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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0717**

Richard Thurmer,
Relator,

vs.

Diff's Trucking, LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed February 25, 2019
Affirmed
Bratvold, Judge**

Department of Employment and Economic Development
File No. 35943614-5

Richard J. Thurmer, White Bear Lake, Minnesota (pro se relator)

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

Diff's Trucking, LLC, Brainerd, Minnesota (respondent employer)

Considered and decided by Bratvold, Presiding Judge; Halbrooks, Judge; and
Jesson, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Relator Richard J. Thurmer applied for unemployment benefits. Respondent Department of Employment and Economic Development (DEED) notified Thurmer on October 25, 2017, that he was ineligible and that the decision would become final if he did not appeal by November 14, 2017. Thurmer appealed DEED's decision on November 15, 2017, and an unemployment-law judge (ULJ) dismissed the appeal as untimely. Because Thurmer filed his appeal electronically one day after the statutory deadline, his appeal was untimely and we affirm.

FACTS

In September 2017, Thurmer quit his job as a truck driver for Diff's Trucking LLC (Diff's). Thurmer then applied to DEED for unemployment benefits, claiming Diff's provided him with faulty equipment and instructed him to avoid state inspections that would have revealed that the equipment was unsafe. On October 25, 2017, DEED mailed Thurmer a notice that stated he was ineligible for unemployment benefits. The notice included a paragraph entitled "Right of Appeal," which stated:

This determination will become final unless an appeal is filed by Tuesday, November 14, 2017. *The 'filed' date is the postmark date, if mailed, or the date received by the Unemployment Insurance Program, if sent by fax or internet. The recommended method for filing an appeal is by internet. You can do so by logging in to your account at www.uimn.org/uimn/ and following the prompts. If filing by fax or mail please send this determination, or a photocopy,*

along with a short statement explaining why you are filing the appeal to the fax number or address listed below.

(Emphasis added.)

Sometime on or before Thursday, November 9, Thurmer attempted to file an appeal through DEED's website, but encountered an error message on the website. On Thursday, November 9, Thurmer called DEED about his attempt to file and spoke to a DEED operator, who said that DEED had not received an appeal from Thurmer. He called again later that same day and spoke to a second DEED operator, who tried to help Thurmer. The ULJ found that:

[Thurmer] spoke to a department operator on November 9, 2017, about the issue. The operator walked Thurmer through the appeal process and entered the same screens as Thurmer. Thurmer encountered another error.

At the end of the phone call, the operator told Thurmer that he would not be able to file an appeal that day. [Friday,] November 10, 2017, was [Veteran's Day] a [legal] holiday. The operator suggested that he call back on November 14, 2017, because November 13, 2017, was likely to be hectic following a three-day weekend. The operator told Thurmer that he would have time to file his appeal.

Thurmer asked about calling in on Monday, November 13, 2017. The operator told him he had that option.

Another DEED employee attempted to call Thurmer on Monday, November 13, to let him know that the website error had been resolved. DEED was unable to reach Thurmer or leave a voicemail message because his voicemail had not been activated. The ULJ found that Thurmer did not contact DEED or attempt to submit an appeal on November 13 or 14.

On November 15, one day after the appeal deadline, Thurmer filed an appeal through DEED's website. Thurmer noted in the "Hearing Details" that he was filing the appeal late because "[he] filed on time but there was a problem with the unemployment website. [He] did contact [DEED] and was instructed to refile [the] appeal." The next day, a ULJ dismissed Thurmer's appeal as untimely. Thurmer filed a request for reconsideration that same day and stated in his request that he tried to file his appeal, kept receiving unexpected errors on DEED's website, called DEED "right away," and that DEED should see the notes on his account.

A second ULJ granted Thurmer's request for reconsideration, which led to an evidentiary hearing to determine whether Thurmer had attempted to file an appeal and if so, whether the ULJ had jurisdiction to consider the appeal. At the hearing, the ULJ heard testimony from Thurmer and received evidence including DEED's event log for Thurmer's account.

In a written decision, the ULJ determined that Thurmer had not filed an appeal before the deadline and, as a result, the ULJ did not have jurisdiction to consider the appeal. The ULJ relied on Minnesota Supreme Court precedent holding that statutory deadlines for filing an unemployment benefits appeal "are absolute, regardless of any mitigating circumstances" and that "[t]here are no exceptions." Consequently, the ULJ dismissed Thurmer's appeal. Thurmer filed another request for reconsideration, stating that he disagreed with the ULJ's determination. In a written decision, the ULJ supplemented his findings of fact and affirmed the earlier decision.

DECISION

An applicant must file an appeal no later than 20 calendar days after DEED has sent a determination of ineligibility for unemployment benefits. Minn. Stat. § 268.101, subd. 2(f) (2018); *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 29-30 (Minn. App. 2012); *see also* Minn. Stat. § 268.105, subd. 1a(c) (2018).¹ An appeal is filed *either* on the day it is received by electronic transmission (i.e., via fax or internet) *or* on the postmark date if submitted by mail. Minn. Stat. § 268.035, subd. 17 (2018).

If a party fails to file an appeal before the deadline, the ULJ lacks jurisdiction and “must issue a decision dismissing the appeal as untimely if the judge decides the appeal was not filed within 20 calendar days after the sending of the determination.” Minn. Stat. § 268.105, subd. 1a(c); *Rowe v. Dep’t of Emp’t & Econ. Dev.*, 704 N.W.2d 191, 195-96 (Minn. App. 2005). The ULJ may either summarily dismiss the appeal or hold an evidentiary hearing to determine whether the appeal was timely. Minn. Stat. § 268.105, subd. 1a(c). The Minnesota Supreme Court has held that the statutory deadline for appealing from unemployment-benefits decisions is “absolute and unambiguous.” *Semanko v. Dep’t of Emp’t Servs.*, 244 N.W.2d 663, 666 (Minn. 1976).

¹ This 20-calendar-day period excludes the first day and includes the last day of the period, but if the last day of the period falls on a Saturday, Sunday, or legal holiday, a document may be timely filed on the “next succeeding day which is not a Saturday, Sunday, or legal holiday.” *See* Minn. Stat. §§ 268.033 (applying Minn. Stat. §§ 645.15, .151 to chapter 268), 645.15 (time periods exclude the first day and include the last day), 645.151 (if a time period ends on a Saturday, Sunday, or legal holiday, a document may be timely filed on the next succeeding day that is not one of those) (2018).

A ULJ's decision to dismiss an appeal as untimely is a question of law, which this court reviews de novo. *Stassen*, 814 N.W.2d at 29; see *Harms v. Oak Meadows*, 619 N.W.2d 201, 202 (Minn. 2000) ("Jurisdiction is a question of law that we review *de novo*"). But on review of an ULJ's findings of fact, "we will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

Here, the ULJ's decision correctly states that "[t]he most significant fact of the case is undisputed: Thurmer did not file an appeal of the determination of ineligibility by the November 14, 2017, deadline." The ULJ made four related factual findings: (1) Thurmer encountered a system error when he attempted to file his appeal on November 9, but the "error was corrected by November 13, 2017;" (2) Thurmer could have filed his appeal electronically on either November 13 or 14 but did not; (3) "Thurmer did not file an appeal until November 15, 2017, the day after the appeal deadline;" and (4) the system "error did not prevent Thurmer from filing an appeal by mail or fax on November 9, 10, 11, 12, 13, or 14, 2017."

We conclude that substantial evidence in the record supports each of the ULJ's factual findings. In particular, the record amply supports the ULJ's findings that, although Thurmer was unable to file an appeal electronically on November 9, Thurmer could have filed electronically as of November 13, well before the deadline, yet Thurmer did not file his appeal until one day after the deadline. Also, the record supports the ULJ's finding that the system error did not prevent Thurmer from filing his appeal by mail or fax.

Because the law provides for no exceptions to the statutory appeal period, the ULJ correctly determined that he did not have jurisdiction to decide whether the determination of ineligibility was correct. *See Rowe*, 704 N.W.2d at 195-96.

Thurmer also argues that this court should reverse the dismissal of his appeal based on his conversation with the DEED operator on November 9. We understand Thurmer to argue that the DEED operator misled him regarding his appeal, although Thurmer does not say in what way he was misled.

At the evidentiary hearing on Thurmer's motion to reconsider, the ULJ told Thurmer that he would listen to the recording of Thurmer's conversation with the DEED operator and summarize it in his decision. Based on the ULJ's written summary of the call, it would appear that the ULJ considered the recording of Thurmer's conversation with the operator. In addition, we note that the recording and a transcript of the recording are part of the record.

The ULJ made detailed findings regarding Thurmer's phone call with the DEED operator, as discussed above. The ULJ specifically found that the DEED operator "did not tell [Thurmer] that his appeal had been submitted. She told him to call back about the appeal the following week." The ULJ also found that Thurmer did not call DEED again until after the appeal deadline had passed. Based on our review of the record evidence, substantial evidence supports the ULJ's findings regarding Thurmer's conversation with the DEED operator on November 9, 2017. On this record, we reject Thurmer's argument that he was misled by the operator.

Thurmer also appears to argue that he failed to file an appeal within the statutory timeframe due to medical issues. In his brief to this court, Thurmer states that during late 2017, he was “experiencing cognitive difficulties . . . as precursors of [a series of later] strokes,” which have since rendered him permanently blind. We note that Thurmer did not mention any cognitive difficulties during the evidentiary hearing or in his two motions for reconsideration. Generally, we will not consider an issue that was not argued to and considered by a ULJ. *Eley v. Southshore Invs., Inc.*, 845 N.W.2d 216, 222 (Minn. App. 2014). Because Thurmer did not raise any health concerns during proceedings before the ULJ, we do not address the issue on appeal.

While we are very sympathetic to Thurmer’s difficult circumstances, the ULJ’s decision that it lacked jurisdiction over Thurmer’s appeal is solidly grounded in Minnesota law and the record in his case. By Minnesota statute, there is no equitable allowance of unemployment benefits. Minn. Stat. § 268.069, subd. 3 (2018). Therefore, we reject Thurmer’s arguments and affirm the ULJ’s ruling.

Affirmed.