

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1737**

Joshua C. Steel,
Relator,

vs.

Department of Employment and Economic Development,
Respondent.

**Filed June 9, 2014
Affirmed
Schellhas, Judge
Dissenting, Klaphake, Judge***

Department of Employment and Economic Development
File No. 31209581-3

Peter B. Knapp, Owais Ahmed (certified student attorney), William Mitchell Law Clinic,
St. Paul, Minnesota (for relator)

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

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

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

In this certiorari appeal, relator argues that the unemployment-law judge's decision is not supported by substantial evidence. We affirm.

FACTS

Relator Joshua Steel worked part time as a massage therapist for Lifetime Fitness until December 2012, when Lifetime Fitness terminated his employment. Steel established an unemployment-benefit account with respondent Minnesota Department of Employment and Economic Development (DEED) in December and received a weekly benefit of \$242 for 18 weeks. Before establishing his account with DEED, Steel took steps to start his own business, Steel Wellness Center, LLC, offering services such as personal training and massage and physical therapy.

But, for each of the 18 weeks in which Steel received unemployment benefits—until May 2013, less than one week after DEED initiated an audit of Steel's unemployment-benefits account—Steel reported to DEED that he did not work. In May, DEED determined that Steel was “working 32 or more combined total hours in employment, self-employment, or volunteer work”; was ineligible to receive unemployment benefits; and had been overpaid unemployment benefits in the amount of \$4,114. DEED also determined that Steel's receipt of benefits was the result of fraud and imposed a penalty of \$1,645.60.

Steel appealed, and an unemployment-law judge (ULJ) found that Steel performed 32 or more hours of services in a week; concluded that Steel was not eligible for

unemployment benefits for that period and was overpaid benefits in the total amount of \$4,114, through fraud; and assessed a penalty in the amount of \$1,645.60. Steel requested reconsideration, and the ULJ affirmed.

This certiorari appeal follows.

D E C I S I O N

This court may affirm, remand to the ULJ for further proceedings, reverse, or modify the decision of the ULJ if the substantial rights of the relator are prejudiced because the findings, conclusions, or decision are affected by an error of law, are unsupported by substantial evidence, or are arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d)(4)–(6) (2012). “[T]he determination of whether an employee was properly disqualified from receipt of unemployment compensation benefits is a question of law on which we are free to exercise our independent judgment.” *Jenkins v. American Exp. Financial Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). “[T]he appellate court is to review the ULJ’s factual findings in the light most favorable to the decision.” *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). We give deference to the ULJ’s credibility determinations and will not disturb those findings if the evidence substantially sustains them. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We “will narrowly construe the disqualification provisions of the statute in light of their remedial nature, as well as the policy that unemployment compensation is paid only to those persons unemployed through no fault of their own.” *Stagg*, 796 N.W.2d at 315 (quotations omitted); Minn. Stat. §§ 268.03, subd. 1, .031, subd. 2 (2012) (same).

In this case, as stated by the ULJ in his decision, “[t]he issue is whether or not Steel is ineligible to receive unemployment benefits because he was not unemployed during this period, i.e. performing services 32 or more hours a week.” *See* Minn. Stat. § 268.085, subd. 2(6) (2012) (providing that an applicant is not eligible for benefits for any week “that the applicant is performing services 32 hours or more, in employment, covered employment, noncovered employment, volunteer work, or self-employment regardless of the amount of any earnings”). The ULJ summarized the evidence as follows:

When questioned, Steel was unable even to hazard a guess as to how many hours a week he was averaging working in self-employment and volunteer work. The information he provided was insufficient to support his contention that he was working through less than 32 hours a week.

The [ULJ] does not find Steel’s self-serving suggestion that he was putting in less than the 32 hours a week, during each of the weeks that he requested benefits, to be particularly credible.

Steel argues that the ULJ’s finding that he performed 32 or more hours of services in the weeks for which he received unemployment benefits is not supported by substantial evidence. We disagree. Prior to Steel’s hearing before the ULJ, Steel was asked to provide information to support his job-seeking activities and to document the level of his involvement in self-employment in his operation of Steel Wellness Center, LLC. Steel’s response to the initial request was “very deficient,” and, to ensure a fair hearing, the ULJ rescheduled the hearing to allow Steel to gather additional information. *See* Minn. Stat. § 268.105, subd. 1(b) (2012) (providing that the hearing is conducted as

“an evidence gathering inquiry,” and the ULJ “must ensure that all relevant facts are clearly and fully developed.”); Minn. R. 3310.2921 (2013) (“The [ULJ] should assist unrepresented parties in the presentation of evidence” and “must exercise control over the hearing procedure in a manner that protects the parties’ rights to a fair hearing.”).

Before the rescheduled hearing, Steel provided only a copy of his business checking account statement and a handwritten “two-page listing of client appointment hours for the period from December 2012, through the first week of June, 2013.” Based on his handwritten list, during the 18 weeks for which Steel requested unemployment benefits, he spent between 1.5 and 11.5 hours per week providing personal training, massage therapy, and physical therapy to clients. Steel acknowledged that he also spent time in the management and promotion of his business, scheduling client sessions, accounting for the business’s finances, securing equipment and facilities, marketing, and volunteering. But, when questioned about his other activities relating to self-employment and volunteer work, Steel could not even provide a guess as to the number of hours he spent each week. The ULJ found Steel’s testimony that he was working less than 32 hours per week to be self-serving and not credible. In deference to the ULJ’s credibility determination, we conclude that substantial evidence supports the ULJ’s finding that Steel spent 32 or more hours per week on his self-employment and volunteer activities during the weeks in which he requested unemployment benefits.

Steel also argues that the ULJ erred by imposing a fraud penalty of \$1,645.60. We disagree. “Any applicant who receives unemployment benefits by knowingly misrepresenting, misstating, or failing to disclose any material fact, or who makes a false

statement or representation without a good faith belief as to the correctness of the statement or representation, has committed fraud.” Minn. Stat. § 268.18, subd. 2(a) (2012). After a determination that benefits were obtained by fraud, the claimant must promptly repay the benefits, and the commissioner “must” assess a penalty of 40% of the amount fraudulently obtained. *Id.* “Whether a claimant knowingly and willfully misrepresented or misstated material facts to obtain benefits involves the credibility of the claimant’s testimony” *Burnevik v. Dep’t of Econ. Sec.*, 367 N.W.2d 681, 682–83 (Minn. App. 1985) (addressing overpayment-through-fraud decision under previous version of the statute). We defer to a ULJ on credibility issues. *Skarhus*, 721 N.W.2d at 344.

Here, the ULJ found that

[d]uring the first 18 weeks that he requested benefits, Steel gave no indication that he was engaged in self-employment or volunteer work at all. This was clearly false. Steel justified this by stating that his expenses exceeded his revenue and that the system did not allow him to show this. The [ULJ] is not persuaded that this was a good reason for providing false information. The [ULJ] is persuaded that by not disclosing his self-employment and volunteer work when requesting benefits, which allowed him to be paid benefits to which he was not entitled, Steel committed [fraud] as defined above and the imposition of the fraud penalty under the statute is deemed appropriate.

The ULJ rejected Steel’s argument that his inability to report that his business expenses exceeded his business revenue on DEED’s online reporting system justified his failure to report his self-employment. Indeed, Steel did not report his difficulty using DEED’s online reporting system until May 2013, shortly after DEED initiated an audit of

his file. Until then, Steel provided false information and received benefits for 18 weeks. Deferring to the ULJ's credibility determination, we conclude that the ULJ did not err by imposing a fraud penalty of \$1,645.60.

Affirmed.

KLAPHAKE, Judge (dissenting).

I respectfully dissent because the ULJ's decision is not supported by substantial evidence.

Substantial Evidence

Substantial evidence includes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002). Here, the ULJ received evidence relating to Steel's client sessions during the 18-week period that he received unemployment benefits. Steel's weekly activities as to client sessions varied considerably, ranging between 1.5 and 11.5 hours per week. But rather than engaging in a week-by-week analysis of Steel's other work and volunteer activities and adding those hours to the respective hours Steel spent in client sessions in a given week, the ULJ simply averaged the hours Steel spent in client sessions and attributed those hours to each of the weeks that Steel received benefits. Relying on this flawed methodology, which yielded an average of 7 hours per week in client sessions, the ULJ further erred by inferring that Steel spent at least 25 additional hours every week performing his other business-related activities.

Besides the client sessions, the ULJ found that Steel engaged in activities to manage and promote his business, such as scheduling, accounting, securing equipment and facilities, general marketing, and volunteering. The nature of these activities and the time Steel spent on them appear to vary from week to week. But the record does not contain evidence of the amount of time per week that Steel spent regularly performing

these activities, and the ULJ did not inquire to what extent Steel performed any of these activities in a given week. *See* Minn. Stat. § 268.105, subd. 1(b) (2012) (providing that the ULJ “must ensure that all relevant facts are clearly and fully developed.”). It was only in response to the ULJ’s broad request for an estimate of the average number of hours he spent on his business-related activities, that Steel could not provide a guess, stating that “[b]etween doing [activities related to his business] and raising three kids and looking for another job[,] there’s no way to calculate that.”

Even based on the ULJ’s averaging of 7 hours per week in client sessions, the record is devoid of evidence on how many additional hours per week Steel spent scheduling those sessions. Besides a cellphone application that accepted credit card payments and a checking account that tracked his business expenses and revenue, no record evidence suggests that Steel spent a significant amount of time managing his business’s finances. Relating to securing equipment and facilities, Steel testified that he rents space for his business from a chiropractor, and the record indicates that Steel incurred some expenses in purchasing business materials. But there is no evidence that Steel’s business moved to another location or that Steel spent a significant amount of time purchasing equipment on a weekly basis. As for general marketing activities and volunteering, the record only contains evidence that Steel had four meetings with chiropractors over a span of 18 weeks, that he displayed posters at the store located across from his business, and that he volunteered at three charity events with the hope of networking with potential customers. “Circumstantial evidence is adequate to support a decision if the evidence justifies the fact-finder’s reasonable inferences and these

inferences outweigh conflicting evidence.” *Kellogg v. Woods*, 720 N.W.2d 845, 851 (Minn. App. 2006). In this case, however, while there may be evidence that Steel worked more than zero hours per week on his business, the evidence and testimony do not support the inference that Steel’s self-employment activities exceeded 32 hours in any given week, much less in *every* week for the 18 weeks that Steel received unemployment benefits. The ULJ’s decision is not supported by substantial evidence, and Steel is entitled to reversal or remand for findings based on a more developed record.

Fraud

Steel also argues that the ULJ erred by imposing the \$1,645.60 fraud penalty. “Any applicant who receives unemployment benefits by knowingly misrepresenting, misstating, or failing to disclose any material fact, or who makes a false statement or representation *without a good faith belief as to the correctness of the statement or representation*, has committed fraud.” Minn. Stat. § 268.18, subd. 2(a) (2012) (emphasis added). Whether a claimant fraudulently obtained benefits involves a credibility determination, *Burnevik v. Dep’t of Econ. Sec.*, 367 N.W.2d 681, 683 (Minn. App. 1985), and we generally defer to the ULJ on credibility issues, *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). But Minnesota law provides that “[w]hen the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the [ULJ] must set out the reason for crediting or discrediting that testimony.” Minn. Stat. § 268.105, subd. 1(c) (2012); *Ywswf*, 726 N.W.2d at 531-32. And failure of the ULJ to set forth the reasons for

discrediting testimony is basis for reversal. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007).

Steel explained that he did not have earnings because his business expenses exceeded his revenue. But when he responded that he was self-employed, DEED's online system would not allow him to report zero or a negative number, terminating Steel's session.¹ To mitigate this problem, Steel answered "no," in response to the question of whether he was working. In the second week of May, Steel indicated that he had worked for his business and reported earnings of \$160. But in the third week of May, despite working 25 hours, Steel again had negative or zero earnings. Steel contacted DEED to inquire about the error, and a DEED employee told him to enter \$1 as his earnings.² The ULJ ruled that Steel's explanation was not a "good reason" for reporting that he was not working, and the ULJ did not find Steel's "self-serving suggestion that he was putting in less than 32 hours a week . . . to be particularly credible." But the ULJ neither set out the reasons for discrediting Steel's explanation nor

¹ DEED asserts that this issue has since been corrected, and applicants may now report a lack of earnings.

² Notably, this advice may have constituted a knowingly false statement or representation because Steel's business revenue did not exceed his expenses.

assessed whether Steel's response was made in good faith.³ The ULJ's fraud decision is not supported by substantial evidence and should be reversed. I respectfully dissent.

³ While we generally defer to the ULJ on credibility issues, under these circumstances, I find it questionable to afford deference to a credibility determination that is made based on written responses to an inadequate DEED processing system and a telephonic hearing at which only voices may be heard.