



IN THE SUPREME COURT OF THE STATE OF NEVADA

ASSURED DEVELOPMENT, INC, A
NEVADA CORPORATION,
Appellant,
vs.
NEVADA STATE CONTRACTORS
BOARD AND TED CAPLE, AN
INDIVIDUAL,
Respondents.

No. 89915

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review of a Nevada State Contractors Board order imposing administrative fines. Eighth Judicial District Court, Clark County; Tara D. Clark Newberry, Judge.

Respondent Ted Caple filed a complaint with respondent the Nevada State Contractors Board (NSCB) in June 2022, alleging substandard workmanship by appellant Assured Development, Inc. (ADI) that resulted in flooding of Caple's newly built home in Henderson. Caple hired Dwyer Engineering in March 2022 to inspect the drainage on the property, and Dwyer concluded that ADI's deviation from construction plans led to the flooding issues. The NSCB notified ADI and its owner, Joseph Yakubik, in June 2022 that the NSCB was initiating an investigation and encouraged ADI to resolve the workmanship issue with Caple directly over the next 30 days to avoid a formal investigation. The letter stated that otherwise, the investigator Josue Barrera would work with the parties to "determine whether the workmanship issue f[ell] below the minimum industry standards," including a site visit requiring both parties' attendance. The NSCB required that ADI submit various documents to the

NSCB. ADI did not respond to the NSCB's communications and requests. Caple supplemented his complaint after another major storm caused severe extensive flooding in July 2022.

Yakubik finally responded via email in early August 2022 confirming that ADI received NSCB's correspondence and asserting that ADI did not have a contract with Caple. However, Yakubik misspelled Barrera's name in the email address so Barrera never received it. A few days later, the NSCB notified ADI that its attendance was required at a jobsite meeting on August 19 and that "[a]ny conflict with the aforementioned schedule must be brought to the Investigator's attention immediately" and that failure to attend "may result in disciplinary action being taken against the Licensee." Yakubik emailed Barrera on the day of the site visit (again using the misspelled email address) stating that he was unable to attend the jobsite meeting. After the site visit, the NSCB sent a Notice to Correct that required ADI to address the drainage issues and fix all secondary damage caused by the flooding, explaining that failure to comply could result in further disciplinary action, including a \$10,000 fine for each violation. The NSCB notified ADI a month later that it was initiating a formal investigation of ADI's license and directed ADI to submit financial and building permit information within 30 days.

The NSCB charged ADI with poor workmanship, abandonment, and failures to cooperate, provide records, comply with the Notice to Correct, and prove financial responsibility. *See* NRS 624.3017(1); NRS 624.302(5)-(6); NRS 624.3013(3), (5); NRS 624.301(1). At the disciplinary hearing, Caple testified that the flooding in the garage "was like a river" such that "[y]ou could visually see the current flowing through," and he also described water flowing through his home from the front door to the back

patio. The NSCB presented photos and videos of the flooding. The administrative law judge (ALJ) continued the hearing for 30 days to allow ADI to visit Caple's home and obtain engineering reports to challenge Dwyer's conclusions.

About a month later, ADI provided the NSCB with a letter from DW Landscape, which concluded that the flooding was caused by (1) the excessive mud on Caple's property from the street acting as a ramp, (2) the City of Henderson's failure to control water in drainage swells, and (3) alterations in the front yard drainage landscape. ADI also provided a letter from another landscaper stating that it was unable to determine whether the landscaping and drainage at Caple's home was installed consistent with the planning documents.

The NSCB held another disciplinary hearing to resolve the workmanship issue. By that time, ADI had visited Caple's home and submitted documents requested by the NSCB. Barrera testified that (1) ADI deviated from the construction plans by failing to construct a proposed berm; (2) Caple's photo and video evidence was consistent with Dwyer's report; (3) ADI failed to respond to the NSCB's correspondence; and (4) ADI failed to submit any competing engineering reports to the NSCB. Caple testified that after the July 2022 flood, he hired an excavator to remove the excess mud piles that were carried onto his property via the floods.

The ALJ found that the photos, videos, Caple's and Barrera's testimony, and Dwyer's report showed that ADI's substandard workmanship led to improper drainage on Caple's property, proximately causing the floods. He rejected ADI's arguments that it met workmanship standards or that any failure by the City of Henderson caused the flooding. He found that ADI was a "no show" to the site meeting and failed to respond

to the NSCB's Notice to Correct and other requests. He further found that DW Landscape's opinion was not as persuasive or credible as the Dwyer report. The ALJ assessed administrative fines as follows: (1) \$9,000 for poor workmanship, (2) \$1,000 for failure to cooperate, (3) \$1,000 for failure to provide information and records, (4) \$9,000 for failure to comply with the Notice to Correct, and (5) \$5,000 for failure to establish financial responsibility. However, the ALJ determined that ADI had not violated NRS 624.302(1) by abandoning the construction project. The ALJ held Yakubik jointly responsible for the fines. The district court denied ADI's petition for judicial review, holding that substantial evidence supported the ALJ's decision. ADI appeals.

Standard of review

“When reviewing a district court’s denial of a petition for judicial review of an agency decision, this court engages in the same analysis as the district court.” *State, Dept. of Corrs. v. Ludwick*, 135 Nev. 99, 101, 440 P.3d 43, 45 (2019) (internal quotation marks omitted). We review the agency’s decision to determine whether it was clearly erroneous, an abuse of discretion, or affected by an error of law. *Id.* Factual findings are overturned only if they lack substantial evidence, or “evidence which a reasonable mind might accept as adequate to support a conclusion.” *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 624, 310 P.3d 560, 564 (2013) (internal quotation marks omitted); NRS 233B.135(4). We “will not reweigh the evidence or revisit a [hearing] officer’s credibility determination.” *Elizondo v. Hood Machine, Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013) (internal quotation marks omitted). In reviewing an agency decision, “[t]he burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid.” NRS 233B.135(2).

The ALJ did not legally err, and substantial evidence supports his decision

NRS 624.112 authorizes the NSCB to investigate and enforce the various provisions of NRS Chapter 624. NRS 624.3017 provides that a contractor may be disciplined for “[w]orkmanship which is not commensurate with standards of the trade in general or which is below the standards in the building or construction codes adopted by the city or county in which the work is performed.” The NSCB may take various disciplinary actions against a contractor licensee that violates NRS 624.3017, including imposing an administrative fine of not more than \$10,000 or ordering the licensee to “correct a condition resulting from an act which constitutes a cause for disciplinary action, at the licensee’s cost.” NRS 624.300(1)(d), (f).

ADI argues that the ALJ’s decision was legally erroneous because the NSCB relied on *res ipsa loquitur* in asserting that the flood itself proved poor workmanship without any material evidence of a code violation or deviation from plans. ADI argues that the ALJ failed to consider that external factors contributed to the flooding. ADI alternatively argues that the ALJ’s decision was not supported by substantial evidence because it failed to account for the Clark County Regional Flood Control District’s report addressing the 100-year rain intervals and Caple’s landscape modifications. We disagree.

ADI’s contention that a substandard workmanship violation must be based on a code violation conflicts with the plain language of NRS 624.3017, which authorizes discipline against a contractor that either fails to perform “commensurate with *standards of the trade in general or*” violates a local code. (Emphasis added). The NSCB imposed liability on ADI for workmanship that failed to comply with generally accepted trade standards, not a building code violation. Although ADI argues that the

NSCB failed to show a deviation from the design plans, it provided neither those plans nor other key documents underlying the ALJ's decision—including the Dwyer report and the landscapers' letters offered in support of its alternative causation theory—in its appendix. Nor does ADI specifically explain why Dwyer's conclusions that ADI deviated from the design plans were not credible. Because ADI failed to provide an adequate appellate record, we presume the omitted materials support the challenged decision. *See McClendon v. Collins*, 132 Nev. 327, 333, 372 P.3d 492, 496 (2016) (explaining that appellant bears the burden of providing an adequate appellate record and that omitted portions of the record are presumed to support the district court decision).

ADI refers to a letter sent by Barrera during the investigation, responding to Yakubik's assertion that the NSCB abandoned its Notice to Correct, wherein Barrera stated: "As you are aware, we also provided you notice of the job site inspection which identified the flooding issues, which you failed to attend. Accordingly, we have not abandoned the notice to correct as there is obviously a drainage problem when a home floods, *res ipsa loquitur*." However, at no point did the NSCB explicitly or implicitly rely on *res ipsa loquitur* in the proceedings before the ALJ or in the remainder of its investigation. Rather, the NSCB relied on photos and videos depicting the flooding, Barrera's testimony, Caple's testimony, and the Dwyer report. The Dwyer report was particularly important, as the ALJ found credible Dwyer's assessment that ADI's work did not comply with the design drawings. This finding formed the basis for the ALJ's ruling that ADI's work was not commensurate with the general standards of the trade. Per the report, instead of constructing the berm in the design plans, ADI constructed a circular driveway without a raised hump of sufficient height

to prevent offsite flows from entering past the front yard. As the ALJ found, the report also noted several other inconsistencies between the construction plans and ADI's work that "have led to the flooding problems being experienced since completion." The ALJ also found Caple's testimony about the flooding and resultant damage credible.

The ALJ considered evidence ADI presented in its alternative-causation theory but found DW Landscape's letter less persuasive than the Dwyer report because (1) a landscaper is less qualified than a civil engineer to render opinions on drainage; (2) the letter neither contradicted nor critiqued the Dwyer report; (3) DW conducted its site inspection ten months after the Dwyer report was completed (and after the second major rainstorm); and (4) unlike the Dwyer report, the letter lacked specific design details supporting its conclusions. The ALJ also considered ADI's contention that Caple's landscape modifications caused the flooding. But the evidence showed only that, after the July 2022 rainstorm, Caple hired an excavator to remove the excess mud that accumulated in front of his house, which does not support ADI's theory that Caple's modifications caused the flooding. Nor did the ALJ err by failing to consider Clark County Regional Flood Control District's report addressing the 100-year rain intervals, as ADI did not submit that report until it petitioned the district court for review. NRS 233B.135(1)(b) (limiting judicial review to the administrative record).

ADI's arguments ultimately challenge the ALJ's weighing of the competing evidence and credibility determinations in the NSCB's favor. But those determinations are not subject to appellate reweighing. *City Plan Dev. v. Lab. Comm'r*, 121 Nev. 419, 426, 117 P.3d 182, 187 (2005) ("An administrative decision based on a credibility determination is not open to

appellate review.” (internal quotation marks omitted)). Considering the record as a whole, including the Dwyer report, testimony from Caple and Barrera, and the photo and video evidence, substantial evidence supports the ALJ’s conclusion that ADI’s “work fell below the standard of care in that [ADI] deviated from the plans and specifications, and that the proximate cause of the flooding was, at least in part, such deviation.”

The NSCB properly exercised its authority under NRS 624.112

ADI argues that the NSCB exceeded its jurisdictional authority because it may only discipline contractors for active violations related to ongoing licensure, and here, ADI had allowed its license to expire by the time the ALJ decided the case. ADI reasons that NSCB’s purpose is to protect the public by regulating licensed contractors’ fitness, not to punish or resolve disputes post-licensure. ADI also argues that this case amounts to a Chapter 40 construction defect matter, which the NSCB lacked authority to resolve.

ADI principally relies on *Bivins Construction v. State Contractors’ Board*, 107 Nev. 281, 809 P.2d 1268 (1991), for its post-licensure argument. There, the subcontractor filed a complaint with the NSCB after the general contractor failed to pay for its grading and paving services. *Bivins Constr.*, 107 Nev. at 282, 809 P.2d at 1269. We considered an NSCB order suspending the general contractor’s license until it paid the full amount due to the subcontractor. *Id.* at 283-84, 809 P.2d at 1270. The court was “troubled by the Board’s assumption of what was essentially a judicial role in the resolution of this dispute,” because the suspension of the general contractor’s license being contingent on the payment of the subcontractor’s claim “was tantamount to the award of contract damages in a contested case.” *Id.* at 283-84, 809 P.2d at 1270. The NSCB lacked the authority to

impose civil damages upon parties under its licensing authority and the contractual issues “raised legal issues properly resolvable only by a court of law,” we explained. *Id.* at 284, 809 P.2d at 1270.

Unlike in *Bivins*, the ALJ in this case did not suspend ADI’s license contingent on ADI paying Caple for the repairs to his home or contract damages. NRS Chapter 40 and NRS Chapter 624 address entirely separate issues—the former addresses construction defect claims for individual recovery of legal damages against a responsible party, while the latter addresses contractor licensing, regulation, and discipline. The fines imposed (1) were statutorily authorized under NRS 624.300(1)(d); (2) were unrelated to any civil remedy that Caple is seeking under NRS Chapter 40; and (3) will ultimately be deposited with the State Treasurer for credit to the Construction Education Account, which serves a public protective purpose rather than a civil damage award. NRS 624.300(12). As ADI concedes, “[t]he primary purpose of Nevada’s licensing statutes is to protect the public against both faulty construction and financial irresponsibility.” *Tom v. Innovative Home Sys., LLC*, 132 Nev. 161, 166, 368 P.3d 1219, 1223 (Ct. App. 2016) (citation modified). ADI fails to cogently argue why that protective purpose is not met when the NSCB disciplines a contractor that voluntarily relinquished their license or that lack direct privity with the property owner. Moreover, ADI was licensed when it constructed Caple’s home and when the disciplinary proceedings began such that ADI’s conduct

fell squarely within the NSCB’s jurisdiction under NRS 624.300. NRS 624.300(8) (“The expiration of a license by operation of law . . . , or the voluntary surrender of a license by a licensee, does not deprive the Board of jurisdiction to proceed with any investigation of, or action or disciplinary proceeding against, the licensee or to render a decision suspending or revoking the license.”). We therefore conclude that the NSCB properly exercised its disciplinary authority over ADI.

The NSCB did not deny ADI due process

ADI argues that the NSCB denied ADI procedural due process under NRS Chapter 233B, pointing to the investigator’s site visit on August 19, 2022, without ADI present and despite ADI’s rescheduling request, and argues that NSCB failed to timely produce photos and videos. ADI also contends that NRS 233B.122 prohibited Barrera from participating in the adjudication of ADI’s case because he investigated ADI.

As an initial matter, ADI forfeited its due process claim by failing to cogently argue the issue or cite relevant and existing legal authority in support of it. *Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). In any event, the claim fails on the merits because the NSCB followed the procedures in NRS 624.320-.351 and NAC 624.6975-.7296,¹ and ADI largely chose not to participate in the NSCB’s investigation or take corrective action, despite Barrera’s requests for ADI’s documentation and participation. *See, e.g.*, NRS 624.341 (authorizing issuance of order to take corrective action). Though ADI claims the NSCB ignored Yakubik’s request to reschedule the site visit, Yakubik

¹ADI argues that the NSCB must close a complaint or determine its validity within 90 days but fails to cite any statute or NAC provision for this requirement.

sent his rescheduling request to the incorrect email address on the same day as the site visit. ADI's NRS 233B.122 claim similarly lacks merit because Barrera was not directly involved in the ALJ's decision-making process. In any case, we have held that "it is not uncommon in administrative law to find the combination of investigating, prosecuting and judging functions" and that "such a combination in one office, standing alone, does not constitute a denial of due process." *City Plan Dev., Inc.*, 121 Nev. at 429, 117 P.3d at 188 (citation modified). Therefore, we conclude that the NSCB did not deny ADI due process.

The ALJ's assessment of fines and joint responsibility was consistent with NRS 624.300's disciplinary purposes

ADI argues that the NSCB's fines were punitive and excessive and unrelated to NRS 624.300's disciplinary purposes. It also contends that the ALJ lacked a statutory basis to impose joint responsibility on Yakubik. Again, we disagree.

NRS 624.300 authorizes the NSCB to take various disciplinary actions "if the licensee commits any act which constitutes a cause for disciplinary action" including, but not limited to, (1) suspending or revoking the contractor's license, (2) imposing an administrative fine of not more than \$10,000, and (3) ordering the licensee to take corrective action. NRS 624.300(1)(a), (d), (f). When imposing fines, the NSCB must consider (1) the gravity of the violation, (2) the good faith of the licensee, and (3) any history of the licensee's previous violations. NRS 624.300(4)(a)-(c); NAC 624.7251(2).

All of the fines here were within the statutory limit set by NRS 624.300(1)(d) (allowing the NSCB to "[i]mpose an administrative fine of not more than \$10,000"), and substantial evidence supports that ADI's failure

to cooperate during the investigation or take any corrective actions justified the ALJ's imposition of fines. ADI claims that the fines were punitive rather than remedial; however, the NSCB tried lesser remedial measures before imposing fines by issuing the Notice to Correct and repeatedly seeking ADI's involvement in the investigation. ADI makes no attempt to show that the gravity of the harm did not justify the fines or that ADI was operating in good faith when failing to cooperate with the NSCB's investigation. So we conclude that the ALJ's imposition of \$25,000 total in fines was appropriate and not overly punitive.

The ALJ also properly imposed joint responsibility on Yakubik based on the plain language of NRS 624.3018(2), which provides that

[t]he performance by any partnership, corporation, firm or association of any act or omission constituting a cause for disciplinary action likewise constitutes a cause for disciplinary action against *any licensee who is a member, officer, director or associate of such partnership, corporation, firm or association, and who participated in such prohibited act or omission.*

(Emphasis added). ADI fails to cogently argue why this statute does not provide a basis to impose joint responsibility on Yakubik. *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. In any event, the statute contemplates that a contracting company's conduct giving rise to disciplinary action serves as a basis to discipline an individual member or officer who participated in that conduct. Yakubik is the president of ADI and the qualifying party for its license under NRS 624.260, and he engaged in the prohibited acts and omissions underlying the violations such that the

ALJ properly imposed joint responsibility. NRS 624.3018(2). Accordingly,
we

ORDER the judgment of the district court AFFIRMED.



cc: Hon. Tara D. Clark Newberry, District Judge
Persi J. Mishel, Settlement Judge
Schwab Law Firm PLLC
Hayes Wakayama Juan
Joseph Sakai
Eighth District Court Clerk