

A06-677

STATE OF MINNESOTA
IN COURT OF APPEALS

DANIEL P. WICHMANN,
Relator,
v.

TRAVALIA & U.S. DIRECTIVES, INC.,
Respondent Employer and

**DEPARTMENT OF EMPLOYMENT AND
ECONOMIC DEVELOPMENT,**
Respondent.

RELATOR'S BRIEF AND APPENDIX

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STATEMENT OF LEGAL ISSUES

1. Did the ULJ state an improper standard for the Employee's responsibility to the Employer in cases where there is absence caused by illness?

The ULJ stated that the Employee was required to "see that another employee took care of his duties" when he was sick.

Most apposite authority:

Minn. Stat. § 268.095, subd. 4(1) (2004)

2. Did the ULJ fail to make statutorily required credibility findings where the case hinged on the credibility of the participants?

The ULJ made no credibility finding.

Most Apposite Authority:

Minn. Stat. § 268.105, subd. 1 (c) (2005)

3. Did the ULJ fail in its duties to conduct the hearing as an evidence gathering inquiry and to assist pro se parties?

The ULJ did not explicitly consider these duties.

Miller v. Int'l Express Corp., 495 N.W.2d 616, 618 (Minn. App. 1993)

Ntamere v. DecisionOne Corporation, 673 N.W.2d 179 (Minn.App. 2003)

Minn. Stat. § 268.105, subd. 1 (b) (2005)

Minn. R. 3310.2921 (2005)

STATEMENT OF THE CASE

Relator Daniel Wichmann was discharged from a position with Respondent on November 23, 2005. (T-13) Relator was disqualified from unemployment insurance for

misconduct. Relator appealed his initial determination of disqualification from the Department of Employment and Economic Development. (A-2) An unemployment telephone hearing was held on January 30, 2006 before Unemployment Law Judge Kent E. Todd. (A-2) In a decision dated January 31, 2006, the ULJ upheld relator's disqualification. *Id.* Relator requested reconsideration of the ULJ's decision. In a decision dated March 6, 2006, the ULJ issued an Order of Affirmation of its decision. (A-1) Relator sought review of the ULJ's March 6, 2006 decision by Writ of Certiorari. (A-15)

STATEMENT OF FACTS

Relator Daniel P. Wichmann worked at the Minnesota Horse & Hunt Club from May 10, 2003 until approximately November 23, 2005 as a full-time stable manager in the company's horse boarding and training operation. (T-13-14) He was paid \$10 per hour plus lodging. (T-13)

The Horse & Hunt Club noted a number of concerns that it had about Mr. Wichmann's employment prior to his termination. The first of these incidents addressed by the Unemployment Law Judge in his Order occurred on May 23, 2005. On that day, Mr. Wichmann was attempting to start a tractor, which apparently then damaged a horse trailer. (A-6) Neither Relator nor Respondent was allowed by the ULJ to provide any testimony concerning this incident. It does not appear to form the basis for the ULJ's decision that Mr. Wichmann was terminated for employment misconduct.

The employer also referenced an incident on June 13, 2005 when it alleges that

Mr. Wichmann was in jail pursuant to an old warrant. (T-16; A-6) The ULJ did not allow Mr. Wichmann to provide any testimony concerning this incident, and it does not appear to form the basis for the ULJ's misconduct determination.

The employer asserts that the conduct that Mr. Wichmann was terminated for commenced approximately November 7, 2005. The employer testified that on November 7, 2005, Mr. Wichmann "didn't show up for work, he didn't call." In its "File Notes", the employer concedes that Mr. Wichmann "arrived around noon to 1:00 p.m." (A-6) Mr. Wichmann testified that he had been working at the time that he made a cell phone call to his girlfriend that is recorded as occurring at 6:13 a.m. on his cell phone bill. (T-31) He knew that at that time he "had to unhook the horse trailer from taking that horse to the U of M that was colicking." (T-31) His time sheet notes that he clocked in that morning as of 6:42 a.m. (A-11) The employer testified that he handwrote that he began work at 5:00 a.m. on that day. (T-19)

The employer in its "File Notes" referenced an incident occurring on November 9, 2006 in which Mr. Wichmann was threatened with a loaded gun by someone named Ken Larson. (A-7) The ULJ does not address this issue as employment misconduct.

The employer reported that on November 16 and November 18, the horses had not been cared for as of 8:00 a.m. and that Ms. Urseth had to wake Mr. Wichmann up on each of those days. (A-7-8) Mr. Wichmann disputed in his testimony that he was late to work on November 16. (T-32) He wrote on his time card that he began work at 8:00 a.m. on November 16. (A-11) The time card for November 17 is punched as of 5:54

a.m. (A-11) The time card for November 18 had an 8:30 a.m. start time written in. The ULJ did not specifically ask Mr. Wichmann about November 18.

The employer noted that on November 21, 2005, Mr. Wichmann clocked in from 2:05 a.m. to 7:27 a.m. to feed the horses. (A-8) He did not complete the rest of his shift because he was sick. *Id.* On November 22 and 23, he missed all of his work, according to the employer. (T-21) Mr. Wichmann was asked by the ULJ if he called Ms. Urseth to inform her that he was sick. He answered, “Yes, sir, she knew it. The employer testified that she knocked on his door on each of those mornings and admitted that “he looked terrible”. (T-21) Mr. Wichmann testified that Ms. Urseth told him to “get up and just at least feed, [and] I will find somebody” to cover the rest of the shift. (T-34) Mr. Wichmann testified that he fed the horses each morning even though he was ill. *Id.*

Mr. Wichmann was discharged by Mr. Correll and Ms. Urseth on the night of November 23. (T-35) He testified that he did some additional work repairing a fence for the employer on November 25. (T-38)

Mr. Wichmann offered testimony that the employer was trying to terminate his employment because the number of horses had decreased from 36 horses “down to 11 or 12” (T-29) and the company was “financially in grave danger.” (T-35) He offered testimony that the employer was trying to make him quit by postponing his vacation twice. (T-35) Finally, he testified that he had demanded his overtime pay from his employer. (T-35)

DEED's initial determination, dated January 9, 2006 was that Mr. Wichmann was discharged for misconduct. He appealed the determination in a telephone hearing dated January 30, 2006. ULJ Kent E. Todd issued a written decision dated January 31, 2006 upholding the determination of misconduct. Mr. Wichmann requested reconsideration. In an Order of Affirmation dated March 6, 2006, Kent E. Todd affirmed his January 31, 2006 decision.

STANDARD OF REVIEW

This Court reviews the decision of the Unemployment Law Judge under the following statutory framework:

The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because of the findings, inferences, conclusion, or decision are:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious.

Minn. Stat. § 268.105, subd. 7(d)(1)-(6) (Supp. 2005) (effective as to Unemployment Law Judge decisions issued on and after June 26, 2005). This language is nearly identical to the Minnesota Administrative Procedure Act's judge review standard at Minn. Stat. § 14.69 (a)-(f). It is appropriate to use the MAPA standard because the

Department of Employment and Economic Development is and administrative agency that makes quasi-judicial decisions through a hearing process. *Cf. Arvig Telephone Co. v. Northwestern Bell Telephone Co.*, 270 N.W.2d 111, 116 (Minn. 1978) (“Agency determinations which are legislative in character receive an extremely limited review on appeal, while quasi-judicial actions are somewhat more closely scrutinized.”)

Prior to the 2005 amendment to § 268.105, the Supreme Court in *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002), cited *Ress v. Abbott Northwestern Hosp., Inc.*, 448 N.W.2d 519, 523 (Minn. 1989), for this statement of the standard of review of findings of fact in unemployment insurance cases:

We review the commissioner’s factual findings in the light most favorable to the commissioner’s decision and will not disturb them as long as there is evidence that reasonably tends to sustain those findings.

But the Court’s deference to the Commissioner’s findings is not unlimited. *Neve v. Austin Daily Herald*, 552 N.W.2d 45, 47 (Minn.App. 1996). A finding of fact may be reversed if it is arbitrary and capricious or not reasonably supported by the record as a whole. *See Abbey v. Contract Programing Specialists, Inc.*, 377 N.W.2d 28, 31 (Minn.App. 1985) (holding that the Commissioner was arbitrary in rejecting a credibility finding where the case had been remanded for such a finding).

The Commissioner’s decision must be supported by reliable, probative, and substantial evidence. Minn. Rules 3310.2922. That is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Soo Line R.R. Co. v. Minnesota Dep’t of Transp.*, 304 N.W.2d 305, 306 (Minn. 1981); *cf. Schmidgall*, 644

N.W.2d at 804 (Commissioner’s findings are upheld if there is evidence reasonably tending to sustain them). Substantial evidence means more than a scintilla of evidence, more than “some” evidence, and more than “any” evidence. *Hiawatha Aviation of Rochester, Inc. v. Minnesota Dep’t of Health*, 375 N.W.2d 496, 501 (Minn. 1986). A decision cannot be affirmed merely on the basis of evidence which in and of itself justifies it, without taking into account contradictory evidence from which conflicting inferences can be drawn. *Liffrig v. Independent Sch. Dist. No. 442*, 292 N.W.2d 726, 729 (Minn. 1980).

The Court is “free to exercise its independent judgment” on questions of law, *Smith v. Employers’ Overload Co.*, 314 N.W.2d 220, 221 (Minn. 1981), which are reviewed on a *de novo* basis, without deference. *Id.* The Commissioner’s conclusions of law are not binding if they do not have reasonable support in the findings of fact. *Zepp v. Arthur Treacher Fish & Chips, Inc.*, 272 N.W.2d 262, 263 (Minn. 1978); *Bray v. Dogs & Cats Ltd.*, 679 N.W.2d 182, 184 (Minn.App. 2004).

ARGUMENT

I. The ULJ states an improper standard for the Employee’s responsibility to the Employer in cases where there is absence caused by illness

An employee who is discharged for employment misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2004).

Employment misconduct is defined as “any intentional, negligent, or indifferent conduct, on the job or off the job (1) that evinces a serious violation of the standards of behavior

the employer has the right to reasonably expect of the employee, or (2) that displays a substantial lack of concern for the employment.” *Id.*, subd. 6(a). But employment misconduct does not include “*absence because of illness or injury with proper notice to the employer.*” *Id.* (emphasis added).

The ULJ concedes in his Order that Mr. Wichmann was sick in late November and that these absences from illness were a cause of Mr. Wichmann’s termination from employment. However, the ULJ notes that “it was [Mr. Wichmann’s] responsibility to see that another employee took care of these duties and he had not done so.” This is not a requirement of the illness exception to the misconduct statute. *See Davis v. Rainbow Foods*, 2006 WL 46783 (Minn.App. Feb. 28, 2006) at *2 (reversing the ULJ where the ULJ followed the employer’s policy requiring a doctor’s note for absences due to illness rather than the statutory standard of “proper notice” to the employer).

Thus, here, where there is evidence that the employee notified the employer of his illness and where the illness resulted in Mr. Wichmann’s termination, this matter should be reversed.

**II. The ULJ failed to make statutorily required credibility findings where
The case hinged on the credibility of the participants**

“When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony.” Minn. Stat. §

268.105, subd. 1(c) (Supp. 2005).¹

Here, the hearing hinged solely on the credibility of the parties. Each of the employer's witnesses was an employee of the company. Mr. Wichmann had no other witnesses than himself. The employer's documentary evidence consisted largely of documents prepared by the employer for DEED, "File Notes", which also appear to have been prepared in anticipation of Mr. Wichmann's unemployment hearing, and additional statements and court printouts that refer to older incidents that do not appear to form the basis for Mr. Wichmann's discharge.

At the hearing, the employer's witnesses testified that Mr. Wichmann's attendance and recording of his time on time cards started to be a problem beginning on November 7, 2005 through the date of his termination on approximately November 23, 2005. (T-16-21) Mr. Wichmann disputed that he had added time to his time card when he was not working. (T-31-32) He testified that he had always handwritten times on the card and that he was instructed to do so. (T-31) He testified that the number of horses had decreased from 36 horses down to 11 or 12 and that the decreased number of horses caused there to be less work to do. (T-29) Mr. Wichmann testified that he was sick in late November and that he had called Ms. Urseth in advance to notify her of his illness. (T-33-34) Finally, Mr. Wichmann offered as evidence of a pretext for discharge both that the business was doing poorly financially and that he had made a claim for his unpaid overtime wages. (T-35) He testified that by repeatedly moving his vacation, the

¹ This express requirement is laid out in an August 2005 amendment of the

employer was attempting to force him to quit so that it would not have to pay overtime.
(T-35)

Clearly, the ULJ credited the employer's testimony and discredited Mr. Wichmann's. However, contrary to the express statutory requirement, the ULJ did not mention the credibility of the parties let alone "set out the reason for crediting or discrediting testimony." Minn. Stat. § 268.105, subd. 1(c) (Supp. 2005).

Because this decision hinges solely on the parties' credibility and the ULJ failed to make any credibility determination, this matter must be remanded for these essential findings.

III. The ULJ failed in its duties to assist an unrepresented party and to conduct the hearing as an evidence-gathering inquiry

The ULJ is required to assist unrepresented parties in the presentation of evidence, to control the hearing in order to protect the parties' right to a fair hearing, and to ensure that relevant facts are clearly and fully developed. Minn. R. Part 3310.2921 (2005). When a party is pro se, the ULJ must help the party "to recognize and interpret the parties' claims." *Ntamere v. Decisionone Corp.*, 673 N.W.2d 179, 180-181 (Minn.App. 2003) (citing *Miller v. Int'l Express Corp.*, 495 N.W. 2d 616, 618 (Minn.App. 1993)). At an unemployment compensation hearing, both parties may examine and cross-examine witnesses and present exhibits. Minn. R. Part 3310.2921 (2005). The hearing is to be conducted by the ULJ as an evidence-gathering inquiry, not an adversarial proceeding, without regard to common law burdens of proof. Minn. Stat. § 268.105, subd. 1(b)

(2004).

Here, there is no evidence that the ULJ considered his responsibilities in conducting a fair hearing under this process. The ULJ noted the employer's concerns about incidents from May and June of 2005 but failed to ask Mr. Wichmann his side of the story for either incident. Yet both of these incidents were listed in the ULJ's decision as Findings of Fact. When Mr. Wichmann testified that he knew that he was working at 6:13 a.m. on November 7 when he called his girlfriend, testimony that would have directly refuted the employer's testimony that he did not come to work until noon or 1 p.m. that day, "[b]ecause I had to unhook the horse trailer from taking that horse to the U of M that was colicking," the ULJ did not ask any additional questions to clarify how Mr. Wichmann knew that this occurred on November 7. The ULJ failed to ask Mr. Wichmann to provide his testimony concerning November 18, when he is reported by the employer to have been late to work. To elicit Mr. Wichmann's testimony about whether he'd given proper notice to the employer of his illness, the ULJ asked Mr. Wichmann, "Are you saying you called her on those mornings..." (T-34) When Mr. Wichmann answered, "Yes, sir, she knew it," *id.*, the ULJ did not inquire further by asking Mr. Wichmann how he notified his employer that he was sick, whom he notified, or when he notified them. Because Mr. Wichmann's final absences have to do with an illness, the ULJ had a duty to ask questions to discover whether proper notice had been given to the employer.

The ULJ failed to conduct this hearing as required by statute. This matter should properly be remanded to conduct a hearing that clearly and fully develops the relevant facts.

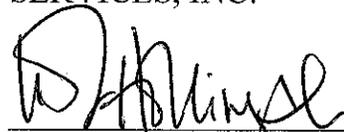
CONCLUSION

This matter should be reversed because Relator gave proper notice of an absence due to illness. In the alternative, this matter should be remanded for required credibility findings and because the ULJ failed to properly conduct this hearing as required by the applicable case law, statutes, and rules.

Respectfully submitted,

Dated: 6/5/06

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CERTIFICATION OF BRIEF LENGTH

v.

Travalia & U.S. Directives, Inc.
Employer-Respondent,

CASE NO. A06-677

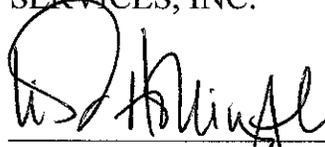
and

Minnesota Department of Employment and Economic Development,
Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with proportional font. The length of the brief is 2,919 words. This brief was prepared using Microsoft Word XP.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).