

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT**

In the Matter of)
)
GARY BURTON) OAH No. 21-1891-LUI
) Agency No. 21 0041 74, 33, 32
_____)

APPEAL DECISION

Docket Number: 21 0041 74, 33, 32

Hearing Date: September 7, 2021

CLAIMANT APPEARANCES:

Gary Burton

DETS APPEARANCES:

Steve Kinzie

CASE HISTORY

The claimant, Gary Burton, timely appealed a November 30, 2020 determination that denied Unemployment Insurance (UI) benefits and imposed penalties for not reporting wages and for knowingly misrepresenting material facts with the intent to obtain benefits.

The Department of Labor referred the appeal to the Office of Administrative Hearings on August 10, 2021. Under the agreed terms of referral, an administrative law judge hears and decides the appeal under procedures specific to UI appeals. AS 44.64.060 procedures do not apply.

The matter was heard in a recorded hearing on September 7, 2021. Mr. Burton provided testimony under oath. Agency representative Steve Kinzie was also present.

The issues on appeal are whether Mr. Burton (1) failed to report employment and wages; (2) knowingly made false statements of material fact with intent to obtain benefits; and (3) must repay overpaid benefits with penalties.

FINDINGS OF FACT

Mr. Burton was an assistant manager of a retail store and on the cusp of a major promotion when the COVID-19 pandemic hit and municipal orders shuttered his store. Mr. Burton's last day of work before the shutdown was March 15, 2020. He then filed for unemployment.

Mr. Burton had filed for unemployment before and had found the process straightforward. When filing in response to the pandemic shutdown, however, Mr.

Burton testified that the process was “confusing and unclear” and that it was difficult to get clear direction from the agency. On the website and in phone calls to Department of Labor, Mr. Burton was instructed to indicate that he was separated from his job due to lack of work. Mr. Burton testified that he felt doing so was a “lie” because he had not lost his job and was not unemployed or underemployed because of a lack of work; he was prohibited from working because his job was not considered “essential.”

On April 9, 2020, Mr. Burton took on part-time work as a cashier at an essential business that was exempt from the shutdown. Mr. Burton testified that when he had filed for unemployment due to lack of work in the past, he had been told he could go out and get another job to supplement reduced hours. Based on that past experience, Mr. Burton belief he was permitted to accept work to supplement unemployment payments and did not need to report the supplemental work.

For his cashier work, Mr. Burton received \$195.26 for the week ending April 11, 2020, \$489.58 for the week ending April 18, 2020, \$288.99 for the week ending April 25, 2020, and \$487.63 for the week ending May 2, 2020. Mr. Burton also filed unemployment claims for those weeks. On these weekly claims, Mr. Burton was asked “Did you work for any employers?” and Mr. Burton marked “No.” Mr. Burton testified that he did not make that statement to be dishonest or to obtain benefits he was not entitled to. Mr. Burton thought he was filling out his claims as instructed, noting that the online forms were not set up for information related to a pandemic shutdown. Mr. Burton also testified that he thought if he said that he worked for an employer, it would disqualify him from any benefits and that he thought he was allowed to take supplemental work while continuing to collect unemployment.

On May 11, 2020, the agency sent Mr. Burton a letter stating that he needed to report hours and earnings from the cashier job “[i]f you continue to file for benefits beyond your hire date.” Mr. Burton testified that he stopped filing claims.

The agency issued a decision on November 30, 2020 finding that (1) Mr. Burton failed to report employment and wages for the weeks ending April 11, 2020, April 18, 2020, April 25, 2020, and May 2, 2020; (2) that Mr. Burton had knowingly misrepresented facts by not reporting this employment and wages and was therefore disqualified from benefits for 24 weeks; and (3) that Mr. Burton was liable for overpayment of benefits with penalties for knowingly misrepresenting facts. According to the record, the agency is seeking \$1312.00 in overpaid benefits plus a \$656.00 penalty.

At the hearing, Mr. Burton acknowledged the accuracy of records of his cashier work and the wages he received and stated his willingness to repay any overpaid benefits for that work. Mr. Burton, however, denied knowingly misrepresenting facts to obtain benefits and took issue with the remedies for misrepresentations.

EXCERPTS OF RELEVANT PROVISIONS OF LAW

AS 23.20.360 Earnings deducted from weekly benefit amount

The amount of benefits, excluding the allowance for dependents, payable to an insured worker for a week of unemployment shall be reduced by 75 percent of the wages payable to the insured worker for that week that are in excess of \$50. However, the amount of benefits may not be reduced below zero. If the benefit is not a multiple of \$1, it is computed to the next higher multiple of \$1. If the benefit is zero, no allowance for dependents is payable.

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.

8 AAC 85.220. Recovery of overpayments.

(a) A determination of overpayment liability issued under AS 23.20.390 will include a statement of the right to request a waiver of repayment of the overpayment. An individual may request a waiver within 30 days after the date on which the determination of liability becomes final. The director may extend this period if the request is delayed by circumstances beyond the individual's control.

(b) The director shall waive repayment of an overpayment of benefits to an individual under AS 23.20.390 if

- (1) the individual has died or received the benefits in good faith;
- (2) repayment would be against equity and good conscience; and
- (3) the request for a waiver meets the requirements of this section.

(c) Benefits have been received in good faith if the overpayment was received without fault by the individual, and the individual did not have the capacity to recognize that he or she was incorrectly overpaid. Benefits have not been received in good faith if the individual

- (1) negligently reports or fails to report information, which results in the overpayment; or
- (2) knew or should have known that the individual was not lawfully entitled to receive the benefits.

(d) Repayment of an overpayment is against equity and good conscience if

- (1) repayment in 12 consecutive monthly installments would cause great hardship to the individual, considering the current and potential income and other financial resources available to the individual and the individual's family;
- (2) the overpayment resulted from a decision of the department or a court overturning a determination of eligibility made at any level of appeal, and the individual did not withhold or conceal pertinent information on any claim for benefits or in any investigation or proceeding;
- (3) the individual received the overpaid benefits by relying on clearly incorrect advice, given to the individual by the division or an employment security agency of another state, which the individual could not recognize as incorrect; or
- (4) the overpayment cannot be waived under (1) - (3) of this subsection, but the department determines that recovery would be injurious to the individual after consideration of the standards in (1) - (3) of this subsection, and any extraordinary circumstances.

(e) A waiver of repayment of the overpayment will not be granted if the overpayment is the result of a false statement or misrepresentation of a material fact, or failure to report a material fact.

(f) The director may waive a portion of an overpayment if recovery of the full amount would be against equity and good conscience under (d) of this section.

(g) The director shall not waive an overpayment if waiving the overpayment would cause the individual to receive more than the individual's maximum weekly benefit amount or maximum entitlement of benefits.

(h) To recover an overpayment established under AS 23.20.390, the director may

(1) accept payment, in full, or as part of a repayment schedule under an agreement by the individual and the department, by cash, check, money order, or credit card;

(2) deduct the full weekly benefit amount for each week that benefits are payable to an individual until the overpayment is recovered; or

(3) upon request of the individual, deduct at a rate of 50 percent of the full weekly benefit amount if

(A) the individual received the overpaid benefits in good faith as described in (c) of this section;

(B) sufficient benefits are available to the individual when the overpayment liability is established to allow recovery of the overpayment at a rate of 50 percent of the full weekly benefit amount; and

(C) the amount of the overpayment is greater than two times the full weekly benefit amount.

(i) Repealed 7/19/2019.

(j) If the director is unable under (h) of this section to recover an overpayment owed by an individual, the director may pursue recovery of the overpayment through a

(1) claim against the individual's permanent fund dividend under 8 AAC 85.225; and

(2) civil action against the individual.

(k) For the purposes of this section,

(1) "family" includes all persons living in a single residence who are related to each other by blood, marriage, or adoption, including stepchildren and stepparents; however, it does not include an individual aged 18 or older who receives less than 50 percent of support from the family and who is not the principal earner or the spouse of the principal earner of the family;

(2) "financial resources" includes assets, such as stocks, bonds, interest in mutual funds, cash, and credit union or savings accounts; "financial resources" does not include an individual's home or furnishings, automobiles needed for transportation, clothing, or tools of the trade;

(3) "great hardship" means an individual's inability to obtain minimal necessities of food, medical care, and shelter for the individual or the

individual's family for at least 30 days within a period of 90 days after the date of the waiver request;

(4) “full weekly benefit amount“ means

(A) the weekly benefit amount as set out in AS 23.20.350(d); plus

(B) the allowance for dependents, if the individual receives one under AS 23.20.350(f); less

(C) amounts deductible under AS 23.20.360, 23.20.362, and 8 AAC 85.140;

(5) “income“ includes income from all sources, including benefits under AS 23.20.

APPLICATION

Was Mr. Burton Overpaid Benefits Because of Unreported Wages?

The first issue is whether Mr. Burton was overpaid benefits for the weeks ending April 11, 2020, April 18, 2020, April 25, 2020, and May 2, 2020 because of unreported wages. At the hearing, Mr. Burton conceded the wages he received from interim, part-time cashier work during these weeks. Earnings in excess of \$50 reduce a claimant’s weekly benefits. Mr. Burton received more than \$50 in each of these weeks, so these wages did result in Mr. Burton being overpaid.

Did Mr. Burton Knowingly Misrepresent or Omit Material Facts?

The second issue is whether Mr. Burton knowingly misrepresented or omitted material facts with the intent to obtain benefits by not reporting his wages from the cashier job for the weeks ending April 11, 2020, April 18, 2020, April 25, 2020, and May 2, 2020.

The agency has the burden of demonstrating by a preponderance of the evidence that Mr. Burton “knowingly” misrepresented material facts on his UI claims with the intent to obtain benefits to which he was not entitled. AS 23.20.387. To satisfy this burden, “the Division must prove that the insured worker had a subjective intent to defraud before it can exercise its discretionary authority to disqualify him from receiving benefits for up to a calendar year.” *Blas v. State, Dep’t of Labor and Workforce Development*, 331 P.3d 363, 374 (Alaska 2014). Subjective intent is a high hurdle. Evidence of what a claimant or a reasonable person should have known is not sufficient. *Cf. ARCTEC Servs. v. Cummings*, 295 P.3d 916, 921-23 (rejecting reasonable person standard for “knowingly” misrepresenting facts for workers’ compensation claims); AS 11.81.900(a)(1), (2) (defining “intentionally” and “knowingly” in criminal context). Rather, it is evidence of a claimant’s actual beliefs and purpose that will demonstrate the claimant’s subjective intent.

Mr. Burton's unreported wages impacted his benefit amounts, so they are material facts. And he did omit those wages from his claims for the weeks at issue. But to find that Mr. Burton knowingly misrepresented his wages, the agency has the burden of showing that Mr. Burton knew he was omitting material facts and did so for the purpose of increasing his benefits. The agency has not met that burden. Mr. Burton credibly testified that the UI claims process was confusing in the context of the pandemic shutdown and that he was instructed to fill out his claims in a manner that would work within a system that was not set up for this situation. He credibly testified that he understood — albeit incorrectly — that he was not required to report what he viewed as interim work to supplement his income while unemployed due to the pandemic shutdown. Mr. Burton credibly testified that he did not omit his wages to deceive the agency or receive additional benefits, and that he said he was not working these weeks because he believed it was the appropriate answer in relation to the shutdown. It was not until after the weeks at issue that the agency sent Mr. Burton a letter telling him he needed to report wages from the cashier job, at which point Mr. Burton stopped filing UI claims. In light of Mr. Burton's credible testimony, and which no contradictory evidence of his subjective intent, the agency has failed to meet its burden to prove that Mr. Burton knowingly misrepresented facts with the intent to receive benefits.

Because Mr. Burton did not knowingly misrepresent facts, he may not be disqualified from benefits for 24 weeks based on misrepresentations.

Must Mr. Burton Repay Overpaid Benefits with Penalties?

The third issue is whether Mr. Burton is responsible for repayment of benefits and penalties. A claimant who receives unentitled benefits is liable for repayment unless circumstances warrant a waiver, such as because repayment would be against equity and good conscience. AS 23.20.390(a). Here, Mr. Burton conceded his liability for repaying overpaid benefits at the hearing and voiced his willingness to do so.

Mr. Burton is not, however, liable for penalties. A claimant who is disqualified from benefits because of knowing misrepresentations is liable for penalties equal to 50 percent of the benefits obtained by those misrepresentations. AS 23.20.390(f). As discussed above, the agency did not meet its burden to show Mr. Burton knowingly misrepresented material facts. Accordingly, he is not liable for penalties for misrepresentations.

DECISION

The November 30, 2020 decision is **affirmed in part and reversed in part**. Mr. Burton did not correctly report wages for the weeks April 11, 2020, April 18, 2020, April 25, 2020, and May 2, 2020 and is liable for any overpayment of benefits based on unreported wages for those weeks. The decision is affirmed as to those issues. All other issues and findings are reversed. There is insufficient evidence to find that Mr. Burton knowingly

misrepresented material facts with intent to obtain benefits and accordingly Mr. Burton is not disqualified from benefits for 24 weeks or liable for penalties on overpaid benefits.

DATED September 13, 2021.




Rebecca Kruse
Administrative Law Judge

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.

CERTIFICATE OF SERVICE

I certify that on September 13, 2021, this document was sent to: Gary Burton (by mail); Steve Kinzie (by email); UICC Fraud Team (by email). A courtesy copy has been emailed to the DETS UI Appeals Team.


Office of Administrative Hearings