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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-26**

Gregory Lindwall,
Relator,

vs.

Department of Employment and Economic Development,
Respondent.

**Filed October 13, 2009
Reversed; motion denied
Kalitowski, Judge**

Department of Employment and Economic Development
File No. 21198593-4

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, First National Bank Building, 332 Minnesota Street, Suite E200, St. Paul,
MN 55101-1351 (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Kalitowski, Judge; and
Wright, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Pro se relator Gregory Lindwall challenges the unemployment-law judge's
decision that under Minn. Stat. § 268.085 (2006), the Department of Employment and

Economic Development properly reduced relator's extended unemployment compensation benefits due to his receipt of social security benefits. We reverse.

DECISION

Relator Gregory B. Lindwall established an unemployment compensation benefits account with respondent Department of Employment and Economic Development (DEED) on January 28, 2007, requesting unemployment benefits after being discharged from his employment with America Title Services. At the time that relator established the benefits account, he had an active social security claim that entitled him to old-age benefits in the amount of \$1,589 per month.

Relator exhausted his unemployment benefits and in August 2008 applied for extended unemployment benefits under the federally-funded Emergency Unemployment Compensation program. During the weeks of August 17, 24, and 31, 2008, relator received the full unemployment benefit amount of \$521 per week.

On September 11, 2008, a DEED adjudicator determined that because relator was receiving social security benefits, 50% of the weekly equivalent amount of those social security benefits had to be deducted from relator's weekly extended unemployment benefits, as required by Minn. Stat. § 268.085, subd. 4(a) (2006). Beginning the benefit week of September 7, 2008, DEED began subtracting \$168 from relator's weekly unemployment benefits to recover the overpayment for the weeks of August 17, 24, and 31, in addition to the reduction for the social security benefits.

In a telephone hearing with an unemployment-law judge (ULJ) on October 6, 2008, relator argued that Minn. Stat. § 268.085, subd. 4(a) (Supp. 2007), should apply to

his extended unemployment benefits account because he established the extended benefits account in 2008. Relator contended that because the 2006 version of the statute was amended in 2007 to prohibit DEED from making deductions for unemployment benefits based on the receipt of social security benefits, DEED was not permitted to deduct money from his extended benefits account that was established in 2008.

After the hearing, the ULJ issued a decision, finding that Minn. Stat. § 268.085, subd. 4(a) (2006), applied because “the emergency federal extension is just that, an extension of [relator’s] account established on January 28, 2007.” Thus, the ULJ concluded that DEED properly deducted money from relator’s unemployment benefits.

I.

We first address DEED’s April 24, 2009 motion to dismiss relator’s appeal under the doctrine of collateral estoppel. Specifically, DEED asserts that this court “has already decided the identical issue under the identical facts” in a previously decided unpublished case between relator and DEED. *See Lindwall v. Dep’t of Employment & Econ. Dev.*, No. A07-1719, 2008 WL 4133566 (Minn. App. Sept. 9, 2008), *review denied* (Minn. Nov. 25, 2008). We disagree.

Collateral estoppel prevents a party from relitigating issues if: (1) *the issue is identical to an issue in a prior litigation*; (2) there was a final judgment on the merits; (3) the estopped party was a party in the prior litigation; and (4) there was a full and fair opportunity to be heard on the issue. *In re Trust Created by Hill*, 499 N.W.2d 475, 484 (Minn. App. 1993) (emphasis added), *review denied* (Minn. July 15, 1993). Collateral estoppel applies to issues “actually litigated, determined by, and essential to a previous

judgment.” *In re Application of Hofstad*, 376 N.W.2d 698, 700 (Minn. App. 1985) (quotation omitted). Collateral estoppel is not “rigidly applied” and the focus is on whether its application would work an injustice on the estopped party. *Falgren v. State Bd. of Teaching*, 545 N.W.2d 901, 905 (Minn. 1996) (citation omitted). Whether collateral estoppel precludes relitigation of an issue is a mixed question of law and fact that is reviewed de novo. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004).

In the 2008 *Lindwall* case, relator argued that the ULJ erred in holding that 50% of his weekly social security benefits should be deducted from his unemployment benefits pursuant to Minn. Stat. § 268.085, subd. 4(a) (2006). Relator specifically argued that the deductions were impermissible because money was being deducted during a period when his social security benefits were being withheld due to overpayment. *Lindwall*, 2008 WL 4133566, at *1. Thus, relator argued that he was being deprived of all social security benefits, while also improperly receiving a reduced amount of unemployment benefits. *Id.* This court affirmed the ULJ’s decision to withhold the social security deductions, determining that because relator received a constructive social security benefit during this time period, as he had already been overpaid for benefits, the deductions were permissible. *Id.* at *3.

Here, relator argues that the deductions are impermissible because his federally-funded extended benefits account constitutes a new benefits account, and therefore, the 2007 amendment to the statute applies, not the 2006 version. The crux of this case,

whether an extended benefits account is considered to be a new account or a continuation of the state benefits account, was not litigated in the previous case.

Because the statute at issue in this appeal and the type of benefits are not identical to the issues litigated in the 2008 *Lindwall* case, respondent's motion is denied.

II.

Relator argues that: (1) the ULJ incorrectly applied the 2006 version of Minn. Stat. § 268.085; (2) DEED should not deduct the money it overpaid to relator because the payments were made without fault on his part and requiring the repayments would be contrary to principles of equity and good conscience; and (3) DEED improperly started deducting money from his extended unemployment compensation before relator's appeal and before the ULJ hearing was held.

This court may affirm the decision of the ULJ, remand the case for further proceedings, or 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) (2008). “We view the ULJ’s factual findings in the light most favorable to the decision, giving deference to the credibility determinations

made by the ULJ. In doing so, we will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (citations omitted). 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).

Minn. Stat. § 268.085, subd. 4(a) (2006), states, "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." In contrast, the amended version of this statute states, "If the effective date of the applicant's Social Security claim for old age benefits is before the start of the base period, there is no deduction from the applicant's weekly unemployment benefit amount." Minn. Stat. § 268.085, subd. 4(a) (2008). The amendment to the statute "is effective for unemployment insurance benefit accounts filed on or after September 30, 2007." Minn. Laws 2007, ch. 128, art. 1, sec. 15, at 940.

To establish whether the 2007 amendment to the statute applies to relator, we must determine whether relator's extended benefits account is a new account, or a continuation of his previous benefits account. Statutory interpretation is a question of law, which we review de novo. *Houston v. Int'l Data Transfer Corp.*, 645 N.W.2d 144, 149 (Minn. 2002). Words and phrases in a statute are to be construed according to their plain and ordinary meaning. *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). "Where the legislature's intent is clearly discernable from plain and unambiguous language, statutory construction is neither necessary nor permitted and we apply the

statute's plain meaning.” *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 539 (Minn. 2007). A statute is ambiguous only if its language is subject to more than one reasonable interpretation. *Schroedl*, 616 N.W.2d at 277.

Minn. Stat. § 268.115, which provides for extended unemployment benefits, states that “[t]his section is enacted to conform to the requirements of United States Code, title 26, section 3304, the Federal-State Extended Unemployment Compensation Act of 1970 as amended and the applicable federal regulations.” Minn. Stat. § 268.115, subd. 7 (2008). The Supplemental Appropriations Act of 2008 (the SAA) applies to this case because it amended the Federal-State Extended Unemployment Compensation Act of 1970 to authorize federal emergency unemployment compensation benefits. *See* Supplemental Appropriations Act of 2008, §§ 4001-4007, 26 U.S.C.A. § 3304, n. (Supp. 2008). The SAA states, “The terms and conditions of the State law which apply to claims for regular compensation and to the payment thereof shall apply to claims for emergency unemployment compensation and the payment thereof” *Id.* at § 4001(d)(2). Thus, individuals applying for extended benefits must meet all of the state law eligibility requirements governing the regular unemployment benefits account.

In order to be eligible for extended unemployment benefits in Minnesota, an individual must meet the requirements set forth under Minn. Stat. § 268.115, subd. 3. There is no dispute that relator satisfied these requirements.

Relator contends that because a new unemployment benefits account was created when he applied for extended benefits in August 2008, the amended version of Minn. Stat. § 268.085 applies. We agree.

Here, relator received extended unemployment benefits under the SAA, which specifically provides that “the State will establish, for each eligible individual who files an application for emergency unemployment compensation, an emergency unemployment compensation account with respect to such individual’s benefit year.” Supplemental Appropriations Act of 2008, § 4002(a). The SAA mandates that the state “will establish” an account for an individual who applies for extended benefits, thereby implying that an account does not already exist. Thus, this language indicates that an emergency unemployment compensation account under the SAA is an account that is separate from a state benefits account. Moreover, we note that in *Ebert v. Dep’t of Employment & Econ. Dev.*, DEED took a contrary position to the one it takes in this appeal. No. A06-703, 2007 WL 92921 (Minn. App. Jan. 16, 2007). In *Ebert* we affirmed DEED’s argument that an account established under statutory language similar to that cited above constituted a new account. *Id.* at *2.

The legislative purpose behind Minnesota’s unemployment compensation law, as stated in Minn. Stat. § 268.03 (2008), supports construction of the statute in a manner that favors awarding relator unemployment benefits. *See* Minn. Stat. § 268.03, subd. 1 (2008) (“The public good will be promoted by providing workers who are unemployed through no fault of their own a temporary partial wage replacement to assist the unemployed worker to become reemployed.”). And concluding that the extended benefits account is not a new account would result in relator being deprived of the full amount of unemployment compensation to which he is entitled.

Relator also argues that even if the 2006 statute applies, DEED should not deduct the money it overpaid to him because the payments were made without fault on his part, and requiring the repayments would be contrary to equity and good conscience. Further, relator argues that DEED improperly started deducting money from his extended unemployment compensation before relator's appeal and before the ULJ hearing was held. Although there is some merit to relator's equitable argument, because we conclude that the amendment to the statute applies, we decline to reach these issues.

In sum, we conclude that relator's extended benefits account is a new account, separate from the original state benefits account, with an effective date of August 17, 2008. Minn. Stat. § 268.085, subd. 4(a) (2008), applies, and the ULJ erred in determining that deductions from relator's unemployment benefits account by DEED were permissible, based on his receipt of social security benefits.

III.

Relator also argues that DEED has been deducting erroneous amounts from his unemployment benefits, but in his reply brief, relator states that most of these issues have been resolved. Relator states in his reply brief that the only matters remaining are: "First, the payment for April 20, 2009, has again shrunk to \$169.00. Second, the excess deductions for those two issues may be \$372.00 more than DEED repaid."

Because relator's first contention relates to an April 2009 payment, this argument was not presented to the ULJ at the October 2008 hearing. Further, this argument was not made in relator's brief. And issues waived because not raised or argued in appellant's brief cannot be revived in a reply brief. *McIntire v. State*, 458 N.W.2d 714, 717 n.2

(Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990). Relator's second argument in his reply brief is not adequately briefed. This court may decline to reach an issue in the absence of adequate briefing. *State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997). We thus conclude that appellant's additional arguments are waived.

Reversed; motion denied.