

***Karcher Firestopping v. Meadow Valley Contr.*, 125 Nev. Adv. Op. No. 11
(April 16, 2009)**

APPEAL OF ARBITRATION - STATUTORY INTERPRETATION

Summary

Appeal and cross appeal from district court order granting a motion to vacate an arbitration award, referring the matter back to arbitration for further proceedings, and denying a motion to confirm the award.

Disposition/Outcome

In determining whether such an order is appealable under NRS 38.247(1), the court concluded that, under the plain language of NRS 38.247(1)(e), it lacked jurisdiction to consider appeals challenging such orders. As a result, the court dismissed the appeal.

Factual and Procedural History

Appellant, Karcher Firestopping was the prevailing party at arbitration. Respondent Technicoat Waterproofing Specialists, joined by respondents Meadow Valley Contractors and United States Guaranty Company filed a motion to vacate and modify the arbitration award. Karcher filed a countermotion to confirm the arbitrator's award. The district court denied Karcher's countermotion to confirm the award, granted Technicoat's motion to vacate the arbitration award, and referred the matter back to arbitration for supplemental proceedings. Karcher appealed from the district court's order. The Nevada Supreme Court's preliminary review of the case raised concerns regarding the order's appealability under NRS 38.247(1). The Court directed Karcher to show cause as to whether the district court order was substantively appealable. Karcher has filed a response to the show cause order, and respondents filed a reply.

Discussion

The Court has jurisdiction to consider an appeal only when the appeal is authorized by statute or court rule.¹ The Nevada Legislature has authorized appeals from certain arbitration-related orders as set forth in NRS 38.247(1). Under this statutory scheme, if the order challenged on appeal had only denied appellant's motion to confirm the arbitration award, it would be appealable under NRS 38.247(1)(c). Similarly, if the challenged order had vacated the award without directing a rehearing, the order would be appealable under NRS 38.247(1)(e). In this case, however, the district court order denied the motion to confirm the award, vacated the award, and directed a rehearing. Thus, the Court focused on whether the order was appealable under NRS 38.247(1). The interpretation of this statute dictates whether the Nevada Supreme Court has jurisdiction to consider this type of appeal. Questions of statutory construction are reviewed de novo.

¹ Taylor Constr. Co. v. Hilton Hotels 100 Nev. 207, 678 P.2d 1152 (1984).

The Court has never addressed whether an order that both denies confirmation of an arbitration award and vacates the award, while directing a rehearing, is substantively appealable under NRS 38.247(1). A number of other courts have addressed this issue under similar provisions of the UAA.² The Court looked at these other jurisdictions as guidance.

Decisions concluding that no jurisdiction exists

The majority of courts that have considered jurisdictional issues regarding orders that deny confirmation of an arbitration award and also vacate the award while directing rehearing have determined that such orders are not appealable. These holdings are based on the plain meaning of the statute. These statutes provide for appeals only from orders vacating an arbitration award which do not also direct a rehearing. Thus, the various courts have concluded that the plain language of their statutes provide that orders vacating an award and directing a rehearing cannot be appealed.³

The rationale behind this conclusion is that allowing such orders to be appealed simply because a portion of the order denies confirmation of an arbitration award renders the “without directing a rehearing” language of these states’ versions of NRS 38.247(1)(e) superfluous.⁴ Courts also focus on the uniform policy rationale of the Uniform Arbitration Act. The Court noted that other courts have acknowledged that the uniform language in other states’ statutes that correspond to NRS 38.247(1) “implicitly contains a policy choice of permitting appellate review only when there is a sufficient degree of finality to the arbitration proceedings.”⁵

Decisions concluding that jurisdiction exists

Only two courts have interpreted statutory language similar to that of NRS 38.247(1) as permitting appellate jurisdiction over orders that both deny confirmation of an arbitration award and vacate the award while directing rehearing.⁶ In reaching their interpretation, these courts emphasized the fact that their states’ versions of NRS 38.247(1)(c) expressly permits appeals from orders denying confirmation of an arbitration award.⁷ Both of these courts also emphasized that not allowing appeals from orders that deny confirmation and vacate the award, yet direct a rehearing may allow the arbitration process to continue indefinitely.⁸

The *Stewart* court found it persuasive that no subsection of the applicable statutes explicitly bars the appealability of an order made appealable under another subsection when that

² See *Connerton, Ray & Simon v. Simon*, 791 A.2d 86 (D.C. Cir. 2002); *Kowler Assocs. v. Ross*, 544 N.W.2d 800 (Minn. Ct. App. 1996); *Nat’l Ave. Bldg. Co. v. Stewart*, 910 S.W.2d 334 (Mo. Ct. App. 1995); *Thrivent Fin. for Lutherans v. Brock*, 251 S.W.3d 621 (Tex. App. 2007); *Werline v. E. Tex. Salt Water Disposal Co.*, 209 S.W.3d 888 (Tex. App. 2006); *Prudential Securities, Inc. v. Vondergoltz*, 14 S.W.3d 329 (Tex. App. 2000);.

³ See *Simon*, 791 A.2d at 87-88; *Ross*, 544 N.W.2d at 801; *Vondergoltz*, 14 S.W.3d at 331.

⁴ See *Simon*, 791 A.2d at 87-88; *Ross*, 544 N.W.2d at 801; *Vondergoltz*, 14 S.W.3d at 331.

⁵ *Karcher v. Meadow Valley Contractors, Inc.*, 125 Nev. Adv. Op. No. 11, 6 (Apr. 16, 2009); see *Simon*, 791 A.2d at 88; *Ross*, 544 N.W.2d at 802; *Brock*, 251 S.W.3d at 622, 627; see also *Dep’t of Transp. v. State Employees Ass’n*, 581 A.2d 813, 814-15 (Me. 1990); *Neb. Dep’t of Health v. Struss*, 623 N.W.2d 308, 313-14 (Neb. 2001).

⁶ *Stewart*, 910 S.W.2d at 337-41 (interpreting a statute that provides for appeals from orders “confirming or denying confirmation of an award” and orders “vacating an award without directing a rehearing”; *Werline*, 209 S.W.3d at 893-96 (same).

⁷ *Stewart*, 910 S.W.2d at 340-41; *Werline*, 209 S.W.3d at 895-96.

⁸ *Stewart*, 910 S.W.2d at 340; *Werline*, 209 S.W.3d at 896.

order also contains a ruling that would not otherwise be independently appealable.⁹ The *Stewart* court also noted that if it's state's legislature had intended such an order as the one at issue here not to be appealable, it would have added the qualifier "without directing a rehearing."¹⁰ The *Werline* court asserted that if Texas' version of NRS 38.247(1)(c) was not read as allowing an appeal from an order of the type at issue here, the second half of subsection (c)'s authorization of appeals from orders denying confirmation would be rendered "almost meaningless."¹¹ The *Werline* court held that if such orders could not be appealed, appellate jurisdiction would only exist in the rare situation when the trial court denies a motion to confirm, but fails to vacate the award."¹²

The Nevada Supreme Court lacks jurisdiction to consider this appeal

The Court found those decisions that concluded that appellate courts lack jurisdiction to review orders denying confirmation of an arbitration award and vacating the award, while directing a rehearing, to be better reasoned and more persuasive. The Court agreed with those courts concluding that the plain language of their versions of NRS 38.247(1)(e), which provide for appeals from orders vacating arbitration awards without directing a rehearing, also bars appellate review of orders vacating an award while directing a rehearing. The holding would be the same even if the order also denied confirmation of the award, which on its own, would be appealable under a statute analogous to NRS 38.247(1)(c).¹³ The Court found that since the district court directed a rehearing, permitting appellate review at this point would render NRS 38.247(1)(e)'s "without directing a rehearing" language superfluous.

The Court further agreed that, when read as a whole, the statutory structure that provides for appeals from arbitration-related orders is designed to permit appeals only from orders that bring an element of finality to the arbitration process.¹⁴ In this case, the district court's order vacating the arbitration award, while remanding for supplemental proceedings, actually extended, rather than concluded, the arbitration process. Thus, the order, under NRS 38.247(1), is not the type of order that is sufficiently final to be suitable for review.

Conclusion

After reviewing the plain text of NRS 38.247(1)(e), as well as the implicit policy contained in NRS 38.247(1) favoring finality of the arbitration proceedings prior to appellate review, the court ruled that it lacks jurisdiction to review a district court order that vacates an arbitration award, directs rehearing, and denies a motion to confirm the award. The Court, with no dissenting justices, dismissed the appeal.

⁹ 910 S.W.2d at 341.

¹⁰ *Id.*

¹¹ 209 S.W.3d at 895.

¹² *Id.*

¹³ See, e.g., *Simon*, 791 A.2d at 87-88; *Ross*, 544 N.W.2d at 801-02; *Vondergoltz*, 14 S.W.3d at 331.

¹⁴ See *Simon*, 791 A.2d at 88; *Dep't of Transp.*, 581 A.2d at 814-15; *Struss*, 623 N.W.2d at 314; *Brock*, 251 S.W.3d at 627.