**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-2071**

Mark D. Lilja,
Relator,

vs.

Mile-Hi Dr Acquisition I & Mile-Hi Dr Acquisition II,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed October 6, 2009**
**Affirmed**
**Kalitowski, Judge**

Department of Employment and Economic Development
File No. 21075091-3

Mark D. Lilja, 3476 116th Lane Northwest, Coon Rapids, MN 55433 (pro se relator)

Mile-Hi Dr Acquisition I & Mile-Hi Dr Acquisition II, P.O. Box 749000, Arvada, CO 80006-9000 (respondent)

Lee B. Nelson, Katrina I. Gulstad, Department of Employment and Economic Development, First National Bank Building, 332 Minnesota Street, Suite E200, St. Paul, MN 55101-1351 (for respondent Department of Employment and Economic Development)

Considered and decided by Kalitowski, Presiding Judge; Stoneburner, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

**KALITOWSKI**, Judge

Pro se relator Mark Lilja challenges the unemployment-law judge's determination that relator was discharged for employment misconduct and therefore was ineligible to receive unemployment benefits. We affirm.

## D E C I S I O N

Relator was employed as an equipment-sales-and-service representative for Mile-Hi Dr Acquisition I & II (Deep Rock Water), from November 21, 1989, through June 20, 2008. Relator was discharged from employment after refusing Deep Rock Water's request that he submit to a drug test. The unemployment-law judge (ULJ) determined that relator was ineligible for unemployment benefits because relator committed employment misconduct by refusing Deep Rock Water's reasonable request that he submit to a drug test.

Relator contends that (1) upon relator's request for reconsideration, the ULJ incorrectly determined that an additional evidentiary hearing was not required, and (2) relator's refusal to perform a drug test at his employer's request was not employment misconduct.

This court may affirm the ULJ's decision, remand it for further proceedings, or reverse or modify it if the relator's substantial rights "may have been prejudiced because the findings, inferences, conclusion, or decision are . . . affected by . . . error of law," "unsupported by substantial evidence in view of the entire record as submitted," or "arbitrary or capricious." Minn. Stat. § 268.105, subd. 7(d) (2008); *see Ywswf v.*

*Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007) (citing this standard).

**Additional Evidentiary Hearing**

Relator contends that a letter from the union business agent submitted to the ULJ after the initial decision was relevant, and therefore the ULJ incorrectly determined that an additional evidentiary hearing was not required. We disagree.

In deciding a request for reconsideration, the ULJ is only permitted to consider additional evidence to determine if an additional evidentiary hearing is needed. Minn. Stat. § 268.105, subd. 2(c) (2008). The ULJ must order an additional evidentiary hearing if the relator demonstrates that (1) the additional evidence would "change the outcome of the decision and there was good cause" for not previously submitting it, or (2) the additional evidence would show that evidence "submitted at the evidentiary hearing was likely false and that the likely false evidence had an effect on the outcome of the decision." *Id*. This court defers to the ULJ's decision not to order an additional evidentiary hearing and will reverse that decision only for an abuse of discretion. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006).

Here, the ULJ's determination of relator's employment misconduct was based on relator's initial refusal to take a drug test at the request of his employer. The letter from the union agent was not related to the issue of relator's refusal to take the drug test. Rather, the subject of the letter was a conversation between the agent and Deep Rock Water's human resources manager concerning whether a Deep Rock Water district

manager told relator that the last drug test was at 4:00 p.m., and that relator was to punch out and go home.

Because the ULJ based the determination of employment misconduct on relator's initial refusal to undergo drug testing, additional evidence regarding a conversation that occurred after relator's refusal would not affect the outcome of the employment misconduct determination. We therefore conclude that the ULJ did not abuse her discretion in determining that an additional evidentiary hearing was not required.

**Employment Misconduct**

Relator argues that because the normal drug-testing facility was closed at the time of the request and he was not informed of an alternative testing facility, his refusal to perform the drug test at his employer's request was not employment misconduct. We disagree.

Whether an employee committed employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether the employee committed a particular act is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). But whether an employee's particular act constitutes employment misconduct is a question of law that we review de novo. *Schmidgall*, 644 N.W.2d at 804. We review the ULJ's finding in the light most favorable to the decision, giving deference to the ULJ's credibility determinations. *Skarhus*, 721 N.W.2d at 344. "In doing so, we will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Id*.

An employee who is discharged for employment misconduct is ineligible to receive all unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). "Employment misconduct" is "any intentional, negligent or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6(a) (2008). Employment misconduct is determined without regard to any common law burden of proof. *Vargas v. Nw. Area Fdn.*, 673 N.W.2d 200, 205 (Minn. App. 2004). Generally, if the employer's request is "reasonable and does not impose an unreasonable burden on the employee, a refusal will constitute misconduct." *Sandstrom v. Douglas Mach. Corp.*, 372 N.W.2d 89, 91 (Minn. App. 1985). What constitutes a "reasonable" request varies "according to the circumstances of each case." *Id.*

The ULJ determined that relator's initial refusal to submit to the drug test at Deep Rock Water's request constituted employment misconduct, finding that: (1) Deep Rock Water's drug-testing policy was reasonable; (2) Deep Rock Water's request that relator be tested for drugs was reasonable; and (3) relator refused this request.

We conclude that Deep Rock Water's request that relator be tested for drugs pursuant to the company policy was reasonable. Deep Rock Water has a legitimate interest in ensuring that its drivers do not endanger the public, and this interest makes it reasonable to require a driver to perform a drug test when there is suspicion that the driver is impaired. The record indicates that Deep Rock Water received two phone calls on two consecutive days from concerned members of the public detailing relator's

aggressive and reckless driving, and that Deep Rock Water's request was based on a reasonable suspicion that relator was under the influence of drugs. According to Deep Rock Water's representatives, submitting to the drug test merely required relator to ride with a company employee to a testing facility and be tested for drugs by a urine and saliva test. We conclude that based on the complaints Deep Rock Water received regarding relator, the request was reasonable and that submitting to the drug test would not have unreasonably burdened relator.

It is undisputed that relator refused to submit to the drug test, and that after relator's refusal, he was informed that the normal drug-testing facility was closed for the day. The only disputed events and conversations occurred after relator was informed that the normal drug-testing facility was closed. Relator contends that he was never informed of an alternative facility but instead was instructed to punch out and go home. But Deep Rock Water's representatives testified that they informed relator of an alternative drug-testing facility that was still open and that they requested relator undergo drug testing at this facility. The ULJ credited the testimony of Deep Rock Water's representatives to determine the events that occurred after relator's initial refusal. We defer to the ULJ's credibility determinations. *See Skarhus*, 721 N.W.2d at 344 (stating that this court defers to the ULJ when examining conflicting testimony or assessing credibility). Moreover, on reconsideration, the ULJ stated that "[w]hether [relator] remained or departed was irrelevant, because he'd already refused the test by the time [he was] told . . . to go home."

We conclude that relator's refusal to submit to drug testing constituted a refusal to comply with his employer's reasonable requests, pursuant to the employer's drug-testing policy. And this refusal constituted employment misconduct disqualifying relator from receiving unemployment benefits. *See Schmidgall*, 644 N.W.2d at 804 (stating that refusal to submit to employer's reasonable policies and requests amounts to disqualifying conduct). Because this refusal constituted employment misconduct, the ULJ did not err in determining that relator is ineligible for unemployment benefits.

**Affirmed.**