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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0881**

In the Matter of: Natasia Moose.

**Filed February 14, 2022
Reversed and remanded
Reyes, Judge
Dissenting, Frisch, Judge**

Department of Employment and Economic Development
File No. 46315553-2

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Considered and decided by Frisch, Presiding Judge; Segal, Chief Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

Relator challenges an unemployment-law judge's (ULJ) determination that she filed an untimely appeal of the denial of her unemployment benefits. We reverse and remand.

FACTS

On December 27, 2020, relator Natasia Moose applied for unemployment benefits and established a benefit account with respondent Minnesota Department of Employment and Economic Development (DEED). On February 16, 2021, DEED mailed to relator an amended determination reducing her unemployment benefits and stating that any

administrative appeal of that determination must be filed by March 8, 2021. Relator appealed 22 days after the deadline on March 30, 2021. The ULJ dismissed her appeal as untimely.

Relator filed a timely request for reconsideration, asserting that she did not receive the February 16, 2021 determination by mail and that it did not appear in her online portal maintained by DEED. The ULJ denied her request for reconsideration and affirmed its prior conclusion that she filed an untimely appeal. In its determination, the ULJ relied on an affidavit submitted by DEED in which a supervisor testified about DEED's general mailing procedures. The ULJ found that, based on the affidavit, "it is more likely true than not" that DEED mailed the determination to the address provided by relator.

Relator appeals by a writ of certiorari.

DECISION

Relator argues that the ULJ erred by dismissing relator's administrative appeal as untimely without considering the *Murack* substantial-compliance factors.¹ We agree.

A ULJ's decision to dismiss an appeal as untimely raises a jurisdictional question of law, which we review de novo. *Kennedy v. Am. Paper Recycling Corp.*, 714 N.W.2d 738, 739 (Minn. App. 2006). We may reverse or remand a ULJ's decision if it is affected by an error of law and if it prejudiced the relator's substantial rights. Minn. Stat. § 268.105, subd. 7(d) (2020).

¹ Relator also argues that the ULJ's decision is not supported by substantial evidence, specifically challenging its reliance on DEED's affidavit stating that it followed its standard mailing protocol during the relevant time period. Because we reverse and remand on the substantial-compliance issue, we do not address this issue.

On March 8, 2021, this court issued its *In re Murack* opinion, holding that Governor Tim Walz’s March 16, 2020 executive order (the executive order) suspended strict compliance with the 20-day administrative appeal deadline under Minn. Stat. § 268.101, subd. 2(f) (2020). 957 N.W.2d 124, 131 (Minn. App. 2021) (citing Emerg. Exec. Order No. 20-05, *Providing Immediate Relief to Employers & Unemployed Workers During the COVID-19 Peacetime Emergency* (Mar. 13, 2020)). That statutory deadline required an applicant to file an appeal within 20 days of mailing of a ULJ determination. *Id.* at 127. But with the executive order in effect, we stated that an applicant can show “substantial compliance” with the statute if the applicant “has a reasonable explanation for failing to strictly comply, has taken steps to comply with the statute, and has generally complied with the statute’s purpose; and there is reasonable notice and a lack of prejudice to other parties.” *Id.* at 130. We reversed and remanded for further consideration by the ULJ to apply those substantial-compliance factors. *Id.* at 131.

On April 28, 2021, approximately seven weeks after this court’s *Murack* opinion and more than a year after the executive order remained in effect, the ULJ dismissed relator’s appeal as untimely because she filed it 22 days after the 20-day deadline. The ULJ stated that “the statutory time period for appeal is absolute, regardless of any asserted mitigating circumstances.” The ULJ determined that it had no legal authority to consider the appeal because she did not file it within the 20-day period. It never mentioned the executive order, *Murack*, or the substantial-compliance standard.

Relator filed a timely request for reconsideration on May 24, 2021, asserting that she never received the February 16, 2021 amended determination by mail and that it never

appeared on her online benefit account portal with DEED. She also cited to the executive order and *Murack* and argued that she is in substantial compliance with the appeal deadline. Relator further noted that she timely appealed an April 27, 2021 order, which is an amended determination of the February 16, 2021 order.

On June 8, 2021, the ULJ denied relator's request for reconsideration and affirmed its earlier determination that she filed an untimely appeal. The ULJ first relied on the DEED affidavit describing DEED's general mailing procedures during that time period to determine that DEED had mailed relator's amended determination letter on February 16, 2021. It then determined that relator did not timely appeal because she "made no efforts to file an appeal *within the 20-day appeal period*. As such, [relator] did not substantially comply with the appeal deadline under [the executive order]." (Emphasis added). The ULJ reads our decision in *Murack* too narrowly. We never stated in *Murack* that to demonstrate "substantial compliance" a relator had to demonstrate that she made efforts to file the appeal *within the 20-day appeal period*. Thus, while the ULJ referenced the executive order and the new substantial-compliance standard, it did not apply the correct standard. This is an error of law.

This error also prejudiced relator's substantial rights. Relator alleged that she never received the February 16, 2021 amended determination and that it did not appear on her account portal. DEED does not deny that it does not appear on the account portal, and the ULJ never addressed this issue.

We also note that relator timely appealed the related April 27, 2021 amended determination, which DEED concedes. But as of oral argument in December 2021, DEED

has not held a hearing on that appeal. DEED, to its credit, conceded at oral argument that this is an error.

Finally, the ULJ's lack of an explanation of (1) relator's efforts to comply with the statutory deadline; (2) the reasonableness of her explanation for filing her appeal late; (3) whether she generally complied with the statute's purpose; and (4) the level of notice and prejudice to other parties, have prejudiced relator. *See Murack*, 957 N.W.2d at 130. Moreover, without an explanation, we cannot review whether the record supports the ULJ's findings and determination, and this court cannot make those factual findings on appeal. *See In re Welfare of M.D.O.*, 462 N.W.2d 370, 374-75 (Minn. 1990) (stating role of court of appeals is to correct errors, not to find facts).

Because the ULJ erred by applying a legal standard that is too narrow and relator's substantial rights were prejudiced as a result, we reverse and remand for proceedings consistent with this opinion. On remand, the ULJ, in its discretion, may open the record including by conducting a hearing. *See* Minn. Stat. §268.105, subd. 1a(c) (2020).

Reversed and remanded.

FRISCH, Judge (dissenting)

I respectfully dissent.

The question before us is whether the unemployment-law judge (ULJ) properly dismissed appellant Natasia Moose's appeal as untimely, which is subject to de novo review. *Godbout v. Dep't of Emp. & Econ. Dev.*, 827 N.W.2d 799, 802 (Minn. App. 2013). Moose makes two arguments in her appeal. She argues that (1) the ULJ's decision is not supported by substantial evidence, and (2) she substantially complied with the deadline. I would affirm the decision of the ULJ because the ULJ's decision is supported by substantial evidence and even if the ULJ erred in its application of the law, Moose failed to meet her burden to show that she substantially complied with the deadline.

After respondent Minnesota Department of Employment and Economic Development (DEED) denied Moose's initial request for benefits, Moose filed a request for reconsideration, asserting that she did not receive DEED's determination by mail and that the determination did not appear in her online portal as maintained by DEED. Moose's request notably did not state when or how she learned of the determination or what steps she took to promptly comply with the deadline once she learned of the determination. She argued only that she substantially complied with the deadline because she missed the deadline by "a few weeks."

The ULJ denied Moose's request for reconsideration and affirmed the conclusion that her appeal was untimely. In its determination, the ULJ relied on an affidavit submitted by DEED in which a supervisor testified about DEED's general mailing procedures. The ULJ found that, based on the affidavit, "it is more likely true than not" that DEED mailed

the determination to the address provided by Moose. The ULJ then concluded that “Moose *did not substantially comply* with the appeal deadline under Executive Order 20-05” because Moose did not point to any evidence in the record showing that she tried to file an appeal within the appeal period. (Emphasis added.)

To address the first issue raised by Moose, these findings were based on substantial evidence, when viewed in the light most favorable to the ULJ’s decision, as we are required to do. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Substantial evidence is “(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Minn. Ctr. for Env’t Advoc. v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002). DEED submitted an affidavit from a supervisor setting forth its policies and procedures related to the mailing of determinations and compliance measures to ensure delivery of such determinations to the postal service. The affidavit provides that DEED followed its standard mailing protocol and that there were no operational issues disrupting the timely departure of mail during the relevant time period. Moose argues that the “blanket statement of general protocol is not enough to demonstrate that a particular claimant has failed to make substantial efforts to comply with the law.” I agree that the affidavit lacks specificity. Although DEED could have, and maybe should have, submitted more detailed information regarding the mailing of Moose’s determination, the affidavit contains enough evidence, however minimal, to support the ULJ’s factual finding that “it is more likely true than not that the Department mailed the determination” to Moose. And as to that finding, the

affidavit is “more than a scintilla of evidence” that the determination was actually mailed.

Id. I therefore conclude that the ULJ’s decision is supported by substantial evidence.

To address the second issue raised by Moose, the ULJ also specifically found that “Moose did not substantially comply” with the deadline, invoking the applicable standard set forth in *In re Murack*, 957 N.W.2d 124 (Minn. App. 2021).² The record shows that Moose filed her appeal 22 days after the statutory 20-day deadline. Moose asserts that she never received the determination and therefore did not know her appeal period began. But Moose learned of the determination *at some point* before she submitted her appeal. In our de novo review on appeal, we cannot evaluate whether Moose acted reasonably because Moose did not produce any evidence to establish *when* or *how* she learned of the determination. Without these details, we cannot assess on appeal whether her explanation for failing to strictly comply with the deadline is reasonable and, therefore, whether she substantially complied with the deadline.³

² The majority also concludes that it was an error of law for the ULJ to dismiss Moose’s appeal as untimely without mentioning the executive order, *Murack*, or the substantial-compliance standard. But because Moose is appealing the ULJ’s order denying her request for reconsideration, and not the initial dismissal, our appellate review is limited to whether the ULJ legally erred in the order denying the request for reconsideration. Thus, any legal error in the ULJ’s initial dismissal is not subject to this appeal and is outside the scope of our review.

³ I also question whether Moose’s explanation for failing to strictly comply with the deadline is reasonable in light of the parties’ agreement at oral argument that Moose’s benefits were greatly reduced as early as January 2021, within the statutory appeal period, and at that time, she would have had actual notice of a change to her unemployment benefits. Although the appeal period is triggered by an actual mailing, *Smith v. Masterson Pers., Inc.*, 483 N.W.2d 111, 112 (Minn. App. 1992), actual notice of her reduced benefits may implicate whether her explanation for failing to strictly comply was reasonable.

Nor could the ULJ. The ULJ was required to determine Moose’s entitlement to unemployment benefits based on the information available to him. *See* Minn. Stat. § 268.069, subd. 2 (2020). And in her request for reconsideration, Moose failed to provide the ULJ with *any* information from which a determination could be made that she substantially complied with the statutory requirements.

The ULJ concluded that Moose failed to substantially comply with the deadline. And although the majority faults the ULJ for apparently reading *Murack* to require a claimant to take steps during the appeal period to challenge a determination—an argument not advanced by Moose—any legal error could not have prejudiced Moose’s substantial rights when she did not provide the ULJ with *any* facts sufficient for the ULJ to determine that she had substantially complied with the appeal deadline. *See* Minn. Stat. § 268.105, subd. 7(d) (2020) (allowing reversal on enumerated grounds “if the substantial rights of the [relator] may have been prejudiced”). Any error in the ULJ’s articulation of the substantial-compliance standard is therefore not a basis for reversal under the statute.

I would therefore affirm the decision of the ULJ because Moose failed to meet her burden on appeal of showing that she substantially complied with the appeal deadline. *See Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949) (holding that we do not presume error on appeal, and the party asserting error has the burden of showing it).