

**IN THE SUPREME COURT OF THE
STATE OF NEVADA**

HOME WARRANTY
ADMINISTRATOR OF NEVADA,
INC. dba CHOICE HOME
WARRANTY, a Nevada corporation,

Appellant,

vs.

STATE OF NEVADA, DEPARTMENT
OF BUSINESS AND INDUSTRY-
DIVISION OF INSURANCE, a Nevada
administrative agency,

Respondent.

Supreme Court No. 80218

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First Judicial District Court
Elizabeth A. Brown
Case No. 17 OC 00269 JB
Clerk of Supreme Court

Appeal from First Judicial District Court, State of Nevada, Carson City
The Honorable James. T. Russell, District Judge

**REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE
SUPPLEMENTAL APPENDIX**

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Appellant Home Warranty Administrator of Nevada, Inc., dba Choice Home Warranty (“HWAN”), by and through its counsel of record, hereby submits this Reply in support of its Motion for Leave to File Supplemental Appendix (“Motion”).

I. INTRODUCTION

HWAN seeks leave to file a supplemental appendix with a relevant Division email that was created and received by HWAN *after* both the underlying administrative proceedings and the district court petition for judicial review proceedings had concluded. In Opposition to the Motion, the Division does not analyze any of the factors courts generally consider in determining whether to grant leave to expand the record in extraordinary cases such as this. Instead, the Division cites the Nevada Administrative Procedure Act (“APA”) for the proposition that the record is confined to the record before the agency. But that is exactly the point of the Motion. There is no dispute that this Court’s review is generally confined to the record. The Motion requests leave for a rare circumstance that nonetheless is critical to the issues on review before this Court, and this Court has inherent authority to expand the record in such circumstances.

Throughout the entirety of the underlying administrative and district court proceedings, the Division argued that all who sell service contracts in Nevada must obtain a certificate of registration under NRS 690C.150. After succeeding on this

argument, the Division revealed its true intentions—the Division will enforce this interpretation of the statutory registration requirement only against HWAN and its third-party sales agent, but it will not enforce this interpretation against any other Nevada service contract provider or sales agent. HWAN did not present the email revealing this disparate treatment of HWAN before the administrative hearing officer or the district court below because it was authored by a Division employee and received by HWAN in response to a public records request *after* those proceedings had concluded. Yet HWAN argued before the district court that the Division was applying its purported registration requirement only against HWAN and not against any other provider or sales agent. HWAN simply did not have the “smoking gun” email of the Division admitting the same at the time. Now, HWAN seeks leave to file the Division email in a supplemental appendix with this Court.

The Division may not hide its true intentions until after the administrative record is closed and then use the Nevada APA to thwart the interests of justice. HWAN’s Motion should be granted so this Court may review the Division’s own admission that it does not apply to any other service contract provider or third-party sales agent the interpretation of NRS 690C.150 that all who sell service contracts must be registered with the Division. This email reveals the correct disposition of this case—the plain language of NRS 690C.150 and the Division itself do not require such registration.

II. LEGAL ARGUMENT

This Court has inherent authority to supplement the record on review in certain circumstances, such as where the evidence sought to be included establishes “beyond any doubt the proper resolution of the pending issue.” *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003); *Ross v. Kemp*, 785 F.2d 1467, 1475 (11th Cir. 1986).¹ This is exactly the case here.

In the underlying case, the Division took the position that all third-party sales agents who sell service contracts on behalf of registered service contract providers must themselves be registered with the Division. But the Division knew at the time it made this argument that the Division had never before required, and did not intend to require, sales agents of other service contract providers to register. The Division sought and obtained an order that HWAN, alone, could not use an unregistered third-party sales agent. After obtaining the District Court Order, and faced with uncertainty from the service contract industry, the Division assured the SCIC that it does not and would not require sales agents to register.²

¹ The Division disregards the standards in these cases because they are federal cases, but this Court has long held that federal authority is properly considered by this Court as persuasive authority for analogous rules. *Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002). While specific rules of civil procedure are not at issue here, this Court certainly has the same inherent authority as those federal appellate courts to determine whether to enlarge the record in extraordinary circumstances, and the Division cites no authority to the contrary.

² The Division mischaracterizes NAC 679B.490 as stating that “a statement on statutory interpretation by an employee is not a position or an opinion of the

Notably, HWAN requested a new hearing because it is aggrieved by the Division's disparate treatment and uneven application of the service contract provider registration requirements, where the Division's email could be received and considered by the administrative agency. But the Division denied HWAN's request for a hearing. Mot., Ex. 2. Thus, the Division seeks to evade judicial scrutiny of its disparate treatment of HWAN. The Division may not impose different requirements on different service contract providers. The Division took the position in this case that NRS 690C.150 requires all who sell service contracts to register with the Division. Not only is this interpretation in direct conflict with the plain language of that statute, as discussed in HWAN's Opening Brief, but the email HWAN seeks to include within a supplemental appendix demonstrates the Division does not even enforce such a requirement in practice.

It is indisputable that the evidence in the Supplemental Appendix is relevant to the interpretation of NRS 690C. HWAN has attempted to provide this evidence

Division." Opp'n at 5 n. 2. NAC 679B.490 states that the "Commissioner will not issue an oral advisory opinion or respond over the telephone to a request for an advisory opinion. An oral response or a response given over the telephone by a member of the staff of the Division is not a decision or an advisory opinion of the Commissioner or Division." The email from the Division is not an "oral advisory opinion" or a "response given over the telephone." The Division employee in question confirmed *in writing* the position of the Division. Even so, whether the Commissioner herself disagrees with this stated position is inapposite. *In practice*, the Division does not prohibit any other registered service contract provider from using an unregistered third-party sales agent, just HWAN.

directly to the Division (via a request for a hearing), to the District Court (in various petitions for judicial review), and now to this Court (via the instant motion). It cannot be, as the Division seemingly contends, that no forum exists where the full panoply of the Division's actions and inactions can be reviewed and adjudicated.

Finally, the Division makes much ado about HWAN's argument that the Division has conceded that this Court is the proper forum for considering this evidence. Opp'n at 5. But HWAN did not make any misrepresentation to this Court that the Division concedes that Exhibit 1, specifically, is properly before this Court. *Id.* The Division has twice stated that the issues pertaining to statutory interpretation of NRC 690C.150 are before this Court, and Exhibit 1 is undeniably relevant to statutory interpretation.³ Thus, the Division cannot reasonably contend that this Court is not the proper forum for considering Exhibit 1.

III. CONCLUSION

For the foregoing reasons, HWAN respectfully requests that this Court grant the Motion and permit HWAN to file Exhibit 1 in a supplemental appendix.

³ Specifically, the Division stated in denying HWAN's request for a hearing that "the jurisdiction over any matters related to the District Court Order and the underlying Administrative Decision currently lies with the Nevada Supreme Court." Mot., Ex. 2 at 2 (emphasis added). And the Division opposed HWAN's attempt to bring the very same Exhibit 1 before the district court in a subsequent petition for judicial review on the basis that "statutory interpretation of the provisions of chapter 690C is one of the issues currently on appeal and under the jurisdiction of the Nevada Supreme Court." Mot., Ex. 3 at 4.

DATED this 26th day of May, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(b) and 25(1)(d), I, the undersigned, hereby certify that I electronically filed the foregoing **REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE SUPPLEMENTAL APPENDIX** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system on the 26th day of May, 2020.

I further certify that all participants in this case are registered with the Supreme Court of Nevada's E-filing system, and that service has been accomplished to the following individuals through the Court's E-filing System or by first class United States mail, postage prepaid, at Las Vegas, Nevada as follows:

Via Electronic Filing System:

Richard P. Yien

Joanna N. Grigoriev

/s/ Joyce Heilich

An Employee of Holland & Hart LLP