

No. 82883

IN THE SUPREME COURT OF THE STATE OF NEVADA

COMPLETE CARE CONSULTING, LLC

Appellant,

v.

SHANNON M. CHAMBERS, IN HER CAPACITY AS THE LABOR
COMMISSIONER OF THE STATE OF NEVADA; AND THE STATE
OF NEVADA OFFICE OF THE LABOR COMMISSIONER

Respondents.

On Appeal from the Second Judicial
District Court of the State of Nevada
Case No. CV20-02009

RESPONDENTS' ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a final order of the District Court entered on April 12, 2021, which dismissed a Petition for Judicial Review and remanded the matter to the Labor Commissioner. Appellant timely filed its Notice of Appeal on May 5, 2021. This Court has jurisdiction pursuant to NRS 233B.150.

ROUTING STATEMENT

This matter concerns an administrative agency and is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(9).

Appellant notes that in *Déjà Vu Showgirls v. State Dept. of Taxation*, 130 Nev 719, 725 n. 5, 334 P.3d 392, 397, n. 5 (2014) the Nevada Supreme Court did not decide the question of whether the failure to exhaust administrative remedies is jurisdictional or a claim prerequisite. However, resolution of that issue is not necessary for a determination of the instant matter because the District Court did not make an explicit finding that Complete Care Consulting failed to exhaust administrative remedies. The District Court remanded the matter pursuant to NRS 233B.135.

RESTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Did the District Court correctly determine that the factual record was not fully developed because the Labor Commissioner did not hold a hearing?

Was the District Court correct in remanding this matter to the Labor Commissioner to conduct a hearing and enter a final decision?

STATEMENT OF THE CASE

Nature of the Case

This is an appeal of a District Court Order which granted the Office of the Labor Commissioner's Motion to Dismiss Complete Care Consulting's Petition for Judicial Review, and Ordered the matter remanded to the Labor Commissioner to conduct a hearing and enter a final decision.

Course of Proceedings

The Nevada Labor Commissioner and the Office of the Labor Commissioner (collectively "OLC") issued a Final Order Setting Forth Findings of Fact and Conclusions of Law on November 12, 2020.¹ Among

¹ App. 29-38.

other things, the OLC found that Complete Care Consulting (“CCC”) failed to pay overtime to employees working over 40 hours per week.² On January 6, 2021, the Labor Commissioner issued a Notice of Hearing setting the matter for a hearing to commence on January 28, 2021.³ The Notice of Hearing included a finding that timely objections had been filed.⁴

CCC filed its Petition for Judicial Review on December 14, 2020. However, CCC did not serve its Petition for Judicial Review until January 25, 2021. On January 26, 2021, Complete Care submitted a Notice of Want of Jurisdiction with Request to Vacate Hearing Set for January 28, 2021.⁵ That same day, January 26, 2021, the Labor Commissioner issued an Order vacating the hearing.⁶

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² *Id.* at 36.

³ App. 10-13.

⁴ App. 20, ll. 19-20.

⁵ App. 15-16.

⁶ App. 20-21.

The OLC filed its Motion to Dismiss in the District Court on February 9, 2021.⁷ CCC filed its Opposition.⁸ And the OLC filed its Reply.⁹

The Disposition Below

On April 4, 2021, the District Court entered its Order Granting the Nevada Labor Commissioner's Motion to Dismiss and, pursuant to NRS 233B.135, ordered the matter remanded to the Labor Commissioner to conduct a hearing.¹⁰ The OLC filed its Notice of Entry of Order on April 13, 2021.¹¹

STATEMENT OF FACTS

The OLC received a complaint alleging that CCC was misclassifying employees as independent contractors and issued a subpoena for records.¹² CCC complied with the subpoena. An OLC

⁷ App. 3-21.

⁸ App. 22-48.

⁹ App. 49-54.

¹⁰ App. 54-57

¹¹ App. 58-66.

¹² App. 30, ll. 2-12 and App. 43.

Auditor/Investigator reviewed the records and issued a Determination of Payroll Records Audit, on September 17, 2020.¹³ The Determination concluded that CCC intentionally misclassified employees and failed to pay overtime to employees working over 40 hours in a work week.¹⁴

Through its attorney, CCC submitted a Request for Hearing and Objection to Determination, on October 2, 2020.¹⁵ The OLC found that the Request for Hearing and Objection lacked merit and issued its Final Order Setting Forth Findings of Facts and Conclusions of Law on November 12, 2020.¹⁶ The OLC received additional objections from CCC, and on January 6, 2021, the OLC set the matter for hearing to commence on January 28, 2021.¹⁷

CCC filed its Petition for Judicial Review on December 14, 2020 but did not serve it until January 25, 2021. On January 26, 2021, CCC filed a Notice of Want of Jurisdiction with Request to Vacate Hearing Set for

¹³ App 40-45.

¹⁴ *Id.* at App. 43.

¹⁵ App 47-48.

¹⁶ App. 29-38.

¹⁷ App. 10-13.

January 28, 2021, with the OLC.¹⁸ That same day, January 26, 2021, the OLC issued an Order vacating the hearing.¹⁹

The OLC filed its Motion to Dismiss for Failure to Exhaust Administrative Remedies on February 9, 2021.²⁰ CCC filed its Opposition.²¹ And the OLC filed its Reply.²² On April 4, 2021, the District Court entered its Order Granting OLC's Motion to Dismiss CCC's Petition for Judicial Review and ordering the matter remanded to the Labor Commissioner to conduct a hearing.²³

The District Court's Order makes reference to the well-established doctrine of failure to exhaust administrative remedies.²⁴ The District Court noted that the administrative review process provides the district court with a fully developed record and administrative decision including

¹⁸ App. 15-16.

¹⁹ App. 20-21.

²⁰ App. 3-21.

²¹ App. 22-48.

²² App. 49-54.

²³ App. 54-57.

²⁴ App. 54-57 and App. 63-66.

factual findings by an administrative body with expertise in a particular area.²⁵ However, the Order does not specifically find that CCC failed to exhaust administrative remedies. Rather the District Court's Order specifically found,

This Court's review of the Labor Commissioner's Final Order is conducted pursuant to NRS 233B.135. The Court may remand or affirm the final decision or set it aside in whole or in part. When reviewing an administrative agency's decision the Court defers to the agency's findings of fact, but reviews questions of law de novo. *Bombardier Transportation (Holdings) USA, Inc., v. Nevada Labor Commissioner*, 135 Nev. 15, 18, 433 P.3d 248, 252 (2019). Here the factual record is not fully developed because the Labor Commissioner did not hold a hearing. Therefore, the Court finds this case should be remanded to the Labor Commissioner for further proceedings.²⁶

SUMMARY OF ARGUMENT

A District Court may remand a matter to an administrative agency for further proceedings pursuant to NRS 233B.135.

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²⁵ App. 55 and 64 citing to *Benson v. State Engineer*, 131 Nev. 772, 780, 338 P.3d 221, 226 (2015).

²⁶ App. 56 and 65.

STANDARD OF REVIEW

This matter was before the District Court on a Petition for Judicial Review. The applicable standard of review is set forth in NRS 233B.135, which places the burden of proof on the party attacking an agency decision to show that the final agency decision is invalid. When reviewing an administrative agency's decision the Court defers to the agency's findings of fact, but reviews questions of law de novo. *Bombardier Transp. (Holdings) USA, Inc., v. Nev. Lab. Comm'r*, 135 Nev. 15, 18, 433 P.3d 248, 252 (2019) (citing to *Nevada Dep't. of Tax'n v. Masco Builder Cabinet Grp.*, 127 Nev. 730, 735, 265 P.3d 666, 669 (2011)).

A dismissal for failure to state a claim pursuant to NRCP 12(b)(5) is reviewed de novo. *Eggleston v. Stuart*, 137 Nev. Adv. Op. 51, 495 P.3d 482, 487 (2021) (citing to *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008)).

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ARGUMENT

I. The District Court had Inherent Authority to Remand the Matter to the Labor Commissioner

Appellant, CCC, asserts that “the sole basis for dismissal of the petition was a failure to exhaust administrative remedies.”²⁷ However, the District Court’s Order does not contain a specific finding that CCC failed to exhaust administrative remedies. The District Court found, “the factual record is not fully developed because the Labor Commissioner did not hold a hearing. Therefore, the Court finds this case should be remanded to the Labor Commissioner for further proceedings.”²⁸ Thus, CCC’s argument is based on a false assertion.

NRS 233B.135(1) provides that Judicial review of a final decision of an agency is conducted by the court without a jury and is confined to the record. NRS 233B.135(3) provides that the court may remand the final decision. The Nevada Supreme Court, “has also recognized that a reviewing court has the inherent authority to remand administrative agency cases for factual determinations.” *General Motors v. Jackson*, 111 Nev. 1026, 1030, 900 P.2d 345, 348 (1995). See also *Day v. Washoe*

²⁷ Appellant’s Opening Brief p. 9.

²⁸ App. 56 and 65.

County School Dist., 121 Nev. 387, 389, 116 P.3d 68, 69 (2005) (citing to *General Motors v. Jackson*) and, *Clark County Liquor and Gaming Licensing Bd. v. Clark*, 102 Nev 654, 658, 730 P.2d 443, 446 (1986) (noting “The Administrative Procedures Act expressly authorizes remand to state agencies for the taking of further evidence.”) Accordingly, there was nothing erroneous about the District Court’s decision to remand this matter to the OLC for a hearing.

II. Complete Care Consulting’s Argument Concerning Failure to Exhaust Administrative Remedies Lacks Merit

A. Exhaustion of Administrative Remedies

CCC first argues that it exhausted administrative remedies. But CCC does not explain why it could not stay its Petition for Judicial Review until after the OLC held a hearing. In its Request for Hearing, CCC alleged that the OLC’s Determination lacks actual facts.²⁹ But when given the opportunity to present facts CCC has declined to do so. CCC requested a hearing before the OLC, and the matter was set for hearing.³⁰ CCC chose instead to pursue a Petition for Judicial Review in the District

²⁹ App. 47.

³⁰ App. 47-48 and App. 10-13.

Court.³¹ The District Court remanded this matter to the OLC for a hearing.³² But again when given the opportunity to present facts, CCC chose instead to pursue an appeal in this Court.

B. The District Court’s Jurisdiction for Dismissal and Remand

CCC next argues the dismissal was jurisdictional. However, in *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571-572, 170 P.3d 989, 993-994 (2007) this Court stated,

While in the past we have held that the failure to exhaust administrative remedies deprives the district court of subject-matter jurisdiction, more recently, in *City of Henderson v. Kilgore*, we noted that failure to exhaust all available administrative remedies before proceeding in district court renders the matter unripe for district court review. Nevertheless, whether couched in terms of subject-matter jurisdiction or ripeness, a person generally must exhaust all available administrative remedies before initiating a lawsuit, and failure to do so renders the controversy nonjusticiable. The exhaustion doctrine gives administrative agencies an opportunity to correct mistakes and conserves judicial resources, so its purpose is valuable; requiring exhaustion of administrative remedies often resolves disputes without the need for judicial involvement.

³¹ App. 1-2.

³² App. 54-57 and App. 58-69.

CCC relies on an unpublished decision to reach the conclusion that the District Court's dismissal was one for lack of subject matter jurisdiction.³³ CCC then leaps to the conclusion that once the District Court dismissed the Petition for Judicial Review, it could not remand the matter. CCC's argument lacks merit because if the District Court lacked jurisdiction the Court's only option was to remand.

In *Collins v. Ocean West Nev. Corp.*, 2015 Nev. Unpub. LEXIS 1282 at *2, 131 Nev. 1266, 2015 WL 6447548 (2015) the unpublished decision that CCC cites to, this Court stated that because exhaustion of administrative remedies wasn't statutorily mandated the district court had subject matter jurisdiction. The Court notes, "that nothing in the record indicates that appellant presented this argument to the district court and requested dismissal." This Court then cites to *Eluska v. Andrus*, 587 F.2d 996, 999 (9th Cir. 1978) for, "explaining that when exhaustion is statutorily mandated, the exhaustion requirement is

³³ Appellant's Opening Brief, p. 9 citing to *Collins v. Ocean West Nev. Corp.*, 2015 Nev. Unpub. LEXIS 1282 at *2, 131 Nev. 1266, 2015 WL 6447548 (2015).

jurisdictional but when it is not, the court has discretion to dismiss the action.”

The *Eluska* case concerned an appeal from a judgment and order denying a motion for summary judgment and remanding a case to an administrative agency for an oral hearing. The case does discuss the discretion of federal courts to remand for exhaustion of administrative remedies. But ultimately the Ninth Circuit dismissed the appeal without prejudice because the order remanding the case was not a final appealable order.

CCC argues that since exhaustion of administrative remedies was statutorily required for a finding of exhaustion, this means that the District Court lacked subject matter jurisdiction.³⁴ This argument lacks merit first because CCC fails to identify any statute that requires exhaustion of administrative remedies. And second because this Court has held that failure to exhaust administrative remedies renders the matter nonjusticiable. As a practical matter the only reason such a determination would matter in this case is, whether the District Court

³⁴ Appellant’s Opening Brief pp. 9-10.

was required to dismiss or had discretion to dismiss, if the District Court found CCC failed to exhaust administrative remedies. But the District Court Order did not make an explicit finding that CCC failed to exhaust administrative remedies.

As discussed above the District Court had inherent authority to remand this matter. Again, as a practical matter, if the District Court erred in dismissing the matter and had simply remanded it, the District Court would have retained jurisdiction. Whether or not the District Court retained jurisdiction does not provide a basis for the relief CCC requests.

NRS 233B.135 provides statutory authority for the District Court to dismiss the Petition for Judicial Review and remand the matter back to the OLC. Honoring CCC's request to have this matter remanded to the District Court will do nothing more than delay these proceedings in violation of NRCP Rule 1.

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CONCLUSION

For the foregoing reasons, the District Court's Order dismissing Complete Care Consulting's Petition for Judicial Review and remanding this matter to the Office of the Nevada Labor Commissioner should be affirmed.

Dated this 5th day of January 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type face requirements of NRAP 32(a)(5) and the type of style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in font size 14 and font style Century Schoolbook.

2. 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 proportionately spaced, has a typeface of 14 points or more and contains 2,845 words.

3. Finally, I hereby certify that I have read this appellate 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 if the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of January 2022.

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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 January 5, 2022.

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 any of the participants in the case that are not registered as electronic users will be mailed the foregoing document by First-Class Mail, postage prepaid.

/s/ S. Messina
An employee of the Office of the Attorney
General