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**STATE OF MINNESOTA
IN COURT OF APPEALS**

A18-2147

A18-2148

A18-2149

In the Matter of:
Dennis Arel, Relator.

Filed August 12, 2019

Affirmed

Slieter, Judge

Department of Employment and Economic Development
File Nos. 36620658, 36625160, 36625163

Jasper Berg, IAJ Law, LLC, Edina, Minnesota (for relator)

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

Considered and decided by Slieter, Presiding Judge; Halbrooks, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

SLIETER, Judge

Relator Dennis Arel challenges the decisions made by an unemployment-law judge (ULJ) that he was ineligible for unemployment benefits because he was not available for and actively seeking suitable employment. Relator argues that (1) he was actively seeking suitable employment, (2) the ULJ's decisions addressed a different issue than was noticed for the hearing, and (3) the ULJ acted as an improper material witness by conducting

internet searches for available jobs during the hearing. The ULJ properly found the relator was not ready, willing, and able to accept suitable employment; the relator was aware of what the issue was to be considered at the hearing; and the ULJ properly considered the labor market in reaching a decision. For these reasons, we affirm.

FACTS

Relator has worked at Arel Trucking for the past 30 years. He works as a truck driver, hauling gravel, asphalt, and rock in a dump truck. This work is seasonal, he usually begins work for the year in April and ends in November, and he makes approximately \$30 per hour. On January 1, 2017, relator established an unemployment-insurance account after he was laid off due to lack of work. He established another account on January 7, 2018, again because of unemployment due to “lack of work.” Relator received unemployment benefits through these accounts.

On July 24, 2018, the department of employment and economic development (DEED) issued determinations of ineligibility for three time periods that relator received benefits. The first was from January 1, 2017 through April 15, 2017. This resulted in an overpayment of benefits of \$6,608. The second time period was from November 19, 2017 through January 6, 2018. This resulted in an overpayment of benefits of \$3,304. The last period was from January 7, 2018 through April 21, 2018. This resulted in an overpayment of benefits of \$5,811. The reason stated on all three ineligibility determinations was that Arel “failed to conduct an active search for suitable employment.”

On July 30, 2018, relator appealed these determinations, which all were consolidated for hearing and assigned to one ULJ. The ULJ held a *de novo* evidentiary

hearing on August 16, 2018. Relator was present and testified on his own behalf. The ULJ explained that the only issue to be decided was whether relator was actively seeking suitable employment during the three time periods.

Upon being questioned by the ULJ, relator testified that he established the unemployment accounts when he was laid off from Arel Trucking. His job title when he was laid off was “truck driver.” He worked full time for \$31 per hour. Relator testified that between January 1, 2017 and April 15, 2017, he looked for work by searching Craigslist and looking in the newspaper. But he explained that “[i]t’s all seasonal work, there’s nothing out there.” Relator testified that he was looking for truck driving positions that paid around \$30 an hour, but that he only saw ones that paid \$18 an hour.

The ULJ asked relator if he had “any objection to [the ULJ] doing a new search about truck driving jobs?” and relator replied “[n]o.” The ULJ went online and looked at the American Trucking Associations website, which stated that the trucking industry is “facing a shortage of drivers.” Relator testified that he was not aware of any shortage. Relator continued to testify that, for the time periods at issue, he would look for work on Craigslist and in the newspaper but was unable to find any full-time employment. He maintained that “[t]here was no trucking work” during these periods. At one point during the hearing, the ULJ asked if relator had any objection to the ULJ going on Indeed.com and trying to “see what it looks like?” Relator stated that he had no objection. The ULJ entered a job search for “truck driver” in Minneapolis, Minnesota and got 1,974 results. Relator testified that he “never heard of this website.” The ULJ decided to continue the hearing to do more research into what was available during these times for work, and kept

the record open to allow relator time to review additional evidence, which included labor market data. Relator did not respond to the ULJ's labor market information, nor did he add any additional evidence of his own.

On September 10, 2018, the ULJ issued a findings of fact and decision for each time period. The ULJ found that “[t]he testimony of [relator] was not credible, because it was contradictory and not plausible. . . . It is not plausible that the employment conditions in Minnesota were such that no full-time work existed in the winters of 2017 and 2018.” The ULJ held that “the only logical conclusion is that [relator] was not interested in obtaining other work” during the three time periods. On a request for reconsideration, the ULJ affirmed its decision on December 4, 2018.

Relator appeals, by writ of *certiorari*, the three separate determinations by the ULJ. They have been consolidated on appeal.

D E C I S I O N

When reviewing the ULJ's decision, this court may affirm, remand for further proceedings, or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision were: “(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) (2018).

“Whether [a relator] was properly disqualified from receiving unemployment compensation is a mixed question of law and fact.” *Posey v. Securitas Sec. Servs.*

USA, Inc., 879 N.W.2d 662, 664 (Minn. App. 2016) (quotation omitted). This court reviews the ULJ’s factual findings in the light most favorable to the decision, and we “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) (quotation omitted). “Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal.” *Bangtson v. Allina Med. Grp.*, 766 N.W.2d 328, 332 (Minn. App. 2009) (quotation omitted). “The determination that an applicant is ineligible for unemployment benefits based on the facts of the case is reviewed de novo.” *Posey*, 879 N.W.2d at 664.

I. Substantial evidence supports the ULJ’s finding that relator was not actively seeking or available for suitable employment.

Relator argues that the ULJ erred in determining that he was ineligible for unemployment benefits because he was not actively seeking employment. We disagree.

Unemployment benefits are intended to assist those who are discharged through no fault of their own. Minn. Stat. § 268.03, subd. 1 (2018). An applicant for unemployment benefits must meet a number of eligibility requirements, including that the applicant was available for and actively seeking suitable employment. Minn. Stat. § 268.085, subd. 1 (2018).

Whether an applicant for unemployment benefits is available for suitable employment is a question of fact. See *Semanko v. Dep’t of Emp’t Servs.*, 244 N.W.2d 663, 665 (Minn. 1976). We review that finding in the light most favorable to the decision and

will not disturb the finding when the evidence substantially sustains it. *Wiley v. Robert Half Int'l*, 834 N.W.2d 567, 569 (Minn. App. 2013).

An applicant is not eligible for unemployment benefits for any week if the applicant was not “available for suitable employment” during that week. See Minn. Stat. § 268.085, subd. 1(4) (2018).

“Available for suitable employment” means an applicant is ready, willing, and able to accept suitable employment. The attachment to the work force must be genuine. An applicant may restrict availability to suitable employment, but there must be no other restrictions, either self-imposed or created by circumstances, temporary or permanent, that prevent accepting suitable employment.

Id., subd. 15(a) (2018). “An applicant who has restrictions on the hours of the day or days of the week that the applicant can or will work, that are not normal for the applicant’s usual occupation or other suitable employment, is not ‘available for suitable employment.’” *Id.*, subd. 15(d) (2018). “An applicant must be available for daytime employment, if suitable employment is performed during the daytime, even though the applicant previously worked the night shift.” *Id.*

“Suitable employment means employment in the applicant’s *labor market area* that is reasonably related to the applicant’s qualifications.” Minn. Stat. § 268.035, subd. 23a(a) (2018) (emphasis added). “In determining whether any employment is suitable for an applicant, the degree of risk involved to the health and safety, physical fitness, prior training, experience, length of unemployment, prospects for securing employment in the applicant’s customary occupation, and the distance of the employment from the applicant’s residence is considered.” *Id.* Furthermore, “[i]f reasonable prospects of suitable

employment in the applicant's usual or customary occupation do not exist, the applicant must actively seek other suitable employment to be 'actively seeking suitable employment.' This applies to an applicant who is seasonally unemployed." Minn. Stat. § 268.085, subd. 16(c) (2018).

The ULJ found that:

[Relator] browsed Craigslist and newspaper[s] for gravel truck driving positions. He did not apply for any jobs, because he was only interested in returning to work with Arel Trucking in the spring. Full-time work that paid \$18 per hour was available in the Twin Cities of Minnesota. . . . [Relator] was not interested in obtaining other work. His plan was to go back to work with Arel Trucking.

These findings are supported by the limited record. When asked on the DEED questionnaire to provide the name, date, and provider of any job search workshops, fairs or clubs attended, relator answered "[n]one. Guaranteed job back in spring." When asked to provide a detailed work search history, relator answered "Craigslist every day[.] No work out there." This, combined with his testimony at the hearing, supports the ULJ's finding that relator was not genuinely looking for employment, he was simply waiting until spring to start back with Arel Trucking. Relator testified, "[w]e get laid off about the same time every year, get called back the same time every year, and we're guaranteed our jobs back. I don't understand what the problem is." The ULJ found relator's testimony that he was genuinely looking for employment to be not credible, and this court does not disturb credibility determinations on appeal. *Bangston*, 766 N.W.2d at 332.

Viewing the record in the light most favorable to the decision, the evidence substantially supports the ULJ's findings that relator was not actively seeking suitable employment, and thus, was ineligible for unemployment benefits.

II. Relator had proper notice of the issues to be considered.

Relator also argues that the ULJ "rendered a decision that violated the constitution and was based on an unlawful procedure[]" because the legal issue the ULJ described in the hearing was different than the legal issue stated in the written decision. We are not persuaded.

On receiving an application, DEED must make an initial eligibility determination. Minn. Stat. § 268.101, subd. 2(a) (2018). Then, if the initial determination is timely challenged by the employer or employee, a hearing must be held before a ULJ. Minn. Stat. § 268.105, subd. 1(a) (2018). The ULJ must generally send a notice of hearing to the parties at least ten days before the scheduled hearing date. Minn. R. 3310.2905, subp. 2 (2017). The notice must include the time and date of the hearing, along with a statement of the issues to be considered. *Id.* But, the ULJ "may take testimony and render a decision on issues not listed on the notice of hearing if each party is notified on the record, is advised of the right to object, and does not object." Minn. R. 3310.2910 (2017).

After relator appealed the determinations of ineligibility, DEED sent him a notice of hearing for each of the determinations. Each of the notices stated that the issue to be considered at the hearing was "[w]hether DENNIS J AREL has been available to accept suitable employment and actively seeking suitable employment." Relator now argues for the first time on appeal that the ULJ violated his constitutional rights by framing the issue

slightly differently at the hearing. The ULJ stated that, “[t]he issue before me today is whether [relator] was actively seeking suitable employment between January 1, 2017 and April 15, 2017, November 19, 2017 and January 6, 2018, and January 7, 2018 to . . . April 21, 2018.”

“When . . . a due process challenge revolves around the adequacy of notice, we determine whether the notice was reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Godbout v. Dep’t of Emp’t & Econ. Dev.*, 827 N.W.2d 799, 802 (Minn. App. 2013) (quotation omitted). Relator was given full notice on each of the three notices of hearing that the issue that would be decided by the ULJ was whether he was available to accept employment and whether he was actively seeking employment. The fact that the ULJ misspoke at the hearing and omitted the “available to accept employment” issue does not mean that relator never received notice that it would be an issue.

Relator argues that he relied on the ULJ’s verbal description of the case because he does not have a high school diploma or GED. However, he provides no caselaw that would support the argument that the ULJ’s verbal description of the issues supersedes what was very clearly stated on the three notices. The ULJ misspoke in its description of the issues at the hearing, but relator does not argue that he was prejudiced in any way, and does not argue that he would have testified differently if he had been told about the other issue. *See* Minn. R. Civ. P. 61 (requiring harmless error be ignored). The notices relator received provided him sufficient information to apprise him of the issues at stake at the hearing, and gave him the opportunity to present objections. There is no due-process violation here.

III. The ULJ did not act as an improper “material witness.”

Relator, lastly, argues that the ‘ULJ should have been disqualified for serving as [a] material witness.’ Relator states that “the ULJ served as a material witness and used their own testimony and internet searches to support the reasons for decision.” We disagree.

At the hearing, the ULJ went online and searched for truck driving jobs in the Twin Cities, asking relator about what potential job positions he would be capable of applying for. At the end of the hearing, the ULJ also left the record open in order to submit job market information into the record, and gave relator time to respond to the later submitted exhibits.

The unemployment statute requires an analysis of the applicant’s job search in relation to the labor market area. *See* Minn. Stat. § 268.085, subd. 16(a). (“‘Actively seeking suitable employment’ means those reasonable, diligent efforts an individual in similar circumstances would make if genuinely interested in obtaining suitable employment under the existing conditions in the labor market area.”). This court has explained that, “[c]ase law implicitly supports the rule that ineligibility determinations must consider the number and scope of employment options available to an applicant in addition to the number of applications submitted or time expended.” *Neumann v. Dep’t of Emp’t & Econ. Dev.*, 844 N.W.2d 736, 739 (Minn. App. 2014).

We have also explained the unique role the ULJ maintains in this process, stating that a ULJ “must consider the relevant ‘labor market area’ based on surrounding circumstances[.]” because the “labor market area may differ depending on the work experience and location of each applicant for benefits.” *Work Connection, Inc. v. Bui*, 749

N.W.2d 63, 69 (Minn. App. 2008), *review granted* (Minn. June 18, 2008) and *appeal dismissed* (Minn. July 6, 2009). For example, “the relevant labor market is different for a brain surgeon and a common laborer; it is different for an urban and a rural Minnesotan; and it may be different for ex-urban and inner-city parts of a metropolitan area.” *Id.* In *Neumann*, this court reversed the finding that the applicant was not seeking suitable employment because the ULJ failed to identify the labor market area and to consider the existing labor conditions. 844 N.W.2d at 739.

In this case, the ULJ was not acting as a witness; she was not under oath and did not testify about information that she personally knew about. Instead, the ULJ did research into the existing job market so that she could ask relator about his job search, in light of what the statute and caselaw require. The ULJ also repeatedly asked relator if he had any objections, which he said he did not, and gave him time to respond to the information later submitted in exhibit six, which he did not do. Relator cites no authority with respect to this argument, and does not explain how he was prejudiced. Given the ULJ’s unique role as fact-finder in this situation, it was not error to conduct internet searches into the labor market during the hearing.

Affirmed.