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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-0379**

Cyrus R. McClain,  
Relator,

vs.

Clarus Inc.,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed May 6, 2008  
Reversed and remanded  
Poritsky, Judge\***

Department of Employment and Economic Development  
File No. 15852-06

Richard A. Williams, Jr., Angela M. Rouillard, Paul W. Iversen, Williams & Iversen,  
P.A., 1611 West County Road B, Suite 208, Roseville, MN 55113 (for relator)

Clarus, Inc., 7760 Beech Street Northeast, Fridley, MN 55432-2512 (respondent  
employer)

Lee B. Nelson, Katrina I. Gulstad, Department of Employment and Economic  
Development, First National Bank Building, 332 Minnesota Street, Suite E200, St. Paul,  
MN 55101-1351 (for respondent DEED)

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

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Poritsky, Judge.

## **UNPUBLISHED OPINION**

**PORITSKY**, Judge

The unemployment law judge (“ULJ”) determined that relator was disqualified from receiving unemployment benefits because relator had been discharged for misconduct for failing to follow instructions from his employer. Because the ULJ’s credibility determination is not supported by the record, we reverse and remand.

### **FACTS**

Relator Cyrus McClain worked for Clarus, Inc., as a drill press operator from February 2006 through October 13, 2006. After being discharged by Clarus, McClain sought unemployment benefits from the Minnesota Department of Employment and Economic Development (DEED). A DEED adjudicator determined McClain was entitled to receive benefits because he was discharged through no fault of his own. Clarus appealed the determination, and a de novo hearing was held.

At the hearing, McClain’s direct supervisor, Jensmark Hovelsrud, testified on behalf of Clarus. Hovelsrud testified that McClain was discharged for failing to follow proper part-inspection protocol, which resulted in many uninspected and defective parts, and for neglecting to present parts for independent inspection. McClain disputed Hovelsrud’s entire version of events. He claimed that he was never warned that his work was unsatisfactory. He also maintained that he complied with Clarus’s independent inspection protocol and followed the personal inspection procedure he learned in training.

McClain explained that any deficiencies in his inspection procedure were attributable to the fact that he had “five people telling [him] five different” methods of performing an inspection. Hovelsrud agreed that McClain could have been confused by the varying instruction he received.

The ULJ concluded that McClain’s failure to follow orders constituted employment misconduct and disqualified him from receiving unemployment benefits. McClain moved for reconsideration, but the ULJ affirmed the decision. This certiorari appeal followed.

### **D E C I S I O N**

The ULJ’s determination must be affirmed unless the decision derives from unlawful procedure, relies on an error of law, is unsupported by substantial evidence, or is arbitrary and capricious. Minn. Stat. § 268.105, subd. 7(d)(3)-(6) (2006). An applicant for unemployment benefits is disqualified if “the applicant was discharged because of employment misconduct.” Minn. Stat. § 268.095, subd. 4(1) (2006). Whether an employee committed employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether the employee committed a particular act is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). But whether the act committed by the employee constitutes employment misconduct is a question of law reviewed de novo. *Id.* This court reviews factual findings in the light most favorable to the decision and will not disturb them as long as they are supported by substantial evidence. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

McClain disputes the ULJ's finding that he had been discharged for failing to participate in personal and independent inspections. Specifically, McClain claims that the ULJ's credibility determination in favor of Hovelsrud is unsupported by the record. We agree. When the credibility of a witness has a "significant effect on the outcome of a decision" the ULJ must explain the basis for credibility decisions. Minn. Stat. § 268.105, subd. 1(c) (2006). Credibility determinations must also be supported by substantial evidence. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007). "[S]ubstantial evidence" means: "1. Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2. More than a scintilla of evidence; 3. More than some evidence; 4. More than any evidence; and 5. Evidence considered in its entirety." *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 668 (Minn. 1984).

Here, the ULJ found that McClain's testimony was less credible than Hovelsrud's because it "varied during the course of the hearing regarding the instruction he was given and the content of the discussions he had with Hovelsrud." This finding is not supported by the record. McClain consistently testified that, despite receiving contradictory advice from other employees, he was trained by plant manager Robert Peterson and followed his instructions. For example, McClain testified that Peterson "was the one who showed me how to run the drill, how to set certain things up. He was the one who actually trained me." Later in his testimony, McClain provided an account of his discussion with Hovelsrud after Hovelsrud accused him of failing to follow appropriate inspection protocol:

[Hovelsrud] came over to me and said how do you check this part[?] and I did exactly the way I was trained to do it. And [Hovelsrud] said . . . how come you're not doing it this way[?] And I said, well, I wasn't trained on how to do it that way, because you got [Peterson] telling me how to do things and that's the right way, and [you also have several other employees] tell[ing] me how to do things different ways. And I told [Hovelsrud] . . . the right way to do things, you said . . . [Peterson] is the right, I mean [Peterson] was the right way and that's the way I'm doing it. And [Hovelsrud] said, well, you should be doing it this way. And I said, [Hovelsrud], I wasn't trained on how to do things this way.

Hovelsrud responded to this testimony by reiterating that McClain's inspection technique was flawed, and, again, McClain explained "I have five people telling me five different [methods for inspection]. And the sixth person was [Peterson]. And [Hovelsrud] said [Peterson's] way is the right way, and that's the way I follow up." Based on our review of the record, McClain provided consistent testimony regarding the instruction he received, and Hovelsrud agreed with McClain's testimony that McClain was receiving different instructions from various personnel and may have become confused. We also see no discrepancies in McClain's testimony regarding his discussions with Hovelsrud. Thus, the ULJ's credibility determination is not supported by the record.

We note that if there is any inconsistency in the record it is found in the difference between Hovelsrud's testimony and a written statement submitted to DEED by Clarus prior to the hearing. The statement is contained in the "Determination of Benefit Account" document, dated October 27, 2006. As described above, Hovelsrud's testimony was that McClain was discharged, but the Determination of Benefit Account

document, signed by Clarus's office manager, states that McClain voluntarily quit. It was undisputed that this document was part of DEED's files, although it was not made part of the record at the hearing and was not in the agency record submitted to this court for review.<sup>1</sup> Further, it was not presented to or considered by the ULJ in making her decision.

Because the credibility determination is not supported by the record, we reverse and remand. In doing so, we allow the ULJ the discretion to reopen the record and supplement it as necessary.

**Reversed and remanded.**

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<sup>1</sup> This court took judicial notice of the document.