NO. 83322

IN THE SUPREME COURT OF THE STATE OF NEVADA

EMPLOYMENT SECURITY DIVISION, STATE OF NEVADA; LYNDA PARVEN, in her capacity as Administrator of the EMPLOYMENT SECURITY DIVISION; J. THOMAS SUSICH, in his capacity as Chairperson of the EMPLOYMENT SECURITY DIVISION BOARD OF REVIEW,

Appellants,

vs.

KELLY EPPINGER,

Respondent.

On Appeal from an Order Granting a Petition for Judicial Review
of the Eighth Judicial District Court of the State of Nevada,
in and for Clark County District Court Case No. A-20-826310-P

RESPONDENT'S ANSWERING BRIEF

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NRAP RULE 26.1 DISCLOSURE

The undersigned counsel certifies that there are no persons and entities as described in NRAP 26.1(a) that must be disclosed because undersigned counsel has no parent corporation and no shareholders. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 29th day of November, 2021.

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STATEMENT OF THE CASE

A. Nature of the Case

Pursuant to NRS 612.530(6), Appellant Nevada Employment Security Division (hereinafter referred to as "ESD") filed its appeal with this Court after the District Court granted Respondent Kelly Eppinger's (hereinafter referred to as "Ms. Eppinger") Petition for Judicial Review. Previously, ESD denied Ms. Eppinger's claim for unemployment insurance benefits.

B. Course of Proceedings

Ms. Eppinger was employed at Linden & Associates PC (hereafter referred to as "Linden") from May 2019 until January 2020. (AA047-AA048). Ms. Eppinger filed for unemployment benefits in March 2020. (AA033). Ms. Eppinger was denied benefits on July 1, 2020. (AA092). Ms. Eppinger timely appealed her denial on July 7, 2020. (AA096).

On October 14, 2020, a hearing was held before the Appeals Referee. (AA039). In a written decision dated October 15, 2020, the Appeals Referee found Ms. Eppinger ineligible for unemployment benefits pursuant to NRS 612.380. (AA033-AA036). On October 20, 2020, Ms. Eppinger timely appealed the Referee's decision to the Board of Review. (AA031). On December 3, 2020, the Board of Review affirmed the decision of the Appeals Referee. (AA022).

On December 14, 2020, Ms. Eppinger filed a Petition for Judicial Review. (AA01-AA02). On June 29, 2021, the Honorable Judge Joe Hardy granted the Petition for Judicial Review and reversed the Board of Review decision. (AA192-AA197). On June 30, 2021, the Notice of Entry of Order was mailed to ESD and it was subsequently filed on July 6, 2021. (AA198-AA200). On July 30, 2021, ESD filed the instant appeal with this Court. (AA207-AA208).

STATEMENT OF FACTS

Ms. Eppinger was employed by Linden from May 2019 until January 2020 as a psychiatric technician (AA047-AA048). In October 2019, Jennifer Williams, an Office Manager at Linden, approached Ms. Eppinger and demanded that she agree to be changed from a W-2 employee to a 1099 independent contractor. (AA053-A055). Ms. Eppinger felt uncomfortable by this demand and asked Ms. Williams why Linden wanted to reclassify her employment. (AA053). Instead of providing an answer to Ms. Eppinger, Ms. Williams instructed her to meet with Dr. Linden to further discuss the issue. (AA053). Ms. Eppinger then requested a meeting with Dr. Linden with the intent to the proposed employment reclassification. (AA055).

While waiting to meet with Dr. Linden, Ms. Eppinger spoke with other employees regarding this issue and quickly learned that Linden had unilaterally switched three other employees to independent contractors. (AA059-AA060). Ms.

Eppinger was also informed that when those employees complained about their reclassification, they were fired. (AA055; AA058-AA060).

During this time, and before her meeting with Dr. Linden, Ms. Eppinger was switched to an independent contractor without her consent and without her knowledge. (AA053; AA058-AA059). Ms. Eppinger did not sign new tax documents, nor did she sign a new employment contract. (AA053; AA058-AA059). Ms. Eppinger first learned of the reclassification when she noticed the change on a paycheck that she received on November 13, 2019. (AA053). After this surprising realization, Ms. Eppinger began searching for other employment and ultimately secured a job at Summit Mental Health (hereafter referred to as "Summit") on November 26, 2019. (AA053; AA056). The payrate at Summit was $17.00 per hour to perform basic skills training services and $22.00 per hour to perform rehabilitative mental health services. (AA066-AA067). Both services paid more than the $15.50 per hour that Ms. Eppinger earned while working at Linden. (AA088).

When Ms. Eppinger met with Dr. Linden in November 2019, she asked him if he would match her higher rate of pay at Summit. (AA055-AA056; AA068). (AA068). During their meeting, Ms. Eppinger elected not to discuss the employment reclassification with Dr. Linden, as she was only interested in asking Dr. Linden whether he would match Summit's higher rate of pay. (AA055). Dr. Linden advised Ms. Eppinger to take the job at Summit because he was unable to match the higher

rate pay. (AA056). Ms. Eppinger then signed an employment contract with Summit on November 26, 2019. (AA056).

Ms. Eppinger ultimately remained working at Linden until January 2020 in order to complete several projects that she wanted to finish prior to her departure. (AA056-AA057). Once Ms. Eppinger left Linden, she worked at Summit until a COVID-19-related business closure. Ms. Eppinger subsequently filed for unemployment benefits, but was denied. (AA095). Ms. Eppinger timely appealed the denial. (AA096). ESD then scheduled an appeal hearing on October 14, 2020. (AA075-AA076).

At the appeal hearing, Ms. Eppinger testified as to the above-mentioned facts. Notably, Linden did not participate in the appeals hearing. (AA041-AA042). Ms. Eppinger testified that Linden's decision to reclassify her as an independent contractor was the "catalyst" for her search of new employment (AA052), but that she ultimately left Linden because she was offered a higher paying job at Summit (AA051). Ms. Eppinger also testified that she simultaneously worked both jobs in December 2019 until she left Linden in January 2020. (AA048; AA052).

On October 15, 2020, the Appeals Referee determined that Ms. Eppinger did not have good cause to quit working at Linden because she "quit due to personal non-compelling reasons and prior to exhausting all reasonable alternatives available

to her." (AA033-AA036). The Appeals Referee also explained that she did not believe Ms. Eppinger's testimony that she worked at Linden until January 1, 2020 while also working at Summit because "it is not within logic or reason the claimant would continue working in an employment capacity and receive compensation for months in a position she was not in agreement with...[a]dditionally...the claimant's actions of remaining employed as a 1099 employee [sic] even after securing other employment lacks logic and reason since the claimant maintained the classification change was the 'catalyst,' which led to her decision to quit and the fundamental basis for seeking other employment." (AA035).

STANDARD OF REVIEW

In reviewing an administrative unemployment compensation decision, courts are limited to examining the evidence in the administrative record to ascertain whether the agency acted arbitrarily or capriciously, thereby abusing its discretion. *Clark County School Dist. v. Bundley*, 148 P.3d 750, 754 (2006). An agency's factual findings are conclusive when supported by substantial evidence. *Bundley*, 148 P.3d at 754; *Emp. Security Dep't. v. Hilton Hotels Corp.*, 102 Nev. 606, 609, 729 P.2d 497, 499 (1986). Substantial evidence is evidence that a reasonable mind could find adequately upholds a conclusion. *Bundley*, 148 P.3d at 754, *Kolnik v. Emp. Security Dep't.*, 112 Nev. 11, 16, 908 P.2d 726, 729 (1996). This Court must reverse an ESD decision that lacks substantial evidence. S*tate, Emp. Sec. Dep't v.*

Weber, 100 Nev. 121, 124-25, 676 P.2d 1318, 1320 (1984); *Lellis v. Archie*, 89 Nev. 550, 554, 516 P.2d 469, 471 (1973).

Thus, pursuant to NRS 612.530(4), if the Board of Review's finding of facts are supported by evidence and without fraud, the jurisdiction of the court is confined to questions of law. *Emp. Sec. Dep't. v. Verrati*, 104 Nev. 302, 304, 756 P.2d 1196, 1197 (1988). The court must review all questions of law de novo. *Emp. Sec. Dep't. v. Capri Resorts*, 104 Nev. 527, 528 763 P.2d 50, 51 (1988); *Jones v. Rosner*, 102 Nev. 215, 217, 719 P. 2d 805, 806 (1986). The final decision of an agency may be reversed by a reviewing court where the agency decision was based upon an error of law. *Department of Motor Vehicles & Pub. Safety v. Jones-West Ford, Inc.*, 114 Nev. 766, 772 (Nev. 1998), *Nevada Gaming Commission v. Consolidated Casinos Corp.*, 94 Nev. 139, 141, 575 P.2d 1337, 1338 (1978).

ARGUMENT

The central issue in Ms. Eppinger's case is whether she had good cause to quit working at Linden. Pursuant to NRS 612.380, a "person is ineligible for [unemployment] benefits for weeks in which she has voluntarily left her last or next to last employment without good cause." ESD has not specifically promulgated a standard for good cause for an employee to voluntarily leave her employment and there is little case law from the Nevada Supreme Court on this issue. However,

Nevada courts have reasoned that, in the context of assessing good cause to quit, "a claimant must establish a compelling reason that would cause a reasonably prudent person, genuinely desirous of maintaining her employment, to consider leaving." *Flippen v. Nev. Empl. Sec. Div.*, 2013 Nev. Dist. LEXIS 3579, *5.

Most neighboring states use a two-part reasonableness test in determining whether an employee has good cause to quit her employment. The first step is to assess whether the employee's reasons for quitting are compelling enough to cause a reasonable person in the same situation to quit. In California, a claimant has good cause to quit where she has a "real, substantial, and compelling" motivation to leave and her circumstances would cause a "reasonable person genuinely desirous of retaining employment to leave work under the same circumstances." Cal. Unemp. Ins. Code § 1256-3(b) (2011); *see also McCrocklin v. Empl. Dev. Dep't*, 156 Cal. App. 3d 1067, 1073-1074, 205 Cal. Rptr. 156, 159-160 (Cal. Ct. App. 1984); *Rabago v. Unemployment Ins. Appeals Bd.*, 84 Cal. App. 3d 200, 210-211, 148 Cal. Rptr. 499 (Cal. Ct. App. 1978). In Arizona, good cause to leave employment depends on what a reasonable worker would have done under similar circumstances. Ariz. Admin. Code § R6-3-50210 (1977). Oregon holds that good cause exists where it would "compel a reasonably prudent person to quit." *Waide v. Empl. Div.*, 38 Ore. App. 121, 125-26, 589 P.2d 1138, 1140 (Or. Ct. App. 1979). Utah law also looks to the "reasonableness of the claimant's actions, and the extent to which the actions

evidence a genuine continuing attachment to the labor market." Utah Code Ann. § 35A-4-405 (2013). In Idaho, good cause requires that the circumstances which compel the decision to leave employment be "real, substantial, and reasonable to the average man or woman." *Burroughs v. Empl. Sec. Agency*, 86 Idaho 412, 414, 387 P.2d 473, 474 (1963); *Ullrich v. Thorpe Elec.*, 109 Idaho 820, 823, 712 P.2d 521, 524 (1985). In Washington, good cause is judged by what an "ordinarily prudent person would have done under the circumstances faced by a claimant." *Robinson v. Empl. Sec. Dept.*, 84 Wn. App. 774, 778-779, 930 P.2d 926, 928 (Wash. Ct. App. 1996).

If the employee's reason for quitting is compelling, the employee must then show that they took reasonable efforts to resolve the issue with their employer. California requires that an employee take reasonable steps to "preserve the employment relationship" before she is justified in leaving her employment. Cal. Unemp. Ins. Code § 1256-3(b) (2011). Arizona requires a worker to attempt to resolve his grievance prior to leaving unless such an attempt was not feasible. Ariz. Admin. Code § R6-3-50515 (1977). Idaho requires a claimant to demonstrate that she examined her reasonable alternatives prior to quitting. *Higgins v. Larry Miller Subaru-Mitsubishi*, 175 P.3d 163, 166 (2007).

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A. The District Court Did Not Substitute Its Own Credibility Judgment for That of ESD's; Rather, It Overruled ESD's Determination Due to the Appeal Referee's Failure to Comply with the Requirements Enumerated in *Ceguerra*.

An administrative law judge may not tacitly reject a witness's testimony as not credible. *Ceguerra v. Secretary of HHS*, 933 F.2d 735, 738 (9th Cir. 1991). Where a decision rests on the testimony and credibility of a witness, the administrative law judge must make a determination that a witness lacks credibility, but "must make findings on the record and must support those findings by pointing to substantial evidence on the record." *Id.* This rule is simply a specific application of a bedrock principle of administrative law. *Id.* A reviewing court can evaluate an agency's decision only on the grounds articulated by the agency. *Id.*

Contrary to ESD's argument in its Opening Brief, Ms. Eppinger did not request that the District Court overrule the credibility determination made by ESD. Rather, Ms. Eppinger's Petition for Judicial Review, and the District Court Order, was premised on the fact that ESD chose to disbelieve the most relevant and material portions of her testimony without sufficiently explaining *why* and *how* such determinations were made.

The Appeal Referee arbitrarily chose not to believe Ms. Eppinger's testimony that she worked at Linden until January 1, 2020 while also working at Summit because "it is not within logic or reason the claimant would continue working in an

employment capacity and receive compensation for months in a position she was not in agreement with...[a]dditionally...the claimant's actions of remaining employed as a 1099 employee [sic] even after securing other employment lacks logic and reason since the claimant maintained the classification change was the 'catalyst,' which led to her decision to quit and the fundamental basis for seeking other employment." (AA035). The Appeal Referee's statement that Ms. Eppinger's conduct "is not within logic or reason" is not a sufficient explanation pursuant to *Ceguerra*, as the Appeal Referee failed to make specific findings on the record supported by substantial evidence. (AA035).

If the Appeal Referee had come to her adverse credibility determination based on inconsistencies in Ms. Eppinger's testimony or due to conflicting evidence, she may have had grounds to deem Ms. Eppinger's testimony not credible; however, labeling Ms. Eppinger not credible simply because she subjectively does not agree with Ms. Eppinger's choice to remain at Linden for months after the employment reclassification does not comport with the *Ceguerra* requirements and it was well within the District Court's power to overrule ESD's clearly arbitrary and capricious determination.

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B. The Record Lacks Substantial Evidence to Support ESD's Determination that Ms. Eppinger Quit Without Good Cause.

1. Ms. Eppinger's Consistent Testimony That She Secured Higher Paying Employment at Summit Prior to Quitting Linden, Which Was Not Contradicted by Any Conflicting Testimony or Contrary Evidence, Demonstrates That ESD's Determination Is Arbitrary and Capricious, and Not Founded on Substantial Evidence.

Substantial evidence has been defined as that which "a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389 (1971). Inconsistent statements constitute substantial evidence to support an adverse credibility determination. *Kaur v. Mukasey*, 313 Fed. Appx. 28 (9th Cir., 2008). Conflicting testimony amongst witnesses constitutes substantial evidence to support an adverse credibility determination. *State Employment Sec. Dep't. v. Hilton Hotels Corp.*, 102 Nev. 606, 609 (Nev. 1986). However, substantial evidence is not the mere absence of documentary corroboration.

During the Appeal Hearing, Ms. Eppinger testified that she secured employment at Summit on November 26, 2019. (AA056). Ms. Eppinger testified that she simultaneously worked both jobs at Summit and Linden in December 2019 until she left Linden on January 1, 2020. (AA056-AA057). Ms. Eppinger further testified that she was hired at Summit to perform basic skills training services at a rate of $17.00 per hour and rehabilitative mental health services at a rate of $22.00 per hour. (AA066-AA067). Both services paid more than the $15.50 per hour that

Ms. Eppinger earned while working at Linden. (AA088). Ms. Eppinger also testified that during her meeting with Dr. Linden, she asked him to match Summit's rate of pay, but when he refused, she decided to quit her job at Linden, but that she remained working at Linden to finish her pending projects. (AA056-AA057).

The Record does not contain any testimony that contradicts Ms. Eppinger's account that she quit Linden to accept a higher paying job at Summit, as Linden did not participate in Ms. Eppinger's unemployment claim in any way. Representatives from Linden did not participate in the appeal hearing. (AA041-AA042). Representatives from Linden did not respond to the Employer Form provided by ESD. (AA085). Representatives from Linden did not correspond with an ESD Adjudicator and did not return his voicemail. (AA091).

In addition, the Record is entirely void of any evidence that disproves Ms. Eppinger's testimony that she simultaneously worked at Linden and Summit and that her pay at Summit was higher than her rate of pay at Linden. Ms. Eppinger's testimony during the Appeal Hearing that she worked both jobs simultaneously and earned more while at Summit is supported by her prior responses early on in her unemployment insurance benefits application. (AA088-AA089).

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2. Pursuant to Case Law and ESD's Very Own, Prior Decisions, Securing Higher Paying Employment Is Good Cause for Quitting.

Securing higher paying employment is a compelling reason to leave a lower paying job. While there is no Nevada case directly on point with the facts of Ms. Eppinger's claim, ESD's rationale in the instant case not only defies common sense, but it also directly contravenes *Unemployment Compensation Board of Review v. Pennsylvania Power and Light Co.*, 23 Pa. Commw. 220, 351 A. 2d. 698 (1976). In that case, the Claimant left his job after accepting employment that paid a higher salary. *Id.* at 223. The Court stated that, in regards to a good cause analysis, "the firm acceptance of other employment is a more compelling reason for terminating present employment" and "the Claimant's decision to leave employment with PP&L to take a higher paying position was certainly consistent with common sense and prudence." *Id.*

Pursuant to the rationale in *Pennsylvania Power and Light Co.*, Ms. Eppinger acted with common sense when she decided to quit her job at Linden for a higher paying job at Summit and her decision to quit was a compelling reason that amounted to good cause. Ms. Eppinger also exhausted all reasonable alternatives by attempting to negotiate a pay raise with Dr. Linden; however, when he refused, she elected to leave Linden for Summit, which paid $1.50 more for basic skills training services and $6.50 more for rehabilitative mental health services.

As was demonstrated in Ms. Eppinger's District Court Reply Brief, ESD's contention that securing a higher paying job does not entitle a claimant to benefits is indisputably false, given its very own precedent in previous cases. In addition, not only did Ms. Eppinger repeatedly testify that she secured higher paying employment at Summit prior to leaving Linden, ESD admitted to this fact in its Answering Brief; therefore, by ESD's own precedent and admission, Ms. Eppinger had good cause to quit, is entitled to benefits and it was well within the District Court's power to overrule ESD's clearly arbitrary and capricious determination.

CONCLUSION

The decision of the administrative tribunal is not supported by substantial evidence in the Record and it was both arbitrary and capricious. The District Court did not substitute its own judgment for that of the administrative tribunal and did not fail to follow the correct legal standards. As such, the District Court decision should not be reversed.

DATED this 29th day of November, 2021.

Respectfully submitted,
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NRAP 28.2 CERTIFICATE

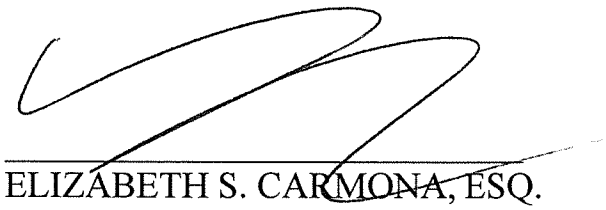
1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman, 14-point font.

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 does not exceed 30 pages and is proportionately spaced, has a typeface of 14 points or more, and contains approximately less than 14,000 words.

3. 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 JA 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 29th day of November, 2021.

Respectfully submitted,
NEVADA LEGAL SERVICES, INC.



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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d)(1)(B), I hereby certify that I am an employee of the State of Nevada, over the age of eighteen (18) years; and that on the 29th day of November, 2021, I filed the foregoing RESPONDENT'S ANSWERING BRIEF with the Clerk of the Nevada Supreme Court.

I hereby certify that on the 29th day of November, 2021, I mailed a true and correct copy of the above and foregoing RESPONDENT'S ANSWERING BRIEF to the Appellant, first-class postage fully prepaid thereon, by placing the same in the United States Mail at Las Vegas, Nevada, addressed as follows:

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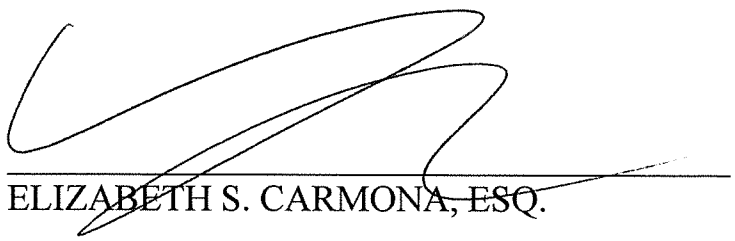
DATED this 29th day of November, 2021.



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