STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 01, 2021

IN THE MATTER OF:
Appeal Board No. 616305

PRESENT: MICHAEL T. GREASON, MEMBER

In Appeal Board Nos. 616305, 616306 & 616307, the claimant appeals from the decisions of the Administrative Law Judge filed May 12, 2021, insofar as it sustained the initial determinations disqualifying the claimant from receiving benefits, effective August 18, 2020, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by . prior to August 18, 2020 cannot be used toward the establishment of a claim for benefits; charging the claimant with an overpayment of $2,231.25 in regular benefits recoverable pursuant to Labor Law § 597 (4); and reducing the

claimant's right to receive future benefits by 8-effective days and charging a civil penalty of $334.68 on the basis that the claimant made a willful misrepresentation to obtain benefits.

At the combined telephone conference 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 employer.

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

FINDINGS OF FACT: The claimant worked in a warehouse for a food distribution company. He worked on three separate occasions for this employer, and at least once, he was re-hired after being fired. In the course of employment, the shift manager addressed a group of workers, including the claimant, about taking unauthorized breaks during work.

On or about August 17, 2020, after the claimant and his co-workers finished all the unloading, he went to the bathroom while his co-workers sat down. The shift manager was unable to find the claimant for approximately 25 minutes. When the claimant returned from the bathroom, he informed the manager that he was in the bathroom. Prior to claimant's shift-end, the manager told the claimant he cannot work anymore, to get his belongs, and to go home. The manager did not use the term "fired", and the claimant did not realize that he was fired at this time. In the past, the claimant had been sent home and prohibited from working for days on end but later permitted to return to work. Some weeks later, when the claimant called the employer, he was told that there was no job available since the employer did not need any more workers.

On or about September 28, 2020, the claimant sought assistance at an employment agency to file an application for unemployment insurance benefits. The claimant does not understand English. The claimant advised the employment-agency individual that he was not working because of COVID-19 and that he was fired. The helper reported to the Department of Labor that the claimant quit.

The claimant received $2,231.25 in regular unemployment insurance benefits.

OPINION: The credible evidence establishes that the employer fired the claimant because the manager determined that the claimant took an unauthorized break during his shift. Although the manager could not find the claimant during his shift, his undisputed testimony establishes that he was in the bathroom. Furthermore, the claimant took the bathroom break after all the unloading work was completed and other workers took a break. Under these circumstances, the claimant's short absence is not unreasonable.

Even if the claimant received warnings about taking unauthorized breaks, there is no evidence that the claimant would have known that taking a bathroom break, after completing the work, would lead to his discharge. When the claimant's employment ended, the manager told him to take his things and go home. Since the manager did not use the term "fired", the claimant reasonably did not know that he was being fired at that time, especially since the employer had removed him from the workplace and then permitted him to return to work on prior occasions. When the claimant called weeks later, he was told that there was no work for the claimant, which led him to believe that he had been fired. Therefore, the claimant did not provide contradictory testimony,

which should not be discredited. Accordingly, the claimant's employment ended under non-disqualifying circumstances. As the claimant is not disqualified from receiving benefits, he was not overpaid.

With respect to the issue of willful misrepresentation, the evidence establishes that the claimant, when filing the claim, reported that he quit his employment. Significantly, based on information that the claimant was not working because of COVID-19, the employment-agency individual could have understood and entered on the original claim that the claimant quit his employment. Regardless, the claimant is responsible for the actions of his appointed helper acting as his agent. Therefore, since the claimant knew he was fired, providing information on the claim that he quit constitutes a willful misrepresentation. Since the claimant is entitled to benefits and not overpaid, the forfeit penalty is modified to four-effective days and the monetary civil penalty is eliminated.

DECISION: In Appeal Board Nos. 616305, 616306 & 616307, the decisions of the Administrative Law Judge, insofar as appealed, are modified as follows and, as so modified, are affirmed.

In Appeal Board Nos. 616305 & 616306, the initial determinations, disqualifying the claimant from receiving benefits, effective August 18, 2020, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by HYUN DAI

INTERNATIONAL . prior to August 18, 2020 cannot be used toward the establishment of a claim for benefits; and charging the claimant with an overpayment of $2,231.25 in regular benefits recoverable pursuant to Labor Law § 597 (4), are overruled.

In Appeal Board No. 616307, the initial determination, reducing the claimant's right to receive future benefits by 8-effective days and charging a civil penalty of $334.68 on the basis that the claimant made a willful misrepresentation to obtain benefits, is modified to 4-effective days and zero civil penalty, and as so modified, is sustained.

The claimant shall forfeit benefits for 4-effective days.

The claimant is allowed benefits with respect to the other issues decided

herein.

MICHAEL T. GREASON, MEMBER

TO EMPLOYERS: By order of the Commissioner of Labor dated January 14, 2021, the account of an employer liable for contributions under Article 18 of the Labor Law shall not be charged for the duration of the claim for benefits paid to a claimant during the COVID-19 pandemic. Such charges shall be made to the general account. This applies to 100% of benefits attributable to employers liable for contributions and to 75% of benefits attributable to employers liable for payments in lieu of contributions. Any charges covered by the Commissioner's order and previously applied to an employer's account will be canceled and shall instead be applied to the general account.