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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1719**

Gregory B. Lindwall,
Relator,

vs.

Department of Employment
and Economic Development,
Respondent.

**Filed September 9, 2008
Affirmed
Hudson, Judge**

Department of Employment and
Economic Development
File No. 5011 07

Gregory B. Lindwall, 1120 West Minnehaha Parkway, Minneapolis, MN 55419-1162
(pro se relator)

Lee B. Nelson, Katrina I. Gulstad, Department of Employment and Economic
Development, 1st National Bank Building, 332 Minnesota Street, Suite E200, St. Paul,
MN 55101-1351 (for respondent)

Considered and decided by Schellhas, Presiding Judge; Shumaker, Judge; and
Hudson, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

On certiorari appeal, relator argues that the unemployment law judge (ULJ) erred
in holding that 50% of his weekly social security old-age benefits should be deducted

from his unemployment benefits pursuant to Minn. Stat. § 268.085, subd. 4(a) (2006), during the several-month period in which his social security old-age benefits were being withheld to recoup an earlier overpayment. Because the ULJ properly applied Minn. Stat. § 268.085, subd. 4(a), we affirm.

FACTS

When relator turned 62 in November 2004, he was unemployed. He applied for, and received, social security old-age benefits. Relator then obtained a job starting November 1, 2005. Because he did not know how long his job would last, and because he thought that his social security benefits would stop automatically once new social security taxes were paid from his employment, he did not immediately notify the Social Security Administration that he was employed. The social security benefits did not stop, and relator forgot that he was receiving them because they were directly deposited into his banking account. In August 2006, he advised the Social Security Administration that he was employed and those benefits stopped.

Relator then lost his job at the end of January 2007. He established an unemployment-benefits account on January 28, 2007, with a weekly benefit amount of \$521. At that time, he also became entitled to receive social security old-age benefits in the amount of \$1,538 per month. He reported the latter as required to the Department of Employment and Economic Development (DEED). Because 50% of the weekly equivalent of social security benefits are to be deducted from weekly unemployment benefits received, DEED made an ineligibility determination on March 1, 2007, that

relator's receipt of social security benefits required a deduction of \$177.60 per week from his unemployment benefits.

Relator then received a March 2, 2007 letter from the Social Security Administration advising that his social security benefits would be withheld from March through June 2007 to recover the social security overpayment. Relator does not dispute the social security overpayment.

Relator, however, believed that, during the period in which he would not actually be receiving social security payments due to the offset for the overpayment, the amount of his unemployment benefits should not be reduced based on his receipt of social security benefits. He unsuccessfully attempted to reach the DEED adjudicator who made the initial ineligibility determination to inform him of this and also submitted a "protest" to DEED, but he did not receive a response.

Relator then appealed the ineligibility determination, and a hearing was held. The ULJ ruled that DEED did not err in continuing to make the social security deduction, on the ground that relator was the beneficiary of those amounts because they were being used to reduce the debt he owed to the Social Security Administration. The ULJ affirmed on reconsideration and this certiorari appeal follows.

D E C I S I O N

The standard of review is set out by statute as follows:

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.

Minn. Stat. § 268.105, subd. 7(d) (2006). This court will review the ULJ’s findings of fact “in the light most favorable to the decision,” and defer to the ULJ’s credibility determinations. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court will not disturb the ULJ’s findings of fact when the evidence substantially sustains them. *Id.*; Minn. Stat. § 268.105, subd. 7(d)(5). An appellate court will exercise its “independent judgment” on questions of law. *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006).

A. State law argument

An applicant is eligible for unemployment benefits for any week in which the applicant has an active benefit account, filed a continued biweekly request for benefits, and was unemployed, among other requirements. Minn. Stat. § 268.085, subd. 1(1), (3) (2006). An applicant aged 62 or older must state “whether the applicant is receiving, has filed for, or intends to file for, primary Social Security old age benefits for any week

during the benefit year” when filing an application or bi-weekly request for unemployment benefits. Minn. Stat. § 268.085, subd. 4(a) (2006). “There shall be deducted from an applicant’s weekly unemployment benefit amount 50 percent of the weekly equivalent of the primary Social Security old age benefit the applicant has received, has filed for, or intends to file for, with respect to that week.” *Id.* Under this provision, the ULJ concluded that relator’s weekly unemployment benefits must be reduced by 50% of the social security benefits he received as calculated on a weekly basis, or \$177.60.

Relator does not dispute the facts, but he argues that the social security deduction should not be applied during the period in which he was not actually receiving social security payments, due to the fact that they were being applied to his social security overpayment. First, relator argues that the public purpose of the unemployment insurance program is to provide a temporary partial wage replacement and to help those who are unemployed to become reemployed. *See* Minn. Stat. § 268.03, subd. 1 (2006). He argues that when the unemployment benefits are reduced because of an alleged or implied benefit that does not in fact pay wage replacement in the form of money, the unemployed worker cannot use the benefit to pay bills or mortgages, and thus the purposes of the law are not met. Next, he asserts that section 268.085, subdivision 4(a), applies only to social security “money payments.” He argues that just because an applicant is eligible for social security benefits, there should not be a social security offset when he is not actually receiving funds on a monthly basis.

Although relator may not have received a money payment during these months, there can be no doubt that he received a constructive payment. *See Sanders v. Miss. Employment Sec. Comm'n*, 662 So.2d 635, 640 (Miss. 1995) (holding as to same argument that even though the applicant “did not actually receive Social Security benefits [during the relevant period], he was eligible to receive them and was being constructively paid even though those benefits were applied” toward the social security overpayment).

As to relator’s argument that he does not feel it is fair to deduct his social security old-age benefits while those benefits are used to offset a social security overpayment, “[t]here shall be no equitable or common law denial or allowance of unemployment benefits.” Minn. Stat. § 268.069, subd. 3 (2006).

Finally, relator also in effect argues that he is being punished for something that is not his fault. But relator admits that he received social security benefits to which he was not entitled, that he forgot he was receiving them for some time because they were being directly deposited to his account, and that he did not notify the Social Security Administration that he was reemployed until he had already received several months of social security benefits to which he was not entitled. Consequently, he already received the benefit of that payment.

B. Federal law argument

Under the federal unemployment tax act (FUTA), I.R.C. § 3304(a)(15)(A)(1) (2000), the majority of jurisdictions hold that “unemployment compensation benefits must be offset by the amount of Social Security benefits received where the base period employer contributed to the Social Security system.” *Sanders*, 662 So.2d at 638; *see*

Edwards v. Valdez, 789 F.2d 1477, 1481 (10th Cir. 1986) (holding same as to federal law).

Relator argues that under the language in FUTA, which refers to a “payment,” the unemployment benefits may be offset only when that individual is receiving actual social security payments. *See* I.R.C. § 3304(a)(15)(A)(1). He contends that federal law does not provide that the state can expand or increase the reduction in payment, but only that it can limit the amount of the reduction as Minnesota did.

The analysis under state law, as described above, applies equally here. Relator received a constructive payment, which was applied to recoup his earlier social security overpayment. Relator has not shown that FUTA was violated.

C. DEED’s failure to respond to relator’s new information before his appeal

Finally, relator complains that the ULJ’s decision should be declared void because DEED did not respond to his attempts to contact it after the initial ineligibility determination on March 1, 2007, and before his appeal. Relator raised this issue for the first time in his request for reconsideration, but the ULJ rejected all of relator’s arguments and affirmed the earlier decision.

An applicant may challenge a determination of ineligibility only by filing a notice of appeal with the department pursuant to Minn. Stat. § 268.101, subd. 3(d), as relator did. Relator’s argument that DEED improperly failed to respond when he attempted more informal means of challenging the decision has no merit.

Next, relator contends that because DEED failed to respond to a “protest” he filed under Minn. Stat. § 268.043(a) (2006), the initial determination of ineligibility should be

declared void. Section 268.043(a) and the protest referred to in it apply to coverage issues that do not apply to relator.

Affirmed.