her certifications, she just checked the answers the same way each time she completed a certification. The claimant certified that her answers were true and correct each time she filed a certification to claim benefits.

On July 23, 2020, a Division representative contacted the claimant by phone to take a statement about the reason her last work ended, in order to adjudicate that issue. The claimant told the representative that she was in a treatment facility at the time of the call. The claimant also told the representative that she had traveled from her residence in Kodiak to Anchorage in June 2020 to stay with family because she was getting a divorce and wanted to be away from Kodiak. When the claimant filed certifications to claim benefits for weeks ending June 8, 2020 through June 30, 2020, she answered “No” to the questions, “Did you travel?” and “Did you move to another town?”

The Division representative referred the claimant’s claim for investigation because the claimant had travelled from Kodiak to Anchorage and Anchorage to Oregon and had not reported the travel when she claimed benefits, and because she told the representative that she had not been able to work at all since she left work in January 2020. At the hearing, the claimant held that she believed she was able to work and available for work since she established her claim because she could physically perform work. She believed she was available for work during the time she was in in-patient treatment in Oregon because she could leave that facility at any time to accept work.

The claimant spoke to her employer when she returned from in-patient treatment at the end of July 2020, and her doctor provided an initial letter stating the claimant could return to work. The employer told the claimant that her work as a recruiter in the human resources office was on hold due to COVID-19 and there wasn’t enough other work available for her.

On about September 3, 2020, the employer advised the claimant that her position was being eliminated. The claimant continued to look for other human resources and administrative positions online, but she did not apply for any jobs because she had not updated her résumé after working for the employer for many years. She needed to get information about dates she had performed certain types of work from the employer. She asked her supervisor for a copy of her employment file, but did not follow up on her request. The claimant was experiencing upheaval after her return from treatment including the death of her sister, loss of her job, divorce and its effects on her children and her home. At the time of this hearing, the claimant was currently working on updating her résumé so she could apply for work.

**PROVISIONS OF LAW**

**AS 23.20.378 provides:**

(a) 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. An insured worker is not considered available for work unless registered for work in accordance with regulations adopted by the department. An insured worker may not be disqualified for failure to comply with this subsection if

(1) the insured worker is not available for work because the insured worker . . .

(A) is ill or disabled;

(B) is traveling to obtain medical services that are not available in the area in which the insured worker resides, or, if a physician determines it is necessary, the insured worker is accompanying a spouse or dependent who is traveling to obtain medical services;

(C) resides in the state and is noncommercially hunting or fishing for personal survival or the survival of dependents;

(D) is serving as a prospective or impaneled juror in a court; or

(E) is attending the funeral of an immediate family member for a period of no longer than seven days; and

 (2) a condition described in (1) of this subsection occurs during an uninterrupted period of unemployment immediately following a week for which the insured worker has filed a compensable claim, and work has not been offered that would have been suitable for the insured worker before the illness, disability, hunting, fishing, medical travel, jury service, or funeral attendance.

**8 AAC 85.010 provides:**

1. In this chapter, unless the context requires otherwise, . . .

(8) "compensable claim" means a continued claim for which a money benefit is payable or has been paid, or for which a credit against an overpayment is allowable or has been allowed;

**8 AAC 85.350 provides:**

 (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 provides, in part:**

1. 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 or 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.

**8 AAC 85.354 provides in part:**

1. A claimant seeking an exemption granted to an ill or disabled claimant under AS 23.20.378 will, in the discretion of the division, be required to submit to the division a medical report verifying the illness or disability. A report may be required for an illness or disability of any duration, or periodically during an extended illness or disability. The report must be completed and signed by a physician; however, if no physician is available, the statement may be completed and signed by a nurse or other medical official. The report must specify at least the nature of the illness or disability, the date it was incurred, and its expected duration.

**AS 23.20.387. Disqualification for misrepresentation.**

1. 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

Alaska Statute 23.20.378 holds that a claimant must be able to work and available for work in a week in order to be eligible for benefits for that week. The first issue before the Tribunal is whether the claimant was able to work and available for work during the period under review.

In Arndt v. State, DOL, 583 P2d 799, Alaska, September 22, 1978, the Alaska Supreme Court adopted a two-fold test for determining a claimant's availability for work. The court held:

*The test requires (1) that an individual claimant be willing to accept suitable work which he has no good cause for refusing, and (2) that the claimant thereby make himself available to a substantial field of employment.*

The claimant in this case left work to obtain treatment for substance abuse. At the time she established her claim for unemployment benefits, the claimant was home from an unfinished treatment attempt. The claimant held that she had attempted to return to work in mid-March, but the employer wanted her to provide a doctor’s note.

*A Hearing Officer must base his decision on a "preponderance of evidence." See e.g. Patterson, Com. Dec. 86H-UI-233, 1C Unemp. Ins. Rptr. (CCH), AK ¶8121.28, 10/16/86. "Preponderance of evidence" has been defined as "that evidence which, when fairly considered, produces the stronger impression, and has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition thereto." Adelman, Com. Dec. 86H-UI-041, 1C Unemp. Ins. Rptr. (CCH), AK ¶8121.25, 5/10/86, citing S. Yamamoto v. Puget Sound Lumber Co., 146 P. 861, 863 (WA).*

A person’s efforts to locate work are indicative of that person’s genuine desire to become employed. The claimant stated she looked for work online when she returned from her incomplete treatment before establishing her claim, but she did not apply for work with other employers because she intended to return to work for her previous employer until she was advised her job was being eliminated on September 3, 2020. Even after she was told that she could not return to work, the claimant did not prepare her résumé and apply for work. While it is understandable that the claimant’s life was in upheaval at that point, she has not established that she was available for work since she completed treatment. The Tribunal finds that the claimant was not able to work and available for work at the time she established her claim for benefits in the week ending May 2, 2020, and her unavailability has continued through the date of this hearing, when the claimant stated she has working on her résumé so that she may apply for work, but had not completed it.

The claimant’s availability for work was further hampered when she traveled from Kodiak to Anchorage to stay with family on an unknown date in June 2020. Regulation 8 AAC 85.353 holds that the terms of the regulation apply to any period when a claimant leaves the area in which they reside. The claimant did not travel for an allowable reason when she traveled to Anchorage in June 2020 and she did not make work searches as outlined in that regulation, which would show a reasonable effort to find work in that area.

The claimant traveled from Anchorage to Oregon on June 30, 2020 to begin in-patient treatment. AS 23.20.378 holds that a claimant may be considered to be available for work if they travel to seek medical services that are not available in their area of residence, however they must have filed a compensable claim the week before the travel began. The claimant in this case was not in compensable status before her medical travel started because the Tribunal has concluded that she was not available for work from the date she established her claim, including the week before she traveled to Oregon. Although the claimant held she could leave the facility in Oregon at any point to accept work, she was not located in her area of residence and not available to promptly begin work.

*The purpose of the Employment Security Act is to enhance the economic security of persons who are involuntarily unemployed. In order to fulfill this statutory objective, it is not unreasonable to require claimants to be within the area of their normal labor market during the regular workweek. If a claimant travels for reasons unrelated to his work search, he runs the risk of being unable to promptly respond to job offers. This risk clearly runs counter to the statutory purpose of enhancing the employment security of the unemployed. (3PA-84-28, Henderson v. Employment Security Division, January 7, 1988)*

The claimant did not provide the employer with a requested note from her doctor releasing her to return to work. If the claimant were in fact available for work at that point, it would have been reasonable for her to provide a note and arrange to return to work. She did not prepare a résumé and begin searching in earnest for work at any point in the period under review, which would indicate that she had a desire to find work. The preponderance of evidence indicates the claimant was not available for work from the date she established her claim and through the date of this hearing.

The second issue before the Tribunal is whether the claimant knowingly made a false statement or misrepresentation in connection with the claim. The claimant reported to the Division that she was able to work and available for work when she established her claim and again each week when she filed a certification to claim benefits. She certified on her initial application and each week when she filed a claim for benefits that her answers were true and correct. The claimant held in the hearing that she believed she was able to work and available for work during the period under review because she was physically capable of performing her work duties. However the claimant expected to return to work for her previous employer and was not searching for other employment. Her employer would have been allowed to return to her previous work if she had provided a medical release from her doctor, but she could not provide one and she did not complete the treatment necessary to be released. The claimant also held that she could have worked for another employer when her employer would not permit her to work, but she did not apply for any other work because she planned to return to her old job. When she was told her old job would not be available, she still did not apply for other work or prepare her résumé so she could apply. In light of the claimant’s situation, it is not reasonable that she believed she was able to work and available for work during the period under review, thus her answers were deliberate misinformation intended to receive benefits.

*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. Morton, Com. Dec. 79H-149, 9/14/79.*

The claimant also failed to report when she traveled to Anchorage in June 2020 and then to Oregon on June 30, 2020. She held that she did not read the questions and simply answered them in the same order each time. She certified that her answers were true and correct after being warned that knowingly providing false information was considered fraud. In reaffirming that simply contending a mistake or oversight fails to rebut the presumption of fraud, the Commissioner held as follows in the matter of Gillen, Com. Dec. 9121667, December 6, 1991:

*If we were to allow this kind of excuse, the fraud provision would become a dead letter. Any claimant can come into a hearing and testify that the false claim was a mistake, or that he doesn't know or doesn't remember how the false entries were made.*

Based upon Morton and Gillen, the Tribunal must hold that the claimant intentionally misrepresented her eligibility for benefits for the weeks under review when she reported that she was able to work and available for work from the time she established her claim and when she failed to report that she had traveled in weeks for which she claimed benefits and certified that her answers were correct.

The third issue is whether the claimant is liable for the repayment of benefits and the payment of a penalty. Alaska Statute 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 she was not entitled and that she intentionally misrepresented her eligibility in order to receive benefits to which she was not entitled. The Tribunal holds that the claimant is liable to the fund the amount of benefits she received to which she 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 July 31, 2020 is **AFFIRMED**.

* That portion of the determination holding that the claimant was not able to work and available for work is **AFFIRMED**. Benefits remain denied under AS 23.20.378 for weeks ending May 2, 2020 through July 18, 2020.

* 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
* weeks ending May 2, 2020 through July 18, 2020 and
* weeks ending August 1, 2020 through July 24, 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 she received to which she is not entitled and the payment of the assessed penalty.

The determination issued July 29, 2020 is **AFFIRMED**. Benefits remain **DENIED** beginning with the week ending July 4, 2020 and continuing until the claimant is available for work.

 **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 January 15, 2021.

 Rhonda Buness, Appeals Officer