IN THE MATTER OF THE GUARDIANSHIP OF THE PERSON AND ESTATE OF CARMEN GOMEZ WITTLER, AN ADULT.

CARMEN GOMEZ WITTLER, APPELLANT, *v.*
ERIC WITTLER, RESPONDENT.

No. 76948

August 1, 2019 445 P.3d 852

Jurisdictional prescreening of an appeal from a district court order extending a temporary guardianship and denying a motion to dismiss. First Judicial District Court, Carson City; James E. Wilson, Judge.

Appeal dismissed.

Washoe Legal Services and *Jennifer M. Richards*, Reno, for Appellant.

Allison MacKenzie, Ltd., and *Joel W. Locke*, Carson City, for Respondent.

Before the Supreme Court, PICKERING, PARRAGUIRRE and CADISH, JJ.

OPINION

Per Curiam:

Appellant appeals from a district court order extending a temporary guardianship and denying a motion to dismiss. We conclude that such an order is not independently appealable and thus dismiss the appeal for lack of jurisdiction.

FACTS AND PROCEDURAL HISTORY

On May 4, 2018, respondent Eric Wittler filed a verified petition for the appointment of a temporary and permanent guardian of the person and estate of his mother, appellant Carmen Gomez Wittler. Five days after the petition was filed, the district court entered an order appointing a temporary guardian, issuing letters of temporary guardianship, and setting a hearing regarding an extension of the temporary guardianship. On May 30, 2018, the district court entered an order extending the temporary guardianship and setting a hearing. The district court conducted the hearing and, on August 22, 2018, entered an order extending the temporary guardianship and denying a motion to dismiss the action for lack of jurisdiction. The order set a new hearing date of September 11, 2018, to determine permanent guardianship. Carmen appeals from the August 22, 2018, order.

This court's initial review of the docketing statement and other documents before us revealed a potential defect—it appeared the challenged order was not substantively appealable because it was merely temporary and did not finally decide the guardianship question. *See Brown v. MHC Stagecoach, LLC*, 129 Nev. 343, 345, 301 P.3d 850, 851 (2013) (this court "may only consider appeals authorized by statute or court rule"). Accordingly, we ordered Carmen to show cause why this appeal should not be dismissed for lack of jurisdiction. Carmen has now filed a response, and Eric has filed a reply.

DISCUSSION

Carmen first contends that the order is appealable as a final judgment under NRAP 3A(b)(1) because temporary guardianship proceedings are distinct from plenary guardianships.[1] However, the initial petition filed in this matter sought both a temporary and a permanent guardianship. The challenged district court order does not finally resolve the request for a permanent guardianship. Thus, the order does not resolve all issues before the court and is not a final judgment for purposes of NRAP 3A(b)(1). *See Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (defining a final judgment as "one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs" (internal quotation marks and citation omitted)).

Next, Carmen asserts that the order is appealable as the functional equivalent of a preliminary injunction. *See* NRAP 3A(b)(3) (allowing an appeal from an order granting or refusing to grant an injunction). While there may be some similarities between a preliminary injunction and a temporary guardianship order, this court has consistently concluded that temporary orders subject to periodic review are not appealable. *See, e.g.*, *Sicor, Inc. v. Sacks*, 127 Nev. 896, 900, 266 P.3d 618, 620 (2011) ("[W]e routinely dismiss appeals from interim custody orders that contemplate further district court proceedings before entry of a final custody order."); *In re Temporary Custody of Five Minors*, 105 Nev. 441, 443, 777 P.2d 901, 902 (1989) ("[O]rders granting petitions for temporary custody pursuant to NRS Chapter 432B are not substantively appealable."). The statutory framework regarding temporary guardianships contemplates periodic review of those guardianships. For example, the initial appointment of a temporary guardian lasts no more than 10 days; the court may extend the temporary guardianship only after a hearing to determine if specific criteria have been met. NRS 159.0523(5). The

[1]This contention seems to rely on the implied assertion that the challenged order finally resolves the petition for temporary guardianship.

temporary guardianship may be extended upon a showing of good cause for no longer than two successive 60-day periods, or for no longer than 5 months upon a showing of extraordinary circumstances. NRS 159.0523(8).

Carmen asserts that temporary guardianship orders are not subject to periodic review and modification because they contain an automatic sunset date. The order challenged in this appeal does not contain an automatic sunset date. Moreover, as described above, temporary guardianship orders are of short duration and may be extended only upon review by the district court. Like temporary custody orders, temporary guardianship orders are unsuitable for appellate review. *See In re Five Minors*, 105 Nev. at 443, 777 P.2d at 902 ("[P]eriodic review by the district courts of orders placing minor children in temporary protective custody renders the appellate process unsuitable for the review of such orders by this court.").

Carmen next contends that the temporary guardianship order is appealable under NRS 159.375(1). NRS 159.375(1) allows appeals from orders granting or revoking letters of guardianship. The order challenged in this appeal, however, does not grant or revoke letters of guardianship.[2] We decline to conclude that the order is appealable under NRS 159.375(1) because it impliedly reauthorizes the previously issued letters of temporary guardianship. *See Yonker Const., Inc. v. Hulme*, 126 Nev. 590, 591, 248 P.3d 313, 314 (2010) (statutes authorizing appeals from specified interlocutory orders are narrowly construed).

To the extent Carmen asserts that we should consider this appeal because it presents important issues implicating public policy, we are unable to do so. *See Brown v. MHC Stagecoach, LLC*, 129 Nev. 343, 345, 301 P.3d 850, 851 (2013) (this court "may only consider appeals authorized by statute or court rule"). Further, we deny Carmen's request to treat the appeal as a writ of prohibition or mandamus. Carmen may file an original petition for a writ under NRAP 21 if deemed warranted.

Accordingly, as Carmen fails to demonstrate that this court has jurisdiction, *see Moran v. Bonneville Square Assocs.*, 117 Nev. 525, 527, 25 P.3d 898, 899 (2001) (the burden lies with appellant to demonstrate that this court has jurisdiction), this appeal is dismissed. Given this dismissal, we need not consider whether the appeal was rendered moot by entry of a later order granting a general guardianship over the person and estate.

[2]NRS 159.375(1) does not expressly authorize appeals from letters of temporary guardianship, and in any case, no appeal was taken from the May 9, 2018, order issuing letters of temporary guardianship in this case.

CITY OF MESQUITE, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE GLORIA STURMAN, District Judge, Respondents, and DOUGLAS SMAELLIE, Real Party in Interest.

No. 75743

August 1, 2019 445 P.3d 1244

Original petition for a writ of mandamus or, alternatively, prohibition, challenging a district court order denying a motion to dismiss in an employment matter.

Petition granted.

Erickson Thorpe & Swainston, Ltd., and *Rebecca Bruch* and *Charity F. Felts*, Reno, for Petitioner.

Law Office of Daniel Marks and *Daniel Marks* and *Adam Levine*, Las Vegas, for Real Party in Interest.

Allison MacKenzie, Ltd., and *S. Jordan Walsh*, Carson City, for Amici Curiae Carson City School District, City of Sparks, Eureka County School District, Humboldt County, Humboldt County School District, Lander County School District, Lincoln County School District, Lyon County, and Truckee Meadows Water Authority.

Steven B. Wolfson, District Attorney, and *Scott Davis*, Deputy District Attorney, Clark County, for Amicus Curiae Clark County.

Mark Jackson, District Attorney, and *Douglas Ritchie*, Chief Deputy District Attorney, Douglas County, for Amicus Curiae Douglas County.

Before the Supreme Court, En Banc.

OPINION

By the Court, Hardesty, J.:

The question presented in this petition is what statute of limitations applies to a local government employee's complaint alleging both that the employer breached the collective bargaining agreement and that the union breached its duty of fair representation. The district court applied the six-year statute of limitations for contract claims. The employer, petitioner City of Mesquite, argues that the claims are subject to a six-month limitations period under Nevada's Local Government Employee-Management Relations Act (EMRA)

and federal labor law. However, without reaching the statute of limitations questions, we take this opportunity to clarify that there is no private cause of action to enforce a claim against a union for breach of the duty of fair representation in the first instance. Instead, the EMRA affords a local government employee an administrative process to bring such a claim. We conclude that the exclusive original jurisdiction over a claim against a union for breach of the duty of fair representation is vested in the Employee-Management Relations Board (EMRB), and district courts only have jurisdiction to review the EMRB's decision. Because our previous decision in this case may have suggested that both claims could proceed in the district court, and the parties and district court appear to have relied on that order, we exercise our discretion to consider the City's petition for a writ of mandamus and clarify the law.

FACTS AND PROCEDURAL HISTORY

The City of Mesquite employed real party in interest Douglas Smaellie as a police officer. A collective bargaining agreement between the City and the Mesquite Police Officer's Association (the Union) prohibited the City from terminating officers without cause and provided that off-duty arrests were not grounds for termination.[1] In February 2013, the City terminated Smaellie's employment based on his arrest while off duty. Smaellie filed a grievance with the Union and asked the Union to advance his grievance to arbitration. In April 2013, the Union declined to pursue arbitration because its legal defense coverage did not include off-duty conduct. Smaellie then asked the City to arbitrate his termination, but the City refused because only the Union could invoke arbitration under the collective bargaining agreement.

In February 2014, Smaellie filed a complaint against the City in district court alleging that the City breached the express terms of the collective bargaining agreement by terminating him without cause. Smaellie also alleged that he had attempted to exhaust his available remedies but had been prevented from doing so by the Union and/or the City. The district court dismissed the case with prejudice after concluding that Smaellie failed to demonstrate that he had standing as a third-party beneficiary of the collective bargaining agreement.

Smaellie appealed, and we affirmed in part the district court's dismissal of the complaint but concluded the dismissal should have been without prejudice, as it was based on standing. *See Smaellie v. City of Mesquite*, Docket No. 69741 (Order Affirming in Part and Vacating in Part, April 17, 2017). We explained that, in addition to not alleging that he was a third-party beneficiary, Smaellie failed to allege that the Union had breached its duty of fair representation,

[1]For the purposes of this opinion, we accept as true all of the facts alleged in the complaint.

which is a required component of a "hybrid" action.[2] In so explaining, this court relied upon federal labor law, and also cited *Clark County v. Tansey*, Docket No. 68951 (Order of Affirmance, March 1, 2017), for the conclusion that "the district court had subject matter jurisdiction to hear an employee's hybrid action against his employer for breach of the collective bargaining agreement and his union for breach of the duty of fair representation."

In August 2017, following the first appeal, Smaellie filed a new complaint against the City, in which he alleged that the City breached the collective bargaining agreement and that the Union, which had the sole right to invoke arbitration, breached its duty of fair representation by refusing to advance his grievance to arbitration. The City moved to dismiss for failure to state a claim upon which relief may be granted, arguing that Smaellie's claim as to the Union was time-barred because it was not filed within six months as required under the EMRA and federal labor law, and that Smaellie's claim against the City could not advance because it was dependent on the time-barred claim against the Union. The district court denied the City's motion to dismiss, finding that the six-year limitations period for actions based in contract applied.

The City filed the instant petition seeking a writ of prohibition or, alternatively, mandamus, in which it asks us to vacate the district court's order denying its motion to dismiss and to clarify which statute of limitations applies to this "hybrid" action.

Amici curiae, a collection of municipal and county entities, filed a brief arguing that Nevada law requires a breach-of-the-duty-of-fair-representation claim to be brought before the EMRB within six months after it arises; that the EMRB has exclusive original jurisdiction over such a claim; and that federal labor law allowing a private-sector employee to bring an unfair representation claim as part of a hybrid action in court without first exhausting administrative remedies does not apply in the public sector. In light of the arguments raised by the amici, we ordered the parties to provide supplemental briefing on the applicability of federal "hybrid" action law in the state public-sector context.

DISCUSSION

We elect to exercise our discretion to consider the petition

Writ relief is an extraordinary remedy, and it is within our discretion whether to entertain a petition seeking that relief. *Renown*

[2]In the federal scheme, a "hybrid" action consists of two separate but "inextricably interdependent" claims: a claim that the employer breached the collective bargaining agreement, and a claim that the union breached its duty of fair representation by failing to adequately pursue a grievance or arbitration on the employee's behalf. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164-65 (1983).

Reg'l Med. Ctr. v. Second Judicial Dist. Court, 130 Nev. 824, 827, 335 P.3d 199, 201 (2014). A writ of prohibition is used to restrain a district court from acting in excess of its jurisdiction. *See* NRS 34.320. A writ of mandamus is used "to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (footnote omitted); *see also* NRS 34.160. For a writ to issue, there must be "no plain, speedy, and adequate remedy at law." *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991); *see also* NRS 34.170; NRS 34.330. An appeal after final judgment usually constitutes an adequate and speedy legal remedy, and "we generally decline to consider writ petitions that challenge interlocutory district court orders denying motions to dismiss." *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. However, we will exercise our discretion to consider a petition denying a motion to dismiss when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Id*. at 197-98, 179 P.3d at 559.

In this case, the district court denied the City's motion to dismiss after determining that the six-year statute of limitations for actions arising from a contract controlled in this case and finding that the suit was not time-barred. *See* NRS 11.190(1)(b). The City and the amici take issue with the district court's reliance on the six-year statute of limitations, instead arguing that the governing limitations period is the six-month period used for unfair labor practice complaints filed before the EMRB. *See* NRS 288.110(4). We have not addressed the statute of limitations for an action that alleges both a breach-of-collective-bargaining claim and a breach-of-duty-of-fair-representation claim. Furthermore, we are concerned that our previous order in this matter may have misled the parties and the district court about the law surrounding "hybrid" actions in the state public-sector context. Thus, in the interest of judicial economy and to clarify the "hybrid" action for state public-sector cases, we exercise our discretion to consider the petition. *Renown*, 130 Nev. at 828, 335 P.3d at 202; *Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. 578, 581, 331 P.3d 876, 878 (2014).

No private cause of action exists to pursue a claim for breach of duty of fair representation brought in the district court in the first instance

The issue raised in this writ petition—what statute of limitations applies to a "hybrid" action filed by a public employee in district court—presupposes that both claims comprising the "hybrid" action

can be brought in a complaint filed in district court. However, as the EMRA's statutory scheme and our labor law jurisprudence make clear, a public employee has no private cause of action against a union for breach of the duty of fair representation. Rather, a public employee's right to fair representation arises under the EMRA, and, as we have previously held, the EMRB has exclusive original jurisdiction over any unfair labor practice arising under the EMRA, including a claim that the union breached its duty of fair representation. *Rosequist v. Int'l Ass'n of Firefighters Local 1908*, 118 Nev. 444, 447-49, 49 P.3d 651, 653-54 (2002) (citing NRS 288.110 and NRS 288.270(2)(a)), *overruled on other grounds by Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 573 n.22, 170 P.3d 989, 995 n.22 (2007). Furthermore, an employee must exhaust the administrative remedies set forth in the EMRA before seeking relief in the district court. *See City of Henderson v. Kilgore*, 122 Nev. 331, 336-37 & n.10, 131 P.3d 11, 14-15 & n.10 (2006). This means that the employee must present the fair-representation claim to the EMRB within six months of it arising. NRS 288.110(4); *see also Rosequist*, 118 Nev. at 450-51, 49 P.3d at 655. If the employee is aggrieved by the EMRB's decision, the employee then may seek judicial review of the EMRB's decision. NRS 288.130. Thus, when it comes to a fair-representation claim, the district court's jurisdiction is limited to reviewing the EMRB's decision.

Here, it is undisputed that Smaellie did not file a complaint with the EMRB; rather, he sought relief against the Union by filing a complaint directly in the district court. As explained above, the district court does not have jurisdiction over the fair-representation claim.[3]

Smaellie contends that the United States Supreme Court recognized in *Vaca v. Sipes*, 386 U.S. 171, 173 (1967), that an employee may bring a "hybrid" action in court without first exhausting administrative remedies. In *Vaca*, the Court held that a private-sector employee who alleged wrongful discharge against an employer, but who was prevented from exhausting the remedies under the collective bargaining agreement due to the union's refusal to pursue a grievance, could bring a hybrid claim in court and was not re-

[3]The jurisdictional defect did not preclude Smaellie from bringing his claim against the City for breach of the collective bargaining agreement. But where the collective bargaining agreement contains an exclusive grievance and arbitration procedure, any claim that the employer breached the collective bargaining agreement will necessarily depend on a showing that the union breached its duty of fair representation so as to excuse the employee from exhausting the grievance and arbitration procedures before suing the employer. Thus, without first raising the fair-representation claim through the administrative process provided by the EMRA and proving that the union breached its duty during the grievance or arbitration process, the employee cannot succeed on the merits of the contract claim against the employer.

quired to exhaust the fair-representation claim before the National Labor Relations Board (NLRB). 386 U.S. at 173, 175-76; *see also DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 165 (1983). That decision was grounded in the concern that though the federal labor statutes authorized an employee to sue his employer for breach of the collective bargaining agreement, no statutory provision allowed the court to enforce the union's duty of fair representation, and the NLRB had unreviewable discretion to refuse to institute a complaint. *Vaca*, 386 U.S. at 181-84. Thus, to avoid leaving the employee "remediless," the Court recognized a cause of action, known as a "hybrid" claim, whereby the employee could allege and prove in court both the employer's breach of the collective bargaining agreement and the union's breach of the duty of fair representation. *Id*. at 185-86; *DelCostello*, 462 U.S. at 164-65.

We have clear precedent rejecting *Vaca* and its judicially created "hybrid" action with respect to claims arising from the EMRA. In *Rosequist*, the employee had filed a complaint in district court against his public employer and union, alleging, among other things, a breach of the collective bargaining agreement against the employer and a breach of the duty of fair representation against the union. 118 Nev. at 447, 49 P.3d at 653. We held that the district court correctly dismissed the employee's claim against the union because the EMRA required him to bring that claim before the EMRB. *Id*. at 449, 49 P.3d at 654. While we noted the holding in *Vaca*, we declined to apply it because the concerns underlying *Vaca* were not implicated under Nevada's EMRA, which requires the EMRB to consider a timely filed unfair labor practices complaint and provides for judicial review of the EMRB's decisions. *Id*. at 449-50, 49 P.3d at 654.

More recently, however, in an unpublished order, this court applied *Vaca* to find that the district court had jurisdiction to adjudicate a public employee's "hybrid" action—both the claim against the employer for breach of a collective bargaining agreement and the claim against the union for breach of its duty of fair representation. *Clark Cty. v. Tansey*, Docket No. 68951 (Order of Affirmance, March 1, 2017). However, the *Tansey* order did not recognize the differences between the federal statutory scheme addressed in *Vaca* and the EMRA's statutory scheme or our prior decision in *Rosequist* that rejected *Vaca* based on those differences. Because our citation to the *Tansey* order when we resolved Smaellie's first appeal may have implied that the instant action is properly before the district court, we take this opportunity to disavow *Tansey* and clarify that a fair-representation claim must be raised before the EMRB within the six-month period prescribed in the EMRA, *see* NRS 288.110(4), and may be brought before the district court only by way of a petition for judicial review of an adverse decision by the EMRB, *see*

NRS 288.130. As this court already determined in *Rosequist*, the concerns underlying the Supreme Court's holding in *Vaca* are not present in Nevada's public-sector labor law. The EMRA statutory scheme and caselaw make clear that the EMRB is statutorily required to hear and resolve complaints alleging breach of duty of fair representation, *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 963, 194 P.3d 96, 103 (2008), and its decisions are subject to judicial review. Because Smaellie did not raise his claim for breach of the duty of fair representation before the EMRB, the dependent claim for breach of contract was not properly before the district court in the first instance.

CONCLUSION

Rosequist established that the EMRB has exclusive original jurisdiction over a claim for breach of the duty of fair representation, even when that claim is a necessary predicate to pursue a claim for breach of a collective bargaining agreement. Thus, there is no private right for a local government employee to pursue a fair-representation claim in the district court in the first instance, and there is no basis to allow Smaellie to proceed on that claim in the district court. Accordingly, we grant the City's petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying the City's motion to dismiss and to proceed consistent with this opinion.[4]

Gibbons, C.J., and Pickering, Parraguirre, Stiglich, Cadish, and Silver, JJ., concur.

IAN ANDRE HAGER, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 72613

August 29, 2019 447 P.3d 1063

Appeal from a judgment of conviction, pursuant to a jury verdict, of six counts of possession of a firearm by a prohibited person. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Reversed and remanded.

[Rehearing denied September 20, 2019]

[En banc reconsideration denied November 22, 2019]

[4]Given our disposition, we do not address which statute of limitations applies to a claim against an employer for breach of a collective bargaining agreement following an EMRB decision.

John L. Arrascada, Public Defender, and *John Reese Petty*, Chief Deputy Public Defender, Washoe County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, *Terrence P. McCarthy*, Chief Appellate Deputy District Attorney, and *Joseph R. Plater*, Appellate Deputy District Attorney, Washoe County, for Respondent.

Before the Supreme Court, Gibbons, C.J., Pickering and Hardesty, JJ.

OPINION

By the Court, Pickering, J.:

NRS 202.360 (2015) makes it a felony for certain categories of prohibited person to possess a firearm. A jury convicted Ian Hager of six counts of violating this statute. Counts one through three charged Hager with violating NRS 202.360(2)(a) by virtue of him possessing specified firearms as a person who has "been adjudicated as mentally ill . . . by a court of this State, any other state or the United States." Counts four through six charged Hager with illegally possessing the same firearms based on his status as a person who is "an unlawful user of, or addicted to, any controlled substance." NRS 202.360(1)(d).

This appeal presents questions as to both categories of prohibited person. First, is a defendant who is assigned to and successfully completes a mental health specialty court diversion program under NRS 176A.250 through NRS 176A.265 (2013) thereby "adjudicated as mentally ill," making it illegal for him to possess a firearm under NRS 202.360(2)(a)? Second, was it harmless error to instruct the jury in a way that theoretically allowed Hager to be convicted of illegal possession of a firearm by an "unlawful user" of a controlled substance under NRS 202.360(1)(d) based on a single current use of the substance?

We hold that Hager's assignment to and successful completion of a Nevada mental health court diversion program did not constitute an adjudication of mental illness that made his subsequent possession of a firearm a felony under NRS 202.360(2)(a). We further hold that, under NRS 202.360(1)(d), the jury should have been instructed that an "unlawful user" of a controlled substance is someone who regularly uses the substance, in a manner not medically prescribed, over a period of time proximate to or contemporaneous with possession of a firearm. Based on these holdings, we reverse the judgment of conviction as to counts one through three, and reverse and remand for a new trial before a correctly instructed jury as to counts four through six.

I.

In February 2013, Hager was arrested for outstanding warrants after being stopped for speeding on I-80 in Humboldt County. When they arrested Hager, the police found and confiscated two firearms. The Humboldt County district attorney charged Hager with illegally carrying a concealed weapon and another offense. After negotiations, Hager pleaded guilty to carrying a concealed weapon. In exchange for Hager's plea, the criminal case was suspended, the remaining charge was dismissed, and Hager was referred by Humboldt County to the mental health specialty court program that Washoe County established under NRS 176A.250 through NRS 176A.265.

A licensed mental health professional diagnosed Hager with post-traumatic stress disorder (PTSD) associated with traumatic family events. Hager's PTSD diagnosis, together with the fact he was neither charged with nor previously convicted of a felony involving violence or the threat of violence, made him eligible for Washoe County's mental health court diversion program. As part of the intake process, a presentence investigator interviewed Hager. Then 28 years old, Hager admitted in the interview that he had been addicted to methamphetamine between the ages of 12 and 19 but stated that, with the exception of a one-time use of methamphetamine in January 2013, he no longer used drugs.

After evaluation, and with Hager's consent, Washoe County assigned him to its mental health court diversion program. Among other conditions, the program required random drug and alcohol tests. As a result of his assignment, no judgment of conviction was entered on Hager's guilty plea in Humboldt County. In May 2014, Washoe County discharged Hager from its program based on his having successfully completed it, and Humboldt County dismissed its criminal case against him. Hager's "[d]ischarge and dismissal restore[d him], in the contemplation of the law, to the status occupied before the arrest, indictment or information," NRS 176A.260(4), and Hager's records were sealed, NRS 176A.265. After his discharge and dismissal, Hager filled out paperwork asking the State to return his confiscated firearms, which the State did in August 2015.

In 2015, police responded twice to disturbances at Hager's residence, and both times confiscated firearms. Later, Hager again contacted the police about returning his firearms. After completing the necessary paperwork and background check, the police again returned Hager's firearms to him, this time in January 2016.

A month later, in February 2016, Hager contacted a detective to discuss the police department's investigation into Hager's brother's death in 2012. Hager believed his brother had been murdered but the investigation concluded that Hager's brother's death resulted from an accidental methamphetamine overdose, not foul play. Hager asked the detective to reopen the investigation. After looking

into the case, the detective told Hager he found nothing to support reopening it. This infuriated Hager, and he sent the detective a link to a video he created and posted on Facebook. The record on appeal does not include the video but the trial transcript indicates that it shows Hager railing against the police for incompetence in attributing his brother's death to an accidental overdose, with Hager snorting a white substance from a baggy to dramatize how much methamphetamine a person can consume without overdosing. The video reportedly shows Hager with firearms beside him.

This and other social media posts Hager made led police to take Hager into custody for illegal possession of firearms. Hager consented to a search of his car, which did not turn up guns or drugs. Police then executed a search warrant at Hager's home and found the firearms underlying the charges in this case. They also found a glass pipe, and empty baggies commonly used to hold drugs, but no controlled substances or trace evidence of them. In the police interview that followed his arrest, Hager admitted possessing the firearms found in his home and that the substance he snorted in the Facebook video was meth—a statement Hager later denied at trial, where he testified the substance was salt.

Hager was charged with three counts of possession of a firearm after having been adjudicated mentally ill and three counts of possession of a firearm while being an unlawful user of, or addicted to, a controlled substance. A jury convicted Hager on all counts, and he appeals.

II.

Similar to its federal counterpart, illegal firearm possession under NRS 202.360 has three main elements: (1) a status element (the defendant falls within one of the categories of person the statute prohibits from possessing a firearm); (2) a possession element ("[a] person shall not . . . have in his or her possession"); and (3) a firearms element ("any firearm"). *See Rehaif v. United States*, 139 S. Ct. 2191, 2195-96 (2019) (stating the status, possession, and firearms elements of the federal firearms statute, 18 U.S.C. § 922(g) (2012)). Hager admits the possession and firearms elements of the charges against him. His appeal centers on whether the State satisfied the status elements of the two groups of crimes he stands convicted of.

A.

1.

Counts one through three charged Hager with violating NRS 202.360(2)(a).[1] The status element in that section is that of a person

[1]Hager participated in Washoe County's mental health specialty court program between 2013 and 2014 and allegedly committed his firearm-possession

who "[h]as been adjudicated as mentally ill . . . by a court." Reprinted in full for context, NRS 202.360(2) provides:

> *A person shall not* own or *have in his or her possession* or under his or her custody or control *any firearm if the person*:
>
> (a) *Has been adjudicated as mentally ill* or has been committed to any mental health facility *by a court of this State, any other state or the United States*;
>
> (b) Has entered a plea of guilty but mentally ill in a court of this State, any other state or the United States;
>
> (c) Has been found guilty but mentally ill in a court of this State, any other state or the United States;
>
> (d) Has been acquitted by reason of insanity in a court of this State, any other state or the United States; or
>
> (e) Is illegally or unlawfully in the United States.
>
> ➥ A person who violates the provisions of this subsection is guilty of a category D felony and shall be punished as provided in NRS 193.130.

(emphasis added). At trial, the State maintained that Hager had been adjudicated mentally ill in 2013 by virtue of his assignment to Washoe County's mental health court diversion program.

After the State rested its case, Hager orally moved to dismiss counts one through three.[2] His motion challenged whether assignment to and successful completion of a mental health court diversion program constitutes a sufficient adjudication of mental illness for NRS 202.360(2)(a) to apply. The district court denied the motion, crediting the State's position that this was a question of fact for the jury to decide. But the issue is legal, not factual—requiring us to interpret NRS 202.360(2)(a) and the mental health specialty court procedures and statutes, NRS 176A.250-.265, to determine what assignment to a mental health court diversion program entails and if it qualifies as an adjudication of mental illness for purposes of NRS 202.360(2)(a). Courts interpreting 18 U.S.C. § 922(g)(4), the federal analog to NRS 202.360(2), have uniformly held "that whether a defendant has been adjudicated a mental defective [in a prior state court proceeding] for the purposes of § 922(g)(4) is a question of law to be determined by the court rather than a question of fact to be reserved for the jury." *United States v. McLinn*, 896 F.3d 1152, 1156 (10th Cir. 2018) (noting that "every court of appeals to have addressed the issue has [so] held") (citing cases); *see United States*

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crimes between November 6, 2015, and April 8, 2016. Unless otherwise noted, references to statutes codified in NRS Chapters 176A and 202 are to the versions in effect at those times, not as later amended. *See* 2013 Nev. Stat., ch. 186, §§ 81-83, at 686-87 (amending the relevant portions of NRS Chapter 176A); 2015 Nev. Stat., ch. 329, § 15, at 1806-07 (amending NRS 202.360).

[2]Hager also filed a pretrial motion to dismiss that the district court denied as untimely.

v. Rehlander, 666 F.3d 45, 47, 50 (1st Cir. 2012). Since the issue is legal, our review of Hager's challenge to the judgment of conviction on counts one through three is de novo, not deferential.

2.

NRS 202.360(2)(a) does not define the phrase "adjudicated as mentally ill." The State cites the *Black's Law Dictionary* (10th ed. 2014) definition of "adjudicate—to rule on judicially" and equates assignment to a mental health court diversion program with an adjudication of mental illness. Hager counters with definitions of "adjudicate" that imply an adversary proceeding followed by a formal judicial decision, embodied in a final judgment. *See* Bryan A. Garner, *Garner's Dictionary of Legal Usage* 26 (3d ed. 2011) ("*Adjudication* = (1) the process of judging; (2) a court's pronouncement of a judgment or decree; or (3) the judgment so given."); *The American Heritage Dictionary of the English Language* 21 (5th ed. 2011) ("*Adjudicate* = 1. To make a decision in a legal case or proceeding: *a judge adjudicating on land claims*.").

Both interpretations are plausible. In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court held that the Second Amendment right to bear arms is a personal right not tethered to any militia. *See McDonald v. City of Chi., Ill.*, 561 U.S. 742, 750 (2010) (holding that the Second Amendment "right is fully applicable to the States"). Though the *Heller* opinion states that nothing in it "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," 554 U.S. at 626, post-*Heller* decisions recognize that "the right to possess arms (among those not properly disqualified) is no longer something that can be withdrawn by government on a permanent and irrevocable basis without due process," *Rehlander*, 666 F.3d at 48; *see United States v. McMichael*, 350 F. Supp. 3d 647, 659 (W.D. Mich. 2018). The loss of gun rights that follows a person's adjudication as mentally ill (or "a mental defective" under 18 U.S.C. § 922(g)(4)) or commitment to a mental institution is immediate and, in many instances, effectively permanent. *Beers v. Att'y Gen. U.S.*, 927 F.3d 150, 158-59 (3d Cir. 2019). In deciding whether an emergency hospitalization, temporary commitment order, or other summary proceeding qualifies as a sufficient adjudication of mental illness or commitment to make it illegal for an individual thereafter to possess a firearm, "an adjudicatory hearing, including a right to offer and test evidence if facts are in dispute, is required." *Rehlander*, 666 F.3d at 48.

Given this context, we conclude that, as used in NRS 202.360(2)(a), "[t]he plain meaning of 'adjudicated' connotes the involvement of a judicial decision-maker, the resolution of a dispute after consideration of argument by the parties involved, and a

deliberative proceeding with some form of due process." *Franklin v. Sessions*, 291 F. Supp. 3d 705, 715 (W.D. Pa. 2017) (construing the phrase "adjudicated as a mental defective" in 18 U.S.C. 922(g)(4)).

3.

By this measure, assignment to and successful completion of the mental health court diversion program Washoe County established pursuant to NRS 176A.250 "for the treatment of mental illness or intellectual disabilities" does not constitute a sufficient adjudication of mental illness for NRS 202.360(2)(a) to apply. To be sure, mental health court is supervised by a judge, who has the discretion to assign or refuse to assign a defendant to the program. *See* NRS 176A.250 (the mental health specialty court "*may* assign a defendant" to its diversion program) (emphasis added); NRS 176A.260(1) (similar). But participation in the program is voluntary; a defendant may not be diverted to mental health court absent consent. NRS 176A.260(1).

A defendant is eligible for diversion to mental health court if he or she "*appears* to suffer from mental illness or to be intellectually disabled." NRS 176A.255(2)(b) (emphasis added). This standard encompasses conditions—intellectual disability and types of mental illness that do not make a person a danger to him or herself or to others—that may not justify gun dispossession. And the standard is met, not by an adversarial hearing at the conclusion of which the judge finds the defendant is in fact mentally ill (or intellectually disabled), but by the submission to the mental health court team of a qualifying diagnosis by a licensed mental health professional, from which it can be said that the defendant "appears to suffer from mental illness or to be intellectually disabled." *Id.*; *see* Second Jud. Dist. Ct., *Policy and Procedure—Specialty Courts* 4, at 2 (eff. July 26, 2016). Unlike a commitment order, which requires a judge to find by clear and convincing evidence that the person is a danger to him or herself or to others, *see* NRS 433A.310(1)(b) (2017)—an adjudication that disarms the person under NRS 202.360(2)(a)—under the specialty court statutes as written at the time relevant to this appeal, a defendant was not eligible for diversion to mental health court if charged with a crime or convicted in the past of a felony involving violence or the threat of violence. *Compare* NRS 176A.260(2) (2013) ("If the offense committed by the defendant involved the use or threatened use of force or violence or if the defendant was previously convicted . . . of a felony that involved the use or threatened use of force or violence, the court may not assign the defendant to the program [unless the prosecuting attorney stipulates to the assignment]"), *with State v. Second Judicial Dist. Court (Hearn)*,

134 Nev. 783, 789-90, 432 P.3d 154, 160-61 (2018) (severing the bracketed language from NRS 176A.290(2) (2017), the then-analogous veteran's court statute, as an unconstitutional violation of the separation of powers doctrine).[3] And as Hager's paperwork and the trial testimony established, Hager's assignment to Washoe County's mental health court was documented not by an order, decree, or findings signed by a judge, but rather by an "acceptance letter" signed by a specialty courts officer.

NRS 179A.163 and the mental health reporting statutes it collects support that the Legislature has not equated assignment to a mental health court diversion program under NRS 176A.260 with an adjudication of mental illness that makes later possession of a firearm a felony under NRS 202.360(2)(a). State and federal firearms statutes emphasize prevention—keeping firearms out of the hands of those whose possession of them is illegal under 18 U.S.C. § 922(g) and state statutes like NRS 202.360. To that end, when a mental illness adjudication that disqualifies a person from thereafter possessing a firearm occurs in Nevada, the court that enters the adjudication is required, within 5 days, to transmit the record reporting the finding to the Central Repository for Nevada Records of Criminal History, "along with a statement indicating that the record is being transmitted for inclusion in each appropriate database of the National Instant Criminal Background Check System." NRS 159.0593(1) (requiring reporting of the appointment of a guardian for a protected person who has been found, by clear and convincing evidence, to be "a person with a mental defect who is prohibited from possessing a firearm"); *see* NRS 174.035(9) (same, for a defendant from whom a court accepts a plea of guilty but mentally ill); NRS 175.533(3) (same, for a defendant who is found guilty but mentally ill); NRS 175.539(4) (same, for a defendant who is acquitted by reason of insanity); NRS 178.425(6) (same, for a defendant who is found incompetent to stand trial); NRS 433A.310(7) (same, for a person who is involuntarily committed to a mental health facility). On "receiving a record transmitted pursuant to NRS 159.0593, 174.035, 175.533, 175.539, 178.425, or 433A.310, the [Nevada] Central Repository . . . [s]hall take reasonable steps to ensure that the information reported in the record is included in each appropriate database

[3]The 2019 Legislature amended NRS 176A.260 and NRS 176A.290(2) to eliminate the provisions excluding violent offenders from specialty court unless the prosecuting attorney stipulated and replaced it with separate provisions for mental health and veteran's specialty courts. *See* 2019 Nev. Stat., ch. 388, § 1 (amending NRS 176A.260(2) to provide that "[i]f the offense committed by the defendant is a category A felony or a sexual offense as defined in NRS 179D.097 that is punishable as a category B felony, the defendant is not eligible for assignment to the [mental health specialty court diversion] program."); 2019 Nev. Stat., ch. 388, § 3 (amending NRS 176A.290(2)).

of the National Instant Criminal Background Check System." NRS 179A.163(1). "Mandated by the Brady Handgun Violence Prevention Act of 1993," the National Instant Criminal Background Check System or "NICS is used by Federal Firearms Licensees (FFLs) to instantly determine whether a prospective buyer is eligible to buy firearms. Before ringing up the sale, cashiers call in a check to the FBI or other designated agencies to ensure that each customer does not have a criminal record or isn't otherwise ineligible to make a purchase." Federal Bureau of Investigation, *National Instant Criminal Background Check System (NICS)*, https://www.fbi.gov/services/cjis/nics (last visited 8/5/2019).

Notably, Nevada's mental health court diversion program statutes, NRS 176A.250 through NRS 176A.265, do not include a Central Repository reporting requirement. (In fact, NRS 176A.265(1) provides for the records to be sealed upon successful completion of the program.) Surely, if the Nevada Legislature equated assignment to a mental health court diversion program under NRS 176A.260 with an adjudication of mental illness for purposes of NRS 202.360(2)(a), it would have included in NRS 176A.250 through NRS 176A.265 a mandatory Central Repository report obligation like that imposed by NRS 159.0593, 174.035, 175.533, 175.539, 178.425, or 433A.310. It also would not have omitted NRS 176A.260 from the list of adjudications of mental illness that NRS 179A.163(1) requires the Central Repository to see added to all appropriate National Instant Criminal Background Check System databases.

4.

Even accepting the State's argument that assignment to mental health court constitutes an adjudication of mental illness that triggers application of NRS 202.360(2)(a), a defendant who successfully completes such a program is restored to the status he or she occupied before the assignment. NRS 176A.250-.265 create a diversion program: Upon the defendant's assignment, the court "without entering a judgment of conviction[,] . . . suspend[s] further proceedings and place[s] the defendant on probation upon terms and conditions that must include attendance and successful completion of [the] program." NRS 176A.260(1). If the defendant violates a term or condition, the "court may enter a judgment of conviction and proceed as provided in the section pursuant to which the defendant was charged," NRS 176A.260(3)(a)—whereupon, if the crime charged was a felony, the defendant is disarmed by virtue of his status as a convicted felon under NRS 202.360(1)(a). But if the defendant fulfills the terms and conditions imposed, "the court shall discharge the defendant and dismiss the proceedings." NRS 176A.260(4). The statute continues:

> Discharge and dismissal pursuant to this section is without adjudication of guilt and is not a conviction for purposes of this section or for purposes of employment, civil rights or any statute or regulation or license or questionnaire or for any other public or private purpose, but is a conviction for the purpose of additional penalties imposed for second or subsequent convictions or the setting of bail. *Discharge and dismissal restores the defendant, in the contemplation of the law, to the status occupied before the arrest, indictment or information.*

(emphasis added).

Hager successfully completed Washoe County's mental health court diversion program in 2014. The "[d]ischarge and dismissal" that resulted "restore[d Hager], in the contemplation of the law, to the status [he] occupied before [his] arrest, indictment or information" in Humboldt County in 2013. *Id*. In 2013, Hager did not occupy the status of a person who has "been adjudicated as mentally ill" for purposes of firearm dispossession under NRS 202.360(2)(a). The State charged Hager with illegally possessing firearms between November 2015 and April 2016. By then, his discharge and dismissal from the mental health court diversion program had "restore[d]" him to the pre-assignment status he occupied in 2013. NRS 176A.260(4). Confirming this, the State returned the firearms it confiscated from Hager in 2013 to him in 2015.

The State presses us to accept that NRS 202.360(2)(a)'s use of the phrase "has been adjudicated as mentally ill" signifies a permanent prohibition and that being disarmed as a result of assignment to a mental health court diversion program is a species of "additional penalt[y]," NRS 176A.260(4), that survives dismissal and discharge from the program. But that reading of NRS 202.360(2)(a) cannot be squared with NRS 176A.260(4)'s declaration that discharge and dismissal restores a defendant to his or her pre-assignment status. *Cf. Lewis v. United States*, 445 U.S. 55, 61 n.5 (1980) (rejecting the proposition that a person "who has been convicted" of a felony and thus disarmed by the predecessor statute to 18 U.S.C. § 922(g)(1) retains that status and cannot thereafter legally possess a firearm even if the conviction is later vacated and the felony charge dismissed). The State cannot constitutionally hold "an individual criminally responsible for conduct which he could not reasonably understand to be proscribed." *Gallegos v. State*, 123 Nev. 289, 293, 163 P.3d 456, 458 (2007) (internal quotation marks omitted). By its plain terms, NRS 176A.260(4) restored Hager to his pre-2013 arrest status after he successfully completed Washoe County's mental health court program, a reading the State itself confirmed by returning his firearms to him in 2015. Hager's judgment of conviction on counts one through three fails as a matter of law.

B.

Hager also appeals his conviction on counts four through six, which charged him with illegal possession of firearms by a person who "is an unlawful user of, or addicted to, any controlled substance," a category B felony under NRS 202.360(1)(d). Hager challenges the sufficiency of the evidence to sustain his convictions on these counts and the adequacy of the jury instruction defining "unlawful user."

1.

A challenge to the sufficiency of the evidence asks "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Middleton v. State*, 114 Nev. 1089, 1103, 968 P.2d 296, 306 (1998) (internal quotation marks omitted). As with counts one through three, Hager admits the possession and firearms elements of counts four through six but disputes the status element. Hager asserts that the State failed to provide sufficient evidence that he possessed firearms while being an unlawful user of, or addicted to, drugs because the police did not find any controlled substances in Hager's possession, only drug paraphernalia, which Hager claims he last used many years ago.

NRS 202.360(1)(d)'s prohibition against a person who "[i]s an unlawful user of, or addicted to, any controlled substance" possessing a firearm mirrors the similar prohibition in 18 U.S.C. § 922(g)(3). Neither statute defines "unlawful user" or "addicted to." The meaning of "addiction" is straightforward: "The habitual and intemperate use of a substance . . . frequently and without the ability to stop on one's own." *Addiction*, *Black's Law Dictionary* (11th ed. 2019). The meaning of "unlawful user" is less clear, but prevailing federal caselaw holds that "unlawful user" is not the same thing as "addicted to," *see United States v. Bennett*, 329 F.3d 769, 776 (10th Cir. 2003), and that to sustain a conviction under § 922(g)(3) of illegally possessing a firearm by "an unlawful user of" a controlled substance, the government must prove "that the defendant took drugs with regularity, over an extended period of time, and contemporaneously with his purchase or possession of a firearm." *United States v. Purdy*, 264 F.3d 809, 813 (9th Cir. 2001); *see United States v. Augustin*, 376 F.3d 135, 138-39 (3d Cir. 2004) ("Those of our sister courts of appeals that have considered 18 U.S.C. § 922(g)(3) have concluded, as do we, that one must be an unlawful user at or about the time he or she possessed the firearm and that to be an unlawful user, one needed to have engaged in regular use over a period of time proximate to or contemporaneous with the possession of the firearm.") (collecting cases). "The use of the present

tense"—criminalizing firearm possession by a person "who *is* an unlawful user"—"was not idle." *Augustin*, 376 F.3d at 138 (internal quotation marks omitted); *see United States v. Yancey*, 621 F.3d 681, 687 (7th Cir. 2010) ("Every circuit to have considered the question has demanded that the habitual abuse be contemporaneous with the gun possession.").

Had the jury accepted Hager's testimony that he overcame his addiction to methamphetamine by the time he turned 20, that the substance in the Facebook video was salt, and that his last use of methamphetamine was a single use in 2013, it might have acquitted him. But the jury was not required to credit Hager's testimony. And judged by *Middleton*'s highly deferential standard—could "*any* rational trier of fact . . . have found the essential elements of the crime beyond a reasonable doubt"?, 114 Nev. at 1103, 968 P.2d at 306—sufficient evidence supports Hager's convictions on counts four through six. Regarding Hager's drug use, the State presented evidence that Hager was addicted to methamphetamine from 1997-2004, suffered a relapse in 2013, and also abused Oxycodone; that in the Facebook video Hager forwarded to the detective in 2016, Hager appears to ingest methamphetamine with firearms in the background; that in his interview with officers after his arrest for firearm possession, Hager admitted the substance in the video was meth; and that after searching Hager's house pursuant to his arrest, police found drug paraphernalia—a glass pipe and baggies. This evidence, although some of it circumstantial, is enough to show that Hager either maintained his prior addiction to methamphetamine or was using the drug regularly, proximate to, or contemporaneous with his firearm possession between December 2015 and April 2016. *See Canape v. State*, 109 Nev. 864, 869, 859 P.2d 1023, 1026 (1993) ("circumstantial evidence may constitute the sole basis for a conviction").

2.

Hager next challenges jury instruction 16, in which the district court stated the elements of the crime of possessing a firearm while an unlawful user of, or addicted to, a controlled substance. Over Hager's objection, the instruction defined "unlawful user" as "a person who uses any controlled substance." Hager asserts that this definition of "user" was too broad and erroneously permitted his conviction based on a single use proximate in time to the illegal firearms possession charge, an invalid theory for conviction under NRS 202.360(1)(d). Although a district court has "broad discretion to settle jury instructions[,] we review de novo whether a particular instruction, such as the one at issue in this case, comprises a correct statement of the law." *Cortinas v. State*, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008).

We noted but did not resolve the question of whether a person can be convicted of being an unlawful user of a controlled substance in possession of a firearm under NRS 202.360(1)(d) based on a single use of a controlled substance in *Byars v. State*, 130 Nev. 848, 860, 336 P.3d 939, 947 (2014). Consistent with the federal caselaw just discussed, *see* § II.B.1, *supra*, we hold that "an unlawful user" of a controlled substance for purposes of NRS 202.360(1)(d) is a person who regularly uses the substance, in a manner not medically prescribed, over a period of time proximate to, or contemporaneous with, possession of a firearm. Under this caselaw, a single use of the drug is insufficient to establish a person as an "unlawful user." *Augustin*, 376 F.3d at 139. As stated in *United States v. Burchard*, 580 F.3d 341, 346 (6th Cir. 2009):

> A one time use of a controlled substance is not sufficient to be an unlawful user under the applicable statute. Rather, the [d]efendant must have been engaged in the regular use of a controlled substance either close in time to or contemporaneous with the period of time he possessed the firearm.

Jury instruction 16 failed to capture the concept of regular use, proximate in time to the illegal firearm possession charged. Though the State argues otherwise, instruction 17, which added that "an unlawful user may regain his right to possess a firearm simply by ending his drug use," does not clarify that conviction must rest on more than a single contemporaneous use.

Under *Cortinas v. State*, 124 Nev. at 1026-27, 195 P.3d at 324, we must determine "whether the instructional error in this case is harmless beyond a reasonable doubt." Consistent with NRS 202.360(1)(d), instruction 16 allowed the jury to convict Hager based on his status as either an "unlawful user" or a person "addicted to" a controlled substance. The jury returned a general verdict, without specifying the theory on which it convicted him. It is possible that the error in defining "unlawful user" did not affect the verdict, since the jury could have convicted Hager on the theory he had been and remained addicted to methamphetamine when the alleged unlawful firearm possession occurred. But the State's search of Hager's car and house turned up no direct evidence of possession of methamphetamine—only a glass pipe and baggies. And from the evidence of Hager's drug use presented at trial, the jury equally could have convicted Hager based on the video that depicted him snorting meth in the presence of firearms in 2016—a single use that qualified Hager as an "unlawful user" due to the objected-to error in instruction 16. Because doubt exists as to whether a correctly instructed jury would have convicted Hager, it is not clear beyond a reasonable doubt that the misstatement of law in the instruction was harmless.

For these reasons, we reverse Hager's convictions on counts one through three and reverse and remand for a new trial on counts four through six.

Gibbons, C.J., and Hardesty, J., concur.

LAURA DeMARANVILLE, Surviving Spouse of DANIEL DeMARANVILLE (Deceased), Appellant/Cross-Respondent, *v.* EMPLOYERS INSURANCE COMPANY OF NEVADA; and CANNON COCHRAN MANAGEMENT SERVICES, INC., Respondents, and CITY OF RENO, Respondent/Cross-Appellant.

No. 72737

September 5, 2019 448 P.3d 526

Appeal and cross-appeal from a district court order granting in part and denying in part a petition for judicial review in a workers' compensation matter. First Judicial District Court, Carson City; James E. Wilson, Judge.

Affirmed in part, reversed in part, and remanded.

Evan B. Beavers, Nevada Attorney for Injured Workers, *Samantha Peiffer*, Deputy Nevada Attorney for Injured Workers, Carson City, for Appellant/Cross-Respondent.

Sertic Law Ltd. and *Mark S. Sertic*, Reno, for Respondent Employers Insurance Company of Nevada.

McDonald Carano LLP and *Timothy E. Rowe* and *Chelsea Latino*, Reno, for Respondent Cannon Cochran Management Services, Inc., and Respondent/Cross-Appellant City of Reno.

Before the Supreme Court, Hardesty, Stiglich and Silver, JJ.

OPINION

By the Court, Stiglich, J.:

This appeal and cross-appeal concern a claim for workers' compensation death benefits. Laura DeMaranville sought benefits after her husband Daniel DeMaranville died as a result of heart disease. After Daniel's former employer, the City of Reno, and its former insurer, Employers Insurance Company of Nevada (EICON), denied benefits, an appeals officer reversed, finding that Daniel's death was

caused by compensable occupational heart disease, that the City of Reno was liable as the self-insurer, and that the amount of the claim was based on Daniel's income from his private employer at the time of death. The district court affirmed the appeals officer's decisions as to compensability and liability and reversed as to the award amount, concluding that the award should be based on Daniel's wages from the City on the date of disablement (death), which were zero.

Because EICON insured the City when Daniel was last exposed to the risk that was causally connected to his occupational disease, EICON was liable under the last injurious exposure rule. We therefore reverse the liability determination, as the last injurious exposure rule determines the liable insurer for an occupational disease claim that arose out of and in the course of employment, even if the employee no longer works for that employer. We also reverse the award amount determination because for a death benefit claim for an occupational disease arising out of and in the course of employment under the statutory scheme as it applied to Daniel's claim, the monthly compensation amount should be based on the deceased employee's earnings in the employment causally connected to the occupational disease underpinning the claim. Thus, death benefits should have been based on Daniel's wages at the time he last worked for the City.

FACTS AND PROCEDURAL HISTORY

Daniel worked for the City as a police officer from 1969 to 1990. He retired from that position and began working as a security officer for a private company. EICON insured the City's workers' compensation and occupational disease claims through 2002, when the City began to self-insure. On August 5, 2012, Daniel died from cardiac arrest shortly after a laparoscopic cholecystectomy (gallbladder removal surgery).

Laura filed a claim for compensation for occupational disease with the City. The City denied the claim, finding that the evidence did not show that heart disease caused Daniel's death. Laura appealed, and the parties agreed to forego a hearing before the hearing officer in favor of proceeding directly to an appeals officer. *Cf.* NRS 616C.315(7). After being informed that EICON was the appropriate insurer, Laura separately filed a claim with EICON, which also denied the claim on the basis that the evidence did not establish that Daniel died from heart disease. Laura appealed EICON's determination to a hearing officer, who reversed EICON's denial and held EICON liable. EICON appealed the hearing officer's decision. The City also appealed EICON's claim denial.

After consolidating the three appeals, the appeals officer considered several medical opinions and found that Daniel had heart disease that caused his death and that his heart disease was compensable as an occupational disease under NRS 617.457. The ap-

peals officer concluded that the date of disablement was August 5, 2012—the date of Daniel's death—and that the City was liable for the claim because it was a self-insured employer on the date of disablement. Holding that the City was liable, the appeals officer reversed the hearing officer's decision that EICON was liable for the claim, reversed the City's determination letter denying the claim, and affirmed EICON's determination letter denying the claim.

The City petitioned for judicial review of the appeals officer's decision. As that petition was pending and to comply with the appeals officer's decision, the City issued a determination that based the monthly amount for Daniel's death benefits on Daniel's wages in 1990 when he last worked for the City. Laura appealed this determination, seeking compensation based on the amount of Daniel's earnings from his private employer at the time of his death in 2012. A hearing officer affirmed the City's determination, and Laura appealed again. The appeals officer reversed the hearing officer's decision and concluded that the monthly benefit should be based on Daniel's wages as of the date of disablement. The City and EICON each petitioned for judicial review of the decision that the monthly benefit should be based on Daniel's 2012 wages from his private employer.

After consolidating these petitions for judicial review, the district court entered an order granting the petitions in part and denying them in part. The district court affirmed the finding that Daniel died from heart disease, a compensable occupational disease; affirmed the conclusion that the City was the liable insurer based on the date of disablement, ruling that the last injurious exposure rule did not apply; and reversed the conclusion that the monthly benefit was based on Daniel's 2012 wages from his private employer, ruling that the monthly benefit was based on Daniel's wages on the date of disablement from the covered employer, the City, which were zero in 2012. Laura appealed, and the City cross-appealed.[1]

On appeal, Laura argues that her monthly benefits should be based on Daniel's 2012 wages from his private employer. The City argues that the evidence did not show that Daniel died from heart disease, that EICON should be liable for any viable claim because it insured Daniel's claims during his employment by the City, and that any benefit calculation should be based on Daniel's wages from the City at the time of disability, which were zero. EICON agrees with the district court that the correct benefit amount should be zero and that the City should be liable for any viable claim, but argues that it could not be liable for any claim because this court deprived it of

[1]EICON also cross-appealed, but its cross-appeal was dismissed for want of standing and its participation was limited to filing an answering brief. *See DeMaranville v. Cannon Cochran Mgmt. Servs., Inc.*, Docket No. 72737 (Order Dismissing Cross-Appeal and Reinstating Briefing, January 25, 2018); *cf.* NRAP 3A(a).

due process by precluding it from arguing that Daniel's death benefit claim was not viable.

DISCUSSION

Substantial evidence supports the finding that Daniel died from heart disease

Our role in reviewing an administrative agency's decision is the same as the district court's, and we give no deference to the district court's decision. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). We review an administrative agency's legal conclusions de novo and its factual findings for clear error or an abuse of discretion and will only upset those findings that are not supported by substantial evidence. *Id.* Substantial evidence is present where "a reasonable person could find the evidence adequate to support the agency's conclusion." *Id.* (internal quotation marks omitted).

In Nevada, the surviving spouse and dependents of an employee who dies from an occupational disease arising out of and in the course of that employment are entitled to compensation. NRS 617.430(1). A person who has been employed as a police officer for at least five continuous years and is disabled by heart disease is conclusively presumed to have a compensable claim for occupational disease benefits. *See* NRS 617.457(1) (2011).[2] An employee's heart disease may be compensable even if first discovered after the employee has terminated his or her employment. *See Gallagher v. City of Las Vegas*, 114 Nev. 595, 601-02, 959 P.2d 519, 522-23 (1998).

The City argues that substantial evidence did not support the finding that Daniel's death was caused by heart disease. We disagree. After surgery, Daniel became hypotensive and tachycardic (low blood pressure and an elevated heart rate). Troponin I enzymes (cardiac enzymes) were drawn, showing a level of 0.32 ng/mL. Daniel suffered cardiac arrest and could not be resuscitated. Daniel's surgeon, Dr. Myron Gomez, certified the cause of death as cardiac arrest caused by atherosclerotic heart disease. Dr. Charles Ruggeroli, a cardiologist specialist, concluded that heart disease caused Daniel's death, noting that Daniel had several cardiovascular risk factors and a baseline abnormal resting electrocar-

[2]At all pertinent times in these proceedings, NRS 617.457 applied as amended in 2011. *See* 2011 Nev. Stat., ch. 124, § 2, at 584-85.

Consequently, we note that our reasoning here does not apply to claims subject to the 2015 amendments to NRS 617.457 that would have limited Daniel to receiving medical benefits and became effective on January 1, 2017. *See* 2015 Nev. Stat., ch. 420, §§ 3, 7, at 2429-31, 2433 (adding the limitation that "[a] person who files a claim for a disease of the heart specified in this section after he or she retires from employment as a firefighter, arson investigator or police officer is not entitled to receive any compensation for that disease other than medical benefits").

diogram; that Daniel was in good condition after surgery but then became hypotensive and tachycardic; and that Daniel's levels of troponin I were elevated, consistent with myocardial necrosis (heart damage) and heart disease as a cause of death. Dr. Jay Betz, an occupational medicine specialist, concluded that heart disease was a probable cause of death but posited that a certain cause of death could not be determined without an autopsy. Dr. Sankar Pemmaraju, a physical medicine and rehabilitation specialist, concluded that Daniel had several risk factors consistent with heart disease. Drs. Yasmine Ali and Zev Lagstein, internal medicine and cardiovascular disease specialists, however, concluded that heart disease was not likely the cause of death, though both were unaware that cardiac enzymes were drawn and showed an elevated level. Noting that the appeals officer found Dr. Ruggeroli's opinion to be credible, *see Elizondo*, 129 Nev. at 784, 312 P.3d at 482 (providing that this court will not "revisit an appeals officer's credibility determination" (internal quotation marks omitted)), and that the medical experts disagreeing that heart disease was the cause of death were unaware of Daniel's elevated troponin I level, we conclude that the record contains substantial evidence for a reasonable person to conclude that heart disease caused Daniel's death and thus that the district court did not err in upholding the appeals officer's determination in this regard.

The last injurious exposure rule applies in determining liability for occupational disease claims for conclusively presumed disabilities

As Daniel's dependents had a compensable claim for his occupational disease, we must determine which entity was liable to pay the benefit under the Nevada Occupational Diseases Act. The last injurious exposure rule places "full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability." *State Indus. Ins. Sys. v. Jesch*, 101 Nev. 690, 696, 709 P.2d 172, 176 (1985) (internal quotation marks omitted). The rule is a judicial creation, *Riverboat Hotel Casino v. Harold's Club*, 113 Nev. 1025, 1029-30, 944 P.2d 819, 822-23 (1997), the application of which we review de novo. *See State Indus. Ins. Sys. v. Foster*, 110 Nev. 521, 523, 874 P.2d 766, 768 (1994) (reviewing agency's conclusion concerning judicially created rule in workers' compensation matter de novo). We have previously applied the last injurious exposure rule to determine liability where a workers' compensation disability claimant had successive employers that could each have been liable for the claim. *Emp'rs Ins. Co. of Nev. v. Daniels*, 122 Nev. 1009, 1016-17, 145 P.3d 1024, 1029 (2006). We conclude that this rule applies here as well, where a claimant's occupational disease is conclusively presumed to have arisen out of and in the course

of employment pursuant to NRS 617.457(1) and has not been shown to be caused by later employment with a successive employer.

As Daniel's heart disease is conclusively presumed to have arisen out of and in the course of his employment with the City, liability falls on the carrier of the City's risk at the time Daniel worked for the City because that employment is the latest exposure causally connected to Daniel's occupational disease. *See* NRS 617.410 (providing that compensation for an occupational disease claim "must be paid by the insurer"); NRS 617.457(1) (providing for compensation for heart disease as an occupational disease that is conclusively presumed to be connected to a qualifying claimant's employment); *Daniels*, 122 Nev. at 1017, 145 P.3d at 1029 (concluding that the employer temporally closest to the disabling event to whom the conclusive presumption applies is liable for a claim with successive, conclusively presumed employers). EICON was the City's insurer in 1990 when Daniel had his last injurious exposure to the risk causally connected to his occupational disease and thus is liable under the last injurious exposure rule. The City's subsequent change to self-insured status and decision to carry its own risk does not affect the determination that EICON insured the risk at the causally relevant time. We therefore conclude that the appeals officer and the district court both erred in concluding that City was liable based on the date of Daniel's death.

The occupational disease death benefit amount is based on the wages earned during the period causally connected to the occupational disease

We next review the appeals officer's and district court's determinations regarding the amount of compensation appropriate for Daniel's death benefit. NRS Chapter 617 does not provide a method for determining the amount of the benefit, *Mirage Casino-Hotel v. Nev. Dep't of Admin. Appeals Officer*, 110 Nev. 257, 260, 871 P.2d 317, 319 (1994), but applies NRS Chapters 616A to 616D and their implementing regulations for the purpose of determining benefits, NRS 617.015; NRS 617.430(1). The application of these statutes to determine the proper period from which to calculate occupational death benefits is a purely legal question that we review de novo. *Mirage*, 110 Nev. at 259, 871 P.2d at 318. When a statute is unambiguous, we apply its ordinary meaning. *Valdez v. Emp'rs Ins. Co. of Nev.*, 123 Nev. 170, 174, 162 P.3d 148, 151 (2007). When it may be given more than one reasonable interpretation, it is ambiguous and should be interpreted consistent with the Legislature's intent, according with reason and public policy. *Id.*

NRS 616C.505 sets forth the amount of a death benefit for an occupational disease claim. *See Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 224-25, 19 P.3d 245, 246-47 (2001) (interpreting

NRS 616C.505 as controlling the death benefits where an employee died from work-related lung disease). Notwithstanding burial and other related expenses and in the absence of other dependents, a surviving spouse may recover 66 2/3 percent of the decedent's average monthly wage for the life of the surviving spouse. NRS 616C.505(1)-(2). To determine average monthly wage, the adjudicator considers the employee's earnings from a period of 12 weeks "ending on the date on which the accident or disease occurred, or the last day of the payroll period preceding the accident or disease if this period is representative of the average monthly wage" pursuant to NAC 616C.435(1), (8). While the date of occurrence for an industrial accident may be unambiguous, the date of occurrence for an occupational disease is not. *See Union Carbide Corp. v. Indus. Claim Appeals Office of Colo.*, 128 P.3d 319, 321 (Colo. App. 2005) (observing that the occurrence of an occupational disease is ambiguous because the disease may be interpreted as occurring when the worker "is injuriously exposed to the disease, when the disease is first diagnosed, when symptoms first appear, or when the disease becomes disabling"); *see also Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1222 (6th Cir. 1980) (concluding that "injury" and "occurrence" are ambiguous in the context of progressive diseases, which are distinguishable from injuries resulting from common accidents). Accordingly, we must ascertain the relevant legislative intent.

We conclude that the statutory scheme that provides for and regulates compensating a disabled employee for an occupational disease demonstrates a legislative intent to compensate viable claims. For a decedent like Daniel with a claim conclusively connected with employment, but who worked for a different employer at death, two interpretations present themselves: (1) either the Legislature intended the amount of Daniel's monthly death benefits to be zero because he did not work for the employer causally connected to his claim immediately before his disablement, i.e., his death, or (2) the Legislature intended the amount of death benefits to be based on actual wages Daniel earned. As basing Daniel's death benefits on his wages from the City at the time of death would effectively nullify any claim for an occupational disease arising more than 12 weeks after terminating the employment that is causally connected to the disease, *cf.* NAC 616C.435, we conclude that interpretation conflicts with the Legislature's intent, as numerous provisions envision compensating claims arising after separation from service without reference to a 12-week limiting period, *see* NRS 616C.052(3) (requiring testing for certain diseases 12 months after termination of employment that establishes lifetime eligibility for claims for those diseases); NRS 616C.150 (providing that employees may show after terminating employment that an industrial injury claim was causally connected to the employment and thus compensable); NRS 617.358(2) (same for occupational diseases); NRS 617.453(5) (contemplating

compensable disabling cancer for firefighters arising in the period up to 60 months after terminating employment); NRS 617.487(5) (contemplating compensable disabling hepatitis for police officers first diagnosed within one year after terminating employment); *see also Gallagher*, 114 Nev. at 601, 959 P.2d at 522 (concluding that it would be unreasonable to deny claims of retired firefighters "because they did not discover their heart disease until some months after they retired"), and NRS Chapter 617 invites application of other provisions of NRS Chapters 616A to 616D in constructing its provisions, *see* NRS 617.015 (directing reference to NRS Chapters 616A to 616D). *See Banegas*, 117 Nev. at 229, 19 P.3d at 250 (providing that statutes should be construed within the context of the purpose of the legislation). Administrative regulations cannot contradict the statutes they implement, *Nev. Attorney for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 83, 225 P.3d 1265, 1271 (2010), and construing NAC 616C.435 to provide a monthly benefit of zero in many of these instances would effectively nullify the provisions in these statutes that establish compensable claims. *See also Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 366, 184 P.3d 378, 386 (2008) (providing that statutory construction must not render any provisions nugatory).

The City and EICON argue that this court's decisions in *Howard* and *Mirage* hold that Daniel's death benefit should be based on his 2012 wages from the City and thus equal zero. We disagree, as those cases are distinguishable on several bases. First, they addressed disability benefits, not death benefits, as here. *Howard v. City of Las Vegas*, 121 Nev. 691, 693, 120 P.3d 410, 411 (2005); *Mirage*, 110 Nev. at 260, 871 P.2d at 319. Second, they involved claims by the disabled employee, not an independent claim sought by a surviving dependent, as here. *See State Indus. Ins. Sys. v. Lodge*, 107 Nev. 867, 871, 822 P.2d 664, 666-67 (1991) (presupposing that widow's death benefit claim was an independent claim that was not foreclosed by decedent employee's failure to timely claim disability benefits before his death); *see also Survivors of Young v. Island Feeling, Inc.*, 125 P.3d 476, 480-81 (Haw. 2005) (collecting cases stressing distinction between claims for death and disability benefits). Third, both *Howard* and *Mirage* rested their conclusions that disability benefits were unavailable on the provision in NRS 617.420(1) limiting compensation payable for temporary total disability. *Howard*, 121 Nev. at 695, 120 P.3d at 412; *Mirage*, 110 Nev. at 260, 871 P.2d at 319. That provision plainly does not apply here, as temporary total disability and death benefits are calculated differently, demonstrating the Legislature's intent that the two categories of benefits are distinct. *Compare* NRS 616C.475, *with* NRS 616C.505 (starting separate statutory sections by setting forth different calculations for disability and death benefits); *Banegas*, 117 Nev. at 230, 19 P.3d at 250 (considering titles affixed to statutes or subsections in ascertain-

ing legislative intent). Fourth, providing that Daniel's dependents could not recover a meaningful death benefit would be contrary to the statutory "purpose of providing economic assistance to persons who suffer disability or death as a result of their employment." *See Banegas*, 117 Nev. at 231, 19 P.3d at 251; *see also* NRS 617.430(1) (providing that dependents are entitled to compensation where an employee dies as a result of an occupational disease). And fifth, negating the value of Daniel's death benefit would be inconsistent with the legislative intent evinced by the Legislature expanding the coverage of this type of occupational disease claim to a conclusive presumption for police officers like Daniel. *See* NRS 617.457(1); *Gallagher*, 114 Nev. at 601, 959 P.2d at 522. As *Howard* and *Mirage* are distinguishable, the district court erred in concluding that Daniel's death benefit amount was zero because he was not earning wages from the City when he died.

We further conclude that the legislative intent supports that Daniel's death benefit should be related to the wage earned at the time the occupational disease causally connected to the disability occurred. The Legislature created an entitlement for an employee who is injured or dies because of an occupational disease that arises out of and in the course of employment in Nevada to recover compensation. NRS 617.430(1). The compensation paid to an employee or his or her dependents is based on the value received by the employee for his or her services, NRS 616A.090; NAC 616C.420, in the employment in which the injury or disease occurs, NAC 616C.435(9). The Legislature intended the linkage between an employee's compensable claim and employment to be so great that, in certain cases like this one, the connection is conclusively presumed. *See* NRS 617.457(1). Thus, the applicable statutory scheme shows a legislative intent to base the amount of Daniel's death benefits claim on the earnings from the employment causally connected to the occupational disease underpinning his claim. Accordingly, we disagree with Laura's argument that Daniel's death benefit claim should reflect his 2012 wages from his private employer rather than his 1990 wages from the City.

The role and liabilities of the insurer of this claim support this conclusion. The Legislature provided that the insurer who carries the risk of employee injury and illness must pay any compensable claim. NRS 617.410. Consistent with the legislative intent that we have discussed, the insurer's obligations for such claims should be based on the employment from which both the claim and the occupational disease arose, as that is the risk that the insurer insured. *See MGM Mirage v. Nev. Ins. Guar. Ass'n*, 125 Nev. 223, 231, 209 P.3d 766, 771 (2009) (observing that insurers traditionally undertake a duty to pay claims in exchange for the consideration of premium payments from the insured in construing an insurer's obligations on workers' compensation claims). To hold otherwise and base death

benefits compensation on employment unrelated to the occupational disease or the claim that the insurer must pay would require insurers to pay obligations unrelated to the risk that they agreed to insure. Such an outcome would be both unreasonable and unfair.

Accordingly, we conclude that the applicable statutory scheme envisioned that Daniel's death benefits for his occupational disease claim should be based on the employment from which his disease arose. For purposes of determining his claim, we conclude that an occupational disease occurs for the purposes of an original death benefits claim on the last day of the disease-risk exposure that is causally connected to the disease. The district court therefore should have relied on Daniel's 1990 wages from the City and should have concluded that the appeals officer erred in relying on Daniel's 2012 private-employer wages.

EICON has not shown a due process violation

Lastly, EICON argues that this court violated its right to due process in barring it from challenging the validity of Daniel's claim. EICON has not shown a due process violation. EICON relies solely on *Callie v. Bowling*, 123 Nev. 181, 160 P.3d 878 (2007), which is distinguishable. In the suit underlying the appeal in *Callie*, Mr. Callie was not named as a party or served with a complaint or a summons. 123 Nev. at 182-83, 160 P.3d at 879. Where a claimant got an out-of-state judgment against Callie's company, domesticated the judgment in Nevada, and sought to amend the judgment to add Callie as an alter ego, Callie's due process rights were violated because he was rendered individually liable without receiving notice and opportunity to be heard. *Id.* at 183-84, 160 P.3d at 879-80. In contrast, EICON had notice of and participated in its own capacity at many different levels of administrative and judicial review. EICON undeniably had "notice and an opportunity to be heard" on Daniel's death benefits claim. *See id.* at 183, 160 P.3d at 879. EICON offers no authority supporting its proposition that this court deprived it of due process by limiting its participation to that of a respondent, and thus it has not shown a due process violation in this regard. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

Accordingly, we affirm the district court's conclusion that substantial evidence supported the appeals officer's finding that Daniel died as a result of compensable occupational heart disease, reverse its conclusion that the City was the liable insurer, reverse its conclusion that the amount of death benefits compensation should be based on Daniel's 2012 wages rather than his 1990 wages from the City, and remand for further proceedings consistent with this opinion.

Hardesty and Silver, JJ., concur.