IN THE SUPREME COURT OF THE STATE OF NEVADA

CANNON COCHRAN MANAGEMENT SERVICES, INC. and LAS VEGAS METROPOLITAN POLICE DEPARTMENT Appellants, vs. DAVID FIGUEROA, Respondent.	Supreme Court Case No.: 78926 District Court Case No.: A-18-779790-J

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

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. NRAP 26.1(a).
2. The Appellant LAS VEGAS METROPOLITAN POLICE DEPARTMENT is a governmental party and therefore exempt from the NRAP 26.1 disclosure requirements.
3. The undersigned counsel of record for CANNON COCHRAN MANAGEMENT SERVICES, INC. and LAS VEGAS METROPOLITAN POLICE DEPARTMENT has appeared in this matter before District Court. DANIEL L. SCHWARTZ, ESQ. has also appeared for the same in District Court and at the administrative proceedings before the Department of Administration.

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

DATED this 30 day of October, 2019.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____
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I.

STATEMENT OF THE CASE

This is a workers' compensation case. On March 7, 2015, the Respondent, DAVID FIGUEROA (hereinafter "Respondent") was involved in a motor vehicle accident while driving his personal motorcycle on his commute home from work. The evidence showed that Respondent's sergeant had given Respondent and a co-officer (Tyler McMeans) an "early out" for their shift and that Respondent's accident happened at 12:25 a.m., i.e. five (5) minutes before his shift technically ended at 12:30 a.m. At the time of the accident, Respondent was driving his personal vehicle, wearing civilian clothes, and although he was carrying service items with him such as his department issued radio, duty weapon, handcuffs, and badge, it was undisputed that Employer LAS VEGAS METROPOLITAN POLICE DEPARTMENT (hereinafter "Employer") did not require that Respondent have any of those items with him.

Employer's workers' compensation Administrator CANNON COCHRAN MANAGEMENT SERVICES, INC. (hereinafter "Administrator") denied this claim as Respondent was not performing work at the time of his accident and his injuries were not related to his employment. Respondent appealed and transferred this matter directly to the Appeals Office.

On May 10, 2017, this matter came on for hearing before the Appeals Officer. Respondent and Employer's Director of Risk Management, Jeff Roch (hereinafter "Mr. Roch"), gave testimony.

On July 25, 2018, after hearing testimony and receiving written closing arguments from both parties, the Appeals Officer affirmed claim denial, finding that Respondent had not satisfied his burden to prove that he was injured within the course and scope of his employment.

Respondent filed this Petition for Judicial Review, contesting the Appeals Officer's July 25, 2018 Decision and Order.

On April 30, 2019, the District Court issued an Order Reversing the Appeals Officer's Decision and Order. The Court determined that the Appeals Officer's Decision was affected by error of law and contained clearly erroneous facts.

Appellants filed a Motion for Stay and Request for Reconsideration. The District Court denied both stating that it had not misapprehended the Appeals Officer's Order.

Appellants timely filed an appeal to this Honorable Court and sought a stay of the District Court's Order, which this Court denied.

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II.

SUMMARY OF THE ARGUMENT

This case presents a challenge to the "law enforcement" exception to the going and coming rule that was adopted in Tighe v. Las Vegas Metropolitan Police Dept., 110 Nev. 632, 877 P.2d. 1032 (1994). Under that exception, this Court reasoned that "police officers are generally charged with a duty of law enforcement while traveling on public thoroughfares" and therefore injuries sustained on the commute "may be compensated." (Id.) However, this Court also made it clear that the law enforcement exception "is not sufficiently broad and all-inclusive to justify the conclusion that all law enforcement officers are *always* excluded from the general rule that injuries sustained while traveling to or from work do not arise out of and in the course of employment."(Emphasis in original)(Id.)

The Appeals Officer in this case properly concluded that Respondent had failed to prove that Employer had a necessary amount of control over him sufficient to establish that Respondent's injuries were sustained due to the performance of job duties. Indeed, the Appeals Officer concluded that Respondent was discharging his duties as a police officer at the time of the injury. However, the District Court disagreed, finding in principle that Respondent was necessarily discharging his duties as a police officer as "there is no question the Appellant was

on the clock at the time of the accident and, therefore, under the control of LVMPD unlike an off-duty officer returning home."

The District Court erred in three respects. First, the ultimate determination in this case was fact based and therefore within the purview of the Appeals Officer. The Appeals Officer's Decision was supported by substantial evidence and therefore entitled to deference. Second, the District Court explicitly concluded that being on the clock was sufficient to render this claim compensable, a position that this Court has refuted numerous times over. Third, the import of the District Court's decision is that it would allow the "law enforcement" exception to swallow entirety of the going and coming rule as, according to Respondent, he could always be called back to work. If the fact that police officers can always be called into service were dispositive, there would be no need for an "exception" to the rule as police officers would always be covered by workers' compensation for all injuries ever sustained because they are technically always subject to being called into service. That is not the purpose of workers' compensation coverage. The District Court's Decision effectively transforms coverage for injuries sustained within the course and scope of employment into coverage for injuries sustained by police officers whenever and wherever they may go, no matter the activity. This is contrary to the entire grand bargain of workers' compensation. The District Court

erred and the Appeals Officer's Decision should be affirmed as being supported by substantial evidence.

II.

STATEMENT OF THE ISSUES FOR REVIEW

1. WHETHER AN APPEALS OFFICER IS ENTITLED TO DEFERENCE IN DETERMINING WHETHER AN EMPLOYER EXERCISED A SUFFICIENT AMOUNT OF CONTROL OVER AN EMPLOYEE TO RENDER A CLAIM COMPENSABLE?

2. WHETHER AN INJURY SUSTAINED BY A POLICE OFFICER WHILE ON HIS COMMUTE HOME IS COMPENSABLE UNDER THE LAWS GOVERNING WORKERS' COMPENSATION INSURANCE BY VIRTUE OF THE FACT THAT THE OFFICER WAS STILL TECHNICALLY "ON THE CLOCK" FOR FIVE (5) MORE MINUTES AT THE TIME OF HIS ACCIDENT?

III.

FACTS NECESSARY TO UNDERSTAND ISSUE PRESENTED

This is a workers' compensation case. The Respondent has multiple prior industrial claims. In the instant matter, on March 7, 2015, according to the C-4 form, the Respondent was "driving" and was in an "MVA." (Appellants' Appendix p. 12.)(hereinafter "APP p. ___")

The Employer completed its C-3 form upon receiving the C-4 form. (APP p. 13.)

An Injury Report was also completed on March 7, 2015. This report indicated the Respondent was not in the normal course of his work or duties as a police officer at the time of the incident. (APP p. 14.)

The Respondent was notified on April 9, 2015 that his claim was being denied. (APP pp. 15-16.)

The Respondent appealed the determination letter of April 9, 2015, regarding claim denial, to the Hearing Officer. (APP p. 17.) This appeal was transferred directly to the Appeals Office. (APP p. 18.)

This matter came on for hearing before the Appeals Officer on May 10, 2017. Respondent and Employer's Director of Risk Management, Jeff Roch (hereinafter "Mr. Roch"), gave testimony. (APP pp. 151-226)

On July 25, 2018, the Appeals Officer for Appeal Number 1511793-MM issued the subject Decision and Order. The Appeals Officer noted that, on the day of the subject incident, Respondent had been released early from his shift. The Appeals Officer also noted that Respondent testified that his sergeant told him to leave early to get some "seat time" on Respondent's personal motorcycle and that Respondent was involved in the subject accident at 12:25 a.m. on his commute home while he was still technically on the clock. The Appeals Officer also found that Respondent's co-worker, Tyler McMeans, was also released early.

The Appeals Officer made three salient determinations based the above referenced facts. The Appeals Officer concluded that Tyler McMeans had not been released early for *Respondent* to get some seat time. Further, the Appeals Officer also concluded that Respondent's commute home on the day in question was no different than any other day. Finally, the Appeals Officer concluded that there was no evidence that Respondent's sergeant explicitly required Respondent to "get some seat time" as a condition of his employment. Further, it should also be noted that the Appeals Officer included a discussion in the Decision as to how simply being on the clock does not render this claim compensable. (APP pp. 227-239)

On August 21, 2018, Respondent filed the subject Petition for Judicial Review. (APP p. 560-576)

On March 26, 2019, after the parties had presented to Department 18 for hearing, the judge called a bench conference, informed that he had not read the briefing, and the hearing was rescheduled for April 23, 2019. (APP p. 654)

On April 23, 2019, counsel for Appellant had a conflict and could not attend the hearing that had been reschedule after the bench conference and sent an e-mail to the law clerk for Department 18 and requested a continuance. The District Court chose to set this matter for an in chambers decision. (APP p. 655)

On April 30, 2019, the District Court issued an Order Reversing the Appeals Officer's Decision and Order. (APP pp. 656-663) That Court determined that the

Appeals Officer's Decision was affected by error of law and contained clearly erroneous facts. The Court found four errors. First, the Court determined that the Appeals Officer had omitted the fact that Respondent was still on the clock because it was not discussed in the Findings of Fact section. Second, the Court also determined that the Appeals Officer had omitted the fact that Respondent was given an "early out" to "get some additional practice riding a motorcycle, as he called it 'seat time.'"

Third, the Court concluded the Appeals Officer committed an error of fact in finding that Respondent Employer received no benefit from Respondent being on the road at the time of incident. The Court concluded that Respondent Employer did receive a benefit because Respondent was on the clock, could have been called back, was ordered to get some "seat time," and Respondent was still subject to Employer's rules and regulations. Therefore, the Employer did receive a benefit. Finally, the Court concluded that it was dispositive that Appellant "had his radio and the general duty of law enforcement while traveling public thoroughfares under Tighe."

Appellants filed a Motion for Stay and Request for Reconsideration. (APP pp. 676-695) The District Court denied both stating that it had not misapprehended the Appeals Officer's Order. (APP pp. 745-754)

Appellants timely filed an appeal to this Honorable Court and sought a stay of the District Court's Order, which This Court denied.

IV.

JURISDICTION

Respondent timely appealed this Petition for Judicial Review of the Appeals Officer's Decision dated July 25, 2018. NRS 233B.130. Said Petition was timely filed with the District Court on August 21, 2018. On April 30, 2019, the Notice of Entry of Order of the District Court's Decision and Order reversing the Appeals Officer's Decision was filed. Appellants timely and properly filed an appeal of that Decision and Order with this Honorable Court on May 30, 2019. See NRS 233B.150; NRAP Rule 3; NRAP Rule 4. This Court has jurisdiction over the instant appeal.

A. Routing Statement

Under NRAP 17(b)(10), this case would be presumptively assigned to the Court of Appeals as it concerns a Petition for Judicial Review of an administrative agency's final decision. However, under NRAP 17(a)(11) and (12), the Supreme Court would be justified in retaining jurisdiction over this case as this case deals directly with the application of Tighe v. Las Vegas Metropolitan Police Dept., 110 Nev. 632, 877 P.2d. 1032 (1994). The District Court improperly extended the decision in Tighe to effectively encompass all police officers at all times.

B. Standard Of Review

Judicial review of a final decision of an agency is governed by NRS 233B.135.

> **NRS 233B.135 Judicial review: Manner of conducting; burden of; standard for review.**
>
> 1. Judicial review of a final decision of an agency must be:
>
> (a) Conducted by the court without a jury; and
>
> (b) Confined to the record.
>
> In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities.
>
> 2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.
>
> 3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:
>
> (a) In violation of constitutional or statutory provisions;
>
> (b) In excess of the statutory authority of the agency;
>
> (c) Made upon unlawful procedure;
>
> (d) Affected by other error of law;
>
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
>
> (f) Arbitrary or capricious or characterized by abuse of discretion.

The standard of review is whether there is substantial evidence to support

the underlying decision. The reviewing court should limit its review of administrative decisions to determine if they are based upon substantial evidence. North Las Vegas v. Public Service Comm'n., 83 Nev. 278, 291, 429 P.2d 66 (1967); McCracken v. Fancy, 98 Nev. 30, 639 P.2d 552 (1982). Substantial evidence is that quantity and quality of evidence which a reasonable man would accept as adequate to support a conclusion. See, Maxwell v. SIIS, 109 Nev. 327, 331, 849 P.2d 267, 270 (1993); and Horne v. SIIS, 113 Nev. 532, 537, 936 P.2d 839 (1997).

When reviewing administrative court decisions, the Court has held that, on factual determinations, the findings and ultimate decisions of an appeals officer are not to be disturbed unless they are clearly erroneous or otherwise amount to an abuse of discretion. Nevada Industrial Comm'n. v. Reese, 93 Nev. 115, 560 P.2d 1352 (1977). An administrative determination regarding a question of fact will not be set aside unless it is against the manifest weight of the evidence. Nevada Indus. Comm'n. v. Hildebrand, 100 Nev. 47, 51, 675 P.2d 401 (1984). A decision by an appeals officer that is based upon the credibility of Respondent and other witnesses is "not open to appellate review." Brocas v. Mirage Hotel & Casino, 109 Nev. 579, 585, 854 P.2d 862, 867 (1993).

In determining whether an administrative decision is supported by substantial evidence, the methodology of the District Court is also well-defined.

First, for each issue appealed, the pertinent rule of law is identified. Thereafter, the Record on Appeal is reviewed to determine whether the agency's decision on each issue is supported by substantial factual evidence. State Dep't of Motor Vehicles v. Torres, 105 Nev. 558, 560, 799 P.2d 959, 960-961 (1989).

If the decision of the administrative agency on the appealed issue is supported by substantial factual evidence in the Record on Appeal, the District Court must affirm the decision of the agency as to that issue. On the other hand, a decision by an administrative agency that lacks support in the form of substantial evidence is arbitrary or capricious and, thus, an abuse of discretion that warrants reversal. NRS 233B.135(3); Titanium Metals Corp. v. Clark County, 99 Nev. 397, 399, 663 P.2d 355, 357 (1983).

Substantial evidence has been defined as that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion. State Emp't Sec. Dep't v. Hilton Hotels Corp., 102 Nev. 606, 608 at n.1, 729 P.2d 497 (1986). Additionally, substantial evidence is not to be considered in isolation from opposing evidence, but evidence that survives whatever in the record fairly detracts from its weight. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 488 (1951); Container Stevedoring Co. v. Director, OWCP, 935 F.2d 1544, 1546 (9th Cir. 1991). This latter point is clearly the significance of the requirement in

NRS 233B.135(3)(e) which states that the reviewing court consider the whole record.

Further, this Court "[does] not give any deference to the district court decision when reviewing an order regarding a petition for judicial review." City of Reno v. Bldg. & Constr. Trades Council of N. Nev., 127 Nev. 114, 119, 251 P.3d 718, 721 (2011)).

While the Court is not required to give deference to pure legal questions determined by the agency, those conclusions of the agency which are "closely related to the agency's view of the facts, are entitled to deference, and will not be disturbed if they are supported by substantial evidence." Jones v. Rosner, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986)..

In this case, the Appeals Officer's decision is supported by substantial evidence. As such, the District Court erred in reversing the same. This Honorable Court retains review of the instant Petition for Judicial Review.

V.

LEGAL ARGUMENT

A. Standard At The Appeals Officer Level

It was the Respondent, not Appellants, who had the burden of proving entitlement to any benefits under any accepted industrial insurance claim by a preponderance of all the evidence. State Industrial Insurance System v. Hicks, 100

Nev. 567, 688 P.2d 324 (1984); Johnson v. State ex rel. Wyoming Worker's Compensation Div., 798 P.2d 323 (1990); Hagler v. Micron Technology, Inc., 118 Idaho 596, 798 P.2d 55 (1990).

In attempting to prove his case, the Respondent has the burden of going beyond speculation and conjecture. That means that the Respondent must establish all facets of the claim by a preponderance of all the evidence. To prevail, a claimant must present and prove more evidence than an amount which would make his case and his opponent's "evenly balanced." Maxwell v. SIIS, Id.; SIIS v. Khweiss, 108 Nev. 123, 825 P.2d 218 (1992); SIIS v. Kelly, 99 Nev. 774, 671 P.2d 29 (1983); 3, A. Larson, the Law of Workmen's Compensation, § 80.33(a).

NRS 616A.010(2)makes it clear that:

> A claim for compensation filed pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS must be decided on its merit and not according to the principle of common law that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature.

B. The Standard of Review For This Court is Substantial Evidence

The issue in this case is whether the Appeals Officer properly affirmed the denial of this claim. Specifically, given that this injury happened while the Respondent was on his commute home, the Appeals Officer was charged with determining whether the Employer had sufficient control over the Respondent to render this claim compensable. This was a fact sensitive determination requiring

the Appeals Officer to weigh the testimony of multiple witnesses and other evidence. The standard for review is substantial evidence. ("[The appeals officer's] decision is based on the conclusion of the appeals officer that appellant was not acting within the course and scope of his employment at the time of his accident. This conclusion was supported by substantial evidence in the form of appellant's testimony. Under appellant's own version of the facts, the appeals officer could have reasonably concluded that this case does not fall under any exception to the coming and going rule."Schepcoff v. State Indus. Ins. Sys., 109 Nev. 322, 325-26, 849 P.2d 271, 274 (1993)(This Court "[does] not give any deference to the district court decision when reviewing an order regarding a petition for judicial review." City of Reno v. Bldg. & Constr. Trades Council of N. Nev., 127 Nev. 114, 119, 251 P.3d 718, 721 (2011)).

As will be demonstrated below, the Appeals Officer's Decision and Order was based on substantial evidence and a proper application of the law. The Appeals Officer concluded that the Respondent's injuries did not arise out of and in the course and scope of his employment. That is a fact based finding and the substantial evidence supports the same.

C. Definition of Course and Scope of Employment

Under NRS 616C.150(1), the Respondent has the burden of proof to show that the injury arose out of and in the course and scope of his employment. The

Respondent must satisfy this burden by a preponderance of the evidence. Further, NRS 616B.612 mandates that an employee is only entitled to compensation if he is injured in the course and scope of his employment. Here, the Respondent was not in the course and scope of his employment when the subject accident occurred while Respondent was on his commute home while driving his personal motorcycle.

NRS 616A.030 defines an accident as ". . . an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Furthermore, NRS 616A.265 defines an injury as ". . . a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result which is established by medical evidence . . ."

This Court has held that:

> An award of compensation cannot be based solely upon possibilities and speculative testimony. A testifying physician must state to a degree of reasonable medical probability that the condition in question was caused by the industrial injury...

United Exposition Services Co. v. SIIS, 109 Nev. 421, 851 P.2d 423 (1993).

This holding has been affirmed and bolstered in the Horne v. SIIS, 113 Nev. 532, 936 P.2d 839 (1997) case, which held that "mere speculation and belief does not rise to the level of reasonable medical certainty."

Further, this Court has held that:

> An accident or injury is said to arise out of employment when there is a causal connection between the injury and the employee's work ... the injured party must establish a link between the workplace conditions and how those conditions caused the injury ... a Respondent must demonstrate that the origin of the injury is related to some risk involved within the scope of employment.

Rio Suite Hotel v. Gorsky, 113 Nev. 600, 939 P.2d 1043(1997).

The same Court further stated that the "Nevada Industrial Insurance Act is not a mechanism which makes Employers absolutely liable for injuries suffered by employees who are on the job." (Id.).

Here, the accident in question occurred while Respondent was on his commute home while driving his personal motor cycle. (ROA pp. 23:6-24:21) Respondent was wearing civilian clothes and although he was carrying service items such as his department issued radio, duty weapon, handcuffs, and badge (ROA p. 34:8-36:2), Employer did not require that Respondent have any of those items with him. Mr. Roch testified that Respondent *could* have those items on his person if he wanted, but he was not required to have them. (ROA pp. 56:17-57:18) Further, Respondent testified that it was merely his own personal habit to take those items with him. ("My radio I have an option to leave it in my locker if so be.") In short, there is substantial evidence showing that Respondent was not

acting within the course and scope of his employment at the time of the accident and was simply driving home just as he would on any other day.

Indeed, the Appeals Officer weighed all of the facts and found that Respondent was not acting within the course and scope of his employment at the time of the injury. Put simply, there is no "causal connection between the injury and the employee's work." Gorsky, Id.

D. The Going and Coming Rule

The case at bar presents a going and coming rule scenario given that Respondent was not performing any work for the Employer and was on his commute home at the time of the accident. As a general rule, the going and coming rule provides that employers are not liable for injuries sustained by employees while commuting to and from work. Tighe v. Las Vegas Metropolitan Police Dept., 110 Nev. 632, 877 P.2d. 1032 (1994). The reason for the rule is inherent in the grand bargain that is the workers' compensation system: when an employee is *under the control* of his/her employer, injuries sustained within the course and scope of employment are covered by workers' compensation insurance to avoid the monetary and human expense of litigation by either party. Indeed, as this Court has stated:

> Nevada looks to whether the employee is in the employer's control in order to determine whether an employee is acting within the scope of employment when an accident occurs outside of the actual period of

> employment or off the employer's premises. Thus, we have embraced a "going and coming" rule, precluding compensation for most employee injuries that occur during travel to or from work. This rule frees employers from liability for the dangers employees encounter in daily life.

MGM Mirage v. Cotton, 121 Nev. 396, 399-400, 116 P.3d 56, 58 (2005)

However, as this Court well knows, when dealing with travel to and from work, "daily life" and "the employee's work" are often intertwined. Therefore, this Court has recognized several exceptions to the going and coming rule which allows for the rule to more accurately comport with the realities of the employee/employer relationship. As noted above in the citation from Cotton, the tie that binds all of these exceptions involves a fact based determination as to whether the employee was under the employer's control at the time of the accident.

In Evans v. Southwest Gas Corp., 108 Nev. 1002, 842 P.2d 719 (1992), this Court held that, although an accident occurred while an employee was commuting, an employee may still be within the course and scope of his employment when the travel to or from work *confers a distinct benefit* upon the employer or the employer exercised *significant control* over the employee. In Evans, the employee was provided a hand held radio and a radio in his van. He would be notified of those emergencies via the radio or the hand held radio. *The employee was required to take the van home to respond to emergencies.*

Note also that Evans is not technically a workers' compensation case. It is a summary judgment case. Ms. Evans was injured when the Southwest Gas employee's van made contact with the school bus that Ms. Evans was driving. Ms. Evans brought a civil action against Southwest Gas but the District Court dismissed the case on summary judgment, finding that the Southwest Gas employee was not acting within the course and scope of his employment at the time of the accident.

On appeal, this Court exercised *de novo* review (because it was a summary judgment case), and reversed the District Court, finding that, as discussed above, there was evidence that the Southwest Gas employee was acting within the course and scope of his employment at the time of the accident. Therefore, the matter was remanded for trial where the jury could have concluded that the employee was within the course and scope of his employment.

A second case which is of particular import to the current matter is Tighe. In that case, the claimant, an undercover narcotics officer, was commuting home and was involved in a traffic accident. At the time of the accident, the officer was driving an unmarked undercover vehicle provided by the police department. The vehicle in question was equipped with a radio and the officer was carrying a beeper provided by the police department as he was "on call." The claimant's claim was denied under the going and coming rule. The Appeals Officer reversed claim

denial, finding that the claimant was within the course and scope of his employment. However, on appeal, the District Court reversed the Appeals Officer. The Respondent appealed to this Court. This Court reversed the District Court, finding that ***the Appeals Officer's decision was supported by substantial evidence.*** The Court supported its conclusion, noting that two exceptions to the going and coming rule applied to the facts of that case.

The first exception is satisfied "when the travel to or from work confers a distinct benefit upon the employer." Id., 110 Nev. at 635, 877 P.2d at 1035 (citing Evans). The Court found it dispositive that the officer was driving a vehicle provided by the employer, was "on call" as evidenced by the beeper and radio, and that the employer benefited from having an officer out driving an undercover vehicle. Therefore the Court concluded that the officer in Tighe was providing a "distinct benefit" to the employer.

Second, the Tighe Court adopted the "law enforcement exception." The Court reasoned that "police officers are generally charged with a duty of law enforcement while traveling on public thoroughfares" and therefore injuries sustained on the commute "may be compensated." (Id.)

However, this Court made it clear that the law enforcement exception "is not sufficiently broad and all-inclusive to justify the conclusion that all law enforcement officers are *always* excluded from the general rule that injuries

sustained while traveling to or from work do not arise out of and in the course of employment."(Emphasis in original)(Id.) This Court specifically concluded that Tighe satisfied the law enforcement exception because "Tighe was on call and driving a police vehicle equipped with a police radio, and he was prepared to respond to any public emergency he may have encountered."

Note also that unlike Evans, Tighe *is* a workers' compensation case. The administrator denied Mr. Tighe's claim and the Appeals Officer reversed, finding among other things that Mr. Tighe's injuries arose out of and in the course of his employment. The District Court reversed the Appeals Officer, finding it was legal error to conclude that Mr. Tighe's injuries arose out of and in the course of his employment. This Court reversed the District Court, finding that "there is substantial evidence in the administrative record to find that Tighe's injuries occurred within the course of his employment." Id.

1. Other States' Application of the Law Enforcement Exception

This application of the going and coming rule is echoed in other states. Indeed, other states have ruled that in situations such as the one in the present case, where the officer is not performing police work or is otherwise simply commuting just as any other employee would, the going and coming rule operates to exclude coverage.

Of the cases to be cited in this section, the case of Rogers v. Indus. Com., 40 Colo. App. 313, 315, 574 P.2d 116, 118 (1978) provides the best outline as to how the going and coming rule should apply to police officers and contains facts that are strikingly similar to the present case. In Rogers, the claimant, a police officer, was driving his personal motorcycle to work when he was involved in an accident. At the time of the accident, he was not in uniform but carried his service revolver, badge, and police identification card, as required by police regulations. The claimant argued that his claim should be compensable because he was required to be "always on duty, although periodically relieved from [his] performance of it."

The Court therein held that the claim was not compensable based on the following:

> The controlling factor is whether, at the time of the accident, the officer was actually engaged in the performance of law enforcement activities. Where the policeman is not engaged in police work when the injury occurred, no compensation is awarded.
>
> This criterion is in accord with the general rule in Colorado that in order for an injury to be compensable, the employee, at the time of the accident, must be "engaged in doing an act, or performing a duty, which he is definitely charged with doing as a part of his contract of service, or under the express or implied direction of his employer."

...

Like Colorado and Nevada, California also recognizes a law enforcement exception to the going and coming rule but, also like Colorado and Nevada, has opined that such an exception "is not sufficient to render the going and coming rule inapplicable." State Comp. Ins. Fund v. Workmen's Comp. Appeals Bd., 29 Cal. App. 3d 902, 906, 106 Cal. Rptr. 39, 42 (1973). In that case, the California Court of Appeals was faced with a police officer who was commuting to work in his personal automobile. It was notable that the officer was not wearing his uniform and was simply commuting just as he would on any other day. The Court held that the claim was not compensable as the officer was not engaged "in conduct reasonably directed toward the fulfillment of his employer's requirements, performed for the benefit and advantage of the employer." In arriving at that conclusion, the Court stated as follows:

> In street clothes, the officer would have been indistinguishable from any other worker on his way to work. Having made provision for the officer to change into uniform at the police station, and not having requested or required the officer to wear his uniform on the way to work, the employer should not be charged with liability resulting from an injury that does not arise from the officer's performance of law enforcement activities while the officer is in everyday transit from his home to the police station. Any other conclusion would permit the officer to impose liability upon the employer at his own whim or caprice.

The state of Georgia has adopted a similar position. In the case of Mayor & Aldermen of Savannah v. Stevens, 278 Ga. 166, 166, 598 S.E.2d 456, 457 (2004) a

police offer was injured while driving to work. Like Nevada, the Court held that although the going and coming rule generally prevents workers from establishing a claim if an injury is incurred while commuting to or from work, "[t]he unique role of police officers, however, will sometimes require a departure from this general rule." The Georgia rule recognizes that "police officers are often called to enforce the law at any time within their jurisdiction, regardless of whether or not they are actually on-duty at the time." As such, under that rule, the Court concluded that the claimant's injury therein arose "in the course of" her employment.

However, because she was merely commuting and not actually performing any work at the time of her injury, the Court went on to conclude as follows:

> Stevens' car accident in this case was in no way related to her work as a police officer. At the time of the accident, she was not actively engaged in any police work nor was she responding to a law enforcement problem. The hazards she encountered were in no way occasioned by her job as a police officer. Because there was no causal connection between her employment and her accident, Stevens' injuries did not arise out of her employment.

Finally, in Tighe, this Court used as primary authority an opinion from the Appellate Court of Illinois, Springfield v. Indus. Comm'n, 244 Ill. App. 3d 408, 185 Ill. Dec. 344, 346, 614 N.E.2d 478, (1993). In that case, an officer had taken a lunch break in an unmarked squad car. It was undisputed that claimant was "on call" 24 hours a day and was required to have a department issued radio turned on

to receive calls. On his way back from lunch, the officer was involved in a motor vehicle accident when another motorist ran a stop sign. Benefits were awarded and the Appellate Court affirmed.

In affirming, the Court made it clear that being "'on call' 24 hours a day is not always determinative since it 'does not necessarily follow that every injury suffered by a peace officer is compensable.'" However, the reason why this case was significant to the Court was that:

> although claimant was not responding to any particular call or emergency, he had his police radio activated pursuant to department directive at the time the accident occurred....In this sense, claimant was not acting outside his employment-related duties or engaged in a purely personal diversion or enterprise. The principal issue, as we have indicated, was whether the employer, under all the circumstances, can be deemed to have retained authority over the employee. *Actively monitoring the police radio* during the course of claimant's return trip to the station is sufficient evidence upon which the Commission could draw the conclusion that the employer intended to retain authority over claimant at the time his injuries arose.

Id., 244 Ill. App. 3d at 411, 185 Ill. Dec. at 346-47, 614 N.E.2d at 480-81 (1993)(emphasis added)

In a more recent decision, the Appellate Court of Illinois distinguished Springfield and upheld the denial of benefits for an officer who was injured while commuting to work, a situation which more accurately tracks with the present case.

In Allenbaugh v. Ill. Workers' Comp. Comm'n, 2016 IL App (3d) 150284WC, 405 Ill. Dec. 611, 58 N.E.3d 872 (Opinion filed on July 12, 2016), the claimant was a patrol officer who was commuting to police headquarters for mandatory training when he was involved in a motor vehicle accident after another vehicle crossed over into his lane. According to the claimant, police officers were on duty 24 hours a day. Claimant was initially awarded benefits by the arbitrator. This was appealed to the workers' compensation commission (which appears to be akin to Nevada's workers' compensation Appeals Officer) which reversed the award of benefits. Claimant appealed and the Circuit Court affirmed the Commission. Claimant appealed again and the Appellate Court affirmed the denial of benefits.

Claimant's main argument in Allenbaugh was that the holding from Springfield should apply and benefits should be awarded. Just as Mr. Figueroa is arguing in the present case, Mr. Allenbaugh argued that his employer maintained sufficient control over him that he was within the scope of his employment at the time of the accident, relying heavily on Springfield, Id. wherein the claimant was injured while returning from lunch. The Court was not persuaded by the analogy, holding as follows:

> [I]t seems to us that all employees are required to go to work. Thus, we fail to see how the fact that claimant was going someplace he was required to go for work distinguishes his situation from normal commuting. Claimant cites nothing to support the proposition that one's obligation to go to the place where one works

> supports an inference that one is within the scope of employment while commuting. Claimant states he would have been subject to discipline if he missed the training session; this is simply another way of saying he was ordered to attend and that attendance was mandatory.
> ...
> Claimant points out that, per departmental directive, he was ordered to bring several items of equipment with him. It is true that the City of Springfield court relied on the fact that the officer had a radio (that was required to be on at all times) and a beeper with him at the time of the accident. However, in City of Springfield, the court mentioned that equipment because it allowed the respondent to maintain control over the officer while he was otherwise off duty. In claimant's case, he was required to bring to training his nightstick, gun belt, handcuffs and key, tazer, holster, and training uniform. Unlike a radio and beeper, none of these items allowed respondent to maintain control over claimant. Therefore, City of Springfield is distinguishable on this basis.

E. Substantial Evidence Supports The Appeals Officer's Decision

The District Court determined that the law enforcement exception adopted in Tighe was sufficiently broad to encompass the factual scenario at bar. However, as noted above, the law enforcement exception is fact based and the Appeals Officer concluded that there was insufficient facts to find sufficient control to render this claim compensable. When determining whether an exception to the going and coming rule applies, the Appeals Officer must necessarily conduct a weighing of the facts and decide whether the evidence supports the exercise of an exception. As noted above, the Court in Tighe reversed the District Court in that case for

invading on the Appeals Officer's purview, holding that the Appeals Officer's decision was supported by substantial evidence. (See also Schepcoff, Id.)Therefore, deference must be given to the Appeals Officer.

Here, Respondent was not performing any work at the time of the incident. He was operating his own personal vehicle at the time of the incident while wearing civilian clothes. Indeed, Respondent would have been indistinguishable from any other civilian motorcycle rider. The Employer received no benefit by Respondent simply being on the road, unlike the undercover "on call" officer from Tighe or the employee in Evans who was *required* to take a company vehicle and company radio to respond to emergencies. (See Also State Comp. Ins. Fund, Id.)

Further, although Respondent had a radio with him, he was *not required* to have it and only carried it out of his own personal habit. Therefore, the two things which both the Tighe and Evans courts found dispositive (i.e. an employer provided vehicle and a mandatory form of radio from the employer) are not present in this case. Respondent even testified that he is *never* required to use his personal motorcycle while he is on duty (ROA p. 43:23-44:15) and only carries his radio out of personal habit. At the time of the accident, Respondent was not providing any distinct benefit to his employer and was simply driving home just as any non-law enforcement employee would.

It must also be noted that Respondent's accident happened at 12:25 a.m. and he was technically still "on the clock" at the time of the accident. Respondent testified that although his shift ended at 12:30 a.m., he was released early. Mr. Roch confirmed that it is common practice for officers to sometimes be released prior to the official conclusion of their shift but that they would be paid for the entire shift. (ROA pp. 54:18-53:9) He referred to this as an "early out," or "EO."

Respondent further testified that the reason he was released early was because his sergeant had informed him that he was being released from a re-acclimation program to return to his position with the Traffic Bureau as a motorcycle officer[1] and that the sergeant wanted Respondent to ride his personal motorcycle to "get some seat time." (ROA pp. 36:24-39:25) Though Mr. Roch was not present for this alleged conversation between Respondent and his sergeant, Mr. Roch questioned the same, stating that "I don't know why you would mix personal with work, but seat time on a personal bike is a whole lot different than seat time on a Metro bike." (ROA pp. 63:12-15)

Furthermore, it should also be noted that Respondent's co-worker, Tyler McMeans, was working the exact same shift as Respondent, had been released at

[1] Respondent, who had previously been a motorcycle officer with the Traffic Bureau, had been participating in a re-acclimation program while recovering from a prior work injury. Respondent had been using an employer provided SUV to perform his job while in the re-acclimation program and he testified that he would be returning to motorcycle duty on either the next shift or the shift after that.

the exact same time, was also driving his personal motorcycle, and was traveling close enough to Respondent at the time of the incident to both witness the incident and speak with the driver who caused the accident. (ROA pp. 39:1-43:22) The Appeals Officer found that this fact drew Respondent's testimony into question, noting that "[s]urely Mr. McMeans was not released early from his shift because *Respondent* was ordered to 'get some seat time.'" (ROA p. 85:23-24)

F. Respondent's Injuries Were Not Connected to His Employment

Respondent's entire argument and apparently the District Court's reasoning to reverse the Appeals Officer is premised on the fact that Respondent was still on the clock at the time of his injury. Therefore, Respondent argues that Respondent was still under enough of the Employer's control at the time of the accident to render this claim compensable. However, simply being on the clock is not a dispositive factor in the state of Nevada. Indeed, it is a mainstay of the Nevada workers' compensation law that a Respondent must establish *more* than the fact that they are getting paid at the time of an injury to make out a compensable claim: "an injured employee is not entitled to receive workers' compensation 'unless the employee . . . establishes by a preponderance of the evidence that the employee's injury arose out of and in the course of his employment.'" Mitchell v. Clark Cty. Sch. Dist., 121 Nev. 179, 181, 111 P.3d 1104, 1105 (2005)(citing NRS 616C.150(1))

Just as with the Respondent in Mitchell, the fact that Respondent was "on the clock," by itself, does not render this claim compensable. Respondent must establish a workplace connection to his injury. Here, there is no work place connection. Respondent was on his personal motorcycle in civilian clothes while commuting home (just as he or any other non-law enforcement employee would) and happened to be involved in a traffic accident. He was not being compensated for his commute nor was he performing any employment related tasks at the time. There is no workplace connection and Respondent was not conferring any benefit on his employer at the time of the incident.

Further, there is no "police" connection to Respondent's accident/injury. Unlike the officer in Tighe, Respondent was driving his own personal vehicle and had been released from service for the day. Though he was still technically "on the clock" at the time of the incident, not only would it have been impossible for Respondent to be called back in prior to his shift's conclusion given that he was ten (10) minutes away from his place of employment and there was only five (5) minutes left in his shift, but Respondent also claims that he could have been called back in at any time even if he was "off the clock." As such, there does not appear to be any real meaningful difference in Employer's ability to call Respondent back when the subject accident happened or five (5) minutes later when his shift technically concluded. If the Appeals Officer were to conclude that the fact that he

was "on the clock" had significance because he could have been called back, then, according to Respondent's testimony, the law enforcement exception would swallow the rule as apparently police officers are *always* subject to be being called back.

Finally, the fact that Respondent had his radio on him at the time of the incident is inconsequential as Respondent made the personal choice to carry it with him and was in no way required to have it while he was off duty. Nor is there any indication that he was required to monitor the same. (See Allenbaugh, Id.) Respondent does not satisfy the law enforcement exception to the going and coming rule.

Claim denial is proper. This case is a going and coming rule scenario with no exceptions applicable. There is substantial evidence to support the Appeals Officer's Decision to affirm the April 9, 2015 claim denial determination and there is no legal error. The Appeals Officer should be affirmed.

G. The District Court Committed Error

To begin with, although the District Court reversed the Appeals Officer, this Court should disregard that District Court decision given that this Court "[does] not give any deference to the district court decision when reviewing an order regarding a petition for judicial review." City of Reno v. Bldg. & Constr. Trades Council of N. Nev., 127 Nev. 114, 119, 251 P.3d 718, 721 (2011)) Should the

reasoning of the District Court be considered, it should still be disregarded as it fails to defer to the Appeals Officer and also fails to adequately account for the proper control analysis that is required in this case.

In the April 30, 2019 Order, the District Court found fault with the Appeals Officer's Order for not including reference in the Findings of Fact that Respondent was on the clock or the fact that Respondent was given an "early out" to "get some additional practice riding a motorcycle, as he called it 'seat time.'" However, both of these facts were discussed at length in the Conclusions of Law section of the Appeals Officer's Order and there was an explicit line in the Decision noting that "[a]ny Finding of Fact more appropriately deemed a Conclusion of Law shall be so deemed, and vice versa." The District Court found that it was legal error to not contemplate the fact that Respondent was on the clock at the time of the incident. However, the Appeals Officer absolutely considered this fact. Although it was not mentioned in the Findings of Fact section, the Appeals Officer noted in the Conclusions of Law that "the claimant was still on the clock at the time of the accident." Not only that, the Appeals Officer went into detail discussing the import of this fact to the case:

> 24. It must also be noted that the fact that this accident happened while claimant was still technically "on the clock" does not somehow render this claim compensable. Indeed, it is a mainstay of the Nevada workers' compensation law that a claimant must establish more than the fact that they are getting paid at the time of an

> injury to make out a compensable claim: "an injured employee is not entitled to receive workers' compensation 'unless the employee . . . establishes by a preponderance of the evidence that the employee's injury arose out of and in the course of his employment.'" Mitchell v. Clark Cty. Sch. Dist., 121 Nev. 179, 181, 111 P.3d 1104, 1105 (2005)(citing NRS 616C.150(1))
>
> 25. Just as with the claimant in Mitchell, the fact that claimant was "on the clock," by itself, does not render this claim compensable. Claimant must establish a workplace connection to his injury. Here, as established above, there is no work place connection. Claimant was on his personal motorcycle in civilian clothes while commuting home and happened to be involved in a traffic accident. Claimant's employment did not contribute to his accident in any way.

The Appeals Officer also quoted Rio Suite Hotel v. Gorsky, 113 Nev. 600, 939 P.2d 1043(1997) which held that the "Nevada Industrial Insurance Act is not a mechanism which makes Employers absolutely liable for injuries suffered by employees who are on the job." The Appeals Officer absolutely considered the fact that Appellant was still on the clock at the time of this incident and included a detailed discussion of the same in the Decision.

As for the District Court's finding that the Appeals Officer "left out" the fact that Appellant testified that he was told to leave early and "get some seat time," the Appeals Officer addressed this fact at length as well. It was not "left out." And again, the subject Decision and Order explicitly noted that "[a]ny Finding of Fact

more appropriately deemed a Conclusion of Law shall be so deemed, and vice versa."

As for the merits of the position that being on the clock should have rendered this claim compensable, the fact that Respondent or any other claimant in the state is on the clock and subject to an Employer's rules and regulations is simply not dispositive. As this Court has held numerous times over, it is the claimant's burden to prove more than just being on the clock when an injury occurs – the claimant must prove by a preponderance of evidence that the origin of the injury is related to some risk involved within the scope of employment. Gorsky; Mitchell; Rio All Suite Hotel and Casino v. Phillips, 126 Nev. 346, 240 P.3d 2 (2010).

Furthermore, from a public policy standpoint, under the District Court's current ruling, if Respondent's accident had happened five (5) minutes later when Respondent was five (5) minutes further down the road with all other facts being the same, this claim would not be compensable. There is no further work connection other than the passage of five (5) minutes. Appellants would submit that such an outcome is arbitrary on its face, especially considering this Court's opinion that being on the clock by itself is not enough for a compensable claim.

Further, if this Court interprets the District Court's holding to be based on something other than the passage of time, then the District Court is explicitly concluding that the police officer exception should swallow the general rule.

Next, the District Court concluded that it was error for the Appeals Officer to find that Employer "received no benefit from claimant being on the road." The District Court reasoned that Employer *did* receive a benefit because Respondent was on the clock, could have been called back, was ordered to get some "seat time," and Respondent was still subject to Employer's rules and regulations. However, save for the "seat time" which will be discussed more below, all of the reasons listed by this Court as "benefits" to the Employer are simply consequences of being on the clock which, as discussed above, is not enough reason by itself to render a claim compensable. (See Allenbaugh, Id.)

The District Court concluded that "there is no question the Appellant was on the clock at the time of the accident and, therefore, under the control of LVMPD unlike an off-duty officer returning home." Indeed, Appellants agree that the only difference between an off-duty police officer and Respondent is the fact that Appellant was on the clock. However, again, this Court has stated several times over that that is simply not enough to render a claim compensable.

Regarding the fact that Respondent testified that his sergeant ordered him to "get some seat time," the Appeals Officer weighed the facts and concluded that

there was no evidence to show that Respondent's job required him to ride his personal motor cycle as a condition of his employment. Indeed, it was Respondent's choice to have a personal motor cycle to commute to and from work and Respondent was not performing any training or any other police function while he was driving that personal motor cycle on the day in question. The Employer received as much benefit from Respondent commuting home on his personal motor cycle as it would have if Respondent were commuting home in a mini-van. That is to say that Employer received no benefit from Respondent commuting home in a vehicle of his choosing just as he would on any other day. It nothing else, this was a fact question for the Appeals Officer and there was substantial evidence to support the Appeals Officer conclusion.

Finally, the District Court concluded that it was error to affirm claim denial given that Respondent "had his radio and the general duty of law enforcement while traveling on public thoroughfares under Tighe." However, that is not the complete holding of Tighe. Indeed, the Tighe Court held that injuries sustained by law enforcement officers on their commute "*may* be compensable" and that the "law enforcement exception is not sufficiently broad and all-inclusive to justify the conclusion that all law enforcement officers are *always* excluded from the general rule that injuries sustained while traveling to or from work do not arise out of and in the course of employment." (Id.) This Court specifically concluded that Tighe

satisfied the law enforcement exception because "Tighe was on call and driving a police vehicle equipped with a police radio, and he was prepared to respond to any public emergency he may have encountered."

Here, just as being injured on the clock is not enough by itself for a compensable claim, the fact that Respondent was a police officer on his commute home is not enough to render this or any other claim compensable. The law enforcement exception is fact sensitive and does not apply across the board to police officers on their commute home. Further, the fact that Respondent had his radio is not dispositive as he chose to bring the radio with him. In Tighe, the employer *mandated* that Tighe carry a radio to respond quickly given his "on call" status. Here, Respondent admitted that it was his choice to bring the radio and that he could have left the same at the station if he wanted to.

Respondent was not performing any police work at the time of the incident – he was commuting home just as any other police officer (or non-police officer) would. The only potential work connection that this claim has is that it occurred five (5) minutes before Respondent was technically off the clock. This Court has been clear that being on the clock is not enough, there must be a work connection. Other than being on the clock, the only other facts which the District Court found dispositive were Respondent's personal choices to drive a motor cycle and his personal choice to bring his radio with him. There is no evidence that Employer

instructed Respondent to purchase a motorcycle or even to undertake police duties while driving his personal motor cycle. Nor is there any evidence that Employer instructed Respondent to carry a radio with him. The District Court should be reversed and the Appeals Officer affirmed.

VI.

CONCLUSION

Based upon the foregoing, Appellant requests that this Court affirm the Appeals Officer, reverse the District Court, and find that the Respondent has failed to prove that injuries arose out of and in the course of his employment.

Dated this 30 day of October, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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 type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 9,714 words and 899 lines of text.

3. Finally, I hereby certify that I have read this appellate brief, 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.

...

...

...

4. 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,
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CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 30th day of October, 2019, service of the attached **APPELLANTS' OPENING BRIEF** was made this date by depositing a true copy of the same for mailing, first class mail, and/or electronic service as follows:

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