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Electronically Filed
Jul 25 2022 09:23 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT

STATE OF NEVADA

COMPLETE CARE CONSULTING, LLC,

Appellant,

vs.

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.

PETITION FOR REHEARING

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ARGUMENT

The court may consider rehearings in the following circumstances:

(A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or

(B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

NRAP 40(c). This Petition is based upon the argument that the Court misapplied the law controlling a dispositive issue in the case.

The Order of Affirmance (“OOA”), entered on June 22, 2022, states:

Arguably, CCC timely filed a petition for judicial review from a final order and therefore the petition was properly before the district court. *See* NRS 233B.130(2)(d) (a petition for judicial review must "be filed within 30 days after service of the final decision of the agency"). However, this does not automatically make dismissal improper. We note that the district court did not specifically find it lacked jurisdiction over CCC's petition when

dismissing it, but rather focused on the failure to exhaust administrative remedies as rendering the controversy nonjusticiable. *See Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007).

OOA at 4 n. 5.

But CCC did not fail to exhaust administrative remedies. The Court notes that CCC engaged fully in the process, including objecting to the determination and requesting a hearing. ODA at 1-2. The Commissioner issued a final order. OOA at 2. CCC's administrative remedies had been exhausted when it filed its petition. Ergo, the district court could not dismiss based upon a failure to exhaust administrative remedies. The Court's assertion otherwise is belied by the record. The Court's assertion thus cannot be used to support affirmance.

The Court's citation to *Thorpe* does not advance its reasoning here. In *Thorpe*, at the cited page, the Supreme Court was addressing whether, notwithstanding the administrative process, the aggrieved could sue in district court on the same subject matter. The Court used non-justiciability as a stepping stone to support its holding that there could be no private cause of action for the

aggrieved because the agency had been given exclusive jurisdiction, rendering a civil action non-justiciable. The issue was not whether a district court could remand.

As in *Thorpe*, the administrative process here is exclusive. Unlike *Thorpe*, CCC used it. Unlike *Thorpe*, CCC did not sue in district court. *Thorpe* is inapposite, and does not support affirmance.

Arguably, under *Baldonado*, the November order could not be considered final because it was issued before the requisite administrative hearing was conducted. Nevertheless, the record shows that the Labor Commissioner intended, at least initially, to issue a final order in November. Therefore, CCC should not be faulted for treating it as such and filing its petition for judicial review.

OOA at 5 n. 7.

Baldonado v. Wynn Las Vegas, LLC, 124 Nev. 951, 961, 194 P.3d 96, 102 (2008), held that the Labor Commissioner must have a hearing. *Baldonado* did not hold that abdication of that charge affects the finality of an order. The OOA's

reliance upon *Baldonado* is misplaced and does not support affirmance.

In this case, the district court did not specifically find that CCC failed to exhaust its administrative remedies, only that the administrative remedy of a hearing had yet to be exhausted. Pursuant to *Baldonado*, the Labor Commissioner was required to conduct an administrative hearing before entering a final order. As such, the Labor Commissioner's decision to issue the November 12 order without a hearing was an error of law. *See* NRS 233B.135(3). Unquestionably, this error adversely affected the Labor Commissioner's decision, as its factual findings were not developed as required. Indeed, the Labor Commissioner appears to have tacitly acknowledged this concern by attempting to schedule an administrative hearing in January. Therefore, the district court did not err in remanding the matter to the Labor Commissioner for further proceedings.

OOA at 7.

An agency's legal error can justify a remand. But the district court did not find a legal error. The district court must first reach that conclusion before

remanding. NRS 233B.135(3) provides:

The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;
- (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) Arbitrary or capricious or characterized by abuse of discretion.

The district court remanded without determining if the Commissioner erred legally.

The order of dismissal should thus be reversed.

CCC has presented no cogent argument to show that the outcome would have been different had the district court granted its petition, or how CCC would be prejudiced by participating in an administrative hearing on remand

that it had initially requested. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider claims that are not cogently argued or lack the support of relevant authority).

OOA at 8.

The Court punishes CCC for not speculating about something that never happened. The record does not permit such speculation. This part of the Court's reasoning does not support affirmance.

The Court punishes CCC for not demonstrating prejudice in having to attend a hearing. The record prevents that too: it was CCC that asked for a hearing in the first place. The record shows that request was denied. This is the legal error unaddressed by the district court prior to remanding to the agency. The Court's new-found prejudice factor does not support affirmance.

CONCLUSION

The Court misapplied the law in reaching its decision. The district court had no statutory authority to dismiss the petition. The Commissioner's order was a

final order. CCC exhausted its administrative remedies to obtain that final order.

The Commissioner tried to unwind that finality by ordering a hearing, but that hearing was foreclosed by the Commissioner's final order which led to the petition.

The district court's premature remand does not save the legal error below. The district court's order should be reversed.

Dated July 25, 2022

_____/s/Jeffrey A. Dickerson_____
JEFFREY A. DICKERSON

CERTIFICATE OF COMPLIANCE

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:

a. This brief has been prepared in a proportionally spaced typeface using Wordperfect X9 in 14 point Times New Roman font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a font of 14 points and contains 1,580 words and 249 lines.

3. The undersigned certifies that the foregoing brief complies with the requirements contained in NRAP 28A. Specifically, I certify that I have written this petition, and to the best of my knowledge, information, and belief, it is not frivolous or imposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the

record to be supported by a reference to the page 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 July 25, 2022

_____/s/Jeffrey A. Dickerson_____
JEFFREY A. DICKERSON

AFFIRMATION

The undersigned does hereby affirm that the preceding document DOES
NOT contain the Social Security Number of any person.

Dated July 25, 2022

_____/s/Jeffrey A. Dickerson____

JEFFREY A. DICKERSON

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I certify that today, I electronically filed the preceding document and the appendix with the Clerk of the Court by using the e-filing system, which will send a notice of electronic filing to Ms. Nichols.

Dated July 25, 2022

_____/s/Jeffrey A. Dickerson____

JEFFREY A. DICKERSON