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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-83**

Lucky's Station, LLC,
Relator,

vs.

Department of Employment
and Economic Development,
Respondent.

**Filed July 23, 2012
Reversed and remanded
Cleary, Judge**

Department of Employment
and Economic Development
File No. 28376663-2

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(for relator)

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

Considered and decided by Rodenberg, Presiding Judge; Stauber, Judge; and
Cleary, Judge.

UNPUBLISHED OPINION

CLEARY, Judge

Relator Lucky's Station, LLC, seeks certiorari review of a Minnesota Department
of Employment and Economic Development (DEED) unemployment law judge's (ULJ)

order dismissing relator's request for reconsideration as untimely. Because the ULJ's decision was based on facts not substantially supported by the record, we reverse and remand for an evidentiary hearing regarding whether relator's request was timely.

FACTS

On August 22, 2011, an evidentiary hearing was conducted in relator's appeal of a ULJ's determination that relator is a successor of Twin City Stores, Inc., for purposes of calculating relator's unemployment insurance tax rate. On September 15, 2011, the ULJ issued an order affirming the earlier determination. The decision letter and copy of the order submitted to relator provided that "Under MN Statute 268.105, subd. 2, this decision will be final unless a request for reconsideration is filed with the [ULJ] on or before Thursday, October 6, 2011."

Relator submitted a request for reconsideration. Relator's request letter, dated October 6, 2011, was submitted via facsimile (fax). A fax time-stamp on a copy of relator's request letter provided by DEED reads "Oct. 7. 2011 2:37PM Caseys No. 4328 P. 1/31." Following receipt of relator's request, DEED sent relator a "Notice of Request for Reconsideration" dated October 28, 2011, which stated that "[o]n 10/27/2011, a reconsideration was filed" and provided instructions for submitting written arguments.

In an order issued December 14, 2011, the ULJ summarily dismissed relator's request for reconsideration. The ULJ found that because "[o]n Thursday, October 27, 2011, Department [sic] filed a request for reconsideration, which was not made within 20

calendar days of the mailing of the decision . . . [t]he undersigned has no legal authority to reconsider” the decision.¹ In the “Other Notes” section of the order, the ULJ wrote:

On September 16, 2011, the [ULJ] issued a decision, which stated “This decision will be final unless a request for reconsideration is filed with the [ULJ] on or before Thursday, October 6, 2011.” Lucky’s Station LLC did not file a request for reconsideration within that time frame. Therefore, its request for reconsideration is dismissed as untimely.

Relator is before the Court of Appeals on a writ of certiorari.

DECISION

“When reviewing a ULJ’s decision, we may affirm the decision, remand for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced.” *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 29 (Minn. App. Mar. 5, 2012) (citing Minn. Stat. § 268.105, subd. 7(d) (2010)). When an agency concludes that it lacks jurisdiction to consider an appeal, the only question before the appellate court is whether the agency decision was correct in that respect. *Christgau v. Fine*, 223 Minn. 452, 463, 27 N.W.2d 193, 199 (1947). This court will not disturb the ULJ’s factual findings when the evidence substantially sustains them. Minn. Stat. § 268.105, subd. 7(d) (2010). A decision to dismiss an appeal as untimely raises a question of law, which we review de novo. *Kennedy v. Am. Paper Recycling Corp.*, 714 N.W.2d 738, 739 (Minn. App. 2006).

A ULJ’s decision on appeal following an evidentiary hearing is “final unless a request for reconsideration is filed” within 20 calendar days. Minn. Stat. § 268.105,

¹ It is undisputed that relator, not the department, filed the request for reconsideration.

subds. 1(c), 2(a) (2010). The statutory appeal period of ULJ decisions is “strictly construed against the relator.” *See Rowe v. Dep’t of Emp’t & Econ. Dev.*, 704 N.W.2d 191, 196 (Minn. App. 2005) (regarding what was then a 30-day appeal period under Minn. Stat. § 268.105, subd. 2(a) (2004)). “An untimely appeal from a determination must be dismissed for lack of jurisdiction.” *Stassen*, 814 N.W.2d at _____. If an appeal is made to DEED by electronic transmission, it is considered filed on the day received by the department. Minn. Stat. § 268.035, subd. 17 (2010).

The parties here dispute whether the request for reconsideration that relator faxed and that DEED received was timely. Relator argues that he faxed the request on October 6, 2011. As evidence, relator submitted to this court an affidavit stating that it was his practice to fax time-sensitive materials to DEED on the date reflected on the face of the document being faxed. In further support, relator provided copy of a correspondence to DEED dated November 14, 2011, and a fax machine journal record showing that a fax (of unknown subject matter or recipient) was sent on that same day. Relator contends that by the time he became aware that DEED considered his request untimely, his fax machine journal no longer retained the record of faxes sent in October 2011 due to system limitations. Relator has not therefore provided records pertaining to the specific request letter at issue.

DEED argues that relator faxed the request one day after the October 6 deadline. As evidence, DEED points to a time stamp, located on DEED’s own copy of the fax received from relator, which reads “Oct. 7. 2011 2:37PM Caseys No. 4328 P. 1/31.” The

record does not contain, nor does DEED provide, any evidence tending to support the time stamp's accuracy or authenticity.²

Regardless of the parties' conflicting claims and assertions regarding whether DEED received the fax on October 6 or 7, the order dismissing relator's request for reconsideration states that "[o]n Thursday, October 27 [sic], 2011, Department [sic] filed a request for reconsideration." The record is devoid of any evidence indicating relator's request was received on October 27. In fact, DEED admits the date on the order was error, asserting instead that it was filed on October 7. The ULJ's decision that it is without jurisdiction to consider relator's request because of untimely filing is not supported by substantial evidence in the record, and we will not affirm it. *See Peterson v. Nw Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008) (citing Minn. Stat. § 268.105, subd. 7(d)), *review denied* (Minn. Oct. 1, 2008).

Based on DEED's admitted errors, relator requests that we find that its request was timely filed. The date and time at which relator sent the fax at issue is a factual question, unresolved by the ULJ. "This court cannot serve as the fact-finder," and we cannot grant relator's request. *Wright Elec., Inc. v. Ouellette*, 686 N.W.2d 313, 324 (Minn. App. 2004) (citing *Kucera v. Kucera*, 275 Minn. 252, 254, 146 N.W.2d 181, 183 (1966)), *review denied* (Minn. Dec. 14, 2004). Instead, when a ULJ makes a summary decision concerning a factual issue without an evidentiary hearing, the case should be remanded so that such factual issues can be resolved at an evidentiary hearing. *See Mgmt. Five, Inc. v.*

² An affidavit from DEED explaining their fax time-stamp verification procedures is an example of evidence that might support DEED's assertion regarding when the fax was received.

Comm'r of Jobs & Training, 485 N.W.2d 323, 324–25 (Minn. App. 1992) (reversing and remanding, for an evidentiary hearing, a determination by DEED that a request for reconsideration was untimely when a relator submitted affidavits asserting that the referee’s decision had not been received, but DEED asserted the decision had been mailed).

Notably, DEED has indicated to this court that it is not in compliance with the administrative review process mandated by statute. Minn. Stat. § 268.105, subd. 2(b), provides that “[u]pon a *timely* request for reconsideration having been filed, the department must send a notice . . . that a request for reconsideration has been filed.” (Emphasis added.) DEED explains that when requests for appeal or reconsideration are received, they are hand-sorted by clerks into two piles: timely and untimely. According to DEED, all requests, regardless of whether they are considered timely, result in the mailing of a notice to the parties involved that a request for reconsideration has been received. Nothing on the face of a notice indicates whether the request that triggered the notice was deemed untimely by DEED, so as to alert the party that the request may be dismissed unless the party makes a showing that it was timely. Although we are reversing on other grounds, DEED’s practice concerns us. “When a party induces another to believe that certain facts exist and the other justifiably relies on that belief and loses rights, the party may be estopped from denying the existence of the facts relied upon.” *Stottler v. Meyers Printing Co.*, 602 N.W.2d 916, 919 (Minn. App. 1999).

Especially under the particular facts of this case, we think that an unfortunate waste of resources can result when relators receive no notice from DEED that it considers

a particular request untimely. Not only does this lack of notice prevent parties from submitting evidence of timely filing so the ULJ can hold an evidentiary hearing to sufficiently develop the record and make relevant factual findings, it can also result, as here, in the loss of important documentation and evidence, further complicating matters for all parties involved.

Reversed and remanded.