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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1315**

Brian Podratz,
Relator,

vs.

Built By Design Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed May 25, 2010
Affirmed
Ross, Judge**

Department of Employment and Economic Development
File No. 22115737-3

Brian Podratz, Minnetonka, Minnesota (pro se relator)

Built By Design, Inc., Minnetonka, Minnesota (respondent employer)

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

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and
Ross, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Brian Podratz is president and sole owner of Built By Design, Inc. Business decline left Podratz unable to sustain full-time employment, and he applied for unemployment benefits. The Department of Employment and Economic Development denied Podratz's application because, as a greater-than-25-percent owner of Built By Design, his work for the corporation was not covered employment unless the company filed an election of coverage, and no such election had been filed for Podratz. An unemployment law judge affirmed the department's decision, and Podratz appeals, arguing that Built By Design's paying unemployment tax on his wages indicated that the company intended for his employment to be covered. Because the unemployment law judge was bound to follow the plain statutory language, he correctly determined that Podratz was ineligible for unemployment benefits, and we affirm.

FACTS

Built By Design, Inc. is a construction company organized as a Minnesota S corporation. Relator Brian Podratz is the corporation's president and sole owner. Podratz worked full time for Built By Design from April 1989 until February 2009. The company has been paying unemployment tax on Podratz's wages since 1989.

In September 2004, Built By Design received a letter from the Department of Employment and Economic Development (DEED) explaining that an impending change in the law might reduce or eliminate its unemployment tax effective January 1, 2005. Earlier in 2004, the Minnesota legislature added a new category to the list of noncovered

employment in Minnesota Statutes section 268.035, subdivision 20. *See* 2004 Minn. Laws ch. 183, § 10, at 262; *see also* Minn. Stat. § 268.035, subd. 20(28) (2008) (codified statute). The DEED letter incorporated this new statutory provision: “‘Noncovered employment’ means: . . . employment of a corporate officer, if the officer owns 25 percent or more of the employer corporation.”

Because Podratz was the owner of Built By Design as well as its president, the new statutory provision would render his employment by the corporation noncovered. The letter advised that a corporation could elect to cover services performed by corporate owners whose employment was excluded from coverage under the new law by going to DEED’s website and downloading and submitting a form.

Nothing in the record reveals that Built By Design took any steps to attempt to elect coverage for Podratz’s employment. In his brief to this court, Podratz included a statement from his wife, who does the company’s bookkeeping, claiming that Podratz instructed her to elect coverage for him and to continue paying unemployment tax on his wages. She asserts that she tried to download the required form from DEED’s website but, when that effort was unsuccessful, she assumed that continuing to pay the tax alone would establish Built By Design’s intent that Podratz’s employment remain covered.

In March 2009, Podratz applied for unemployment benefits. But because Podratz’s employment as a corporate officer–owner was noncovered under section 268.035, subdivision 20(28), and because Built By Design had not elected coverage for him, DEED determined that Podratz was ineligible for unemployment benefits. Podratz appealed the ineligibility determination. An unemployment law judge (ULJ) heard the

appeal and followed DEED's determination. Podratz requested reconsideration, and the ULJ affirmed his decision. Podratz appeals by certiorari.

D E C I S I O N

Podratz challenges the ULJ's ineligibility determination. This court will affirm a ULJ's decision unless it derives from unlawful procedure, relies on an error of law, or is unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(3)–(5) (2008). Whether a statute precludes an application for benefits is a legal question, which this court reviews de novo. *Ress v. Abbott Nw. Hosp., Inc.*, 448 N.W.2d 519, 523 (Minn. 1989).

To be eligible to receive unemployment benefits, an applicant must have earned wages from covered employment. *Irvine v. St. John's Lutheran Church of Mound*, 779 N.W.2d 101, 104 (Minn. App. 2010); *see also* Minn. Stat. § 268.069, subd. 1(1) (2008) (conditioning eligibility on establishment of benefit account); Minn. Stat. § 268.07, subd. 2(a) (2008) (requiring applicant to have earned a minimum amount of wages within base period to establish benefit account). "Covered employment" is defined as any employment performed in Minnesota unless excluded as "noncovered employment." Minn. Stat. § 268.035, subd. 12 (2008). The statute lists several categories of noncovered employment. *See* Minn. Stat. § 268.035, subd. 20 (2008). Noncovered employment includes the "employment of a corporate officer, if the officer owns 25 percent or more of the employer corporation." Minn. Stat. § 268.035, subd. 20(28). An employer may elect to cover any noncovered employee, contingent on DEED's approval of the election. Minn. Stat. § 268.042, subd. 3(a) (2008).

The ULJ correctly determined that Podratz was ineligible for benefits. Because Podratz owned 100 percent of Built By Design, his employment was not covered unless Built By Design filed an election under section 268.042, subdivision 3(a). No election was filed before Podratz applied for benefits. Because Podratz's employment has not been covered since the January 2005 law change, he could not establish a benefit account. *See Samuelson v. Prudential Real Estate*, 696 N.W.2d 830, 832 (Minn. App. 2005) (stating that person working in "noncovered employment may not establish an unemployment benefits account"). Without a benefit account, Podratz does not meet the requirements to receive unemployment benefits. *See* Minn. Stat. § 268.069, subd. 1(1).

Podratz argues that his failure to file a coverage election was due to human error and that the fact that Built By Design continued to pay taxes on his wages is a "very strong indication" of his intent to be covered. This argument has sympathetic appeal, but it does not address the statute's requirement that the employer must file a coverage election "by electronic transmission in a format prescribed by the commissioner" and that DEED must approve the election. Minn. Stat. § 268.042, subd. 3(a); *see also* Minn. Stat. § 268.069, subd. 3 (2008) ("There is no equitable . . . allowance of unemployment benefits.").

Affirmed.