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

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-2098**

Steven Carroll,  
Relator,

vs.

Department of Employment and Economic Development,  
Respondent.

**Filed August 20, 2012  
Affirmed in part, reversed in part, and remanded  
Larkin, Judge**

Department of Employment and Economic Development  
File No. 28565835-2

Dean K. Adams, Adams, Rizzi & Sween, P.A., Austin, Minnesota (for relator)

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Development, St. Paul, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Collins,  
Judge.\*

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\* 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## UNPUBLISHED OPINION

**LARKIN**, Judge

Relator challenges the determination of an unemployment-law judge (ULJ) that he is ineligible for unemployment benefits, arguing that he is available to work as an electrician and that he is actively seeking employment. Because the ULJ did not err in determining that employment as an electrician is no longer suitable for relator, we affirm in part. But because the ULJ did not fully develop the record and consider application of Minn. Stat. § 268.085, subd. 16(d) (2010), which is the specific standard that applies when an applicant seeks employment with a staffing service, we reverse in part and remand for further proceedings.

### FACTS

Relator Steven Carroll is an electrician by trade and a member of an electrician's union. On October 12, 2010, Carroll was laid off from his position as an electrician at Doug's Electric because of lack of work. Carroll established an unemployment-benefit account with respondent Minnesota Department of Employment and Economic Development (DEED). Carroll was found eligible for and received unemployment benefits. But after Carroll responded to a questionnaire from DEED regarding his job-search efforts and submitted documents from his doctor regarding his medical condition,<sup>1</sup> DEED determined that he is ineligible for benefits because he is not available for or actively seeking suitable employment. The ineligibility determination was based on a

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<sup>1</sup> Carroll has arthritis in both of his hips.

submission from Carroll's doctor, which states that "the pain [in Carroll's hips] is so severe that he is not able to work as an electrician."

Carroll appealed the ineligibility determination, and a ULJ held a de novo evidentiary hearing. The ULJ found that Carroll is not able to work as an electrician, but is otherwise available for employment. The ULJ made several findings regarding Carroll's efforts to find employment. The ULJ found that Carroll has posted his resume, which lists his experience as an electrician, on MinnesotaWorks.net. He has contacted the Minnesota Workforce Center and has met with a vocational counselor to discuss ways to acquire additional job skills. The ULJ found that Carroll is registered with one "staffing service agency" and "checks in with the staffing service agency on a weekly basis to see if they have work available within his restrictions." He also checks with his union for available positions. In addition, he networks with family, friends, and other electricians. Carroll applied for two electrician and engineering positions, with Hormel and the Mayo Clinic.

Because the majority of these efforts were directed toward finding employment as an electrician and the ULJ concluded that "work as an electrician is no longer suitable for Carroll" due to his medical problems, the ULJ determined that he is not actively seeking suitable employment and is therefore ineligible to receive unemployment benefits. This determination resulted in an overpayment of unemployment benefits. Carroll requested reconsideration, and the ULJ affirmed her original decision. This certiorari appeal follows.

## DECISION

When reviewing a ULJ's eligibility determination, we 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 the findings, inferences, conclusion, or decision are, in relevant part, made upon unlawful procedure, affected by other error of law, or unsupported by substantial evidence in view of the entire record as submitted. Minn. Stat. § 268.105, subd. 7(d) (2010). Minnesota courts have defined substantial evidence as: “(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).

An applicant is not eligible for unemployment benefits unless he is available for and actively seeking suitable employment. Minn. Stat. § 268.085, subd. 1(4), (5) (2010). “‘Available for suitable employment’ means an applicant is ready and willing to accept suitable employment. . . . An applicant may restrict availability to suitable employment, but there must be no other restrictions, either self-imposed or created by circumstances, temporary or permanent, that prevent accepting suitable employment.” *Id.*, subd. 15(a) (2010). “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) (2010).

Suitable employment is defined as “employment in the applicant’s labor market area that is reasonably related to the applicant’s qualifications.” Minn. Stat. § 268.035, subd. 23a(a) (2010). “In determining whether any employment is suitable for an applicant, the degree of risk involved to the health and safety, physical fitness, prior training, experience, length of unemployment, prospects for securing employment in the applicant’s customary occupation, and the distance of the employment from the applicant’s residence is considered.” *Id.*

#### *Suitable Employment Determination*

Carroll first argues that the ULJ erred by determining that Carroll is not able to work as an electrician. We are not persuaded. Carroll’s submission from his doctor states that he “is really quite disabled now” and that “[h]is pain is so severe that he is not able to work as an electrician.” The record therefore belies Carroll’s assertion that “[n]o medical record stated that [he] could not work as an electrician.” Moreover, at the hearing, the ULJ asked Carroll whether he would be able to work as an electrician if such a position were offered through the union. In response, Carroll stated: “I don’t have a choice. I would have to use some pain pills and probably go out and try to get . . . my only hope would be that I could get onto a job where I didn’t have to do any digging or any high climbing.” But Carroll acknowledged that “[b]eing an electrician you’ve got a lot of physical activity up and down ladders, out on catwalks, digging holes, anything you

know with your hips and legs is not gonna do my hip any good.” Carroll also acknowledged that working as an electrician is probably not safe for him but stated that he did not “know what else to do.”

When determining whether employment is suitable for an applicant, “the degree of risk involved to the health and safety” of the individual must be considered. *Id.* Substantial evidence in the record demonstrates that employment as an electrician poses a significant risk to Carroll’s health and safety. The ULJ therefore did not err by determining that employment as an electrician is not suitable for Carroll.

*Actively Seeking Determination*

Carroll also argues that the ULJ erred by determining that Carroll is not “actively seeking suitable employment.” Carroll argues that he “has complied with Minn. Stat. § 268.085, subd. 16, as he checked in with his prior employer, he was registered with a staffing service in Austin, Minnesota who claimed that he was actively looking for work through the services provided . . . [and] was involved in an occupation where hiring in this locale is done through a union.” Carroll cites the following language from the statute to support this argument:

(b) To be considered “actively seeking suitable employment” an applicant must, when reasonable, contact those employers from whom the applicant was laid off because of lack of work and request suitable employment.

. . . .

(d) Actively seeking a suitable job assignment or other employment with a staffing service is considered actively seeking suitable employment.

(e) An applicant who is seeking employment only through a union is considered actively seeking suitable employment if the applicant is in an occupation where hiring in that locality is done through the union. If the applicant is a union member who is restricted to obtaining employment among signatory contractors in the construction industry, seeking employment only with those signatory contractors is considered actively seeking employment. The applicant must be a union member in good standing, registered with the union for employment, and in compliance with other union rules to be considered “actively seeking suitable employment.”

Minn. Stat. § 268.085, subd. 16(b), (d), (e).

Carroll’s argument under section 268.085, subdivision 16(b) and (e) is unavailing. First, although Carroll contacted his previous employer, Doug’s Electric, to request employment, the previous employer cannot provide Carroll with suitable employment, because employment as an electrician is no longer suitable for Carroll. Second, subdivision 16(e) only applies if an applicant “is seeking employment *only* through a union.” *Id.*, subd. 16(e) (emphasis added). Because Carroll undisputedly sought work through other methods, this provision does not apply.

But Carroll’s argument under section 268.085, subdivision 16(d), has merit. The ULJ recognized that Carroll is seeking employment with a “staffing service employer, Specialty Personnel Services.” A “staffing service” is defined as “an employer whose business involves employing individuals directly for the purpose of furnishing temporary assignment workers to clients of the staffing service.” Minn. Stat. § 268.035, subd. 21d (2010). Although the term “staffing service” is statutorily defined and the ULJ’s

decisions state that Carroll is registered with a “staffing service” and seeking employment with a “staffing service,” the decisions do not reference the statutory definition.

The record does not substantially support the ULJ’s finding that Specialty Personnel Services Inc. is a “staffing service” as that term is defined in statute. In fact, the record is inadequate to allow a determination of this issue, because there is no evidence regarding whether Specialty Personnel Services Inc. furnishes “temporary assignment workers” to its clients. *Id.* But the issue was raised at the evidentiary hearing, and the ULJ was therefore obligated to develop a record adequate to resolve the issue. *See* Minn. Stat. § 268.105, subd. 1(b) (2010) (“The evidentiary hearing is conducted by an unemployment law judge as an evidence gathering inquiry. . . . The unemployment law judge must ensure that all relevant facts are clearly and fully developed.”).

Moreover, if Specialty Personnel Services Inc. is a staffing service as defined by statute, the ULJ erred in failing to address whether Carroll is “actively seeking a suitable job assignment or other employment with a staffing service.” Minn. Stat. § 268.085, subd. 16(d). The record contains a letter from Specialty Personnel Services Inc. dated September 8, 2011, that states:

Steven Carroll has been actively looking for work through our services since September 10th, 2010. *He checks in weekly and has a positive attitude while looking for work.*

*While he is highly educated in the electrical field, we do not get jobs in that related field of work. Although we have not been able to find work for Mr. Carroll, we feel that he has been trying hard to find work and always checks in with us on*

*a weekly basis. Our service works in all trades and industries and we try hard to fit the people with the job that comes in.*

*Due to Mr. Carroll's medical condition we are trying to find him something clerical that would allow him to move around so he does not have to sit or stand all day. This can be found and we have placed people with medical conditions before but unfortunately it can take extra time to find the work he is qualified to do.*

*. . . Even with more skills there is still a limited amount of work available within our surrounding area.*

(Emphasis added.)

On this record, the ULJ found that “Carroll checks in with the staffing service agency on a weekly basis to see if they have work available within his restrictions.” But the ULJ concluded that “seeking suitable employment through one staffing service employer does not reflect the reasonable, diligent efforts an individual in similar circumstances would make if genuinely interested in obtaining suitable employment.” In so concluding, the ULJ appears to have applied the general actively-seeking-employment definition under section 268.085, subdivision 16(a), instead of the specific standard that applies under section 268.085, subdivision 16(d), when an applicant seeks employment with a staffing service. DEED acknowledges the potential application of the staffing-service standard and asserts that “[t]he fact that Carroll was registered with a staffing agency does not mean that ‘no applications for employment were necessary,’ and he was somehow relieved of his responsibility to *actively* search for employment.” But in the absence of any citation to legal authority or legal argument, DEED’s assertion is not persuasive.

Because the ULJ's finding that Specialty Personnel Services Inc. is a staffing service, as that term is defined under subdivision 16(d), is not supported by substantial evidence in the record, the finding is in error. But because the possibility that Specialty Personnel Services Inc. is a staffing service was raised at the hearing before the ULJ and the ULJ did not develop an adequate record to determine the issue, we reverse the ULJ's determination that Carroll is not actively seeking suitable employment and remand for further proceedings to determine whether Specialty Personnel Services Inc. is a "staffing service" under Minn. Stat. § 268.035, subd. 21d. If the ULJ determines that Specialty Personnel Services Inc. is a staffing service, the ULJ must then determine whether Carroll was actively seeking suitable employment under Minn. Stat. § 268.085, subd. 16(d).

**Affirmed in part, reversed in part, and remanded.**