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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1008**

Elmore Truck and Trailer Repair, Inc.,
Relator (A16-1008),
Dahl Trucking, Inc.,
Relator (A16-1009),

vs.

Department of Employment and Economic Development,
Respondent.

**Filed March 6, 2017
Affirmed
Stauber, Judge**

Department of Employment and Economic Development
File No. 32140149-2

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relators)

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Economic Development, St. Paul, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Stauber, Judge; and Rodenberg,
Judge.

UNPUBLISHED OPINION

STAUBER, Judge

In these consolidated unemployment-compensation appeals, relator-employers
challenge determinations by an unemployment-law judge (ULJ) that (1) certain per-diem

payments to employees made by relator-employers are wages and (2) relator-employers can be penalized for colluding with employees to fraudulently obtain unemployment benefits. We affirm.

FACTS

DTI¹ is a Minnesota trucking business that paid its drivers taxable wages and nontaxable per-diem payments for meals and incidental expenses. DTI paid its drivers 24% of the tonnage fees for each load hauled. That 24% was generally broken into two checks: a payroll check and a per-diem check. Generally, the per-diem payments were \$240, although there was significant variation.

In 2013, respondent Minnesota Department of Employment and Economic Development (DEED) found that DTI-Dahl acted fraudulently by failing to report wages. As a result, DEED determined that adjustments were required for years 2007-2010, and penalties were warranted because the employer colluded with employees to fraudulently obtain unemployment benefits. DTI appealed DEED's determinations, arguing that the per-diem payments were not wages because they qualified under a statutory wage exception that excludes from wages "advances or reimbursements for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred." Minn. Stat. § 268.035, subd. 29(a)(10) (2016).

¹ Relators Elmore Truck & Trailer Repair Inc. and Dahl Trucking Inc. are collectively referred to as DTI, and individually as DTI-Dahl and DTI-Elmore. They have the same part-owner, Marlin Dahl, and are located in the same facility. DTI-Elmore succeeded DTI-Dahl in 2010. DTI-Elmore and DTI-Dahl separately petitioned for certiorari, raising the same issues, and this court consolidated those appeals on June 24, 2016.

At an evidentiary hearing, Paul Schwieters, an unemployment-insurance field-audit supervisor, testified that DEED received a tip in 2009 that DTI-Dahl was defrauding the unemployment-insurance program by directing drivers not to report certain wages so they could continue to collect unemployment benefits. DEED determined that employees were working and ineligible for unemployment benefits during certain weeks they were receiving unemployment payments and that not all wages were being reported. According to Schwieters, DTI-Dahl would lay off its employees on a seasonal basis, and the employees would then apply for and receive unemployment benefits; however, while receiving unemployment benefits, the employees would still be working for DTI-Dahl and getting paid under the table. DTI-Dahl would report no wages for the employees so they could continue to collect unemployment benefits and “cut them a road expense check” rather than a payroll check. Schwieters testified that the road-expense checks met DEED’s definition of wages as “compensation for services in employment.”

Tiffany Breitreutz, a contract chief financial officer for DTI, testified that she is familiar with per-diem payments in the trucking industry. According to Breitreutz, during the regular road-construction season, \$240 for per-diem payments was “a weighted fleet average of what . . . meals and incidental expenses would be.” Breitreutz testified that IRS rules during the relevant periods allowed per-diem payments of \$52 to \$59 per day, and per-diem payments below the allowable amounts do not require receipts. She further testified that compensation for employees of 24% of the tonnage fees for each load hauled “was stipulated as both wages and expense reimbursement.”

Breitkreutz conceded that accounting errors had been made, and \$928,078 in per-diem payments should have been deemed wages.

Following the evidentiary hearing, the ULJ determined that the per-diem payments were wages, DTI fraudulently failed to report those wages, and “DTI colluded with employees so the employees could receive unemployment benefits while working and receiving pay.” The ULJ’s conclusion that the per-diem payments were wages was primarily based on the following: (1) DTI used fixed per-diem payments; (2) drivers could freely spend the payments; and (3) itemization of expenses was not required. The ULJ determined that DTI’s witnesses were not credible and that Schwieters was more credible. The ULJ determined that the taxes and fees assessed were properly calculated. But the ULJ cancelled applicable collusion penalties because “they were not assessed within the statutory time limit,” as set forth by Minn. Stat. § 541.07 (2016). DTI requested reconsideration, and the ULJ affirmed the earlier decisions. DTI petitioned this court for review.

On June 30, 2015, this court issued an order opinion reversing the ULJ’s order and remanding the case for further proceedings. *Elmore Truck and Trailer Repair, Inc. vs. Dep’t of Emp’t & Econ. Dev.*, No. A14-1422 (Minn. App. June 30, 2015). We concluded that (1) fixed per-diem payments are not prohibited; (2) the statutory exception for reasonably expected expenses did not require employees to spend the advances in any particular way; and (3) itemization of expenses reasonably expected to be incurred was not required. *Id.* We concluded that DTI’s failure to report per-diem payments as wages was not evidence of fraud if the payments qualified under statutory wage exceptions. *Id.*

We instructed the ULJ to determine which of DTI's per-diem payments qualified as nonwages under the statutory exceptions and permitted the ULJ to reopen the record. *Id.*

Following the remand, DTI submitted driver records and driver reports, which were reviewed by the ULJ to determine whether DTI was taxed on nonwages. On January 29, 2016, the ULJ issued an order determining that DTI was improperly taxed on approximately \$15,000 in advances and reimbursements. The ULJ concluded that the remaining per-diem payments were wages.

On February 18, 2016, DTI requested reconsideration of the ULJ's determinations. The ULJ modified the previous decision, but maintained the conclusion that all but approximately \$15,000 in advances and reimbursements were wages, and the balance of the per-diem payments to drivers were properly considered wages. The ULJ reversed the previous determination that penalties for collusion were time-barred and imposed those penalties. This certiorari appeal followed.

D E C I S I O N

In reviewing a ULJ's decision, this court may affirm, remand for further proceedings, or reverse or modify the decision if the relator's substantial rights were prejudiced by conclusions, decisions, findings, or inferences that are unconstitutional, legally erroneous or in excess of the ULJ's powers, arbitrary, or unsupported by substantial evidence in the record. Minn. Stat. § 268.105, subd. 7(d) (2016). This court reviews a ULJ's factual findings in the light most favorable to the decision. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). But questions of law are

reviewed de novo. *Abdi v. Dep't of Emp't & Econ. Dev.*, 749 N.W.2d 812, 814–15 (Minn. App. 2008).

I. The ULJ properly determined that the per-diem payments were wages.

DTI argues that the ULJ improperly concluded that the per-diem payments were wages because the payments qualified under statutory wage exceptions. For purposes of Minnesota unemployment insurance law, “[w]ages’ means all compensation for employment.” Minn. Stat. § 268.035, subd. 29(a) (2016). But certain payments to employees are statutorily exempted from classification as wages. Reimbursements for meals for employees required to work after regular hours and “advances or reimbursements for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer” are exempted from the wage classification. *Id.*, subd. 29(a)(6), (10). DTI argues that its per-diem payments fall under those statutory wage exceptions.

As a threshold matter, it must be determined if the ULJ’s determination that the per-diem payments constitute wages is a finding of fact, a conclusion of law, or a mixed question. We conclude that it is a mixed question requiring a standard similar to that used in employee-misconduct and employment-status cases, where “determining whether the evidence supports the findings of fact is a question of fact,” but determining whether the facts rise to a particular legal standard or definition presents a question of law. *Neve v. Austin Daily Herald*, 552 N.W.2d 45, 47-48 (Minn. App. 1996); see *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008) (noting that whether acts met the definition of misconduct is a question of law).

We next address whether the facts in this case support the legal conclusion that DTI's per-diem payments were wages. Minn. Stat. § 268.035 (2016) does not reference per-diem payments, though the use of per-diem payments undoubtedly occurs, as such payments are permitted under federal guidelines. Rev. Proc. 2011-47; *see, e.g., Knudsen v. Transp. Leasing/Contract, Inc.*, 672 N.W.2d 221, 222 (Minn. App. 2003) (discussing per-diem payments for truck drivers), *review denied* (Minn. Feb. 25, 2004); *Hix v. Minn. Workers' Comp. Assigned Risk Plan*, 520 N.W.2d 497, 499 (Minn. App. 1994) (noting that drivers were paid per-diem allowances). Determining whether the payments in this case were wages or some type of non-wage allowance thus requires an inquiry into the purpose and nature of the payments.

The ULJ concluded that the per-diem payments in this case were wages and made findings that (1) Breitreutz testified that the per-diem payments were commonly part of drivers' "compensation packages"; (2) there were significant deviations in the amounts of the per-diem payments; (3) DTI colluded with employees so that the employees could receive unemployment benefits while working and receiving pay in the form of per-diem payments; and (4) Marlin Dahl, part-owner of DTI, was convicted by a jury for willfully failing to pay federal employment taxes on per-diem payments.

The ULJ's determination that the per-diem payments were wages because Breitreutz testified that the per-diem payments were commonly part of truck drivers' "compensation packages" is not supported by the record. Breitreutz was testifying about the trucking industry in general, and she specifically testified that it is "common in the trucking industry for the per diem checks to be . . . considered part of the drivers[']

compensation package although non-taxable.” In sum, Breitzkreutz did not consider the per-diem payments to be “wages.” Despite this error, the ULJ properly determined that the per-diem payments were wages in this case because of the evidence of collusion and fraud and the significant variation in the amounts of the per-diem payments.

Regarding the collusion and fraud, the ULJ found that DTI colluded with employees so that the employees could collect unemployment benefits while working and receiving pay in the form of per-diem payments. Substantial evidence supports this finding. For example, in 2007-2010, in weeks when drivers received per-diem payments and unemployment benefits, the amount of the per-diem payments fluctuated and could be much higher than \$240. Schwieters testified that DTI employees confirmed DTI’s knowledge of the practice of paying employees who were collecting unemployment. DTI received quarterly statements from DEED with information about employees receiving unemployment benefits. By reviewing these statements, DTI should have known that its employees were receiving unemployment benefits in weeks that they were working. Finally, Marlin Dahl was convicted of failing to pay payroll taxes on per-diem payments during four quarters between 2007 and 2010. The presence of collusion and fraud in this case supports the ULJ’s conclusion that the per-diem payments were intended as a form of compensation, a means of paying employees nontaxable wages, rather than a bona fide advance or reimbursement of expenses.

The ULJ also found that there was significant variation in the amounts of the per-diem payments. This finding is also supported by substantial evidence. At times, drivers were getting per-diem payments in excess of \$1,000 per week. As Schwieters testified,

“I don’t know how it’s calculated[,] how in one week it’s calculated at \$752.85 and another week it’s \$240[;] it does not compute.” The presence of these fluctuations indicates that the per-diem payments were intended as compensation. *See Shotgun Delivery, Inc. v. United States*, 269 F.3d 969, 973 (9th Cir. 2001) (concluding that fluctuating reimbursement rate suggested that the “plan’s primary purpose was to treat the least amount possible” as wages).

DTI argues that the per-diem payments are in compliance with federal per-diem regulations and that IRS guidelines are “helpful in providing context” for Minnesota’s wage exemptions. However, under the federal system, if an employer is abusing the system or a plan for employee reimbursement is deficient, then all of the payments made under that plan are deemed wages. *See* Treas. Reg. § 1.62-2(k) (2016) (stating that, if a reimbursement or expense-allowance arrangement evidences a pattern of abuse, all payments made under the arrangement will be treated as wages). Evidence of abuse exists if an “arrangement routinely pays allowances in excess of the amount that may be deemed substantiated without requiring actual substantiation or repayment of the excess amount.” Rev. Proc. 2011-47, § 8.06. Breitreutz openly acknowledged that over \$928,000 in wages between 2007 and the first quarter of 2010 were improperly classified as per-diem payments. Further, Marlin Dahl was convicted of willfully failing to pay federal employment taxes on per-diem payments. In sum, deeming all of DTI’s per-diem payments as wages in this case is consistent with federal guidelines.

DTI next argues that per-diem payments made in compliance with the statutory wage exceptions do not provide evidence of fraud. Statutory penalties were assessed

against DTI pursuant to Minn. Stat. § 268.184, subd. 1(a) (2016), which penalizes employers for “collusion with any applicant for the purpose of assisting the applicant to receive unemployment benefits fraudulently.” As previously discussed, substantial evidence in the record supports the ULJ’s determination that DTI colluded with employees so the employees could receive unemployment benefits while working and receiving pay. Therefore, DTI’s argument is unavailing; the ULJ did not need to rely on the \$240 per-diem payments to make a finding of collusion.

II. The ULJ properly concluded that DTI was liable for collusion penalties.

The ULJ previously determined that statutory penalties for fraud/collusion were time-barred by Minn. Stat. § 541.07, which sets a two or three-year limitation on the commencement of certain actions. In the ULJ’s order of May 20, 2016, following DTI’s request for reconsideration, the ULJ determined that Minn. Stat. § 541.07 was improperly applied and concluded that the time-bar did not apply to Minnesota unemployment-insurance law. The ULJ therefore reinstated the previous collusion penalties. DTI argues that Minn. Stat. § 541.07 applies, and that there is no exception that would preclude its application in this case. We disagree.

Minn. Stat. § 541.07 governs the commencement of “actions,” which refers to “judicial proceedings.” Minn. Stat. § 541.07; *see Har–Mar, Inc. v. Thorsen & Thorshov, Inc.*, 300 Minn. 149, 152-53, 218 N.W.2d 751, 754 (1974) (defining “actions” in the context of six-year statute-of-limitations as “judicial proceedings”); *see also Homewood Theatre v. Loew’s Inc.*, 101 F. Supp. 76, 77 (D. Minn. 1951) (noting that Minn. Stat. § 541.07(5) was designed and intended to be limited to actions for wages, damages and

penalties arising out of employer-employee relationship). Here, DEED did not assess collusion penalties by way of a judicial proceeding. See *Gerber v. Gerber*, 714 N.W.2d 702, 706 (Minn. 2006) (holding that administrative income withholding to collect child support was not an “action”); *In re PERA*, 820 N.W.2d 563, 570 (Minn. App. 2012) (stating Public Employees Retirement Association board’s adjustment of contributions and benefits or recoupment of overpaid benefits is not an “action”). Rather, DEED imposed a mandatory administrative penalty. See Minn. Stat. § 268.184, subd. 1(a) (stating that the administrative penalty “must” be imposed); *Gerber*, 714 N.W.2d at 704-05 (stating that administrative income withholding was not a “judicial proceeding,” in part, because it was an administrative action requiring no prior judicial approval). Therefore, the ULJ correctly determined that Minn. Stat. § 541.07 is inapplicable.

DTI argues that the ULJ provided no justification for the decision to reverse course on the application of the collusion penalties. DTI’s argument has no merit; the ULJ specifically noted that the penalties were applicable because Minn. Stat. § 541.07 did not apply. DTI also argues that reversal in the ULJ’s reconsideration order meant that DTI’s sole appeal right was to this court. However, this is true of any determination made in a reconsideration order. See Minn. Stat. § 268.105, subd. 2(f)(3) (noting that the ULJ reconsideration decision “is the final decision on the matter and is binding on the parties unless judicial review is sought” with this court). Lastly, DTI argues that the parties did not request reconsideration of the statute-of-limitations issue. But the parties are not required to specifically raise an issue in order for the ULJ to reconsider that issue. See Minn. Stat. § 268.105, subd. 2(b)(1) (2016) (stating that the parties must receive

notice that reconsideration is the procedure for the ULJ “to correct any factual or legal mistake in the decision”); *Rowe v. Dep’t of Emp’t & Econ. Dev.*, 704 N.W.2d 191, 195-96 (Minn. App. 2005) (discussing a ULJ’s implied power to correct erroneous decisions when the ULJ has jurisdiction).

In sum, the ULJ properly concluded that DTI’s per-diem payments are wages and that collusion penalties were not barred by the statute-of-limitations.

Affirmed.