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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-743**

Erik Ahl,
Relator,

vs.

Department of Employment and Economic Development,
Respondent.

**Filed December 14, 2010
Reversed and remanded
Shumaker, Judge**

Department of Employment and Economic Development
File No. 24168657-3

Erik S. Ahl, Minneapolis, Minnesota (pro se relator)

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

Considered and decided by Shumaker, Presiding Judge; Worke, Judge; and
Collins, 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UNPUBLISHED OPINION

SHUMAKER, Judge

Relator challenges the decision by the unemployment-law judge (ULJ) on reconsideration that his appeal from the initial determination of ineligibility was untimely and should be dismissed. Because relator raised the factual issue of whether the determination had been mailed to him, we reverse, and remand for an evidentiary hearing in which the ULJ can make a factual inquiry into whether the Minnesota Department of Employment and Economic Development (DEED) mailed the determination of ineligibility to relator, triggering the time to appeal to the ULJ.

FACTS

Relator Erik Ahl applied for unemployment benefits and established a benefit account effective October 4, 2009, with respondent DEED. DEED claims it mailed Ahl a notice of determination of ineligibility on December 28, 2009, finding him ineligible for unemployment benefits because he failed to participate in reemployment assistance services as required under Minnesota Statutes section 268.085, subdivision 1(7) (Supp. 2009). The determination of ineligibility stated it would become final unless an appeal was filed by January 19, 2010. Ahl claims he did not receive the determination in the mail. Ahl filed an appeal online on February 4, 2010.

On February 5, 2010, the ULJ summarily dismissed Ahl's appeal as untimely, without conducting a hearing or obtaining testimony. Ahl filed a timely request for reconsideration online on February 8, 2010. In his request, Ahl asserted he never received notice from DEED requiring him to attend an unemployment class, did not

receive mail stating that he “needed to file with unemployment to get it restarted,” and contended that, “I keep applying every week and no message got to me that I could lose my unemployment.” Without ordering an additional evidentiary hearing, the ULJ affirmed on reconsideration, and Ahl filed a timely certiorari appeal.

D E C I S I O N

This court may affirm, remand, reverse, or modify the decision of a ULJ if the substantial rights of the relator may have been prejudiced because the findings, conclusion, or decision are affected by an error of law or are unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2008). “An agency decision to dismiss an appeal as untimely is a question of law, which we review de novo.” *Kennedy v. Am. Paper Recycling Corp.*, 714 N.W.2d 738, 739 (Minn. App. 2006).

Ahl challenges the decision by the ULJ that his appeal was not timely and asserts he never received a determination of ineligibility in the mail.

A determination of ineligibility becomes final unless an appeal is filed within 20 calendar days after DEED sends the determination. Minn. Stat. § 268.101, subd. 2(f) (Supp. 2009). The statutory time period for appeal commences on the date of mailing. *Jackson v. Dep’t of Manpower Servs.*, 296 Minn. 500, 501, 207 N.W.2d 62, 63 (1973). Therefore, if the determination has not been mailed, the time for appeal cannot begin to run.

The parties dispute whether or not the determination was mailed. DEED claims it mailed to Ahl a determination of ineligibility on December 28, 2009, to his address on file and that the determination was also available to Ahl when he

accessed his online account. Ahl's deadline for filing an appeal was January 19, 2010. It is undisputed that Ahl did not file an appeal until February 4, 2010. Ahl contends he never received a determination in the mail. Without conducting a fact-finding inquiry into this dispute, the ULJ summarily concluded a determination was mailed on December 28, 2009.

DEED argues that actual notice is not required for the statutory appeal period to run and that receipt of the mailing is not determinative for purposes of the law. DEED cites *Johnson v. Metro. Med. Ctr.* and *Grewe v. Comm'r of Econ. Sec.*, where this court held that it is the mailing of the determination rather than actual receipt of the determination that triggers the appeal period. *Johnson v. Metro. Med. Ctr.*, 395 N.W.2d 380, 382 (Minn. App. 1986); *Grewe v. Comm'r of Econ. Sec.*, 385 N.W.2d 894, 895 (Minn. App. 1986) We agree, but neither *Johnson* nor *Grewe* is authority for the proposition that the issue of whether notice was in fact mailed should be determined without a factual inquiry. *Mgmt. Five, Inc. v. Comm'r of Jobs & Training*, 485 N.W.2d 323, 324 (Minn. App. 1992).

The record contains a copy of the determination of ineligibility dated December 28, 2009, but does not include any evidence that DEED actually mailed the determination. Ahl filed an appeal online on February 4, 2010, asserting non-receipt of the determination in the mail as the reason for appeal. The record is devoid of the type of evidence presented in *Johnson* and *Grewe* that shows that DEED mailed a determination to the relator or that the relator received other correspondence from DEED at the same address without incident.

DEED also cites *Smith v. Masterson Personnel, Inc.*, which is factually distinguishable from the instant case. *Smith v. Masterson Pers., Inc.*, 483 N.W.2d 111 (Minn. App. 1992). In *Smith*, this court held that the commissioner did not err as a matter of law by failing to consider a delay in relator's receipt of a determination caused by the United States Postal Service when forwarding relator's mail. *Id.* at 112. Here, Ahl does not allege a mere delay in receipt of the determination; rather he asserts he *never* received the determination. Also, unlike Ahl, the *Smith* relator voluntarily quit his job without good cause and consequently was disqualified from receiving benefits and had been overpaid benefits. In this case, upon rescheduling participation in reemployment services, Ahl can again become eligible for benefits. See Minn. Stat. § 268.05, subd. 1(7).

Finally, DEED argues that the time for appeal to this court from a DEED determination is absolute and an untimely appeal must be dismissed for lack of jurisdiction. See *Cole v. Holiday Inns, Inc.*, 347 N.W.2d 72, 73 (Minn. App. 1984) (holding that the time for appeal from a department determination is "absolute" and there are no provisions for extensions or exceptions); see also *King v. Univ. of Minn.*, 387 N.W.2d 675, 677 (Minn. App. 1986) (stating time limitations for appeals from department decisions are jurisdictional and must be strictly construed), *review denied* (Minn. Aug. 13, 1986). But when a relator challenged a summary determination that an appeal was untimely and submitted affidavits asserting that he had not received the referee's decision in spite of DEED's assertion that it had been mailed, this court reversed and remanded for an evidentiary hearing. *Mgmt. Five*, 485 N.W.2d at 325. Concluding

that the relator should have been afforded an opportunity to present evidence, this court ruled that “the department cannot summarily dismiss the claim [of a failure to mail] without conducting a factual inquiry to distinguish the meritorious claims from the frivolous.” *Id.* at 325.

Although time for appeal from a DEED determination is absolute, that assumes the time for appeal was properly triggered. The triggering event is the mailing of a determination of ineligibility. *See Jackson*, 296 Minn. at 500-501, 207 N.W.2d at 63. The ULJ’s order on reconsideration states that evidence shows DEED mailed a determination of ineligibility to Ahl, but the record does not contain any evidence of mailing, only a dated copy of the determination. Without evidence of mailing, there is no proof of the trigger of the appeal time and the ULJ’s dismissal rests merely on an assumption. The ULJ has a responsibility to ensure that all relevant facts are developed at a hearing. Minn. Stat. § 268.105, subd. 1(b) (Supp. 2009). When a party is not represented by counsel, the ULJ should assist the party with presenting evidence. Minn. R. 3310.2921 (2009). After the hearing is concluded, the ULJ must make findings of fact and a decision based on the evidence obtained. Minn. Stat. § 268.105, subd. 1(c) (Supp. 2009). Accordingly, we reverse and remand for the ULJ to hold an evidentiary hearing to address the issue of whether the determination of ineligibility was mailed to Ahl.

Reversed and remanded.