

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1283**

Mary Lou Martinez,
Relator,

vs.

Lunds Incorporated,
Respondent,

Department of Employment and Economic Development,
Respondent

**Filed May 3, 2011
Reversed and remanded
Wright, Judge**

Minnesota Department of Employment and Economic Development
File Nos. 21171365-3, 22276916-2

Charles H. Thomas, Southern Minnesota Regional Legal Services, Inc., Mankato,
Minnesota (for relator)

Lunds Incorporated, Edina, Minnesota (respondent)

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

Considered and decided by Wright, 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.

UNPUBLISHED OPINION

WRIGHT, Judge

Relator challenges the decision of the unemployment law judge (ULJ) that she fraudulently obtained unemployment benefits. Because there is not substantial evidence in the record to support the ULJ's finding that relator committed fraud, and because relator was not given adequate notice or an opportunity to be heard concerning the fraud determination, we reverse the fraud penalty and remand for further proceedings consistent with this opinion.

FACTS

Relator Mary Lou Martinez was employed by Deutschland Meats, Inc. (Deutschland), as a meat packager from September 28, 2006 to March 17, 2008. She was paid approximately \$7 per hour and worked approximately 40 hours per week. Following her separation from Deutschland, Martinez established an unemployment benefit account with the Department of Employment and Economic Development (DEED); she stated on the unemployment benefit application that she had worked for Deutschland from September 2006 to March 2008. DEED determined that Martinez's weekly benefit amount was \$326, based on approximately \$30,000 in base-period wages. Except for approximately \$650, all of Martinez's base-period wages were based on earnings reported by Lunds Incorporated, an employer for whom Martinez has never worked. No earnings were reported during the base period by Deutschland.

Martinez requested and received weekly unemployment benefit payments between March and December 2008. In December 2008, DEED notified Martinez that, according

to its records, Martinez had worked for and was being paid by Lunds between March 23, 2008, and the end of August 2008, while also collecting unemployment benefits and that the reported Lunds earnings exceeded her weekly benefit amount. DEED issued an ineligibility determination based on the overpayment and another ineligibility determination based on fraud. The fraud determination was based on Martinez's failure to report the Lunds earnings while she was receiving unemployment benefits. Martinez appealed both determinations, arguing that she has never worked at Lunds and, therefore, had not failed to report Lunds earnings.

At the telephonic hearing that followed, the ULJ observed that there could be no fraud without earnings, stating: "If the Lunds wages go away . . . the fraud determination automatically goes away." Thus, the evidentiary focus at the hearing was on whether the person who worked at Lunds and used Martinez's name and social security number during the base period was indeed Martinez. Martinez presented convincing evidence that she was not the person working at Lunds who supplied Martinez's name and social security number, prompting the ULJ to state that "there's going to be no determination from the department that [Martinez] ever committed fraud on the department" for failing to report Lunds wages.

Near the end of the telephonic hearing, the ULJ observed that, because Martinez has never worked at Lunds, the Lunds wages had to be deducted from her base-period wages and Martinez's weekly and maximum benefit amounts would need to be recalculated accordingly. The ULJ also observed that, because Martinez's weekly benefit amount was based almost entirely on the approximately \$30,000 in wages that DEED

erroneously believed Martinez had received from Lunds, Martinez likely had been overpaid and would be required to repay the unemployment benefits to which she was not entitled.

On June 30, 2009, the ULJ issued a decision, finding that Martinez had neither received nor failed to report any Lunds earnings while collecting unemployment benefits. The ULJ also determined that Martinez would have to repay DEED the difference between the weekly benefits she actually received during the relevant period and the benefits to which she was actually entitled after the Lunds earnings were removed from her base-period wages.

The ULJ also found that Martinez had committed fraud by intentionally failing to notify DEED that she has never worked at Lunds in order to collect unemployment benefits. After observing that the determination of intent was a question of credibility, the ULJ found that Martinez had put her credibility in question when, upon receipt of the Determination of Benefits Account (DBA), she failed to notify DEED that she has never worked at Lunds and that Deutschland had not been listed as an employer on the DBA. The ULJ assessed \$4,387.60 in statutory fraud penalties.

After the ULJ affirmed the decision on Martinez's request for reconsideration, this certiorari appeal followed.

DECISION

Martinez does not contest the overpayment determination or the repayment requirement that results from this determination. Rather, Martinez challenges the fraud determination and the assessment of statutory fraud penalties. Martinez argues that the

record lacks substantial evidence to support the ULJ's finding that she fraudulently collected unemployment benefits by intentionally failing to notify DEED about material errors in its DBA. She also contends that she was deprived of notice of and an opportunity to address the fraud determination raised for the first time in the ULJ's decision.

I.

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of a petitioner have been prejudiced because the findings, inferences, conclusion, or decision are, among other things, affected by an error of law or unsupported by substantial evidence in view of the entire record as submitted. Minn. Stat. § 268.105, subd. 7(d) (2010).

Whether an employee committed a particular act is a question of fact. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We view the ULJ's factual findings in the light most favorable to the decision, giving deference to the ULJ's credibility determinations. *Id.* We will uphold the ULJ's factual findings if they are supported by substantial evidence. *Id.* Substantial evidence is defined as: "(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'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002). Whether an unemployment benefits applicant intentionally misreported earnings to receive

unemployment benefits, and thus committed fraud, involves a credibility determination entitled to our deference on appeal. *Cash v. Comm'r of Econ. Sec.*, 352 N.W.2d 535, 537 (Minn. App. 1984).

Under Minn. Stat. § 268.18, subd. 2(a) (Supp. 2009),

[a]ny applicant who receives unemployment benefits by knowingly misrepresenting, misstating, or failing to disclose any material fact, or who makes a false statement or representation without a good faith belief as to the correctness of the statement or representation, has committed fraud. After the discovery of facts indicating fraud, the commissioner must make a determination that the applicant obtained unemployment benefits by fraud and that the applicant must promptly repay the unemployment benefits to the trust fund. In addition, the commissioner must assess a penalty equal to 40 percent of the amount fraudulently obtained.

Martinez challenges the determination that she fraudulently failed to inform DEED that she never worked at Lunds in order to receive unemployment benefits to which she was not entitled.

Martinez argues that, because the DEED fraud determination at issue in the evidentiary hearing concerned her failure to report earnings, she did not prepare or submit any evidence addressing whether her failure to notify DEED that she never worked at Lunds constituted fraud. She observes that “[t]he Department never issued a determination alleging that [she] had committed fraud by withholding the information that she had been a victim of identity theft” and that, consequently, “there was no evidence received concerning the finding of fraud [concerning the overpayment of benefits] that was made by the ULJ.” We agree. The fraud issue on which DEED’s ineligibility determination was founded is based on Martinez’s failure to report the Lunds

earnings while she was receiving unemployment benefits. The overwhelming majority of time at the hearing was spent determining whether Martinez had failed to report these earnings. It was only after Martinez had conclusively established that she has never worked at Lunds that the ULJ observed, for the first time, that the inclusion of the Lunds earnings in the base-period amount must have resulted in an overpayment. Martinez has never challenged the overpayment determination based on the Lunds wages erroneously attributed to her.

The ULJ, however, never suggested during the telephonic hearing that Martinez might have fraudulently obtained benefits by intentionally failing to notify DEED that she *never worked* at Lunds. There is no evidence in the record on this issue, the ULJ did not question Martinez about it, and it was not the subject of an ineligibility determination by DEED. The ULJ determined that Martinez committed fraud by intentionally failing to notify DEED that she has never worked at Lunds in order to collect unemployment benefits—a theory raised for the first time in the ULJ’s decision.

The ULJ also determined that Martinez committed fraud because she “put her credibility in question” by failing to notify DEED, upon receipt of the DBA, that she never worked at Lunds and that the information in the DBA about her employment with Deutschland was incorrect. The ULJ’s findings concerning Martinez’s credibility lack substantial support in the record. The ULJ’s credibility determination is based entirely on Martinez’s failure to notify DEED about errors in the DBA. But the DBA was not in the record during the telephonic hearing and cannot, therefore, serve as the basis of either the ULJ’s findings or our decision. *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn.

1988) (“An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.”). The itemized list of documents that DEED provided for this appeal plainly indicates that the DBA was not marked or received in evidence during the telephonic hearing. Martinez correctly asserts that, because there is no evidence in the record that the DBA was in fact issued by DEED or received by her, knowledge of its contents cannot simply be imputed to Martinez.

A DEED evidentiary hearing is an evidence-gathering inquiry during which the ULJ “must ensure that all relevant facts are clearly and fully developed.” Minn. Stat. § 268.105, subd. 1(b) (Supp. 2009). And the question of Martinez’s intent is a credibility determination, which rests exclusively with the ULJ. *See Cash*, 352 N.W.2d at 537. But relevant facts cannot be considered, nor can we discern the evidentiary basis for them, when they are contained in documents that are not in evidence. The hearing transcript suggests that the ULJ was consulting and reading from the DBA pertaining to Martinez’s employment during the telephonic hearing. But the ULJ never named the document, admitted it in evidence, or asked Martinez if she possessed or was aware of the document. Moreover, the ULJ never asked Martinez about the conduct related to the DBA on which the ULJ’s fraud determination is based. On this record, Martinez’s receipt and possession of the DBA cannot be assumed or reasonably inferred; nor can her fraudulent nondisclosure of material information to correct the DBA be assumed or reasonably inferred.

“When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony.” Minn. Stat. § 268.105, subd. 1(c) (Supp. 2009). When the ULJ’s bases for discrediting Martinez’s testimony are founded on a document outside the record, the credibility determination and any rulings that flow from it cannot be upheld. It is true that “[c]redibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal.” *Skarhus*, 721 N.W.2d at 345. But when, as here, those determinations are derived from information that is not in the record and founded on a theory of fraud articulated for the first time in the ULJ’s written decision, they cannot be sustained on appeal.

II.

Martinez also argues that she was deprived of due process because she did not receive notice of a fraud determination concerning her inflated base-period earnings and did not have an opportunity to address that determination at the hearing. We agree.

“Unemployment benefits are an entitlement protected by the procedural due process requirements of the fourteenth amendment.” *Schulte v. Transp. Unlimited, Inc.*, 354 N.W.2d 830, 832 (Minn. 1984). Administrative agencies “must observe the basic rules of fairness as to parties appearing before them.” *Id.* at 834 (quotation omitted). And notice of a benefits hearing “must contain such information and be presented in such a manner so as to enable a person of ordinary perception to understand the nature and purpose of the notice.” *Id.* (quotation omitted). Minnesota Rule 3310.2910 requires that

the hearing notice include “the issues to be considered at the hearing.” Minn. R. 3310.2910 (2009). The December 2008 fraud determination issued by DEED alleged that Martinez collected benefits without reporting earnings. This notice is insufficient to inform Martinez that the ULJ would consider how the absence of any Lunds earnings to report could affect the DBA and result in a different fraud determination. Moreover, there was no evidence—documentary or testimonial—produced at the telephonic hearing addressing Martinez’s allegedly fraudulent failure to notify DEED about the errors it made on the DBA.

Because the ULJ’s finding that Martinez committed fraud by failing to notify DEED about errors that it made on her DBA is not supported by substantial evidence, and because Martinez did not receive adequate notice or an opportunity to be heard concerning the ULJ’s fraud determination, we reverse the fraud penalty imposed on Martinez and remand for further proceedings not inconsistent with this opinion.

Reversed and remanded.