

*This opinion will be unpublished and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
A11-2316**

Randall D. Frey,
Relator,

vs.

Ecowater Systems, LLC,
Respondent,

Department of Employment
and Economic Development,
Respondent.

**Filed September 24, 2012
Affirmed as modified
Hudson, Judge**

Department of Employment
and Economic Development
File No. 28446095-3

Randall D. Frey, Almena, Wisconsin (pro se relator)

Ecowater Systems, LLC, Woodbury, Minnesota (respondent)

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

Considered and decided by Kalitowski, Presiding Judge; Halbrooks, Judge; and
Hudson, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Relator challenges a determination by an unemployment-law judge (ULJ) that his receipt of unemployment benefits be delayed based on his pension-plan withdrawal and his receipt of retention and medical-expense payments. Because we conclude that the ULJ did not err by concluding that relator's unemployment benefits are delayed, but did err in calculating the length of the delay, we affirm as modified.

FACTS

Relator Randall Frey worked for Ecowater Systems, LLC, a water treatment system manufacturer, from 1977 until January 2011, when he was laid off as part of a large layoff program. As a result of the layoff, he received a taxable retention payment of \$23,592, which was paid in 30 equal weekly payments of \$786.40, from January 27, 2011 to August 18, 2011. Because of the layoff, Frey also received a medical-expense payment of \$3,961.92, before taxes, which represented the amount he would have received under the company's medical plan for retiree medical expenses had he retired. On August 12, 2011, Frey also withdrew a lump sum of \$55,923.48 from his retirement fund. Because Frey was over 59-1/2, he was not subject to an early-withdrawal penalty for the retirement-fund withdrawal.

Frey applied for unemployment insurance benefits, and he was deemed ineligible for all or partial benefits from January 16, 2011 to December 22, 2012, based on his receipt of the retention and medical-expense payments and the lump-sum pension payment. Frey challenged the determination and, after a hearing, a ULJ found that a

preponderance of the evidence established that Frey had received payments that delayed the payment of his unemployment benefits from January 16, 2011–January 27, 2013. Frey requested reconsideration, and the ULJ affirmed. This certiorari appeal follows.

D E C I S I O N

This court may affirm the ULJ’s decision, remand the case for further proceedings, or reverse or modify the decision 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) (2010). In determining whether there is substantial evidence for a ULJ’s findings, we will view those findings “in the light most favorable to the decision.” *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). But we review the issue of whether the statute precludes the payment of unemployment benefits de novo. *Id.*

In order to receive unemployment benefits, a person must meet the statutory requirements for ongoing eligibility for those benefits. Minn. Stat. § 268.069, subd. 1(3) (2010). An applicant is not eligible to receive unemployment benefits for any week for which the applicant receives, or has filed for payment of, an amount equal to or in excess of the applicant’s weekly unemployment benefit amount, if the payment falls within certain categories. Minn. Stat. § 268.085, subd. 3(a) (Supp. 2011).

The ULJ concluded that Frey’s receipt of retention, medical-expense, and pension payments following his separation from employment made him ineligible for unemployment benefits. We consider each of these payments in turn.

First, severance pay that is paid by an employer because of separation from employment delays receipt of unemployment benefits, “if the payment is considered wages at the time of payment under section 268.035, subd. 29.” Minn. Stat. § 268.085, subd. 3(a)(2). Severance pay is defined as “a sum of money usually based on length of service for which an employee is eligible upon termination.” *Carlson v. Augsburg Coll.*, 604 N.W.2d 392, 394 (Minn. App. 2000) (quotation omitted). Frey does not dispute that the sum he received for the 30-week period from January 27, 2011 to August 18, 2011, in the amount of \$23,592, was in the nature of severance pay, as it was paid because of his separation from employment. Minn. Stat. § 268.085, subd. 3(a)(2). Because the definition of “wages” explicitly includes severance pay, Minn. Stat. § 268.035, subd. 29(a) (Supp. 2011), Frey’s retention pay delayed payment of his unemployment benefits until that 30-week period ended. Minn. Stat. § 268.085, subd. 3(a).

Second, in February 2011, Ecowater also paid Frey a lump sum of \$3,961.92, the equivalent of five weeks of his pay. The ULJ found that this payment was “for medical expenses because of [Frey’s] separation from employment,” which was deductible from his weekly benefit amount under Minn. Stat. § 268.085, subd. 3(a). The ULJ’s characterization of this payment comports with the testimony of Ecowater’s representative that this distribution would have been a fringe benefit, payable toward Frey’s medical expenses at retirement, but that it was paid because he was permanently laid off. We conclude that the ULJ did not err by finding that this payment was part of his severance pay and thus constituted wages, which were paid upon Frey’s separation

from employment, and which delayed his receipt of benefits for an additional five weeks, or until September 24, 2011.

Third, Frey received a lump-sum pension payment of \$55,923.48 from his retirement plan. “[P]ension, retirement, or annuity payments from any plan contributed to by a base period employer” also delay receipt of unemployment benefits. Minn. Stat. § 268.085, subd. 3(a)(3). The ULJ found that the lump-sum payment delayed his eligibility for benefits for an additional 71 weeks under that subdivision.

Frey does not contest that Ecowater, his base-period employer, was considered to have contributed to the plan because his pension contribution was excluded from the definition of wages under Minn. Stat. § 268.035, subd. 29(1). Minn. Stat. § 268.085, subd. 3(a)(3). But he argues that, because he withdrew the pension funds due to a medical emergency and he contributed \$6,000 back to an IRA six months after the withdrawal, all or part of the pension withdrawal should not count as a payment delaying his receipt of benefits.

A pension payment does not delay the receipt of unemployment benefits if the applicant receives a lump-sum payment and “immediately deposits the payment in a qualified pension plan” or receives it as an early distribution for which he paid a penalty. *Id.* But Frey did not receive the payment as an early distribution, and the contribution of some of the funds back to an IRA after six months does not qualify as “immediately deposit[ing]” those funds to a qualified pension plan. *Id.*; see 26 U.S.C. § 408(d)(3)(A) (2006) (providing that distributions from retirement plans are not taxable if rolled over

into another retirement account within 60 days). We also must reject Frey's argument based on an emergency withdrawal of his pension because by statute, "[t]here is no equitable or common law denial or allowance of unemployment benefits." Minn. Stat. § 268.069, subd. 3 (Supp. 2011).

But we agree with DEED's contention on appeal that the ULJ incorrectly calculated the length of Frey's period of ineligibility for benefits. The ULJ determined that the total payments Frey received would delay his benefits until January 27, 2013: this included the 30-week period in which he received retention pay; the 5-week period for medical-expense pay; and the 71-week period for the lump-sum pension withdrawal. Because Frey established his benefits account on August 14, 2011, that account expires on August 11, 2012, and Ecowater was Frey's base-period employer through the calendar quarter ending June 30, 2011. *See* Minn. Stat. § 268.035, subd. 6 (2010) (defining benefit year as 52 calendar weeks, beginning on effective date of benefit account); *id.*, subd. 4(a) (Supp. 2011) (defining base period as the most recent four completed calendar quarters before the effective date of a benefits application). Therefore, Frey's wages paid through the end of the June 2011 calendar quarter amounted to "wage credits," which are attributable to Ecowater for the purpose of establishing his benefits account. *See id.*, subd. 27 (2010) (defining "wage credits" as amount of wages paid for covered employment within base period). Because the retention and medical-expense payments constituted "wages" paid by Ecowater within Frey's base period for covered employment, they properly delayed Frey's receipt of benefits until September 24, 2011 under Minn. Stat. § 268.085, subd. 3(a)(2).

But should Frey qualify for, and establish, a new benefit account effective on or after November 4, 2012, it would have a new base period: October 1, 2011–September 30, 2012. *See* Minn. Stat. § 268.035, subd. 4(b) (Supp. 2011). The 35 weeks of Frey’s wages attributable to the retention and medical-expense payments ended on September 24, 2011. Because the pension-plan payment is not considered wages under Minn. Stat. § 268.035, subd. 29(a), Frey would not have additional wage credits attributable to Ecowater after that date, and Ecowater would not be considered his base-period employer for the new base period. Minn. Stat. § 268.035, subd. 27. And because pension-plan payments only delay the receipt of unemployment benefits if they come “from [a] plan contributed to by a base period employer,” Minn. Stat. § 268.085, subd. 3(a)(3), the pension-plan payment would not further delay Frey’s receipt of unemployment benefits. We therefore correct the ULJ’s determination and hold that Frey’s period of benefits ineligibility will end on November 3, 2012.

Affirmed as modified.