

IN THE SUPREME COURT OF THE STATE OF NEVADA

LABOR COMMISSION, DEPARTMENT  
OF BUSINESS AND INDUSTRY,  
STATE OF NEVADA,  
Appellant,  
vs.  
UNIVERSAL ELECTRIC, INC.,  
Respondent.

No. 38073

FILED

NOV 21 2002

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF CLERK / CLERK

ORDER OF REVERSAL

This is an appeal from a district court order reversing an administrative decision that the respondent, Universal Electric, Inc. (UEI), failed to pay Timothy Kusz, an employee, the prevailing wages for his work as a general foreman.<sup>1</sup> A general foreman's wages are subject to the prevailing wage rates set by the labor commissioner, but a superintendent's are not. UEI alleges that Kusz was a superintendent, not a foreman, and therefore, not subject to the prevailing wage rates.

The standard of review for this court in this case is the same as the district court's – to determine whether substantial evidence supports the labor commissioner's determination.<sup>2</sup> If there is substantial evidence, “neither this court, nor the district court, may substitute its

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<sup>1</sup>See NRS 233B.150.

<sup>2</sup>See Secretary of State v. Tretiak, 117 Nev. 299, 305, 22 P.3d 1134, 1138 (2001).

judgment for the administrator's determination."<sup>3</sup> We will set aside an administrative decision only if that determination is affected by clear legal error, or characterized by an abuse of discretion.<sup>4</sup>

Timothy Kusz filed a wage claim with the labor commissioner's office seeking reimbursement of wages from UEI for work he performed as a general foreman on three public works projects. Mr. Kusz alleged that he spent fifteen percent of his time as superintendent<sup>5</sup> on those projects and the remainder of his time as a general foreman.

The district court reversed the initial determination by a hearing officer in favor of Kusz and remanded the case for a new hearing to determine "appropriate definitions of terms of status that have root in law as established in the State of Nevada."

The labor commissioner acted as hearing officer in a second hearing. At this hearing, Kusz testified as to his duties on the projects pertaining to his claim. Gail Maxwell, the labor commissioner's chief compliance investigator/auditor who investigated Kusz's wage claim, testified how she conducted her investigation. She talked with Kusz and thirty other witnesses, and reviewed documents and sworn statements. She concluded that Kusz was the general foreman on the projects in

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<sup>3</sup>Id. (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 607-08, 729 P.2d 497, 498 (1986)).

<sup>4</sup>See NRS 233B.135(3).

<sup>5</sup>Mr. Kusz only sought reimbursement for the time he spent serving as a general foreman, not the time he spent as a superintendent.

question. Maxwell also testified as to the references she used to determine job classifications, including the Dictionary of Occupational Titles, published by the United States Department of Labor, determinations by different labor commissioners, court determinations, and union labor agreements. Maxwell described the labor commission's process and authority for determining categories of job classifications and their definitions as follows:

[T]he Commissioner himself pursuant to NRS 338.030 is obligated to establish the prevailing wage rates for classes . . . crafts and types of work in the State of Nevada pursuant to a survey. . . . [T]he awarding bodies include those rates in the bid documents and post them at the site of the work and that the contractors pay those rates. The responsibility to publish those rates [is] with the Labor Commissioner but there [also] is a responsibility on the contractors to contact this office if they're not completely sure or [sic] the type of work that falls within the classification. The Commissioner establish[es] rates for specific crafts and types of work and to that end he must also define the work within the classification.

These rates are included in public works contracts. Maxwell admitted that the 1995-96 prevailing wages did not contain a definition of general foreman, but read into the record a definition of a "foreman" and a "general foreman" that the 1997 commissioner had stated.<sup>6</sup>

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<sup>6</sup>In that letter, then-Commissioner David Dahn described a "general foreman" as one who "[c]oordinates work responsibilities for one (1) company over one (1) or more foremen. [He] [w]orks with [the] *continued on next page . . .*

After the hearing, the commissioner, as hearing officer, found that Kusz performed the duties of electrical general foreman at times, but was not properly paid for such time and awarded Kusz \$17,340.37 in wages. The commissioner found that the description of "electrical general foreman" was based on classifications and definitions rooted in Nevada law.

The district court reversed that ruling, finding that the classification of "general foreman" was not rooted in Nevada law. The district court concluded that because Mr. Kusz "himself recognized that the terms 'superintendent' and 'general foreman' were practically synonymous," no prevailing wage issue existed because superintendents are not subject to prevailing wage requirements. The district court also held that there was "no substantial evidence to support the hearing officer's factual determination that Mr. Kusz was another kind of foreman to whom the prevailing wage requirements would apply." The district court based its decision on Mr. Kusz's uncontroverted testimony that the superintendent and general foreman classifications were equivalent. We disagree.

We conclude that the district court applied the incorrect standard of review in relying on Kusz's testimony regarding classifications, rather than the commissioner's determination. Neither this court, nor the district court, is in a position to make determinations of

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*... continued*

superintendent and foreman to coordinate scheduling of work. He may work with tools of the trade."

credibility of witnesses at the administrative hearing. The labor commissioner is authorized to determine the classification of workers for the purpose of determining the prevailing wage rate. The labor commissioner can utilize information from annual contractors' surveys, collective bargaining agreements, and state and federal agencies to determine prevailing wage rates.<sup>7</sup> The commissioner properly used this power to determine worker classifications by relying on various sources at his disposal.<sup>8</sup> The courts should leave the issue of worker classifications to the labor commissioner.<sup>9</sup> "[A]n agency's conclusions of law which are closely related to the agency's view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence."<sup>10</sup>

Substantial evidence supports the commissioner's determination that Kusz was a general foreman rather than a superintendent on the projects in question and, therefore, entitled to the appropriate prevailing wage rate. At the hearing, Kusz testified at length about the work he performed and the duties he was assigned. UEI

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<sup>7</sup>See NAC 338.020.

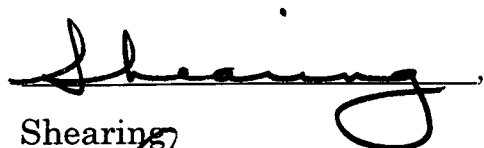
<sup>8</sup>See, e.g., U.S. ex rel. Plumbers & Steam. v. C.W. Roen Const., 183 F.3d 1088, 1093-94 (9th Cir. 1999).

<sup>9</sup>See, e.g., U.S. ex rel. Windsor v. DynCorp, Inc., 895 F. Supp. 844, 851 (E.D. Va. 1995) ("[T]he responsibility for resolving such [classification] disputes rests not with the courts, but with the Department of Labor.").

<sup>10</sup>SIIS v. Khweiss, 108 Nev. 123, 126, 825 P.2d 218, 220 (1992).

documents and a number of witnesses investigated by Maxwell substantiated his claim.

We conclude that the district court erred in concluding that the commissioner did not have substantial evidence to support the decision. We reverse the judgment of the district court and reinstate the order of the labor commissioner.

 J.

Shearing

 J.

Leavitt

 J.

Becker

cc: Hon. Mark R. Denton, District Judge  
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