

No. A09-219

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State of Minnesota  
In Court of Appeals

JAMES P. MEDER,

*Relator,*

vs.

RAPID SPORTS CENTER INC,

*Respondent,*

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

*Respondent.*

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RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

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## **I. LEGAL ISSUE**

Under the law, if an applicant has earnings, with respect to any week, from employment, those earnings are deductible from the applicant's weekly unemployment benefit amount. James P. Meder received commission payments that accrued from his employment with Rapid Sports Center, Inc., during weeks he requested unemployment benefits. Are Meder's commission payments deductible from his weekly benefit amount?

The Unemployment Law Judge held that Meder's commission payments are deductible from his weekly unemployment benefits.

## **II. STATEMENT OF THE CASE**

This case involves whether Relator James P. Meder is entitled to unemployment benefits. Meder established a benefit account with the Minnesota Department of Employment and Economic Development. A department adjudicator initially determined that commission payments Meder received that accrued for weeks he requested payment of unemployment benefits must be deducted from his unemployment benefits.<sup>1</sup>

Meder appealed that determination, and after a de novo hearing, a department Unemployment Law Judge ("ULJ") issued a decision that affirmed the initial department determination.<sup>2</sup> Meder filed a request for reconsideration with

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<sup>1</sup> E1. (Transcript references will be indicated as "T." Exhibits in the record will be "E," with the number following).

<sup>2</sup> Appendix to Department's Brief, A5-A8

the ULJ, who affirmed the decision that the commission payments Meder received that accrued with respect to weeks he requested payment of unemployment benefits are fully deductible from his unemployment benefits.<sup>3</sup> This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Meder under Minn. Stat. § 268.105, subd. 7(a) (2008) and Minn. R. Civ. App. P. 115.

### III. STATEMENT OF FACTS

James P. Meder began working at Rapid Sports Center, Inc., a boat dealership, as a salesman in May 2006.<sup>4</sup> The work is seasonal, generally February to mid-September.<sup>5</sup> Meder was paid a salary plus commissions.<sup>6</sup>

The commissions on a sale of a boat don't accrue to Meder until everything is "finalized."<sup>7</sup> The boat must be fully paid for by the customer, which can be "30, 60, maybe even 90 days" after the purchase agreement, and all the extras, such as, extra seats, trolling motor, depth finders, are installed "as the customer wants it." At that time, the transaction "gets finalized" and commissions accrue.<sup>8</sup>

During the week of September 23, 2007, while requesting unemployment benefits, Meder accrued and was paid commissions of \$706.05 for "three boat deals" he wrote up in June or July.<sup>9</sup> During the week of October 21, 2007, Meder

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<sup>3</sup> Appendix, A1-A4

<sup>4</sup> T. 7, 8

<sup>5</sup> T. 8

<sup>6</sup> T. 8

<sup>7</sup> T. 11, 14, 15

<sup>8</sup> T. 13, 14, 15

<sup>9</sup> E-3; T. 10

accrued and was paid \$1,082.13 in commissions for a boat deal that was written up at a boat show earlier in the spring.<sup>10</sup> During the week of November 4, the paperwork got closed out, and Meder accrued commissions of \$510.35 for another boat deal.<sup>11</sup>

#### **IV. ARGUMENT**

##### **A. STANDARD OF REVIEW**

The standard of review for unemployment insurance matters is set out in the statute as follows:

(d) The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious.<sup>12</sup>

The Court of Appeals reiterated the long-held standard in *Skarhus v. Davannis*, that it views the ULJ's factual findings "in the light most favorable to

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<sup>10</sup> E-3; T.11

<sup>11</sup> E-3; T.11

<sup>12</sup> Minn. Stat. § 268.105, subd. 7(d) (2008)

the decision.”<sup>13</sup> The Court also stated that it will not disturb the ULJ’s factual findings when the evidence substantially sustains them.<sup>14</sup>

The courts exercise independent judgment on issues of law.<sup>15</sup> Interpretation and application of statute is a question of law.

## **B. ARGUMENT FOR INELIGIBILITY**

Minn. Stat. §268.085, subd. 5 states that:

### **Deductible earnings.**

(a) If the applicant has earnings, including holiday pay, with respect to any week, from employment, covered employment, noncovered employment, self-employment, or volunteer work, equal to or in excess of the applicant’s weekly unemployment benefit amount, the applicant is ineligible for unemployment benefits for that week.

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(e) Deductible earnings does not include any money considered a deductible payment under subdivision 3, but includes all compensation considered wages under section 268.035, subdivision 29, and any other compensation considered earned income under state and federal law for income tax purposes.

There is no factual dispute in this case. This case is one of first impression before Court of Appeals within the context of the unemployment insurance program, but is not a new or novel question to the Department’s administration of the program. The Department has addressed the issue since the inception of the program, and has consistently handled commissions, as applied to the deductible

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<sup>13</sup> 721 N.W.2d 340, 344 (Minn. App. 2006)(citing *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996)

<sup>14</sup> *Id.* (citing Minn. Stat. §268.105, subd. 7(2008)

<sup>15</sup> *Ress v. Abbott Northwestern Hosp., Inc.*, 448 N.W.2d 519, 523 (Minn. 1989).

earnings provision of Minn. Stat. §268.085, subd. 5 (and its predecessor statutes).

That statute provides in applicable part:

(a) if the applicant has earnings, including holiday pay, with respect to any week, from employment,..., equal to or in excess of the applicant's weekly unemployment benefit amount, the applicant is ineligible for unemployment benefits for that week.

The legal issue here is “with respect to” what week commissions are considered earnings. It's undisputed that Meder is not entitled to commissions upon getting a customer to sign a purchase agreement. The work effort Meder puts in regarding the sale entitles him to nothing (over and above his salary) until and unless the sale becomes “finalized.” The sale may not be finalized for months (if ever), as is what happened here. Meder accrues nothing as to commissions until, as Meder describes it, “...that actually is all completed.”<sup>16</sup> There is nothing to suggest that Rapid Sports Center was, in any way, dilatory in “finalizing” the sale. Meder does not even hint that Rapid Sports Center was not properly processing the transactions and paying him commissions promptly.

Commission sales present a different situation than almost all other types of work. A salesman could, in selling an expensive boat, talk to a customer a number of times over a few weeks span. The work of selling is actually performed over a number of weeks. While a salesman's work may be complete when the purchase agreement is signed, he may get nothing. The statutory question is when the commissions legally become earnings with respect to a week.

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<sup>16</sup> T. 10

An applicant for unemployment benefits must report his earnings each week unemployment benefits are requested. To hold that the commissions become earnings at the time of the purchase agreement is problematic, as an applicant must report his earnings each week unemployment benefits are requested. If Meder had been requesting unemployment benefits at the time of the purchase agreement, he would have been required to report commissions he may never receive. Currently tens of thousands of Minnesotans are requesting unemployment benefits while working part time (over 180,000 Minnesotans are in active request status). Many of those no doubt are on commission. Virtually, every type of work relationship imaginable occurs and must be accounted for in applying the statute.

For example, an individual is laid off and then decides to start selling real estate. Unemployment benefits may be available so long as the individual is selling real estate less than 32 hours a week and his earnings with respect to the week are less than his weekly unemployment benefits. If he sells a house, that is, a client signs a purchase agreement during a week, what does he report on his weekly continued request for benefits? The sale may or may not go through. His entitlement to commissions normally doesn't occur until closing. He accrues nothing until then, regardless of when the work effort was extended. To go back and apportion the commissions to weeks he met with the client or negotiated on the client's behalf is impossible. To require assignment of the commission to the week of the purchase agreement would also be virtually impossible. Such would

require an individual to report commissions, with a reduction or elimination of benefits for that week, when the individual will not know with any certainty for months whether he will ever become legally entitled to a commission. To not report it would mean going back and holding the individual overpaid benefits. To do so would require the individuals who may no longer be requesting benefits at the time of closing, to *sua sponte* contact the Department.

Only when an individual's entitlement to a commission accrues, that is, when he has a legal claim to it, can the commissions be considered earnings. Any other handling of commissions is impossible. It's noted that the statute includes holiday pay as earnings. Many applicants for unemployment benefits, laid off over Christmas or the Fourth of July, receive holiday pay while on layoff. Such is considered deductible earnings under the statute during the week of the holiday. The fact that an individual is on layoff does not mean, that under the statute, the individual cannot have earnings with respect to that week. An applicant for unemployment benefits cannot have both unemployment benefits and earnings, that is, earned income under the tax law, whether from employment, self-employment or any other type of venture with respect to the same week. An applicant who has earnings with respect to a week does not incur a reduction in the maximum amount of unemployment benefits available. He receives less in a given week, but if he remains unemployed, he can collect the available benefits later. He is not penalized.

Guidance on this matter can be found in a June 2008 decision of the New York Court of Appeals. In *Pachter v. Bernard Hodes Group, Inc.*, Pachter received a commission for arranging media advertisements for clients.<sup>17</sup> The Court held that for purposes of labor law when commissions are “deemed ‘earned’ or vested” for purposes of labor law is regulated by the parties express or implied agreement. The agreement between Meder and Rapid Sports Center is that commissions did not become vested, or put another way, accrued, until the boat was fully paid for and the sale “finalized.”

### **C. MEDER’S ARGUMENTS**

Meder cites to the statutory definition of wages paid, Minn. Stat. §268.035, subd. 30, and now asserts that the commission should be applicable to his last day of work. But again, Meder has no legal claim to the commissions until everything is finalized, which in this case occurred much after his last day of work. Meder’s new argument has a flaw, because he could not have known on his last day of work whether or not he was going to receive commission payments down the road. If Meder’s last day of work had been a Monday and he immediately applied for unemployment benefits, under his new theory, he would have been required to report commissions that had not accrued as part of the application process in order to determine if that week could be considered his waiting week under Minn. Stat.

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<sup>17</sup> 10 N.Y.3d 609 (2008)

§268.085, subd. 1(5). But Meder wouldn't have done that, because he may never have received commissions.

Second of all, employers are required to pay unemployment taxes, quarterly, on all "wages paid." Accepting Meder's argument would mean Rapid Sports Center would have been required to report on the quarterly wage detail report and pay unemployment taxes, for the third quarter of 2007 (the quarter ending September 30) on commissions to Meder which didn't accrue to Meder until after September 30.

The scheduled payday for commissions to Meder was after the sales became finalized. There is no dispute that he was properly paid. The statute Meder cites in his brief is not the statute applicable here. The only statute applicable to this case is Minn. Stat. §268.085, subd. 5.

Meder has a misunderstanding on page 17 of the transcript when he asserts that his benefit account included the commissions at issue. The benefit account at issue is the one he filed in September 2007, not the one he filed a year later in 2008. The base period on his 2007 account is April 1, 2006 to March 31, 2007. The commissions here fall in the base period of his 2008 account, April 1, 2007 to March 31, 2008. The Department did not discover, until the fall of 2008, the unreported earnings while Meder was requesting benefits in the fall of 2007. While Meder's failure to report the accrued commissions as earnings is understandable, the commissions are deductible from unemployment benefits under the law.

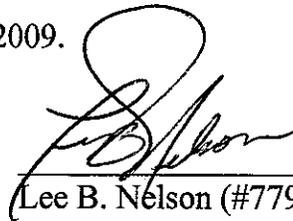
The Legislature created the unemployment insurance program. How money received by an individual affects unemployment benefits is for the Legislature to determine so long as it does not run afoul of Constitutional requirements. Commissions can only be considered earnings with respect to the week the commissions accrue; any other result is unworkable. Under Minn. Stat. §645.17, statutes must be interpreted and applied to be workable. And the only way to render Minn. Stat. §268.085, subd. 5, workable, is to apply commission payments to the period they accrue (and in this case also paid), as the ULJ did in this case.

## **V. CONCLUSION**

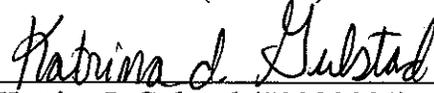
The Unemployment Law Judge's decision that commission payments Meder received with respect to periods he requested payment of unemployment benefits were deductible from his weekly unemployment benefit amount is supported by the record.

The department requests that the Court to affirm the Unemployment Law Judge's decision.

Dated this 27<sup>th</sup> day of April, 2009.



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