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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A16-1207**

Cynthia M. Leisey,  
Relator,

vs.

Express Scripts Services Company,  
Respondent,

Department of Employment and  
Economic Development,  
Respondent.

**Filed April 3, 2017  
Affirmed  
Jesson, Judge**

Department of Employment and  
Economic Development  
File No. 34024783-5

Cynthia M. Leisey, Maple Grove, Minnesota (pro se relator)

Hal A. Shillingstad, Stephanie J. Willing, Ogletree, Deakins, Nash, Smoak & Stewart,  
Minneapolis, Minnesota (for respondent employer)

Lee B. Nelson, Keri A. Phillips, St. Paul, Minnesota (for respondent department)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Jesson,  
Judge.

## UNPUBLISHED OPINION

**JESSON**, Judge

In this unemployment-compensation appeal, relator Cynthia Leisey challenges a decision by an unemployment-law judge that Leisey was ineligible for and overpaid unemployment benefits during the weeks that she received payments from her employer's supplemental-unemployment-benefits plan in amounts equal to or exceeding her regular weekly pay. We affirm.

### FACTS

Leisey worked as a senior director for respondent Express Scripts Services Company from 1997-2003, and again from 2005 until March 2015, when she was laid off in a reorganization. She was paid a base salary of \$2,857.64 per week and also received a bonus based on the prior year's performance. In 2015, she received a performance bonus for 2014 in the amount of \$39,331.51; in 2014, she received a bonus of \$40,820.79; and in 2013, she received a bonus of \$48,745.15. The bonuses were not guaranteed.

When Leisey was laid off, she was notified that she was eligible for supplemental unemployment benefits through a plan with Express Scripts. Express Scripts' plan provides that employees are eligible to participate in the plan if, among other requirements, they have been involuntarily terminated due to a layoff, have applied for state unemployment benefits, and have continued to demonstrate eligibility for those benefits. The plan provides for weekly supplemental unemployment benefits "equal to 100% of [an applicant's] weekly Base Pay." "Base pay" is defined as "the product of the Eligible Employee's base hourly rate multiplied by his or her standard hours per week . . . multiplied

by 52.” The plan also provides that “[i]n most cases, [supplemental-unemployment-benefit] pay is not subject to Social Security and Medicare taxes (FICA taxes).”

At the time of her layoff, Leisey was told by Express Scripts that, in order to receive supplemental unemployment benefits under its plan, she must also apply for regular state unemployment benefits. She therefore applied for the supplemental unemployment benefits and also sought regular unemployment benefits by opening a benefits account with the Minnesota Department of Employment and Economic Development (DEED). According to Leisey, a DEED representative told her that her receipt of supplemental benefits would not affect her eligibility for regular state benefits. Leisey began receiving regular state unemployment benefits of \$640.00 per week. She also received 20 weeks of supplemental unemployment benefits under the plan, at \$2,857.64 per week, for a total of \$57,152.80.

In November 2015, after Leisey submitted requested information to DEED on the supplemental unemployment benefits, she was notified that she had an ineligibility period for state benefits from April 19, 2015, through September 4, 2015, the period of time she received supplemental benefits from Express Scripts. She appealed, and following a hearing, an unemployment-law judge determined that the sum of her supplemental benefits under Express Scripts’ plan, plus her regular employment benefits, exceeded her regular weekly pay. Therefore, Leisey’s supplemental benefits constituted wages under Minnesota Statutes section 268.035, subdivision 29 (a)(13) (2014), and she had been overpaid state benefits for the ineligibility period. *See* Minn. Stat. § 268.085, subd. 3(e) (2014).

Leisey requested reconsideration, and the unemployment-law judge issued an order setting aside the prior findings of fact. At an additional hearing, Leisey argued that her bonuses from Express Scripts should be counted as part of her regular weekly pay, so that her supplemental employment benefits plus her regular unemployment benefits amounted to *less* than her regular weekly pay. Therefore, she maintained, she was eligible for state benefits during the designated weeks. The unemployment-law judge issued findings of fact and a decision determining that: (1) the bonuses did not qualify as part of Leisey's weekly pay; (2) therefore, the sum of her supplemental and regular unemployment benefits was more than her weekly pay; (3) the supplemental benefits thus constituted wages under subdivision 29; and (4) Leisey was ineligible during the weeks specified and so had been overpaid benefits. *See id.* This certiorari appeal follows.

## **D E C I S I O N**

This court may reverse a decision of an unemployment-law judge if, among other reasons, that decision is arbitrary and capricious, unsupported by substantial evidence in the record as a whole, or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d) (2016). We view the factual findings of the unemployment-law judge in the light most favorable to the decision. *Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 342 (Minn. App. 2006). But we review *de novo* the unemployment-law judge's interpretation of unemployment statutes and the ultimate issue of whether an applicant is eligible for unemployment benefits. *Menyweather v. Fedtech, Inc.*, 872 N.W.2d 543, 545 (Minn. App. 2015).

Leisey argues that the unemployment-law judge erred by considering her supplemental benefits as wages affecting her eligibility for regular benefits and by determining that she had been overpaid state benefits. In considering this issue, we address the history of supplemental unemployment benefits, Minnesota law on the effect of receiving supplemental unemployment benefits on eligibility for state unemployment benefits, and the application of that law to this case.

The concept of supplemental unemployment benefits originated with labor demands for a guaranteed annual wage. *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1402 (2014). These benefits were furnished by employers to “offer[] second-level protection against layoffs by supplementing unemployment benefits offered by the States.” *Id.* (quotation omitted). Supplemental-unemployment plans had the purpose of providing economic security for regular employees and assuring a stable work force through short-term layoff periods. *Id.* at 1402-03. But in order for these plans to work, supplemental unemployment benefits needed to be excluded from the definition of “wages” under federal law because in some states, unemployment benefits were not available to applicants if they were earning “wages” from their employers. *Id.*<sup>1</sup>

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<sup>1</sup> As one commentator has noted, whether claimant benefit eligibility should be affected by other forms of compensation, such as supplemental unemployment benefits, “depends upon the specific language contained in the applicable unemployment statute. When statutory provisions expressly cover different forms of collateral income, they either require a commensurate reduction in weekly benefit amounts or cause recipients to lose their benefit eligibility.” Mark A. Rothstein, et al., 2 *Employment Law* § 10:17, at 870 (5th ed. 2014).

In Minnesota, the receipt of supplemental unemployment payments may, in certain situations, affect an applicant's eligibility for state unemployment benefits. *See* Minn. Stat. § 268.085, subd. 3(b) (2016). Specifically, an applicant is not eligible for state unemployment benefits for any week in which he or she receives “severance pay, bonus pay, or any other payments paid by an employer because of, upon, or after separation from employment,” if those payments are considered “wages” under Minnesota Statutes, section 268.035, subdivision 29, or are subject to FICA taxation. *Id.* For this purpose, “wages” includes “all compensation for employment, including bonuses . . . [and] severance payments.” Minn. Stat. § 268.035, subd. 29(a).

But supplemental-unemployment benefit payments under an employer's plan are not designated as wages, and therefore do not affect an applicant's eligibility for state benefits, if certain statutory requirements are met. *See id.*, subd. 29(a)(13). In order to be excluded from the definition of wages, (1) the supplemental plan must provide payments “only for those weeks the applicant has been paid regular, extended or additional unemployment benefits” (known as the “timing provision”), and (2) “[t]he supplemental payments, when combined with the applicant's weekly unemployment benefits paid, may not exceed the applicant's regular weekly pay.” *Id.*<sup>2</sup> Examining the definition of “regular weekly pay” forms the crux of this appeal.

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<sup>2</sup> We note that, in 2016, the Minnesota Legislature amended and substantially rewrote subdivision 29(a)(13). *See* 2016 Minn. laws ch. 189, art. 9, § 2, at 1027. This amendment followed the Minnesota Supreme Court's 2015 holding that the “timing provision” of subdivision 29(a)(13) was preempted by the Employment Retirement Income Security Act of 1974 (ERISA). *Engfer v. Gen. Dynamics Advance Info. Systems, Inc.*, 869 N.W.2d 295, 308 (Minn. 2015). We apply the 2014 version of the statute here because Leisey received

In the proceeding before the unemployment-law judge, and by implication in this appeal, Leisey argues that the bonuses she received should be included in the definition of “regular weekly pay” in section 268.035, subdivision 29(a)(13). And when the bonuses are so included, the supplemental benefits she received, when combined with her regular unemployment benefits, do *not* exceed her regular weekly pay. *See id.* Thus, she argues, the supplemental benefits do not constitute “wages” under section 268.035, subdivision 29(a); they do not affect her eligibility for regular unemployment benefits; and she was not overpaid benefits. The unemployment-law judge disagreed and determined that, under the plain language of the statute, bonuses are not included in the definition of “regular weekly pay,” which instead refers to the amount that a person is paid on a weekly or biweekly basis. *See id.* She also determined that, even if bonuses could be considered, they would not amount to part of Leisey’s “regular weekly pay” because Leisey’s bonuses “were not guaranteed and were only paid annually.”

Addressing Leisey’s argument requires us to discern the meaning of “regular weekly pay” in section 268.035, subdivision 29(a)(13). In ascertaining the meaning of a statute, this court first examines whether it is ambiguous. *Engfer*, 869 N.W.2d at 300. If statutory language is unambiguous, we apply its plain meaning. *Id.* Plain meaning assumes the

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all of her supplemental plan benefits in 2015 and because the legislature specifically provided that the 2016 amendment would take effect on July 31, 2016. 2016 Minn. Laws ch. 189, art. 9, § 2, at 1034; *see also* Minn. Stat. § 645.21 (2016) (stating that generally, a law is not construed to be retroactive unless the legislature clearly intended it to be retroactive). We note, however, that even if we were to apply the 2016 version of the statute, we would reach the same result in this case. *See* Minn. Stat. § 268.035, subd. 29(a)(13) (2016).

ordinary usage of words that are not statutorily defined and draws from the full-act context of the provision. *Occhino v. Grover*, 640 N.W.2d 357, 359 (Minn. App. 2002), *review denied* (Minn. May 28, 2002). Courts may determine the plain meaning of a statute with the aid of dictionary definitions. *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 458 (Minn. 2016). Only if statutory language is ambiguous, meaning that it is susceptible to more than one reasonable interpretation, do we look beyond its language to discern legislative intent. *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 73 (Minn. 2012).

Here, clause 13 does not define “regular weekly pay.” Minn. Stat. § 268.035, subd. 29(a)(13). But we may look to dictionary definitions to aid in determining the statute’s plain meaning. *Wilson*, 888 N.W.2d at 458. This court has previously held that, for the purpose of determining police pension deductions, the statutory term “regular monthly salary” did not include educational incentive pay. *City of Crystal Police Relief Ass’n v. City of Crystal*, 477 N.W.2d 728, 730 (Minn. App. 1991), *review denied* (Minn. Jan. 17, 1992). In so doing, we employed a dictionary definition of “regular,” meaning “usual, customary, or general.” *Id.* (quoting *Black’s Law Dictionary* 1155 (5th ed. 1979)). Applying this definition of “regular” to clause 13, we discern that, under its plain meaning, Leisey’s bonus does not qualify as “regular weekly pay” when it was not paid customarily on a weekly or biweekly basis.

Leisey also argued before the unemployment-law judge that the term “regular weekly pay” should be defined consistently with the term “last level of regular weekly pay” in Minnesota Statutes, section 268.085, subdivision 3(d). That provision furnishes the method for determining the number of weeks of payment, which is calculated by dividing



the total of the payments, or the lump-sum payment, by the applicant’s “last level of regular weekly pay.” Minn. Stat. § 268.035, subd. 3(d)(1)-(2). And it provides that “[f]or the purposes of this paragraph, ‘last level of regular weekly pay’ includes commission, bonuses, and overtime pay if that is part of the applicant’s ongoing regular compensation.” *Id.*, subd. 3(d).

We agree with the unemployment-law judge’s rejection of this argument. Even if otherwise relevant, subdivision 3(d) expressly states that, in order for bonuses to be included in an applicant’s “last level of regular weekly pay” under that subdivision, those bonuses must amount to “part of the applicant’s ongoing regular compensation.” Minn. Stat. § 268.085, subd. 3(d). In some circumstances, bonuses may constitute part of an applicant’s “regular weekly pay” if they are prorated or guaranteed, but here Leisey’s bonuses were not part of her regular weekly compensation because they were only paid annually, and they were not guaranteed.

We therefore conclude that Leisey’s bonuses did not qualify as part of her “regular weekly pay” under subdivision 29(a)(13). And because the sum of her supplemental payments and regular unemployment benefits exceeded her weekly pay, the supplemental benefits amounted to statutory wages, which affected Leisey’s entitlement to state unemployment benefits. *See* Minn. Stat. § 268.035, subd. 29(a)(13); Minn. Stat. § 268.085, subd. 3(b).<sup>3</sup> The unemployment-law judge did not err by determining that Leisey had been overpaid benefits.

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<sup>3</sup> Leisey argues that DEED representatives incorrectly informed her that her receipt of supplemental unemployment benefits would not affect her eligibility for state benefits. But

**Affirmed.**

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unemployment benefits are to be paid only if “the applicant has met all of the ongoing eligibility requirements under section 268.085.” Minn. Stat. § 268.069, subd. 1(3) (2016); *see id.*, subd. 3 (stating that “[t]here is no equitable or common law denial or allowance of unemployment benefits”). Therefore, the DEED representative’s mistake in informing Leisey about the effect of her supplemental benefits on her state benefits eligibility does not affect her entitlement to regular unemployment benefits.