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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1822**

Erwin Butler,
Relator,

vs.

Mahkahta Trucking,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 22, 2019
Affirmed
Bratvold, Judge**

Department of Employment and Economic Development
Case No. 36324561-5

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Mahkahta Trucking, Eveleth, Minnesota (respondent-employer)

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Considered and decided by Larkin, Presiding Judge; Slieter, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Relator challenges an unemployment-law judge's (ULJ) determination that he is ineligible for unemployment benefits because he was discharged for employment misconduct after he negligently operated a dump truck. Because the ULJ's decision is supported by substantial evidence, and because the ULJ did not abuse her discretion in denying Butler's motion for reconsideration, we affirm.

FACTS

Relator Erwin Butler began working as a driver for respondent Mahkahta Trucking (Mahkahta) on May 8, 2016.

On October 9, 2017, Butler was driving a dump truck for Mahkahta and taking loads of mud from Duluth to a "pit" in Carlton. After dumping a load at the pit in the evening, Butler "forgot to put the bed of the dump truck down before leaving the site." Butler then drove away from the jobsite and onto State Highway 45. After driving about a quarter of a mile on the highway, Butler's truck box struck a power line, which he failed to notice. About a block later, Butler's truck box, still in the upright position, struck an interstate overpass. The force of the impact "caused extensive damage to the bridge that he hit" and to Mahkahta's truck, which had the truck box ripped off. Before the accident, Butler "did not check his rearview mirror on October 9." Butler reported the accident to Mahkahta and the police around 6:30 p.m., and he remained at the scene until Shelly Holmes, Mahkahta's owner, arrived.

Mahkahta discharged Butler on October 9. Mahkahta's insurance carrier had informed Holmes that "it would no longer cover Butler as a driver."¹ A few days later, the state charged Butler with a petty misdemeanor for driving a vehicle with a height of over 13 feet six inches. See Minn. Stat. § 169.81, subd. 1(a) (2016) ("[N]o vehicle unladen or with load shall exceed a height of 13 feet six inches."); see also Minn. Stat. § 169.80, subd. 1(a) (2016) (providing that violation of size, weight, and load restrictions is a misdemeanor). Butler later entered an *Alford* plea on the traffic violation and was convicted.²

Butler applied for unemployment benefits. Respondent Department of Employment and Economic Development (DEED) determined that Butler was ineligible for unemployment benefits because he was discharged for employment misconduct. Butler appealed and the ULJ conducted a telephone evidentiary hearing.

Butler, represented by counsel, and Holmes provided testimony. Regarding the October 2017 accident, Holmes testified that Butler should have noticed his truck box was raised by looking "in his mirrors." She also testified that the insurance company determined

¹ Holmes testified, in part, that Mahkahta's insurer refused to cover Butler because he had two accidents in one year. Butler was also involved in an accident in May 2017. Butler backed up his dump truck over an electrical manhole at a job site, causing damage. Butler stated that he relied on directions from a foreman. The ULJ's first written decision addressed the May 2017 accident and determined that Butler "was not negligent." In the ULJ's decision after reconsideration, she did not address the May 2017 accident.

² In an *Alford* plea, a defendant consents to a conviction without admitting guilt. *Doe 136 v. Liebsch*, 872 N.W.2d 875, 879 (Minn. 2015) (citing *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167 (1970)). The hearing record indicates that Butler entered his plea and was convicted in March 2018, but the plea and record of conviction are not included in the appellate record.

nothing was wrong with the truck-box hydraulics. Butler testified that he did not recall how often he checked his mirrors. He also testified that he put the truck box down before he left the pit and he “disengaged” the truck-box hydraulics. Because he found the truck-box controls in “neutral” after the accident, he asserted that the truck box should have been down. Butler testified that he believed “something in the electrical” systems caused the truck box to lift up. Butler also offered brief testimony about his *Alford* plea. Butler’s attorney asked the ULJ to take judicial notice of Butler’s *Alford* plea to the traffic violation.

The ULJ issued a written decision in April 2018, finding that Butler was eligible for benefits because he was terminated “for reasons other than employment misconduct.” Regarding the October 2017 accident, the ULJ found that Butler “check[ed] the controls” before leaving the jobsite and “checked his mirrors,” but that he did not know the truck box “had lifted” or “engaged.” The ULJ also found that a “preponderance of the evidence shows that the box was engaged . . . because of a technical malfunction that was not within Butler’s control.” The ULJ concluded that Butler’s driving was not misconduct. Because Butler was discharged for reasons other than misconduct, the ULJ determined that he was eligible for unemployment benefits.

Mahkahta requested reconsideration, asserting that it could submit “statements from mechanics, truck specialists, [the Minnesota Department of Transportation (DOT)] or others to verify that there could not be [a] technical malfunction” with the truck box. The ULJ granted Mahkahta’s request, set aside her previous decision and findings of fact, and conducted a second evidentiary hearing, in part, to reopen the record for more information about the October 2017 accident.

At the second evidentiary hearing, the only witness to testify was Shane Lokken, a dispatcher for Mahkahta. Lokken “oversee[s] the truck shop mechanics” and has “a degree in truck trailer maintenance and mechanics.” Lokken testified that he went to the scene of the October 2017 incident, looked inside Butler’s dump truck, and saw the switches that controlled the truck box were in “[o]ff and neutral,” which is consistent with the truck box being left “in the air.”³ Regarding whether an electrical malfunction could have caused the truck box to lift, Lokken testified: “It’s two separate systems. It’s not capable of doing that.” Lokken also testified that the truck box is “completely mechanically operated” and that there “is no electrical whatsoever.” He described the lift system as “air over hydraulics.” After Lokken finished testifying, Butler requested a continuance so he could subpoena two DOT officers who were at the scene of the accident. The ULJ granted Butler’s request.

The evidentiary hearing continued in August 2018. Initially, the ULJ stated that she was taking judicial notice of “an *Alford* Plea that [Butler] made on March 8 of 2018.” The ULJ also received testimony from four people. Butler, Holmes, and Lokken largely repeated earlier testimony. The only new witness was DOT Officer Dinehart, who inspected the accident scene shortly after the collision occurred. Dinehart testified that she did not inspect or photograph the truck box’s operating mechanism.

³ Lokken testified that two switches control the dump truck box. The “power switch,” which is either on or off, activates the drive for the pump to raise the truck box, but does not actually move the truck box up or down. A second switch has three positions: up, down, or neutral. Lokken testified that if an operator leaves the second switch in the neutral position while the truck box is already up, this “will hold the box up . . . and it will stay there.”

On August 20, 2018, the ULJ issued a written decision, determining that Butler was ineligible for unemployment benefits because he was discharged for employment misconduct. The ULJ found that Butler committed two negligent acts during the October 2017 incident: he failed to “put the bed of the dump truck down before leaving the site,” and also failed to “check his rearview mirror.” The ULJ determined that Mahkahta’s “witnesses’ testimony and written submission are more credible overall” because Lokken gave “reliable testimony that the truck bed operated on an air-based hydraulic system, which is not connected in any way to the electrical system.”

In September 2018, Butler requested reconsideration of the ULJ’s decision. In part, Butler argued that his plea and conviction for driving an “over height” vehicle “is irrelevant to the basic factual issue as to how the dump truck box came to be in the upright position.” Butler also requested that the record be reopened to allow for “expert testimony as to the possibility of mechanical or electrical problems or malfunctions being the cause of the box being raised.”

In October 2018, the ULJ determined that “[n]one of [Butler’s] arguments are new information or evidence” that would necessitate an additional hearing. Accordingly, the ULJ affirmed her findings of fact and decision from August 2018. Butler appeals.

D E C I S I O N

In reviewing a ULJ’s decision on unemployment benefits, this court “may affirm the decision of the [ULJ] or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced.” Minn. Stat. § 268.105, subd. 7(d) (2018). A petitioner’s substantial rights may be

prejudiced if, among other things, “the findings, inferences, conclusion, or decision” are (1) “affected by other errors of law,” (2) “unsupported by substantial evidence in view of the entire record as submitted,” or (3) “arbitrary or capricious.” *Id.* at (4)-(6)

I. The ULJ’s decision that Butler committed employment misconduct is supported by substantial evidence.

An employee who is discharged for employment misconduct “is ineligible for all unemployment benefits.” Minn. Stat. § 268.095, subd. 4(1) (2018). Employment misconduct includes “intentional, negligent, or indifferent conduct” that clearly displays “a serious violation” of the employer’s standards or a “substantial lack of concern for the employment.” *Id.*, subd. 6(a) (2018). This court reviews a ULJ’s determination that an employee engaged in employment misconduct under a mixed standard of review. *Dourney v. CMAK Corp.*, 796 N.W.2d 537, 539 (Minn. App. 2011). Whether an “employee committed a particular act is a fact question, which [this court] review[s] in the light most favorable to the decision and will affirm if supported by substantial evidence.” *Id.* But this court reviews de novo whether the employee’s act “constitutes employment misconduct.” *Id.*

Here, the ULJ concluded that Butler committed employment misconduct because he was negligent while driving a dump truck for Mahkahta. First, the ULJ found that Butler “failed to lower the truck bed, which resulted in Butler hitting a bridge and causing extensive damage.” The ULJ based this finding, in part, on Lokken’s testimony regarding the mechanics of the “truck bed,” which she found credible. The record evidence supports these findings. Butler presented no evidence, apart from his own testimony, in support of

his theory that an “electrical problem or failure” caused the truck box to spontaneously engage. Butler testified that he “believe[d] it was something in the electrical underneath [the truck box].” But Lokken, who worked on Mahkahta’s dump trucks as a mechanic, testified that the truck-box hydraulics are “completely mechanically operated” and “have no electrical whatsoever.” He testified that the box-elevating mechanism used air over hydraulics. Because Butler did not provide any evidence supporting his theory that the truck box went up by itself, the ULJ had ample basis for rejecting it. Even if we were to assume the ULJ had received evidence supporting both theories, the ULJ found Lokken’s testimony credible. This court does not second-guess the credibility determinations of the ULJ. *See Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006) (“Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal.”). When we view the evidence in the light most favorable to the ULJ’s decision, we conclude that the ULJ’s finding that Butler forgot to lower the truck box is supported by substantial evidence.⁴

Second, the ULJ found that Butler “failed to exercise the care necessary to avoid damaging the truck and [overpass],” in part, because Butler failed to check his mirrors and

⁴ Butler also appears to suggest that the ULJ should have disregarded Lokken’s testimony because he is married to the owner of Mahkahta and was “an interested party.” But Butler cites no legal authority for this claimed error, and we deem it waived. *See Yusuf v. Masterson Pers., Inc.*, 880 N.W.2d 600, 605 (Minn. App. 2016) (“Mere assertions of error not supported by authority cannot be considered on appeal except where prejudice is obvious.”). To the extent that Butler is arguing that Lokken is biased, he did not explicitly raise this issue in the ULJ hearings and only asked a few questions relating to Lokken’s relationship with Mahkahta’s owner. Therefore, the issue of bias is not properly before us on appeal. *See In re A.D.*, 883 N.W.2d 251, 261 (Minn. 2016) (stating that an appellate court generally “will not consider an issue not addressed below”).

“knew he was supposed to check [them].” Butler did not testify why he failed to notice the elevated truck box at any point between the jobsite and the interstate overpass. Butler testified that he did not know how often he checked his mirrors before the accident and stated that “[i]t’s just a thing that you do automatic.” He also testified that it was around a quarter of a mile from the jobsite to the overpass. The record evidence also established that, before striking the overpass, Butler struck a power line, but failed to notice that he had hit it. “About a block” after he struck the power line, Butler struck the interstate overpass. Substantial evidence supports the district court’s finding that “[i]f Butler had checked the rear view mirror, he would have noticed that the dump bed was up.”

Butler argues that the ULJ erred in relying on his *Alford* plea to a petty misdemeanor “as evidence substantiating his negligence.” The ULJ’s written decision states that “Butler’s *Alford* Plea relating to the accident supports a finding that Butler was responsible for the truck bed being up at the time he hit the [overpass].” Butler contends that the traffic violation has “only two elements,” which were (1) “operating a motor vehicle” (2) that the vehicle exceeded “the maximum height limit of 13’ 6”.” He asserts that “this statute does not establish *why* or *how* the box became elevated, just that it *was* elevated.”⁵

⁵ We observe that Butler introduced the *Alford* plea and petty misdemeanor conviction as evidence at the first evidentiary hearing but did not argue its relevance, or lack thereof, until he filed his motion to reconsider, which the district court denied. Therefore, to the extent that Butler now objects to the ULJ’s consideration of the *Alford* plea and petty misdemeanor conviction as evidence of his negligence, this argument was not presented to or considered by the ULJ, and is not properly before this court. See *In re A.D.*, 883 N.W.2d at 261. Further, as provided below, we also conclude that any error did not prejudice Butler.

Minnesota law provides that “[n]o record of the conviction of any person for any violation [under chapter 169] shall be admissible as evidence in any court in any civil action.” Minn. Stat. § 169.94, subd. 1 (2018). Butler testified that a district court accepted his *Alford* plea and he paid a fine for his conviction. After hearing this testimony, the ULJ took judicial notice of the plea at the third evidentiary hearing and determined that it “supports a finding that Butler was responsible for the truck bed being up at the time he hit the [overpass].” Based on section 169.94, subdivision 1, the ULJ may have erred in taking judicial notice of Butler’s *Alford* plea and petty misdemeanor conviction.⁶

Even if the ULJ erred in taking judicial notice of Butler’s *Alford* plea as evidence of negligence, that does not end our analysis. Butler must demonstrate how this error prejudiced him. *See* Minn. Stat. § 268.105, subd. 7(d) (permitting reversal when a ULJ’s findings are unsupported by substantial evidence); *Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993) (stating that the burden is on the appellant to demonstrate that error is prejudicial), *review denied* (Minn. Jun. 28, 1993). We conclude that Butler was not prejudiced because the *Alford* plea only related to the truck box being elevated. Regardless of why or how the truck box became elevated, Butler’s negligence in failing to check his mirrors is itself sufficient to support the ULJ’s determination of employment misconduct. We conclude that Butler was not prejudiced by judicial notice of the *Alford* plea because the ULJ found employment misconduct on unrelated grounds.

⁶ It is not clear whether “any court” or “any civil action” includes an administrative hearing. *See* Minn. Stat. § 169.94, subd. 1. We need not decide whether the ULJ committed error in taking judicial notice of Butler’s conviction, however, because we conclude that the any error did not prejudice Butler.

Additionally, Butler offered the *Alford* plea as evidence at the first evidentiary hearing and asked the ULJ to take judicial notice. In *Anderson v. Blair*, we determined that a defendant's introduction of his own misdemeanor conviction for driving while intoxicated in a civil action precluded him from later claiming that the district court's erroneous admission of this evidence prejudiced him. 358 N.W.2d 708, 711-12 (Minn. App. 1984). This was because any prejudice "was established by [the defendant's] own presentation of evidence." *Id.* at 712. Thus, we conclude that Butler is precluded from claiming this error because Butler presented the evidence and asked the ULJ to take judicial notice.

II. The ULJ did not abuse her discretion in denying Butler's request for reconsideration.

A party may request reconsideration from the ULJ who issued the decision. Minn. Stat. § 268.105, subd. 2(a), (e) (2018). Upon receiving a timely request for reconsideration, a ULJ may affirm the findings and decision, modify the findings and decision, or set aside the findings and decision and order an additional hearing. Minn. Stat. § 268.105, subd. 2(f) (2018). A ULJ generally has broad discretion on whether to grant reconsideration and order an additional evidentiary hearing. *See Vassei v. Schmitt & Sons Sch. Buses Inc.*, 793 N.W.2d 747, 751 (Minn. App. 2010) (noting that statutory requirements do not restrict the ULJ's authority to grant an additional hearing). However, a ULJ "*must* order an additional hearing" if a party shows good cause for not previously submitting evidence that would likely change the outcome of the decision. Minn. Stat. § 268.105, subd. 2(c) (2018)

(emphasis added). “Good cause” means a reason that would prevent “a reasonable person acting with due diligence from submitting the evidence.” *Id.*

Butler argues that the ULJ abused her discretion when she denied his request for reconsideration because she relied on Lokken’s testimony at the second evidentiary hearing “to overturn her previous findings as to the cause of the box having become raised.” Butler argues that Lokken’s testimony was “confusing and far from consistent,” was not substantial evidence, and the ULJ should have permitted him to supplement the record with additional evidence of his theory that the truck box raised “due to some sort of mechanical or electrical problem or failure.”⁷

Butler’s request for reconsideration stated that he would introduce expert testimony regarding whether the truck box “could have raised independently of any action by Butler.” Butler stated that he “contacted the University of Minnesota, Duluth Mechanical Engineering Department to determine if an expert can be retained to examine the records of the truck and hydraulic system in question.” Butler named no particular expert.

The ULJ did not abuse her discretion in denying Butler’s request for two reasons. First, Butler does not establish good cause for why he did not offer expert evidence at the first two evidentiary hearings. When Mahkahta requested reconsideration of the ULJ’s opinion in May 2018, Mahkahta indicated that it intended to “provide statements from

⁷ Butler makes two separate challenges to the ULJ’s denial of his request for reconsideration. First, Butler argues that the ULJ’s refusal to grant an evidentiary hearing is not supported by substantial evidence; second, he argues that the ULJ did not “ensure that all relevant facts are clearly and fully developed.” We consider Butler’s challenges together.

mechanics, truck specialists, DOT or others.” Therefore, Butler was aware that Mahkahta was likely to offer expert testimony. Moreover, after the ULJ granted reconsideration to Mahkahta and held another evidentiary hearing in July 2018, Mahkahta offered Lokken’s expert testimony. The ULJ continued the hearing so that Butler could subpoena testimony from DOT officers. After a three-week continuance, Butler offered testimony from one DOT officer who failed to provide relevant information about what caused the truck box to elevate. Butler fails to demonstrate good cause for not obtaining any other experts earlier.

Second, Butler provided no basis for the ULJ to determine that additional expert testimony would likely change the outcome. Butler only stated that he generally inquired at the University of Minnesota to determine “if an expert can be retained” to testify “as to the possibility of mechanical or electrical problems or malfunctions being the cause of the box being raised independent of . . . Butler.” Butler did not identify an expert, indicate whether an expert was, in fact, available, or describe the substance of the expert’s intended testimony.

Butler also argues that there was no evidence presented at the reconsideration hearings to “warrant a reversal of the ULJ’s findings of April [2018].” But this court has already explained that the ULJ’s decision is supported by substantial evidence. To the extent Butler argues that the ULJ’s two orders contradict each other, the first order is of no legal effect because the ULJ issued an order “setting aside” the previous findings of fact and decision, and then issued a new decision “modifying the previously issued findings of fact, reasons for decision, and decision.” Minn. Stat. § 268.105, subd. 2(f)

We conclude that there is substantial evidence in the record to support the ULJ's determination that Butler engaged in employment misconduct, and that the ULJ did not abuse her discretion in denying Butler's motion for reconsideration.

Affirmed.