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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2085**

Scott Schultz,
Relator,

vs.

Performance Office Papers, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 1, 2011
Reversed and remanded; motion granted
Connolly, Judge**

Department of Employment and Economic Development
File No. 25444615-3

Anne M. Loring, Minneapolis, Minnesota (for relator)

Performance Office Papers, Inc., Lakeville, Minnesota (respondent)

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

Considered and decided by Connolly, Presiding Judge; Hudson, Judge; and
Collins, Judge.*

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

UNPUBLISHED OPINION

CONNOLLY, Judge

Relator argues that the unemployment-law judge (ULJ) erred when she summarily dismissed his request for reconsideration as untimely because he did not receive notification of the ULJ's decision in the mail, which triggers the 20-day statutory time period to request reconsideration. Because summary dismissal of a request for reconsideration as untimely is error when there is a factual dispute over whether the ULJ's decision was mailed to the relator, we reverse and remand for an evidentiary hearing to determine whether the decision was in fact mailed to relator.

FACTS

Relator applied for unemployment benefits following termination by his employer. The Minnesota Department of Employment and Economic Development (DEED) determined that he was eligible for benefits. Employer appealed this determination to a ULJ and an evidentiary hearing was held. Relator did not appear at this hearing. Following the hearing, the ULJ decided that relator was ineligible for unemployment benefits because he had been discharged for employee misconduct. The ULJ's decision was dated August 4, 2010. Relator requested that the ULJ reconsider the decision on September 9, 2010, which was beyond the 20-day statutory time period to file for reconsideration. In his request for reconsideration, relator claimed that the ULJ's decision was not mailed to him. The ULJ, without holding an evidentiary hearing to determine whether DEED mailed the decision to relator, summarily dismissed relator's

request as untimely. The only issue on appeal is whether DEED provided relator with proper notice.

D E C I S I O N

I. The ULJ erred by summarily dismissing relator's request for reconsideration as untimely.

This court may affirm, remand, reverse or modify the decision of a ULJ if the substantial rights of the relator may have been prejudiced because the findings or decision are affected by unlawful procedure or an error of law, are arbitrary and capricious, or are unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2010); *see also Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). “An agency decision to dismiss an appeal as untimely is 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 request for reconsideration of an adverse determination must be filed within 20 calendar days after the ULJ's decision is mailed following an evidentiary hearing, otherwise the decision is final. Minn. Stat. § 268.105, subd. 2(a), (f) (2010). The statutory time period to request reconsideration of an adverse determination thus begins to run on the date the decision is mailed, not the date it is rendered. *Jackson v. Minn. Dep't of Manpower Servs.*, 296 Minn. 500, 500-01, 207 N.W.2d 62, 63 (1973). The parties do not dispute that the time to appeal begins to run when the decision is mailed. It is also undisputed that relator did not file his request for reconsideration until September 9, 2010, more than 20 days after the decision was rendered. However, relator

argues that the decision was never mailed to him and that a remand is necessary in order for the ULJ to hold an evidentiary hearing on that question.

The statutory time period to seek review of a ULJ's decision is absolute and unambiguous. *Rowe v. Dep't of Emp't & Econ. Dev.*, 704 N.W.2d 191, 195 (Minn. App. 2005). Relying on this proposition, DEED argues that the ULJ was obligated to dismiss relator's request for reconsideration when it was filed more than 20 days after her decision. This argument is dependent upon DEED's claim that implicit in the ULJ's summary dismissal is the finding that the ULJ's decision was mailed within the necessary timeframe. This, however, is a conclusory assumption without substantial evidence supported by the record. The only evidence in the record regarding the mailing of the decision is relator's contention in his request for reconsideration that he never received it. Indeed, it is the lack of factual inquiry by the ULJ regarding whether DEED mailed relator the determination that is the decisive factor here. This distinction is clear from our own caselaw.

When there is a factual dispute over whether a ULJ's decision has been mailed to the relator, and the mailing triggers the period to request reconsideration of a ULJ's decision, summary dismissal of a request for reconsideration as untimely is error, because the "relator should have been afforded an opportunity to present evidence and have this factual issue resolved." *Mgmt. Five, Inc. v. Comm'r of Jobs & Training*, 485 N.W.2d 323, 325 (Minn. App. 1992). The ULJ is responsible for ensuring that all relevant facts in a given case are "clearly and fully" developed. Minn. Stat. § 268.105, subd. 1(b) (2010). Therefore, when the ULJ fails to hold an evidentiary hearing on the factual

dispute over the mailing of a decision, summary dismissal of an appeal or request for reconsideration must be reversed and remanded for an evidentiary hearing. *Mgmt. Five*, 485 N.W.2d at 325.

II. The motion to strike is granted.

Here the ULJ made no such factual inquiry and the record is void of any evidence indicating that the decision was mailed. DEED disputes the veracity of relator's claim that he did not receive the decision in the mail by arguing that "[r]elator has no evidence that [DEED] did not mail the ULJ's decision" and asserting that problems receiving mail at relator's address, not a failure by DEED to mail it, is the actual cause of relator never receiving the decision.¹ Although DEED now attempts to introduce evidence of its secure standard mailing procedures by way of an affidavit, it did not submit this evidence to the ULJ at the evidentiary hearing. Additionally, relator has made a motion to strike, from DEED's brief, the affidavit and other supporting material regarding DEED's mailing procedures on the basis that they were not part of the record below.²

"The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01. "The court will strike documents included in a party's brief that are not part of the appellate record." *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd*, 504 N.W.2d 758 (Minn. 1993). Because the affidavit and supporting

¹ Relator's original request for reconsideration indicates that he had issues in the past in receiving his mail due to his living situation/residence. DEED argues that, given this history, relator's contention that DEED never mailed the determination is without merit.

² A decision on relator's motion to strike was deferred to this panel.

material in question were not a part of the proceedings below, they are not part of the appellate record, and we will not consider them on appeal. Relator's motion to strike is therefore granted.

There is a presumption that mail which is properly addressed and has prepaid postage is received by the addressee. *Nafstad v. Merchant*, 303 Minn. 569, 570-71, 228 N.W.2d 548, 550 (1975). Once receipt is denied by the addressee, however, this presumption disappears and the burden of proof is on the sender to establish, based on a preponderance of the evidence, that the notice was in fact sent. *Id.* at 571, 228 N.W.2d at 550. In order to meet this burden, the sender may present evidence of the habit, custom, or procedure by which it mails notices and evidence of compliance with these procedures in the individual case. *Id.* In this case, relator denied receipt of the decision, eliminating the presumption that it was mailed and placing the burden of proof on DEED to demonstrate that it mailed the decision. Because there is no evidence in the record that would satisfy DEED's burden of proof, we reverse and remand for an additional evidentiary hearing in front of a ULJ to resolve the factual dispute over whether the ULJ's decision was mailed. On remand the ULJ could consider the affidavit and supporting material regarding DEED mailing procedures, among other evidence, when deciding whether DEED has met its burden of proof.

Finally, relator argues that DEED violated his constitutional due-process rights. “[Courts] do not decide constitutional questions except when necessary to do so in order to dispose of the case at bar.” *State v. Hoyt*, 304 N.W.2d 884, 888 (Minn. 1981).

Because we are remanding this case for an additional evidentiary hearing, it is unnecessary to reach this issue.

Reversed and remanded; motion granted.