STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0242

In the Matter of the Licensing Order Issued to
All Main Street Electric and Timothy Barrett

Filed November 4, 2013
Affirmed
Connolly, Judge

Minnesota Department of Labor and Industry
File No. 16-1902-22137-2

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Considered and decided by Cleary, Presiding Judge; Connolly, Judge; and Larkin, Judge.

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

CONNOLLY, Judge

In this certiorari appeal from the decision of the Department of Labor and Industry (DLI), relators, All Main Street Electric (AMSE) and Timothy Barrett (Barrett), argue that (1) the commissioner's decision was not supported by substantial evidence in view of the entire record, (2) the commissioner's decision to revoke Barrett's journeyman license

was an abuse of discretion, (3) the administrative-law judge's failure to grant relators' motions for a continuance was an abuse of discretion, and (4) that relators' constitutional rights have been violated. We affirm.

FACTS

Barrett obtained his Class A Journeyman Electrician's license on March 23, 1982. The journeyman license enables him to perform electrical work and supervise registered unlicensed individuals while he is employed by licensed electrical contractors. He subsequently obtained his Class A Master Electrician license on May 28, 1986 and a Class A Electrical Contractor's license on behalf of AMSE on August 15, 2001. The master electrician license allows him to perform electrical work, to supervise registered unlicensed individuals while he is employed by licensed contractors, and to be the responsible master electrician for an electrical contractor or registered employer.

The properties of electricity are scientifically well established. Voltage is the electrical force that moves electricity through a conductor. Residential electrical systems consist of an incoming electrical line service from a utility company transformer that travels through a metering system to a circuit breaker box. The voltage delivered by a utility company to a residential home is generally 240 volts. Residential electrical wiring is rated up to 600 volts. Voltage significantly in excess of a component's rating can damage that component by causing thermal overload. Catastrophic events, such as lightning, can cause power surges that damage residential electrical systems. When lightning contacts residential wiring, it can cause the wiring insulation to fail and can melt grounded objects. A lightning strike will not necessarily damage every circuit

branch in a home. When lightning or other catastrophic events occur, electricians commonly use a device called a megohmmeter to measure damage to wiring insulation.

In their work as electricians, relators used the "Ideal SureTest Meter" to measure the occurrence of "voltage drop" in residential electrical systems. Voltage drop is a naturally occurring phenomenon in which the amount of voltage between two points on an electrical circuit decreases. This phenomenon can be caused by a variety of factors including old age, poor workmanship, and loose or corroded connections. The SureTest meter can measure voltage drop but cannot determine its cause.

Relators made repairs to their customers' homes based on voltage drop damage that they identified by using the SureTest meter. Relators often told their customers that their homes needed extensive electrical work based on voltage drop caused by lightning. Relators represented that their customers' insurance providers were required by law to pay for electrical repairs based on voltage drop tests. They incorrectly claimed that the amount of voltage drop is restricted by the National Electrical Code (NEC).[1]

Relators often billed State Farm insurance for the substantial repairs they made to residential electrical systems. State Farm's standard homeowner's policy covers sudden, accidental, and direct physical losses caused by an occurrence such as lightning. To be

[1] NEC is referenced as the compliance standard by the Minnesota Electrical Act. Minn. R. 1315.0200 (2011). NEC states, "Conductors for branch circuits . . . sized to prevent a voltage drop exceeding 3 percent at the farthest outlet of power, heating, and lighting loads, or combinations of such loads, and where the maximum total voltage drop on both feeders and branch circuits to the farthest outlet does not exceed 5 percent, provide reasonable efficiency of operation." NEC § 210.19(A)(1), Fine Print Note No. 4 (2011). Fine print notes are explanatory material and are used for informational purposes only. NEC § 90.5(C) (2011).

included within its coverage, the loss must be causally related to the event and must be reasonable and necessary. State Farm's standard insurance does not cover electrical damage due to ordinary wear and tear.

State Farm became suspicious of relators' business activities after being billed for electrical work that was completed based on relators' insistence that total electrical replacements were needed. In May 2010, State Farm notified relators that it wanted to inspect any alleged damage prior to relators performing or completing electrical work.

In response to this request, AMSE began conducting business under the name "Layton Electric, Inc." in order to continue securing insurance proceeds to rewire homes based on the presence of voltage drop. Barrett falsely held himself out as "Tim Johnson," and invoiced customers using the Layton name. The Layton invoices were practically identical to AMSE's invoices.

In 2010, State Farm sent independent experts to investigate relators' proposed and completed work. State Farm representatives determined that the claims of extensive damage were inconsistent with basic scientific principles and were overall unsupportable. In the homes where relators had already completed work, State Farm paid for the claim under its vandalism coverage.

After receiving a customer complaint, respondent launched an investigation into relators' work at approximately 20 homes. On July 29, 2010, DLI sent relators a request for information via certified and first-class mail requesting a complete list of all of their customers since 2009, copies of all contracts, bids, estimates, and invoices for those customers, and a complete list of all employees, subcontractors and independent

contractors that performed work on AMSE's behalf. On July 30, 2010, AMSE's representative signed an acknowledgement of receipt of certified mail from DLI. On the same day, Barrett supplemented a police report that he originally filed on July 9, 2010. In this supplement, he claimed that a UPS envelope with work documents had been stolen from his vehicle and that a majority of his business records and flash drives were taken. Relators provided a written response to DLI, which stated that the requested documents were unavailable due to theft.

On September 17, 2010, Barrett provided a sworn statement in which he admitted that his sons and son-in-law performed electrical work for AMSE without the proper licensure or registration. After this meeting, relators' attorney informed DLI that two of Barrett's colleagues, J.T. and J.F., were journeyman electricians who were employed by AMSE. He stated that J.T. and J.F. supervised Barrett's sons and son-in-law. J.T. and J.F. responded that they did not work for AMSE in 2009 or 2010. In fact, J.T. and J.F. both testified that Barrett contacted them and asked them to lie to DLI by stating that they worked for AMSE. Both men refused to lie and instead assisted DLI in the investigation.

On June 23, 2011, DLI served relators with a licensing order pursuant to Minn. Stat. § 326B.082, subds. 11(b), 12, 13 (2010). The order revoked relators' electrical licenses, imposed a $30,000 civil penalty for which they were held jointly and severally liable, and ordered them to cease and desist from acting or holding themselves out as electricians in Minnesota.

On August 19, 2011, the parties met for a prehearing conference. Relators asked for a continuance of the administrative hearing, which they received. The ALJ scheduled the hearing to commence on February 21, 2012.

On October 6, 2011, DLI served relators with interrogatories. Relators failed to respond. On November 29, 2011, the ALJ ordered relators to provide responses by December 9, 2011. One day before this deadline, relators responded to the interrogatory about their expert witness but did not provide the facts or opinions that the witness was expected to testify to or the grounds for his opinion. The ALJ ordered relators to supplement their expert disclosures within seven days. Relators supplemented their discovery response by explaining that their witness is a SureTest salesperson and providing his phone number. Relators still did not identify the facts or opinions that the witness was expected to testify to or the ground for his opinion.

On February 3, 2012, the ALJ issued an order that granted DLI's motion to strike relators' invalid objections and to compel responses to DLI's discovery requests. Thereafter, the matter was reassigned to another ALJ. Relators requested a 30-day continuance to resolve discovery disputes. On February 7, the ALJ denied the request because the February 3 order resolved any remaining disputes. Relators filed another motion for continuance on February 10, on the basis that DLI had not answered any of relators' discovery requests. The ALJ denied the motion because DLI had answered relators' requests. Thereafter, relators filed additional motions to continue the hearing. The ALJ denied relators' motions, stating that relators failed to establish good cause because DLI had responded to relators' requests in a timely fashion.

The administrative hearing occurred between February 27 and March 9, 2012. The ALJ found that relators engaged in fraudulent, deceptive, and dishonest practices, or demonstrated incompetence, untrustworthiness, or financial irresponsibility. He recommended the revocation of Barrett's master electrician license but not his journeyman license, revocation of AMSE's electrical contractor license, and the imposition of a $30,000 civil penalty for which relators would be jointly and severally liable.

On January 8, 2013, the commissioner of labor and industry issued his finding of fact, conclusions of law, and order. The commissioner revoked Barrett's master electrician and journeyman licenses, AMSE's electrical contractor license, and imposed a $30,000 civil penalty for which relators are jointly and severally liable with the possibility that $15,000 of that penalty would be stayed.

D E C I S I O N

DLI falls within the definition of "agency" under the Minnesota Administrative Procedure Act. Minn. Stat. § 14.02, subd. 2 (2012). "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 . . . ." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001) (citation omitted). Agency decisions enjoy a presumption of correctness, and we review them under a narrow standard. *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824-25 (Minn. 1977).

I. The commissioner's decision was not arbitrary and capricious.

Relators contend that the commissioner's decision was arbitrary and not supported by substantial evidence in the record. An agency's conclusions are not arbitrary and capricious if a "rational connection between the facts found and the choice made has been articulated". *In re Review of 2005 Annual Automatic Adjustment of Charges*, 768 N.W.2d 112, 120 (Minn. 2009) (quotation omitted). The party challenging an agency decision bears the burden of proving that the agency findings are not supported by the evidence in the record. *Id.* at 118.

"An agency acts in a quasi-judicial manner when the commission hears the view of opposing sides presented in the form of written and oral testimony, examines the record, and makes findings of fact." *In re N. Metro Harness, Inc.*, 711 N.W.2d 129, 137 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. June 20, 2006). "When an agency acts in a quasi-judicial capacity, an appellate court applies the substantial evidence test on review." *Id.* "Substantial evidence is defined as (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Cannon v. Minneapolis Police Dep't*, 783 N.W.2d 182, 189 (Minn. App. 2010) (quotation omitted). "The substantial evidence test requires a reviewing court to evaluate the evidence relied upon by the agency in view of the entire record as submitted." *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 668 (Minn. 1984) (citation omitted).

The guidelines by which DLI may revoke an electrician's license are set forth in Minn. Stat. § 326B.082. DLI may revoke an electrician's license for engaging in "any fraudulent, deceptive, or dishonest act or practice," or if a person "performed work in connection with the . . . license . . . in a manner that demonstrates incompetence, untrustworthiness, or financial irresponsibility." Minn. Stat. § 326B.082, subd. 11(b)(8), (9).

The commissioner's findings of facts, conclusions of law, and order adopts the ALJ's findings and conclusions with minor modifications. The commissioner concluded that relators routinely engaged in fraudulent, deceptive, and dishonest practices in violation of Minn. Stat. § 326B.082 by misleading their customers about the cause and scope of their purported electrical problems. He adopted the following finding:

> Respondents repeatedly and incorrectly represented to the public that substantial rewiring of homes was necessary based on their analysis and representations concerning the cause and effect of voltage drop. Respondents gained substantial economic benefit to the detriment of their customers (and insurance companies) by falsely representing that lightning and other electrical events caused voltage drop, that the presence of voltage drop necessitated substantial rewiring of entire electrical systems, and that the charges to remove and replace electrical circuitry under such circumstances were covered losses under homeowner's insurance policies.

The commissioner determined that the extensive work performed was overcharged, unnecessary, and misdiagnosed.

There is substantial evidence in the record that relators made false and misleading statements about voltage drop due to their misplaced reliance on the SureTest meter. One of DLI's expert witnesses testified that numerous factors can lead to voltage drop and that

the SureTest meter does not have the ability to ascertain the cause of the phenomenon. He also testified that lightning does not cause voltage drop. Another DLI expert witness testified that the megohmmeter is commonly used to determine damage if there is a surge event or a lightning strike on the property.

There is also substantial evidence that relators misrepresented that insurance companies were legally required to pay for any repairs based on the voltage drop test. DLI entered an exhibit into evidence showing that relators told their customers that insurance coverage would be recovered based on the voltage drop test. Relators stated on their website, "This is precisely why insurance companies pay for repairs based off the readings of a voltage drop test in a home. It's the law!" However, a State Farm representative testified at the hearing that State Farm insurance does not cover normal wear and tear that causes voltage drop.

The record also shows that relators failed to obtain the requisite permits before performing work on their customers' homes. On more than one occasion, relators charged their customers a $262 permit fee for permits that relators never secured. This supports the commissioner's conclusion that relators received an economic benefit from their deceptive activities.

The commissioner also concluded that relators demonstrated incompetence or untrustworthiness in violation of Minn. Stat. §§ 326B.082, subd. 11(b)(1), (9), 326B.31, subd. 16 (2010), and 326B.33, subd. 12(a) (2010). He found that relators used the Layton name to conceal their involvement in their customers' insurance claims after State Farm

began investigating their work. He also found that relators allowed unlicensed and unregistered persons to perform work for AMSE.

These findings are supported by substantial evidence in the record. After State Farm began its investigation, AMSE used the name "Layton Electric, Inc." and Barrett held himself out as "Tim Johnson" in order to cloak their involvement on projects where State Farm was the homeowner's insurer. Several exhibits show that AMSE created "Layton" invoices and billed multiple customers using the Layton name. Witnesses testified that Barrett held himself out as "Tim Johnson," and one witness testified that Barrett explicitly instructed him not to use the name "Tim Barrett" when speaking with State Farm representatives.

Witnesses testified that relators improperly allowed unlicensed and unregistered individuals to perform electrical work on AMSE's behalf. On more than one occasion, these unlicensed and unregistered individuals worked without any direct supervision. Furthermore, witnesses J.F. and J.T. testified that Barrett instructed them to lie to DLI and say that they were journeyman electricians who supervised AMSE's unlicensed and unregistered employees. Both men refused to lie to DLI and testified at the hearing that they had not acted as journeyman electricians for AMSE.

Relators also contend that the commissioner's decision was not supported by substantial evidence because their spirited cross-examination of DLI's witnesses highlighted the witnesses' bias, contradictions and inaccuracies. The ALJ concluded that relators were not credible but that DLI's witnesses were credible in all material respects. The court defers to an agency's conclusions regarding conflicts in testimony, the weight

given to expert testimony, and the inferences to be drawn from testimony. *Blue Cross & Blue Shield*, 624 N.W.2d at 278. The commissioner's decision was not arbitrary or capricious.

II. The commissioner did not abuse his discretion by revoking Barrett's journeyman license.

Although the ALJ did not recommend revocation of Barrett's journeyman license, the commissioner determined that revocation of that license is in the public's best interest. Relators argue that because the commissioner's decision was based on arbitrary portions of the record, this determination was an abuse of discretion.

The imposition of a sanction lies within the discretion of an agency. *In re Haugen*, 278 N.W.2d 75, 80 n.10 (Minn. 1979). "The standard of review is not heightened when the final decision of the agency decision-maker differs from the recommendation of the ALJ . . . ." *In re Excelsior Energy, Inc.*, 782 N.W.2d 282, 289 (Minn. App. 2010). "Rejection of the ALJ's recommendations without explanation however, may suggest that the agency exercised its will rather than its judgment and was therefore arbitrary and capricious." *Blue Cross & Blue Shield*, 624 N.W.2d at 278.

When applying a sanction upon a license holder who does not comply with applicable law or rule, the commissioner "shall issue to the person an order denying, conditioning, limiting, suspending, or revoking the person's permit, license, registration, or certificate, or censuring the permit holder, licensee, registrant, or certificate holder." Minn. Stat. § 326B.082, subd. 12(a). This order may include an assessment of monetary penalties up to $10,000 for each violation. *Id.*, subd. 12(b).

The ALJ concluded that relators engaged in over 20 different violations. Relators argue that because the commissioner both embraced and rejected the ALJ's findings, the commissioner abused his discretion by revoking Barrett's journeyman license. Contrary to relators' assertion that the findings suggest that relators' deficiencies stem from the diagnosis of extensive damage due to catastrophic electrical events and the misplaced reliance on the SureTest meter, the ALJ and commissioner both determined that relators were involved in deceptive and fraudulent practices. Because Barrett engaged in a pattern of fraudulent, deceptive, and dishonest practices and performed work in connection with his license in an incompetent and untrustworthy manner in violation of Minn. Stat. § 326B.082, subd. 11(b)(8), (9), the commissioner had explicit authority to revoke relator's journeyman license. *Id.*, subd. 1 (2010) ("The commissioner may enforce all applicable law under this section. The commissioner may use any enforcement provisions in this section . . . ."); *id.*, subd. 12 (authorizing the commissioner to issue revocation orders).

The commissioner was not convinced by the ALJ's conclusion that Barrett's misconduct was primarily comprised of questionable business practices relating to marketing, contracting, supervision, and billing. The commissioner also disagreed with the ALJ's conclusion that a licensed journeyman could not engage in deceptive, dishonest, or untrustworthy practices simply because he is supervised by another licensed electrician. The commissioner recognized that revoking Barrett's journeyman license was necessary to protect the public and to deter others from engaging in similar misconduct. We agree.

The commissioner determined that it is in the public's interest to revoke all of relators' licenses. The commissioner based this determination on relators' failure to competently test electrical systems, their performance of extensive and unnecessary work, and their representations that substantial electrical rewiring was needed based on an incorrect understanding of the cause and effect of voltage drop. Furthermore, the commissioner suspected that relators' practices were intentional and, even if not intentional, showed very serious forms of incompetence requiring revocation of Barrett's journeyman license.

Relator also argues that his exceptions to the ALJ's findings show an absence of clearly defined procedures or processes for diagnosing catastrophic events. However, the commissioner determined that these exceptions were filed late and therefore were properly not considered. Minn. Stat. § 14.61, subd. 2 (2012). The commissioner did not abuse his discretion by revoking Barrett's journeyman license. Because the commissioner explained his deviation from the ALJ's conclusion, the revocation of that license was not arbitrary or capricious.

III. The ALJ's denial of a continuance was not an abuse of discretion.

Relators' first request for a continuance was granted; their subsequent requests were denied. They now argue that their motions for continuance should have been granted to allow them more time to resolve discovery and expert witness issues that prejudiced their case. We review the denial of a motion for a continuance for an abuse of discretion. *See Torchwood Props., LLC v. McKinnon*, 784 N.W.2d 416, 418 (Minn. App.

2010). "[W]hen we evaluate the denial of a continuance motion, the critical question is . . . whether the denial prejudiced the outcome of the trial." *Id.* at 419.

"Requests for a continuance of a hearing shall be granted upon a showing of good cause." Minn. R. 1400.7500 (2011). Good cause includes

> lack of proper notice of the hearing; a substitution of the representative or attorney of a party if the substitution is shown to be required; a change in the parties or pleadings requiring postponement; and agreement for a continuance by all parties provided that it is shown that more time is clearly necessary to complete authorized discovery or other mandatory preparation for the case and the parties and the judge have agreed to a new hearing date . . . .

Id. Good cause does not include "failure of the attorney or representative to properly utilize the statutory notice period to prepare for the hearing." *Id.*

On August 19, 2011, relators requested a continuance to extend the time to prepare for the hearing. The ALJ granted this request, and the hearing was rescheduled for February 21, 2012, more than six months after relators' request.

On February 3, 2012, the ALJ issued an order that granted DLI's motion to strike relators' objections and to compel further discovery responses, and rescheduled the hearing to commence on February 27. The same day, relators requested a 30-day continuance to resolve discovery disputes. On February 7, the ALJ denied the motion and explained in a prehearing order that the February 3 order concluded all remaining discovery disputes. On February 10, relators again moved for a continuance on the grounds that DLI had not answered any of relators' discovery requests. The ALJ

determined that this assertion was incorrect and that DLI responded to all discovery requests in a timely manner.

Thereafter, relators made several more requests to continue the hearing, contending that they needed more time to obtain necessary materials, prepare for the hearing, and secure an expert witness. The ALJ denied these motions because relators failed to establish good cause for a continuance; relators' proffered expert did not wish to testify on relators' behalf, and relators made no effort to subpoena that witness or secure another expert. Additionally, the ALJ determined that a continuance would have caused prejudice and hardship to the nonstate witnesses who were subpoenaed to testify at the hearing. We conclude that the ALJ's denial of relators' requests for a continuance was not an abuse of discretion.

IV. Relators have not established a constitutional violation.

Relators claim that the action taken against them is in violation of their due process and equal protection rights. Relators do not support their assertion that their due process rights have been violated. They claim that their equal protection rights were violated because DLI targeted them based on their nonunion status. The state and federal equal protection clauses are "analyzed under the same principles and begin with the mandate that similarly situated individuals shall be treated alike, but only invidious discrimination is deemed constitutionally offensive." *Scott v. Minneapolis Police Relief Ass'n, Inc.*, 615 N.W.2d 66, 74 (Minn. 2000) (quotation omitted).

Relators did not develop the record to support a claim of invidious discrimination based on their nonunion status. Relators reference a letter from the commissioner to

show that they raised the issue of equal protection in this case. This exhibit does not show that relators identified a constitutional violation, nor does it set forth any facts showing invidious discrimination. Relators also cite their opening statement to make a showing of invidious discrimination. This statement was never admitted into evidence. The record does not contain any facts sufficient to support a constitutional violation.

Affirmed.