IN THE SUPREME COURT OF THE STATE OF NEVADA

****

BOMBARDIER TRANSPORTATION (HOLDINGS) USA, INC., Appellant(s), v. NEVADA LABOR COMMISSIONER; THE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS; AND CLARK COUNTY, Respondent(s).	Case No. 71101 District Court No. A-14-698764-J

REPLY IN SUPPORT OF MOTION TO DISMISS THE APPEAL

The Office of the Labor Commissioner (the "Commissioner") files its reply in support of its motion to dismiss the appeal filed by Bombardier Transportation (Holdings) USA, Inc. ("Bombardier").

I. LEGAL ARGUMENT

As noted by Bombardier, the underlying case was unusual, complex and the case was both factually and legally intensive. The March 6, 2014 Order issued by the Labor Commissioner (the "L.C. Order") established liability, but the value of that liability was never set. This calculation of damages, like the case itself, is unusual, complex and both factually and legally intensive. Nor did the L.C. Order "establish[] a formula whereby the allegedly due prevailing wage differential can

be calculated and paid." Opposition, p. 15. To the contrary, the party tasked with providing a calculation of damages indicated:

> To calculate the 20% due, would require the appropriate documentation (payroll, hours worked, total benefits package, etc.) from Bombardier to even attempt to make such calculations.

Motion, Exhibit F. This matter needs to be returned to the Labor Commissioner to provide an assessment of the amount owed.

While this matter is eight years old, to proceed with the appeal at this juncture will likely exacerbate that problem rather than diminish it. Appellate briefing will take some time, review and a decision on holding argument will take more time, writing the decision will take even more time. Unless Bombardier prevails completely on its appeal and this Court directs a particular outcome below, the matter will be remanded below for further proceedings which will likely include some measure of damage. As the amounts involved are not inconsequential, there is a strong likelihood that any damages determination will be appealed – and the whole process will be repeated solely on the issue of damages. Having one full appeal on liability and another full appeal on damages obviously raises the specter of piecemeal appeals.

Much of Bombardier's argument is based on the assumption that the L.C. Order was issued pursuant to NRS 607.215. Yet, Bombardier only argues that

NRS 607.215 was triggered "by implication." [1] Opposition, pp. 8-9. The L.C. Order itself does not cite to NRS 607.215, indicate finality, nor mention appeal rights. More importantly, the L.C. Order does not include a **mandatory** determination that is required by statute.

The L.C. Order does find that the prevailing wage was not paid. Under such circumstances, the statutes require that a specific assessment be levied. NRS 338.090, provides, in part:

> 2. The Labor Commissioner, in addition to any other remedy or penalty provided in this chapter:
>
> (a) **Shall** assess a person who, after an opportunity for a hearing, *is found to have failed to pay the prevailing wage* required pursuant to NRS 338.020 to 338.090, inclusive, an amount equal to the difference between the prevailing wages required to be paid and the wages that the contractor or subcontractor actually paid;

(all emphasis added). Thus, a mandatory determination was not included in the L.C. Order. Rather than imply finality, the absence of this mandatory determination coupled with a request that the Department provide a calculation that would assist the Labor Commissioner in assessing the amount to be paid, indicates that the decision was not final.

. . .

[1] NRS Chapter 607 deals with the powers of the Labor Commissioner in general. NRS 338.020 – NRS 338.090, and the definitions in NRS 338.010, deals with the prevailing wage in particular.

Plainly, if the statutes and regulations are read in conjunction with one another, then NRS 338.090 provides that an assessment must be provided before a decision can be considered final under NRS 607.215.

As to subject matter jurisdiction, parties cannot agree to confer subject matter jurisdiction upon a court. *See Vaile v. Eighth Judicial Dist. Court*, 118 Nev. 262, 275, 44 P.3d 506, 515 (2002) ("Parties may not confer jurisdiction upon the court by their consent when jurisdiction does not otherwise exist."). If subject matter can be waived under appropriate circumstances, those circumstances are not present here.[2] Bombardier left out some important words when citing to *Gamble v. Silver Peak*, 35 Nev. 319, 323, 133 P. 936, 937 (1912)[3] (opinion on reh'g)(emphasis added). The full quote, with emphasis added, is:

> A party in an appellate court who has treated the judgment as final and asked that the same be affirmed **or reversed** will not be heard afterwards, **when the decision has gone against him**, to contend that the judgment was not final and the court therefore without jurisdiction to determine the questions presented on the appeal.

Id. Here the Labor Commissioner has no decision against it, so any such estoppel does not apply.

. . .

[2] That a court can obtain subject matter jurisdiction through waiver by one party seems a highly suspect proposition.

[3] The name of the case cited by Bombardier appears to be incorrect, at least when using Westlaw.

Next, Bombardier uses the same assumption regarding NRS 607.215 in the section dealing with the July 6, 2016 Order issued by the District Court (the "D.C. Order"). Again, it seems that the District Court perceived the problem caused by the lack of a damage assessment and attempted to resolve it by partially remanding the matter to the Labor Commissioner so damages could be assessed. Regardless, the D.C. Order was not final either because the amount of damages remained open.

Finally, a writ of mandamus certainly does not appear to be the correct method in moving this case along. NRS 338.010 does not need immediate clarification; immediate review would not serve considerations of public policy, sound judicial economy or administration. Indeed, the sound judicial and administrative policy at issue here is that decisions must be final before being appealed or significant time and energy can be lost arguing over an incomplete decision. Also, the imposition of additional cost and significant delay does not warrant mandamus relief. *Mortgages, Inc. v. U.S. Dist. Court for Dist. of Nev. (Las Vegas)*, 934 F.2d 209, 211 (9th Cir. 1991). These circumstances to not warrant the extraordinary remedy of granting a writ of mandamus.

II. CONCLUSION

As neither the L.C. Order nor the D.C. Order constituted a final order, this Court does not yet have subject matter jurisdiction. As such, this appeal should be dismissed and remanded to the Commissioner so a final decision may be issued

which would include an assessment of the amount owed for failure to pay the prevailing wage as required by statute.

DATED: May 4, 2017.

ADAM PAUL LAXALT
Attorney General

/s/ Robert E. Werbicky
Robert E. Werbicky (Bar. No. 6166)
Deputy Attorney General
State of Nevada
Office of the Attorney General
555 E. Washington Ave, Suite 3900
Las Vegas, NV 89101
(702) 486-3105 (phone)
(702) 486-3416 (fax)
rwerbicky@ag.nv.gov
Attorneys for *Nevada Labor Commissioner*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on May 4, 2017.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

I further certify that some of the participants in the case are not registered as electronic users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following participants:

Ara Shirinian
10651 Capesthorne Way
Las Vegas, NV 89135

Gary C. Moss, Esq.
3800 Howard Hughes Pkwy., Suite 600
Las Vegas, NV 89169

/s/ Marilyn Millam
an employee of the Office of the Attorney General