

IN THE SUPREME COURT OF THE STATE OF NEVADA

CASINO CONNECTION INTERNATIONAL, LLC, Appellant,

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Elizabeth A. Brown
Clerk of Supreme Court

v.

NEVADA LABOR COMMISSIONER, a Nevada Administrative Agency, and
JOHN BUYACHEK, Respondents.

Supreme Court No. 82683

Eighth Judicial District Court
Case No. A-19-805612-J

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF REPLY

Appellant argues below: 1) The district court glossed over the significance of placing the burden of proof on the Appellant employer; 2) A lack of substantial evidence existed in the record to support the hearing officer award, but the district court disregarded this; 3) The hearing officer disregarded evidence that the rate of any commission must to be reduced by 5% to account for commissions paid to another salesperson required to manage Buyachek's sale orders; 4) Buyachek is not entitled to any commission at all, because he did not perform those additional tasks required to receive one.

For the reasons stated, the district court must be reversed, and the commissions due either be reduced by 5% or reduced to 0.

II. LEGAL ARGUMENT

The State's Reply Brief unsuccessfully attempts to reframe the issues and arguments before this Court. For the reasons stated below, however, the district court must be reversed, and the commissions due either be reduced by 5% or reduced to 0.

A. The district court glossed over the significance of placing the burden of proof on the Appellant employer.

Under Nevada law, an employer must pay a discharged employee "[w]ithin 3 days after the wages or compensation of a discharged employee becomes due." NRS 608.040(1). The parties agree that Appellant could not violate NRS 608.040(1), or

the corresponding regulation of NAC 608.040, unless Appellant owed commissions to Buyachek under NAC 608.120(1).

A determination under NAC 608.120 comes down to the central questions of whether and “when the commission becomes payable pursuant to the agreement” and, in this case, the definition of “sale.” Buyachek, the claimant and objector to the Labor Commission’s original determination, bore that burden. Nonetheless, the hearing officer necessarily interpreted the regulation, or some other provision, as putting the burden of proof for the key question upon the employer, the Appellant in this case. In effect, the Labor Commission’s hearing officer put the burden on the employer to prove the commissions did not become payable.

Upon review, the district court made no express ruling on this burden shifting and merely glossed over the issue. The Answering Brief asserts that there is no evidence the Labor Commission’s hearing officer placed the burden of proof on the Appellant. However, the State’s argument about burden shifting in the underlying Award can be easily rebutted.

As for who bore the burden, no one disputes that Buyachek is the party who initiated the claim and then objected to the Labor Commissioner’s initial findings that he was entitled to \$11,554.21. Buyachek is the one who instigated both the claim and the hearing process. The burden must fall on the claimant objecting to a determination by an agency and seeking relief from that determination, regardless

of the grounds. Nowhere does NAC 608.120(1) put the burden of proving “when the commission becomes payable pursuant to the agreement” upon the employer. Yet here the Labor Commission effectively presumed commissions were due then placed upon the employer the burden to prove the commissions did not become due.

Appellant is not the party who objected to the initial determination. In fact, it tendered full payment, including penalties, to resolve the matter. As for the Respondent’s reference to the time frame of the Labor Commission’s initial determination, Buyachek did not seek clarification of that initial determination or file a new claim as he had the option to do. Instead, he rejected the payment, objecting to the Labor Commission’s initial determination and seeking a hearing to change that determination. The burden must be upon the claimant when he objects to the Labor Commissioner’s determinations and invokes the administrative law process. This is consistent with basic due process and with the burden expressly imposed upon “the party attacking or resisting the decision,” in the context of judicial review.¹

The district court below implicitly acknowledged the misplaced burden at the hearing, but it did not directly rule on the error. It simply commented that “Buyachek met his burden of proof.” However, this comment lacks support in the record. Neither the Award nor the Order makes reference to any sufficient evidence offered

¹ See, NRS 633B.135(2).

by Buyachek, the claimant, aside from the Offer of Employment itself.² Both the Award and Order simply reach a conclusion that the Offer of Employment required Buyachek be paid on revenues collected even after his employment ended; this despite Award's finding the Offer of Employment to be silent "as to the triggering event to be paid,"³ and despite language in the Offer of Employment making clear that managing existing sales after a salesperson leaves has a specific value (a 5% commission to another salesperson) and expressly describing commission payments in terms of "paychecks."⁴

Similar to the district court's conclusory statement, the State's Answering Brief simply falls back on the fact that Buyachek did not receive commissions in the months that followed the end of his employment in May 2018.⁵ While a factual statement, it only begs the question as to if and when any additional commissions ever came due.

Again, the Award specifically found the Offer of Employment silent as to the triggering event for any payment of commissions. If "silent," the Offer of Employment alone could not possibly be determinative on this point. Whether

² AA000062-AA000068; see also AA000532-AA000537.

³ AA000065, l. 13-14.

⁴ One does not receive a paycheck after leaving an employment.

⁵ See, Answering Brief at 15-16.

“silent” or ambiguous, the burden fell on Buyachek to prove his entitlement to commissions for the months after his employment. Either through misapplication of NAC 608.120 and basic due process, or plain legal error, the hearing officer improperly placed a burden to show non-entitlement upon the Appellant. This is confirmed by the fact that the Award does not articulate how Buyachek met his burden, but only how Appellant failed to meet a burden not properly place on it. The district court saw the legal problem with that result but made only a conclusory statement that Buyachek had met his burden, without pointing to any substantial evidence.

B. A lack of substantial evidence existed in the record to support the hearing officer award, but the district court disregarded this.

By disregarding evidence that Buyachek knew of and agreed to terms that he would not receive commissions on revenues due and paid by customers on contracts after his departure from the company, or at least that any commissions would be reduced by the 5% paid to others in order to administer any open contracts, the Labor Commission’s hearing officer acted arbitrarily and lacked substantial evidence to support her findings and conclusions as to the actual terms of the Offer of Employment.

The hearing officer ordered that Appellant, “owes [Buyachek] \$42,244.00 in

unpaid commissions for the time period of May 10, 2018, to October 22, 2018.”⁶ She came to that award by applying a 12.5% commission to the entire amount of \$337,952.60 collected from Appellant’s customers between May 10, 2018, to October 22, 2018. In order to get to the determination, however, the hearing officer acted arbitrarily and made certain factual findings that disregarded important evidence and, therefore, lacked substantial evidence to support those findings. The district court let this error stand without any real analysis.

C. The hearing officer disregarded evidence that the rate of any commission must be reduced by 5% to account for commissions paid to another salesperson required to manage Buyachek’s sale orders.

In its Answering Brief, the Labor Commissioner argues there is no evidence in the record “tending to show” Buyachek’s commissions should be reduced by 5%. This is simply not the case.

Buyachek stated, “I don’t want anything that hasn’t been consummated.”⁷ The word “consummate” means “to make something complete or perfect.”⁸ He wants something more. Buyachek claims entitlement to a full 12.5% of net revenues for

⁶ AA000066.

⁷ Hearing Transcript, AA000006, p. 16, l. 20-23.

⁸ See, Oxford Advanced American Dictionary, https://www.oxfordlearnersdictionaries.com/definition/american_english/consummate2.

ads he booked with clients who paid after his departure from Appellant, regardless of whether he saw the ad through to completion by publication and payment, and regardless of the fact Buyachek knew Appellant had to pay another salesperson a 5% commission to manage those ad contracts to publication and payment. Buyachek asserts that all he had to do was get a customer to sign on the dotted line, no matter what work it required to get an ad to print and the bill paid. He did not rebut evidence, however, that Appellant paid another employee to complete his post-departure work, nor did not rebut evidence that he himself received a 5% commission for that same purpose when he started his employment with Appellant.

The hearing officer correctly noted that the Offer of Employment was the only written agreement between the parties, but that Offer of Employment does in fact state that a “5% commission will be paid on existing sale you will be managing,” providing clear evidence salespersons did not complete a sale by simply obtaining a signed contract and confirming that 5% of commissions was allocated to the process of getting ads to publication and to payment after the customer signed the ad contract.⁹ Thus, the Award’s finding that “[if] an employee left employment...the contract would be re-assigned to a new salesperson who would then receive a management fee of 5%...[t]his is not memorialized in writing,” cannot be

⁹ AA000165.

supported.¹⁰ It was expressly stated in the written Offer of Employment, and Buyachek actually received such commissions during his tenure.

The findings of the Award also fail to mention evidence of the 14 steps of the “sales cycle” required by Appellant to be completed in order to “consummate” the agreement that would earn a 12.5% commission. Of these 14 steps, listed in Exhibit 4 and discussed in testimony, 11 come after the customer signs an advertising agreement, and nine of those come prior to payment.¹¹ An employee like Buyachek might leave the company with one of those steps remaining or with nine remaining. Either way, the employer had to compensate someone to perfect the contract by receiving payment for the ads. That compensation was set at a 5% commission on collected revenue. Again, Buyachek read and accepted this and he received that 5% on certain ad contracts when he started employment with Appellant.

The State argues the evidence does not support a position that Buyachek was required to complete any task other than getting a customer’s signature in order to collect a 12.5% commission. To make that argument the Labor Commission claims to simply refer to the four corners of the Offer of Employment. Unfortunately, as the hearing officer expressly found, the four corners of the document do not provide a definition of the triggering event to payment of commissions. In addition, the

¹⁰AA000064, l. 5-8.

¹¹ AA000450.

Answering Brief criticized the list of tasks presented at the hearing, because Appellant created the actual document after Buyachek's departure.¹² To be clear, however, Appellant never claimed that document to be a written attachment to the Offer of Employment, but only a demonstrative for purposes of the hearing. The Hearing Officer admitted the document with that understanding, based upon Appellant's testimony.¹³

Buyachek himself testified to post-contract tasks 4-10 being required of him.¹⁴ Forced to acknowledge these post-contract tasks, Buyachek at one point tried to downplay their significance by claiming, "I did that separate from my agreement."¹⁵ Buyachek, however, received no compensation separate and apart from commissions. This lack of separate compensation belies any insinuation that Buyachek's sale responsibility was somehow separate from his post-sale responsibilities, and directly contradicts the district court's decision.

The compensation paragraph of the Offer of Employment begins with the

¹² See, Answering Brief at 18.

¹³ Becky Kingman-Gros testified for Appellant and acknowledged the list of "cycle tasks," Exhibit 4, was reduced to writing during the claim process, and was not itself part of a written contract.¹³ Hearing Transcript, AA000026, p. 94, l. 10 - 95, l. 2.

¹⁴ See Hearing Transcript, AA000015: Item 4 at 50, l. 18-22; Item 5 at 50, l. 25 to 51, l. 4; Item 6 at 51, l. 5 to 9; Item 7 at 51, l. 10 - 16; Item 8 at 52, l. 1 to 8; Item 9 at 52, l. 9 - 14; Item 10 at- 53, l. 9 - 16.

¹⁵ Hearing Transcript, AA000015, p. 52, l. 11-14

sentence, “5% commission will be paid on existing sales you will be managing.”¹⁶ Therefore, Buyachek knew at the inception of his employment that managing of existing sales, i.e., completing the remainder of tasks 4-14, had a specific monetary value. Buyachek admitted receiving that 5% commission himself on existing sales when he became employed by Appellant.

Contrary to the evidence, and without substantial evidence from Buyachek, the Labor Commission’s hearing officer found that “the salesperson may or may not have to perform additional duties depending on the needs of the client.”¹⁷ However, she cited no evidence at all to support that finding. Nor did Buyachek claim an instance ever occurred in which none of the tasks needed to be performed. On the contrary, Buyachek did not dispute having received a 5% commission on existing sales himself, regardless of whether tasks 4-14 needed to be completed or merely tasks 12-14.¹⁸ While Buyachek questioned that each and every step might need to be done every time,¹⁹ he did not dispute that these steps were generally required to get an ad to print and the bill paid. Nor did Buyachek deny that he received 5% to manage existing accounts when he began employment with Appellant, as the Offer

¹⁶ AA000165.

¹⁷ AA000064.

¹⁸ See, AA000450.

¹⁹ Buyachek testified that sometimes a client would send over the ad for an upcoming publication without prompting. Hearing Transcript AA000015, p. 52, l. 1-8.

of Employment provided.

Furthermore, the hearing officer noted the undisputed evidence that Appellant actually brought a new employee, Lauren Byrage, on to manage Buyachek's accounts and that she actually received a 5% commission on the contracts Buyachek obtained during his employment but did not see through to receipt of payment. Buyachek knew from his own contract and his experience that would occur when he left. Nonetheless, the Award ignored these facts and made the award based upon a full 12.5% commission being due to Buyachek.²⁰

To do this, the Award claims to rely on the terms of the Offer of Employment, but this reliance defies logic. The Award itself found that "the commission terms are silent as to what the triggering event to be paid were and how [Appellant] will distribute commissions for sales that were completed during an employee's employment but were paid after an employee's employment ended."²¹ Despite this, the hearing officer, without substantial evidence, concluded that "[e]ntering into a contract was that sale (the triggering event)."²² Effectively, the hearing officer supplied a term she found absent from the agreement.

In doing so, the Labor Commission's hearing office ignored the express term

²⁰ The result is Appellant owing 17.5% commission on ads Buyachek never saw through to publication and payment.

²¹ AA000065, 1.13-15.

²² AA000065, 1. 20.

concerning payment to employees of a 5% commission on existing sales he or she manages, which speaks directly to “what is to happen upon separation of employment.”²³ The Offer of Employment describes a specific value (5% commission) to the management that comes after the step of signing a contract for an ad. Buyachek is estopped to deny this specific 5% value that he himself received when he was a new employee doing the work it takes to fully complete a sale for a magazine like the one Appellant puts out.

Without analysis, the district court simply took the position -- no more supported by the evidence than the Award – that “[s]ubstantial evidence supports the Hearing Officer's determination that, "based on the terms of the agreement the parties mutually entered into, the Claimant [Mr. Buyachek] should have continued to receive commissions even after he was terminated from his employment; he had completed the sale."²⁴ The district court did not specify the “substantial evidence” supporting this conclusion. It could not specify such evidence, because the Award cited none and Buyachek offered nothing at the hearing on this point except to claim that the Offer of Employment on its face satisfied his burden. This determination inevitably leads to the conclusion the district court viewed the 5% as being for some component of the business other than sales. Buyachek, however, never received

²³ *Cf.* the Award’s conclusion at AA000065, l. 24.

²⁴ AA000535.

compensation separate and apart from commissions. This lack of separate compensation belies any insinuation that Buyachek's sale responsibility was somehow separate from his post-sale responsibilities.

To the extent the district court's conclusion seems to come from Respondent's argument that a completed "sale" means only obtaining a customer's signature, that argument actually contradicts – indeed nullifies—the contract language itself. Again, the contract term pertaining to commissions states:

5% commission will be paid on existing sales you will be managing.
12.5% commission will be paid on any new sales you make.²⁵

Under Buyachek's definition, and the district court's logic, only one kind of "sale" exists and it is completed once the customer signs on the dotted line, warranting a 12.5% commission even if he does nothing else. Keeping in mind uncontested evidence that both Buyachek and his successor received the same 5% commission to shepherd "existing sales" to payment, the district court's determination directly contradicts the Offer of Employment, which describes two kinds of sales – "new sales" and "existing sales."

If the contract had instead said, "12.5% will be paid to you on sales you make and 5% for collecting payment on sales previously completed by others," then the district court's conclusion might make sense. As it stands, however, the district

²⁵ AA000165.

court's conclusion nullifies the contract language expressly providing that something remains to be done in the sales cycle after the customer signs. That something is, specifically, the sales process described in the evidence.²⁶ Whether one of those things or all ten of those things must be done in a given instance, even Buyachek agreed they must be done to complete a sale, and this process is assigned a value of 5%. As was true of his predecessors, once he left Buyachek could not complete the sales process. Appellant paid someone else to do that, as it had paid Buyachek in the past. Thus, Buyachek could only receive 7.5% commission after his departure, and he knew this from not only the language of the contract but his own experience.

The hearing officer acted arbitrarily by disregarding the substantial evidence, both in the Offer of Employment and extrinsic to it, in concluding that Buyachek was to receive a full 12.5%, rather a reduced 7.5% commission. On review, the district court did no better and must be reversed.

D. Buyachek is not entitled to any commission at all, because he did not perform those additional tasks required to receive one.

The preceding argument also supports Appellant's position that Buyachek is not entitled to any further commission at all, because he did not perform the additional tasks in the sales cycle required for him to receive one. Again, a

²⁶ See, *supra*.

determination under NAC 608.120 comes down to the central questions of “when the commission becomes payable pursuant to the agreement,” and in this case the definition of “sale.”

Buyachek is not entitled to any commission at all for revenue received after his employment concluded, because the Offer of Employment does not state such commissions were payable to him. The Answering Brief repeats the mantra that the hearing officer “based her decision on the four corners of the parties’ agreement,” but the Offer of Employment does not on its face provide that commissions become due to a former employee for revenues the employer receives after his departure from the company. In looking at the “four corners,” the hearing officer concluded that the Offer of Employment contained no express “triggering event to be paid [a 12.5% commission].”²⁷ She did not find the contract ambiguous – the Award does not contain the words ambiguous or ambiguity. Nonetheless, she arbitrarily determined the sole triggering event to be merely obtaining a signed contract for ads to be run at some time in the future and to be paid at some time after that.²⁸ In effect, the Labor Commission’s hearing officer supplied a term of the agreement not found in the Offer of Employment itself. The hearing officer did that without citing to any substantial evidence. She erred by supplying a “triggering event” not found in the

²⁷ AA000065, l. 13-14.

²⁸ AA000064, l. 20.

contract and ignoring evidence presented concerning a list of steps in a “sales cycle” that ultimately leads to receipt of revenues and payment of commissions.

Buyachek himself testified to post-contract tasks 4-10 being required of him, though perhaps not every single task in every single case. Forced to acknowledge these post-contract tasks, Buyachek claimed at one point that, “I did that separate from my agreement,” implying he performed these task – tasks which would lead to payment by a customer – for some other recompense. Buyachek, however, received no compensation separate and apart from commissions. Therefore, no substantial evidence supports any insinuation that Buyachek’s contract signing responsibility was somehow separate from his post-signing responsibilities.

The Award ignores evidence Buyachek knew of and performed the post-signing tasks, and it asserts that “the salesperson may or may not have to preform [sic] additional duties depending on the needs of the client.”²⁹ Only one instance where one of the 11 tasks was not required by a particular contract based upon “the needs of the client” is found anywhere in the record. No evidence exists in the record of any instance where none of the post-signing tasks was required to complete the sales cycle and receive payment from a customer. Even so, the Award in effect concludes, without any substantial evidence, that after step three, “Receive signed advertising agreement,” Buyachek need never have done anything else to collect his

²⁹ AA00064, 1.16-17.

commission, even if he still worked for Appellant.³⁰ By denying the Petition, the district court confirmed that conclusion.

The conclusion not only lacks any evidentiary basis but is, frankly, absurd. It means that Buyachek would always be paid regardless of whether, for example, he did any of the following: created manifest of ads to run, shared the manifest with publisher/editor/art director, met with publisher/editor/art director to lay out where ads/editorial will be placed in upcoming publication, contacted advertiser and request ad for upcoming publication, coordinated with art director to be sure all ads are received, reviewed digital version of prepress files to be sure all ads are in, placed correctly and formatted correctly, or assisted finance with collections when necessary. These management tasks do not depend “on the needs of the client,” but concern the needs of Appellant. The express language of the contract values that management component when it states “5% commission will be paid on existing sales you will be managing.”³¹ Contrary to the arbitrary conclusion of the hearing

³⁰ Though not expressly stated, this may be accounted for by the hearing officer shifting the burden to the Appellant employer. In particular, the Award seems to suggest that the employer failed to prove each task was required for every ad contract and, therefore, these remaining 11 tasks were not required to consummate any contract.

³¹ AA000165. To be clear, Buyachek’s objection sought, and the Award granted, a 12.5% commission. He did not offer to accept a 7.5% alternative, nor did the Award even suggest it. Undisputed evidence in the records shows that the 7.5% retained by Appellant would go to the costs of hiring a new employee. AA00064, 1. 23-25.

officer and the district court, the substantial evidence, both in the Offer of Employment and in the record, shows the triggering event for entitlement to a commission to be the completion of a series of tasks. While some of those tasks might not need to be completed in a given instance, Buyachek offered no evidence as to which contracts and which tasks, those might be. Buyachek, despite what ought to be his burden of proof, simply stated the tasks were “separate from my agreement.”

The hearing officer reach her central conclusion by misinterpreting the agreement and inserting a term not found, arbitrarily disregarding evidence offered by the Buyachek, and not requiring the claimant to meet his burden of proof. In its review, the district court did the same and must be reversed.

III. CONCLUSION

For the reasons stated above, this Court should hold that the district court erred in entering judgment in favor of Appellant and should reverse that judgment.

DATED this 6th day of December 2021.

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IV. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office 365 Word in 14-point Times New Roman font.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

proportionally spaced, has a typeface of 14 points or more and contains 4259 words; or

does not exceed 30 pages.

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules

of Appellate Procedure.

DATED this 6th day of December 2021.

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CERTIFICATE OF SERVICE

I certify that on the 6th day of September 2021, I served a copy of this completed **APPELLANT’S REPLY BRIEF** upon all counsel of record:

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- By E-Service through Nevada Supreme Court; email and by first class mail with sufficient postage prepaid to the following address(es):
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