STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0375

James Barnett,
Relator,

vs.

Electrolux Home Products, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed March 6, 2017
Affirmed
Ross, Judge

Department of Employment and Economic Development
File Nos. 23319013-3, 34003789-3

James Barnett, Waite Park, Minnesota (pro se relator)

Lee B. Nelson, Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Jesson, Presiding Judge; Ross, Judge; and Schellhas, Judge.

U N P U B L I S H E D   O P I N I O N

ROSS, Judge

Relator James Barnett received unemployment benefits while he simultaneously received income from an employer during several weeks in 2009. An unemployment-law judge (ULJ) determined that Barnett fraudulently requested and received six weeks of benefits. Barnett requested reconsideration, but the case sat dormant for six years until Barnett was discharged by an employer in 2015 for alleged employment misconduct. A different ULJ decided that Barnett was ineligible for unemployment benefits because his 2015 discharge resulted from misconduct. Yet another ULJ decided that Barnett fraudulently received the overpayments in 2009. Barnett challenges both decisions in this certiorari appeal, arguing that his benefits card had been stolen and used without his permission or knowledge in 2009 and that he did not commit employment misconduct in 2015. Because substantial evidence supports both decisions, we affirm.

FACTS

Fraudulent Requests

Respondent Electrolux Home Products Inc. employed Barnett for nearly five years before January 2009. Between January 4 and March 22, 2009, Barnett allegedly requested and received unemployment benefits from his state unemployment-benefits account. Respondent Minnesota Department of Employment and Economic Development (DEED) issued earnings and fraud determinations that concluded Barnett was overpaid $1,686 in benefits due to his joint receipt of employment income and unemployment benefits for an overlapping period. DEED assessed a fraud penalty of $674.40.

Barnett appealed the earnings and fraud determinations, admitting he had requested payment for several weeks but arguing that he had not requested benefits for six of those weeks. He asserted that several requests had been made by two people staying in his home. A hearing was scheduled for a date in October 2009, but Barnett did not appear and the

ULJ dismissed his appeal. Barnett asked the ULJ that month to reconsider the dismissal. Barnett's request for reconsideration was apparently mishandled by DEED, and the case sat inactive for years.

The inactive 2009 case revived in 2015, apparently resulting from Barnett's 2015 unemployment-benefits dispute. Barnett received an evidentiary hearing on both the earnings and fraud determinations.

A ULJ received exhibits and heard testimony at a December 2015 hearing. The evidence confirmed a series of requests and payments on Barnett's unemployment-benefits account from January 4 through March 22, 2009. DEED made the requested benefits payments directly to Barnett's debit-card account. The precipitating request questionnaires represented that Barnett had not worked, had not received paid holiday leave, and had not received any unreported income during those weeks. But some of these representations were false. For the weeks beginning January 4, January 11, January 18, January 25, February 1, and March 22, 2009, Barnett was also earning income from Electrolux.

Barnett asserted that he had two friends living with him at the time of the disputed 2009 benefits requests and payments, presumably to support his original contention that someone else had used his benefits card. But despite an earlier directive to "submit . . . any police reports or other evidence to show that another individual requested and collected benefits on his account," Barnett offered only his own testimony.

The ULJ was unconvinced by Barnett's claim that someone other than him requested and received the disputed 2009 payments. The ULJ found it "unlikely that a thief made requests in January and then allowed Barnett to make requests in February and

March. It is more likely Barnett made the requests in January, February, and March." The ULJ affirmed the decision after Barnett requested reconsideration.

Employment Misconduct

Meanwhile, Electrolux terminated Barnett's employment in September 2015, believing that Barnett stole copper piping from the company. DEED deemed Barnett ineligible for unemployment benefits in November 2015 based on his discharge for employment misconduct. Barnett appealed the determination.

A ULJ heard Barnett's appeal in January 2016 and received numerous exhibits. Among other things, the ULJ considered Barnett's initial statement of the offending conduct in which Barnett admitted to taking a small piece of copper to make a bracelet, Electrolux's letter discharging Barnett with its termination report, and three payment summaries from Northern Metal Recycling to Barnett totaling almost $400 in exchange for three separate transactions in August and September 2015 for about 190 pounds of copper.

An Electrolux representative testified about the admitted documents. She told the ULJ that Barnett stole its copper and attempted to recycle it at Northern Metal Recycling, keeping the proceeds for himself. She explained that the company interviewed Barnett, who, when confronted with photographs of an individual selling copper at Northern Metal Recycling, admitted that it was him depicted in the photographs. She also testified that photographs of the copper piping showed that the copper piping Barnett sold to Northern Metal Recycling was "crimped and cut . . . in the exact same format of what we do here at Electrolux." The representative said that Electrolux was "very certain that it's Electrolux copper."

Barnett testified that he took only “about 12 inches” of copper from Electrolux to make two bracelets. He admitted to recycling copper at Northern Metal Recycling but denied that the copper belonged to Electrolux. He claimed he could not have removed that much copper from Electrolux’s premises without detection.

The ULJ found Electrolux’s witnesses and evidence to be credible. By contrast, he found that Barnett’s answers were evasive and substantively unlikely. He ultimately found that Barnett stole hundreds of dollars’ worth of Electrolux’s copper, recycled it, and kept the proceeds for himself, which “showed clearly a serious violation of the standards of behavior the employer has a right to reasonably expect of the employee.” He also found that the company discharged Barnett for employment misconduct. And he held that Barnett was therefore ineligible for unemployment benefits. The ULJ affirmed his decision in an order on reconsideration.

Barnett appeals both decisions.

D E C I S I O N

Barnett challenges the two ULJs’ respective fraud and misconduct decisions. We may reverse or modify a ULJ’s decision if the relator’s substantial rights have been prejudiced because the findings, inferences, conclusion, or decision violate the constitution, exceed statutory or jurisdictional authority, are made upon unlawful procedure, are affected by a legal error, lack the support of substantial evidence, are arbitrary, or are capricious. Minn. Stat. § 268.105, subd. 7(d)(1)–(6) (2016). We review the ULJ’s fact findings in the light most favorable to the decision. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). We also recognize that credibility determinations are the ULJ's exclusive province, and we will not disturb them on appeal. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006). We first address Barnett's contention that he did not commit fraud and then his contention that he did not commit employment misconduct.

I

The ULJ determined that Barnett fraudulently requested and received multiple weeks of unemployment benefits for which he was ineligible. Whether an applicant made knowing misrepresentations while requesting benefits is a question of fact. *See Skarhus*, 721 at 344. Barnett argues that his unemployment card was stolen and used without his knowledge by his former tenants. We are satisfied that the record supports the ULJ's finding, which is based largely on credibility determinations, that Barnett fraudulently requested and received unemployment benefits while he was gainfully employed.

Barnett received payments in 2009 based on a continued request for unemployment benefits. "A continued request for unemployment benefits is a certification by an applicant . . . that the applicant is unemployed and meets the ongoing eligibility requirements for unemployment benefits . . . ." Minn. Stat. § 268.0865, subd. 1 (2016). An applicant must meet ongoing eligibility requirements to receive unemployment benefits. *See* Minn. Stat. §§ 268.069, subd. 1, 268.085, subd. 1 (2016). Applicants who are overpaid benefits must generally repay the excess amount. Minn. Stat. § 268.18, subd. 1(a) (2016). But when an applicant receives overpayment through fraud, "the commissioner must issue a determination of overpayment penalty assessing a penalty equal to 40 percent of the amount overpaid." *Id.*, subd. 2(a). An applicant commits fraud if he receives overpayment by either "(1) knowingly misrepresenting, misstating, or failing to disclose any material fact; or (2) making a false statement or representation without a good faith belief as to the correctness of the statement or representation." *Id.*, subd. 2(a)(1)–(2).

Each applicant is issued a password to facilitate filing continued requests for benefits. Minn. Stat. § 268.084(a) (2016). The statute includes a presumption that, "[i]f a password assigned to an applicant is used in the filing of a continued request for unemployment benefits . . . the applicant is presumed to have been the individual using that password and presumed to have received any unemployment benefit payment issued." Minn. Stat. § 268.084(b). The presumption may be rebutted by a preponderance of the evidence that shows that the applicant assigned the password was not the person who used the password. *Id.*

Barnett does not dispute that DEED made payments to his account while he was working during the weeks at issue. But other than merely asserting that two other people must have taken his card and made the requests using his personal identification number, he offered no evidence to overcome the presumption that he requested and received the benefits fraudulently. The ULJ's finding that it is unlikely that thieves made requests and then stopped making requests while Barnett made his own requests is not arbitrary. And neither is her implicit rejection of Barnett's assertions as incredible. Because we defer to credibility determinations, we will not disturb the finding. And because the record substantially supports the ULJ's decision, we affirm the fraud decision.

DEED volunteers that its mishandling of Barnett's request to reconsider the 2009 dismissal would make DEED's assessment of any interest "unconscionable." DEED represents that it will neither assess nor undertake any collection action on either the overpayment balance or the interest that Barnett owes. DEED includes no authority either supporting its position that collection on the overpayment's principal itself would be inappropriate or requiring us to limit its collection. We take no position and hold only that we affirm the ULJ's findings of fraud.

II

We now address Barnett's contention that he did not engage in employment misconduct. The ULJ determined that Barnett is ineligible for unemployment benefits because Electrolux discharged him for employment misconduct, specifically, the copper theft. An employee discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2016). Employment misconduct is "any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly . . . a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee [or] a substantial lack of concern for the employment." *Id.*, subd. 6(a)(1)–(2).

Whether an employee engaged in misconduct is ordinarily a mixed question of fact and law. *Peterson v. Northwest Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). Whether an employee committed the specified act is a question of fact, and whether the act constitutes employment misconduct is a question of law. *Id.* Barnett does not dispute that the theft constitutes misconduct, only that he did not engage in the theft. We therefore consider only the factual challenge.

Contrary to Barnett's position, the evidence overwhelmingly supports the ULJ's finding that he repeatedly stole copper from Electrolux and then sold it to benefit himself. The ULJ specifically found that the Electrolux representative's testimony was credible and found that Barnett's testimony was not. The photographs of Barnett fencing the copper, the receipts recounting Barnett's various sales totaling about 190 pounds of copper for $400, Barnett's admission that he stole at least a small amount of copper, the remarkable similarities between the stolen and recycled copper piping, and the witness testimony about Barnett's employment interview, all point to Barnett's guilt.

Barnett's final contention that he could not have taken all 190 pounds of the copper undetected falls to DEED's reasonable response that Electrolux never claimed that he took all the copper at once and that, as a practical matter, he might have taken it gradually, even a pound or two each day. DEED's argument is persuasive. *See* Johnny Cash, *One Piece at a Time* (Columbia Records 1976):

> One day I devised myself a plan
> That should be the envy of most any man
> I'd sneak it out of there in a lunchbox in my hand
> Now gettin' caught meant gettin' fired
> But I figured I'd have it all by the time I retired
> I'd have me a car worth at least a hundred grand.
> I'd get it one piece at a time
> And it wouldn't cost me a dime.

Again, Barnett does not argue that theft of 190 pounds of copper is an insufficient ground for a misconduct determination. And we have held that theft of even a small amount violates "the standards of behavior the employer has the right to reasonably expect." *See, e.g.*, *Skarhus*, 721 N.W.2d at 343–44 (determining that a theft of less than four dollars' worth of goods seriously violated standard of behavior expected of employee). Because substantial evidence supports the ULJ's determination that Barnett stole the copper, and because theft from one's employer constitutes employment misconduct, the ULJ correctly decided that Barnett is ineligible for unemployment benefits.

Affirmed.