CHAPTER 9
OVERPAYMENTS AND WILLFUL MISREPRESENTATIONS

2.9.1 INTRODUCTION

Overpayments are payments of benefits to claimants who are later found not to have been entitled to receive them as a result of new information received by the Department of Labor or a decision by an ALJ or the Board

Benefits which are later determined to have been overpaid cannot be recovered from the claimant as long as the claimant received the benefits in good faith and did not make a false statement or willfully conceal a pertinent fact in connection with the claimant.[1] In cases where a claimant initially gave inaccurate information but subsequently remedied the fault by providing accurate information, only those benefits received prior to the corrected statement may be subject to recovery.[2]

Unless the claimant received benefits as a result of fraud or a willful misrepresentation, the Department of Labor may — with one exception — only re-determine a claim based on new or corrected information within one year of the original determination.[3] If the claimant's testimony supports a conclusion that no willful misrepresentation was made, then the underlying

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[1] Labor Law § 597 (4); Between 1983 and 1998 all overpayments were recoverable, without the need of a false statement or willful misrepresentation, so Board and Court decisions issued between those years should not be relied upon with respect to the recoverability of an overpayment.

[2] *Matter of Winston*, 82 A.D.3d 1395 (3d Dep't 2011) where the claimant informed the Department of Labor upon filing her claim that she was not a corporate officer but on two subsequent occasions, had the corporate accountant contact the Department and provide information about her corporate status and activities, court found only those benefits received prior to the first disclosure were recoverable, noted the Department witness had conceded at the hearing "that he made a mistake by considering claimant to be employed part-time by the corporation rather than ineligible for benefits based upon her potential to receive a financial reward" (at 1396) and concluded the claimant should not be penalized by being charged with a recoverable overpayment or having a forfeit penalty imposed for the period following the disclosure); Appeal Board No. 536558 (where the claimant filed a claim on October 8, 2006, but the only evidence of a factually false statement was one made during a telephone interview with the Department on October 24, 2006; the benefits the claimant received between the 8th and the 24th of October were held to be non-recoverable).

[3] Labor Law § 597 (3); the limitation is six months only for an overpayment arising out of a retroactive payment of remuneration (such as retirement payments).

determination of disqualification or ineligibility must be overruled.[4] If the claimant lost employment as a result of a felony, the Department of Labor may re-determine the claim at any time, regardless of whether there was a willful misrepresentation. Further, the statute provides that any benefits accepted by such a claimant are deemed not to have been accepted in good faith and are, as a result, always recoverable.[5]

If a decision is reached that the claimant was overpaid benefits and that the benefits were originally paid as a result of a willful misrepresentation, a civil penalty will also be imposed against the claimant in the amount of $100.00, or 15 percent of the total overpaid benefits, whichever is greater.[6]

2.9.2 WILLFUL MISREPRESENTATION

Under the law, a claimant who has willfully made a false statement or representation to obtain benefits shall forfeit benefits for at least the first four but not more than the first eighty effective days following discovery of such offense for which he or she otherwise would have been entitled to receive benefits. Such penalty shall apply only once with respect to each such offense.

Willful misrepresentation "means 'knowingly', 'intentionally', 'deliberately' making a false statement." It "does not imply a criminal intent to defraud."[7] If the claimant knows that the information is incorrect but provides that information anyway, the claimant has made a willful misrepresentation. In addition, claimants are under a duty to disclose all facts to the Department of Labor, in order that the Department may reach a proper determination, and a failure to disclose pertinent facts constitutes a willful misrepresentation.[8] If the statement is not false, it cannot be a willful misrepresentation.

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[4] Appeal Board No. 555760 (the claimant testified that when he reopened an existing claim, he certified to the days worked accurately, was not asked about his separation from employment and the Department had no evidence to the contrary).

[5] Labor Law § 593 (4)

[6] Labor Law § 594 (4)

[7] *Matter of Vick*, 12 A.D.2d 120 (3d Dep't 1960)

[8] *Matter of Marder*, 16 A.D.2d 303, 306 (3d Dep't 1962) (claimant, who had been a part owner of a bungalow community and whose wife owned ½ the stock, filed claims in three years but did not disclose his prior interest in the business, the incorporation, or the stock issued to his wife. The Court found "Claimant was under a duty to make a full disclosure of all the facts from the inception of his claim so that the local office might make a proper determination of all the issues. The proof herein compels the conclusion that claimant deliberately divested himself of a proprietary interest in the bungalow colony in an attempt to qualify for benefits during the off-seasons. Accordingly, it is apparent that claimant realized that his true relationship with the corporation and its business was a material factor in the determination of his eligibility for benefits, and therefore, he realized that it was his duty to disclose all of the facts in connection therewith. His silence, when there was a duty to speak, constitutes such concealment as to constitute willful misrepresentation

An allegation by the claimant that the answers given during the claim process or while certifying was based on advice or information given by a Department of Labor representative must be tested for credibility. The claimant should be questioned about when and under what circumstances the information was allegedly given, including what the claimant told the Department of Labor representative initially. The claimant should also be questioned about whether he or she can identify the Department of Labor representative.[9] However, an inadvertent error by the claimant precludes a finding that the claimant made a willful misrepresentation.[10] For example, a claimant who certified prior to the end of a statutory week but assumed she was certifying for that week and consequently certified incorrectly as to the days worked was held to have made an inadvertent error.[11]

A claimant who has received a handbook but did not read it or read it in its entirety[12], or a claimant who was made aware of the online handbook but did not read it or read it in its entirety[13], is not excused for certifying incorrectly, if the handbook would have given the claimant the information necessary to certify accurately. For example, a claimant who was a paid member of a Town Planning Board did not report as days worked those days on which he attended Board meetings. As he had access to the *Handbook* and had read parts of it, he was on notice that any activity that brings in income must be reported.[14] A claimed lack of intent by the claimant does not excuse

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within the meaning of the Law"); Appeal Board No. 591219 (claimant, after filing a claim for benefits, accepted a job which he then quit a few days later but failed to disclose he had worked when certifying for benefits that week. In sustaining the willful misrepresentation, the Board held that the claimant was obligated to make a full and complete disclosure of all pertinent facts and concealing the fact that he quit employment constituted a willful misrepresentation) (citing *Marder, supra*).

[9] *Matter of Keegan*, 306 A.D.2d 2d 740 (3d Dep't 2003); Appeal Board No. 562010 (involving a claimant who, after filing her claim, continued working for a part-time employer but did not report those days worked when certifying. The Board noted in its decision that even the claimant's testimony about what she was told did not establish misinformation about how to certify).

[10] *Matter of Forbes*, 181 A.D.2d 956 (3d Dep't 1992).

[11] Appeal Board No. 587849 (in overruling the determination of willful misrepresentation, the Board noted that in the following week, the claimant again certified prior to the end of the statutory week and that she only certified for two weeks, which corresponded to her having been unemployed for only two weeks. The Board also specifically overruled the holding in Appeal Board No. 565208, which had relied on an inaccurate analysis of *Matter of Sferlazza*, 69 AD3d 1184 (3d Dep't 2010)).

[12] *Matter of Roberts*, 49 A.D.3d 1129 (3d Dep't 2008).

[13] *Matter of Nigro*, 47 A.D.3d 1040 (3d Dep't 2008); *Matter of Pasinski*, 141 A.D.3d 989 (3d Dep't 2016); *Matter of Denes*, 147 A.D.3d 1144 (3d Dep't 2017).

[14] *Matter of Denes*, 147 A.D.3d 1144 (3d Dep't 2017) (the Appeal Board had rejected the claimant's contentions that the Planning Board was not his primary occupation and that he was paid annually, not by meeting; the Board noting that the claimant conceded at the hearing that the *Handbook* did not support his position) (*aff'g* Appeal Board No. 586337)).

a willful misrepresentation, when the claimant had access to the *Handbook* and thus knew the definition of work.[15]

Documents produced by the Department of Labor (including certification records and records provided to the Department by the employer) may still be relied upon, even if there is no witness to authenticate the documents as business records[16], if the claimant does not dispute the contents of those records.[17]

A claimant who has cognitive disabilities as a result of multiple surgeries has been held not to have made a willful misrepresentation when he failed to report work he performed one day a week for the village in which he lived, when he understood the question to refer to the hospital where he had worked full-time prior to filing his claim for benefits.[18] However, a claimant who had bipolar disorder and anxiety was held to have made willful misrepresentations when she certified that she was ready, willing, and able to work during periods when she was not capable of working, including periods when she was in the hospital.[19]

A claimant who has been arrested on felony or misdemeanor charges cannot rely on the Fifth Amendment to excuse a false statement.[20]

MISTAKE OF LAW

An incorrect answer arising out of a misunderstanding of the law, rather than an incorrect statement of fact,[21] should not be held to be a factually false statement, let alone a willful

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[15] *Matter of Guibord*, 147 A.D.3d 1137 (3d Dep't 2017) (claimant's certifications regarding his days of work found to be willful misrepresentations as he performed paid part-time services for a municipality, writing specifications for tennis courts that the municipality was planning to build) (*aff'g* Appeal Board No. 585827).

[16] See Chapter 1.6.2, "Hearsay and Its Exceptions"

[17] Appeal Board No. 566637: The claimant admitted to working during the time period at issue, and testified only that he had no recollection of the specific days he worked or the answers he gave when certifying for benefits.

[18] Appeal Board No. 570159

[19] Appeal Board No. 570159 (Board noted that the medical documentation did not indicate that the claimant was unable to distinguish between truth and falsehood).

[20] *Matter of Mathis*, 110 A.D.3d 1412 (3d Dep't 2013); *lv denied* 23 N.Y.3d 902 (2014) (Court wrote that claimant "unquestionably had the right to refuse to respond to any inquiries related to her possible guild in connection with her arrest and the pending criminal charges [but] neither the text nor the spirit of the Fifth Amendment confers a privilege to lie") (citing *Brogan v United States*, 431 US 174 (1977)); Appeal Board No. 534557 (claimant informed the TCC he was not guilty of DWI but later pled guilty to that charge).

[21] *Matter of Valvo*, 57 NY2d 116, 126 (1982)) ("the agency's interpretation of the statute defining employment (Labor Law §522) although rational, does not reflect the common understanding of employment. As a result, laymen, particularly unskilled laymen who undoubtedly represent the majority of claimants for unemployment benefits, may not realize that occasionally helping a friend or relative may constitute employment even though they are not paid for it")

misrepresentation. For example, a Canadian citizen working in the US under a TN visa did not make a willful misrepresentation when he certified that there were no days when he was not ready, willing, and able to work, even though the TN visa was good only for a specific employer.[22]

WHEN FILING A CLAIM

A claimant may be held to have made a willful misrepresentation by selecting an incorrect reason for the separation from employment or by answering another question incorrectly. Questions of whether a claimant indicated that the separation was due to lack of work when the claimant knows that he quit or knows that she was fired are typical willful misrepresentation factual issues. Whether a claimant's statement as to the reason for the separation may depend on what, if anything, the employer told the claimant about the separation. For example, a claimant who received a severance check and a letter attributing his separation to downsizing after he was unable to return from sick leave did not make a willful misrepresentation when he indicated he was no longer employed due to lack of work.[23] In addition, a claimant who answers "no" to a question about whether she is a corporate officer,[24] is receiving a pension, etc., when the correct answer should have been "yes," may also be held to have made a willful misrepresentation.

aff'g Matter of Valvo, 83 A.D.2d 344 (3d Dep't 1981) (claimant found not to have made a willful misrepresentation when she certified that she did not work on any days during a period where she occasionally wrote a check during her employer's off-season, a service which was unpaid).

[22] Appeal Board No. 511006 (Board noted the claimant's awareness that upon finding new employment he would be able to obtain a new TN visa within a short space of time since it had taken him five minutes to obtain the TN visa he was currently holding).

[23] Appeal Board No. 540711 (the Board, having held that his inability to return from sick leave was a voluntary separation—albeit with good cause—noted that given the receipt of the letter, the claimant's response was "logical under the circumstances, we cannot expect a layperson to draw a legal conclusion of voluntary separation from employment under these circumstances." See, also, Appeal Board No. 545910 (the claimant was had been warned about performance and at discharge was told only that her services were no longer needed; her certification that she was discharged due to performance issues was reasonable, even though the employer testified that the final incident was attendance-related.

[24] However, a claimant who is a member of a limited liability company has not made a willful misrepresentation if she answers "no" to this question as a limited liability company is an unincorporated organization (LLC § 102 [m]).

Practice Tip:

In order to establish willfulness, the record must establish that the claimant knew that the answer given was false. In a case where the basis of the willful misrepresentation relates to the answer given in response to the question on the reason for the claimant's separation from employment, the record must contain evidence on the following points:

- Was the claimant asked about the reason for separation?
- What answer did the claimant give in response?
- What was the claimant's knowledge regarding the reason for separation? This is usually developed during the testimony relating to the disqualification issue. For instance, it may be appropriate to ask the claimant what reason, if any, was given by the employer for the discharge?

If the answer appears to be incorrect (for example, the claimant certified that the job separation was due to lack of work, when the record includes evidence that the claimant was fired), why did the claimant answer "lack of work?"

The screen shot showing the questions put to the claimant during the claim process or the telephone script may also be entered into evidence, particularly in cases where, for example, the claimant testifies that the only option available was "lack of work."

DEPARTMENT OF LABOR INVESTIGATION

A claimant who correctly answers questions about a business on the claim form and accurately fills out a questionnaire and is found eligible has not made a willful misrepresentation when, at a later date, she minimizes the nature of her business during a telephone interview with the Department of Labor.[25] However, a claimant who gives misleading information to the Department has made a willful misrepresentation. For example, the claimant informs the Department that he quit based on his doctor's advice that he switch jobs due to a medical condition and is found eligible. At a hearing on the employer's objection, the record establishes that the claimant had been medically cleared to return to work two years before he quit and the doctor had only advised the claimant to think about a different position.[26]

[25] Appeal Board No. 576695

[26] Appeal Board No. 518992

WEEKLY CERTIFICATIONS

Certifications to not having worked or to the incorrect number of days worked may constitute willful misrepresentations.[27] Aggregating the hours worked during a week and then dividing by seven and one-half or eight to come up with "full days" of work also constitutes a willful misrepresentation.[28] The *Claimant Handbook* is not needed in such cases to establish that the claimant knew or should have known how to certify as the question about the number of days worked is considered to be straightforward, and without the need of special instruction.[29] A claimant who has limited English proficiency and has an English-speaking friend certify on his behalf may still have made a willful misrepresentation if the claimant does not tell the friend to report days of employment.[30]

A claimant who falsely certifies to earning less than the maximum benefit rate, relying on net pay, has made a willful misrepresentation, when the claimant is aware, either from the *Claimant Handbook* or the actual question posed during the certification process, that the answer should be made using gross pay.[31]

Whether certifications to total unemployment by self-employed claimants constitute willful misrepresentations will depend on the nature and extent of the activities which were performed. A claimant who owned a golf pro shop did not make willful misrepresentations during the off-season even on the occasional days where he wrote a check.[32] A claimant who provided full particulars of his business, was found eligible, and correctly reported days when he performed services did not make willful misrepresentations when he certified to being totally unemployed on days when he did not perform any actual services on behalf of his business.[33] A claimant who

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[27] *Matter of Bowlby*, 31 A.D.2d 939, 940 (3d Dep't 2006) (Court wrote that "there is no acceptable defense to making a false statement").

[28] Appeal Board No. 538611 (citing *Matter of Nebel*, 108 A.D.3d 1007 (3d Dep't 2013)); *Matter of Smith*, 107 A.D.3d 1287 (3d Dep't 2013).

[29] Appeal Board No. 519560 (claimant, an accountant who enrolled in college to obtain a degree in advance business management, obtained a work-study position; Board concluded there was no ambiguity about her status, given that she had filled out a W-4 and was paid and that the claimant, an accountant knew she was working); Appeal Board No. 519083 (claimant contended she thought the question posed was asking whether she had earned any money; the Board noted that the question clearly asked whether the claimant had worked, only).

[30] Appeal Board No. 520237

[31] *Matter of Schwartz*, 141 A.D.3d 1045 (3d Dep't 2016); Appeal Board No. 583399

[32] *Matter of Smith*, 53 A.D.3d 908 (3d Dep't 2008) (given that "the definition of employment under the Labor Law 'does not reflect the common understanding of employment' we find that claimant's sporadic and minimal activities were not so concerted or time-consuming as to have put him on notice that his certification of lack of employment was false…").

[33] Appeal Board No. 539016 (when a claimant discloses information which would be sufficient to justify a denial of benefits, the claimant should not be penalized when the Department finds the claimant eligible).

owns (or is starting up) a business and who certifies to a lack of total unemployment may have made willful misrepresentations if she received—or was on notice of—the *Claimant Handbook*, or if those activities were "so concerted or time-consuming as to generate awareness that the continuing certification of total unemployment misrepresents reality".[34]

A claimant who has refused a job offer must report that offer, even if the claimant had good cause for the refusal, and certifying that no job offer was refused constitutes a willful misrepresentation.[35] However, a claimant who did not receive a definite job offer does not make a willful misrepresentation by certifying that he or she did not refuse a job offer.[36]

A claimant who travels within the United States for personal reasons but certifies that there were no days when he or she was not ready, willing, and able to work has made a willful misrepresentation, when the claimant has received the *Claimant Handbook* or is aware of the online version and is thus on notice that to be ready, willing, and able the claimant must be available to start work immediately.[37]

A claimant who travels outside the United States and its possessions, Puerto Rico, or Canada is not available for employment and certifications that there were no days when the claimant was not ready, willing, and able to work constitute willful misrepresentations.[38] In addition, a claimant

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[34] *Matter of Czarniak*, 60 A.D.2d 745 (3d Dep't 1977) (citing to *Matter of Bailey*, 18 A.D.2d 727 (3d Dep't 1962)). In *Bailey,* the claimant spent 20-80 hours a week while in benefits constructing a four-unit motel. In *Czarniak*, the claimant, a plumber, formed a corporation with another individual for the purpose of retails sales of plumbing supplies. His activities over a period of about six months while in benefits included assisting in leasing space, purchasing inventory, and paying utility bills. Once he opened the business to the public, he stopped claiming benefits. In finding that his certifications to total unemployment did not constitute willful misrepresentations, the Court noted that the claimant had no business at the time that he filed his claim and that the record did not contain evidence of what instructions he was given about reporting further activities. The Court concluded that his activities, unlike the *Bailey* claimant, were not so concerted or time-consuming that he should have realized he was not totally unemployed. The rule in *Czarniak* would only apply in situations where the record established that the claimant had neither received the *Handbook* nor been made aware of the online version of the *Handbook.*

[35] Appeal Board No. 574742 (claimant, a skilled cabinetmaker, refused a job offer as a yogurt packer and certified he had not refused a job as he did not consider the offered employment suitable; the Board held that job was not suited to the claimant but he was still required to report the refusal when certifying).

[36] Appeal Board No. 569327 (no willful misrepresentation where claimant had only engaged in e-mail exchanges with a non-profit's executive director regarding the possibility of a project which might materialize at an indefinite point in the future); Appeal Board No. 530657 (no willful misrepresentation where claimant did not attend an interview with a hospital, but the hospital was only scheduling interviews with several individuals for two possible positions); Appeal Board No. 538906 (no willful misrepresentation where claimant was asked to submit a résumé to an employment agency which would then forward it to the potential employer, which would be the entity that would decide whether to extend an offer); Appeal Board No. 517968 (claimant did not respond to a canvas letter sent to over 60 individuals, which was inviting bids on seven possible positions).

[37] Appeal Board No. 579299 (claimant spent a week on Florida while *en route* to a pre-planned trip to Argentina)

[38] *Matter of Corso*, 144 A.D.3d 1367 (3d Dep't 2016) (claimant was traveling throughout Europe).

who certifies from outside the US or Canada, by circumventing the Department of Labor's system which is designed to prevent such certifications or by providing his or her PIN or NY.GOV ID to an individual in the US[39] is considered to have committed flagrant fraud. Use of a Virtual Private Network [40] or a "Magic Jack"[41] are considered instances of flagrant fraud (*see "Flagrant Fraud" later in this chapter)*. However, it may be appropriate to reduce the 80-day penalty for flagrant fraud in cases where a claimant certifies from outside the country for a week when she was still at in the United States.[42]

A claimant who received the *Claimant Handbook,* which advises claimants of the requirement that the PIN be safeguarded and warns of the consequences for failing to safeguard the PIN, but then fails to safeguard his or her PIN (or, now, NY.GOV ID) may be responsible for any false certifications made by another person.[43]

If the claimant denies certifying and contends that he or she was the victim of identity theft, the record must contain, as the Court puts it, "persuasive proof" before such a contention is credited. A claimant who denies disclosing his PIN and who admits that the benefits were deposited into his bank account has not provided any such proof.[44]

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[39] Appeal Board No. 570132 (claimant gave his PIN to his brother so his brother could certify while the claimant was in Colombia)

[40] Appeal Board No. 577024 (claimant certified while in Italy, using a VPN which had been set to auto-select a server located in New Jersey)

[41] Appeal Board No. 574627 (claimant certified from Guyana)

[42] Appeal Board No. 574562 (claimant traveled to Guyana on a Thursday, March 7, 2012; she certified on Sunday, March 10, from Guyana, using a "Magic Jack," because she had been at home in New York for most of the week. She remained in Guyana until Friday, March 22, without further certifying while outside the US. In modifying the 80-day penalty to a four-day penalty, the Board noted that she notified the Department about her certification error on Monday, March 25, 2012, and that she only certified once from outside the US and did so for a week when she was in the US for part of that week).

[43] Appeal Board No. 555113; *cf. Matter of Hart*, 125 A.D.3d 1021 (3d Dep't 2014) (Court held that a mere failure to safeguard a PIN is not an intentional act, if the claimant testifies that he or she did not authorize any other individual to certify for the claimant); *but see, Matter of McCann*, 143 A.D.3d 1033 (3d Dep't 2016) (sustaining willful misrepresentation despite the claimant's contention that he did not authorize his girlfriend to certify on his behalf. The Court did not explain the reason for not following *Hart*; the only difference between the two cases is that the claimant in *Hart* had left his PIN in a folder in an unlocked file cabinet in his bedroom while the claimant in *McCann* had put a notation of his PIN in his wallet and then handed the wallet to his girlfriend upon being incarcerated).

[44] Appeal Board No. 560238, affirmed in *Matter of Monserrate*, 102 AD3d 1046 (3d Dep't 2013); *cf*. Appeal Board No. 577510 (claimant lived and worked on Staten Island but the documentary evidence established that a bank account was opened in her name in Texas; that the benefits released after certifications on her claim had been made once she returned to work were direct deposited into the Texas bank; and withdrawals were made at ATMs located in Florida, California, and South Carolina at the same time that she was working); Appeal Board No. 569543 (claimant wrote his PIN on a small piece of paper, which he kept in a small compartment inside his duffel bag. The claimant was arrested at home but was not allowed to take his wallet (which contained his UI debit card) or his duffel bag. He did not authorize

Practice Tip:

In cases where a claimant denies certifying and alleges that he or she was the victim of identity theft, evidence should be obtained on the following points:

- Did the claimant ever file a report of identity theft with the police?
- Did the claimant ever reveal his or her PIN or NY.GOV ID?
- Did the claimant ever reveal the PIN to his or her bank account?
- If the claimant denies disclosing his PIN, what explanation, if any, does the claimant have for how another individual could have obtained the PIN?
- If certifications were made by telephone, was it from the claimant's telephone number and, if so, did any other individual have access to that telephone?
- Did the claimant ever lose his or her debit card?
- If the case concerns benefits received in a prior year, did the claimant include UI benefits on that year's income tax return?

A claimant who certifies incorrectly and then contacts the Department of Labor immediately to explain the error should not be found to have made either a factually false statement or a willful misrepresentation.[45] However, where the claimant does not disclose the error spontaneously and only reveals the correct facts after having received the benefits, the original false statement is still considered to be a willful misrepresentation.[46]

DURING A HEARING

Recoverability of overpayments may be based on testimony given at a hearing. For instance, he claimant is disqualified or held ineligible. After a hearing, the initial determination is overruled and the claimant then starts receiving benefits. On appeal (by the Department of Labor or the employer if the employer appeared at the hearing) or after a hearing held on an application to reopen by the employer, the initial determination is sustained. The Department then issues an initial

any individual to certify on his behalf and several months after he was incarcerated, his duffel bag was found in a storage facility located miles from the apartment he had been residing at prior to his arrest and incarceration. The Board overruled the flagrant fraud determination).

[45] Appeal Board No. 541352 (On January 15, 2008, the claimant re-opened his claim, intending to certify for the week ending December 16, 2007 but instead certifying for the week ending January 13, 2008; the Department had no evidence to contradict the claimant's testimony that he realized his error, tried to fix it online but was unable to do so, and then contacted the TCC immediately).

[46] Appeal Board No. 524611-A (claimant, who had been fired, reopened a claim in early March and certified that he had been separated due to lack of work; he did not reveal the discharge until early July, after having received benefits for four weeks)

determination charging the claimant with a recoverable overpayment; based on the allegation that the claimant's testimony at the first hearing was factually false or constituted a willful misrepresentation.

In such cases, the testimony which forms the basis for recoverability must be factual testimony. "Interpretations, opinions, judgements, puffings and evaluations, etc. given by the claimant at a hearing and found by the Appeal Board to the contrary on appeal, do not constitute factually false statements on which to base the recoverability of an overpayment."[47] Factual testimony, for example, that the employer agreed to pay the claimant a specific salary, will constitute a factually false statement if that testimony is later shown to be incorrect.[48] A claimant's testimony at one hearing may be sufficiently misleading that it serves as a basis for finding that his testimony constituted a willful misrepresentation.[49]

Practice Tip:

In a case where an overpayment is based on testimony given at a prior hearing, the transcript of that hearing must be entered into evidence. The findings of fact in the ALJ decision arising from that earlier hearing cannot be used to establish that the claimant testified falsely. *See* Appeal Board No. 489409.

THE CLAIMANT HANDBOOK

The *Claimant Handbook* is needed to establish the requisite knowledge in a willful misrepresentation case if the specific information is needed to understand that the responses provided during the certification process would be false. A claimant who is working for an employer and receiving a salary knows that he is employed and does not need the *Handbook* to inform his how to answer the question about whether there were any days when he was not totally unemployed. However, a claimant, who is taking steps to start a business while receiving benefits but certifies to total unemployment because she has not yet opened the business to the public, may not understand that she is considered employed. In that case, the *Claimant Handbook* should

[47] Appeal Board No. 231207, cited in Appeal Board No. 491060.

[48] Appeal Board No. 501326 (claimant testified at one hearing that the employer agreed to her salary demands but at a later hearing recanted that testimony).

[49] Appeal Board No. 572776 (claimant was fired for leaving his store without a manager for four hours. At the first hearing he testified only that he left another individual in charge who then also decided to take lunch; at the second hearing he admitted that he and the other individual had lunch together at the same sports bar and watched television together. The Board concluded that his omission of this fact at the first hearing was clearly meant to conceal his knowledge that the other individual had also left the store for an extended period of time.)

be entered into evidence, provided that the *Handbook* had been placed in the hearing file by Department of Labor.

A claimant who refused a job offer does not need the *Claimant Handbook* to tell her how to answer the certification question about refusals. A claimant who is traveling on vacation knows that he is not ready to work; a claimant who is traveling at least in part to look for work may not know whether he is considered available for employment without the *Handbook*.

A claimant who either received the *Claimant Handbook* or was made aware of the online version of the *Claimant Handbook* is on notice of all the information contained within it, even if the claimant did not read it, or only skimmed it.

Practice Tip:

When the *Claimant Handbook* must be made part of the record, proceed with these questions:

- Was the claim filed by telephone or online?
- If the claim was filed by telephone, was the claimant asked if she wanted to receive a copy of the *Claimant Handbook*?
- If the claimant answered "yes," did she receive it?
- If the claim was filed online, was the claimant asked if he wanted to receive a copy of the *Claimant Handbook*?
- If the claimant answered "yes," did he receive it?
- If the claimant answered "no," was he made aware of the online version of the *Claimant Handbook*?

The hearing file should contain copies of the relevant screen shots, including the confirmation page, or telephone IVR scripts. The confirmation page includes a section advising the claimant of the existence of the online version of *Claimant Handbook* and the claimant's responsibility to read the *Handbook*. It also includes a hyperlink to the *Handbook* itself. If the claimant denies being asked whether she wanted the *Claimant Handbook* or denies being advised of the online version, those documents should be confronted on the claimant, and the claimant asked whether he recalls seeing those pages on hearing that information. If the claimant continues to maintain that he did not see or did not hear anything related to the *Claimant Handbook*, it may be necessary to adjourn the case to allow the Department of Labor to present a witness to testify about the claim process.

If the claimant admits to receiving the *Handbook* or being aware of the online version, the relevant pages from the *Handbook* must be entered into evidence, even if the claimant also admits he did not read it. Judicial notice cannot be taken of the information contained within the *Handbook*.

2.9.3 FORFEIT PENALTIES

The basic penalty[50] for one willful misrepresentation is four days if the willful misrepresentation did not result in an overpayment of benefits and eight days if the willful misrepresentation did result in an overpayment of benefits. If the primary issue is overruled, then benefits were not overpaid. As a result, the forfeit penalty will need to be modified from eight to four days (assuming that the willful misrepresentation determination is being sustained). In addition, any civil penalty must be overruled as the amount of a civil penalty is tied to the amount of the overpayment. If there is no overpayment, there cannot be a civil penalty.[51]

The penalty for flagrant fraud is 80 days, and each instance of such fraud can carry its own penalty.

A claimant who obtains employment after filing a claim for benefits and is then separated from employment, and upon certifying conceals the employment and the fact of the separation has made two willful misrepresentations and is subject to a separate forfeit penalty for each occurrence.[52]

A claimant who is working but certifies to zero days of employment for a period of several weeks is subject to a separate forfeit penalty for each certification. These certifications are considered to be multiple offenses, as the claimant's work in one week is a different false statement than the claimant's work in a second week. However, the calculation is different in cases where a claimant's certifications are considered to be a single offense. For example, a claimant is unavailable for two or more weeks for the same reason and certifies to zero days when he was unavailable. These multiple certifications are considered to be the same false statement. The penalty in such cases will depend on the number of days for which the claimant was overpaid.

FLAGRANT FRAUD

A willful misrepresentation that amounts to flagrant fraud carries a substantial penalty (see below). Flagrant fraud includes impersonation, which would include disclosing one's PIN or NY GOV ID to another in order to allow that person to certify on one's behalf when the claimant is able to enter the information. Claimants who are unable to enter their PIN may have the assistance of another individual, but the claimant must be physically present with the helper at the time of the certification. Flagrant fraud also includes contrived employment intended for the purpose of allowing the claimant to file a valid original claim or break a prior disqualification. The Department of Labor has also imposed the penalty for flagrant fraud in cases of repeated

[50] The Department of Labor's standards on calculation of the forfeit penalty are set forth in Special Bulletin A-710-21.

[51] Appeal Board No. 583134

[52] Appeal Board No. 549600A (after filing her claim, the claimant worked for one week but then stopped reporting to work); Appeal Board No. 528173.

behavior; that is, the claimant had previously been penalized for making willful misrepresentations in a particular situation (working while collecting benefits, for example), and then subsequently makes the same willful misrepresentations in the same situation.[53]

2.9.4 FACTUALLY FALSE STATEMENT

A factually false statement is sufficient to render an overpayment recoverable, even if the factually false statement is not willfully made.[54]

Factually false opinions must be distinguished from a claimant's opinion or interpretation of the circumstances at issue. A claimant who informs the Department of Labor on a questionnaire that he was not insubordinate in that he did not refuse to perform a job-related task is not making a false statement but giving his interpretation of his actions.[55] Similarly, a claimant who correctly informs the Department of the reason for his discharge but contends that his actions were justified is only providing his interpretation of the incident.[56] A claimant who answered that he had not received holiday pay did not make a factually false statement when he received a check after certifying from an employer who had never been known to distributed holiday pay.[57] However, the

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[53] Appeal Board No. 516318 (In 2000, the claimant filed a claim falsely indicating that he worked for a relative when, in fact, he was the sole proprietor of a tax preparation business. The willful misrepresentation determination was sustained by the hearing ALJ and the Board. In 2002, while still involved with the same business, he again filed a claim indicating that he worked for a relative. As he had previously been penalized for the same offense, the Department of Labor imposed a penalty for flagrant fraud).

[54] *Matter of Piccirilli*, 92 A.D.2d 686 (3d Dep't 1983); *Matter of Mondragon*, 85 A.D.3d 1477 (3d Dep't 2011) (Court held "[e]ven accepting that claimant's misrepresentation was not intentional, that explanation is not a defense to making a statement on the certification that was false in fact" despite claimant's contention that certifying he lost a job due to lack of work when he had actually quit was an innocent mistake due to rushing through the certification process).

[55] Appeal Board No. 538509 (the claimant was not given a reason for his discharge; testimony at the hearing established that the claimant was discharged for continuing to argue after being told to stop, but the claimant was not asked about whether he had been arguing and the Department of Labor questionnaire did not indicate that he had been discharged for continuing to argue).

[56] Appeal Board No. 491060 (The Department of Labor issued a misconduct determination, based on the claimant having submitted false time records; the ALJ overruled the determination; the Board reversed the ALJ and sustained the ID. In the interim, the claimant received benefits which were subsequently held to be a recoverable overpayment. In concluding that the overpayment was not recoverable, the Board noted that the claimant had testified truthfully that his time records did not always reflect his time worked accurately but had contended that he was simply making a business decision as to how his time should be recorded. The Board held that the claimant's "opinion as to the propriety of his actions do not constitute factually false statements").

[57] Appeal Board No. 583642 (the initial determination on holiday pay had been continued in effect because the claimant's hearing request was untimely; the overpayment determination had been issued several months later so a decision was issued on the merits of the overpayment); Appeal Board No. 587929 (the claimant was not advised by the employer that he would receive holiday pay for the July 4th holiday and certified for benefits prior to receiving the

certification by a claimant on filing a claim for benefits that he was fired and who sincerely believed that he was fired even though he was held to have quit has made a factually false statement, but the statement was not willfully made.[58]

2.9.5 GOOD FAITH

An overpayment may be held to be recoverable by the Department of Labor on the basis that the benefits were not accepted by the claimant in good faith.[59] The lack of good faith exists when the claimant accepts benefits when he or she knows without any doubt that he or she was not entitled to those benefits.

A claimant who provided accurate information to the Department of Labor and is found eligible but is later determined not to have been eligible has accepted the benefits in good faith: The claimant is entitled to have the Department of Labor determine eligibility; it is not the claimant's responsibility to decide whether he or she is eligible for benefits.[60] However, a claimant who is advised of his benefit rate and then accepts benefit checks at an amount greater than his benefit rate has not accepted the benefits in good faith.[61]

2.9.6 CAUSAL RELATIONSHIP BETWEEN OVERPAYMENT AND FALSE STATEMENT

Benefits which are considered to be overpaid must have been released by the Department of Labor to the claimant as a result of a factually false statement or willful misrepresentation by the claimant or as a result of to the claimant's lack of good faith. If there is no relation between the

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holiday pay check; the Board held that as he did not know he would receive and had not received his pay at the time he certified, the certification was neither factually false nor willfully made).

[58] Appeal Board No. 552986 (the claimant, an unadmitted law school graduate, was out sick for several days; he did not return to work upon recovering because he had heard from a co-worker, with no management responsibilities, that he was fired).

[59] The statutory authority for this basis is Labor Law § 597(4) which provides that (absent a willful misrepresentation or factually false statement) overpaid benefits are not recoverable "provided they were accepted by the claimant in good faith."

[60] Appeal Board No. 552896 (where the claimant correctly informed the Department of Labor that she had been fired for falsifying inventory and the Department found her eligible to receive benefits) (citing Appeal Board No. 492207).

[61] Appeal Board No. 299819 (claimant was told his benefit rate was $63.00 but the payments made to him were in the amount of $103.00) *cf.* Appeal Board No. 531328 (where the benefit checks were larger than the claimant's weekly benefit rate, but there was no evidence that the claimant had ever been advised of his benefit rate).

release of the benefits and the factually false statement, willful false statement, or lack of good faith, there is no rational basis for finding that the overpayment is recoverable.

For example, a claimant is discharged for cursing at his supervisor and is disqualified on the basis of misconduct. At the hearing, while cross-examining the employer's witness and prior to being sworn in, the claimant denies having cursed. The judge overruled the determination on the grounds that the claimant had been provoked by his supervisor and any intemperate remark made by the claimant was poor judgment only. The Department subsequently issued an overpayment determination, based on the claimant's comment during cross-examination. In overruling the determination, the Board noted that the claimant's statement was not the basis relied upon by the judge in overruling the misconduct determination, so there was no causal relationship between the false statement and the overpayment.[62]

Additionally, benefits released upon the filing of a new claim cannot be found recoverable based on a willful misrepresentation made upon filing an earlier claim.[63] Benefits that are received by a claimant prior to any false statement are not subject to recovery.[64]

2.9.7 BENEFIT LEDGER TRANSCRIPT

The benefit ledger transcript sets out the Department of Labor's record of the benefits that are alleged to have been paid to the claimant. It contains a series of columns, listing the statutory weeks (including the waiting week), the amount of the benefits to which the claimant was entitled for each week, the effective days which the benefit amounts represent, the actual amount of the check, the employer tax identification number associated with the statutory week, the manner of release (debit card, for example, or direct deposit), and the release date.

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[62] Appeal Board No. 496258 (the Board's decision also included dicta questioning the propriety of basing an overpayment determination on an unsworn statement made during cross-examination); Appeal Board No. 493710 (where the claimant was initially disqualified for having refused to take a drug test and the judge overruled the determination on the basis that the test was not random, as required by policy; the Board overruled an overpayment determination which based on the claimant having told the TCC he was unaware of the drug testing policy. The Board held that the overpayment could not be recovered because the judge's decision was not based on whether the claimant was aware of the policy; in fact, the judge found that the claimant was aware of the policy. As there was no nexus between any false statement and the overpayment, there was no basis for recoverability).

[63] Appeal Board No. 577862 (The claimant made a willful misrepresentation upon reopening an existing claim in August 2013. He filed a new claim in October 2013, and received $234.00 in benefits on the new claim. The determination made the $234.00 overpayment recoverable based on the certification made in August, as there was no connection between those benefits and the August certification, the overpayment was made non-recoverable).

[64] Appeal Board No. 530801 (claimant was initially found eligible, received all her benefits, but was subsequently disqualified after hearing; Department issued an overpayment determination based on statements made by the claimant at the hearing, only and Board found not recoverable because any statement upon which the overpayment was based was made after the benefits were originally released)

If the claimant chose to have taxes withheld, the benefit amount and the actual check amount will not be the same. This information can be explained by the judge when confronting the parties with the document. The benefit ledger transcript also shows various codes, which will usually not be necessary to the case; if an explanation of those codes is needed, Department of Labor witness must be produced.

Practice Tip:

Whether the benefit ledger transcript needs to be entered into evidence will depend on the claimant's independent knowledge of the amount of the benefits she had received. For example, the claimant is charged with a recoverable overpayment in the amount of $2,975.00. The claimant may be asked, "Did you receive benefits in the amount of $2,975.00?" If the claimant gives any affirmative answer ("yes," or "that sounds about right," for example) there is usually no need to enter the benefit ledger transcript.

Be careful in cases where the overpayment is related to a "working while collecting" case which covers several weeks. The overpayment in each week must correspond to the number of days worked but not reported in the respective weeks (see, NB No. 30).

If the claimant answers that she does not know or does not recall, the benefit ledger transcript will need to be entered to refresh recollection or to establish the amount of the overpayment. To enter the benefit ledger transcript:

- Identify the document by stating that it is a document generated by the Department of Labor that, in Department's view, reflects the benefits which the Department alleges were released to the claimant. The judge should be careful not to indicate that the ledger is assumed to be correct.

- Explain the entries in the document: the week for which the benefits were claimed, the amount of the benefits released, the number of effective days reflected by that week's benefits, the date on which the benefits were released, etc.

- Ask the claimant whether the document helps to refresh her recollection of the amount of the benefits she received.

- If the claimant still indicates she does not recall, ask the claimant whether she disagrees with the amounts listed on the benefit ledger transcript.

- If the claimant does not dispute the information contained in the benefit ledger transcript, enter the document into evidence.

Unless a witness from the Department of Labor is present to authenticate the document, the benefit ledger transcript is a hearsay document. If the claimant disputes the amount, or contends that she never received any benefits, the hearing must be adjourned for a witness from the Department, provided that the file documents indicate that the Department was not already on notice that the claimant was disputing receipt of the benefits. If the claimant had indicated in her hearing request or in some other communication with the Department that she had not received the benefits or that she disagreed with the amount with which she was being charged, the Department was on notice that a witness to authenticate the Department's documents would be required. If the Department was on such notice but chose not to produce a witness, then the initial determination should be overruled (assuming that there is no other evidence which would impeach the claimant's denial at the hearing).

2.9.8 NON-RECOVERABLE OVERPAYMENTS

Even if benefits are found to have been overpaid as a result of a decision by an ALJ or the Board, in order to be found to be recoverable, the benefits must have been released to the claimant as a result of a factually false statement, a willful misrepresentation, or fraud, or were not accepted by the claimant in good faith.

In addition to situations similar to *Valvo, supra*, or, as mentioned above, claimants holding an unexpired work visa who certify to being ready, willing, and able to work, other situations where a claimant's certification should not be considered either factually false or willfully made include the following: A claimant who received bridge payments until he qualified for his pension made a mistake of law as he was not expected to understand the legal definition of a bridge payment.[65] A claimant who was held to have quit by filing a claim for benefits was not expected to understand that filing a claim would constitute a quit.[66]

2.9.9 OFFSET AND CANCELLATION OF CREDIT

Where a claimant has an existing recoverable overpayment and files a new claim at some later date, the Department of Labor has the authority to withhold some or all of the benefits payable on the new claim in order to offset the existing overpayment.[67] The Department of Labor may also withhold part or all of a tax refund in order to offset an existing overpayment.[68] If the Department, after releasing benefits on the new claim (some or all of which were used to offset the existing overpayment), determines that the claimant is subject to a disqualification on the new claim, the Department may then cancel the offset.[69]

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[65] Appeal Board No. 519712

[66] Appeal Board No. 573350

[67] Labor Law § 590 (6) (d)

[68] Appeal Board No. 514388 (Claimant had an existing overpayment of $130.00; benefits in that amount on a subsequent claim were withheld to offset the overpayment. The claimant was then disqualified on the new claim; the Department cancelled the offset and then withheld $130.00 from the claimant's tax refund to offset the overpayment.)

[69] Appeal Board No. 519419 (Claimant had a benefit rate of $141.00; the Department withheld $70.50 to offset an existing overpayment and the claimant received an after-tax amount of $63.54. After claimant was disqualified on the grounds of refusal, rendering the entire $141.00 an overpayment. Consequently, the $70.50 offset was cancelled.)

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