

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2010-000892-001 DT

10/19/2011

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT  
H. Beal  
Deputy

WILFONG INC

ROGER R FOOTE

v.

WILLIAM A MUNDELL (001)  
MICHAEL HIGGINS (001)

MONTGOMERY LEE  
MICHAEL HIGGINS  
BOX 93613  
PASADENA CA 91109

OFFICE OF ADMINISTRATIVE  
HEARINGS  
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Plaintiff/Appellant Wilfong Inc. (Wilfong) asks this Court to vacate the Order of the Arizona Registrar of Contractors, William Mundell (AzROC), denying Wilfong's Motion for Rehearing. For the following reasons, this Court vacates the Order of the AzROC.

I. FACTUAL BACKGROUND.

In 2008, Michael Higgins (Higgins) filed his first complaint against Wilfong dba Debco Construction Corporation, and the Arizona Registrar of Contractors gave this Cause Number P08-0270. On August 11, 2009, the Administrative Law Judge issued a Decision, which included Findings of Fact Number 5 that no evidence was taken on the flooring allegations. It recommended that Wilfong's license be suspended until Wilfong made restitution of \$806.81 to Higgins. On September 18, 2009, the AzROC issued its Order in Case No. P08-0270 adopting the \$806.81 restitution portion of the recommendation, but remanded the matter to the Office of Administrative Hearings to resolve the flooring issue. On September 30, 2009, Higgins filed a Request for Clarification, and October 5, 2009, ALJ Grant Winston issued an Order stating the Complainant (Higgins) filed a motion for clarification on October 5, 2009, and then denied the motion because the ALJ had remanded the matter to the AzROC. On October 14, 2009, Wilfong filed a Motion for Rehearing/Reconsideration, and on November 4, 2009, Higgins filed a Response. On November 5, 2009, ALJ M. Douglas issued a Recommended Order Denying Petition for Rehearing noting Respondent (Wilfong) had filed a petition for rehearing. On December 11, 2009, in Case No. P08-0270, the AzROC issued an Order Denying Request for Rehearing. On

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December 23, 2009, in Case No. 08F-P0270-ROC, ALJ M. Douglas issued a Recommended Order that Complainant's (Higgins') Request for Correction and Clarification be denied.

Some time before September 24, 2010, Higgins apparently filed a Request for Ruling because on September 24, 2010, Wilfong filed a Response to Request for Ruling. This Court says "apparently" because the record submitted to this Court does not contain a Request for Ruling from Higgins. On November 16, 2010, in Case No: 2008-2703078 Formerly P08-0270, the AzROC issued an Order denying Complainant's (Higgins') October 5, 2009, Request for Correction, and denying Complainant's (Higgins') October 15, 2009, Request for Correction and Clarification. It further ordered the matter closed because Respondent had fully complied with the terms of the AzROC's September 18, 2009, Order. That Order further stated:

As to the alleged flooring issues brought up in this matter, such are the subject of Case No. 2010-1840. A Default Decision and Order was issued in Case No. 2010-1840 on October 25, 2010.

On November 3, 2009, Michael Higgins filed a second complaint with the Arizona Registrar of Contractors against Debco Construction Co. concerning the flooring work done by Wilfong, and the Complaint form lists this as Complaint # P10-0078. On January 20, 2010, the AzROC sent a letter to Debco Construction Co. stating Complaint No. P10-0078 was closed, but may be reopened upon written request by Complainant. On September 8, 2010, the AzROC issued a Citation and Complaint against Wilfong dba Debco Construction Co., and stated on it Case No: 2010-1840 Formerly P10-0078. That Citation and Complaint contained the following language starting on the first page and continuing onto the second page:

In accordance with provisions of A.R.S. § 32-1155, **YOU, THE RESPONDENT, ARE DIRECTED TO FILE YOUR WRITTEN ANSWER** to this citation and complaint with the Legal Department of the Registrar of Contractors **NO LATER THAN FIFTEEN (15) DAYS** after the date this Citation was mailed. Your written answer must be RECEIVED no later than **09/23/2010**.

**IMPORTANT: REGARDLESS OF ANY PRIOR ORAL OR WRITTEN RESPONSES 'YOU, THE RESPONDENT, MAY HAVE MADE TO THE INSPECTOR OF OTHER AGENCY EMPLOYEE, REGARDING THE MATTERS COVERED BY THE COMPLAINT OR ANY LEGAL EXCUSE YOU MAY HAVE TO THE FACTS ALLEGED, A TIMELY ANSWER MUST NEVERTHELESS BE FILED IN WRITING FOLLOWING YOUR RECEIPT OF THIS CITATION AND COMPLAINT. A COPY OF YOUR WRITTEN ANSWER MUST BE MAILED TO THE COMPLAINANT.**

RESPONDENT IS ADVISED AND NOTIFIED THAT **FAILURE TO ANSWER WITHIN 15 DAYS** SHALL BE DEEMED AN ADMISSION BY YOU OF THE CHARGES MADE BY THE COMPLAINANT, AND THE REGISTRAR OF

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**CONTRACTORS MAY REVOKE OR SUSPEND YOUR LICENSE OR INCREASE  
YOUR LICENSE BOND REQUIREMENTS WITHOUT ANY FURTHER PRO-  
CEEDINGS PURSUANT TO A.R.S. § 32-1101 ET SEQ.**

The Certified Mail Receipt shows the AzROC mailed the Citation and Complaint to Wilfong on September 8, 2010, and the Return Receipt shows Nancy L. Coleman signed for that Citation and Complaint on September 9, 2010.

Wilfong prepared a Written Answer to Citation and Complaint, which was dated September 24, 2010, and stated on it Case No.: 2010-1840 Formerly P10-0078, and sent that Written Answer to the AzROC by fax on September 24, 2010. On October 25, 2010, the AzROC issued its Decision and Order, and stated on it Case No: 2010-1840 formerly P10-0078. In that Decision and Order, the AzROC made the following findings: (1) the Citation and Complaint was served on Wilfong; (2) Wilfong did not file a written Answer as required by law; and (3) failure to file an Answer was deemed an admission of the Charges contained in the Citation and Complaint. The AzROC gave a conclusion that Wilfong violated the provisions of A.R.S. § 32-1154 as charged in the Complaint. The AzROC then entered an Order suspending Wilfong's license until the AzROC received proof that Wilfong had appropriately rectified the issues involved and detailed in the Complaint.

On November 2, 2010, Wilfong filed a Motion for New Trial, Rehearing, Motion To Vacate Default, and Request for Immediate Ruling (stating on it Complaint No: P08-0270 formerly P10-0078), "request[ing] the Registrar vacate the Decision and Order of October 25, 2010, as it was erroneously entered." Under Facts, that Motion stated as follows:

On September 8, 2010, the Complaint was mailed to Wilfong. On September 24, 2010, Wilfong Inc., responded to the Citation and Complaint in the above caption. The written response was timely. The written Answer was also accompanied by a Response to request for Ruling also filed by Mr. Higgins in P08-0270. Attached hereto is a copy of the Written Answer, Response, fax transmission and fax confirmation that the documents were in fact received by the Registrar of Contractors on September 24, 2010. The likely error is that the Registrar of Contractors put both pleadings in the P08-0270 file.

That Motion went on to argue that A.R.S. § 32-1155(B) would only apply if no written response were filed, and because there was a timely written response, no proper default may be issued.

On November 15, 2010, the AzROC sent a letter to Wilfong, which appears to be the AzROC's denial of Wilfong's motion for rehearing. That letter contained the following statement:

On 09/24/2010, the Registrar received your written Answer in this matter. Your written Answer was due no later than 09/23/2010. Since your written Answer was not timely filed, a Default Decision and Order will be issued.

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It further advised that Wilfong may petition for rehearing within 35 days of the date of that Decision and Order. This statement in the November 15, 2010, letter that “a Default Decision and Order will be issued” is somewhat puzzling because on October 25, 2010, the AzROC had already issued its Default Decision and Order.

On November 29, 2010, Wilfong filed a Verified Complaint for Review of Administrative Decision. This Court has jurisdiction pursuant to A.R.S. § 12–124(A) and A.R.S. § 12–905(A).

II. GENERAL STANDARDS FOR REVIEW:

The Arizona statutory authority and case law define the scope of administrative review as follows:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

A.R.S. § 12–910(E).

In reviewing an administrative agency’s decision, the superior court examines whether the agency’s action was arbitrary, capricious, or an abuse of discretion. The court must defer to the agency’s factual findings and affirm them if supported by substantial evidence. If an agency’s decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different conclusion.

*Gaveck v. Arizona St. Bd. of Podiatry Exam.*, 222 Ariz. 433, 215 P.3d 1114, ¶ 11 (Ct. App. 2009) (citations omitted).

[I]n ruling on the sufficiency of the evidence in administrative proceedings, courts should show a certain degree of deference to the judgment of the agency based upon the accumulated experience and expertise of its members.

*Croft v. Arizona St. Bd. of Dental Exam.*, 157 Ariz. 203, 208, 755 P.2d 1191, 1196 (Ct. App. 1988).

A trial court may not function as a “super agency” and substitute its own judgment for that of the agency where factual questions and agency expertise are involved.

*DeGroot v. Arizona Racing Comm’n*, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (Ct. App. 1984). The reviewing court must view the evidence in a light most favorable to upholding the agency’s decision and affirm that decision if it is supported by any reasonable interpretation of the record. *Baca v. Arizona D.E.S.*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (Ct. App. 1998). While the reviewing court is not bound by the agency’s conclusions of law or statutory interpretations, an agency’s interpretation of statutes or regulations that it implements is entitled to great weight.

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*Siegel v. Arizona State Liquor Board*, 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (Ct. App. 1991);  
*Baca v. Arizona D.E.S.*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (Ct. App. 1998).

However, the agency's interpretation is not infallible, and courts must remain final authority on critical questions of statutory construction.

*U.S. Parking Systems v. City of Phoenix*, 160 Ariz. 210, 211, 772 P.2d 33, 34 (Ct. App. 1989).

III. ISSUE: WAS THE ACTION OF THE ARIZONA REGISTRAR OF CONTRACTORS  
ARBITRARY AND CAPRICIOUS, OR AN ABUSE OF DISCRETION.

Wilfong asks this Court to vacate the order of the Arizona Registrar of Contractors denying its Motion for Rehearing. The Administrative Code provides as follows:

C. The Registrar of Contractors may grant a rehearing or review of a decision for any of the following causes materially affecting the moving party's rights:

1. Irregularity in the proceedings of the Registrar of Contractors or the Administrative Law Judge, or any order or abuse of discretion that deprived the moving party of a fair hearing;
2. Misconduct of the Registrar of Contractors, Office of Administrative Hearings, Administrative Law Judge, or prevailing party;
3. Accident or surprise that could not have been prevented by ordinary prudence;
4. Newly discovered material evidence that could not, with reasonable diligence, have been discovered and produced at the hearing;
5. Excessive or insufficient penalties;
6. Error in the admission or rejection of evidence or other errors of law occurring at the administrative hearing or during the progress of the proceeding; or
7. The decision is not justified by the evidence or is contrary to law.

Ariz. Admin. Code R4-9-120. Wilfong contend the AzROC abused its discretion in denying its motion for rehearing because it filed its Answer to the Citation and Complaint only 1 day late, on Friday, September 24, 2010, rather than Thursday, September 23, 2010. The AzROC notes Wilfong in its motion for rehearing gave no reason explaining why it filed its Answer 1 day late. In oral argument in this matter, counsel for Wilfong explained Wilfong filed its Answer 1 day late because the proceedings in this matter were confusing. In reviewing this record, this Court agrees with counsel for Wilfong.

This Court notes the AzROC, in its September 18, 2009, Order adopting the \$806.81 restitution portion of the recommendation from the ALJ, remanded the matter to the Office of Administrative Hearings to resolve the flooring issue. As far as this Court can determine from this record, the ALJ and the Office of Administrative Hearings never complied with the AzROC's order

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of remand and therefore never held a hearing to resolve the flooring issue. There is nothing in this record to explain why the ALJ and the Office of Administrative Hearings never complied with the AzROC's order to resolve the flooring issue.

Apparently concerned that the ALJ and the Office of Administrative Hearings were not complying with the AzROC's order to resolve the flooring issue, Higgins filed his second complaint on November 3, 2009, which was given Number P10-0078. Because of the AzROC's order of remand, Higgins should not have had to have filed this second complaint. On January 20, 2010, the AzROC then sent a letter to Debco Construction Co. stating Complaint No. P10-0078 was closed, but may be reopened upon written request by Complainant. This would have led Wilfong to believe the flooring issue was resolved.

Complainant Higgins must have done something because, on September 8, 2010, the AzROC issued a Citation and Complaint against Wilfong dba Debco Construction Co., listing it as Case No: 2010-1840 Formerly P10-0078. Counsel for Wilfong stated it took Wilfong until September 24, 2010, to figure what was going on in these various cases, which was why the Answer was 1 day late.

Counsel for the AzROC stated the AzROC denied Wilfong's motion for rehearing because Wilfong never gave in that motion any explanation why the Answer was 1 day late. This may have been caused by the finding in the AzROC's October 25, 2010, Decision and Order stating that Wilfong did not file a written Answer, rather than making a finding that Wilfong had filed its Answer 1 day late. If the AzROC had given as its reason that Wilfong filed its Answer 1 day late, Wilfong could have addressed that concern rather than operating under the mistaken impression that the AzROC had received its Answer and misfiled it under the wrong cause number.

This Court acknowledges the September 8, 2010, Citation and Complaint advised Wilfong the AzROC must receive its written answer no later than September 23, 2010, and the AzROC did not receive Wilfong's Answer until September 24, 2010, which was 1 day late. This Court further acknowledges that Citation and Complaint advised Wilfong that "[a] timely answer must nevertheless be filed in writing following your receipt of this citation and complaint," thus no matter what Wilfong had previously filed, it still had to file an Answer "following your receipt of this citation and complaint." But this Court also acknowledges those Arizona cases stating a preference for having contested matters resolved on the merits, rather than by procedural default. In Higgins' first complaint, the AzROC ordered the matter remanded to the ALJ and the Office of Administrative Hearings to resolve the flooring issue, but the ALJ and the Office of Administrative Hearings never complied with that order of remand, thus the flooring issue was never resolved on the merits. In Higgins' second complaint, the AzROC found a procedural error, thus again the flooring issue would not be resolved on the merits. Because of the preference to have issues resolved on the merits, and because of the convoluted and confusing path this litigation has taken, this Court find reason to excuse Wilfong's 1 day late filing of its Answer.

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IV. CONCLUSION.

Based on the foregoing, this Court concludes there is reason to excuse Wilfong's 1 day late filing of its Answer. This Court therefore concludes it is appropriate to remand this matter to the Arizona Registrar of Contractors with orders to accept Wilfong's September 24, 2010, Answer as timely filed, and to proceed to resolve the flooring issue on the merits. This Court further determines there is no just reason to delay entry of judgment.

**IT IS THEREFORE ORDERED** granting Wilfong's request to vacate the Order of the Arizona Registrar of Contractors denying Wilfong's Motion for Rehearing.

**IT IS FURTHER ORDERED** remanding this matter to the Arizona Registrar of Contractors with orders to accept Wilfong's September 24, 2010, Answer as timely filed, and to proceed to resolve the flooring issue on the merits.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN  
JUDGE OF THE SUPERIOR COURT

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