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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-845**

Donald Jennings,
Relator,

vs.

Jennings State Bank,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed March 22, 2011
Reversed
Minge, Judge**

Department of Employment and Economic Development
File No. 23932061-6

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Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

MINGE, Judge

Relator challenges the findings of the unemployment law judge (ULJ) that he is a corporate officer with a 25% ownership interest in his employer and therefore does not qualify for unemployment benefits. On this record, ownership of 25% of the parent corporation does not constitute an ownership interest of 25% of the subsidiary employer and we reverse.

FACTS

Jennings State Bank was established in 1890. In 1970, ownership was transferred to Spring Grove Investments, Inc. (SGI), a bank holding company. Relator Donald Jennings and his three siblings acquired SGI from their mother in 1991, each owning 25% of its shares of stock. At the end of 1994, Jennings became the CEO of the bank and a brother was named to other corporate positions within the bank. SGI continued to own all of the shares of stock of the bank. In addition, SGI owned 80% of a title company that ceased business operations in 2007.

Jennings was a full-time employee of the bank. For 15 years, the bank paid him wages, provided him with benefits, and included his wages in the payroll on which it paid unemployment insurance tax to the state of Minnesota. On October 2, 2009, the bank was closed by the Federal Deposit Insurance Corporation (FDIC) and Jennings became unemployed. Jennings then applied to the Department of Employment and Economic Development (DEED) for unemployment insurance benefits.

In response to Jennings's application for unemployment benefits, DEED issued a determination of ineligibility. The basis for that determination was that Jennings was a corporate officer who owned 25% of his employer and that his employer had not elected unemployment insurance coverage for officers. Jennings filed an appeal and received a de novo review before a ULJ. The ULJ reached the same conclusion as DEED staff and reaffirmed that conclusion when Jennings requested reconsideration. This certiorari appeal followed.

D E C I S I O N

The issue is whether Jennings's 25% ownership of SGI constitutes 25% ownership of his employer for the purposes of determining eligibility for unemployment benefits. This court may affirm, reverse and remand, or modify the decision of a ULJ if "the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision" are affected by an error of law or unsupported by substantial evidence in the record. Minn. Stat. § 268.105, subd. 7(d)(4)-(5) (2010).

Whether an individual is an employee is a mixed question of law and fact. *Jenson v. Dep't of Econ. Sec.*, 617 N.W.2d 627, 629 (Minn. App. 2000), *review denied* (Minn. Oct. 17, 2000). The court views the ULJ's findings of fact "in the light most favorable to the decision," and will not disturb those findings "when the evidence substantially sustains them." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). After the controlling facts are decided, whether a person is considered an employee is a question of law. *Jenson*, 617 N.W.2d at 629. On questions of law, this court "remains

free to exercise its independent judgment.” *Ress v. Abbott Nw. Hosp., Inc.*, 448 N.W.2d 519, 523 (Minn. 1989).

Eligibility for unemployment benefits is governed by the Minnesota Unemployment Insurance Law. Minn. Stat. §§ 268.001-.23 (2010). To receive benefits, an applicant must have been engaged in covered employment. Minn. Stat. § 268.07, subd. 1(b). There are 34 exclusions to covered employment, including “employment of a corporate officer, if the officer owns 25 percent or more of the employer corporation” Minn. Stat. § 268.035, subd. 20(29). Employees who perform noncovered employment can still be covered if their employer files an election which is accepted by the commissioner. Minn. Stat. § 268.042, subd. 3(a).

The statute defines “employee” as “every individual who is performing or has performed services for an employer in employment.” Minn. Stat. § 268.035, subd. 13. Employment is defined as “service performed by: (1) an individual who is considered an employee under the common law of employer-employee . . . ; (2) an officer of a corporation” Minn. Stat. § 268.035, subd. 15. The definition of employer includes “a joint venture composed of one or more employers” *Id.*, subd. 14.

The record relevant to this appeal is uncontested.¹ Jennings owns 25% of SGI, which wholly owned Jennings State Bank. The bank also paid unemployment taxes for Jennings but did not elect coverage. The only question on this record is whether Jennings’s 25% ownership in SGI as a holding company constitutes 25% ownership

¹ The ownership and operation of the subsidiary title company is disputed. Because those questions do not impact our analysis, we decline to address the issue.

interest in his employer for unemployment insurance purposes. If so, Jennings would be considered a 25% corporate officer/owner and therefore not eligible for unemployment benefits.

On the record before us it is clear that SGI and the bank were two distinct and separate entities. Even though they had some overlap in members of the board, they had separate legal identities. For example, the FDIC only closed and seized the assets of the bank. The holding company was left intact. SGI was also free to and did pursue business ventures in addition to the bank. The two companies had separate articles of incorporation and were governed by separate bylaws.

Jennings was employed solely by the bank. He served as CEO at the pleasure of the bank board. The bank issued his paychecks, paid for his employee benefits, and paid unemployment insurance tax on his compensation. Jennings owned no shares of the bank. It was entirely owned by SGI. Jennings's ownership interest in SGI only entitled him to vote those shares to influence matters pertaining to SGI.

Jennings was also not employed by SGI, and, as a bank shareholder, the holding company did not directly control his employment. SGI could change the composition of the bank's board to include members that would be inclined to replace Jennings, but such a scenario only underscores the separation between the two entities. Under the law, SGI and the bank are distinct, legal entities and should continue to be treated as such under the unemployment statute. Therefore, Jennings did not own a 25% stake in his employer and the bank was not required to file for election coverage under Minn. Stat. § 268.042, subd. 3 in order for him to receive unemployment benefits.

DEED also argues that SGI and the bank could be considered a “joint venture” under the definition of “employer” in Minn. Stat. § 268.035, subd. 14. However, the existence of a joint venture is generally a question to be determined by the fact-finder. *Am. States Ins. Co. v. Ankrum*, 651 N.W.2d 513, 522 (Minn. App. 2002). It was not argued to or considered by the ULJ, and we decline to consider it on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Because Jennings’s 25% stake in SGI does not constitute ownership of his bank employer, the bank was not required to file for election coverage for Jennings to receive unemployment benefits and Jennings is eligible for benefits. We conclude that the ULJ erred in denying benefits and eligibility.

Reversed.

Dated: