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

Mailed and Filed: JUNE 14, 2023

IN THE MATTER OF:
Appeal Board No. 629089

PRESENT: MARILYN P. O'MARA, MEMBER

In Appeal Board Nos. 629088, 629089 and 629090, the claimant appeals from the decisions of the Administrative Law Judge filed April 14, 2023, which sustained the Commissioner of Labor's timeliness objection and continued in effect the initial determinations holding the claimant ineligible to receive benefits, effective March 15, 2021 through September 5, 2021, on the basis that the claimant was not totally unemployed; charging the claimant with an overpayment of $1,764.00 in Extended (EB) benefits recoverable pursuant to Labor Law § 597 (4) and Pandemic Emergency Unemployment Compensation (PEUC)

benefits of $4,536.00 recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 ; and reducing the claimant's right to receive future benefits by 56 effective days and charging a civil penalty of $1,764.00 on the basis that the claimant made willful misrepresentations 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: A notice of determination including the issues of lack of total unemployment, recoverable overpayment of benefits and willful misrepresentations to obtain benefits imposing forfeit and civil penalties was mailed to the claimant on February 13, 2023. The notice contained instructions

stating that the claimant had the right to request a hearing if she disagreed with the determination and that the hearing request must be submitted no later than 30 days from the mail date on the notice. The claimant read this section.

The notice of determination was delivered to a neighbor's mailbox. The claimant's neighbor was away at the time. The claimant received the initial determination on February 28, 2023.

On March 21, 2023, the claimant requested a hearing.

OPINION: Pursuant to Labor Law § 620 (1), a request for a hearing must be made

within thirty days of the mailing of the determination. The statute provides for an extension of this thirty-day period, at the discretion of the hearing judge, only upon evidence that the claimant's physical condition or mental incapacity prevented the claimant from timely requesting a hearing. The credible evidence establishes that the claimant's hearing request in this matter was timely. The notice of determination was incorrectly delivered to the claimant's neighbor who was away at the time it was delivered. As a result, the claimant did not receive the notice of determination until February 28, 2023. There is no evidence indicating that the claimant's neighbor could be considered her agent when receiving the notice of determination.

However, even without considering the late delivery to the claimant, her hearing request would be timely. The regulations of the Board, as amended, provide that a hearing request will be deemed to have been timely made if the request is postmarked within thirty days of the receipt of the determination. Absent any proof to the contrary, a determination shall be held to have been mailed on the date recited on the determination and received five business days after the mailing of the determination (12 NYCRR § 461.1). As the notice

of determination was mailed to the claimant on February 13, 2023, it would be deemed to be received five business days later, which would be February 20, 2023. As a result, the claimant would have had until March 22, 2023, 30 days after February 20, to submit her hearing request. As the claimant submitted her hearing request on March 21, 2023, her request was made in a timely manner. The Commissioner of Labor's timeliness objection is therefore overruled.

Our review of the record, however, reveals that the case should be remanded for a hearing concerning the issues of lack of total unemployment, recoverable overpayment of benefits and willful misrepresentation to obtain benefits, including forfeit and civil penalties, as the Judge did not take testimony or evidence on these issues.

DECISION: The decisions of the Administrative Law Judge, insofar as they sustained the Commissioner of Labor's timeliness objection, are reversed.

In Appeal Board Nos. 629088, 629089 and 629090, the Commissioner of Labor's timeliness objection is overruled.

The decisions of the Administrative Law Judge, insofar as they continued in effect the initial determinations of lack of total unemployment, recoverable overpayment of benefits, and willful misrepresentation to obtain benefits, including forfeit and civil penalties, are rescinded.

Now, based on all of the foregoing, it is

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issues of lack of total unemployment, recoverable overpayment of benefits, and willful misrepresentation to obtain benefits, including forfeit and civil penalties, only, upon due notice to all parties and their representatives; and it is further

ORDERED, that the Notice of Hearing shall identify as the Purpose of Hearing the remanded issues of lack of total unemployment, recoverable overpayment of benefits, and willful misrepresentation to obtain benefits, including forfeit and civil penalties, only; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and so that at the end of the hearing all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new combined decision, on the remanded issues only, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

MARILYN P. O'MARA, MEMBER