NO. 82721-COA

IN THE SUPREME COURT OF THE STATE OF NEVADA

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NATASHA EARLY,

Appellant,

vs.

EMPLOYMENT SECURITY DIVISION; STATE OF NEVADA, AND LYNDA PARVEN, as ADMINISTRATOR OF THE EMPLOYMENT SECURITY DIVISION,

Respondents.

On Appeal from an Order Denying Petition for Writ of Mandamus
The Honorable Joanna Kishner, District Judge
District Court Case No. A-20-826013-W

RESPONDENTS ANSWERING BRIEF

TROY C. JORDAN, ESQ.
Nevada State Bar No. 9073
State of Nevada, Dept. of Employment,
Training & Rehabilitation (DETR),
Employment Security Division (ESD)
500 East Third Street
Carson City, NV 89713
(775) 684-3996
Attorney for **Nevada ESD Respondents**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider this appeal based on NRS 612.530(6), which parallels NRS 233B.150. The special provisions of Chapter 612 of NRS, for the judicial review of ESD decisions, prevail over the general provisions of the Nevada Administrative Procedure Act. See NRS 233B.039(3).

RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that judges of this court may evaluate possible disqualification or recusal:

Troy C. Jordan

David K. Neidert

Joseph L. Ward, Jr.

Natasha Early

ROUTING STATEMENT

The Supreme Court has already transferred this case to the Court of Appeals.

STATEMENT OF THE ISSUES ON APPEAL

Did the District Court properly dismiss the *Petition for Writ of Mandamus* and deny it?

STATEMENT OF THE CASE

On December 11, 2020, Appellant NATASH EARLY ("Early") filed a *Petition for Writ of Mandamus* in the Eighth Judicial District Court seeking a *Writ* ordering the Employment Security division ("ESD") to pay her unemployment claim. R. 11-22. On January 15, 2021, Early filed a *Supplement* to her *Petition*. R. 61-65. ESD filed a *Motion to Dismiss*, arguing that Early had a plain remedy at law and failed to exhaust her administrative remedies. R. 71-76.

Following a hearing, the district court dismissed and denied the *Writ*, finding that Early did not exhaust her administrative remedies, the case was not ripe, and Early failed to establish a basis for extraordinary relief. R. 109. Early filed a timely *Notice of Appeal*. R. 162.

STATEMENT OF FACTS

Early filed a *Petition for Writ of Mandamus* that included, as exhibits, a *Notice of Monetary Determination Letter* dated May 7, 2019 advising her that she was potentially eligible for unemployment benefits worth $285 a week, while warning her that receipt of the letter did not mean that she qualified for unemployment benefits. R. 23-24. This same letter advised Early of her appeal rights if she disagreed with the determination. R. 26.

Early also provided a letter dated August 11, 2020, with the same warnings regarding eligibility and appeal rights. R. 28-31.

Finally, Early provided a letter from the ESD Adjudication Center dated November 30, 2020, advising her that she was not entitled to benefits for the period between April 26, 2020 and August 8, 2020, denying Early's request to backdate her claim. R. 35,42. Early was advised that her last day to appeal was December 11, 2020.[1] R. 35, 42. In a later pleading, Early provided a letter, dated May 8, 2019, showing she was eligible for benefits. R. 67.

ESD filed a *Motion to Dismiss*, arguing that *Writ* relief was unwarranted because Early had a speedy and adequate remedy in the ordinary course of law and she did not follow the administrative remedies found in NRS 612.500. R. 73-74. The *Motion* further noted that Early had filed a fraudulent claim in 2016 and that ESD had a legal duty to secure repayment. ESD also denied Early's claim that it had a non-functional website. R. 75.

Prior to the hearing Early filed an *Opposition* to the *Motion to Dismiss*, arguing that she tried to appeal ESD decisions. R. 85-86. Early included as exhibits what appear to be fax cover sheets and appellate documents. R. 95-105. Only one such purported fax had an actual fax confirmation that it was sent and received. R. 102.

[1] This is the appeal right codified in NRS 612.495(1) in which a claims referee hears the case.

Early admitted to the district court that she had never had a hearing in front of a claims referee. R. 142.

The district court denied Early's *Writ* request, finding she had a plain, speedy, and adequate remedy at law, specifically the appeals process contained in NRS 612. R. 109. The court found that the issues raised in Early's *Petition* were not ripe before the court because her administrative remedies had not been exhausted. R. 109.

SUMMARY OF ARGUMENT

Because Early had a plain remedy at law and had not exhausted her administrative remedies, the district court properly denied Early's *Petition for Writ of Mandamus.*

STANDARD OF REVIEW

The Supreme Court has held that it reviews a district court's denial of a petition for a writ of mandamus for an abuse of discretion and reviews questions of statutory interpretation *de novo*. *Stockmeier v. Green*, 130 Nev. 1003, 1008, 340 P.3d 583, 586 (2014) (*citing Reno Newspapers v. Haley*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010)).

ARGUMENT

I. Applicable Law

Under the Nevada Constitution, District Courts have the power to issue writs

of mandamus. Article 6, Section 6. This power is codified at NRS 34.160, which provides:

> The writ may be issued by the Supreme Court, the Court of Appeals, a district court or a judge of the district court, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded by such inferior tribunal, corporation, board or person. When issued by a district court or a judge of the district court it shall be made returnable before the district court.

As might be expected, the Nevada Supreme Court has addressed this statute on multiple occasions. Most recently in a published opinion, the Supreme Court started its opinion by stating "extraordinary relief should be extraordinary." *Walker v. District Court*, 476 P.3d 1194 (Nev. 2020). *Walker* held that the statutory language of NRS 34.160 "is consistent with well-established common law rules governing traditional mandamus jurisdiction, and we therefore presume that in prescribing mandamus as a statutory remedy, the Legislature had in view the nature and extent of the remedy, as known at the common law." 476 P.3d at 1196 (internal punctuation omitted).

NRS 34.160 provides that a district court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office, trust or station." *Veil v. Bennett,* 131 Nev. 179, 180, 348 P.3d 684, 686 (2015), *quoting Int'l Game Tech. v. District Court*, 124 Nev.

193, 197, 179 P.3d 556, 558 (2008).

Alternatively, a writ of mandamus may issue "to control an arbitrary or capricious exercise of discretion." *Western Cab Co. v. District Court,* 133 Nev. 65, 67, 390 P.3d 662, 666 (2017), *quoting Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558; *State v. District Court (Armstrong),* 127 Nev. 927, 931, 267 P.3d 777, 779 (2011).

NRS 34.170 provides that a writ of mandamus shall issue "in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of the law. *Armstrong* helpfully noted that "[t]he writ *will not* issue, however, if a petitioner has a plain, speedy, and adequate remedy in the ordinary course of the law. 127 Nev. at 931, 267 P.3d at 779 (emphasis added).

"Petitioners have the burden of demonstrating that writ relief is warranted." *Hairr v. District Court*, 132 Nev. 180, 183, 368 P.3d 1198, 1200 (2016). *Accord Pan v. District Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

II. Early has a speedy and adequate remedy in the ordinary course of law.

Rather than follow the statutory requirements for pursuing her claims, Early instead chose to go directly to the district court and seek mandamus relief, something the law does not allow.

Early argues that her unemployment should be based on the remainder of a 2019 claim and not as ESD calculated. To support this argument, she supplied a

copy of the letter she received in 2019 regarding her unemployment claim showing that she was eligible for $285 per week in unemployment benefits. R. 24-25. As that letter explained, this payment was based on her four quarters of income in **2018**. In August, 2020, Early applied for unemployment benefits and received a letter from ESD showing a monetary determination based on her income during three quarters in **2019** and one quarter in **2020.** R. 28-29. That letter advised Early of her appeal rights, setting her appeal deadline as August 24, 2020. R. 28, 31. Early did not appeal this determination and ESD **no record** of Early appealing that determination.

Early then sought to backdate her claim, which ESD denied, stating she was ineligible for benefits between April 26, 2020 and August 8, 2020 because Early chose not to file sooner. R. 35. The deadline to appeal that decision administratively was December 11, 2020. R. 35. Instead, on the deadline day, December 11, 2020, Early filed her *Petition for Writ of Mandamus* in the district court. R. 10.[2]

What Early wants is for ESD to ignore her late work history because she made more money in her earlier work history – and would be eligible for a higher

[2] Early did send a fax on **December 12,** one day **AFTER** she filed the *Writ*, seeking an administrative appeal of ESD's refusal to backdate her claim. R. 103. This appeal is pending in large part because there are a limited number of referees and because appeals over current claims have priority over appeals of this nature.

unemployment insurance benefit as a result. However, despite her machinations, Early is wrong in her assumption that she is entitled to use her 2018 earnings as a basis for unemployment insurance benefits outside of the benefit year those earnings covered.

NRS 612.025 defines a "base period" as follows:

> 1. Except as otherwise provided in this section and in NRS 612.344, "base period" means the first 4 of the last 5 completed calendar quarters immediately preceding the first day of a person's benefit year, except that if one calendar quarter of the base period so established has been used in a previous determination of the person's entitlement to benefits the base period is the first 4 completed calendar quarters immediately preceding the first day of the person's benefit year.
>
> 2. If a person is not entitled to benefits using the base period as defined in subsection 1 but would be entitled to benefits if the base period were the last 4 completed calendar quarters immediately preceding the first day of the person's benefit year, "base period" means the last 4 completed calendar quarters immediately preceding the first day of the person's benefit year.
>
> 3. In the case of a combined wage claim pursuant to the reciprocal arrangements provided in NRS 612.295, the base period is that applicable under the unemployment compensation law of the paying state.[3]

"Benefit year" is defined as "the 52 consecutive weeks beginning with the

[3] NRS 612.344 covers unemployment benefits following a temporary disability. NRS 612.295 addresses reciprocal arrangements for unemployment insurance benefits with other states and the federal government.

first day of the week with respect to which a valid claim is filed, and thereafter the 52 consecutive weeks beginning with the first day of the first week with respect to which a valid claim is filed after the termination of the person's last preceding benefit year." NRS 612.030(1).

While Early filed for unemployment benefits in 2019, she never received any.[4] The benefit year for her 2019 unemployment claim was from April 28, 2019 to April 24, 2020. The flaw in Early's argument is that *if* she was entitled to unemployment insurance benefits during her benefit year, she would receive $285 a week during **those weeks of the benefit year during the benefit year**. At the conclusion of the benefit year, a **new** benefit year with a **new** base period would be calculated. In other words, if Early had filed for benefits in the 51st week of her benefit year, she would have been eligible to receive $285 for those two weeks and those two weeks only. The maximum benefit of $7,282.00 that Early believes she is owed is not a piggybank nor does she have any legal entitlement to the maximum benefit amount.

This, of course, is beyond the scope of this appeal or the issues presented in it. However, given the Court's order, ESD believed this explanation was necessary.

[4] Early was disqualified in 2019 both because she presented a medical statement from her doctor that she was unable to work because of her child birth and because she had not repaid the benefits she received as part of her 2016 fraudulent claim.

However, Early never sought to challenge her benefits determination prior to the filing of the *Writ*.

NRS 612.460(1) provides in relevant part, "An unemployed person may file a request for a determination of the person's benefit status in accordance with regulations prescribed by the Administrator. Upon such request, the Administrator shall furnish the person with a written determination." NRS 612.500 provides for an administrative tribunal to review disputed unemployment insurance claims. NRS 612.525 provides for judicial review "only after any party claiming to be aggrieved thereby has exhausted administrative remedies as provided by this chapter."

ESD has established a regulatory process for determining eligibility for UI and PUA benefits, and it has also established an administrative process for appealing that determination if a UI or PUA claimant is dissatisfied with the determination. This process ultimately leads to judicial review if a claimant remains dissatisfied. A claimant has no right to short circuit this process as Early has attempted to do through her petition in the district court. Nor does the district court or this court have the authority to summarily order the granting of benefits and bypass the administrative review process.

In this case, Early was determined to be eligible for UI benefits on August 7, 2020, with a weekly benefit amount of $71 per week.[5] If she was dissatisfied with that determination, there was an appeals process set up which Early could have followed. Thus, Early had a plain, speedy, adequate remedy at law she could pursue if she felt she should have been awarded PUA benefits. With respect to Early's request for retroactivity, she has requested a hearing to appeal that determinations.

ESD has no clearly defined legal duty to pay benefits based solely on an initial determination that a person may be eligible for them. Indeed, as Early was advised in August, "Receipt of this letter does not necessarily mean that you are qualified for unemployment benefits. Its purpose is to advise you of the benefit amount you are entitled to if you are meeting all other eligibility requirements for unemployment benefits." R. 28.

Finally, Early's claim that the Respondents did not have a functioning website for UI claims is categorically false. While there have been delays at time due to the crush of claims because of the pandemic, the site has been up and functional throughout. Early appears to confuse the regular unemployment system

[5] ESD records show Early received $71 per week in UI benefits every week from August 15, 2020 through September 25, 2021, when her benefits expired.

with the Pandemic Unemployment System created by the CARES Act in March of 2020, which came on line in May of 2020.

Because there is a plain remedy at law, albeit one Early chose to ignore, she was not entitled to *Mandamus* relief, which the district court appropriately denied.

CONCLUSION

The district court's order should be affirmed.

DATED this 14th day of December, 2021.

TROY C. JORDAN
TROY C. JORDAN, ESQ.
Nevada State Bar No. 9073
Division Senior Legal Counsel
State of Nevada DETR/ESD
500 East Third Street
Carson City, Nevada 89713
(775) 684-3996
Attorney for ESD Respondent

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Answering 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 3,130 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 14th day of December, 2021.

/s/ TROY C. JORDAN

TROY C. JORDAN, ESQ.
Nevada State Bar No. 9073
Division Senior Legal Counsel
State of Nevada DETR/ESD
500 East Third Street
Carson City, Nevada 89713
(775) 684-3996
Attorney for ESD Respondents

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 **ESD'S ANSWERING BRIEF**, either electronically through the Court's e-Flex system and/or by 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:

Natasha Early
4650 West Oakey Boulevard Apt 2035
Las Vegas, NV 89102

DATED this 14th day of December, 2021.

/s/ *Tiffani M. Silva*
TIFFANI M. SILVA