STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0291

Michael Schemel,
Relator,

vs.

Vermilion Capital Management,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed November 26, 2018
Affirmed in part as modified and reversed in part
Larkin, Judge

Department of Employment and Economic Development
File No. 35973635-3

Michael Schemel, Vero Beach, Florida (pro se relator)

Vermilion Capital Management, Minneapolis, Minnesota (respondent employer)

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

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Reyes, Judge.

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

LARKIN, Judge

Pro se relator challenges the decision of an unemployment-law judge (ULJ) that he was ineligible for unemployment benefits during particular weeks because he worked 32 or more hours during each of those weeks and because he had earnings that were greater than his benefit amount during five of those weeks. Because the record does not support the ULJ's finding that relator worked 32 or more hours each of the relevant weeks, we reverse in part the ineligibility determination, as well as the associated overpayment and penalty determinations. However, we affirm that part of the ineligibility determination that is based on relator's receipt of earnings, as well as the associated overpayment and penalty determinations. We also affirm the ULJ's decision not to order an additional hearing.

FACTS

In June 2016, pro se relator Michael Schemel started working as a salesman for respondent-employer Vermilion Capital Management (VCM). His employment was governed by a written employment agreement. Schemel did not receive a salary or hourly wage; his compensation was entirely commission-based. In September 2016, Schemel relocated to Florida for personal reasons. VCM agreed that Schemel could continue to work for VCM remotely from Florida.

In July 2016, Schemel established an unemployment benefit account with respondent Minnesota Department of Employment and Economic Development (DEED). Schemel filed requests for unemployment benefits on that account each week from July 24, 2016, through February 4, 2017, exhausting his maximum benefit entitlement on that

account. In August 2017, Schemel established another benefits account. Schemel filed requests for unemployment benefits on that account each week from August 20, 2017, through October 28, 2017. In each of his weekly benefits requests, Schemel reported that he had not worked and had no earnings.

In September 2017, VCM notified DEED that it contested Schemel's eligibility to receive unemployment benefits because "[Schemel] remains a fulltime employee. There has been no change in his employment status since he was initially hired on 6/17/2016." In October 2017, VCM notified Schemel that it was terminating his employment.

On October 27, 2017, a DEED administrative clerk issued a determination of ineligibility finding that Schemel was ineligible for unemployment benefits beginning July 24, 2016, through the date of the determination, because he worked 32 hours or more each week of that period. That determination resulted in an overpayment of $13,124. DEED issued three additional Determinations of Ineligibility, finding that Schemel had earnings that caused him to be ineligible during five of those weeks. DEED also issued three determinations of overpayment penalty, finding that Schemel "failed to accurately disclose earnings," but the amount of the penalty was listed as "$0.00."

Schemel appealed all seven determinations at a consolidated hearing held before a ULJ. Schemel and Joseph Jasper, President of VCM, testified at the hearing.

At the beginning of the hearing, the ULJ noted:

> The entire overpayment on this case has been attached to the not unemployed issue. That's why if you look through the documents it shows that the earnings issues and the misrepresentation issues even though there was a finding of misrepresentation there was no overpayment and there was no

> penalty applied. That's simply because all of the overpayment was attached to the not unemployed issue. Through a simple clerical error, the Department has not yet raised the misrepresentation issue that attaches to the overpayment to the not unemployed issue.

The ULJ stated that he intended to address the misrepresentation issue and that "the penalty in this case could potentially be substantial." However, the ULJ acknowledged that Schemel lacked notice. The ULJ offered to continue the hearing and asked Schemel if he was "willing to discuss these issues today." Schemel indicated he was willing to proceed with the hearing as scheduled.

VCM had submitted over 70 pages of documents for the ULJ's consideration. By and large, the documents were messages that Schemel had generated or screenshots of his email outbox. During the hearing, it became apparent that Schemel had not received a copy of VCM's documents prior to the hearing. The ULJ emailed VCM's documents to Schemel, and he skimmed them to get a general idea of their content. The ULJ again offered to continue the hearing, this time to allow Schemel to review the documents in greater detail. Schemel responded, "I think I'm prepared to go forward. I'm prepared to go forward now I believe."

The hearing proceeded, and the issue of Schemel's work hours was highly contested. VCM provided records showing that Schemel worked during the weeks in question and maintained that Schemel worked full time. Schemel acknowledged that he had worked during the relevant weeks, but claimed that he only worked five to seven hours per week. VCM's evidence showed that Schemel worked significantly more than the hours he claimed.

The ULJ issued eight decisions after the hearing.[1] The ULJ determined that Schemel was ineligible for unemployment benefits because he worked in excess of 32 hours every week from July 24, 2016, through October 28, 2017, and because his earnings exceeded his weekly benefit amounts for the weeks of August 28, November 27, December 11, and December 25, 2016, and January 29, 2017. The ULJ ruled that Schemel must repay all unemployment benefits to which he was not entitled, totaling $13,124. The ULJ also "assessed a penalty equal to 40 percent of the amount improperly obtained," concluding that Schemel "obtained unemployment benefits through misrepresentation."

Schemel requested reconsideration, submitted additional evidence for the ULJ's consideration, and asked for additional time to review the documents that VCM had submitted at the hearing. The ULJ affirmed his prior decisions, without ordering an additional hearing.

Schemel appeals all eight orders by writ of certiorari.

D E C I S I O N

We interpret Schemel's brief as raising the following issues: (1) whether the ULJ erred by affirming without ordering an additional hearing and (2) whether the ULJ erred

[1] Apparently, the ULJ had to issue multiple decisions due to system limitations. As a result, the majority of the decisions are duplicative. The multiple determinations and decisions in this case make DEED's actions more difficult to understand and review. We appreciate DEED's effort to explain the procedural history in its appellate brief. Obviously, the better approach would be to avoid such a duplicative and confusing record in the first place.

by determining that Schemel was ineligible for unemployment benefits in particular weeks based on his hours worked and earnings. We address each issue in turn.

I.

In deciding a request for reconsideration, the ULJ must not consider evidence "that was not submitted at the hearing, except for purposes of determining whether to order an additional hearing." Minn. Stat. § 268.105, subd. 2(c) (2016). The ULJ

> must order an additional hearing if a party shows that evidence which was not submitted at the hearing:
>
> (1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence; or
>
> (2) would show that the evidence that was submitted at the hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.

Id., subd. 2(c)(1)-(2). "Good cause" is a reason that would have prevented a reasonable person acting with due diligence from submitting the evidence. *Id.*, subd. 2(c) (Supp. 2017). "A reviewing court accords deference to a ULJ's decision not to hold an additional 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).

In affirming his initial decisions, the ULJ noted that Jasper's testimony did not suggest deception and that the documentary evidence supported that testimony. The ULJ also noted that Schemel's new evidence did not show that the ULJ relied on evidence that was "likely false" and that the new evidence would not likely change the outcome of the case. Lastly, the ULJ noted that Schemel did not have good cause for failing to submit the new evidence because the ULJ twice offered Schemel a continuance and Schemel "decided

to proceed immediately." The ULJ concluded that "Schemel clearly felt he was prepared enough to proceed" because "[a] reasonable person acting with due diligence would ask for a continuance if he felt unprepared for a hearing." The ULJ ruled that Schemel would "not now be granted a second hearing after receiving an adverse decision."

The ULJ warned Schemel that the hearing would be his only opportunity to present evidence. The ULJ also warned Schemel that he faced the possibility of a substantial penalty. And the ULJ emphasized that he wanted "to make certain that everyone has time to be fully prepared for [the hearing]." Yet, Schemel declined two offers for a continuance and stated that he was prepared to go forward with the hearing. On this record, we cannot say that the ULJ abused his discretion by not ordering an additional hearing.

II.

We turn to the ULJ's ineligibility determinations. Review of a ULJ's eligibility determination is governed by Minn. Stat. § 268.105, subd. 7(d)(5) (Supp. 2017), which provides that this court may reverse or modify the decision of the ULJ "if the substantial rights of the petitioner may have been prejudiced because the ULJ's findings, inferences, conclusions, or decision are . . . unsupported by substantial evidence in view of the entire record as submitted." Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Minneapolis Van & Warehouse Co. v. St. Paul Terminal Warehouse Co.*, 180 N.W.2d 175, 178 (Minn. 1970) (quotation omitted).

This court views the ULJ's factual findings in the light most favorable to the decision and will not disturb the factual findings when the evidence substantially sustains them. *Wiley v. Robert Half Int'l, Inc.*, 834 N.W.2d 567, 569 (Minn. App. 2013).

"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).

An applicant may be eligible to receive unemployment benefits for any week he was unemployed. Minn. Stat. § 268.085, subd. 1(3) (Supp. 2017). An applicant is "unemployed" in any week that he performs "less than 32 hours of service in employment, covered employment, noncovered employment, self-employment, or volunteer work," and "any earnings with respect to that week are less than his weekly unemployment benefit amount." Minn. Stat. § 268.035, subd. 26 (2016).

An applicant who "has received any unemployment benefits that [he] was held not entitled to, is overpaid the benefits, and must promptly repay the benefits." Minn. Stat. § 268.18, subd. 1(a) (2016). "An applicant has committed misrepresentation if the applicant is overpaid unemployment benefits by making a false statement or representation without a good faith belief as to the correctness of the statement or representation." Minn. Stat. § 268.18, subd. 2(a) (Supp. 2017). "After the discovery of facts indicating misrepresentation, the commissioner must issue a determination of overpayment penalty assessing a penalty equal to 40 percent of the amount overpaid." *Id*.

32 Hours of Service in Employment

The ULJ decided that Schemel was ineligible to receive unemployment benefits for every week beginning July 24, 2016, through October 28, 2017, because he was not unemployed. The ULJ's ineligibility determination, as well as the resulting $13,124 overpayment determination and 40% penalty, is based on the broad finding that "Schemel

worked in excess of 32 hours every week from July 24, 2016, through October 28, 2017." The ULJ did not make any additional, specific findings that explain his broad finding regarding the number of hours that Schemel worked.

On appeal, this court does not reweigh the evidence or make credibility determinations. *See Nichols v. Reliant Eng'g & Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006) ("When witness credibility and conflicting evidence are at issue, we defer to the decision-maker's ability to weigh the evidence and make those determinations."); *see also Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them.").

Moreover, "it is not the role of appellate courts to scour the record to determine if sufficient evidence exists" to support the decision on review. *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). If a decision depends on resolution of conflicting evidence, the decision-maker must make findings of fact that are adequate to enable meaningful review. *See* Minn. Stat. § 268.105, subd. 1a(a) (2016) (requiring a ULJ to set forth the reasons for crediting or discrediting testimony "[w]hen the credibility of a witness testifying in a hearing has a significant effect on the outcome of a decision"); *Gerson v. Comm'r of Econ. Sec.*, 340 N.W.2d 353, 355 (Minn. App. 1983) ("Effective judicial review requires an adequate formulation of a record and findings.").

The ULJ described the testimony at the hearing as "highly disputed" and noted that VCM provided "extensive records." Yet, the ULJ did not make findings indicating how the testimony and VCM's records supported his conclusion that Schemel worked more

than 32 hours *every* week of the relevant period. The ULJ's findings, in their entirety, are as follows:

> The testimony in the hearing was highly disputed. The records showed that Schemel reported to the Department every week that he did not work. VCM provided extensive records showing that Schemel was working during the weeks in question. Schemel acknowledged he was working, but only five to seven hours per week. By Schemel's own testimony, therefore, his weekly reports that he was not working at all were not true. VCM's evidence showed clearly that Schemel was working significantly more than the few hours he claimed. Schemel's story as a whole was not plausible and his manner of testifying suggested deceit. His testimony was not credible. The findings are based on the exhibits and Jasper's testimony.

Given the number of weeks in dispute, the "highly disputed" testimony, and the "extensive" record evidence, the ULJ's general finding that "Schemel worked in excess of 32 hours every week from July 24, 2016, through October 28, 2017" does not facilitate effective appellate review. A remand for additional findings could be in order. *See* Minn. Stat. § 268.105, subd. 7(d) (authorizing this court to remand for further proceedings); *Friend v. Gopher Co.*, 771 N.W.2d 33, 40 (Minn. App. 2009) ("[W]e conclude that the findings are insufficient to permit effective appellate review and we remand for the district court to make further findings."). But we hesitate to further complicate the proceedings with a remand. We therefore review the record to determine whether the ULJ's finding and resulting determinations are supported by substantial evidence.

The record establishes that Schemel was not a traditional hourly employee. Moreover, shortly after Schemel began his employment with VCM, VCM agreed that he could work remotely from Florida. Thus, Schemel did not work at VCM's place of

business and his working hours were not observed or recorded. The evidence does not establish that VCM required Schemel to work a certain number of hours each week or to document his hours. Indeed, Schemel did not have an hourly wage, or even a base salary. According to the employment agreement, Schemel's compensation was based entirely on commissions paid "within a timely manner, subsequent to the receipt of revenue directly attributable to The Employee." In sum, the employment circumstances here make it difficult to determine, with reasonable precision, the number of hours that Schemel worked each week during the relevant period.

As support for the ULJ's finding that Schemel worked 32 or more hours every week, DEED cites the employment agreement, which states:

> Employee shall devote his best efforts and his full business time and attention to the performance of his duties as Research Sales for the Company. Employee's principal duties shall primarily include responsibility for prospecting and capturing new clients for the Company's research products, and maintaining new and existing client relationships. Employee shall perform his duties promptly, diligently and professionally at all times.

However, "full business time and attention" is not defined, and the employment agreement does not state the number of weekly hours that Schemel was expected to work.

DEED also cites a provision of the employment agreement governing reimbursement for employee medical expenses, which stated that "[t]he Company offers, at its discretion, to cover the cost of The Employee's monthly health care insurance premiums while actively employed with the Company." DEED notes that VCM made 11 separate medical-reimbursement payments to Schemel under this provision. However,

"actively employed" is not defined, and it does not necessarily equate with more than 32 hours per week.

DEED also quotes the testimony of VCM's president, Jasper, which indicated that VCM considered Schemel a full-time employee. Jasper testified that he "believed [Schemel] was working full-time, 40 hours a week, devoting his full efforts to his job as a salesperson." However, that belief does not necessarily support a finding that Schemel was working 40 hours per week when the employment agreement did not require Schemel to work a specific number of hours per week and VCM did not require Schemel to document his hours.

DEED also points to emails between Schemel and VCM, in which Schemel described his client contacts and work-related travel. For example, on December 30, 2016, Schemel sent an email to Jasper in which he stated, "[L]ast week I had a number of meetings with accounts" and talked about playing golf with a potential customer. However, the emails do not indicate how much time Schemel spent engaged in such activities on VCM's behalf. Nor do they otherwise establish that Schemel worked 32 or more hours each week. In fact, Jasper testified, "If you just added up the weekly emails, you know, you're coming up, I'm coming up with 16 hours a week, 13 hours a week, 29 hours a week, etc., etc."

Lastly, DEED emphasizes that the ULJ expressly determined that Schemel was not credible. DEED's brief quotes the ULJ as finding that Schemel's "testimony was not credible, on the 32 or more hour question." Although DEED attributes this quote to the ULJ and suggests that it is contained in the ULJ's findings, DEED does not include a

citation to the record. And, we cannot find the quote in any of the ULJ's decisions. Instead, the decisions contain the following general credibility determination, and it is not specifically tied to the issue of whether Schemel worked more than 32 hours each week.

> The testimony in the hearing was highly disputed. The records showed that Schemel reported to the Department every week that he did not work. VCM provided extensive records showing that Schemel was working during the weeks in question. Schemel acknowledged he was working, but only five to seven hours per week. By Schemel's own testimony, therefore, his weekly reports that he was not working at all were not true. VCM's evidence showed clearly that Schemel was working significantly more than the few hours he claimed. Schemel's story as a whole was not plausible and his manner of testifying suggested deceit. His testimony was not credible. The findings are based on the exhibits and Jasper's testimony.

Thus, the ULJ specifically found that Schemel was not credible when he reported to DEED that "he was not working at all." The ULJ also indicated that he did not believe Schemel was credible when he claimed that he only worked five to seven hours per week. Based on "the exhibits and Jasper's testimony," the ULJ found that "Schemel's story as a whole was not plausible" and "his testimony was not credible," perhaps suggesting that the ULJ did not believe Schemel's claim that he worked less than 32 hours per week. However, as explained above, the exhibits and testimony are inconclusive regarding whether Schemel worked more than 32 or more hours every week.

This court need not defer to the ULJ's credibility determination if it is not supported by substantial evidence in the record. *See Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 531-33 (Minn. App. 2007) (noting that the "ULJ's findings are supported by substantial evidence and provide the statutorily required reason for her credibility

determination"); *Skarhus*, 721 N.W.2d at 344 ("[W]e will not disturb the ULJ's factual findings when the evidence substantially sustains them."). Here, we will not defer to any unstated finding that Schemel's "testimony was not credible on the 32 or more hour question" because it is not supported by substantial evidence. *See Ywswf*, 726 N.W.2d at 531-33.

Under the circumstances of this case, it is difficult to determine whether Schemel worked 32 or more hours every week of the relevant period. Given the highly disputed testimony and the inconclusive evidence regarding the number of hours that Schemel actually worked, the record evidence is not such relevant evidence as a reasonable mind might accept as adequate to support the ULJ's finding that "Schemel worked in excess of 32 hours every week from July 24, 2016, through October 28, 2017." *See Minneapolis Van & Warehouse Co.*, 180 N.W.2d at 178 (stating that substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

Because the ULJ's finding that Schemel worked 32 or more hours every week is not supported by substantial evidence, we reverse the ULJ's ineligibility determination that is based on that finding, as well as the associated overpayment and penalty determinations. *See* Minn. Stat. § 268.105, subd. 7(d)(5) (authorizing this court to reverse ULJ decision if it is "unsupported by substantial evidence in view of the entire record as submitted").

Earnings Greater than Weekly Unemployment Benefit Amount

"If the applicant has earnings, including holiday pay, with respect to any week, from employment, covered employment, noncovered employment, self-employment, or volunteer work, equal to or in excess of [his] weekly unemployment benefit amount, [he]

is ineligible for unemployment benefits for that week." Minn. Stat. § 268.085 subd. 5(a) (2016).

Jasper testified that VCM paid Schemel commissions as follows: $1,750 the week of August 28, 2016; $2,800 the week of November 27, 2016; $2,800 the week of December 11, 2016; $3,500 the week of December 25, 2016; and $2,800 the week of January 29, 2017. Schemel did not "dispute the amounts and the timing" of the payments, but he did dispute "when they were earned." The ULJ treated the commission payments as earnings in the weeks they were paid.

The ULJ's approach finds support in this court's decision in *Meder v. Rapid Sports Center, Inc.*, 773 N.W.2d 341, 342-43 (Minn. App. 2009). In *Meder*, a relator salesman received commissions for boats he sold after payments for the boats were made in full. 773 N.W.2d at 342. As a result, he received commission payments after his employment had ended and while he was receiving unemployment benefits. *Id.* Despite his receipt of commission payments, relator reported to DEED that he did not receive income from any other source. *Id.* This court held that relator's commissions were earnings from employment and that he was ineligible for benefits the weeks in which he received the commissions. *Id.* at 343.

Schemel's compensation was set forth in the employment agreement as follows:

> The Employee will be paid commissions on revenue generated and directly attributed to his efforts during each year on the following basis:
>
> 70% first 12 months
> 35% month[s] 13-24
> 20% thereafter

> Payment of any commissions will occur within a timely manner, subsequent to the receipt of revenue directly attributable to The Employee.

Thus, like the circumstances in *Meder*, Schemel's commission payments were not paid until VCM received revenue attributable to Schemel's efforts. Under *Meder*, Schemel's commission payments were earnings from employment in the weeks they were paid. *See id.*

The ULJ found that Schemel's earnings exceeded his weekly benefit amount for the five weeks noted above.[2] For each of these weeks, Schemel had a weekly benefit amount of $424. The ULJ correctly determined that Schemel was ineligible during those five weeks and that he must repay the weekly benefits. The amount of the overpayment resulting from Schemel's failure to declare his earnings is $2,120 (5 x $424 = $2,120).[3]

As to the penalty determination, DEED states that "the ULJ's four decisions referring to the 40 percent penalty for misrepresentation do *not* apply to the deductible earnings issue. The four decisions referring to the 40 percent penalty applicable to

[2] DEED asserts that "[i]t is also undisputed that Schemel was paid a commission of $1,750 during the week of October 8, 2017," which the ULJ "overlooked." We will not make findings regarding evidence that the ULJ "overlooked." *See Whitaker v. 3M Co.*, 764 N.W.2d 631, 640 n.1 (Minn. App. 2009) (explaining that "our role as an error-correcting court does not extend to making factual findings in the first instance"), *review denied* (Minn. July 22, 2009). Because the ULJ did not make a finding regarding VCM's alleged commission payment to Schemel the week of October 8, 2017, we do not consider it.

[3] DEED states that the amount of the overpayment is either $2,820 or $2,470, depending on whether the alleged commission payment from the week of October 8, 2017 is included. We do not consider the alleged payment during the week of October 8, 2017. DEED does not explain how it calculated the $2,470 amount, which is inconsistent with the ULJ's findings (i.e., five weekly benefit payments of $424) and perhaps based on an inputting error. We therefore reject DEED's suggested overpayment amounts.

misrepresentation apply only to Schemel being employed 32 or more hours" during the relevant period.

DEED does not explain its position, and it is inconsistent with the ULJ's decisions, which state that "Schemel knowingly misreported his work *and earnings history* for each of the weeks in question," "[h]e obtained unemployment benefits by making misrepresentations," and he "is assessed a penalty equal to 40 percent of the amount improperly obtained." (Emphasis added.) The ULJ's decisions indicate that the penalty was based on Schemel's improper receipt of benefits under both types of ineligibility determinations: working in excess of 32 hours per week and receiving earnings that exceeded his benefit amount.

As support for the penalty, the ULJ found that in every one of Schemel's requests for benefits, he told DEED "that he had not worked and *had no earnings*" and that "[h]e knew these answers were not correct." (Emphasis added.) The record shows that Schemel filled out a weekly benefits application every week from July 24, 2016, through February 4, 2017. Each application asked Schemel, "For this reporting period, did you or will you receive or apply for income, from any other source, that you have not previously reported to us?" Schemel answered, "No" each time. Thus, the record supports the ULJ's imposition of a 40% penalty on the benefits that Schemel was overpaid as a result of his failure to disclose his earnings from VCM. *See* Minn. Stat. § 268.18, subd. 2(a) ("After the discovery of facts indicating misrepresentation, the commissioner must issue a determination of overpayment penalty assessing a penalty equal to 40 percent of the amount overpaid.").

Schemel asserts that he did not report income "under the assumption that the payments were considered deferred compensation" and because he did not believe that the payments "reflected any ongoing efforts or active status at the firm and therefore were not 'income.'" Schemel does not persuade us that the ULJ erred in determining that he misrepresented his earnings. We therefore affirm the penalty based on that misrepresentation.

In sum, we affirm the ULJ's ineligibility determination that is based on his finding that Schemel received earnings greater than his weekly benefits amount during the five weeks noted by the ULJ. That determination results in an overpayment of $2,120. We also affirm the ULJ's imposition of a 40% penalty on the overpayment of $2,120.

Conclusion

We affirm as modified the ULJ's decision not to order an additional hearing, the ULJ's determination that Schemel was ineligible to receive benefits during the five weeks he received commission earnings from VCM, the resulting overpayment of $2,120, and the associated 40% misrepresentation penalty. But we reverse that portion of the ULJ's ineligibility determination that is based on the inadequately supported finding that Schemel worked 32 or more hours every week from July 24, 2016, through October 28, 2017, as well as the associated overpayment and penalty determinations.

Affirmed in part as modified and reversed in part.