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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1841**

Maryleen Harmon,
Relator,

vs.

Department of Employment and Economic Development,
Respondent.

**Filed June 5, 2017
Affirmed; motion granted
Peterson, Judge**

Department of Employment and Economic Development
File Nos. 34761124-1, 34761124-2, 34761124-3

Nicholas M. Wenner, Parker & Wenner, P.A., Minneapolis, Minnesota (for relator)

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Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Smith,
Tracy M., Judge.

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

PETERSON, Judge

Relator challenges the determination of an unemployment-law judge (ULJ) that she committed fraud. We affirm, and we grant relator's motion to strike portions of respondent's brief and addendum.

FACTS

Relator Maryleen Harmon began working in a food-service position at a retail store in November 2013. She also worked in an accounting position at a community college, but her employment at the college ended in August 2015.

Harmon established an unemployment-benefit account on September 6, 2015, and submitted a claim for unemployment benefits for each of the 37 weeks between September 6, 2015, and May 21, 2016. For 34 of the 37 weeks, Harmon reported that she worked 31 hours or fewer; for each of the 37 weeks, Harmon reported that her gross earnings did not exceed her weekly unemployment-benefit amount of \$412. For 31 of the 37 weeks, Harmon received unemployment benefits that were equal to the difference between her weekly unemployment-benefit amount and 50% of her reported gross weekly earnings.

On June 24, 2016, respondent Department of Employment and Economic Development (DEED) asked the retail store where Harmon worked to provide information about the number of hours that she worked and her gross earnings. The store provided the requested information, which showed that Harmon worked more than 31 hours during 36 of the 37 weeks for which she submitted a claim for unemployment benefits.¹ The information also showed that Harmon's gross earnings exceeded her weekly unemployment-benefit amount for 26 of the 37 weeks and that Harmon had underreported

¹ Harmon did not work during the week of April 3 to April 9, 2016, but she reported having worked 31 hours that week.

her gross earnings for 36 of the 37 weeks.² On July 7, 2016, DEED made determinations that (1) Harmon was ineligible to receive unemployment benefits, and (2) she received \$5,928 in unemployment benefits by fraudulently underreporting the number of hours she worked and her gross earnings. DEED assessed a fraud penalty of \$2,371.20 against Harmon.

Harmon appealed the determinations of ineligibility and fraud, and a ULJ conducted a hearing. Harmon was the only witness at the hearing, and the ULJ received seven exhibits into the record.

Harmon testified that, on August 25, 2015, she called DEED and spoke with a DEED representative about her eligibility for unemployment benefits while she continued working at the retail store. Harmon testified that

[the DEED representative] asked me if I was a full-time employee at [the retail store]. I said no. I said my hours do vary and I said, there's times yes where I work over 30, 32 hours a week. And she told me to receive benefits that I should only report 30 to 31 hours each week. . . . So she said, when you call in each week she said you need to report 30 to 31 hours, even if I was working more hours at [the retail store] because that's only a part-time position. So that's what I ended up doing.

The ULJ found that a DEED representative “did not tell Harmon to report her hours falsely in order to remain eligible for unemployment benefits” and that Harmon’s “testimony that a [DEED representative] instructed her to underreport hours even if she reached or exceeded 32 hours per week” was not credible. The ULJ affirmed DEED’s

² Harmon’s gross earnings for the week of April 3 to April 9, 2016, were \$0, but she reported gross earnings of \$320 for that week.

determinations that Harmon was ineligible to receive unemployment benefits and fraudulently received \$5,928 in benefits. Harmon asked the ULJ to reconsider his decisions, and the ULJ affirmed the decisions.

In this certiorari appeal, Harmon challenges only the determination that she received \$5,928 in unemployment benefits by fraudulently underreporting the number of hours she worked and her gross earnings. She does not challenge the determination that she was ineligible to receive unemployment benefits.

D E C I S I O N

I.

This court may reverse or modify the decision of a ULJ

if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious.

Minn. Stat. § 268.105, subd. 7(d) (2016).

“[Appellate courts] review the ULJ’s findings of fact in the light most favorable to the decision and will not disturb those findings as long as there is evidence in the record that reasonably tends to sustain them.” *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016) (quotations omitted). “Unemployment compensation determinations are inherently fact-based inquiries,” and the “scope of review does not include appellate fact-

finding.” *Id.* at 462 n.13, 463 n.16. “[Appellate courts] give deference to the ULJ’s credibility determinations.” *Icenhower v. Total Auto., Inc.*, 845 N.W.2d 849, 855 (Minn. App. 2014) (quotation omitted), *review denied* (Minn. July 15, 2014). But “[q]uestions of law are reviewed de novo.” *Builders Commonwealth, Inc. v. Dep’t of Emp’t & Econ. Dev.*, 814 N.W.2d 49, 56 (Minn. App. 2012).

“An applicant may be eligible to receive unemployment benefits for any week if,” in addition to other requirements, “the applicant was unemployed as defined in section 268.035, subdivision 26.” Minn. Stat. § 268.085, subd. 1 (2016). “An applicant is considered ‘unemployed’ in any week that: (1) the applicant performs less than 32 hours of service in employment, covered employment, noncovered employment, self-employment, or volunteer work; *and* (2) any earnings with respect to that week are less than the applicant’s weekly unemployment benefit amount.” Minn. Stat. § 268.035, subd. 26 (2016) (emphasis added). “An applicant is ineligible for unemployment benefits for any week . . . that the applicant is performing services 32 hours or more, in employment, covered employment, noncovered employment, volunteer work, or self-employment *regardless of the amount of any earnings . . .*” Minn. Stat. § 268.085, subd. 2 (2016) (emphasis added).

“An applicant has committed fraud if the applicant is overpaid unemployment benefits by: (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.” Minn. Stat. § 268.18, subd. 2 (2016). “After the discovery of facts indicating fraud, the commissioner must issue a determination

of overpayment penalty assessing a penalty equal to 40 percent of the amount overpaid.”

Id.

Harmon argues that the record contains no evidence to support the ULJ’s finding that a DEED representative “did not tell Harmon to report her hours falsely in order to remain eligible for unemployment benefits.” But during the hearing, the ULJ questioned Harmon as follows:

Q: Your testimony today here is that somebody at the department instructed you to lie to the department.

A: She didn’t say it that way sir.

Q: How did she say it? You just testified that she told you that even if you were working more than 32 hours you should lie to the department and report that you were working 30 or 31 hours. So I was just asking, it seems like from that you’re saying that they told you to lie.

A: No sir.

Harmon’s responses that the DEED representative did not instruct her to lie support the ULJ’s finding that a DEED representative “did not tell Harmon to report her hours falsely in order to remain eligible for unemployment benefits.”

Harmon argues that “the ULJ misconstrued or mischaracterized [her] testimony on the subject of what she had been told by the [DEED] representative, and on that basis erroneously discredited [her] testimony which ultimately had a significant effect on the outcome of the decision.” This argument apparently is based on the premise that, although the DEED representative told Harmon to report fewer hours than she actually worked, the DEED representative did not tell Harmon to lie.

Harmon contends that, based on her communication with the DEED representative, she believed and understood that, “as long as the wage disparity between her former

employment and current employment persisted, she could legitimately report less than 32 hours of work per week and continue to collect some amount for unemployment benefits.” In other words, Harmon believed that she was eligible for unemployment benefits if she worked fewer than 32 hours during a week *or* if the earnings disparity persisted, and, to receive benefits for a week when she worked more than 32 hours but the earnings disparity persisted, she needed to falsely report her hours. The false reporting under these circumstances, in her view, was not lying; it was necessary to maintain her eligibility for benefits based on the earnings disparity. Therefore, although the DEED representative told Harmon to falsely report her hours, she did not tell Harmon to lie.

But, in addition to finding that a DEED representative “did not tell Harmon to report her hours falsely,” the ULJ also found that Harmon’s testimony that she was instructed to underreport hours even if she reached or exceeded 32 hours per week was not credible. “When the credibility of a witness testifying in a hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony.” Minn. Stat. § 268.105, subd. 1a(a) (2016). The ULJ set out the reason for discrediting Harmon’s testimony as follows:

Harmon backed down from this testimony when pressed, stating that she “got the impression” that this is what the [DEED representative] was telling her. It is far more credible to conclude that the [DEED representative] factually informed Harmon that she could be eligible for benefits during any week she worked less than 32 hours, and that Harmon therefore concluded that, in order to remain eligible for benefits, she had better report working under 32 hours regardless of the hours she actually worked.

Harmon argues that she did not back down from her testimony and that she never stated that she “got the impression” that the DEED representative was telling her to underreport her hours. Harmon contends that she consistently testified that the DEED representative told her to underreport hours if she exceeded 32 hours per week, and the ULJ’s determination that this testimony was not credible “led the ULJ to conclude that the [DEED] representative actually informed [Harmon] that she would only be eligible for benefits during any week wherein she worked less than 32 hours.”

The hearing transcript reveals that Harmon did not state that she “got the impression” that the DEED representative was telling her to underreport her hours. But the transcript also reveals that the ULJ questioned Harmon as follows:

Q: Now did anybody ever tell you that if you did report working 32 hours a week or more then you would not be eligible for anything.

A: Yes, based on the phone conversation that I had on 8-25 with the individual, they had stated to me that 32 hours or more would constitute a full time work and I would not be eligible and I was a part-time employee so I needed to only report the 30 to 31 hours.

This exchange supports the ULJ’s finding that “Harmon knew if she reported 32 working hours or more during any given week, she would be held ineligible for benefits for that week.” And, although Harmon did not say that she “got the impression” that the DEED representative was telling her to underreport her hours, her response to the ULJ’s question reveals that she thought the DEED representative was telling her that she needed to underreport her hours when she worked 32 hours or more.

As stated above, “[a]n applicant has committed fraud if the applicant is overpaid unemployment benefits by . . . making a false statement or representation without a good faith belief *as to the correctness of the statement or representation*.” Minn. Stat. § 268.18, subd. 2 (emphasis added). Harmon testified that she knew that she had worked more than 31 or 30 hours, but she reported that she worked 31 or 30 hours because that was what somebody at DEED told her to do. This testimony demonstrates that Harmon knew that her statements about the number of hours she worked were not correct.

Harmon argues that she did not knowingly misrepresent facts or make false statements without a good-faith belief as to the correctness of the statements. She contends that she “represented her earnings based upon a good faith belief that she was entitled to unemployment benefits due to the disparity in her earnings between her former employment at [a community college], and her current part-time employment at [the retail store].” But a good-faith belief that she was entitled to unemployment benefits is not the same thing as a good-faith belief as to the correctness of her statements about the number of hours she worked.

Fraud is statutorily defined to include either (1) an applicant’s knowing misrepresentation of any material fact, or (2) an applicant’s false statement or representation without a good-faith belief as to the correctness of the statement or representation. *Id.* Consequently, if Harmon made false statements without a good-faith belief as to the correctness of the statements, it is immaterial whether Harmon also knowingly misrepresented a material fact.

The only reason Harmon claims for believing that it was correct to report fewer hours than she actually worked is that the DEED representative told her that she was eligible for unemployment benefits because of her earnings and, to receive these benefits, she should report fewer hours than she actually worked. But the ULJ found that Harmon's testimony that a DEED representative told her to underreport her work hours was not credible. We defer to that credibility determination and, therefore, conclude that substantial evidence supports the ULJ's decision that Harmon was overpaid unemployment benefits by making false statements without a good-faith belief as to the correctness of the statements. Because the ULJ's decision is supported by substantial evidence, we affirm.

II.

Harmon moved this court to strike portions of DEED's brief and addendum that address Harmon's possible fraudulent receipt of unemployment benefits in 2014, arguing that the challenged portions of the brief and addendum "are not properly before the court and are beyond the scope of this appeal." DEED opposes Harmon's motion to strike, arguing that the challenged portions of its brief and addendum are no more than "procedural background and information regarding a related pending action."

"The documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01; *see* Minn. R. Civ. App. P. 115.04, subd. 1 (providing that rule 110.01 applies to certiorari appeals). "An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). Because Harmon's receipt

of unemployment benefits in 2014 is a matter outside the record on appeal, Harmon's motion to strike is granted.

Affirmed; motion granted.