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may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1933**

Brian L. Mulligan,
Relator,

vs.

Original Mattress Factory,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 21, 2009
Reversed and remanded
Hudson, Judge**

Department of Employment
and Economic Development
File No. 20935592

Brian L. Mulligan, 93 Lexington Parkway South, Apt. 301, St. Paul, Minnesota 55105-2770 (pro se relator)

Original Mattress Factory, 1261 East Highway 36, Maplewood, Minnesota 55109-2058 (respondent)

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

Considered and decided by Kalitowski, Presiding Judge; Klaphake, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Relator challenges the decision by the unemployment-law judge (ULJ), made without an evidentiary hearing, that his appeal from the initial determination of ineligibility was untimely and should be dismissed. We reverse and remand for an evidentiary hearing before the ULJ.

FACTS

Relator was discharged from employment. He applied for unemployment benefits with the Minnesota Department of Employment and Economic Development (DEED). DEED then determined that relator had been discharged for misconduct based on excessive absenteeism or tardiness and was therefore ineligible to receive benefits. DEED advised that the decision would be “final unless an appeal [was] filed by Tuesday, July 15, 2008,” and that the recommended method to use was the Internet, although fax or mail could also be used.

On July 22, 2008, relator faxed an appeal to DEED in which he addressed the merits and explained that he encountered trouble filing the appeal on the Internet. The ULJ summarily dismissed relator’s appeal as untimely without holding a hearing. Relator filed a timely request for reconsideration, in which he continued to assert that he had problems filing the appeal on the Internet. The ULJ affirmed on reconsideration, and relator filed a timely certiorari appeal.

DECISION

This court may affirm, remand, reverse, or modify the decision of a ULJ if the substantial rights of the relator may have been prejudiced because the findings, conclusion, or decision are affected by an error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2008). “An agency decision to dismiss an appeal as untimely is a question of law, which we review de novo.” *Kennedy v. Am. Paper Recycling Corp.*, 714 N.W.2d 738, 739 (Minn. App. 2006).

Relator challenges the decision by the ULJ that his appeal was not timely, asserting his version of events that occurred when he unsuccessfully attempted to file an appeal via the Internet.

A determination of ineligibility becomes final unless an appeal is filed within 20 calendar days after DEED sends the determination. Minn. Stat. § 268.101, subd. 2(f) (2008). “Filed” is defined as delivery to DEED, depositing in U.S. mail, or, where allowed, transmitting electronically. Minn. Stat. § 268.035, subd. 17 (2008). When electronic transmission is used, “it is considered filed on the day received by the department.” *Id.* “If the commissioner allows an appeal to be filed by electronic transmission, that must be clearly set out on the determination or decision subject to appeal.” Minn. Stat. § 268.103, subd. 1 (2008). “The commissioner may restrict the manner, format, and conditions under which an appeal by electronic transmission may be filed. Any restrictions as to days, hours, telephone number, electronic address, or other conditions, must be clearly set out on the determination or decision subject to appeal.” *Id.*

“When an appeal from [an ineligibility] determination is untimely, it must be dismissed for lack of jurisdiction.” *Kennedy*, 714 N.W.2d at 740. “[S]tatutes designating the time for appeal from decisions of all levels of [DEED] should be strictly construed, regardless of mitigating circumstances.” *King v. Univ. of Minn.*, 387 N.W.2d 675, 677 (Minn. App. 1986), *review denied* (Minn. Aug. 13, 1986). But when a relator challenged a summary determination of an untimely appeal and submitted affidavits asserting that the referee’s decision had not been received by the relator or the employer, and DEED asserted it had been mailed, this court held that “relator should have been afforded an opportunity to present evidence and have this factual issue resolved,” ruling that “the [d]epartment cannot summarily dismiss the claim [of a failure to mail] without conducting a factual inquiry to distinguish the meritorious claims from the frivolous.” *Mgmt. Five, Inc. v. Comm’r of Jobs & Training*, 485 N.W.2d 323, 324–25 (Minn. App. 1992).

Here, the ULJ made a summary decision concerning a factual issue without an evidentiary hearing, despite relator’s assertions as to the problems with filing the appeal on the Internet. Both DEED and relator are asserting facts regarding what occurred in relator’s attempts to appeal via the Internet and both have provided this court with documents that are not part of the record below in support of their arguments. DEED also provided information in its brief about the hours that Internet service is available to

applicants,¹ the process for filing an Internet appeal, and what likely happened when relator attempted to use the DEED site for his Internet appeal, as well as referring to undated summaries of two telephone calls relator made to DEED. The papers filed with the agency, the exhibits, and the transcript, if any, constitute the record on appeal. Minn. R. Civ. App. P. 110.01; *see id.*, 115.04, subd. 1 (applying rule 110 to certiorari appeals). “[E]vidence which was not received below may not be reviewed as part of the record on appeal.” *Appelhof v. Comm’r of Jobs & Training*, 450 N.W.2d 589, 591 (Minn. App. 1990). Thus, we cannot consider the facts cited by the parties that are not contained in the record below.

Instead, the hearing before the ULJ is the proceeding at which such evidence is gathered. Minn. Stat. § 268.105, subd. 1(b) (2008). It is at this hearing that the parties may submit their facts. For example, we note that although DEED ascribes certain dates to the summaries of the telephone calls contained in its appendix, the summaries themselves are undated; this would be appropriate to bring before the ULJ, who can make all relevant findings of fact. The ULJ must ensure that all relevant facts are developed. *Id.* When a party is not represented by counsel, the ULJ should assist the party with presenting evidence. Minn. R. 3310.2921 (2007). After the hearing is concluded, the ULJ must make findings of fact and a decision based on the evidence obtained. Minn. Stat. § 268.105, subd. 1(c) (2008). Accordingly, we reverse and remand for the ULJ to hold an evidentiary hearing to address the merits of relator’s claim as to the timeliness of

¹ It is not clear from the record we received from DEED that the restrictions on appeals by Internet were set out in the decision relator seeks to appeal as required under Minn. Stat. § 268.103, subd. 1.

his appeal. *See Mgmt. Five*, 485 N.W.2d at 325 (reversing and remanding for evidentiary hearing).

Reversed and remanded.