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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1850**

James McCormick,
Relator,

vs.

Hockenbergs Equipment & Supply Company (Corp),
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed May 18, 2010
Affirmed
Randall, Judge***

Department of Employment and Economic Development
File No. 22809504-3

James C. McCormick, North St. Paul, Minnesota (pro se relator)

Hockenbergs Equipment & Supply Company, Omaha, Nebraska (respondent)

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

Considered and decided by Toussaint, Chief Judge; Larkin, Judge; and Randall,
Judge.

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

UNPUBLISHED OPINION

RANDALL, Judge

Relator James McCormick brings a certiorari appeal of the decision by the unemployment-law judge (ULJ) that he is ineligible to receive unemployment benefits because he had been discharged for employment misconduct, challenging the facts, asserting that additional evidence should be considered, and arguing that the ULJ did not assist him in developing relevant testimony. We affirm.

FACTS

Relator was employed as a driver. Under the employer's policy, a one-half hour lunch break is automatically recorded on drivers' time cards because they work away from the employer's facility. The employer's witnesses testified that in 2007, relator objected to this policy, contending that he did not take lunch breaks and asserting that if he did take lunch breaks, he would report them. Thereafter, the employer no longer automatically deducted time for lunch breaks on relator's time cards. While relator did not recall having this conversation, he agreed that at some point, lunch breaks were no longer being deducted automatically from his time cards. The director of human resources, who was also the employer's accountant, testified that to her knowledge, relator never reported that he took a lunch break since that time.

During the week of June 8, 2009, a neighbor of relator, who declined to give his name, called the employer to complain that relator's truck was parked on their street, sometimes for hours at a time. On June 11, 2009, the general manager drove to relator's house and parked nearby for half an hour shortly before 11:30 a.m. He saw that relator's

truck was parked in the driveway of his residence for that entire time. The next day, relator was discharged for failing to report lunch breaks on his time card.

Relator testified that the general manager's testimony was untrue, and he asserted that he had stopped home just long enough to fill his thermos with coffee and go to the bathroom. He testified that the break was definitely less than 30 minutes and then that it had been perhaps 15 minutes. He also testified that he did not take lunch breaks between 2007 and June 11, 2009, except occasionally with the sales staff, but that when he did so, he reported it to a manager.

The ULJ credited the general manager's testimony over relator's testimony. He found that on June 11, relator had been parked at his residence for one-half hour, that the general manager's observations were detailed, including the length of time he parked near relator's residence, that there was no evidence the manager had any reason to fabricate his testimony, and that relator's testimony was self-serving. The ULJ found that on that date and on at least a few earlier occasions, relator had taken extended breaks without reporting them to his employer as he had agreed to do. He was discharged for failing to report his lunch breaks and for being paid for time when he was on break. The ULJ ruled that relator engaged in misconduct because he clearly displayed a serious violation of the standards of behavior the employer had a right to reasonably expect of him and a substantial lack of concern for his employment. The ULJ affirmed on reconsideration, and this certiorari appeal followed.

DECISION

On a certiorari appeal of the ULJ's decision, this court may affirm the decision, remand for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the decision is affected by error of law or not supported by substantial evidence in the record. Minn. Stat. § 268.105, subd. 7(d)(4), (5) (2008). This court will view the findings in the light most favorable to the ULJ's decision and will defer to the ULJ's credibility determinations, but will independently review questions of law. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The determination of whether an employee engaged in employment misconduct raises mixed questions of fact and law, because whether the employee committed the claimed act is a question of fact, while whether that act constituted misconduct is a question of law. *Id.*

Relator argues that certain findings are not supported by substantial evidence. He contends that contrary to the testimony of the general manager, who did not directly supervise relator, he did not have to report lunch breaks on a daily basis, but instead reported them at the end of the pay period. Because he had been discharged in the middle of a pay period, he contends it was speculative as to whether he had failed to report his June 11 lunch break. He asserts that the ULJ was inadvertently misled, because had another of the employer's witnesses been asked about the procedure for reporting breaks, it could have been explained correctly. We will not consider these facts for the first time on appeal. They were not presented to the ULJ at the evidentiary hearing. *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (providing that an appellate court generally

will not consider matters not received into evidence before the decisionmaker). Relator also cites to several provisions in the employee handbook that he asserts had not been followed, but again, they were not given to the ULJ. As stated, we cannot consider facts for the first time on appeal. *Id.* Deferring to the ULJ's credibility determinations, we hold that the facts as found by the ULJ are supported by substantial evidence in the record.

Relator also asks this court to give him a chance to present his side of the case and to refute the employer's evidence. To address this argument, we review the ULJ's decision denying relator's request on reconsideration to present additional evidence. "This court will defer to the ULJ's decision not to hold an additional hearing." *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007).

When considering a request for reconsideration, the ULJ may not consider evidence not presented at the evidentiary hearing. Minn. Stat. § 268.105, subd. 2(c) (2008). But, if statutory factors are met that justify consideration of such evidence, the ULJ must hold an additional evidentiary hearing. *Id.*

In his request for reconsideration, relator asserted that the ULJ's initial decision was factually incorrect, and he sought to have the ULJ consider testimony by another employee that a supervisor had approved the hours he worked and the breaks he took. The ULJ first noted that relator did not identify the new witness or the extent of his knowledge. Next, the ULJ ruled that relator had not met the statutory factors for an additional evidentiary hearing because he had not shown (1) that the proposed evidence would likely change the outcome and that relator had good cause for not submitting it

previously; or (2) that the proposed evidence would show that evidence submitted at the evidentiary hearing was likely false and that such false evidence had an effect on the outcome of the hearing. *See id.* (setting out these factors). The question is close, but relator has not shown the ULJ erred in this ruling, and we defer to the ULJ's decision.

Relator also asserts that he expressed confusion about the presentation of the evidence at the hearing. He acknowledges that near the close of the hearing, the ULJ asked if he had any additional information, and admits that he responded that he had nothing more to add to the events of June 11. Relator now asserts that the ULJ should have asked him to elaborate on whether he had additional information, and that had the ULJ done so, relator would have testified that he had an arrangement with his managers regarding additional breaks he could take when work was slow.

The ULJ "should assist unrepresented parties in the presentation of evidence" and "must ensure that relevant facts are clearly and fully developed." Minn. R. 3310.2921 (2009). Here, the ULJ questioned the parties in detail about the events at issue and consistently asked the parties to explain or elaborate on their answers. Further, relator's theory of the case at the hearing was that he had not taken lunch breaks, except occasionally with the sales staff; the ULJ would have had no reason to question him about the theory that he was allowed to take additional breaks when work was slow. The ULJ fulfilled his duty to assist unrepresented parties and to ensure full development of the relevant facts and relator had a fair hearing.

Affirmed.