

CASE NO. A07-348

STATE OF MINNESOTA
IN COURT OF APPEALS

THE WORK CONNECTION, INC.,

Relator,

vs.

SON Q. BUI,

Respondent,

and

DEPARTMENT OF EMPLOYMENT
AND ECONOMIC DEVELOPMENT,

Respondent.

RELATOR'S REPLY BRIEF

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ARGUMENT

I. THE ULJ'S DECISION ON THE "AVAILABILITY" ISSUE IS JUDICIALLY REVIEWABLE.

DEED's primary argument on appeal is that the "availability" issue – Son Bui's ineligibility for benefits because his lack of transportation renders him unavailable for work – may not be judicially reviewed because TWC did not raise it and DEED did not decide it until TWC's Request for Reconsideration, which DEED now characterizes as dicta. This argument is legally and factually baseless.

The Unemployment Insurance Law provides for judicial review of any legal or factual ruling by the ULJ that affects the rights of the parties.¹ The scope of judicial review is not limited to the initial ruling by the ULJ. In fact, the ULJ's initial decision after the evidentiary hearing is not even an appealable decision. It becomes final only if neither party requests reconsideration within 30 days.² If reconsideration is requested, the ULJ must decide the request for reconsideration.³ The ULJ's decision following the Request for Reconsideration becomes final and binding unless judicial review is sought.⁴ If judicial review is sought, this Court then reviews DEED's final decision.⁵

¹ Minn. Stat. § 268.105, subd. 7(d).

² Minn. Stat. § 268.105, subd. 1(c) ("The unemployment law judge's decision is final unless a request for reconsideration is filed pursuant to subdivision 2.")

³ Minn. Stat. § 268.105, subd. 2(e) ("A request for reconsideration shall be decided by the unemployment law judge who issued the findings of fact and decision under subdivision 1").

⁴ Minn. Stat. § 268.105, subd. 2(f).

⁵ Minn. Stat. § 268.105, subd. 7(a) ("The Minnesota Court of Appeals shall, by writ of certiorari to the department, review the unemployment law judge's decision....").

The only decision by DEED in this case that is even *capable* of being reviewed is the ULJ's decision on the Request for Reconsideration. Therefore, judicial review of DEED's decision necessarily encompasses any legal rulings made in the Request for Reconsideration.

Ever since its "Report to Raise an Issue" triggered this proceeding, TWC has maintained that Son Bui should not get benefits because he lacked transportation to get to a job that TWC offered him near his home.⁶ TWC made two distinct legal arguments from this set of facts:

- Bui is ineligible for benefits because he failed to accept a suitable job without good cause (Minn. Stat. § 268.085, subd. 13c(a)(2)); and
- Bui is ineligible for benefits because he was unavailable for work due to his lack of transportation throughout the labor market area (Minn. Stat. § 268.085, subd. 15(e)).

Initially, at least, DEED ignored the "availability" issue, and analyzed Bui's lack of transportation within the framework of subdivision 13c as a "good cause to reject employment" issue. This was not due to any failure on TWC's part to identify the legal basis for its position. The Report to Raise an Issue form, drafted by DEED, asks for an explanation of the employer's position, and leaves enough space for an explanation consisting of two or three lines of cramped prose, in which a TWC employee wrote: "Applicant offered entry level warehouse job. \$10.00 per hr. 1st shift. Co. located 5.88 miles from applicant's home. Stated he does not have transportation."⁷ As requested,

⁶ A-11.

⁷ A-11 (Box D).

TWC explained why it thought Bui should not get benefits. TWC has never changed its position, although it later identified the relevant statutes in written submissions to the ULJ.

DEED's initial adjudicator determined that Bui was eligible for benefits.⁸ TWC filed for a de novo hearing before the ULJ.⁹ The procedure for appeal was explained in the Determination of Eligibility, which did not invite TWC to identify the legal or factual grounds for its appeal. A subsequent letter from DEED advising the parties of the time and procedures for the de novo hearing did not say what the issue to be decided would be, reflecting the fact that *any* coverage issues are fair game at the de novo hearing.¹⁰ The de novo hearing is an "evidence gathering inquiry and not an adversarial proceeding," at which the ULJ is directed by statute to "ensure that all relevant facts are clearly and fully developed."¹¹ The ULJ is an employee of DEED and must be an attorney.¹²

Before the hearing, TWC submitted a letter to the ULJ that elaborated on its position.¹³ The letter came from Jennie Seibert, a non-lawyer corporate representative of TWC. Siebert's letter summarized the expected evidence, including that Bui did not have transportation throughout his labor market. The letter made two arguments from the expected evidence. First, it argued that Bui had failed to accept suitable work when

⁸ A-2 to A-3.

⁹ A-4.

¹⁰ A-1.

¹¹ Minn. Stat. § 268.105, subd. 1(b).

¹² Minn. Stat. § 268.105, subd. 1(d).

¹³ A-13 to A-15.

offered, which made him ineligible for benefits. Second, TWC's letter articulated the availability argument, as follows:

The applicant is not eligible for benefits because he is not "available for work" and "actively seeking employment."¹⁴

TWC made specific reference to the statute as follows:

Among the requirements for benefit eligibility is that the Applicant must be "available for suitable employment" and "actively seeking suitable employment." Minn. Stat. 268.085, subd. 1(2) [sic]. This applicant declined suitable work, which was offered on 9/18/2006, 9/19/2006, 9/20/2006, 10/2/2006, and 10/3/2006. His conduct demonstrates that he was not available for work and actively seeking employment.¹⁵

TWC argued to the ULJ that Bui's conduct in rejecting job offers showed both that he was not available for work and that he was not actively seeking employment. Thus, TWC articulated the availability issue to the ULJ before the de novo evidentiary hearing.

At the hearing itself, TWC was represented by non-lawyers, as allowed by the unemployment law.¹⁶ The ULJ confirmed that he had received TWC's letter containing the availability argument, and he determined that Bui had also received it.¹⁷ Marking the letter as Employer's Exhibit No. 1, he went over each of its three pages with Bui.¹⁸ The letter was received into evidence without objection.¹⁹ Therefore, the evidentiary record

¹⁴ A-15.

¹⁵ Relator's Appendix page A-15.

¹⁶ Minn. Stat. § 268.105, subd. 6(a).

¹⁷ T. 3-4, 5.

¹⁸ T. 21-23.

¹⁹ T. 24.

includes TWC's written argument that Bui was unavailable for work due to lack of transportation.

The ULJ issued his decision awarding benefits to Bui, concluding that Bui had good cause to reject the Biotest job but completely failing to address the availability issue.²⁰ TWC, at this point represented by counsel, filed a Request for Reconsideration asking specifically for a ruling on the availability issue.²¹ TWC submitted written comments directed to the application of subd. 15(e), in light of Bui's admission that he lacked transportation.²²

The ULJ issued his Order of Affirmation on February 8, 2007, which specifically addressed the availability issue.²³ The ULJ ruled that his initial decision to award benefits was correct, and rejected TWC's argument that Bui's lack of transportation made him unavailable for work.²⁴ Thus, the availability issue was expressly decided by the ULJ, and may be reviewed by this Court.

This Court need not concern itself with the question of whether it can or should consider an argument advanced on appeal that was not advanced or addressed below. That circumstance is not present here. TWC raised the availability issue at all three levels of administrative claims review. DEED has had three opportunities to decide whether Bui's lack of transportation makes him unavailable for work, and has concluded

²⁰ A-20 to A-22.

²¹ A-24.

²² A-27 to A-33.

²³ A-34 to A-37.

²⁴ A-35.

it does not. DEED's decision is subject to judicial review.

II. BUI IS NOT ELIGIBLE FOR UNEMPLOYMENT BENEFITS BECAUSE HE LACKS TRANSPORTATION THROUGHOUT HIS LABOR MARKET.

DEED does not take issue with the substance of TWC's argument that Bui is unavailable for work because he lacks transportation throughout his labor market area. There is little that DEED could say, had it chosen to confront the issue rather than to sidestep it yet again, because the ULJ's decision is indefensible. The Unemployment Insurance Law states that "An applicant must have transportation throughout the labor market area to be considered 'available for suitable employment.'"²⁵ Bui testified that he could not get to a job less than 6 miles away, in his neighboring suburb. DEED concedes the job was suitable in every respect.²⁶ DEED does not even attempt to respond to TWC's analysis concluding that Bui did not have transportation throughout his labor market area.²⁷ Because he lacks adequate transportation, Bui is not available for work. He is therefore not eligible for benefits.²⁸

DEED raises several matters that require further comment.

A. This Court Should Reject DEED's Proposal to Allow Another Contested Case to Mature.

Near the end of its brief, DEED advises the Court that counsel for DEED has taken the liberty of "forwarding" the availability issue to DEED's "customer service

²⁵ Minn. Stat. § 268.085, subd. 15(e).

²⁶ DEED's Brief at p. 6 ("It is also not disputed that this employment was suitable for Bui...").

²⁷ See Relator's Brief at pp. 18-21.

²⁸ See Minn. Stat. § 268.085, subd. 1(4).

center” for adjudication.²⁹ The suggestion that an administrative agency can avoid judicial review of its decisions simply by starting another contested case proceeding to decide the same issue again is creative, to say the least. DEED is in effect asking this Court to not require it to follow the law because it might eventually decide to do so on its own. In the meantime, presumably, Bui would continue to collect benefits and TWC would continue to reimburse the unemployment trust fund through the mechanism of an inflated unemployment tax experience rating.

The unemployment law states that decisions of the ULJ have collateral estoppel effect in subsequent unemployment claims proceedings, which makes it doubtful that a second proceeding is permissible absent changed circumstances.³⁰ DEED’s position that parties who lose an unemployment claim contest can simply start the process over again, even where the issue was raised and decided in the first proceeding, is a position DEED may wish to reconsider.

But there is no basis to subject TWC to the considerable expense and delay of a second contested case proceeding involving the same issues that were briefed and decided in the first. The facts relating to the availability issue were fully developed at the de novo evidentiary hearing, and the issue was squarely decided by the ULJ. It is subject to judicial review now. DEED’s request for a fourth chance to decide this case should be rejected.

²⁹ DEED’s Brief at p. 9.

³⁰ See Minn. Stat. § 268.105, subd. 5a.

B. TWC's Position Does Not Preclude People Without Vehicles From Unemployment Benefits.

DEED says that if TWC prevails, "then any individual who does not own a vehicle would not be entitled to unemployment benefits."³¹ Of course, TWC has never maintained that owning a car is required for unemployment benefit eligibility. TWC's position is that "An applicant must have transportation throughout the labor market area to be considered 'available for employment.'" This position should not be controversial because it is taken verbatim from the Unemployment Insurance Law.³²

DEED's fear that enforcing subd. 15(e) will make people without cars ineligible for benefits is exaggerated. The vast majority of people live in communities with sufficient public transportation such that it cannot be said that they lack transportation "throughout the labor market area." As to those who live in rural locations, as DEED's attorney testified to the Senate in 1999 before enactment of subd. 15(e), "There is nothing new here. * * * The law would provide that you're not available for work because you don't have transportation."³³ Bui's residence in Brooklyn Center was not exactly rural, but if he was unable to find a way to get six miles to a job site, the result is no different.

The flip side of DEED's concern for people lacking transportation capabilities is that *not* applying the statute as written would shift the burden of transportation onto employers, in violation of clear statutory language and stacks of judicial precedent. It bears repeating that the policy goals underlying the Unemployment Insurance Law do not

³¹ DEED's Brief at p. 11.

³² Minn. Stat. § 268.085, subd. 15(e).

³³ A-49.

attach to people who do not meet the basic eligibility criteria. People who are unemployed due to circumstances other than a lack of suitable work, such as their lack of transportation, are not intended to benefit under the statute. An agency charged with a fiduciary duty to administer the unemployment trust fund in accordance with law may not expand the class of beneficiaries by ignoring statutory eligibility requirements that it finds objectionable.

C. Bui's Good Cause to Decline the Biotest Job Does Not Make Him Eligible for Benefits.

DEED's brief addresses the issue of whether Bui had good cause to reject the job at Biotest, and little else. DEED concedes that TWC made an offer of suitable employment and that Bui rejected it, but contends that Bui had good cause to reject it.³⁴ Citing Minn. Stat. § 268.085, subd. 13c, DEED argues that Bui's good cause to reject the Biotest job means that the ULJ's decision to allow him benefits should be affirmed.

The problem with this argument is that subdivision 13c (good cause excuses refusal of employment) and subdivision 15(e) (lack of transportation means not available for employment) are two distinct eligibility requirements. Bui needs to satisfy *both* in order to be eligible for benefits. DEED's argument that Bui is not ineligible by operation of subdivision 13c does not mean that Bui is eligible for benefits – he still has to satisfy subdivision 15(e).

DEED nowhere argues that Bui meets the eligibility requirement of subdivision 15(e) – i.e., that he has transportation throughout the labor market area. Nowhere does

³⁴ DEED's Brief p. 6.

DEED explain what that subdivision could mean, other than that Bui's lack of transportation to a job six miles from his home makes him ineligible for benefits.

D. TWC's Judicial Precedents Reinforce its Position.

DEED argues that the cases cited by TWC in its memorandum are distinguishable. These authorities are perhaps best viewed as reflective of the law on the availability issue as it existed when the legislature enacted subd. 15(e), which was intended to codify existing law.³⁵ The judicial precedents that were rolled into subd. 15(e) are useful mainly to understand the intent of subd. 15(e).

Viewed in that manner, these authorities show that the legislature intended that subd. 15(e) would preclude people in Bui's circumstances from receiving benefits. That would have been the result before subd. 15(e) was enacted, and it should be the result after.

In the *Hill v. Contract Beverages, Inc.* case, the employee quit when his employer changed his shift, and he could no longer get a ride to work.³⁶ The unemployment law provided then, as now, that a quit without good cause attributable to the employer disqualifies the applicant. The supreme court said that "transportation is usually considered the problem of the employee." The qualifier "usually" apparently refers to situations in which the employer agrees by custom or contract to transport the employee to and from work.³⁷ The fact that *Hill* arose in the context of a quit rather than a job offer

³⁵ Vega Aff. (A-48).

³⁶ 240 N.W.2d 314 (Minn. 1976).

³⁷ 240 N.W.2d at 316.

refusal does not affect the principle of law for which it is cited -- transportation is the problem of the employee.

The Court of Appeals applied the rule of law articulated in *Hill* to the fact pattern here, i.e., in which the applicant rejects a job because of transportation issues.³⁸ For example, the unpublished decision of *Ess v. Olsten Staffing Services* arose in the context of a failure to accept suitable employment.³⁹ The applicant asserted the job was not suitable because it was 18 miles from his home. Citing *Hill*, this Court said: “Transportation is the problem of the employee and failure to reach a job is not good cause to decline an employment offer.”

DEED attempts to distinguish *Ess* because the applicant there at least *could* have made it to the job site, but chose not to because of considerations of expense – parking and bus fare. Of course, Bui *could* have made it to the job site too, but chose not to. He could have ridden his bike, which was how he sometimes got to his former job located four miles from his home. He could have walked. He could have even taken a six-mile cab ride each way – the increased wages of the Biotest job would likely have covered the expense. Bui simply preferred to remain unemployed over the inconvenience of having to travel six miles to work without a bus or a car. *Ess* is not meaningfully distinguished. The cases cited by TWC illustrate the bright line rule that getting to work is the employee’s problem, which was expressed as an eligibility requirement when the legislature enacted subd. 15(e).

³⁸ See Relator’s Brief footnote 49.

³⁹ 1999 WL 1256587 (Minn. App. Dec. 28, 1999).

With the enactment of subd. 15(e), the legislature codified what it understood to be existing law on the eligibility of people who lacked transportation to and from work. The result is an entirely objective, bright line test that omits completely the concept of “good cause.” Under subd. 15(e), if an applicant for benefits lacks transportation throughout the labor market area, the applicant is not eligible for benefits. If an applicant’s inability to accept a suitable job due to a lack of transportation throughout the labor market area was ever excusable for good cause, the enactment of subd. 15(e) in 1999 closes that door. An applicant’s lack of transportation throughout his or her labor market area is an absolute bar to benefits. To hold otherwise would shift the burden of transportation onto the employer, and would make the employer pay into the fund because the applicant lacks transportation to work.

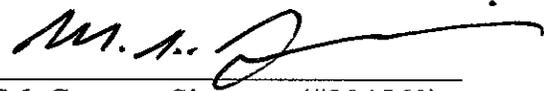
CONCLUSION

The issue for judicial review is whether Son Bui’s admitted lack of transportation throughout the labor market area makes him unavailable for work, and therefore ineligible for unemployment benefits under Minn. Stat. § 268.085, subd. 15(e).

This issue was argued to, and decided by, the ULJ below. On admitted facts, Bui could not find a way to get to a suitable job located under six miles from his home. Bui is therefore ineligible for benefits. Whether Bui had good cause to reject the job is beside the point, because good cause is not a consideration under subd. 15(e). TWC respectfully asks that this Court reverse the decision of the ULJ.

**SIEGEL, BRILL, GREUPNER
DUFFY & FOSTER, P.A.**

Dated: June 19, 2007

A handwritten signature in black ink, appearing to read "M. G. Simpson", written over a horizontal line.

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