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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1780**

Todd Doering,
Relator,

vs.

Lloyd's Construction Services Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 20, 2010
Reversed and remanded
Ross, Judge**

Department of Employment and Economic Development
File No. 22735864-3

Todd J. Doering, Shakopee, Minnesota (pro se relator)

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

Lloyd's Construction Services, Inc., Savage, Minnesota (respondent)

Considered and decided by Kalitowski, Presiding Judge; Wright, Judge; and Ross, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Todd Doering appeals from the Department of Employment and Economic Development's decision holding him ineligible for unemployment benefits. An

unemployment law judge found that Doering must repay benefits because he was unable to work, and therefore ineligible, during a four-month period. Because the finding that Doering was unable to work for the entire repayment period is not supported by substantial evidence, we reverse and remand for a hearing to establish the span of time during which Doering was unable to perform his duties.

FACTS

Todd Doering has worked for Lloyd's Construction Services, Inc. since 1989. For the past ten years he has been a laborer foreman. Doering was laid off in November 2008 because of a work slowdown and began receiving unemployment benefits through the Department of Employment and Economic Development (DEED).

Doering took the opportunity during the work slowdown to undergo shoulder surgery. He had the surgery on January 21, 2009, resulting in a work restriction limiting his lifting ability. Doering received disability insurance benefits under a private policy. Documentation indicates that the insurer approved disability payments to Doering for the period from January 5 to March 31, 2009. Doering reported his surgery and disability status to DEED in response to a questionnaire sent by DEED on January 28. Doering also checked the "No" box next to the question, "Are you currently able to work?"

DEED determined that Doering was eligible for unemployment benefits. The department issued an amended determination of eligibility in February after considering whether Doering's receipt of disability benefits should reduce his unemployment benefits. Minnesota Statutes section 268.085, subdivision 3a (Supp. 2009) provides that any disability insurance payments an employee receives as compensation for lost wages

will offset unemployment benefit payments if the insurance is paid for in whole or in part by the employer. DEED concluded that Doering's receipt of disability insurance benefits did not affect his unemployment benefits because his insurance benefits were not from insurance funded in whole or in part by Lloyd's Construction.

Doering was recalled to work on May 30 and stopped receiving unemployment benefits. In June, DEED determined that Doering had become ineligible for unemployment benefits on January 21, the date of his surgery. DEED calculated that Doering had received an overpayment of unemployment benefits of \$8,490 and directed that he repay it.

Doering appealed DEED's ineligibility determination. An unemployment law judge (ULJ) held an evidentiary hearing in which Lloyd's Construction chose not to participate. Doering conceded that he had applied for disability benefits after his surgery but testified that he could have done his job anyway. He testified that there was no work available with Lloyd's and described his efforts to find other work, including inquiring at another contractor and putting his name on his union's laborer's waiting list. The ULJ observed that there was no medical documentation in Doering's file and asked Doering if he had received a "medical statement" form from DEED for his doctor to complete. Doering replied that he had received no such form. The ULJ asked if Doering himself had any documentation about his work restrictions that he could submit, and Doering replied that he had given the documentation to Lloyd's. The ULJ asked Doering when the work restrictions were lifted and he replied, "The end of May."

The ULJ determined that Doering was ineligible for unemployment benefits from January 21, 2009, through May 29, 2009, based on her finding that he was unable to work during this period. She acknowledged that Doering had contended that he was able to work while he was receiving disability benefits but rejected the claim because the record contained no medical documentation to substantiate it.

Doering filed a request for reconsideration, arguing that physical restrictions did not prevent him from working as a foreman. He claimed to have only recently obtained the work-restrictions report from his doctor and that he had presumed that Lloyd's Construction would submit the documents before the hearing. Doering also claimed to have a letter from the president of Lloyd's Construction stating that Doering had been able to work but that there was no work available. Doering apparently failed to submit these documents with his request for reconsideration. The ULJ affirmed her prior decision on the same ground as before: that there was no medical documentation in the record to substantiate Doering's claim that he was able to work from January 21 to May 30, 2009.

Doering appeals by writ of certiorari.

D E C I S I O N

Doering challenges the ULJ's decision holding him ineligible for unemployment benefits from January 21 to May 29, 2009. This court may remand, reverse, or modify a ULJ's decision if the relator's substantial rights were prejudiced by findings that are unsupported by substantial evidence or by a decision that is affected by an error of law,

made upon unlawful procedure, or arbitrary and capricious. Minn. Stat. § 268.105, subd. 7(d)(3)–(6) (2008).

A person is eligible for unemployment benefits only when that person is available for suitable employment. Minn. Stat. § 268.085, subd. 1(4) (Supp. 2009). A person is “available for suitable employment” if he is “ready and willing to accept suitable employment.” *Id.*, subd. 15 (Supp. 2009). The ULJ determined that Doering was ineligible for benefits from January 21 to May 29, 2009, based on her finding that he was unable to work during that period. Doering challenges this finding. We review the ULJ’s fact findings in the light most favorable to her decision, give deference to the ULJ’s credibility determinations, and rely on the ULJ’s findings when the evidence substantially supports them. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We have reviewed the record and conclude that the ULJ’s finding that Doering remained unable to work until May 29 lacks substantial evidentiary support.

The evidence suggests that Doering became unable to work on January 21. Doering indicated on the January 28 questionnaire that he “went on disability” on January 12, underwent surgery on January 21, and was then unable to work. This admission does not establish that Doering’s disability continued until the end of May. Doering completed the questionnaire reporting his disability one week after his surgery, and it is likely that he was recuperating at that point. The questionnaire might support the conclusion that Doering was unable to work for several weeks after his surgery, but not that he was unable to work for several months.

Some evidence indicates that Doering was in fact able to perform his job during most of the period for which the ULJ found him unable to work. Doering testified that he was able to work as a foreman despite his medical restriction. He stated that the physical limitation resulting from his surgery “had nothing to do with working” because he works in a supervisory role as a “foreman supervisor.” Doering explained his job duties: “I run a crew. I tell people what to do and I look over the plan and I tell people what work [has] to be done and I have the meetings with the contractors.”

It is unclear what the ULJ relied on to determine the end of Doering’s recuperation period. No evidence establishes the “end date” of Doering’s inability to work. Doering’s testimony that he returned to work on May 30 provides just as much support for his contention that May 30 was simply the first date that work was available as it does for the ULJ’s finding that he was unable to work until that date. And there are two significant difficulties with the judge’s reliance on Doering’s receipt of disability benefits as proof that Doering could not work until the end of May. First, nothing in the record suggests that Doering’s disability insurance policy required him to show that he could not fulfill his job duties to collect benefits. *See also* Minn. Stat. § 268.085, subd. 3a (providing that applicant may be eligible to receive unemployment benefits while receiving disability insurance benefits); *Huston v. Comm’r of Employment and Econ. Dev.*, 672 N.W.2d 606, 610–11 (Minn. App. 2003) (holding that prior version of Minn. Stat. 268.085, subd. 4(c) violated the Americans with Disabilities Act by creating an irrebuttable presumption that one who receives Social Security disability benefits is unable to work), *review granted* (Minn. Feb. 25, 2004), *appeal dismissed* (Minn. May 25, 2005). Second, even it were

reasonable to infer that Doering was unable to work during the time he was receiving benefits, the ULJ found him unable to work until the end of May even though he received benefits only through the end of March.

The ULJ may also have relied on Doering's testimony that his work restrictions were lifted at the end of May to establish the date he became able to work. But given Doering's testimony that his work restrictions did not prevent him from fulfilling his supervisory duties, the date the restrictions ended is not probative.

Despite Doering's testimony that he works only as a construction *supervisor*, the ULJ found that Doering's "primary employment has been as a construction *laborer*." If Doering was employed as a construction laborer, the ULJ could have inferred that a shoulder surgery with weight restrictions would render him not "ready and willing to accept suitable employment." Minn. Stat. § 268.085, subd. 15. But the ULJ's finding that Doering was a laborer has no support in the record. The apparent basis for the finding is Doering's characterization of his position in documentation submitted to DEED. Doering described his position as "laborer foreman." This description does not support a finding that Doering was a laborer; the operative word in the description is "foreman." This single piece of ambiguous evidence cannot support a finding that Doering was a laborer, especially in the face of his contrary testimony.

The ULJ was entitled to disbelieve Doering's testimony, but she was also required to explain her credibility determination. *See* Minn. Stat. § 268.105, subd. 1(c) (Supp. 2009) ("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.”). It is apparent from the ULJ’s decision that she did not credit Doering’s testimony. But the only explanation provided for her credibility determination was that “Doering contended that he was able to work throughout the period that he received disability benefits; however, the evidence of record does not include any medical documentation that would substantiate his assertion.” This statement does not contain a “reason for discrediting [Doering’s] testimony”; it merely highlights the lack of evidence of when Doering became able to work again.

That Doering was unable to work at the end of January, that he received disability benefits from January to March, and that his medical restriction lasted until the end of May is not substantial evidence that he was unable to work until May 30. The ULJ emphasized that no medical documentation established when Doering became able to work, but she nonetheless found that he became able to work on May 30. The reasoning is unclear. The ULJ must “ensure that all relevant facts are clearly and fully developed.” Minn. Stat. § 268.105, subd. 1(b) (Supp. 2009). We remand with instructions for the ULJ to conduct a hearing to determine with substantial evidence the date when Doering became ready to accept suitable employment. If the ULJ discredits all or part of Doering’s relevant testimony, her decision should explain why.

Reversed and remanded.