

IN THE SUPREME COURT OF THE STATE OF NEVADA

HOME WARRANTY
ADMINISTRATOR OF
NEVADA, INC. dba CHOICE
HOME WARRANTY, a Nevada
corporation,

Appellant(s),

v.

STATE OF NEVADA,
DEPARTMENT OF BUSINESS
AND INDUSTRY, DIVISION OF
INSURANCE, a Nevada
Administrative agency,

Respondent(s).

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Elizabeth A. Brown
Clerk of Supreme Court

Case No. 80218

First Judicial District Court
No. 17 OC 00269 1B

**DIVISION'S OPPOSITION TO APPELLANT'S MOTION
FOR LEAVE TO FILE SUPPLEMENTAL APPENDIX**

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State of Nevada, Department of Business and Industry, Division of Insurance (“Division”), through its counsel, Nevada Attorney General, AARON D. FORD; Senior Deputy Attorney General, JOANNA N. GRIGORIEV and Deputy Attorney General, RICHARD P. YIEN, hereby submits this Opposition (“Opposition”) to Appellant Home Warranty Administrator of Nevada, Inc. (“HWAN”)’s Motion for Leave to File Supplemental Appendix (“Motion”). Division’s Opposition is based on the following Memorandum of Points and Authorities and all other documents on file herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS AND PROCEDURAL HISTORY

On December 18, 2017, the Nevada Commissioner of Insurance (“Commissioner”) signed into Order the Findings of Fact and Conclusions of Law issued by the hearing officer in the administrative cause No.17.0050 (“Administrative Decision”), finding that Petitioner has engaged in numerous violations of the provisions of chapter 690C of the Nevada Revised Statutes (“NRS”). On December 22, 2017, Petitioner filed a petition for judicial review (“PJR”) in the First Judicial District Court (“FJDC”). On November 7, 2019, a hearing on said PJR was held

before the FJDC. On November 25, 2019, the FJDC issued an order affirming, as modified, the Administrative Decision. On December 13, 2019, HWAN filed an appeal in this Court.

In its Motion, HWAN is seeking to introduce “Exhibit 1” which was not a part of the record before the hearing officer in cause 17.0050, or even in existence at the time of the administrative proceedings. “Exhibit 1” purports to be an exchange of emails from December of 2019 between a Division employee and an individual from a trade group called Service Contract Industry Council (“SCIC”). HWAN alleges in effect, that in these exchanges the employee’s interpretation of the provision of chapter 690C of the Nevada Revised Statutes (“NRS”) varied from that of the hearing officer and from the Division’s argument before the FJDC.¹

II. ARGUMENT

A. HWAN’S MOTION FOR LEAVE HAS NO LEGAL BASIS

¹ HWAN had attempted to bring Exhibit 1 before the FJDC in a related judicial review case No. 19 OC 00015 1B, similarly after the administrative order in that case had been issued and a petition for judicial review had already been filed. The FJDC denied HWAN’s motion on April 6, 2020. The court held that said document was not a part of the record on appeal. HWAN is now attempting the same maneuver before this Court.

There is no legal basis for HWAN's Motion or the relief sought. HWAN effectively seeks to re-define the standard and parameters of review of administrative decisions, as it has already unsuccessfully attempted to do before the FJDC. (HWAN's Motion, 4).

This Court has held that, “[o]n appeal from orders deciding petitions for judicial review, this court reviews the administrative decision in the same manner as the district court.” *Nassiri v. Chiropractic Physicians’ Bd.*, 130 Nev. 245, 248, 327 P.3d 487, 489 (2014). (citations omitted). The review of administrative decisions in this court, as in district court, is limited to the evidence that was before the administrative tribunal.

When a decision of an administrative body is challenged, the function of this court is identical to that of the district court. It is to ***review the evidence presented to the administrative body*** and ascertain whether that body acted arbitrarily or capriciously, thus abusing its discretion. This limitation upon court review is written into the Administrative Procedure Act, NRS ch. 233B . . .

State Indus. Ins. System v. Christensen, 106 Nev. 85, 87, 787 P.2d 408, 409 (1990) (citations omitted) (emphasis added). As the excerpt above indicates, this limitation is also a part of the Administrative Procedures Act (“APA”). NRS 233B.135 (1)(b) unequivocally provides that “[j]udicial

review of a final decision of an agency must be: . . . **(b) [c]onfined to the record.**” *Id.* See also *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 384 (2008); *Wright v. State, Dept. of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005). “In our review, **we are limited to the record** and may not substitute our judgment for that of the agency regarding questions of fact.” *Id.* (internal citations omitted) (emphasis added).

HWAN is asking the Court to disregard this standard. It vaguely references cases from the 9th and 11th Circuits, which do not involve the same APA standard of review, and are generally inapposite. HWAN’s reference to the offered document as being “highly probative to this appeal” further illustrates its complete disregard or misapprehension of the standard of review of administrative decisions, established by this Court and the APA. Moreover, aside from the lack of legal basis for the introduction of the document outside of the record, any alleged “change” in the Division’s “position” on statutory interpretation would be utterly

immaterial to this Court's *de novo* review of statutory interpretation of the administrative hearing officer in the case 17 OC 00269 1B.²

Lastly, although not relevant to the legal question at issue, HWAN misrepresents in its Motion that “the Division has twice conceded that this Court is the proper forum for considering *this evidence* . . . ” (Appellant’s Motion, 7). Nothing can be further from the truth. In both documents that HWAN attaches inexplicably to its Motion as “Exhibit 2 and “Exhibit 3”), the Division asserted that the issue of statutory construction of chapter 690C and other aspects of the Administrative Decision and the FJDC order affirming it, are currently on appeal before the Nevada Supreme Court. Any suggestion that the Division in any way conceded that the document at issue, namely “Exhibit 1” is proper in *any* forum is a deliberate misrepresentation. Although legally pointless, it is offered by HWAN to mislead the Court.

Pursuant to NRS 233B.135 (1)(b) and the Nevada case law, the review by this Court of the Administrative Decision is limited to the

² Additionally, a statement on statutory interpretation by an employee is not a position or an opinion of the Division. *See* NAC 679B.490.

record that was before the hearing officer, and HWAN's Motion has no legal basis or merit.

IV. CONCLUSION

For the reasons set forth above, the Division respectfully requests that HWAN's Motion For Leave to File Supplemental Appendix be denied.

DATED: May 19, 2020.

AARON FORD
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on May 19, 2020.

Participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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/s/ Marilyn Millam
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