

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1771

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

MORTENSON TRUCKING, INC.,

PETITIONER-APPELLANT,

v.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN
RELATIONS, PREDECESSOR TO DEPARTMENT OF
WORKFORCE DEVELOPMENT,

RESPONDENTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Marathon County:
GREGORY GRAU, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

CANE, P.J. Mortenson Trucking, Inc., appeals a judgment dismissing its petition for review and affirming the Department of Industry, Labor and Human Relations' closure order. Mortenson contends the trial court erred when it refused to consider additional evidence, either for the purpose of

remanding the case to the agency under § 227.56(1), STATS., or for expanding the record on review under § 227.57, STATS. Because we conclude the trial court did not erroneously exercise its discretion by refusing to consider additional evidence, we affirm the judgment.

Mortenson Trucking is a family-owned company usually employing more than three employees, and thereby subject to the Wisconsin Worker's Compensation Act. See § 102.04(1)(b), STATS. In January 1994, Mortenson began providing worker's compensation benefits through a plan offered by the International Association of Entrepreneurs of America Benefit Trust (IAEABT). On May 17, 1994, the Department issued Mortenson a notice of intent to issue a closure order, alleging Mortenson was in violation of § 102.28, STATS., because it had not obtained the required insurance for its employees. Mortenson requested a hearing pursuant to § 102.28(4). The hearing was held on August 26, 1994. On December 22 the Department issued its decision and order, granting the request for a closure order and denying Mortenson's claims that (1) § 102.28 was preempted by ERISA and (2) the Department lacked jurisdiction to hear the case because of pending litigation involving the same matter in federal court.¹

Mortenson sought review of the Department's decision by filing a petition for review pursuant to §§ 227.52 and 227.53(1), STATS. It asked the court

¹ Based on DILHR's closure order proceedings against Mortenson in the case at hand, Ross Fuller, trustee for International Association of Entrepreneurs of America Benefit Trust (IAEABT), brought an action in federal court against Carol Skornicka, secretary of DILHR, and Josephine Musser, commissioner of insurance, seeking a declaratory judgment precluding the State from requiring the trust to become licensed as an insurance company in Wisconsin in order to provide worker's compensation benefits. The district court held for the Department, finding that ERISA expressly exempts worker's compensation laws from its coverage. On appeal, the seventh circuit affirmed the district court's dismissal of Fuller's preemption claim. See *Fuller v. Skornicka*, 79 F.3d 685 (7th Cir. 1996).

to set aside the Department's decision because (1) the examiner's decision was wrong as a matter of law because the provisions sought to be enforced were preempted by ERISA; (2) the Department lacked jurisdiction to hear the case; and (3) the Department's finding of fact that the IAEABT plan did not provide Mortenson's employees with the benefits mandated by ch. 102, STATS., was wrong as a matter of law and not supported by substantial evidence.

The proceedings were stayed pending resolution of the appeal of *Fuller*. See *Fuller v. Skornicka*, 79 F.3d 685 (7th Cir. 1996). The seventh circuit held that ERISA does not preempt §§ 102.28(2)(a)-(b), STATS., and that Wisconsin may require that employers secure payment of worker's compensation through state-licensed insurance or approved self-insurance, regardless of how they write their ERISA plans. See *id.* at 687.

Following resolution of the *Fuller* case, Mortenson obtained new counsel, and the circuit court proceedings resumed. The issues raised in Mortenson's original petition were resolved by *Fuller* which, in effect, confirmed the Department's closure order. However, Mortenson then attempted to raise additional grounds for reversal of the closure order in its brief and reply brief. Mortenson argued that: (1) the State failed to enforce ch. 600, STATS. (the insurance code), against IAEABT and the I.C.E. Agency, which sold the plan to Mortenson, thereby waiving enforcement of ch. 102, STATS., against Mortenson; (2) § 102.82(2)(ar), STATS., requires that the case be dismissed and any penalties waived;² (3) Mortenson did comply with the purpose of § 102.28(2)(a), and a strict

² Section 102.82(2)(ar), STATS., provides:

The department may waive any payment owed under par. (a) or (ag) if the department determines that the sole reason for the uninsured employer's failure to comply with s. 102.28(2) is that

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construction of that section requires that the statute not be enforced against Mortenson; and (4) because of procedural irregularities that occurred in the case at the agency level, the trial court should exercise its equitable powers to reach a just result, despite the Department's arguments to the contrary. Mortenson asked the trial court for dismissal of the case and an injunction preventing the future collection of penalties or, alternatively, for a rehearing to address the assessment of penalties or an order directing the Department to consider the applicability of § 102.82(2)(ar).

The trial court considered the issues raised in Mortenson's briefs as an application to present additional evidence to the court to determine whether the case should be remanded to the agency for additional findings under § 227.56(1), STATS. In a letter to the court, the Department opposed the taking of additional evidence.

The trial court held a hearing on the issue of whether it would allow additional evidence under § 227.56(1), STATS. In denying the request, the trial court concluded that Mortenson had an opportunity to make a record during the agency proceedings; that absent exceptional circumstances, supplementing the original record was not appropriate; and that Mortenson's assertions were not sufficient to compel the court to allow the matter to go back to the agency for further fact finding. The court also refused to hear additional evidence based on § 227.57, STATS.

the uninsured employer was a victim of fraud, misrepresentation or gross negligence by an insurance agent or insurance broker or by a person whom a reasonable person would believe is an insurance agent or insurance broker.

Mortenson claims the trial court erred by refusing to hear additional evidence. It argues that, "Once it is demonstrated to the court that procedural irregularities occurred pursuant to sec. 227.57(1) Wis. Stats., then sec. 227.56(1) Wis. Stats. requires a showing that the evidence sought to be introduced is material and that there were good reasons for not presenting it to the agency below." It then goes on to argue that because the trial court refused to hear additional evidence under § 227.57(1), STATS., it failed to consider whether additional evidence was material and whether good reasons existed for not presenting it to the agency. Mortenson claims the trial court erred in both respects.

Mortenson's argument is based on an erroneous reading of §§ 227.56(1) and 227.57(1), STATS., and therefore is flawed. These statutory sections provide two mechanisms for parties to present evidence to the trial court that was not heard at the agency level. Where a party seeks to present new facts to the trial court that were not put before the agency, § 227.56(1) controls. *State Public Intervenor v. DNR*, 171 Wis.2d 243, 248, 490 N.W.2d 770, 773 (Ct. App. 1992). Section 227.56(1) allows the trial court, in its discretion, to remand the case to the agency if the movant convinces the court that the evidence it now wishes to present is material and that good reasons exist why the facts were not developed before the agency. *Id.* at 249, 490 N.W.2d at 773.

On the other hand, § 227.57(1), STATS., sets forth the trial court's scope of review of an agency decision.³ When a circuit court reviews an agency

³ Section 227.57(1), STATS., provides:

The review shall be conducted by the court without a jury and shall be confined to the record, *except that in cases of alleged irregularities in procedure before the agency*, testimony thereon may be taken in the court and, if leave is granted to take such testimony, depositions and written

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decision, it is ordinarily acting in the capacity of a reviewing court. *Guthrie v. WERC*, 107 Wis.2d 306, 315, 320 N.W.2d 213, 218 (Ct. App. 1982), *aff'd*, 111 Wis.2d 447, 331 N.W.2d 331 (1983). The trial court's review is generally confined to the record established before the agency. *Id.* When a party alleges that procedural irregularities took place at the agency level, the trial court may go beyond the agency record and take testimony probative of the alleged irregularities. *Id.*

Having noted that Mortenson's arguments do not comport with the statutory provisions it asserts as support therefor, we nevertheless address its central claim on appeal that the trial court erred by refusing to hear additional evidence, either under §§ 227.56(1) or 227.57(1) or (4), STATS. We begin by addressing our standard of review of a trial court's decision whether to hear additional evidence on its review of an agency decision. Normally, "[i]n reviewing an order of the circuit court affirming an order of an administrative agency the task of this court is to determine whether the circuit court erred in its determination." *Dairy Equip. Co. v. DILHR*, 95 Wis.2d 319, 326, 290 N.W.2d 330, 333-34 (1980) (citing *Bucyrus-Erie Co. v. DILHR*, 90 Wis.2d 408, 416, 280 N.W.2d 142, 146 (1979)).

Here, we review the trial court's refusal to hear additional evidence beyond the confines of the agency record under §§ 227.56(1) and 227.57(1) and (4), STATS., both of which are matters within the trial court's discretion. We therefore review the trial court's action using an erroneous exercise of discretion

interrogatories may be taken prior to the date set for hearing as provided in ch. 804 if proper cause is shown therefor. (Emphasis added.)

standard, where we will affirm if the trial court considered the facts of the case and reasoned its way to a conclusion that a reasonable judge could reach and that is consistent with the applicable law. *Burkes v. Hales*, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991). We conclude the trial court reasonably exercised its discretion by refusing to hear additional evidence, either for the purpose of remanding the case to the agency under § 227.56(1) or § 227.57(4), or for expanding the record on review under § 227.57(1).

In its petition for review, Mortenson raised three separate grounds for reversing the closure order. The *Fuller* decision essentially rejected Mortenson's grounds for reversing the closure order. This meant that Mortenson had not obtained the required insurance for its employees and, until it obtained such insurance, it must close. By the time Mortenson filed its brief in support of its petition for review, it was represented by a new attorney. That attorney then attempted to put before the court information explaining why Mortenson did not comply with § 102.28, STATS.; specifically, it claimed it was a victim of fraud and/or misrepresentation perpetrated on it by IAEABT and, at the very least, a victim of the I.C.E. Agency's gross negligence. Additionally, the issue of penalties and impending enforcement was raised for the first time, without any supporting documentation.⁴ However, these were reasons to explain why

⁴ We do note, however, that the Department's December 22, 1994, closure order included a memorandum stating:

In the event the employer continues operations after the issuance of this order the Wisconsin Department of Justice may bring an action in any court of competent jurisdiction for an order or other remedy to enforce this order pursuant to sec. 102.28(4)(d) of the Statutes.

Sec. 102.85(3) of the Statutes provides that an employer who violates an order to cease operations under sec. 102.28(4) of the

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Mortenson did not secure the required insurance. It abandoned the argument that because it had secured the required insurance, the closure was improper.

The trial court recognized that, following the *Fuller* decision, the only issue before it on review continued to be whether the closure order was proper. The Department had determined that Mortenson was an employer subject to the Wisconsin Worker's Compensation Act; that it was required to obtain insurance for worker's compensation liability pursuant to § 102.28(2)(a), STATS., and was not otherwise exempt from the duty to obtain insurance; and that Mortenson's employee benefit plan did not provide worker's compensation benefits to the extent required by ch. 102, STATS. Mortenson's additional grounds and supporting arguments in its briefs amount to an attempt to argue that because it was a victim of fraud, misrepresentation, or at the very least gross negligence, the closure order should be reversed, or at a minimum the Department should be foreclosed from imposing penalties or required to conduct a hearing to determine whether the penalties should be waived under § 102.82(2)(ar), STATS.

Section 227.56(1), STATS., provides in part:

If before the date set for trial, application is made to the circuit court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceedings before the agency, the court *may* order that the additional evidence be taken before the agency upon such terms as the court may deem proper. (Emphasis added.)

Statutes may be fined not more than \$10,000.00 or imprisoned for not more than two years or both.

Here, the trial court considered the issues Mortenson raised in its briefs to be an application for leave to present additional evidence under § 227.56(1), STATS. The transcript of the hearing on the matter shows the court considered the parties' arguments; examined the agency record, which it considered substantial; and considered Mortenson's request to provide additional evidence from the standpoint of whether a remand to the agency to consider that evidence would result in substantially more evidence coming forward on vital issues. The trial court stated at the hearing:

THE COURT: ... While I consider the argument of Mortenson in this case, I do not find that what is being propounded is sufficient enough to compel the Court to allow this matter to go back to the agency for further fact finding and, therefore, I am denying the request.

Implicit in the trial court's statement is its conclusion that Mortenson's assertions of substantial compliance, and fraud, misrepresentation or gross negligence as an excuse calling for lenience in penalty enforcement were not material to the vital issue in the case; that is, whether the closure order was proper because Mortenson did not have the required insurance for its employees. The record reflects the trial court appropriately exercised its discretion by denying Mortenson's request to present evidence under § 227.56(1), STATS.

Next, Mortenson contends the trial court erred by refusing to take testimony under § 227.57(1), STATS., concerning alleged procedural irregularities that occurred before the agency.⁵ Mortenson argues that ch. 227 sets forth the

⁵ Mortenson's claim of error is grounded in the colloquy between Attorney Palmer, counsel for Mortenson, and the court at the April 7, 1997, hearing where counsel clarified the court's ruling:

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procedures DILHR was required to follow, that the procedures were not followed,⁶ and, as a result, it was denied due process. We reject Mortenson's claim of error because we conclude DILHR was not obligated to comply with the statutory sections Mortenson cites. Rather, the procedures applicable to DILHR in a closure order proceeding are set forth in § 102.17, STATS. *See* § 102.28(4)(b), STATS. ("employer may request and shall receive a hearing under s. 102.17 on the matter."). Mortenson presented no claim of procedural irregularity under § 102.17 to the trial court, or to this court on appeal. Because no issue of a procedural defect was properly presented to the trial court, we conclude its refusal to expand the record on review under § 227.57(1), STATS., was a proper exercise of discretion.

Lastly, Mortenson claims the trial court should have remanded the case to the agency under § 227.57(4), STATS., which provides:

The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.

Because we determine the trial court correctly determined no procedural irregularities were presented to it, we also reject Mortenson's claim that the trial

MR. PALMER: ... I assume that by your ruling, you are also finding that there is no basis to take additional evidence ... under 227.57. Is that correct?

THE COURT: That's correct. The Court's decision will be based upon the record that has been submitted to the Court to this point.

⁶ Mortenson claims DILHR was required to and failed to follow §§ 227.01(3); 227.44; 227.45(7); 227.46(2) & (5); 227.48(20); and 227.54(4), STATS.

court erred by refusing to remand the case to the agency under § 227.57(4) and do not address the issue further.

In summary, we conclude the trial court properly exercised its discretion by refusing to consider additional evidence under §§ 227.56(1) and 227.57(1) and (4), STATS. We therefore affirm the trial court's judgment affirming the Department's closure order.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

