STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
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DECISION OF THE BOARD

Mailed and Filed: MAY 24, 2018
IN THE MATTER OF: Appeal Board No. 599943

PRESENT: RANDALL T. DOUGLAS, MEMBER

In Appeal Board Nos. 599868 and 599943, the Commissioner of Labor appeals from decisions of the Administrative Law Judge filed January 9, 2018, which modified the initial determination, charging the claimant with an overpayment of $967.50 in benefits recoverable pursuant to Labor Law § 597 (4), to hold the overpayment non-recoverable; and which overruled the initial determinations reducing the claimant's right to receive future benefits by nine effective days and charging a civil penalty of $145.12 on the basis that the claimant made willful misrepresentations to obtain benefits. No appeal was taken from the decision of the Administrative Law Judge filed January 9, 2018, which modified the initial determination, holding the claimant ineligible to receive benefits, effective August 20 through September 5, 2017, on the basis that the claimant was not available for employment, to be effective from August 26 through September 5, 2017.

At the combined hearing before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances by the claimant and on behalf of the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant is an attorney and CPA. After separating from employment, he filed a claim for benefits, by internet, in June 2017. He received the Claimant Handbook both electronically and on paper. The Handbook stated that a claimant will be denied benefits if he was not ready, willing and able to work, or if he was not prepared to take a job "immediately."

The claimant went to his required appointment at the Career Center in early August 2017. At that time, he was informed that his next appointment would be on September 5. The claimant explained that he was scheduled to be out of town on September 5, and he asked for a different appointment date. The person the claimant spoke with at the Career

office told him to call the State, as the State schedules the appointments.

The claimant called the TCC on August 10. The claimant called for several reasons. One was to inquire about his ability to claim benefits for the week ending July 30, which he had not claimed because he felt uncertain about how his severance pay would affect his right to benefits. The claimant in fact was eligible for benefits for that week, and he ultimately claimed and received them. The claimant also asked whether a trip outside the country would negatively impact his ability to claim benefits, as he would be going to Niagara Falls, Canada for a day. The claimant asked this question because he had read in the Handbook that a claimant should call the TCC before traveling out of the area or out of the country. This language states:

Q. I need to travel out of the country. How do I claim benefits?

A. If you will be traveling for vacation or personal reasons, you cannot claim and receive benefits for the time you are gone. To protect your rights, you must contact us before you travel, even if you are traveling to look for work or for a job interview. By giving us this information before your trip, your benefits will be held temporarily while you are away. Contact us when you have returned to start your benefits again. You must also contact us before you travel out of your normal area, even if you do not leave the United States, Canada, Puerto Rico or the Virgin Islands....

Hearing the response to his question about traveling to Canada for a day, the claimant understood that this trip would not impact his ability to claim benefits.

On August 24, 2017, the claimant received a job offer for a job that would start September 25, 2017. The claimant accepted this offer and began the onboarding process of completing paperwork and ethics and compliance work for his new employer.

On August 26, 2017, the claimant and his family took a train from New York City, where he lives, to Erie, Pennsylvania. He stayed in Erie for a week. The claimant estimates that, if necessary, he could have returned from Erie to New York City within three hours by car and plane. While in Erie, the claimant continued his job search even though he had already accepted a job, as the Department of Labor required him to look for work, and he felt that maintaining good relationships with recruiters was a good investment anyway. Then, he and his family drove to Niagara Falls, Canada, where they stayed overnight.

The claimant flew from Buffalo back to New York City on September 5, 2017. With respect to the relevant benefit weeks, the claimant certified to being ready, willing and able to work every day. Based on these certifications, the claimant received benefits at a

pre-tax rate of $430 per week.

OPINION: No appeal having been filed by the claimant, and no appeal being filed by either party with respect to the issue of the claimant's availability for work, the law of the case is that the claimant was ineligible for benefits, effective August 26 through September 5, 2017, on the basis that the claimant was not available for work, and the claimant received an overpayment of benefits with respect to that time period.

The credible evidence establishes that, although the claimant was not available for work from August 26 through September 5, 2017, the claimant certified to the Department of Labor that he was ready, willing and able to work with respect to the entirety of this time period. Based on these certifications, the claimant received his full weekly benefits at a rate of $430 per week. We disagree with the Administrative Law Judge's conclusion that the claimant's certifications were not factually false but rather reflected a misunderstanding of law. Significantly, the claimant received and read the Claimant Information Handbook, and the claimant acknowledges in his hearing request letter that he read the paragraph of the Handbook quoted above. Although the heading of that paragraph focuses on travel out of the country, the paragraph further states, "You must also contact us before you travel out of your normal area, even if you do not leave the United States...." The claimant does not contend, however, that he ever informed the TCC of his plan to spend a week in Erie, Pennsylvania. Rather, he contends only that he advised the TCC that he was planning to take a day trip to Niagara Falls, Canada. Even this disclosure was inaccurate, as the claimant's excursion to Canada turned out to include a stay overnight. The claimant was responsible to disclose all of the pertinent facts that might affect his right to receive benefits (see Matter of Lang, 187 AD2d 836 [3d Dept 1992]). Whereas the information that the claimant provided to the TCC was neither accurate nor complete, the claimant cannot rely upon any advice that the TCC may have provided to him based on that inadequate information. Further, the claimant's false certifications cannot be excused as an incorrect legal conclusion, as the claimant was not responsible for drawing this legal conclusion. Rather, the claimant was responsible to report his travel to the Department of Labor so that the Department could instruct him properly. In light of the claimant's failure to comply with this requirement, we conclude that the claimant's certifications are factually false. Accordingly, we conclude that the overpayment of benefits that the claimant received is recoverable. In light of the Administrative Law Judge's modification of the claimant's period of ineligibility (see 017-22254), this matter is referred to the Department of Labor for recalculation of the overpayment amount.

The credible evidence further establishes that, whereas the claimant received the Handbook but nevertheless failed to comply with the Handbook's instruction to report his

travel to the Department of Labor, the claimant knew or should have known that he was not available for work while he was outside his normal area. A willful misrepresentation "is a false statement that is made knowingly, intentionally or deliberately and does not require proof of criminal intent to defraud" (see Matter of Deutsch, 126 AD3d 1209 [3rd Dep't 2015]). Under this legal standard, the claimant's factually false certifications were made willfully. Further, based on the claimant's willful misrepresentations, the claimant received benefits to which he was not entitled. Accordingly, we conclude that the initial determinations of willful misrepresentation and civil monetary penalty are sustained. In light of the Administrative Law Judge's modification of the claimant's period of ineligibility (see 017-22254), this matter is referred to the Department of Labor for recalculation of the applicable forfeiture penalty and civil monetary penalty.

DECISION: The decisions of the Administrative Law Judge, insofar as appealed from, are reversed.

In Appeal Board Nos. 599868 and 599943, the initial determinations, charging the claimant with an overpayment of $967.50 in benefits recoverable pursuant to Labor Law § 597 (4); and reducing the claimant's right to receive future benefits by nine effective days and charging a civil penalty of $145.12 on the basis that the claimant made willful misrepresentations to obtain benefits, are sustained.

The claimant is denied benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER