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2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3 CANNON COCHRAN MANAGEMENT
4 SERVICES, INC. and LAS VEGAS
5 METROPOLITAN POLICE
6 DEPARTMENT

7 Appellants,

8 vs.

9 DAVID FIGUEROA,

10 Respondent,
11

Supreme Court Case No. 78926 Electronically Filed
Jun 24 2019 03:17 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
District Court Case No.: A-18-779790-J

12 **REPLY IN SUPPORT OF MOTION FOR STAY OF DISTRICT COURT'S**
13 **ORDER**
14

15 DANIEL L. SCHWARTZ, ESQ.
16 JOEL P. REEVES, ESQ.
17 LEWIS BRISBOIS BISGAARD & SMITH
18 LLP
19 2300 W. Sahara Avenue, Suite 300, Box 28
20 Las Vegas, Nevada 89102-4375
21 *Attorneys for Appellants*
22 *Cannon Cochran Management Services,*
23 *Inc. and Las Vegas Metropolitan Police*
24 *Department*

JASON D. MILLS, ESQ.
JASON D. MILLS &
ASSOCIATES, LTD.
2200 S. Rancho, Suite 140
Las Vegas, NV 89102
Attorney for Respondent
David Figueroa

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....	ii
NRAP 26.1 DISCLOSURE.....	iii
I. Respondent Will Not Be Harmed by the Granting of a Stay	1
II. Merits of the Appeal	2
CERTIFICATE OF COMPLIANCE	6
CERTIFICATE OF MAILING	7

1 **TABLE OF AUTHORITIES**

2 **Cases**

Page No(s).

3 Brocas v. Mirage Hotel & Casino,
4 109 Nev. 579, 854 P.2d 862 (1993).....4
5
6 City of Reno v. Bldg. & Constr. Trades Council of N. Nev.,
7 127 Nev. 114, 251 P.3d 718 (2011).....2
8
9 North Las Vegas v. Public Service Comm’n.,
10 83 Nev. 278, 429 P.2d 66 (1967).....2
11
12 Tighe v. Las Vegas Metropolitan Police Dept.,
13 110 Nev. 632, 877 P.2d. 1032 (1994).....4
14

15 **STATUTES**

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1. The Appellant, CANNON COCHRAN MANAGEMENT SERVICES, INC., states that it does not have any parent corporation, or any publicly held corporation that owns 10% or more of its stock, nor any publicly held corporation that has a direct financial interest in the outcome of the litigation.

2. The Appellant CANNON COCHRAN MANAGEMENT SERVICES, INC., states that there are no publicly held legal entities that it has issued shares to, nor any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding. NRAP 26.1(a)(2)(C-D).

The undersigned counsel of record for Appellants CANNON COCHRAN MANAGEMENT SERVICES, INC. and LAS VEGAS METROPOLITAN POLICE DEPARTMENT, has appeared in this matter before the District Court. DANIEL L. SCHWARTZ ESQ. is the primary attorney of record and has appeared for the same at the administrative proceedings before the Department of

1 Administration.

2 These representations are made in order that the judges of this court may
3
4 evaluate possible disqualifications or recusal.

5 DATED this 24 day of June, 2019.

6 LEWIS BRISBOIS BISGAARD & SMITH LLP
7

8
9 By: _____

10 JOEL P. REEVES, ESQ.

11 Nevada Bar No. 013231

12 2300 W. Sahara Ave., Ste. 300, Box 28

13 Las Vegas, NV 89102

14 Attorneys for the Appellants
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1 **I. Respondent Will Not Be Harmed By The Granting of a Stay**

2 In his Response, Respondent effectively admits that granting a stay in this
3
4 matter will not cause him any harm. Respondent concedes that he does not need
5 medical care and would not be entitled to any wage replacement benefits going
6 forward. The only issue at this point is potential benefits that have *already* accrued
7
8 such as medical billing and past wage replacement benefits. Though Appellant
9 recognizes that NRS 616C.138 would allow for the recovery of medical bills
10 already paid if Appellant is successful on appeal, there is no legal mechanism to
11
12 recover retro-active wage replacement benefits that were already issued.

13 A significant portion of this particular claim is the substantial amount of
14 retro-active TTD benefits which would be required to issue if this claim were
15
16 accepted. As such, if a stay is not rendered, this appeal will be rendered moot.

17 Given that Respondent does not need any medical care and his prior medical
18 bills have apparently been handled through his private health insurance, the only
19
20 harm to Respondent if this stay is granted is that he would be required to wait until
21 this appeal concludes to receive any retro-active benefits that he may be entitled to.
22
23 Further, Respondent would also receive interest on any sum of retro-active benefits
24 that he may be entitled to if he is successful on appeal.

25 Respondent testified that he was out of work for a year and a half following
26 this incident. (Exhibit pp. 21:9-16) If a stay is not granted, Appellant will be forced
27

1 to issue retro-active total temporary disability (“TTD”) benefits, likely for that
2 entire period. Again, even if Appellants were successful on appeal, if those TTD
3 wage replacement benefits were issued to Respondent, there would be no way to
4 recover the same. Those damages are irreparable.
5

6 In weighing the relative harm to each party in deciding whether to grant this
7 stay, the only harm to Respondent is that he would have to wait. However, he
8 would be compensated for his waiting through the interest accrued. Appellants on
9 the other hand are guaranteed to be irreparably harmed if a stay is not granted and
10 they are successful on appeal. Appellants pray that this Court grant the stay
11 requested until this matter can be fully briefed and decided.
12
13

14 **II. Merits of the Appeal**

15 Respondent places a great deal of reliance on the District Court’s Order.
16 However, this Court “[does] not give any deference to the district court decision
17 when reviewing an order regarding a petition for judicial review.” City of Reno v.
18 Bldg. & Constr. Trades Council of N. Nev., 127 Nev. 114, 119, 251 P.3d 718, 721
19 (2011). The issue in this Petition for Judicial Review is whether the Appeals
20 Officer’s Order was based on substantial evidence. NRS 233B.135. North Las
21 Vegas v. Public Service Comm’n., 83 Nev. 278, 291, 429 P.2d 66 (1967) The
22 subject Appeals Officer’s Decision in this matter was thorough, contained a
23 detailed discussion of the facts of the case, and reaches a conclusion which was
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1 based on that in-depth comprehension of the facts. There is substantial evidence to
2 support the same and Respondent is asking this Court to commit the same error
3 that the District Court made in reweighing the facts of the case.
4

5 This point is fully illustrated in Respondent's first allegation of error. Both
6 Respondent and the District Court claim that the Appeals Officer did not place
7 enough weight into the fact that Respondent was on the clock at the time of this
8 incident, alleging that the exclusion of that fact from the Findings of Fact in the
9 Decision is primary evidence of the same. However, the Appeals Officer
10 absolutely considered this fact and made detailed findings regarding the same.
11
12

13 Specifically, the Appeals Officer concluded that although Respondent was
14 on the clock and ostensibly subject to being called back at the time of the incident,
15 the Appeals Officer also found that "Claimant himself testified that he was ten
16 minutes away from the operations center when his accident occurred and he only
17 had five minutes left before his shift technically ended. Even if Employer had
18 called claimant a minute before the accident happened and requested claimant to
19 come back and finish his shift, it would be physically impossible for him to make it
20 back in time." (Exhibit p. 87) And yet, Respondent claims that there is no evidence
21 that it would have been impossible for Respondent to be called back before his
22 shift ended. There is no interpretation of the facts in this case to establish that
23 Respondent would have been physically able to return to his employment before
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1 his shift ended. As such, the fact that Employer technically could have called
2 Respondent back before his shift ended is of no consequence.

3
4 Next, Respondent is asking this Court to reweigh the fact that Respondent's
5 supervisor released him from his shift early "to get some seat time." However the
6 Appeals Officer questioned Respondent's testimony on this subject. (Exhibit pp.
7 85:18-86:3) (A decision by an appeals officer that is based upon the credibility of
8 claimant and other witnesses is "not open to appellate review." Brocas v. Mirage
9 Hotel & Casino, 109 Nev. 579, 585, 854 P.2d 862, 867 (1993)) Respondent argues
10 that he was *ordered* to leave his shift early so that he could drive his personal
11 motorcycle home just as he would on any other day. However, as the Appeals
12 Officer noted, there is zero evidence to show that leaving his shift early to drive his
13 personal motorcycle was a condition of his employment. The Appeals Officer also
14 noted that Respondent's co-worker was released at the same time as Respondent
15 was. (Exhibit pp. 42:13-44:7) There is no evidence to show that Respondent's co-
16 worker was released so that *Respondent* could drive his personal motorcycle home.

17
18 As for the law enforcement exception, Respondent argues that this case
19 aligns with Tighe because Respondent had his police issued radio with him, was
20 charged with the general duty of law enforcement, and could not drink alcohol at
21 the time of the incident. However, as noted in the underlying Motion, it was
22 Respondent's choice to bring his radio with him. (Exhibit pp. 35:6-36:16) Second,
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1 there is no evidence that Respondent was charged with any general duty of law
2 enforcement. He was on his commute home just as he would be on any other day.
3
4 The only fact which may separate this case from Respondent's daily commute is
5 that he was released early and was still on the clock at the time of the incident.

6 Indeed, Respondent bases his whole argument on the temporal coincidence
7
8 that this accident happened five minutes before his shift ended. So yes, it is true
9 that Respondent could not have consumed alcohol at the time of the incident.
10 However, being unable to consume alcohol is merely a product of being on the
11 clock. Indeed, although both Respondent and the District Court claim that being on
12 the clock was not the only reason why the District Court reversed the Appeals
13 Officer, every single reason cited for finding this claim compensable is directly
14 related to the fact that Respondent was still on the clock. As this Court well knows,
15
16 being on the clock is not enough to render a claim compensable in this state.
17

18 Appellants request that this Court stay the erroneous District Court order
19
20 until this matter can be fully briefed.

21 Dated this 24 day of June, 2019.

22 Respectfully submitted,
23 **LEWIS, BRISBOIS, BISGAARD & SMITH, LLP**

24
25 **DANIEL L. SCHWARTZ, ESQ.**
26 **JOEL P. REEVES, ESQ.**
27 2300 W. Sahara Avenue, Suite 300, Box 28
Las Vegas, Nevada 89102-4375

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this motion complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

2. I further certify that this brief complies with the page limits imposed by NRAP 27(d)(2) as it is five (5) pages in length.

3. Finally, I hereby certify that I have read this motion, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted,
**LEWIS, BRISBOIS, BISGAARD & SMITH,
LLP**

~~DANIEL L. SCHWARTZ, ESQ.(005125)~~
~~JOEL P. REEVES, ESQ.(013231)~~
~~LEWIS BRISBOIS BISGAARD & SMITH~~
~~LLP~~

2300 W. Sahara Avenue, Suite 300, Box 28
Las Vegas, Nevada 89102-4375
Attorneys for Appellants

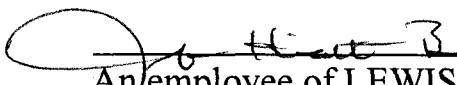
1 **CERTIFICATE OF MAILING**

2 Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on
3 the 24th day of June, 2019, service of the attached **REPLY IN SUPPORT**
4 **OF MOTION FOR STAY OF DISTRICT COURT'S ORDER** was made this
5 date by depositing a true copy of the same for mailing, first class mail, and/or
6 electronic service as follows:

7 Jason Mills, Esq.
JASON D. MILLS & ASSOCIATES, LTD.
8 2200 S. Rancho, Suite 140
Las Vegas, NV 89102

9 LVMPD-Health Detail
10 400 S. Martin Luther King Blvd.
Suite B
11 Las Vegas, NV 89106

12 CCMSI
P.O. Box 35350
13 Las Vegas, NV 89133

14
15
16 
17 An employee of LEWIS, BRISBOIS,
BISGAARD & SMITH, LL
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