

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH P. PEPITONE,

No. 36168

Appellant,

vs.

IGT, A NEVADA CORPORATION; ARIZONA CHARLIE'S, INC., A NEVADA CORPORATION D/B/A ARIZONA CHARLIE'S HOTEL & CASINO; AND STATE GAMING CONTROL BOARD, AN AGENCY OF THE STATE OF NEVADA,

Respondents.

**FILED**

**SEP 10 2001**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Sebade*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review of a Gaming Control Board determination.

At approximately 8:45 p.m., on October 23, 1997, appellant Joseph Pepitone deposited three coins in a "Nevada Nickels" slot machine at Arizona Charlie's Hotel and Casino in Las Vegas. "Nevada Nickels" is a statewide, multi-site linked slot system operated by respondent IGT. When four "Nevada Nickels" symbols become aligned, the player wins the primary or "progressive" jackpot. A progressive jackpot continues to increase within the multi-linked system until a winning alignment occurs on one of the machines. As is the case with all electronic slot machines licensed for use in Nevada, the machine in question displayed a sign advising players that a "malfunction voids all plays and pay."

When Mr. Pepitone pulled the lever, the reels began to spin. According to his formal hearing testimony, the reels eventually stopped spinning, four "Nevada Nickels" symbols sequentially aligned on the machine's payline from left to right, and the lights at the top and front of the machine began to flash. After about five seconds, the reels began to

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roll backwards in a jerking manner and a "tilt code" flashed in the electronic window that ordinarily displayed the number of coins played and the winning payout.

A slot foreman at the casino came to Mr. Pepitone's assistance and observed that the reels were spinning slowly, that the white light on top of the machine was flashing, and that the machine had tilted according to the code on the illuminated display. The slot foreman's supervisor advised Mr. Pepitone that the machine had malfunctioned and that the machine had voided the play. Mr. Pepitone insisted that he had won the progressive jackpot, in this case, \$463,895.80.

The slot foreman then opened the machine, which reset the interrupted play. The slow spinning of the reels then stopped, the flashing lights were no longer in operation, and the reels began to spin again at a normal rate. When the reels stopped spinning, the alignment conformed to a random outcome previously generated by the machine's microprocessor.<sup>1</sup> The completed play indicator displayed a single bar, a red seven, a single bar and a blank -- not a jackpot. The slot foreman testified at the administrative hearing in this matter that he accidentally reset the machine by opening a latch with his key to the machine. He conceded that he should not have reset the machine given Mr. Pepitone's dispute over the play.

IGT technicians arrived at 9:45 p.m. and observed that tilt code "3100" was illuminated on the display. The technician with primary responsibility for handling the incident died before the hearing. His assistant, although unable to independently testify to certain technical workings

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<sup>1</sup>"Nevada Nickels" uses a random number generator to determine play outcomes, which are then translated to the machine's mechanical reels. The digital outcome can be interrupted by a "tilt" of the machine's mechanical features. See Sengel v. IGT, 116 Nev. 565, 568, 2 P.3d 258, 260 (2000).

of the machine in question, explained at the hearing that this code is indicative of a coin jam blocking the coin hopper's optic sensor. The assistant also testified that he personally observed the coin jam after his associate opened the machine.

An agent for the Nevada Gaming Control Board also responded to the scene and inspected the machine along with the IGT technicians. She observed that a nickel "was positioned closer to the 'coin out' optic [sensor] than is normal." The agent test played the machine for some time and observed that it was functioning correctly in all other respects. The agent also accessed the machine's "previous games recall," which recorded the prior randomly generated play outcomes. The computer documentation that she examined recorded no evidence that any player on October 23, 1997, had hit a progressive jackpot.

The machine was placed back into normal service after this incident. However, within two weeks of the dispute, IGT removed and destroyed the machine.

The agent issued a formal report on November 14, 1997, and concluded that, although Mr. Pepitone observed a momentary alignment of four Nevada Nickels symbols, the machine had in fact malfunctioned. She also concluded that the completed game did not result in the final alignment of four Nevada Nickels symbols. Accordingly, the agent denied Mr. Pepitone's claim.

After receiving notice of the agent's decision, Mr. Pepitone filed a petition for reconsideration with the Nevada Gaming Control Board pursuant to NRS 463.363. A formal hearing was held during which percipient witnesses testified and during which conflicting testimony on the significance of the malfunction was considered. The Board hearing officer recommended that the Board uphold the agent's decision in its

entirety. The Board accepted the hearing officer's recommendation in its final order. The district court then denied Mr. Pepitone's petition for judicial review of the Board's decision.

This timely appeal followed, in which Mr. Pepitone claims the Board made its determination upon unlawful procedure, in violation of due process, and based upon insufficient evidence.

Unlawful procedure and due process

This court must reverse the Board's decision if we determine that the decision was "[m]ade upon unlawful procedure."<sup>2</sup> Mr. Pepitone's primary contention in this connection involves restrictions on his ability to conduct pre-hearing discovery at the administrative level.

Mr. Pepitone claims that the hearing officer improperly denied his requests for pre-hearing subpoenas seeking access to the machine in question, its maintenance records, reports of progressive jackpots voided by malfunctions, respondent's internal reports regarding the disputed jackpot, and video surveillance tapes. He further argues that IGT and Arizona Charlie's were in control of all of the discoverable information and that his lack of equal access to important information compromised his ability to meet his burden of proof at the formal hearing. Thus, he claims that denial of this pre-hearing discovery violated Regulation 7A.080 of the Nevada Gaming Commission and State Gaming Board Regulations ("NGCR 7A.080"), and violated his due process rights under the Fourteenth Amendment to the Federal Constitution.<sup>3</sup>

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<sup>2</sup>NRS 463.3666(3)(c).

<sup>3</sup>See U.S. Const. amend. XIV, § 1.

NGCR 7A.080 provides that "[a]t the request of a party, subpoenas must be issued by the board as provided in subsection 1 of NRS 463.3125." NRS 463.3125(1) provides, in turn, that "[b]efore a hearing before the commission, and during a hearing upon reasonable cause shown, the commission shall issue subpoenas and subpoenas duces tecum at the request of a party." Because the commission is statutorily required to issue subpoenas "before" a hearing, Mr. Pepitone argues that he was entitled to subpoenas in aid of pre-hearing discovery. This seems logical, at least as to the preservation of witness testimony, given the requirement in NRS 463.3125(2) that "[t]he testimony of any material witness . . . may be taken by deposition in the manner provided by the Nevada Rules of Civil Procedure." Read in its own context, however, NRS 463.3125(1) facially applies to subpoenas for attendance of witnesses at hearings. Although the right to depose live witnesses under NRS 463.3125(2) subsumes the right to the issuance of witness subpoenas of "material witnesses" for that purpose, including the right to the issuance of subpoenas duces tecum, the right to simply subpoena documents or to subpoena records' custodians as part of pre-hearing discovery appears nowhere within the statutory language.

We conclude that Mr. Pepitone's claims with regard to the pre-hearing discovery do not warrant reversal. First, the hearing officer allowed extensive discovery. Second, there is no indication that Mr. Pepitone was denied the benefit of discovery procedures clearly permitted under the statutory framework for such hearings. Third, "pretrial discovery . . . is not constitutionally compelled by the

Fourteenth Amendment;"<sup>4</sup> rather, "[t]he Due Process Clause, at a minimum, requires advance notice and an opportunity to be heard."<sup>5</sup>

We conclude that Mr. Pepitone was accommodated to an extent beyond that which is required to meet due process standards. While the hearing officer did not issue the requested subpoenas, he did issue a written scheduling order requiring the parties to exchange documents to be relied upon at the hearing and lists of non-rebuttal witnesses. The order also provided that the parties could take deposition testimony at any time after the exchange. Although Mr. Pepitone did not receive all of the documents that were the subject of the subpoena request, respondents produced the "Service Ticket Work Order" regarding the subject incident, the incident report, and voluntary statements of the slot foreman, slot supervisor, service technicians and an eyewitness. Mr. Pepitone was also advised of the untimely death of the primary slot technician, that no videotapes were made of the incident, and that the slot machine had been taken by IGT and destroyed. The service ticket report and the incident report simply restated the events described above.

In response to the information produced by respondents, Mr. Pepitone requested in writing substantial information, including materials concerning internal surveillance controls, contracts between IGT and Arizona Charlie's pertaining to the slot machine system, and manuals describing the internal workings of the machine including the "tilt" mechanism. Respondents then produced correspondence

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<sup>4</sup>Mears v. State, 83 Nev. 3, 7, 422 P.2d 230, 232 (1967) (citing Leland v. Oregon, 343 U.S. 790 (1952); Cicenia v. Legay, 357 U.S. 504 (1958)).

<sup>5</sup>Neal v. Shimoda, 131 F.3d 818, 831 n.14 (9th Cir. 1997).

exchanged between themselves regarding the system, the "Nevada Nickels Progressive Agreement" with sales order, documents concerning the IGT area-wide progressive security and accounting system in Nevada, and documents concerning the IGT "System of Internal Controls for Nevada Wide Area Progressive Security and Accounting Systems."

Mr. Pepitone makes no claim that he was denied the ability to depose material witnesses, or that he was denied the ability to obtain material witness subpoenas and subpoenas duces tecum compelling attendance of records' custodians for the hearing itself. Again, the request for subpoenas at issue here, were sought only in connection with counsel's need for assistance in pre-hearing preparation. It does not appear of record, for example, that maintenance records and incident reports generated over time with regard to the machine in question were the subject of an actual hearing subpoena. Finally, while Mr. Pepitone did not receive all of the requested information, he was provided substantial documentation relative to the incident, arrangements between IGT and the casino regarding the slot machine system, other interactions with regard to the system, and the nature of the system's operation.

In light of the above, we see no basis in this record to conclude that Mr. Pepitone was given inadequate notice or an insufficient opportunity to be heard. We therefore conclude that the denial of pre-hearing discovery did not deprive him of his due process rights.

Mr. Pepitone also takes issue with numerous evidentiary rulings of the hearing officer. First, Board hearings "need not be conducted according to technical rules

relating to witnesses and evidence."<sup>6</sup> Second, his assignments of error in this regard are conclusory at best.<sup>7</sup> Thus, we conclude that Mr. Pepitone's contention that the hearing officer's evidentiary rulings provide a basis for reversal is rejected.

Sufficiency of the evidence

Mr. Pepitone next contends that the Board's decision must be reversed because it was unsupported by competent evidence.<sup>8</sup> We disagree.

NRS 463.3666(3)(d) provides that a Board decision must be supported by "any evidence." The "any evidence" standard affords "great deference" to the factual findings of the Board.<sup>9</sup> "[A] reviewing court should affirm a decision of the Board which is supported by any evidence whatsoever, even if that evidence is less than 'that which 'a reasonable mind might accept as adequate to support a conclusion.'"<sup>10</sup>

The record in this case reflects that sufficient evidence supported the Board's decision. Although the chain of events as described by Mr. Pepitone was essentially uncontested, the hearing officer heard and was entitled to rely upon testimony that the machine malfunctioned, that the

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<sup>6</sup>NGCR 7A.070(1).

<sup>7</sup>See SIIS v. Buckley, 100 Nev. 376, 382, 682 P.2d 1387, 1390 (1984) (declining to consider "conclusory arguments, lacking substantive citation to relevant authority").

<sup>8</sup>Mr. Pepitone styles this assignment of error as a contention that the Board's action was "arbitrary and capricious" because it was not based upon competent evidence. We believe that this argument is more appropriately reviewed under the statutory "any evidence" standard.

<sup>9</sup>Sengel, 116 Nev. at 570, 2 P.3d at 261.

<sup>10</sup>Id. (quoting City of Las Vegas v. Laughlin, 111 Nev. 557, 558, 893 P.2d 383, 384 (1995) (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)))) (emphasis in original).



computer program caused the game to restart, and that the play was completed according to its predetermined outcome. Computer records documenting the play on the machine on October 23, 1997, also showed a tilt and no winning jackpot. Finally, the progressive meter showing the continued increase in the jackpot amount continued to operate after the play in question. This, according to the record, is indicative of the fact that Mr. Pepitone did not win the award. We note that Mr. Pepitone confirmed that the meter continued to operate after his play.

We recognize that the slot foreman accidentally reset the machine before IGT and Board officials could personally observe the malfunction, and that the machine was removed and destroyed shortly after the incident in question.<sup>11</sup> While the Board could certainly have given that evidence more weight than it did and could have drawn certain negative inferences as a result, the Board was within its statutory discretion in relying on the other evidence admitted at the hearing. Thus, we conclude that sufficient evidence was presented to satisfy the standard of proof governing the administrative proceedings below.

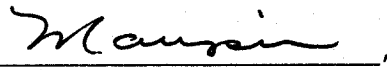
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<sup>11</sup>Mr. Pepitone criticizes the Board agent for not sealing the machine for examination by a Gaming Control Board technician. While this was certainly an option, she could have reasonably considered that the malfunction had been remedied and was not serious enough to remove the machine from play. Mr. Pepitone also criticizes the agent for not seeking out other witnesses to the play in question. There was no apparent reason to do this as the agent agreed that Mr. Pepitone accurately recounted the incident.

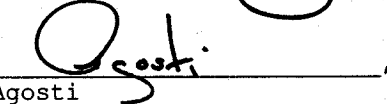
CONCLUSION

We conclude that the Board's decision survives the judicial scrutiny permitted by NRS 463.3666(3). The decision was not made on unlawful procedure, was supported by sufficient evidence, and was not otherwise in violation of Nevada or federal law.<sup>12</sup> We accordingly

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Maupin

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Agosti

cc: Hon. Lee A. Gates, District Judge  
Nikolas L. Mastrangelo  
Lionel Sawyer & Collins  
Clark County Clerk

<sup>12</sup>As noted above, we have considered Mr. Pepitone's other assignments of error and find them to be without merit.