NO. 83322

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, EMPLOYMENT SECURITY DIVISION; LYNDA PARVEN, IN HER CAPACITY AS ADMINISTRATOR OF THE EMPLOYMENT SECURITY DIVISION; AND J. THOMAS SUSICH, in his capacity as Chairperson of the EMPLOYMENT SECURITY DIVISION BOARD OF REVIEW,

Appellant,

vs.

KELLY EPPINGER,

Respondents.

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

APPELLANT'S REPLY BRIEF

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STANDARD OF REVIEW

If supported by evidence and in the absence of fraud, the decision of the Board of Review (Board) and referee is conclusive. NRS 612.530(4); *State Employment Sec. Dept. v. Weber*, 100 Nev. 121, 676 P.2d 1318 (1984). In reviewing the Board's decision, this Court is limited to determining whether the Board acted arbitrarily or capriciously. *State Emp. Sec. Dept. v. Taylor*, 100 Nev. 318, 683 P.2d 1 (1984); *McCracken v. Fancy*, 98 Nev. 30, 31, 639 P.2d 552 (1982); *Bryant v. Private Investigator's Lic. Bd.*, 92 Nev. 278, 549 P.2d 327 (1976); *Lellis v. Archie*, 89 Nev. 550, 516 P.2d 469 (1973).

In performing its review function, this Court may not substitute its judgment for that of the Board, *Weber*, *supra*; *McCracken*, *supra*, nor may this Court pass upon the credibility of witnesses or weigh the evidence, but must limit review to a determination that the Board's decision is based upon substantial evidence. NRS 233B.135(3).

Substantial evidence has been defined as that which "a reasonable mind might accept as adequate to support a conclusion." *Desert Valley Const. v. Hurley*, 120 Nev. 499, 502, 96 P.3d 739, 741 (2004). Stated another way, it has been held that "substantial evidence" means only competent evidence which, if believed, would have a probative force on the issues. *State ex rel. Util. Consumers Council v. P.S.C.*, 562 S.W.2d 688, 692 (Mo. App. 1978). Evidence sufficient to support an

administrative decision is not equated with a preponderance of the evidence, as there may be cases wherein two conflicting views may each be supported by substantial evidence. *Robinson Transp. Co. v. Public Service Comm'n*, 159 N.W.2d 636, 638 (Wis. 1968).

The burden to be met by ESD is to show that the Board's decision is one which could have been reached under the facts of this case. This Court is confined to a review of the record presented below, *Lellis, supra*, at 553-554, and the Board's action is not an abuse of discretion if it is supported by substantial evidence in the record. *State, Dept. of Commerce v. Soeller*, 98 Nev. 579 at 586, 656 P.2d 224 (1982); *Lellis, supra*; *North Las Vegas v. Pub. Serv. Comm'n*, 83 Nev. 278, 426 P.2d 66 (1967); *Randono v. Nev. Real Estate Comm'n*, 79 Nev. 132, 379 P.2d 537 (1963).

In 1986, the Nevada Supreme Court held:

> Pursuant to NRS 612.515(3), the Board of Review is authorized to affirm, modify or reverse a decision of the appeals referee. The Board may act solely on the basis of evidence previously submitted, or upon the basis of such additional evidence as it may direct to be taken.
>
> The district court's power to review a decision of the Board, however, is more limited. Where review is sought the factual findings of the Board, if supported by evidence ... shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. NRS 612.530 (4). Our decisional law is to the same effect. ...
>
> In short, **while the Board of Review is empowered to conduct a de novo review of the decisions of the appeals**

> **referee, the district court has no similar authority with respect to the decisions of the Board**.

Kraft v. Nev. Emp. Sec. Dept., 102 Nev. 191, 193, 717 P.2d 583, 584-85 (1986) (Emphasis added).

In the case of *Clark County School District v. Bundley,* 122 Nev. 1440, at 1444-45, 148 P.3d 750, at 754 (2006), our Nevada Supreme Court stated as follows:

> When reviewing an administrative unemployment compensation decision, this court, like the district court, examines the evidence in the administrative record to ascertain whether the Board acted arbitrarily or capriciously, thereby abusing its discretion. With regard to the Board's factual determinations, we note that the Board conducts de novo review of appeals referee decisions. Therefore, when considering the administrative record, the Board acts as 'an independent trier of fact,' and the Board's factual findings, when supported by substantial evidence, are conclusive.
>
> Accordingly, we generally review the Board's decision to determine whether it is supported by substantial evidence, which is evidence that a reasonable mind could find adequately upholds a conclusion. In no case may we substitute our judgment for that of the Board as to the weight of the evidence. Thus, even though we review de novo any questions purely of law, **the Board's fact-based legal conclusions with regard to whether a person is entitled to unemployment compensation are entitled to deference**. (Emphasis added).

The hearing before the referee was the only evidentiary hearing and the burden was on the claimant to show she was eligible for unemployment benefits. While an appealing party may have the burdening oar before ESD's administrative tribunal,

this Court may only determine whether the record contained substantial evidence from which a reasonable factfinder could conclude the case was proved. As for the mixed question of fact and law, deference to the Board must be given. *Bundley, supra,* 122 Nev. at 1444-45, 148 P.3d at 754, *and see Kolnik v. Nevada Emp't Sec. Dep't*, 112 Nev. 11, 908 P.2d 726 (1996) ("Although the court may decide pure questions of law without giving deference to an agency's determination, an agency's conclusions of law which are closely related to an agency's view of the facts are entitled to deference and should not be disturbed if the court determines that they are supported by substantial evidence").

ESD's burden is to show this Court that the Board's decision is one which could have been reached under the evidence in the record; not that it is the "only" decision or even the "best" decision which may be suggested by the evidence contained within the record.

ARGUMENT IN REPLY

I. The Argument Made by Respondents Regarding the District Judge Overruling the Administrative Tribunal's Credibility Determination is Contradicted by the Order Itself and the Record

In the Answering Brief, the Respondents argue that the District Judge did not just overrule the credibility determination, but did so because of *Ceguerra vs. Secretary of HHS*, 933 F. 2d 735 (9th Cir. 1991). The Court will note that a citation

to that case is nowhere in the District Court's order. (AA201-AA205) The Court neither referenced nor analyzed the case in the order. *Id*. The Court literally just said the credibility determination was overruled and was an abuse of discretion. *Id*. The argument made by Respondents is complete fiction.

Further, the case inapposite with this case. The case analyzed a non-Nevada case that was not an unemployment case. It in no way referenced or analyzed NRS Chapter 612, which controls in this matter. The closest precedential value it might have is the general principal of substantial evidence to support an administrative finding. The court should note a quick "keycite" or "shepardizing" will show it has never been cited by a Nevada Court let alone for the purpose argued by Respondents. Further, to cite the case for that purpose directly contradicts Nevada State Caselaw. Specifically, this Court has held that this Court can neither weigh the evidence nor may it determine the credibility of the witnesses. *Lellis, supra*, 89 Nev. at 554, and see *Weber, supra* and *McCracken, supra*. The argument made by Respondents is simply false.

Further, as analyzed below, the referee had evidentiary support for finding her not credible. Indeed, the appeals tribunal rightfully found:

> It is not within logic or reason that claimant would continue working for employer, and receive compensation from employer for months, in a position or classification she was not in agreement with – whether such disagreement was expressed verbally or in writing. Additionally, claimant's actions of remaining employed as

> a "1099" employee, even after securing other employment, lacks logic and reason since claimant maintained that the classification change was the "catalyst" which led to her decision to quit and was the fundamental basis for seeking other employment. (AA035).

This was not a tacitly rejected determination as falsely argued by Respondents in the first instance.

Based on the evidence presented to the administrative tribunal, which is analyzed below, the claimant switched her story then claimed she quit based on the reclassification, but yet did not quit when reclassified and continued to work for the employer as a "1099" contractor after obtaining new employment. In addition, claimant took no steps to address such reclassification with the employer (AA057-0060), and the Summit position she left employer for was a "1099" position (AA071-AA072). Neither the "1099" classification (that was never challenged) or securing a higher paying job, entitled claimant to benefits.

Based on the above, there is substantial evidence in the record that as the tribunal found that it defied logic that her stated reason for quitting and the "catalyst" for the quit was the reclassification. On that basis, the tribunal found no good cause for quitting and found claimant incredible. Indeed, the burden is on the claimant to prove good cause. Therefore, by finding her incredible because of her flip-flopping stories and contradictory positions, the tribunal had no other evidence to support a good cause finding.

The District Court failed to give the credibility determination deference and overruled the credibility determination. The District Court then failed to stop there by making factual findings contrary to that of the tribunal. Therefore, the District Court erred in substituting its own judgment for that of the administrative tribunal and this Court should reverse the District Court.

II. There was substantial evidence in the record to support the findings of the Administrative Tribunal

Substantial evidence in record supported the findings of the administrative tribunal. A case that applies here is *Dolores v. State , Employment Security Division,* 134 Nev. 258, 416 P.3d 259 (2018), which held "that where the record shows that the appellant's decision to resign was freely given and stemming from his own choice, such a resignation is voluntary pursuant to NRS 612.380." *Dolores, supra*, 134 Nev. at 258-259, 416 P.3d at 259. *Dolores* involved a resign or be fired ultimatum. Claimant, in the matter before the Court, testified about fellow workers who she claimed were fired for challenging the "1099" classification and, despite quitting for a higher paying job, claimant feared she might be fired if she addressed her "1099" reclassification. In the vein, the *Dolores* court explained:

> Nevada has not yet defined "voluntary" for purposes of unemployment benefits; however, other jurisdictions have defined it as "a decision to quit that is freely given and

proceeding from one's own choice or full consent." 76 Am. Jur. 2d *Unemployment Compensation* § 104 (2016) (citing *Thompson v. Kentucky Unemployment Ins. Comm'n,* 85 S.W.3d 621 (Ky. Ct. App. 2002), and *Ward v. Acoustiseal, Inc.,* 129 S.W.3d 392 (Mo. Ct. App. 2004)). Applying that definition to Dolores's case, the question here is whether Dolores's decision to resign was freely given despite the fact that he was given a resign-or-be-fired ultimatum.

…

The Minnesota Court of Appeals, however, has held that **"[w]hen an employee, in the face of allegations of misconduct, chooses to leave his employment rather than exercise his right to have the allegations determined, such action supports a finding that the employee voluntarily left his job without good cause."** *Ramirez v. Metro Waste Control Comm'n,* 340 N.W.2d 355, 357–58 (Minn. Ct. App. 1983). Specifically, in *Seacrist v. City of Cottage Grove*, the Minnesota Court of Appeals **held that an employee who resigned in order to protect his work record did so voluntarily when told to resign or else disciplinary action resulting in termination would result**. 344 N.W.2d 889, 891–92 (Minn. Ct. App. 1984). The *Seacrist* court determined that the claimant's letter of resignation was unequivocal and that "[w]hen an employee says he is quitting, an employer has a right to rely on the employee's word." *Id.* at 892; *see also Fallstrom v. Dep't of Workforce Servs.,* 367 P.3d 1034, 1035 (Utah Ct. App. 2016) ("**A termination of employment is considered a **262 voluntary quit when the employee is the moving party in ending the employment relationship**.").

Like the claimants in the aforementioned cases, Dolores resigned when presented a resign-or-be-fired option. While the Minnesota cases involved employees who almost certainly would have been *261 terminated for

misconduct had they not resigned, and thus are not entirely factually analogous, we conclude that the legal analysis from the Minnesota Court of Appeals is most applicable and adopt it here. **Accordingly, we hold that an employee presented with a decision to either resign or face termination voluntarily resigns under NRS 612.380 when the employee submits a resignation rather than exercising the right to have the allegations resolved through other available means**.

Dolores submitted his unequivocal resignation letter when he faced termination for failing to obtain the SIDA badge required for his job. Although the TSA's application of its policy may have been incorrect, **Dolores consciously chose to resign rather than wait and resolve the issue** through the union or explore other options. *Edwards v. Indep. Servs*., 140 Idaho 912, 104 P.3d 954, 957 (2004) ("**When an employee has viable options available, voluntary separation without exploring those options does not constitute good cause for obtaining unemployment benefits.** …[B]ecause the record shows that Dolores considered multiple factors, and that the decision to resign was freely given and proceeding from his own choice, we conclude that Dolores voluntarily resigned pursuant to NRS 612.380.

Dolores lacked good cause to resign

…

As we have noted above, Dolores **considered many factors when deciding to resign rather than face termination, and he elected to not pursue other options that could have allowed him to maintain his employment**. We therefore conclude that **substantial evidence supports *262 the appeals referee's determination that Dolores lacked good cause to resign, which rendered him ineligible for**

> **unemployment benefits**. NRS 612.380; *Edwards v. Indep. Servs.,* 140 Idaho 912, 104 P.3d 954, 957 (2004) ("**When an employee has viable options available, voluntary separation without exploring those options does not constitute good cause for obtaining unemployment benefits**."); *see also Elizondo v. Hood Mach., Inc.,* 129 Nev. 780, 784, 312 P.3d 479, 482 (2013) (setting forth the standard of review).

Dolores, supra, 134 Nev. 260-262, 416 P.3d 261-262 (Emphasis added).

Claimant made no showing that pursuing available steps regarding her "1099" classification by employer would be futile. No steps were taken in this regard because the"1099" classification did not really bother claimant. (AA099). Claimant testified that the reason for quitting was the higher paying job at Summit. (AA059). Promptly thereafter, claimant changed her story. She testified that the ultimate reason – the catalyst – for quitting was employer's "1099" reclassification. (AA052-AA060). Not only did claimant take no steps to address such reclassification (AA057-0060), the Summit position she left employer for was a "1099" position (AA071-AA072). Neither the "1099" classification (that was never challenged) or securing a higher paying job, entitled claimant to benefits.

The record lays out the following. Claimant's last paycheck from employer was received by claimant on January 7, 2020. (AA047). Claimant explained, "I'm not exactly sure what my last day was, because I had taken another job and I was finishing up a project for Linden [employer]. They knew that I was - - you know,

had took another job." (AA047). Claimant testified that she quit her position with employer. (AA049). She explained: "I took another job. I discussed with Dr. Linden that I had found another job that paid more." (AA049). Claimant stated, "I don't know the exact date that I met with Dr. Linden, but I continued to work and complete projects … for … over a month after that conversation -- that I was going to take another job." (AA050). Claimant's resignation notice was verbal, but she gave no effective last day because, as she said, "I didn't know how long it would take me to finish the project that I had been working on, that I had agreed to finish. And I also had agreed to … train the girl who was going to take over doing what I was doing at the nursing home." (AA050). Claimant's "1099" classification by employer was not the reason given to Dr. Linden for quitting. (AA051). The reason claimant gave to Dr. Linden for quitting was that she had secured a higher paying job with Summit. (AA051). Claimant was hired by Summit on November 26, 2019. (AA051). At that time, she worked for employer and Summit. (AA052).

Claimant and office manager Jennifer Williams communicated about the "1099" change on October 16, 2019. (AA053-AA055). Claimant never spoke with Dr. Linden about the "1099" classification. (AA055-AA056). Claimant spoke with Dr. Linden in November of 2019, when he told her she should take this other job that paid more. (AA056). This conversation between claimant and Dr. Linden

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occurred before she contacted or signed any papers with Summit. Claimant signed with Summit on November 26, 2019. (AA056).

Claimant was asked, "When you filed the unemployment benefit claim … you reported [to ESD] your separation in accordance with Exhibits 12 through 14 as a mutual agreement. Why did you report that if you quit?" (AA057). Claimant responded, "Because, at the time, I didn't really realize that I was quitting. It was -- I looked at it as a mutual separation or a mutual agreement to separate. And that's just the way I had looked at it. But, per, you know, unemployment, I realized that, oh, yeah, yes, she did quit. So, you know, I looked at it as a mutual, you know, agreement to separate." (AA057). Claimant made no effort to resolve the "1099" classification issue. (AA057). She did not file a formal complaint with employer and did not file a complaint with a state government agency regarding being changed to a "1099" service contract employee, before quitting. (AA058 and AA060).

When claimant told Dr. Linden that Summit offered her a higher paying job, Dr. Linden told her to take it. (AA068). The referee went over Exhibit 22 with claimant. (AA069-AA070). Claimant has no supporting documentation showing that she secured other employment before quitting. (AA070-AA071). Claimant testified about her work with Summit as a "1099" contracted services worker. (AA071-AA072). Claimant's first paycheck from Summit was in December of 2019. (AA073).

On March 30, 2020, claimant informed that she discussed her separation with Dr. Linden and that, had she and employer not agreed to a mutual separation, she could have continued working for employer. (AA088). The mutual agreement to separate was due to being offered another position that paid higher wages. (AA089). Claimant was asked, "Was there an incident that occurred that led to the mutual agreement to separate?" Her response to this question was, "No." (AA090).

Accordingly, this matter was not arbitrarily or capriciously decided. Claimant voluntarily quit without good cause and, therefore, she was not eligible to receive benefits. *See* NRS 612.380.

III. The District Court failed to follow the standard of review and unlawfully substituted its own judgment for that of the administrative tribunal

Respondents cite an adjudicator decision from another claimant attached to their Reply Brief in District Court as so-called precedent. First and foremost, no adjudicator decision is precedential on another case. Each claim is different with different facts. Furthermore, there is no evidence that the other case had the same or similar facts, especially considering the credibility failures of this particular claimant who as noted above continued to change her story as it was convenient.

Further, to the extent the Court took into consideration, the Reply Brief as evidence including the arbitrator's decision from another case, it proves the District

Court went beyond the record. As this Court is aware, the Reply is not part of the Record that the District Court is confined to in the proceedings below. The fact that Respondents now argue that the Reply and the attached exhibit from outside the Record was the basis of some sort of ruling is an admission by the Respondents that the District Court went beyond the Record in its decision making, and therefore must be reversed.

The District Court ignored the administrative finding, and substituted its own judgement. Despite the evidence to support the tribunal's finding that the claimant was incredible as laid out above and the numerous changes in story proffered by the claimant during the administrative process, the District Court then overruled the credibility determination of the administrative appeals tribunal and substituted its own judgement for that of the tribunal.

CONCLUSION

The decision of the administrative tribunal is supported by substantial evidence in the Administrative Record and is consistent with Nevada statutory and case law. It was neither arbitrary nor capricious. The District Court substituted its

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own judgment for that of the administrative tribunal and failed to follow the correct legal standard as noted above. The District Court should be reversed.

DATED this 21st day of December, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply 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 Answering Brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this Answering Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is:

[X] Proportionately spaced, has a typeface of 14 points or more and is 4,300 words

3. Finally, I hereby certify that I have read this Answering 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, including NRAP 28(e)(1), which 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 21st day of December, 2021.

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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 18 years; and that on the date hereinbelow set forth, I served a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF**, by electronically serving through Eflex and/or mailing to the address below and placing the same within an envelope which was thereafter sealed and deposited for postage and mailing with the State of Nevada Mail at Carson City, Nevada, addressed for delivery as follows:

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