STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT APPELLATE DIVISION

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| MARVIN PERRY, IN HIS CAPACITY AS DIRECTOR OF THE DEPARTMENT OF LABOR AND TRAINING | ) | |
| | ) | |
| VS. | ) | W.C.C. 03-03222 |
| DERCO, LLC d/b/a THE STATION, MICHAEL DERDERIAN and JEFFREY DERDERIAN | ) | |
| DERCO, LLC d/b/a THE STATION | ) | |
| VS. | ) | W.C.C. 03-02556 |
| MARVIN PERRY, IN HIS CAPACITY AS DIRECTOR OF THE DEPARTMENT OF LABOR AND TRAINING | ) | |

DECISION OF THE APPELLATE DIVISION

CONNOR, J. These matters are before the Appellate Division on the appeal of DERCO, LLC, d/b/a The Station (hereinafter, "DERCO"), from the decision and decrees of the reviewing judge entered on August 4, 2003.

W.C.C. No. 03-02556 and W.C.C. No. 03-03222 originated as cross appeals from a decision and orders entered by the Director of the Department of Labor and Training (hereinafter, "the Director").

W.C.C. No. 03-02556 is DERCO's appeal from the assessment of an administrative penalty in the amount of One Million Sixty-six Thousand ($1,066,000.00) Dollars, and the referral of the matter to the Attorney General for prosecution of criminal charges. After hearing oral arguments from the parties, the reviewing judge affirmed the administrative penalty and referral of the matter to the Attorney General. DERCO has appealed this decision to the Appellate Division.

W.C.C. No. 03-03222 is the appeal of the Department of Labor and Training (hereinafter, "the Department") from the hearing officer's decision that he could not assess penalties against corporate officers individually. The reviewing judge concluded that the Director has the authority to assess penalties against corporate officers individually and remanded the matter to the Director to determine whether to assess a penalty against either Michael Derderian or Jeffrey Derderian, or both of them, and to determine the amount of the penalty. DERCO appealed this decision to the Appellate Division.

In addressing DERCO's appeal, this panel faces an even narrower scope of review than the reviewing judge. The findings of the trial/reviewing judge will not be disturbed on appeal absent this panel finding him clearly wrong or that he overlooked or misconceived material evidence. Mulcahey v. New England

Newspapers, Inc., 488 A.2d 681 (R.I. 1985). The Appellate Division is entitled to conduct a *de novo* review of the record only when a finding is made that the trial/reviewing judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996) (citing R.I.G.L. § 28-35-28(b)); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986). Cognizant of this legal duty imposed upon us, we have carefully reviewed and examined the entire record, and for the reasons set forth, we have determined that there is ample competent evidence to support the decision of the reviewing judge.

Rule 2.32 of the Rules of Practice of the Rhode Island Workers' Compensation Court sets forth the procedure and standard for review of actions of the Director. In reviewing such actions, the court is limited to the record produced before the Director and cannot substitute its judgment for that of the Director as to the weight of the evidence on questions of fact. Rule 2.32 further states:

> "The court may reverse or modify the decision or determination if substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusion, decisions, or determinations are:
> "(1) In violation of constitutional authority of the agency;
> "(2) In excess of the statutory authority of the agency;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

A review of the facts of this case is appropriate at this time.

Louis J. Vallone (hereinafter, "hearing officer"), was designated by the Director to hear a complaint filed by the Department's Division of Workers' Compensation. Named in the complaint were DERCO LLC d/b/a The Station, as well as Michael Derderian and Jeffrey Derderian. The record reveals that the complaint was sent to the company and to the Derderians on March 5, 2003 by Kathy McElroy, a Department investigator. The parties were notified in a letter dated March 17, 2003, of the date, time and place of the hearing regarding the complaint, as well as the purpose of the hearing. At the hearing before the hearing officer, all parties were represented by counsel. A stipulation of facts dated March 31, 2003 was submitted to the hearing officer. The stipulation reads as follows:

> "1. Derco, LLC, is a limited liability corporation duly organized and existing under the laws of the State of Rhode Island.
>
> "2. Attached hereto are records from the Office of the Secretary of State, Corporations Division regarding Derco, LLC.
>
> "3. From March 22, 2000 through February 20, 2003, Derco, LLC, operated a business known as The Station, and during that time frame did employ one (1) or more persons.
>
> "4. From March 22, 2000, through February 20, 2003, Derco, LLC, did not have or maintain workers' compensation insurance coverage as required by Chapter 33-36 of Title 28 of the Rhode Island General Laws.

> "5. That Derco, LLC, ceased operating its business on February 20, 2003, due to a fire that destroyed The Station facility.
>
> "6. The sole issue for determination is the reasonableness and amount of an administrative penalty, if any.
>
> "7. The Department of Labor and Training and the Company agree that the Department will submit a written memorandum herein on the issue of a penalty within 14 days from the date hereof. The Company will submit a written memorandum in response thereto within 30 days from the date hereof."

The hearing officer rejected the stipulation with regard to paragraph 7, and required both parties to submit their memoranda within seven (7) days of the hearing date.

A supplemental stipulation was entered into by the parties. In the second stipulation, the attorneys agreed that the current annual workers' compensation premium for DERCO, LLC, would be One Thousand Eight Hundred and Ninety-one and 20/100 ($1,891.20) Dollars based on an annual payroll of less than Fifty Thousand ($50,000.00) Dollars.

Although both parties submitted memoranda to the hearing officer regarding their respective positions on this matter, the parties offered no additional evidence.

The hearing officer found that based on the stipulation of facts, there was no dispute as to DERCO's lack of workers' compensation insurance coverage. Under the authority afforded him pursuant to R.I.G.L. § 28-36-15, he found that it was within his discretion to take any and all of the actions set forth in subsection

(a) of the statute, once failure to provide coverage was proven. The hearing officer found that DERCO failed to present any mitigating reason for their lack of insurance coverage for the period of their existence, which was one thousand sixty-six (1,066) days. He then imposed the maximum penalty allowed under R.I.G.L. § 28-36-15 of One Thousand ($1,000.00) Dollars per day for each day that DERCO was without workers' compensation coverage, resulting in an administrative penalty of One Million Sixty-six Thousand ($1,066,000.00) Dollars. He also referred the matter to the Attorney General for further proceedings. The hearing officer also concluded that R.I.G.L. § 28-36-15 does not give the Director the authority to assess penalties against corporate officers individually.

Both DERCO and the Department appealed the hearing officer's decision; DERCO's appeal is W.C.C. No. 03-02556, and the Department's appeal is W.C.C. No. 03-03222. The reviewing judge, in addressing these appeals pursuant to Rule 2.32 of the Workers' Compensation Court Rules of Practice, was confined to the record created at the Department hearing.

The first issue this panel must address is whether the reviewing judge erred in affirming the fine assessed by the hearing officer. The arguments made by DERCO and considered by the reviewing judge consisted of claims of violations of due process, equal protection and the excessive fines clauses of both the United States and Rhode Island Constitutions.

We will first address the equal protection claim. DERCO's equal protection claim arises out of their assertion that the fine assessed against them was grossly

excessive in comparison with the administrative penalties previously assessed by the Director against other uninsured employers. The reviewing judge refused to consider this argument because there was no evidence in the record relating to the amounts of the administrative penalties imposed on other employers who failed to carry workers' compensation insurance coverage. DERCO argues that an attachment to the memorandum that they submitted to the hearing officer contained information regarding administrative penalties assessed against other uninsured employers in previous matters heard by the Director. We have carefully reviewed the record from that hearing and find that this document attached to DERCO's memorandum was never admitted as evidence at the administrative hearing. The reviewing judge, therefore, correctly determined that there was no evidence to support DERCO's equal protection claim.

With regard to their due process argument, DERCO alleges that the hearing officer misapplied R.I.G.L. § 28-36-15, thereby depriving them of due process rights and other constitutional guarantees. They allege that the reviewing judge failed to address their argument in this regard. We disagree.

The reviewing judge noted that the fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner. He then determined that the record reflected that the Director had notified DERCO, Michael Derderian and Jeffrey Derderian of the date, time, place and purpose of the hearing in a letter dated March 17, 2003. This same letter stated that any party may testify and present evidence and argument on any or

all of the issues involved. A review of the hearing officer's decision reflects that at the time of the hearing, the parties were represented by counsel who, in fact, entered into a stipulation of facts on their behalf.

As a result of this evidence, the reviewing judge concluded that DERCO and Michael and Jeffrey Derderian were not only given the opportunity to be heard at a meaningful time and in a meaningful manner, but they availed themselves of the opportunity to do so by engaging counsel and submitting this matter to the hearing officer for decision by way of a stipulation of facts.

DERCO now alleges that although the reviewing judge addressed issues of procedural due process, he did not properly address issues of substantive due process. The Rhode Island Supreme Court has stated that substantive due process, in contrast to procedural due process, addresses the "essence of state action rather than its modalities; such a claim rests not on perceived procedural deficiencies but on the idea that the government's conduct, regardless of procedural swaddling, was in itself impermissible." Jolicoeur Furniture Co., Inc. v. Baldelli, 653 A.2d 740, 751 (R.I. 1995) (quoting Amsden v. Moran, 904 F.2d 748, 753 (1st Cir. 1990)).

DERCO's arguments before the reviewing judge were limited to the constitutionality of the method that the Director used to assess the administrative penalty against them, a matter of procedural due process. Not one of DERCO's arguments challenged the constitutionality of the statute itself. More important, however, is the fact that there is no evidence in the record to suggest that such

an argument was ever made before the hearing officer. We will not allow DERCO to raise such an argument before this panel for the first time. See Armour & Co. v. Greco, 95 R.I. 149, 151, 185 A.2d 98, 99 (1962).

DERCO further alleges that the reviewing judge either failed to address or misapprehended their argument that the amount of the penalty assessed by the hearing officer was in violation of the excessive fines clauses of both the Rhode Island and the United States Constitutions. In addressing this argument, the reviewing judge first looked at the relevant amendments in the articles of the Constitutions. He then turned to R.I.G.L. § 28-36-15 and determined that the statute expressed "a clear legislative intent to give the director the discretion to assess administrative penalties of not less than $500.00, no more than $1,000.00 per day for each day of noncompliance." (Tr. p. 46) Because the penalty was within the authority conferred upon the Director by statute, the reviewing judge then needed to determine whether or not assessing the maximum penalty amounted to a constitutional violation, or represented an arbitrary or capricious assessment, or resulted from an abuse of discretion on the part of the hearing officer. The reviewing judge carefully analyzed the relevant case law and concluded that the administrative penalty was none of the above.

It is well settled in this state that the acts of the legislature enjoy the presumption of constitutionality. Rhode Island Insurers' Insolvency Fund v. Leviton Mfg. Co., Inc., 716 A.2d 730, 734 (R.I. 1998). Therefore, the party challenging a statute's validity bears the burden of demonstrating its

unconstitutionality beyond a reasonable doubt. Id. DERCO's arguments rely on the assertion that the fine assessed was grossly disproportionate to administrative fines assessed against other uninsured employers for the same offense. Once again, we find no evidence in the record of the proceeding before the hearing officer to support this contention.

A reading of R.I.G.L. § 28-36-15 reveals that the Director may, in his or her discretion, assess an administrative penalty of not less than Five Hundred ($500.00) Dollars and not more than One Thousand ($1,000.00) Dollars for each day of noncompliance. The statute further provides that each day constitutes a separate and distinct offense for the purpose of the calculation of the fine. To apply this statute to an employer, only three (3) factual matters need to be established. The first is that the employer is subject to the Workers' Compensation Act; the second is that the employer was without insurance; and the third is the number of days that the employer was without insurance. Pursuant to the stipulation of facts submitted in the administrative hearing, DERCO stipulated to each of the facts necessary for the hearing officer to apply this statute.

Although DERCO attempted to persuade the reviewing judge that he should take judicial notice of certain documents attached to a memorandum that they presented to the hearing officer, we find this argument to be without merit. As previously stated, Rule 2.32 dictates the extent of the court's review of this matter, and we must focus on the record before the hearing officer. Neither the

reviewing judge nor this panel can expand the record by taking judicial notice of evidence that was never properly admitted before the hearing officer. It is clear that DERCO never asked the hearing officer to take judicial notice or to enter into evidence any decrees with regard to actions against other uninsured employers. The reviewing judge, therefore, acted appropriately and committed no error in denying DERCO's request to expand the record of the Department hearing by taking judicial notice of those decrees.

We find that the amount of the penalty is discretionary subject to the boundaries set forth in the statute. We, therefore, find that, in light of the evidence presented to the hearing officer, the reviewing judge acted appropriately in upholding the fine.

DERCO next argues that R.I.G.L. § 28-36-15 allows the Director to assess a penalty or refer the matter to the Attorney General for prosecution, but does not authorize him to do both. We disagree.

The applicable portion of § 28-36-15 reads:

> "The director may, in his or her discretion, assess an administrative penalty of not less than five hundred dollars ($500) and not more than one thousand dollars ($1,000) per day for each day of noncompliance and/or bring a civil action in any court of competent jurisdiction, or to refer the matter to the attorney general for prosecution of criminal charges."

It is our opinion that the phrase "and/or" is neither positively conjunctive nor positively disjunctive. We believe that the use of this phrase allows the court

the discretion to apply one term or the other, or both. Star Enterprises v. DelBarone, 746 A.2d 692, 696 (R.I. 2000).

We find that this statute allows the hearing officer to assess a fine and either bring a civil action or refer this matter to the Attorney General. We believe that the comma after the word "jurisdiction" in the statute is misplaced; however, we do not believe that a misplaced comma can be used to distort the meaning of the statute. See State v. Aspinall, 6 Conn. App. 546, 506 A.2d 1063 (1986). We believe that punctuation may be considered in the interpretation of a statute, but not so as to create doubt or to distort or defeat the intention of the legislature. Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3rd Cir. 1965).

This panel, in considering the rules of punctuation, along with the rules of statutory interpretation, finds that the legislature intended to give the hearing officer this option. We find no error in the reviewing judge's analysis and interpretation of this statute, and we, therefore, affirm his holding that the statute allows the hearing officer to assess a penalty and also order referral of the matter to the Attorney General.

We now turn to DERCO's appeal of the reviewing judge's findings and orders in W.C.C. No. 03-03222. The hearing officer determined that he did not have the authority, pursuant to R.I.G.L. § 28-36-15, to assess administrative penalties against corporate officers. The reviewing judge found that the hearing officer was clearly wrong in his interpretation of the statute and remanded the matter back to the hearing officer for further proceedings.

DERCO asserts that the reviewing judge was wrong in remanding this matter back to the Department because Michael Derderian and Jeffrey Derderian were never parties to the original proceeding, and the hearing officer, therefore, had no authority to assess a penalty against them. After a review of the record, we find that this is a misstatement by DERCO. The complaint, in fact, names Michael Derderian and Jeffrey Derderian as the responsible parties to the action. As parties to the proceeding, we find that they were subject to the Director's jurisdiction.

In remanding this matter back to the hearing officer, the reviewing judge examined R.I.G.L. § 28-36-15 and found its language to be clear and unambiguous. We agree. "If the words used in a statute are unambiguous and convey a clear and sensible meaning, we look only to those words to ascertain the intent of the Legislature." Roadway Express, Inc. v. R.I. Commission for Human Rights, 416 A.2d 673, 674 (R.I. 1980). Relying on the plain meaning of the statute, the legislature clearly intended to give the Director, in his or her discretion, the authority to assess a monetary administrative penalty against corporate officers when an employer fails to secure the required workers' compensation coverage.

The record at the Department contains documentation from the Secretary of State with regard to DERCO. These records show that DERCO was a limited liability company organized in accordance with R.I.G.L. Chapter 16 of Title 7. In accordance with these records, DERCO was a partnership and not a corporation.

These records show that Michael Derderian and Jeffrey Derderian were the managers of this limited liability company.

In this panel's opinion, R.I.G.L. § 28-36-15 allows the hearing officer to assess penalties against corporate officers, and that discretion is within the power of the hearing officer and not the reviewing judge. The reviewing judge was correct in remanding this matter to the Department for further proceedings wherein the hearing officer must determine if the Derderians' status as managers of a limited liability company is within the meaning of the term "corporate officers" as set forth in R.I.G.L. § 28-36-15, and whether they should then be fined. Any comments made by the reviewing judge in his decision as to the Derderians' liability as managers is simply dicta, and the hearing officer is not bound by the reviewing judge's analysis in this regard.

Based on the foregoing, we find no error on the part of the reviewing judge and, therefore, his decision and orders are affirmed and DERCO's appeals are denied and dismissed.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, decrees, copies of which are enclosed, shall be entered on

Arrigan, C.J. and Bertness, J. concur.

ENTER:

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Arrigan, C.J.

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Bertness, J.

_____
Connor, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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| PROVIDENCE, SC. | | WORKERS' COMPENSATION COURT APPELLATE DIVISION |
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| VS. | ) | W.C.C. 03-02556 |
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| | ) | |

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the petitioner, and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on August 4, 2003 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Arrigan, C.J.

_____
Bertness, J.

_____
Connor, J.

I hereby certify that copies were sent to Jeffrey B. Pine, Esq., Kathleen M. Hagerty, Esq. and Bernard P. Healy, Esq. on

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the respondent, and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on August 4, 2003 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Arrigan, C.J.

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Bertness, J.

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Connor, J.

I hereby certify that copies were sent to Jeffrey B. Pine, Esq., Kathleen M. Hagerty, Esq., and Bernard P. Healy, Esq., on

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