

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 27, 2024

CV-23-0910

In the Matter of the Claim of MIKE
H. CARMODY,

Appellant.

MEMORANDUM AND ORDER

COMMISSIONER OF LABOR,
Respondent.

Calendar Date: May 30, 2024

Before: Clark, J.P., Aarons, Reynolds Fitzgerald, McShan and Powers, JJ.

Edelstein & Grossman, New York City (*Jonathan I. Edelstein* of counsel), for appellant.

Letitia James, Attorney General, New York City (*Mary Hughes* of counsel), for respondent.

Reynolds Fitzgerald, J.

Appeal from a decision from the Unemployment Insurance Appeal Board, filed February 8, 2023, which ruled, among other things, that claimant was ineligible to receive unemployment insurance benefits because he was not totally unemployed.

Following the onset of the COVID-19 pandemic, claimant, the president and owner of a corporation/store that sells pet supplies and offers pet grooming services, closed his business from March 23, 2020 through April 6, 2020. Although claimant did not go into the store after March 23, 2020 due to health concerns, he reopened the store after April 6, 2020 with reduced hours for the store employees. In May 2020, claimant filed an original claim for unemployment insurance benefits, effective March 16, 2020,

and certified for benefits online for the weeks ending May 24, 2020 and May 31, 2020 and for each of the weeks ending July 19, 2020 through January 17, 2021. Based upon claimant's certifications, claimant collected unemployment insurance benefits, as well as pandemic unemployment assistance (hereinafter PUA) under the Coronavirus Aid, Relief and Economic Security Act of 2020 (the CARES Act) (*see* 15 USC § 9021), federal pandemic unemployment compensation (hereinafter FPUC) (*see* 15 USC § 9023) and lost wage assistance (hereinafter LWA) (*see* 44 CFR 206.120). Thereafter, the Department of Labor found that claimant was ineligible for unemployment insurance benefits because he was not totally unemployed during the relevant time period, charged him with a recoverable overpayment of PUA as well as FPUC and LWA benefits and imposed a monetary penalty, as well as a reduction of claimant's right to receive future benefits by 232 effective days, based upon a finding that he made willful misrepresentations to obtain those benefits. Claimant requested a hearing, and, following several hearings, an Administrative Law Judge, among other things, upheld the initial determination. In a February 2023 decision, the Unemployment Insurance Appeal Board affirmed the decision of the Administrative Law Judge. Claimant appeals, principally contending that the Board erred in finding that he was ineligible for PUA benefits because he was not totally unemployed.

We affirm. It is well settled that "[u]nder state law, regular unemployment insurance benefits require total unemployment" (*Matter of Almino [New York State Dept. of Corr. & Community Supervision-Commissioner of Labor]*, 223 AD3d 5, 8 [3d Dept 2023]; *see* Labor Law § 591 former [1]; *Matter of Kelly [Commissioner of Labor]*, 215 AD3d 1157, 1158 [3d Dept 2023]), and, during the relevant time period in question, "[t]otal unemployment" was defined as "the total lack of *any* employment on any day" (Labor Law former § 522 [emphasis added]). "It is well settled that a claimant who [is a company officer and] performs activities on behalf of [his or her own] . . . business may not be considered totally unemployed, even if such activities are minimal or the business is not profitable, if he or she stands to benefit financially from its continued operation" (*Matter of Pemberton [Commissioner of Labor]*, 166 AD3d 1202, 1203 [3d Dept 2018] [internal quotation marks and citations omitted]; *see* *Matter of McCann [Commissioner of Labor]*, 117 AD3d 1259, 1260 [3d Dept 2014]; *Matter of Whyllie [Commissioner of Labor]*, 38 AD3d 1037, 1038 [3d Dept 2007]; *see also* *Matter of Singer [Commissioner of Labor]*, 30 AD3d 928, 929 [3d Dept 2006]; *Matter of Koenes [Commissioner of Labor]*, 30 AD3d 873, 874 [3d Dept 2006]). "Moreover, it is the responsibility of a claimant to report accurately and disclose any business activity when certifying for unemployment insurance benefits, and there is no valid defense to making such a false statement, even when such misrepresentation is unintentional" (*Matter of Pemberton*

[*Commissioner of Labor*], 166 AD3d at 1203 [internal quotation marks, brackets and citations omitted]). "Whether a claimant is totally unemployed and thereby entitled to receive unemployment insurance benefits is a factual issue for the Board to decide and its decision will be upheld if supported by substantial evidence" (*Matter of Chin [Commissioner of Labor]*, 211 AD3d 1263, 1264 [3d Dept 2022] [internal quotation marks and citations omitted]; see *Matter of Cruz [Commissioner of Labor]*, 215 AD3d 1203, 1204 [3d Dept 2023]), and "[i]ssues of witness credibility, the evaluation of evidence and the inferences to be drawn therefrom are within the exclusive province of the Board" (*Matter of Douglas [Commissioner of Labor]*, 217 AD3d 1311, 1312 [3d Dept 2023] [internal quotation marks and citations omitted]; see *Matter of Singer [Commissioner of Labor]*, 30 AD3d at 930).

The record before us, including the hearing testimony, reflects that claimant, during the time period at issue, performed activities on behalf of his business and stood to gain financially from its continued operation. Although the store was closed on certain days and its operations were more limited during the pandemic, the business remained in operation with employees continuing to work in the store. Claimant continued to operate and manage the store by writing checks from the business checking account every week and by supervising store employees and communicating with them about the business. Claimant also stood to gain financially from the continued operation of the business; for example, he was entitled to transfer business losses to his personal income tax return. Under these circumstances, "the Board's decision that claimant was ineligible for unemployment insurance benefits because he was not totally unemployed is supported by substantial evidence" (*Matter of McNamara [Commissioner of Labor]*, 215 AD3d 1215, 1216 [3d Dept 2023]; see *Matter of Kelly [Commissioner of Labor]*, 215 AD3d at 1158; *Matter of Cardella [Commissioner of Labor]*, 179 AD3d 1367, 1369 [3d Dept 2020]). "Given the Board's finding that claimant was not totally unemployed and therefore ineligible for unemployment insurance benefits under state law, claimant was also not eligible to receive federal pandemic assistance under the CARES Act" (*Matter of McNamara [Commissioner of Labor]*, 215 AD3d at 1216 [citations omitted]; accord *Matter of Johnson [Commissioner of Labor]*, 222 AD3d 1115, 1118 [3d Dept 2023]; *Matter of Kelly [Commissioner of Labor]*, 215 AD3d at 1158; see 15 USC § 9023 [b] [1]; *Matter of Spring [Syracuse City Sch. Dist.-Commissioner of Labor]*, 215 AD3d 1211, 1212 [3d Dept 2023]).¹

¹ Contrary to claimant's contention, certain provisions allowing for the potential payment of benefits to individuals who are partially employed are of no import here because the certifications at issue were for weeks ending prior to when such changes to

"Turning to the issue of willfulness[, and the Board's imposition of recoverable overpayment of benefits], it is well settled that a claimant is responsible for accurate reporting and must disclose any business activity when certifying for unemployment insurance benefits[, and] . . . there is no acceptable defense to making a false statement and a claim that the misrepresentation was unintentional is not sufficient" (*Matter of Cardella [Commissioner of Labor]*, 179 AD3d at 1369 [internal quotation marks, ellipsis and citations omitted]; see *Matter of Kelly [Commissioner of Labor]*, 215 AD3d at 1159; *Matter of Arrigo [Commissioner of Labor]*, 211 AD3d 1287, 1288 [3d Dept 2022]). When claimant certified for benefits online during the time period in question, he reported zero days of work and did not report his business-related activities. Claimant acknowledged reading the unemployment insurance handbook and understood the requirement that he report all work and that self-employment is considered work, even if for less than a day. "Notwithstanding the unintentional nature of claimant's omissions, substantial evidence supports the Board's finding that his failure to fully disclose his business-related activities constituted willful misrepresentations subjecting him to a recoverable overpayment of benefits" as well as the imposition of a monetary penalty and forfeiture of future benefit days (*Matter of Cardella [Commissioner of Labor]*, 179 AD3d at 1370 [citations omitted]; see 15 USC § 9023 [b] [1]; [f] [2]; 20 CFR 625.14; 44 CFR 206.120 [f] [5]; *Matter of McNamara [Commissioner of Labor]*, 215 AD3d at 1216-1217; *Matter of Kelly [Commissioner of Labor]*, 215 AD3d at 1159). To the extent that we have not addressed claimant's remaining contentions, we find them to be unavailing.

Clark, J.P., Aarons, McShan and Powers, JJ., concur.

state law went into effect (see Labor Law § 591 [1], as amended by L 2021, ch 277, §§ 1, 12-14 [effective Aug. 15, 2021]; see also Department of Labor, Partial Unemployment Eligibility [Aug. 16, 2021]).

ORDERED that the decision is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive style with a large, stylized 'R' and 'M'.

Robert D. Mayberger
Clerk of the Court