

**APPEAL TRIBUNAL DECISION**

**Docket number:** P23 0006 **Hearing date:** March 21, 2023

**CLAIMANT:**

LISA DYE

**CLAIMANT APPEARANCES: DETS APPEARANCES:**

Lisa Dye Corrina Garrison

####  CASE HISTORY

The claimant filed an appeal against a June 4, 2021 determination that denied benefits under CARES Act, Public Law 116-136 on the grounds that the claimant did not meet eligibility requirements of the Act. The Division mailed the determination to the claimant’s address of record on June 4, 2021. The claimant’s appeal was filed on February 15, 2023, giving rise to the issue of the timeliness of the claimant’s appeal.

The claimant filed a timely appeal against a determination issued February 15, 2023 determination which denied the claimant a waiver of the requirement to repay overpaid benefits under AS 23.20.390. The issue is whether the claimant is eligible for a waiver of the requirement to repay over-paid benefits.

**FINDINGS OF FACT – TIMELINESS**

The claimant did not recall receiving the Division’s determination or notices of overpaid benefits mailed on June 4, 2021. The claimant had given her brother a key to her Post Office box and she later learned that he may have purposely withheld her mail. The claimant changed the locks on her Post Office box some time after 2021. The claimant’s brother lived in her home through 2022. In 2022, the claimant’s Permanent Fund Dividend check was not deposited as expected. The claimant learned her dividend check was levied by the department to repay overpaid benefits that resulted from the determination in this matter. The claimant filed her appeal on February 15, 2023.

#### PROVISIONS OF LAW - TIMELINESS

**AS 23.20.340 provides in part;**

 (e) The claimant may file an appeal from an initial determination or a redetermination under (b) of this section not later than 30 days after the claimant is notified in person of the determination or redetermination or not later than 30 days after the date the determination or redetermination is mailed to the claimant's last address of record. The period for filing an appeal may be extended for a reasonable period if the claimant shows that the application was delayed as a result of circumstances beyond the claimant's control.

(f) If a determination of disqualification under AS 23.20.360, 23.20.362, 23.20.375, 23.20.378 ‑ 23.20.387, or 23.20.505 is made, the claimant shall be promptly notified of the determination and the reasons for it. The claimant and other interested parties as defined by regulations of the department may appeal the determination in the same manner prescribed in this chapter for appeals of initial determinations and redeterminations. Benefits may not be paid while a determination is being appealed for any week for which the determination of disqualification was made. However, if a decision on the appeal allows benefits to the claimant, those benefits must be paid promptly.

**8 AAC 85.151 provides in part;**

1. An appeal may be filed with a referee, at any employment center, or at the central office of the division and, if filed in person, must be made on forms provided by the division. An appeal must be filed within 30 days after the determination or redetermination is personally delivered to the claimant or not later than 30 days after the date the determination or redetermination is mailed to the claimant’s last address of record. The 30-day time period will be computed under Rule 6 of the Rules of Civil Procedure. However, the 30-day period may be extended for a reasonable time if the claimant shows that the failure to file within this period was the result of circumstances beyond his or her control.

#### CONCLUSION - TIMELINESS

An appellant has the burden to establish some circumstance beyond the appellant’s control prevented the timely filing of the appeal.

*Once a notice has been properly mailed to an individual's last known address, the Department has discharged its "notice" obligation. The appellant's asserted failure to receive the notice does not establish cause for an extension of the appeal period. Andrews, Com. Dec. 76H-167, Oct. 8, 1976; aff'd Andrews v. State Dept. of Labor, No. 76-942 Civ. (Alaska Super. Ct. 1st J.D., April 13, 1977). There is a rebuttable presumption that a notice placed in the mail will be timely delivered. Rosser, Com. Dec. 83H-UI-145, June 15, 1983.*

*The failure of a party's agent or employee to act is not such a circumstance [to grant reopening]. Anderson, Com. Dec. 84H-UI-186, July 20, 1984.*

The Division satisfied its obligation to notify the claimant of the determination, how it affected her benefits, and her appeal rights. The claimant speculated that her brother may have withheld the mail. The claimant had given her brother a key to her Post Office box, thus making him an agent for the receipt of her mail. As in Anderson, above, the failure of a party’s agent to act, or to give the mail to the claimant, is not a circumstance beyond the claimant’s control.

Considering the claimant’s circumstances and the above cited decisions of the Commissioner, the Tribunal must find that the claimant has not established that her delayed appeal was due to a circumstance beyond her control. The matter has become final and the Tribunal has not authority to review it.

#### DECISION - TIMLINESS

The claimant’s appeal from the notice of determination issued on June 4, 2021 is **DISMISSED**.

#### CASE HISTORY - OVERPAYMENT WAIVER

## The claimant timely appealed a determination issued February 15, 2023, which denied the claimant’s request for a waiver of the requirement to repay overpaid benefits. The issue before the Appeal Tribunal is whether the claimant meets the eligibility requirements for her overpayment responsibility to be waived.

**FINDINGS OF FACT - OVERPAYMENT WAIVER**

The claimant established a claim for Pandemic Unemployment Assistance (PUA) benefits effective May 25, 2020. The Division determined that the claimant was not eligible for regular unemployment benefits because she did not have wages in covered employment on which to base a claim. When the claimant applied for PUA she was required to select a reason which demonstrated how she was affected by the COVID-19 pandemic. The claimant indicated that she had worked as an independent contractor in 2019 and could provide proof of her earnings if required.

On December 27, 2020, the Continued Assistance for Unemployed Workers Act was signed into law. The law required that as of January 1, 2021, claimants must provide proof of their previous self-employment earnings as a fraud prevention measure.

On March 5, 2021, the Division sent a letter to the claimant’s address of record and also sent an electronic message letting the claimant know she had a notice to view on the Division’s website. The claimant read the letter, which requested that she provide proof of her earnings in 2019 by June 2, 2021. The letter held that if the information was not provided by the deadline, benefits might be denied and the claimant may be required to repay overpaid benefits. The claimant had not received a 1099 from the taxi business she worked for as an independent contractor in 2019. The business owner had closed the business and abruptly left town. The claimant and other drivers tried to contact the owner and tried to get 1099 information from the business’s former bookkeeper without success. The claimant had trip report records that showed her earnings for 2019 and she had previously confirmed with the owner that her trip reports matched the owner’s calculation of the claimant’s earnings. The claimant did not consider asking the Division if the trip reports could be provided as proof of her previous earnings. She was later advised by a tax preparer that she could use those documents as supporting documents to file her 2019 federal tax return.

The Division’s records show the claimant accessed the Division’s website frequently, that she read the letter, but that she never submitted any information in response to the Division’s request.

When the claimant did not respond to the request by the deadline, the Division denied the claimant’s benefits starting with the week ending January 2, 2021. All benefits paid to the claimant as of that date were considered overpaid and the claimant was required to repay the benefits, including additional weekly amounts from the Federal Pandemic Unemployment Compensation (FPUC) program. The claimant requested that she be waived from the requirement to repay overpaid benefits. The Division denied the claimant’s request on a holding that she was not faultless in the receipt of the benefits. The claimant stated in the hearing that it would be a severe hardship for her to repay the overpaid benefits in twelve monthly payments, considering the size of the overpayment and her current employment status and financial status.

**STATUTORY PROVISIONS - OVERPAYMENT WAIVER**

**AS 23.20.080 Federal-state cooperation**

(a) In the administration of this chapter, the department shall cooperate, to the extent consistent with this chapter, with the Secretary of Labor, and shall take action through the adoption of regulations, administration methods, and standards that is necessary to obtain for this state and its citizens all advantages available under 26 U.S.C. 3303 and 3304 (Internal Revenue Code) and the Wagner-Peyser Act, as amended. The department shall comply with the regulations of the Secretary of Labor relating to the receipt or expenditure by this state of money granted under these federal laws and shall make reports in the form and containing the information which the Secretary of Labor requires. The department shall comply with the provisions which the Secretary of Labor may from time to time find necessary to assure the correctness and verification of the reports. The department may cooperate with every agency of the United States charged with the administration of an unemployment insurance law.

**The CARES Act of 2020, Public Law 116-136, Title II, Sec. 2102 Pandemic Unemployment Assistance**

(3) COVERED INDIVIDUAL.—The term “covered individual”—

(A) means an individual who—

(i) is not eligible for regular compensation or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107, including an individual who has exhausted all rights to regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107; and

(ii) provides self-certification that the individual—

(I) is otherwise able to work and available for work within the meaning of applicable State law, except the individual is unemployed, partially unemployed, or unable or unavailable to work because—

(aa) the individual has been diagnosed with COVID–19 or is experiencing symptoms of COVID–19 and seeking a medical diagnosis;

(bb) a member of the individual's household has been diagnosed with COVID–19;

(cc) the individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID–19;

(dd) a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID–19 public health emergency and such school or facility care is required for the individual to work;

(ee) the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID–19 public health emergency;

(ff) the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID–19;

(gg) the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID–19 public health emergency;

(hh) the individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID–19;

(ii) the individual has to quit his or her job as a direct result of COVID–19;

(jj) the individual's place of employment is closed as a direct result of the COVID–19 public health emergency; or

(kk) the individual meets any additional criteria established by the Secretary for unemployment assistance under this section; or

(II) is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107 and meets the requirements of subclause (I); and

(B) does not include—

(i) an individual who has the ability to telework with pay; or

(ii) an individual who is receiving paid sick leave or other paid leave benefits, regardless of whether the individual meets a qualification described in items (aa) through (kk) of subparagraph (A)(i)(I).

**UIPL 16-20, Change 2 Issued by USDOL July 21, 2020**

Clarification on item (kk) of acceptable COVID-19 related reasons. Section 2102(a)(3)(A)(ii)(I)(kk) of the CARES Act provides for the Secretary of Labor to establish any additional criteria under which an individual may self-certify eligibility for PUA benefits. Section C.1.k. of Attachment I to UIPL No. 16-20 provides for coverage of an independent contractor whose ability to continue performing his or her customary work activities is severely limited because of the COVID-19 public health emergency. The example provided includes a driver of a ride sharing service who has been forced to suspend operations because of COVID-19. Question 42 of Attachment I to UIPL No. 16- 20, Change 1, explains that an independent contractor who experiences a “significant diminution of work as a result of COVID-19” may be eligible for PUA. With these examples in UIPL Nos. 16-20 and 16-20, Change 1, the Secretary provides coverage under item (kk) to those self-employed individuals who experienced a significant diminution of services because of the COVID-19 public health emergency, even absent a suspension of services.

**UIPL 9-21 Issued by USDOL on December 30, 2020**

New Requirement for Individuals to Submit Documentation Substantiating Employment or Self-Employment (Section 241 of the Continued Assistance Act). Any individual that receives a payment of PUA after the date of enactment (December 27, 2020) is required to provide documentation 9 substantiating employment or self-employment, or the planned beginning of employment or self-employment. The deadline for providing such documentation depends on when the individual filed the initial PUA claim.

* Filing New Applications for PUA. Individuals filing a new PUA application on or after January 31, 2021 (regardless of whether the claim is backdated), are required to provide documentation within 21 days of application or the date the individual is directed to submit the documentation by the State Agency, whichever is later. The deadline may be extended if the individual has shown good cause under state UC law within 21 days.
* Filing Continued Claims for PUA. Individuals who applied for PUA before January 31, 2021 and receive a payment of PUA on or after December 27, 2020 (regardless of which week ending date is being paid), are required to provide documentation substantiating employment or selfemployment, or the planned beginning of employment or selfemployment, within 90 days of application or when directed to submit the documentation by the State Agency, whichever is later. The deadline may be extended if the individual has shown good cause under state UC law

**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.

(b) The department shall promptly prepare and deliver or mail to the individual at the individual's last address of record a notice of determination of liability declaring that the individual has been determined liable to refund the amount of benefits to which the individual is not entitled. The amount, if not previously collected, shall be deducted from future benefits payable to the individual. However, the department may absolve liability to the fund for repayment of all or a portion of those benefits if the department determines that an individual has died or has acted in good faith in claiming and receiving benefits to which the individual was not entitled and recovery of those benefits would be against equity and good conscience.

**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.

(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 in 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;

#### CONCLUSION - OVERPAYMENT WAIVER

Under 8 AAC 85.220(a) the director shall waive repayment of an overpayment of benefits under AS 23.20.390 if the claimant received the benefits through no fault of his own and if repayment would be against *equity and good conscience*. Equity and good conscience is described as causing “*great hardship*.” Great hardship is defined as 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.

The claimant in this case received a notice from the Division requesting proof of her self-employment earnings in 2019. The letter advised the claimant that if she did not provide the requested information, her benefits might be denied and she might be required to repay overpaid benefits. While the claimant did not have a 1099 statement from the employer, she did have documents that established her income from 2019. The claimant did not provide the trip reports to the Division or contact the Division to ask if her trip reports could be considered as proof of her self-employment income.

Regulation 8 AAC 85.220 holds that benefits have not been received in good faith if the claimant negligently reports or fails to report information which results in the overpayment.

The Tribunal finds that the claimant was aware of the Division’s request for information, and she had documents that could have satisfied the Division’s requirement for proof of her earnings. The claimant negligently failed to provide the information required by the Division, and this resulted in her overpayment. The claimant did not establish that she was faultless in the receipt of the overpaid benefits.

#### DECISION - OVERPAYMENT WAIVER

The determination issued on February 15, 2023 is **AFFIRMED**. The claimant is not eligible for a waiver of the requirement to repay overpaid benefits under AS 23.20.390.

#### APPEAL RIGHTS

This decision is final unless an appeal is filed 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 appeal rights and procedures is enclosed.

Dated and mailed on March 24, 2023.

 Rhonda Buness, Appeals Officer