STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1700

In the Matter of the Residential Building
Contractor License of LeMaster Restoration, Inc.,
f/k/a LeMaster Construction, Inc. and
in the Matter of the Residential Building Contractor
License of LeMaster Restoration, Inc.,
and Verdean LeMaster, Individually.

Filed June 20, 2011
Affirmed
Connolly, Judge

Minnesota Department of Labor and Industry
OAH Docket No. 3-1902-20840-2

Marshall H. Tanick, Mansfield, Tanick & Cohen, P.A., Minneapolis, Minnesota (for relators)

Lori A. Swanson, Attorney General, Christopher M. Kaisershot, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Toussaint, Presiding Judge; Connolly, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Relators, a construction company and its principal, challenge the denial of their motions for a continuance of an administrative hearing, the subsequent revocation of their contractor's building license, and the imposition of penalties for their violations. Because

the denial of the continuance was not arbitrary or capricious, the determinations supporting the revocation were not erroneous, and the penalties were not an abuse of discretion, we affirm.

FACTS

In July 2009, respondent Department of Labor and Industry (DLI) issued two orders concerning relators LeMaster Restoration, Inc. (LRI), and its principal, Verdean LeMaster (LeMaster).[1] The first order concerned relators' misconduct prior to December 1, 2007 (pre-December 2007 violations); it set a prehearing conference for September 10, 2009. The second order concerned relators' misconduct after December 1, 2007 (post-December 2007 violations); it revoked relators' license, imposed a $20,000 civil penalty, and ordered relators not to act or hold themselves out as licensed residential-building contractors.

On August 26, 2009, relators' attorney requested a hearing on the order imposing discipline for post-December 2007 violations. The hearing on those violations was also scheduled for September 10, 2009. At that hearing, the administrative-law judge (ALJ) consolidated the two actions and scheduled a hearing for January 10, 2010.

[1] DLI issued two orders because of a December 2007 change in the relevant law. Minn. Stat. §§ 326.93-.992 (2006) concerned violations committed prior to November 30, 2007. It provided that DLI had to commence an administrative action before the commissioner could impose any discipline on residential-building contractors, even if the discipline was not challenged, and permitted judicial review of disciplinary acts by parties who did not appear at the hearing. Minn. Stat. § 326B.082 (Supp. 2007) concerned violations committed after December 1, 2007. It provided that the commissioner could impose discipline prior to a hearing and gave disciplined parties 30 days to request a hearing, after which the unchallenged discipline became final with no right to judicial review.

The consolidated action was later amended to include further allegations of relators' misconduct after December 1, 2007, and stated that this misconduct could result in additional disciplinary action beyond that specified in the July 2009 order.

DLI moved for partial summary judgment on the ground of collateral estoppel as to relators' violations adjudicated in *LeMaster Constr., Inc. v. Woeste*, No. A08-0956, 2009 WL 1048194 (Minn. App. Apr. 21, 2009) (affirming a $301,302.72 judgment against relators in favor of homeowners) (*Woeste*).[2] The motion was granted.

On December 29, 2009, relators' attorney withdrew from representation. Relators requested a continuance of the January 20 hearing so they could retain new counsel. The ALJ rescheduled the hearing for March 18.

During January 2010, DLI summarily suspended LRI's license pending the commissioner's final order and learned that relators were conducting business without a license from a customer who had recently paid them $70,000. To stop this practice, DLI issued a subpoena for relators' existing contracts and for an accounting of money for each contract. Relators did not comply with the subpoena.

On March 12, 2010, relators again moved for a continuance. The ALJ denied the motion. On March 17, 2010, relators submitted a third request for a continuance, and LeMaster submitted an affidavit in lieu of appearing at the hearing. The ALJ denied the request and did not accept the affidavit.

[2] Relators paid the judgment affirmed in *Woeste* in August 2009.

Relators did not appear at the hearing. DLI appeared and made a record. The record closed after relators submitted post-hearing correspondence.

The ALJ issued a report including findings of fact and conclusions of law that relators had committed all but one of the violations alleged by DLI and a recommendation that the commissioner affirm the licensing order of July 2009. Both DLI and relators submitted exceptions to the ALJ's report.

After reviewing the ALJ's report and the parties' exceptions to it, an assistant commissioner issued findings of fact, conclusions of law, an order, and a supplemental memorandum that revoked LRI's license and imposed a $30,000 penalty on LRI and a $10,000 penalty on both relators and on LeMaster individually.

Relators challenge the commissioner's decision, arguing that the ALJ's denials of their second and third requests for a continuance were arbitrary and capricious and that the commissioner (1) erred by not considering the new evidence relators submitted with their exceptions to the ALJ's report; (2) erred by not considering the constitutional issues that relators raised in their exceptions to the ALJ's report; (3) violated Minnesota law by considering DLI's exceptions to the ALJ's report; and (4) abused his discretion by imposing a $30,000 penalty on LRI and a $10,000 penalty on LeMaster.

D E C I S I O N

"An appellate court may reverse or modify an administrative decision if substantial rights of the petitioners have been prejudiced by administrative findings, inferences, conclusions or decisions that are unsupported by substantial evidence in view of the entire record, or arbitrary and capricious, but the court must also recognize the

need for exercising judicial restraint and for restricting judicial functions to a narrow area of responsibility lest [the court] substitute its judgment for that of the agency." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001) (quotation and citations omitted).

I. The ALJ's denial of a continuance was not arbitrary or capricious.

Relators' first request for a continuance was granted; their second and third requests were denied. They now contend that the ALJ's denial of these requests was arbitrary and capricious and that they are entitled to a rehearing.[3] We review the denial of a motion for a continuance for an abuse of discretion. *See Torchwood Properties, LLC v. McKinnon*, 784 N.W.2d 416, 418 (Minn. App. 2010) (reviewing district court's denial of a continuance motion). "[W]hen we evaluate the denial of a continuance motion, the critical question is . . . whether the denial prejudiced the outcome . . ." *Id*. at 419.

A. Relators' failure to participate in the hearing estops them from arguing that they were prejudiced by the denial of a continuance.

DLI argues that relators prejudiced the outcome of the hearing by their decision not to appear. In *Torchwood*, the plaintiff declined to participate further in the trial after the denial of its motion for a continuance. *Id*. at 418. Because the plaintiff had presented no evidence, the district court found in the defendant's favor on all of plaintiff's claims. *Id*.

[3] We reject DLI's argument that relators' failure to obtain agency review of the ALJ's denial prevents them from raising the issue on appeal. The commissioner's authority is limited to review of the ALJ's report. *See* Minn. Stat. § 14.61, subd. 1 (2010). Because the ALJ's denial of a continuance was a final decision, review by this court is appropriate. *See* Minn. Stat. § 14.62 (2010).

> We hold that when a party whose midtrial motion[] for a continuance . . . [is] denied reacts by refusing to participate in the remainder of the trial such that its refusal prejudices its chance to prevail, that party is estopped on appeal from challenging the denial for prejudicial error. Entertaining the argument on the merits would be difficult or impossible because it would require us to parse an incomplete record to distinguish between the possible prejudice from the district court's decision and the actual prejudice from the [party's] choice to abandon the trial. And entertaining the argument would be improper because doing so would encourage manipulation if the purpose was to manufacture prejudice to challenge the district court's procedural ruling.
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> . . . [A]s a legal matter, [the plaintiff] is estopped from making the argument.

Id. at 420. Relators attempt to distinguish *Torchwood* on the ground that they were not represented by counsel and did not refuse to participate. But relators did not appear at the hearing either to present evidence or to be cross-examined; nor did they brief any of the issues. Their participation was limited to submitting LeMaster's affidavit. As in *Torchwood*, it is impossible to know to what extent relators were prejudiced by the denial of a continuance and to what extent they were prejudiced by their own decision not to participate in the hearing.

Although we conclude that relators are estopped from challenging the denial of the continuance because they cannot show prejudice, we address the denial on its merits.

B. Relators did not show good cause for granting their second and third requests for a continuance.

"Requests for a continuance of a hearing shall be granted upon a showing of good cause." Minn. R. 1400.7500 (2009). "Good cause" includes substitution of an attorney of a party "if the substitution is shown to be required." *Id.* Good cause does not include

intentional delay or failure of a party "to properly utilize the statutory period to prepare for the hearing," *id.*; *cf. Torchwood*, 784 N.W.2d at 418, 420 (affirming denial of a continuance granted because district court found that ailing defendant was unlikely to be able to produce documents plaintiff sought even if she had more time).

Relators' counsel withdrew on December 29, 2009. On January 15, 2010, relators requested a continuance of the hearing scheduled for January 20, 2010, so they could obtain replacement counsel. This request was granted, and the hearing was rescheduled for March 18, 2010, more than two months after relators' request and 60 days after the original hearing date.

Six days before the rescheduled hearing, LeMaster requested another continuance during a telephone conference, saying he had been unable to procure an attorney because he lacked the funds to pay a retainer. The ALJ denied the continuance and explained, in a letter dated March 12, that she had "concluded that Mr. LeMaster has failed to show good cause under Minn. R. 1400.7500 to continue the hearing." On May 17, 2010, LeMaster submitted another request for a continuance, which was also denied. Relators do not assert that, if they had been granted a further continuance, they could have obtained an attorney. The ALJ's determination that they failed to show good cause for another continuance was not arbitrary or capricious.

Relators assert that "[t]he requested continuance was denied because of Relators' ostensible non-compliance with the January 15, 2010 subpoena" and argue that denial of a continuance is not an appropriate sanction for failure to comply with an allegedly

flawed subpoena. But the ALJ indicated that she denied the continuance because relators failed to show good cause, not because they failed to comply with a subpoena.

In her letter confirming her oral denial of a continuance during the parties' telephone conference, the ALJ summarized the conference. She reported that relator requested a continuance because he had not been able to hire an attorney because he could not fund a retainer and that DLI objected to the continuance because relators, despite the suspension of their license, were continuing to represent to the public that LRI was a licensed residential building contractor and had accepted a check for $70,000 to perform work requiring a license; relators also had failed to respond to an administrative subpoena of items that would enable DLI to determine whether LRI was doing any additional work that required a license. The ALJ also recounted the parties' disagreement over the subpoena: relators said it had no date for compliance and had been improperly served and that they were unable to comply; DLI said the subpoena required immediate compliance and was properly served.

In another paragraph, the ALJ concluded that relators failed to show good cause to continue the hearing. At no point in the letter does she provide any basis for the inference that she denied the continuance as a sanction for noncompliance with the subpoena.

Similarly, in her Findings of Fact, Conclusions, and Recommendation, the ALJ wrote that, at the time relators requested the second continuance, they had not responded to DLI's subpoena issued to find out whether relators were violating the suspension of their license by performing work for which a license was required and that DLI had heard

that relators were continuing to hold themselves out as a licensed contractor. But the ALJ did not state or imply that the denial of the continuance was a sanction for failure to comply with the subpoena.

In fact, the memorandum accompanying the Findings of Fact, Conclusions, and Recommendation goes on to say that, "[Relators] indicated that they had no prospect of obtaining counsel because of lack of funds. On this record, the ALJ concluded that [relators] had failed to demonstrate good cause for the continuance." There are two reasonable inferences from the ALJ's language: first, suspending relators' license had not stopped the misconduct that gave rise to DLI's licensing order, and second, the continuance was denied because relators failed to show good cause for a continuance to enable them to retain counsel by saying they had no prospect of being able to retain counsel.[4] The ALJ's denial of a continuance was not arbitrary or capricious; nor does it provide a basis for granting relators a rehearing.

II. The assistant commissioner did not err by not considering evidence relators submitted with their exceptions to the ALJ's report.

In December 2009, when the ALJ granted partial summary judgment to DLI on the basis of *Woeste*, she commented that relators were entitled "to make a record of additional evidence concerning appropriate discipline and any mitigating circumstances that they believe the Commissioner should consider in determining the appropriate disciplinary response to the [*Woeste*] violations." Based on this comment, relators argue that the assistant commissioner erred by (1) finding that the ALJ "did not keep the record

[4] Relators' arguments on the flaws in the subpoena are thus irrelevant to the denial of the continuance or to any other issue on appeal.

open for additional evidence following the [March 2010] hearing"; (2) noting that some of relators' exceptions to the ALJ's report "allege facts and present evidence not otherwise presented at the hearing, which [relators] did not attend"; and (3) not considering that evidence.

For this argument, relators rely on *Falgren v. State, Bd. of Teaching*, 545 N.W.2d 901 (Minn. 1996). But *Falgren* does not hold that a party may submit new evidence to the commissioner after a hearing with the ALJ; it holds that a teacher terminated for engaging in nonconsensual conduct with a student may present evidence of his subsequent participation in remedial activities to the ALJ at the license-revocation hearing. *Id.* at 908. Analogously, relators could have presented evidence concerning appropriate discipline to the ALJ at the hearing, but they are not entitled to present evidence to the commissioner that was never before the ALJ. *See* Minn. R. 1400.7800, subp. J (2009) (contested-case record closes with written submissions, late-filed exhibits to which the parties and the ALJ have agreed, and the hearing transcript); Minn. R. 1400.8100, subp. 1 (2009) (no information outside the record may be considered by the ALJ or the agency); *Blue Cross & Blue Shield*, 624 N.W.2d at 274 (no evidence not previously agreed to may be submitted after the record closes). The assistant commissioner's decision not to consider the new evidence relators submitted with their exceptions to the ALJ's report was not erroneous.

III. The assistant commissioner did not err by not considering constitutional issues raised in relators' exceptions to the ALJ's report.

The assistant commissioner noted that, in their exceptions to the ALJ's report, "[relators alleged] denial of their constitutional rights to 1) due process, 2) liberty and property, 3) freedom to contract, and 4) right to redress."[5] She did not address these arguments, asserting that relators' constitutional issues were outside the jurisdiction of both the commissioner and the ALJ. For this assertion, she relied on *Holmberg v. Holmberg*, 578 N.W.2d 817, 820 (Minn. App. 1998) (holding that commissioner is without authority to address constitutional issues), *aff'd* 588 N.W.2d 720 (Minn. 1999).

But the assistant commissioner also noted, in the supplemental memorandum accompanying the order, that relators' constitutional arguments were based on evidence not available to the ALJ at the hearing and therefore could not be considered. *See* Minn. R. 1400.8100, subp. l (no information outside the record may be considered by the ALJ or the agency). Thus, the commissioner did not, as relators claim, rely "only" on *Holmberg*.

Relators argue that, despite *Holmberg*, the commissioner and the ALJ did have authority to address their constitutional arguments. For this argument, they rely only on *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446 (Tenn. 1995). But they offer no explanation other than their own opinion as to why a Tennessee case should prevail over Minnesota law.

[5] Relators do not discuss their constitutional arguments; they simply object to the assistant commissioner's failure to address them.

IV. The assistant commissioner did not err by considering DLI's exceptions to the ALJ's report.

The commissioner cannot make a decision until the ALJ's report is made available to parties for at least ten days and "an opportunity has been afforded to each party adversely affected to file exceptions . . . ." Minn. Stat. § 14.61, subd. 1 (2010). Relators argue that DLI was not entitled to file exceptions to the ALJ's report because, although both parties must receive copies of the ALJ's report, only a party adversely affected by the report is entitled to file exceptions, and DLI was not adversely affected. Their argument fails for two reasons.

First, DLI was adversely affected as to one point. In its licensing order, DLI asserted that relators were incompetent, untrustworthy, financially irresponsible, and unqualified to act under a license because they had failed to satisfy the $301,302.72 *Woeste* judgment. At the hearing, DLI's attorney said that relators had satisfied the judgment after the July 2009 licensing order had been prepared, but argued that its allegation against relators had changed only "from no pay to slow pay" and that relators were still liable for "volitional conduct, because they should have satisfied [the judgment] immediately." The ALJ concluded that relators had satisfied the judgment within three months of the release of *Woeste* and that DLI had not shown that relators' failure to satisfy it earlier demonstrated that they were untrustworthy or financially irresponsible. Thus, the ALJ's conclusion was adverse to DLI.

Second, the requirement of Minn. Stat. § 14.61, subd. 1, that adversely affected parties must have an opportunity to file exceptions does not mean that only adversely

affected parties may have an opportunity to file exceptions, or that non-adversely affected parties must not have, or are not allowed to have, such an opportunity. It means only that they are not required to have the opportunity.

Minnesota law was not violated either when both DLI and relators were asked to submit exceptions to the ALJ's report or when the commissioner considered DLI's recommendations.

V. The assistant commissioner did not abuse her discretion by imposing a $30,000 penalty on LRI and a $10,000 penalty on LeMaster.

"The standard of review is not heightened where the final decision of the agency decision-maker differs from the recommendation of the ALJ." *Blue Cross & Blue Shield*, 624 N.W.2d at 278. An agency's assessment of penalties should be set aside only for an abuse of discretion. *In re Haugen*, 278 N.W.2d 75, 80 n.10 (Minn. 1979).

The ALJ imposed the penalty of $20,000 on relators that the DLI's July 2009 order established for misconduct committed after December 1, 2007. The assistant commissioner, in accord with the ALJ's recommendation, imposed additional penalties in connection with *Woeste*, which concerned misconduct committed prior to November 30, 2007: $10,000 was imposed on LRI because it "performed negligently or in breach of contract so as to cause injury or harm to the public in violation of Minn. Stat. § 326.91, subd. 1(4) (2006)" and $10,000 was imposed on relators and on LeMaster individually for engaging in "fraudulent, deceptive, and dishonest practices . . . in violation of Minn. Stat. § 326.91, subd. 1(2) (2006) and Minn. R. 2891.0040, subps. 1(C), 1(D), and 1(H)."

Relators argue that, because the assistant commissioner did not identify any new violations, the increased penalty was not authorized, relying on Minn. Stat. § 326B.082, subd. 12(b) (2010) (providing that "[a] monetary penalty may be up to $10,000 for each violation or act, conduct, or practice committed by the person"). But the assistant commissioner explained that the additional penalties were imposed in connection with the *Woeste* violations. The assistant commissioner also quoted the ALJ's observation that the $20,000 penalty was only for violations occurring after December 1, 2007, because, "under the procedures in effect before December 1, 2007, the Commissioner had to provide a hearing on a Statement of Charges before taking any disciplinary action against a license." Thus, relators' argument that, in connection with imposing the additional penalty, "the [assistant] commissioner's failure to show specific application of the laws to the facts [was] prima facie arbitrary" is refuted by the commissioner's memorandum, which does apply the law to specific facts.

In summary, the ALJ did not err in denying relators' second and third requests for a continuance; the assistant commissioner did not err either in not considering evidence not before the ALJ and relators' constitutional arguments or in considering DLI's exceptions to the ALJ's report; and the assistant commissioner did not abuse her discretion in imposing penalties for violations committed prior to November 30, 2007.

Affirmed.