

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1024**

Chue Her,
Relator,

vs.

FGT Cabinetry LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed April 5, 2021
Affirmed; motion denied
Smith, Tracy M., Judge**

Department of Employment and Economic Development
File No. 38181420

Peter B. Knapp, Peter C. Schmitz (certified student attorney), Mitchell Hamline Law Clinic, St. Paul, Minnesota (for relator)

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

FGT Cabinetry LLC, Eagan, Minnesota (respondent employer)

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

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Relator Chue Her challenges the decision by an unemployment-law judge (ULJ) dismissing his unemployment-benefits administrative appeal as untimely. Although Her

filed his administrative appeal outside of the 20-day appeal period, he asserts that his appeal should be considered timely because respondent Minnesota Department of Employment and Economic Development (DEED) mailed its determination of ineligibility for benefits, which triggered the 20-day appeal period, to a nonexistent address. He further asserts that DEED deprived him of his due-process rights by mailing the determination to a nonexistent address.

In an addendum to its brief to this court, DEED submitted an affidavit from a DEED employee explaining DEED's processes and attaching records showing that Her was responsible for entering the incorrect address that DEED relied upon. Her moves to strike the documents and references to them in DEED's brief.

We deny Her's motion to strike, and we supplement the record with the evidence submitted by DEED. Because the supplemental evidence establishes that Her was responsible for the incorrect mailing address, we conclude that the ULJ did not err when it dismissed Her's untimely appeal and that DEED did not violate Her's due-process rights. We therefore affirm.

FACTS

On March 18, 2020, Her applied for unemployment benefits. On April 6, 2020, DEED sent Her a determination of ineligibility to 1376 SANFORD ST, Saint Paul, MN 55117—an address that does not exist. The letter stated that “[t]his determination will become final unless an appeal is filed by Monday April 27, 2020.”

Her filed an appeal on May 12, 2020. In a follow-up exchange on DEED's online system, Her was asked why he filed his appeal late and he responded, "This [is] my first[.] I didn't know how to even apply or appeal."

The ULJ summarily dismissed Her's appeal as untimely on May 13, 2020. Her requested reconsideration, and the ULJ affirmed the dismissal.

Her's certiorari appeal follows.

DECISION

Her asserts that his appeal should be considered timely under the unemployment-benefits statute because DEED mailed the determination of ineligibility triggering the appeal period to the wrong address. He further asserts that DEED's incorrect mailing violated his due-process rights.

I. Her's appeal was untimely.

A determination of ineligibility for unemployment benefits "is final unless an appeal is filed by the applicant or employer within 20 calendar days after sending." Minn. Stat. § 268.101, subd. 2(f) (2020). "The date of mailing commences the time for appeal." *Smith v. Masterson Pers., Inc.*, 483 N.W.2d 111, 112 (Minn. App. 1992). "The statute does not require actual notice for the appeal period to run." *Johnson v. Metro. Med. Ctr.*, 395 N.W.2d 380, 382 (Minn. App. 1986). But, if DEED fails to mail the notice, the appeal period is not triggered. *Mgmt. Five, Inc. v. Comm'r of Jobs & Training*, 485 N.W.2d 323, 324 (Minn. App. 1992).

The ULJ must dismiss untimely appeals for lack of jurisdiction. *Cole v. Holiday Inns, Inc.*, 347 N.W.2d 72, 73 (Minn. App. 1984); accord Minn. Stat. § 268.105,

subd. 1a(c) (2020) (“The unemployment law judge must issue a decision dismissing the appeal as untimely if the judge decides the appeal was not filed within 20 calendar days after the sending of the determination.”). The statutory time period “is absolute and unambiguous,” *Semanko v. Dep’t of Emp’t Servs.*, 244 N.W.2d 663, 666 (Minn. 1976), and “there are no statutory provisions for extensions or exceptions to the appeal period,” *Kennedy v. Am. Paper Recycling Corp.*, 714 N.W.2d 738, 740 (Minn. App. 2006). “[A] ULJ’s decision to dismiss an appeal as untimely is a question of law, subject to de novo review.” *Godbout v. Dep’t of Emp’t & Econ. Dev.*, 827 N.W.2d 799, 802 (Minn. App. 2013).

It is undisputed that DEED mailed its determination of ineligibility to an address that does not exist. But Her did not raise the issue of an incorrect address prior to his appeal to this court. Instead, when the agency questioned why his appeal was late, he explained that he did not know how to appeal, and, when he requested reconsideration of the ULJ’s summary dismissal of his appeal, he challenged only on the merits of DEED’s ineligibility determination. Litigants are generally bound on appeal by the theory on which the action was actually tried below, *Annis v. Annis*, 84 N.W.2d 256, 261 (Minn. 1957), and an appellate court generally will not consider matters not argued to and considered by the district court, *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Because Her did not argue to the ULJ that the mailing was sent to an incorrect address, Her forfeits that argument on appeal. *See Thiele*, 425 N.W.2d at 582.

But, even if Her’s argument were not forfeited, it would still fail. Her argues that, because DEED failed to mail the notice to an “actual address,” the appeal period was not

triggered. Her relies on *Stassen v. Lone Mountain Truck Leasing, LLC*, where we determined that the appeal period did not start running when DEED mailed a determination of eligibility to the employer's former address. 814 N.W.2d 25, 30 (Minn. App. 2012). In *Stassen*, the ULJ made a finding that the employer had properly updated its address on one page in its online account as directed but had failed to do so on another page. *Id.* DEED mailed the notice to the former address. *Id.* We concluded that "the consequence of the mistaken addressing of the letter should not be borne by the party that followed DEED's website directions in updating its address" and that the appeal period had not begun to run. *Id.*

Her contends that the argument that the appeal period had not started running is even stronger here than in *Stassen* because, here, DEED did not merely send the determination of ineligibility to a former address, it sent it to a nonexistent address. But the basis for the decision in *Stassen* was that a party that properly updated its address according to DEED's directions should not be held responsible for a mistake in mailing. *Id.* Unlike the appellant in *Stassen*, Her presented no evidence that he had properly supplied a correct address to DEED at the time of DEED's mailing.

But Her argues that, because "nothing in the record shows how DEED received the incorrect address," he should receive the benefit of an inference that he was not responsible for the mistake. The problem with his argument is that the record was never developed because Her did not raise the issue of an incorrect address, either to the agency or to the ULJ in his request for reconsideration. It is because the issue was first raised on appeal to

this court that DEED submitted extra-record documents and argument in its briefing addressing why Her's address was incorrect.

Her moves to strike these documents and related briefing because they are outside the record. The record on appeal generally consists of only papers filed in the district court, offered exhibits, and the transcript of the proceedings. Minn. R. Civ. App. P. 110.01; *see also* Minn. R. Civ. App. P. 115.04 (incorporating rule 110 to the extent possible in certiorari appeals). Nevertheless, the supreme court has held that “appellate courts, in order to sustain verdicts and judgments, will permit omissions to be supplied by documentary evidence of a conclusive nature.” *Mattfeld v. Nester*, 32 N.W.2d 291, 303-04 (Minn. 1948); *see also* Minn. R. Civ. App. P. 110.05 (providing an appellate court, on its own initiative, may approve a supplemental record if there is an omission or misstatement in the record). The supplied evidence must support affirmance; it will not be permitted in support of reversal. *Carlson v. Mut. Serv. Ins.*, 494 N.W.2d 885, 888 (Minn. 1993); *see also In re Objections & Defenses to Real Prop. Taxes for 1980 Assessment*, 335 N.W.2d 717, 718 n.3 (Minn. 1983) (holding that evidence outside the district court record may be considered “when the evidence is documentary evidence of a conclusive nature (uncontroverted) which supports the result obtained in the lower court”).

The supplemental evidence submitted by DEED consists of an affidavit from the director of DEED's Customer Service Center and three documents: an excerpt from the handbook that DEED mails to all unemployment-benefits applicants; a page from Her's online application for benefits; and an event log that recorded Her's online account activity. This evidence shows that DEED informs applicants to keep the address on their account

up to date for at least four years after receiving benefits. It further shows that, when Her initially applied for benefits on March 18, 2020, he entered an address on Earl Street in Saint Paul. The event log shows that, twelve days later, on March 30, Her changed the contact information on his account to the nonexistent 1376 Sanford Street address that DEED relied on to mail the determination of ineligibility. Finally, the event log shows that, on April 7, 2020—the day following the mailing of the determination of ineligibility—Her changed his address on his online account to his correct address.¹

Her does not contest the accuracy of any of this evidence. Together, it shows that Her was informed to keep his address up to date but that he nevertheless entered an incorrect address in DEED’s system. It shows that DEED mailed the determination of ineligibility to this incorrect address—Her’s last known address—on April 6, 2020. *See* Minn. Stat. § 268.032(b) (2020) (requiring DEED to mail the determination to the employee’s “last known address”). The evidence conclusively establishes that DEED was not responsible for the incorrect address on file. Unlike in *Stassen*, where we concluded that a party that follows DEED’s instructions should not bear the cost for DEED’s mistake, in this case, Her entered the wrong address and must bear the cost for that mistake. Because the evidence is uncontroverted and supports affirmance, we permit DEED’s

¹ The affidavit also explains that the determination of eligibility was accessible to Her on his online account.

supplementation of the record and deny Her's motion to strike.² On the basis of the complete record, we conclude that the ULJ did not err by dismissing Her's untimely appeal.

II. DEED did not violate Her's due-process rights.

Her also asserts that DEED violated his due-process rights because it failed to provide sufficient notice of the determination of ineligibility when it mailed the determination to a nonexistent address. The Minnesota Constitution guarantees that “[n]o person shall . . . be deprived of life, liberty or property without due process of law.” Minn. Const. art. I, § 7. Unemployment benefits are an entitlement protected by the constitutional right to procedural due process. *See Schulte v. Transp. Unlimited, Inc.*, 354 N.W.2d 830, 832 (Minn. 1984). When, as here, 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.” *McShane v. Comm’r of Pub. Safety*, 377 N.W.2d 479, 482-83 (Minn. App. 1985) (quotation omitted), *review denied* (Minn. Jan. 23, 1986).

Her relies on our decision in *Godbout*, 827 N.W.2d 799, asserting that it stands for the proposition that a “notice mailed to a wrong address is constitutionally defective.” But that was not our holding in *Godbout*. In that case, *Godbout* requested and was paid unemployment benefits. *Godbout*, 827 N.W.2d at 800. After he stopped requesting benefits, DEED mailed a determination of overpayment to his last known address stating

² Because we conclude that the record is properly supplemented with the evidence submitted by DEED, we also deny Her's motion for attorney's fees against DEED based on its submission of the extra-record evidence.

that Godbout had committed fraud, resulting in an overpayment and penalty. *Id.* at 801. By the time of that mailing, Godbout had moved from his former address and was incarcerated. *Id.* at 800-01. He argued that the notice violated his right to due process because DEED had not notified him of the consequences of failing to maintain a current address following the end of his benefit claim. *Id.* at 802. We agreed that Godbout’s due-process rights had been violated because DEED had failed to “communicate the interest at stake” and Godbout had acted rationally by not updating his address after he stopped requesting benefits. *Id.* at 803 (quotation omitted).

Here, in contrast, DEED informed Her to “[k]eep the address on [his] account up-to-date for at least four years after [his] last request for a benefit payment.” Moreover, Her was still requesting unemployment benefits. Unlike in *Godbout* where it was rational for Godbout to not update his address after he stopped requesting services, here it was not rational for Her to fail to update his address during the ongoing unemployment-benefits process.

Her suggests, though, that “any simple search on Google, MapQuest, or any other search engine will show that no such street or address exists.” But there is no requirement that DEED conduct an independent internet search to verify each mailing address provided by applicants. DEED’s notice to Her was reasonably calculated to inform Her of “the pendency of the action and afford [him] an opportunity to present [his] objections.” *Id.* at 802 (quotation omitted). Thus, the record establishes that DEED did not violate Her’s due process rights.

Affirmed; motion denied.