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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0828**

Gary D. Burk,
Relator,

vs.

Department of Employment and Economic Development,
Respondent.

**Filed July 22, 2008
Affirmed
Minge, Judge**

Department of Employment and Economic Development
File No. 1431 07

Gary D. Burk, 1049 Highway 47, Ogilvie, MN 56358-3587 (pro se relator)

Lee B. Nelson, Katrina I. Gulstad, Department of Employment and Economic
Development, First National Bank Building, 332 Minnesota Street, Suite E200, St. Paul,
MN 55101 (for respondent)

Considered and decided by Minge, Presiding Judge; Wright, Judge; and
Muehlberg, 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UNPUBLISHED OPINION

MINGE, Judge

Relator appeals an unemployment law judge's (ULJ's) determination that because he did not show that he was actively seeking suitable employment he was ineligible for unemployment insurance benefits. We affirm.

FACTS

Relator Gary Burk was involved in a motor vehicle accident on February 3, 2006 and was injured. As a result, Burk is unable to stand for long periods of time, and his doctor has instructed him not to lift items that weigh more than ten pounds overhead.

Burk had worked for about 27 years as a brake-press operator at factory in Anoka. When he lost that job, he continued to work at positions as a brake-press operator through temporary placement agencies during 2006. Because his duties as a brake-press operator demanded that he stand on concrete for long periods of time, Burk finally concluded that he had to give up that type of employment.

Burk established a benefit account effective December 24, 2006. Since then, Burk has contacted two temporary staffing services and asked each for work. He testified that the agencies were to call him if they located a position. He has previously worked as a brake pressman through these agencies, but testified he could no longer accept a job in that position because of his health. Burk further testified that the temporary staffing services offer other types of work and that he had "pretty much . . . left everything open," as far as the kinds of jobs he would be willing to consider.

There are inconsistencies in Burk's testimony about his job search. He testified that he had applied for work at Rochester Cheese, a cheese factory, but then stated that this application was made while he was still working as a brake-press operator and before he opened an unemployment insurance benefit account. He testified that he applied for three other jobs: (1) at Woodcraft Industries a week before the hearing; (2) about a month before the hearing, for a light truck driving position, but that the position was filled; and (3) another truck driving job two weeks before the hearing. The truck driving jobs required recent experience, and he has not driven a commercial truck in at least 25 years. He also explained that he "stops in" at the Mora and Cambridge workforce centers about once a week. Other than the three jobs mentioned, Burk did not indicate that he had applied to any other jobs since leaving his most recent employment.

The ULJ determined that Burk was not actively seeking suitable employment and that he was ineligible to receive unemployment insurance benefits. This certiorari appeal follows.

D E C I S I O N

This court may reverse or modify a ULJ's decision if the employee's substantial rights have been prejudiced because the ULJ's findings, inferences, conclusion, or decision are affected by error of law or are arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d)(4), (6) (2006). Questions of law are reviewed de novo. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). We review the ULJ's factual findings to determine whether they are supported by substantial evidence, and we defer to the ULJ's credibility determinations. Minn. Stat. § 268.105, subd. 7(d)(5) (2006) (providing

substantial evidence standard); *Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (stating that we view the ULJ's findings of fact in the light most favorable to the decision); *Nichols v. Reliant Eng'g & Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006) (noting that credibility determinations are resolved by the ULJ and that this court will defer to those determinations on appeal).

To be eligible for unemployment benefits for any week, the record must show that the applicant for benefits was actively seeking suitable employment. Minn. Stat. § 268.085, subd. 1(4) (2006).

“Actively seeking suitable employment” means those reasonable, diligent efforts an individual in similar circumstances would make if genuinely interested in obtaining suitable employment under the existing conditions in the labor market area. Limiting the search to positions that are not available or are above the applicant's training, experience, and qualifications is not “actively seeking suitable employment.”

Id., subd. 16(a) (2006). “[E]ntitlement to unemployment benefits shall be determined based upon [the record] without regard to any common law burden of proof There shall be no presumption of entitlement or nonentitlement to employment benefits.” Minn. Stat. § 268.069, subd. 2. “There shall be no equitable or common law denial or allowance of unemployment benefits.” *Id.*, subd. 3.

Whether an applicant has made “diligent efforts” to obtain suitable employment is a case-by-case determination. *See Pyeatt v. Dep't of Employment Servs.*, 263 N.W.2d 394, 395 (Minn. 1978) (holding that applying for six or seven positions in eight months constituted an inadequate job search); *Monson v. Minn. Dep't of Employment Servs.*, 262

N.W.2d 171, 172 (Minn. 1978) (holding that determination that applicant was not actively seeking employment was reasonably sustained where applicant regularly researched employment opportunities but only applied for two or three positions); *Decker v. City Pages, Inc.*, 540 N.W.2d 544, 549-50 (Minn. App. 1995) (holding that applicant was actively seeking employment when he had made “multiple telephone and in-person ‘networking’ contacts with five prospective employers [two of whom represented more than 100 publications,] . . . had formal interviews with one employer,” and attempted to become self-employed) *superseded by rule on other grounds as recognized by Mueller v. Comm’r of Econ. Sec.*, 633 N.W.2d 91, 93 (Minn. App. 2001); *Valenty v. Med. Concepts Dev. Inc.*, 491 N.W.2d 679, 684 (Minn. App. 1992) (determining that the record did not support the finding that an applicant was unavailable for work when she actively searched for work and applied for 11 positions during the contested period), *aff’d in part, modified in part*, 503 N.W.2d 131 (Minn. 1993).

The record must show that Burk was actively seeking suitable employment under Minn. Stat. § 268.085, subd. 1(4). This means he must be making “reasonable, diligent efforts [that] an individual in similar circumstances would make if genuinely interested in obtaining suitable employment under the existing conditions in the labor market area.” *Id.*, subd. 16(a). This standard requires that Burk apply for positions that are suitable for his skill level but allows for him to participate in approved job training and counseling. *Id.*, subd. 1(4), (6).

Here, the ULJ noted that Burk asserted that he was seeking other work, but that he was “inconsistent in his testimony and was unclear as to when and where he actually applied for other work.” The ULJ also found that

[o]verall, Burk’s testimony was not detailed and was unspecific as to dates and exact names of employers. Burk jumped back and forth in time, and testified about job search efforts made prior to his claim for unemployment benefits. Burk stated he has sought work at the workforce centers in Mora and Cambridge, Minnesota, but did not provide recent dates he has seen them, and did not provide information that he recently applied for any open positions they may have given him. Burk also contradicted himself regarding the type of work and the wages he was willing to accept.

The ULJ’s depiction of Burk’s testimony is not inaccurate. The record indicates that Burk applied for three positions in two months. Although Burk had contacted two trucking companies, the work was apparently seasonal and the employers required recent experience. The record indicates that since Burk left his most recent employment on December 22, 2006, he has called Masterson, a temporary employment agency, once or twice, and has spoken to Aerotek, another temporary employment agency, once. Both indicated that they would call if they found any positions for him. Although Burk has also gone to workforce centers regularly, he has not testified that he applied for any jobs posted at the centers or enlisted in any job training available at the centers. Burk asserts that he reads newspaper ads. Looking at employment ads is not adequate to show a genuine attachment to the work force. *See Monson*, 262 N.W.2d at 172.

We conclude that the ULJ did not err in concluding that this record does not support a determination that Burk was not actively seeking suitable employment.

II.

Burk states that he has a “difficult time communicating, especially over the telephone, and [I] am sorry that this is my problem.” According to the Minnesota Unemployment Insurance statute, “[t]he unemployment law judge shall ensure that all relevant facts are clearly and fully developed.” Minn. Stat. § 268.105, subd. 1(b) (2006). “The [ULJ] should assist unrepresented parties in the presentation of evidence. . . . The [ULJ] shall exercise control over the hearing procedure in a manner that protects the parties’ rights to a fair hearing.” Minn. R. 3310.2921 (2005).

The ULJ clearly and patiently attempted to elicit testimony from Burk regarding when and where he had applied for any employment. The ULJ advised Burk to make a list of employers he had contacted and job fairs that he had attended. Upon reconsideration, the ULJ noted that she had requested specific details regarding Burk’s job search, and that Burk never provided such information. We conclude that the ULJ made a reasonable effort to facilitate Burk’s presentation.¹

Affirmed.

Dated:

¹ Based on the material submitted to this court by Burk, it appears he sincerely believes that he has been seeking employment. If so, his claims suffer from a problem of proof. Burk may benefit by keeping a journal or other record of the positions that he has applied for or of any telephone and face-to-face contacts he makes with potential employers. Additionally, he may use state reemployment assistance services. *See* Minn. Stat. § 268.085, subd. 1 (4), (6). Burk would have to seek a determination from the commissioner that he is in need of such services. *Id.*, subd. 1(6).