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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2230**

Lucia Barenson,
Relator,

vs.

Metropolitan Council,
Respondent,

Department of Employment and Economic Development,
Respondent

**Filed September 21, 2010
Affirmed
Shumaker, Judge**

Department of Employment and Economic Development
File No. 22229283-3

Lucia Barenson, Minneapolis, Minnesota (pro se relator)

Ann K. Bloodhart, Associate General Counsel, Metropolitan Council, St. Paul, Minnesota
(for respondent employer)

Lee B. Nelson, Britt K. Lindsay-Waterman, Minnesota Department of Employment and
Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Klaphake, Presiding Judge; Shumaker, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Relator challenges the determination of the unemployment-law judge (ULJ) that he was discharged for employment misconduct based on a fraudulent workers' compensation claim. Relator also argues that he committed a good-faith error in judgment rather than employment misconduct. We affirm.

FACTS

Respondent Metropolitan Council discharged relator Lucia Barenson for making a fraudulent workers' compensation claim. Relator applied for unemployment benefits, and respondent Minnesota Department of Employment and Economic Development determined that he was eligible to receive benefits. Metropolitan Council appealed this determination, and a hearing was held before a ULJ.

The evidence presented at the hearing showed that relator worked as a vault puller. A vault puller boards a bus after it enters a garage, removes the vault from the bus's fare box, and replaces the removed vault with an empty one. On November 11, 2008, relator telephoned a supervisor and reported that he had sustained an injury to his arm or shoulder while working. In an injury-report form dated November 11, relator stated that his arm and back had been injured when a bus driver "closed the door on [him] as [he] exited the bus."

The next day, relator sought medical attention and told the treating physician that his arms had been caught in the bus door for several seconds. He complained of pain in his back and "mid arms." Relator told the physician that he had been experiencing

increased back pain over the previous year and that the incident with the bus doors had exacerbated the pain. The physician observed a “discoloration”—but no bruise or break in the skin—on relator’s left upper back. The physician also observed that relator’s upper arms were bruised and wrote a note stating that relator should be able to return to work in six days.

Metropolitan Council investigated relator’s injury report. A maintenance worker who saw the incident stated that the touch of the bus doors was not sufficient to injure relator. Another employee stated that relator had continued to work for 20 or 30 minutes with no sign of injury before calling the supervisor.

Surveillance cameras on the bus recorded the incident from two angles. The video shows relator boarding the bus and replacing the vault. The bus doors start to close on relator as he stands in the entryway, facing the back of the bus and holding a vault in front of him. The door closest to the front of the bus touches relator’s right arm or his back. The door closest to the back of the bus appears to touch (or come close to touching) the vault carried by relator. Relator’s left arm or side is not touched. The doors, which did not close fully, open less than one second after they began to close.

Metropolitan Council’s director of internal audit reviewed the risk-management department’s file and interviewed the garage’s safety representative. She also interviewed relator about the incident before he had seen the surveillance video. Relator told her that the doors had struck his left and right midsection. He also stated that he had been reaching forward for the vault when the doors struck him. When the director told relator that his statements were inconsistent with the video, relator changed several

aspects of his account of the incident. The director concluded that relator's account of the incident was inaccurate because it was not consistent with the video and that his injury claim was fraudulent.

A Metropolitan Council safety specialist testified that she had checked the "door pressure" of the bus in question after the incident and found nothing unusual. She stood in the bus entryway and had the doors closed until they made contact with her body. The safety specialist felt no pain. She also testified that the manufacturer of the bus doors told her that the doors exert the least amount of pressure when opening and closing.

Relator was the final witness at the hearing. By this point, he had seen the surveillance video of the incident. Relator stated that a door struck him as he entered the bus. He was not sure where on his body a door had struck him, and he claimed to have told the director of internal audit that he was not certain where a door had struck him. Relator admitted that he previously stated that he had been "crushed." Relator explained that he had used this word because he felt a "crunching pain" in his back and left arm immediately after a door touched him. Relator stated that his upper back was bruised during the incident and that a preexisting injury to his left arm was exacerbated by the incident. Relator testified that he reported the incident to his supervisor approximately 15 or 20 minutes after it occurred. He left work early, sought medical attention the next day, and missed six days of work due to the injury.

The ULJ found that relator made a fraudulent workers' compensation claim related to the incident because the incident did not occur as he reported it. The ULJ concluded that relator was ineligible for unemployment benefits because making the

fraudulent claim was employment misconduct. Relator requested reconsideration, and the ULJ affirmed his decision. This certiorari appeal follows.

DECISION

I.

The ULJ found that relator “was not injured as he reported” and therefore had made a fraudulent workers’ compensation claim. Relator contends that this finding is not supported by substantial evidence because his testimony was truthful, his physician concluded that he had been injured by the bus doors, and Metropolitan Council’s witnesses have no experience in engineering or medicine.

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). When reviewing a ULJ’s decision, this court may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because—among other reasons—the findings, inferences, conclusion, or decision are “unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 268.105, subd. 7(d)(5) (2008). This court views a ULJ’s factual findings in the light most favorable to the decision, defers to the ULJ’s credibility determinations, and will not disturb the findings if the evidence substantially sustains them. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002); *Skarhus*, 721 N.W.2d at 344. 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.” *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

Here, the ULJ did not believe relator’s testimony that he was injured by a bus door and therefore concluded that his workers’ compensation claim was fraudulent. We defer to the ULJ’s resolution of conflicting testimony or assessment of credibility. *Skarhus*, 721 N.W.2d at 344. We note that the ULJ’s credibility determination is supported by the record: relator made inconsistent statements regarding the cause of his injuries and his testimony is inconsistent with the surveillance video. And while relator asserts that his physician concluded that relator had been injured by the bus doors, our review of the record reveals that the physician did not give an opinion as to how relator was injured. We conclude that the ULJ’s finding that relator made a fraudulent workers’ compensation claim is supported by substantial evidence.

II.

Relator argues that even if his injuries were not caused by the bus door striking him, he made the workers’ compensation claim with the good-faith belief that he had been injured in this manner. Relator, characterizing his workers’ compensation claim as a good-faith error in judgment, contends that the ULJ erred by concluding that he committed employment misconduct.

Whether a particular act constitutes employment misconduct is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804. An employee who is discharged for misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Employment misconduct is “any intentional, negligent, or

indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment.” *Id.*, subd. 6(a) (Supp. 2009). Employment misconduct is not simple unsatisfactory conduct, conduct an average reasonable employee would have engaged in under the circumstances, or good-faith errors in judgment if judgment was required. *Id.*, subd. 6(b) (Supp. 2009).

Substantial evidence supports the ULJ’s finding that relator lied about sustaining injury at work so that he would receive workers’ compensation benefits. Making a fraudulent workers’ compensation claim is employment misconduct. *See Baron v. Lens Crafters, Inc.*, 514 N.W.2d 305, 307–08 (Minn. App. 1994) (stating that dishonestly connected with employment constitutes employment misconduct). The statutory exception for good-faith errors in judgment therefore does not apply here. *See* Minn. Stat. § 268.095, subd. 6(b) (stating that “good faith errors in judgment if judgment was required” are not employment misconduct); *Black’s Law Dictionary* 762 (9th ed. 2009) (defining “good faith” as honesty and the absence of intent to defraud). We conclude that the ULJ did not err by concluding that relator committed employment misconduct.

Affirmed.