STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0442

Heather J. Swanson,
Relator,

vs.

Department of Employment & Economic Development,
Respondent.

Filed December 2, 2013
Affirmed in part, reversed in part, and remanded
Crippen, Judge[*]

Department of Employment & Economic Development
File No. 30418384

Heather J. Swanson, Farmington, Minnesota (pro se relator)

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

Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

CRIPPEN, Judge

Relator Heather Swanson challenges the unemployment-law judge's decision that she is ineligible to receive unemployment benefits. She argues that for purposes of determining benefits eligibility her fall-semester class attendance did not make her unavailable for suitable employment, and that her part-time class schedule during the summer semester was subject to a previous final determination of eligibility made by respondent Minnesota Department of Employment and Economic Development. We affirm the determination that relator is unavailable for suitable employment during the fall semester because substantial evidence supports that determination. We reverse and remand the determination of ineligibility as to the summer-semester period because a portion of the summer semester was included in a prior final determination of eligibility, the summer semester was not included in the eligibility period questioned by respondent, and the record lacks substantial evidence to support the unemployment-law judge's decision as to that period.

FACTS

Relator worked full-time as an office specialist from November 2011 until June 3, 2012, when she was laid off during a reduction in force. She immediately signed up for summer-semester college classes, which ran from June 2012 to the first week of August 2012. Relator took a math class from 8:00 a.m. to 10:00 a.m. on Tuesdays and Thursdays, and another online class. Based on information she submitted, including her

summer-semester schedule, respondent issued a determination on June 21, 2012, that relator was eligible to receive unemployment benefits.

Relator signed up for five fall-semester classes, but she withdrew from two classes because she needed to find a job to support her family. In an undated request-for-information form, which the unemployment-law judge (ULJ) found was "from early November 2012," relator reported that she was looking for part-time work, explaining that she had "filed for [d]isability." The information form included the question, "Are you willing to quit, rearrange, or get excused from classes, in order to accept a suitable job?," and relator answered "No," although she further stated that she was classified as a full-time student and that her schooling did not affect her ability to look for or accept a job. This information led to a department determination that relator was ineligible for unemployment benefits beginning on August 27, 2012. Relator challenged the ineligibility determination, and the case proceeded to an evidentiary hearing before the ULJ on November 30, 2012.

At the evidentiary hearing, the ULJ initially framed the issue as whether relator was available for employment during the period August 27, 2012, to the date of the hearing, November 30, 2012. But the ULJ stated that because relator took some classes during the summer, "that could raise another issue of your availability [for suitable employment] in the summer." The ULJ included the summer period within the scope of the evidentiary hearing.

At the hearing, relator testified that her school schedule did not conflict with her ability to accept employment and that she would "quit school" if she were offered a job

that conflicted with her class schedule. She also stated that she intended to quit school after the fall semester, stating, "I need to find a job." With regard to how summer classes affected her ability to work, relator said that she would have quit those classes "in a heartbeat" in order to accept employment. The ULJ asked relator to explain her reason for answering "no" in the November request-for-information form about whether she would quit classes in order to accept work, and relator said:

> I didn't intentionally do it. I would not have ever intentionally done that. It's one of those, you know when you do your questions they're yes, no boxes. And I must have accidentally hit no and just proceeded without double checking it. Believe me I'll never do it again. Because I will take any job I can. I have three children and a husband. I need to have a job, if not more than one.

The ULJ also asked relator why she answered on the form that she was looking for only part-time work, and she said:

> I honestly don't remember doing it. If I did you know it was, I don't know why I would have done it. Because I would take a full-time job and a part-time job, I'd take two part-time jobs. Right now I would take two full-time jobs if I had to. A day job and a night job. I've worked more than one job before and you have to do what you have to do.

In her final statement to the ULJ, relator said: "[T]he one question was a yes, no. I accidentally hit no. I would rearrange my schedule, I would withdraw from school to work. I can't afford not to."

The ULJ ruled that relator "was not available to accept suitable employment for the period beginning June 3, 2012 to November 29, 2012, and is ineligible for unemployment benefits for that period," but that she is eligible for benefits beginning November 30, 2012. The ULJ noted the discrepancy between relator's written statements

and hearing testimony on the issue of her availability for employment, finding that relator's

> testimony that she made a mistake is not persuasive that she actually meant she was willing to quit school when she filled out her questionnaire. It is more likely that she decided to call her initial answer a mistake when she realized she was not eligible for benefits based on . . . her answer. The evidence does not show [relator] was willing to quit school to prioritize work.

The ULJ acknowledged that part-time work was suitable for relator, but found that relator "was restricting her availability to employment that did not conflict with her class schedule." Upon relator's motion for reconsideration, the ULJ affirmed its decision.

D E C I S I O N

This court may modify or reverse a ULJ decision "if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are . . . unsupported by substantial evidence in view of the entire record." Minn. Stat. § 268.105, subd. 7(d)(5) (2012). "Substantial evidence is (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." *Dourney v. CMAK Corp.*, 796 N.W.2d 537, 539 (Minn. App. 2011) (quotation omitted). Whether an applicant is available for suitable employment is a fact question. *Goodman v. Minn. Dep't of Emp't Servs.*, 312 Minn. 551, 553, 255 N.W.2d 222, 223 (1977). "This court views the ULJ's factual findings in the light most favorable to the decision. This court also gives deference to the credibility determinations made by the ULJ." *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774

(Minn. App. 2008) (citation omitted), *review denied* (Minn. Oct. 1, 2008). Questions of law are subject to de novo review. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011).

To be eligible for unemployment benefits, an applicant must be "available for suitable employment." Minn. Stat. § 268.085, subd. 1(4) (2012). An applicant is available for suitable employment if the applicant is "ready, willing and able to accept suitable employment" and does not impose any restrictions that prevent him or her from accepting suitable employment. *Id*., subd. 15(a) (2012). An applicant-student who attends "regularly scheduled classes must be willing to discontinue classes to accept suitable employment when: (1) class attendance restricts the applicant from accepting suitable employment; and (2) the applicant is unable to change the scheduled class or make other arrangements that excuse the applicant from attending class." *Id*., subd. 15(b) (2012).

June 3, 2012 to June 21, 2012 period.

Respondent concedes that the portion of the ineligibility period determined by the ULJ, from June 3, 2012 to June 21, 2012, was unauthorized by law. Despite relator's summer-session enrollment, respondent had determined relator to be eligible to receive benefits as of June 21, 2012. Respondent did not appeal that determination, and the decision became final. *See* Minn. Stat. § 268.101, subd. 2(f) (2012) (stating that "[a] determination of eligibility . . . is final unless an appeal is filed by the applicant or notified employer within 20 calendar days after sending"); Minn. Stat. § 268.101, subd. 4 (2012) (stating that the commissioner "may reconsider a determination of eligibility"

only if it "has not become final"). Thus, the ULJ lacked authority to reconsider relator's eligibility for benefits before June 22, 2012. *See King v. Univ. of Minn.*, 387 N.W.2d 675, 677 (Minn. App. 1986) (stating that "the time for appeal from decisions of all levels of the [d]epartment should be strictly construed"), *review denied* (Minn. Aug. 13, 1986). As noted by respondent, the ULJ was apparently unaware that a determination of eligibility had been made with regard to relator's summer-semester class attendance when the ULJ issued its decision.

June 22, 2012 to August 26, 2012 period.

We next address the remaining portion of the summer-semester period, from June 22, 2012 to August 26, 2012. On November 16, 2012, respondent determined that relator was ineligible for benefits as of August 27, 2012, and from that period forward "until conditions change." But at the evidentiary hearing on appeal of that determination, the ULJ enlarged the period of consideration of relator's eligibility for benefits to also include from June 3, 2012 to August 26, 2012. This action was outside the ULJ's scope of review for several reasons. First, under Minn. Stat. § 268.101, subd. 2(a), "[t]he commissioner must determine any issue of ineligibility raised by information required from an applicant . . . and send to the applicant and any involved employer . . . a document titled a determination of eligibility or a determination of ineligibility." The period between June 3 and August 26, 2012, was included within the June 21, 2012 determination of eligibility. Respondent now urges that relator's summer-class schedule made her ineligible for benefits, but that issue was considered and determined by respondent in June.

In addition, the unemployment statute provides that "[t]he commissioner may issue a determination on an issue of ineligibility at any time within 24 months from the establishment of a benefits account based upon information from any source." Minn. Stat. § 268.101, subd. 2(e). The determination of ineligibility issued by respondent on November 16 stated that the period of ineligibility began on August 27. Because the unemployment statute also directs us to construe ineligibility provisions narrowly to serve the statute's remedial purpose, we conclude that the commissioner had authority to delineate the period for scrutiny of relator's eligibility for benefits. *See* Minn. Stat. § 268.031, subd. 2 (2012) (stating that "[i]n determining eligibility or ineligibility for benefits, any statutory provision that would preclude an applicant from receiving benefits must be narrowly construed").

Finally, at the November 30, 2012 hearing, no evidence established whether or not appellant would have quit her summer classes in order to accept suitable employment. The summer classes were held two days per week for four hours, leaving a large portion of the week available for work. Relator was ineligible for benefits only if she was unavailable for suitable employment due to her class attendance. Minn. Stat. § 268.085, subds. 1(4), 15(b). Because no evidence was elicited on this point, the record lacks substantial evidence to support the ULJ's conclusion that relator was unavailable for employment during the summer session. *See Dourney*, 796 N.W.2d at 539 (defining "substantial evidence" to include at least some evidence).

Respondent argues that Minn. Stat. § 268.101, subd. 3a (2012), Minn. R. 3310.2910 (2011), and *Worthington Tractor Salvage v. Miller*, 346 N.W.2d 168, 173

(Minn. App. 1984), support its argument that the ULJ decision properly included the June 22 to August 27 period in its consideration of relator's eligibility. These authorities do not bear on the issue. Minn. Stat. § 268.101, subd. 3a, includes language pertaining to when an issue of ineligibility may be referred for a hearing. Further, although Minn. R. 3310.2910 permits the ULJ, upon its own motion, to "take testimony and render a decision on issues not listed on the notice of hearing if each party is so notified on the record at the hearing and does not object on the record," this rule does not permit the ULJ to raise and decide a question that cannot be reviewed by the ULJ. *Worthington Tractor* remanded a ULJ decision for further proceedings when an employer, during a hearing to decide whether the employee committed misconduct and was not entitled to receive benefits, raised the question of whether the employee was self-employed and therefore not eligible to receive unemployment compensation. 346 N.W.2d at 173. There, the supreme court ruled that "the issue was easily recognizable and should have been addressed by the appeal tribunal." *Id*. The ruling of *Worthington Tractor* does not apply to the ULJ's decision to enlarge the period of consideration of relator's eligibility for benefits because the issue raised by the ULJ in this case had already been determined.

August 27, 2012 to November 29, 2012 period.

Relator asserts that the record lacks substantial evidence to support the ULJ's finding that she is not available for suitable employment for the period between August 27 and November 29. The ULJ found that relator was registered for five classes for the fall session and that she withdrew from two classes. The ULJ also found that relator attended classes three hours per day three days per week. And the ULJ gave credence to

relator's response on the request-for-information form that showed she was not "willing to quit, rearrange, or get excused from classes[] in order to accept a suitable job." Although relator's sworn testimony contradicted her answer on the request-for-information form, the ULJ rejected relator's argument that her written answer was made in error. Rather, the ULJ found the written answer more credible than her testimonial answer because "[i]t is more likely [relator] decided to call her initial [written] answer a mistake when she realized she was not eligible for benefits based on . . . her [written] answer." Because the ULJ stated the reasons for discrediting relator's testimony, we must defer to the ULJ's credibility determinations. *Peterson*, 753 N.W.2d at 774. Substantial evidence supports the ULJ decision that relator is ineligible to receive unemployment benefits from August 27, 2012 to November 29, 2012, because she was not available for suitable employment. *See Shreve v. Dep't of Econ. Sec.*, 283 N.W.2d 506, 508 (Minn. 1979) ("In a world of limited resources, a State may legitimately extend unemployment benefits only to those who are willing to maximize their employment potential by not restricting their availability during the day by attending school." (quotation omitted)).

We reverse the ULJ's determination of ineligibility as to the period June 3, 2012 to August 26, 2012, and remand for an adjustment in the amount of overpayment owed by relator for that period. We affirm the ULJ's determination of ineligibility as to the period August 27, 2012 to November 30, 2012.

Affirmed in part, reversed in part, and remanded.