

**STATE OF VERMONT
DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE HEARINGS
PO Box 488/ 5 Green Mountain Drive
Montpelier, Vermont 05601-0488**

Docket No. 08-08WCPen

Workers' Compensation and Safety Division,

Petitioner,

v.

McGrath Enterprises, Ltd., d/b/a The Rotisserie,

Respondent

By: Mark Horowitz

Hearing Officer

For: Patricia Moulton Powden

Commissioner

OPINION AND ORDER

Hearing held in Montpelier on March 27, 2009. Memoranda of law received on May 8, 2009.

APPEARANCES:

Rebecca Smith, Esq., for the Petitioner
Robert J. Kaplan, Esq., for Respondent
Sean McGrath, President, McGrath Enterprises, Ltd.
Robert Kaplan, Esq., for Jane Doe

ISSUES PRESENTED:

1. Whether the Respondent failed to comply with the August 3, 2007 Opinion and Order, and if not, was the Respondent subject to a penalty of up to \$5,000.00 ?
2. Whether the Respondent satisfied the terms of the Consent Agreement of September 1, 2006, and if not, was the respondent subject to the stayed penalty of \$5,300.00 ?

EXHIBITS:

Joint Exhibit I: Joint Statement of Undisputed Facts

Joint Exhibit II: Opinion and Order August 3, 2007

Joint Exhibit III: Ruling on Defendants Motion for Stay
September 13, 2007

FINDINGS OF FACT:

1. McGrath Enterprises was incorporated in Vermont in 2002. McGrath Enterprises operates the Rotisserie Restaurant, located in South Burlington, Vermont. Officers of the corporation include Sean McGrath, President and Treasurer and Brendan McGrath, Vice President and Secretary.
2. The Respondent did not have workers' compensation insurance for its employees from on or about December 26, 2003 until on or about August 16, 2005. During the above period, on or about June 30, 2005, Respondent's employee, Jane Doe sustained a compensable injury, Department of Labor State File No. X-00111.
3. According to the Respondent, the failure to have workers' compensation insurance during the above time period was due to inadvertence or oversight, not intentional disregard of the statute.
4. The Workers' Compensation & Safety Division of the Vermont Department of Labor issued Citation and Penalty 11-06WCPen in the amount of \$6,300.00 to Respondent based on its lack of insurance and its initial administration of Ms. Doe's claim.
5. The above Citation & Penalty was resolved by means of a Consent Agreement. The Respondent agreed to a payment of \$1,000.00 of the penalty with the balance, \$5,300.00 to be held in abeyance and potentially waived entirely based on Respondents' future conduct.
6. On August 2, 2007, the Commissioner of the Vermont Department of Labor issued Opinion No. 22-07WC which directed the Respondent to pay Ms. Doe past temporary total benefits from the date such benefits had ceased until a medical end result was reached or Ms. Doe returned to work, whichever was earlier. Respondent was also ordered to pay attorney's fees and costs in the amount of \$26,295.31.
7. The Respondent moved to stay the Order of August 2, 2007. The Motion to Stay was denied by the Commissioner on September 12, 2007.
8. As of March 6, 2009, the Respondent has not paid Ms. Doe any temporary disability benefits as

provided by the August 2, 2007 Order, nor has it paid Ms. Doe's attorney any portion of the \$26,295.31 in fees and costs.

9. The Respondent asserts that his then attorney, William Skiff Esq., told him not to make any payments while Opinion No. 22-07WC was under appeal.
10. In May of 2008, the building housing the Rotisserie Restaurant was damaged by a fire. The restaurant was closed until February 6, 2009.
11. The Respondent, in addition to the Rotisserie Restaurant, operates Marcos Pizzeria on Williston Road, South Burlington, VT. The Williston Road establishment has been in business for approximately eleven years. The Respondent also operates a Marcos Pizzeria on Shelburne Road. That restaurant has been in business for approximately one year.

CONCLUSIONS OF LAW:

1. In the present appeal, since there are no material facts in dispute, the decision turns upon interpretation of statute in addition to the obligations of the parties under the Consent Agreement of August, 2006 and the Order of August, 2007.
2. The Consent Agreement stated in pertinent part:
 - 5) Respondent consents and agrees that if, at any time prior to September 1, 2008, McGrath Enterprizes, Ltd., d/b/a The Rotisserie
 - a. fails to secure workers' compensation insurance for its employees, or
 - b. fails to administer State File No. X-00111 in accord with the Vermont Workers' Compensation Act or the Vermont Workers' Compensation and Occupational Disease Rules, such that the Department finds cause to assess additional administrative penalties,
 - c. is found liable or acknowledges liability for any additional compensable work injury sustained during periods when workers' compensation insurance was not secured, or
 - d. fails to remit the \$1,000.00 to the Department of Labor as agreed in paragraph (2) above,then the remaining \$5,300.00 assessed penalty shall become immediately due and payable to the Department of Labor.
3. Because the Respondent has stipulated to the fact that none of the payments ordered under the August, 2007 Order of the Commissioner were made, parts (b) and (c) of Consent Agreement are implicated. The Respondent raises two arguments to avoid payment of the penalty, one essentially in mitigation, the other an argument of law. Each will be discussed in turn below.
4. Respondent points to the fire of May, 2008, and the advice of Attorney Skiff to withhold payment pending appeal as mitigators of the failure to make payments to either Ms.

Doe or Ms.. Doe's attorney.

5. While the fire was certainly an unforeseeable incident, the Respondent, during the period in question was not only operating another food service establish, Marcos Pizzeria on Williston Road, but was engaged in opening a second restaurant on Shelburne Road. These circumstances do not suggest a business enterprise that was devoid of financial resources.
6. Assuming without concluding that Attorney Skiff provided the Respondent with the advice not to comply with the August, 2007 Opinion and Order, the Respondent certainly has legal redress available should he believe counsel's recommendation breached some standard of duty. Furthermore, as the United States Court of Appeals for the Eighth Circuit succinctly noted "...we have long held that litigants choose their counsel at their own peril." *Inman v. American Home Furniture Placement, Inc.*, 120 F.3d 117, 118-19.
7. Respondent next argues that the Consent Agreement is a 'personal satisfaction condition' and as such the Department was required to introduce expert evidence that the conditions had not been satisfied. Respondent cites *Muzzy v. Chevrolet, Div., Gen. Motor Corp.*, 153 Vt. 179, 192, 571 A.2d 609 (1989) in support of this contention. According to the Respondent, in *Muzzy* the Vermont Supreme Court "recognized the Restatement of Contracts preference for an objective standard of measurement of performance whenever an objective standard can be feasibly applied."
8. Respondent's argument comes from a footnote in the majority opinion. Not only did the court reject the appellant's line of reasoning as to the applicability of the Restatement, but the majority also, in sustaining the decision of the lower court, found nothing inherently contrary in applying a subjective measure for determining certain types of satisfaction.
9. Even assuming, arguendo, that some objective standard of satisfaction is preferable, in the present appeal the respondent has stipulated to the fact that they failed to make any payments as directed by the August 2007 Opinion and Order, either to Ms. Doe or her attorney. Part (b) of the Consent Agreement unambiguously calls for the balance of the penalty to be imposed if the "employer fails to administer State File No. X-00111 in accord with the Vermont Workers' Compensation Act or the Vermont Workers' Compensation and Occupational Disease Rules." By any measure of performance, the Respondent's failure to make a single payment as ordered by the Commissioner must be found to be not in accordance with either the Statute or Rules, hence levying of the \$5300.00 was both objectively reasonable and in compliance with the terms of the Consent Agreement.
10. Because the Respondent failed to abide by the Opinion and Order of August, 2007, they were subject to 21 V.S.A. Sect. 688(a).The statute provides for penalties for a party which has neglected or refused to comply with either orders issued by the Commissioner or to comply with rules and regulations under the Act. Respondent thus becomes subject to fines and penalties including \$500.00 per occurrence plus an additional \$100.00 per day, for each day of non-compliance, up to a total penalty not exceeding \$5,000.00. As the Respondent's failure to pay extended for a period of at least one year, the maximum allowable penalty is both reasonable and in conformance with the purposes of the Act.

11. It bears repeating that the underlying cause of these proceedings was the failure of the Respondent to maintain workers' compensation coverage. Not only did the Respondent fail to have coverage, but during that time period an employee suffered a serious, compensable injury. The Act attempts to balance the needs of workers and employers, providing health benefits and wage supplementation to one and limitation of liability to the other. Unlike other programs such as Unemployment Insurance, Workers' Compensation relies on the voluntary compliance of employers. In the present appeal, as the employer both failed to comply with the statutory requirement to have coverage for employees, and to follow the order of the Commissioner in regards to issuance of certain payments, there is no legal or equitable basis to waive or reduce the proposed penalties.

DECISION:

The Administrative Citation and Penalty of November 18, 2008 is sustained. Respondent shall pay to the Vermont Department of Labor monetary penalties in the amount of \$10,300.

Dated at Montpelier this 1st day of June 2009.

Patricia Moulton Powden
Commissioner

APPEAL RIGHTS:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a Superior Court or questions of law to the Vermont Supreme Court. 21 V.S.A. Sect. 670, 672