IN THE SUPREME COURT, STATE OF NEVADA
Supreme Court No.: 78926

CANNON COCHRAN MANAGEMENT SERVICES, INC., LAS VEGAS METROPOLITAN POLICE DEPARTMENT

Appellants,

vs.

DAVID FIGUEROA,

Respondent.

Electronically Filed
Nov 27 2019 02:49 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT, STATE OF NEVADA, CASE NUMBER A-18-779790-J

RESPONDENT DAVID FIGUEROA'S ANSWERING BRIEF

JASON D. MILLS, ESQ.
Nevada Bar Number 7447
JASON D. MILLS & ASSOCIATES, LTD.
2200 S. Rancho Dr., Ste 140
Las Vegas, Nevada 89102
Telephone (702) 822-4444
Facsimile (702) 822-4440
jdm@jasondmills.com
Counsel for Respondent
David Figueroa

NRAP 26.1 DISCLOSURE

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

Respondent's counsel, Jason D. Mills, Esq., is the principle officer and owner of the law firm Jason D. Mills & Associates, Ltd., a Nevada professional limited liability company, owed solely by Jason D. Mills, Esq., and no other person or entities whatsoever.

The undersigned counsel further confirms that the only attorneys who have appeared on behalf of Respondent in any court or administrative proceedings related to this matter are Jason D. Mills, Esq. of Jason D. Mills & Associates, Ltd. at 2200 S. Rancho Dr., Ste. 140, Las Vegas, NV 89102.

Dated this 27th day of November 2019.

/s/ Jason D. Mills
JASON D. MILLS, ESQ.
Nevada Bar No. 7447
JASON D. MILLS & ASSOCIATES, LTD.
2200 S. Rancho Dr., Ste 140
Las Vegas, NV 89102
Attorney for Respondent,
David Figueroa

TABLE OF CONTENTS

Page(s)

///

///

///

TABLE OF AUTHORITIES

Cases (cont.) **Page(s)**

Statutes, Regulations, and Court Rules

Treatises and secondary sources

I. JURISDICTIONAL STATEMENT

The Appellant's Notice of Appeal was filed on May 30, 2019, 30 days after the April 30, 2019 Notice of Entry of Order. The Appeal is based upon a final order from the District Court. Under NRS 233B.150, NRAP 3 and 4, the Nevada Supreme Court has jurisdiction.

II. ROUTING STATEMENT

The matter is not presumptively retained by the Supreme Court but rather the Court of Appeals pursuant to NRAP 17(b)(9)-(10) as the underlying Petition for Judicial Review from the District Court was based upon an appeal from the Nevada Department of Administration, and does not present any questions of apparent first impression involving the Nevada Constitution. However, Respondent agrees with Appellants that under NRAP 17(a)(12), the Nevada Supreme Court is justified in retaining jurisdiction over this case as it directly impacts the application a Supreme Court case, namely *Tighe v. Las Vegas Metropolitan Police Dept.*, 110 Nev. 632 (1994). Therefore, this issue is of statewide public importance. Thus, the Nevada Supreme Court should retain the case for adjudication.

///

///

///

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

May the District Court overrule an Appeals Officer's Decision that was affected "...by error of law and clearly erroneous in view of the reliable, probative and substantial evidence on the whole record"?

IV. STATEMENT OF THE CASE

The Appellants, Las Vegas Metropolitan Police Department ("Employer") and their industrial administrator CCMSI, collectively "Appellants", seek to reverse the District Court below that reversed the Appeals Officer's Decision denying industrial benefits to Respondent David Figueroa, a Las Vegas Metropolitan Police officer who was severely injured during the course and scope of his employment ("Respondent").

The Appellants contend the Appeals Officer's ruling was supported by "substantial evidence". The Respondent agrees with the District Court that the Appeals Officer made a clearly erroneous decision in view of the reliable, probative, and substantial evidence on the whole record and must be overturned.

V. STATEMENT OF FACTS

David Figueroa (hereinafter "Respondent") is employed as a motorcycle traffic police officer with the Las Vegas Metropolitan Police Department since, November 5, 2006. See Appx. Vol. 1, p. 8, lines 10-19.

On March 7, 2015 Respondent was working at the Bolden Area Command, re-acclimation program. See Appx. Vol. 1, p. 10, lines 4-6. Prior to that date, Respondent had a previously accepted industrial injury. See Appx. Vol. 1, p. 10, lines 14-25. While his regular duties prior to the first accident required Respondent to operate a motorcycle on the job; the re-acclimation duties did not. See Appx. Vol. 1, p. 11 lines 11-23. On March 7, 2015, Respondent was scheduled to work from 2:30 pm until 12:30 am. See Appx. Vol. 1, p. 12, lines 1-4.

Respondent's Sergeant indicated the Captain had determined that the 12-16 week re-acclimation program would not be necessary for Respondent to complete and would return him to his regular duties within the next shift or two; the result being the Respondent would again be operating police motorcycles. See Appx. Vol. 1, p. 13, lines 12-18. On March 7, 2015 Respondent's Sergeant had ordered Respondent to leave early at approximately 11:45 pm, so that Respondent could get "seat time" to practice on his motorcycle to prepare Respondent for his regular duties. See Appx. Vol. 1, p. 24, lines 4-5. The Sergeant further commanded that "[i]f we need you, be close to your phone." See Appx. Vol. 1, p. 39, lines 18-20. Practice riding on a motorcycle colloquially known by motorcycle officers as "seat time". See Appx. Vol. 1, p. 186, lines 8-24. Also, the Respondent's personal motorcycle and the police motorcycle were "very similar" in type. See Appx. Vol. 1, p. 24, lines 12-15.

Respondent changed his clothes and left the station on his motorcycle to get more "seat time" and engage in practice riding as instructed by his superior, and was being paid while "on the clock"; Respondent had no ability to refuse a summon back to the station while "on the clock". See Appx. Vol. 1, p. 14, l-24. Additionally, Respondent was not permitted by his Employer to drink alcohol while "on the clock", and was also in possession of his duty weapon, handcuffs, badge, department radio, and was approximately 5-10 minutes away from and about 1.5 to 2 miles distant from the station when he was in an accident at 12:25 am due to an at-fault driver. See Appx. Vol. 1, p. 15, lines 1-14, p. 40, lines 1-24, p. 41, lines 1-25.

Respondent was transported to UMC, where he was placed in a medically induced coma for 6 days and spent a total of 47 days in hospitals. See Appx. Vol. 1, p. 20, lines 1-12. Respondent then received corrective surgeries at UCLA Medical Center. See Appx. Vol. 1, p. 20, lines 13-25. The injuries were so severe Respondent spent nearly 1.5 years off-work to recover. See Appx. Vol. 1, p. 21, lines 9-16.

On March 7, 2015, a C-4 was completed. See Appx. Vol. 2, p. 215. On April 9, 2015, Respondent's claim was denied. See Appx. Vol. 2, p. 279-280. Respondent appealed and following a hearing a Decision and Order dated July 25,

2018, was filed affirming the TPA's claim denial was issued. See Appx. Vol. 1, p. 78-90.

On August 21, 2018, Respondent sought Petition for Judicial Review regarding the Appeals Officer's Decision and after briefing was scheduled, the District Court issued its Order Reversing the Appeals Officer's Decision on April 30, 2019, with Notice of Entry of Order filed on same day. See Appx. Vol. 4, p. 665-675.

On May 15, 2019, the Appellants filed a Motion to Alter Judgment, See Appx. Vol. 4, p. 676-715. Prior to the District Court ruling on the Appellant's Motion, the Appellant's filed an appeal to the Nevada Supreme Court on May 30, 2019. See Appx. Vol. 4, p. 718-723.

On June 11, 2019, the Appellant's filed their Motion for Stay before this Court, with Respondent filing his Opposition to Motion for Stay on June 17, 2019, and this Court issuing its Order denying on September 26, 2019.

Following unsuccessful mediation, the briefing was reinstated by this Court and Appellant's filed their Opening Brief on October 30, 2019.

This Respondent's Answering Brief follows.

VI. STANDARD OF REVIEW

The Court's roll in reviewing an administrative agency's decision is identical to that of the District Court—to review the agency's decision for clear

error and will overturn the agency's factual findings only if they are not supported by substantial evidence. See NRS 233B.135(3)(e). See also *Original Roofing Company, LLC v. Chief Administrative Officer of Occupational Safety and Health Administration*, 135 Nev. Adv. Op. 18 (June 6, 2019) (citing *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). An agency's fact-based conclusions of law are entitled to deference when supported by substantial evidence; however, purely legal questions are reviewed de novo. *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *City Plan Dev., Inc. v. State, Office of Labor Comm'r*, 121 Nev. 419, 426, 117 P.3d 182, 187 (2005).

VII. ARGUMENT

A. DISTRICT COURT PROPERLY REVERSED THE APPEALS OFFICER'S RULING THAT WAS CLEARLY ERRONEOUS

As indicated the standard of review adopted by the District Court was under NRS 233B.135(3)(e), is whether the underlying Appeals Officer's decision was "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record". Here, the District Court found that the Appeals Officer's decision violated NRS 233B.135(3)(e) in numerous ways.

1. District Court cited the Appeals Officer's clearly erroneous reasoning as it applied to the Respondent being "on the clock"

because of the "significant control" and "distinct benefits" between Employer and Employee

The general rule is that "going and coming" to and from one's place of employment is not compensable under the Nevada Industrial Insurance Act because such travel does not arise out of the course and scope of employment. See *MGM Mirage v. Cotton*, 121 Nev. 396 (2005). See also NRS 616C.150. As the District Court noted there are three exceptions to the "going and coming" rule that are applicable here 1) travel to and from work that confers a "distinct benefit" upon the employer; 2) where the employer exercises "significant control" over the employee; and 3) the "law enforcement" exception as police officers are generally charged with a duty of law enforcement while traveling on public thoroughfares. See Appx. Vol. 4, p. 659, lines 7-15. See also, *Evans v. Southwest Gast Corp.*, 108 Nev. 1002, 1008 (1992) and *Tighe v. Las Vegas Metropolitan Police Dept.*, 110 Nev 632, 635-636 (1994).

Here the District Court found the Appeals Officer's analysis of those three exceptions were "clearly erroneous". See Appx. Vol. 4, p. 659, lines 16-18. The District Court noted that the Appeals Officer only "briefly mentioned" that the Respondent was still "on the clock" at the time of his accident. See Appx. Vol. 4, p. 659, footnote 1.

Specifically, the Appeals Officer and Appellants wrongfully attempt to characterize Respondent's legal position (and therefore that of the District Court)

as somehow advancing the idea that Respondent being "on the clock" is, in and of itself, demonstrative evidence of industrial compensability; at no time has the Respondent ever advanced that argument, nor did the District Court apply it in such a manner.

Rather, the importance of the Respondent being "on the clock" evidences those issues which are relevant; i.e. "distinct benefits" conferred to the Employer all while the Employer exerted "significant control" over its employee interacting with the "law enforcement" exception of the "going and coming" rule. Contrary to Appellants' contention that being "on the clock" means essentially nothing here, is that being "on the clock" specifically with regard to police officers, the "significant control" over the Respondent and the "distinct benefits" to the Employer remain in place because of the "unique nature of law enforcement" and that is dissimilar to most non-police jobs.

It is a subtle nuance yet legally an important distinction that eluded the Appeals Officer.

i. Respondent while "on the clock" cannot refuse a summon back to his station by his superiors

First, when Respondent is "on the clock" he cannot refuse a summon back to the station, by his superiors, and if he did so, he would subject himself to discipline. See Appx. Vol. 1, p. 14, 2-8, p. 65, lines 23-24, and p. 66, lines 1-6. Accordingly, Respondent remained under the "significant control" of the Employer

at the time of the accident. The result of which confers a "distinct benefit" to the Employer by making its police officers who remain "on the clock" equivalent to "on call" officers as in *Tighe v. Las Vegas Metro. Police Dept.,* 110 Nev. 632 (1994).

The Appeals Officer not only failed to appropriately analyze this fact, she contrived a contrary fact that does not exist in the record to attack the importance of Respondent being "on the clock". The Appeals Officer's found while "…technically 'on the clock' at the time of the accident, it would have been **impossible** for Respondent to be called back in prior to his shift's conclusion…". See Appx. Vol. 1, p. 88, ¶ 31, lines 24-25 (Emphasis added).

Nowhere in the record is it supported that it would be an "impossible" feat. The Employer's witness opined that while it would be "fairly tough" to summon him back he nevertheless conceded it "could happen". See Appx. Vol. 1, p. 60, lines 10-18. And the Respondent testified he had been called back to the station approximately five times over his prior 10-year career. See Appx. Vol. 1, p. 40, lines 7-12.. Yet, the Appeals Officer made a factual finding it would be "impossible" for the Employer to do so. Aside from not being based on facts in the record, such a pronouncement is contrary to the common understanding of how employers and employees communicate. Simply picking up the phone (or radio) and calling Respondent is all that had to happen. This explains the supervisor's

order to Respondent to "stay close to the phone" if he was needed back at the station. See Appx. Vol. 1, p. 39 lines 13-20.

Stunningly, that was not the only fact the Appeals Officer contrived. The Appeals Officer also found that "...in no way was claimant's commute from work on the day in question any different than his commute on any other day.". See Appx. Vol. 1, p. 85, line 28 and p. 86, line 1. The record expressly evidences the opposite is true, in a *sua sponte* exchange initiated by the Appeals Officer to the Respondent:

Appeals Officer:	*Okay.*
David Figueroa:	*He said, go get some practice time on your motorcycle and-because effective-I don't recall if was the next shift or the following shift, but you would be sent back to traffic because there's no reason you should be here-to re-acclimate me because-*
Appeals Officer:	*Okay. So, you were told to go practice.*
David Figueroa:	*Correct.*
Appeals Officer:	*On your personal motorcycle.*
David Figueroa:	*Yes ma'am.*
Appeals Officer:	*Is it the same type of motorcycle that you ride?*
David Figueroa:	*Very similar.*

Appeals Officer: *Okay. And so you were only going to practice until your shift ended or you were just practicing on your way home?*

David Figueroa: *Well, practicing on my way home and-I live quite a ways away.*

See Appx. Vol. 1, p. 24, lines 3-21.

Therefore, this journey *was unlike* any other commute home as the Respondent was specifically ordered while "on the clock" to "practice" riding his motorcycle such that it would facilitate Respondent getting ready for his return to motorcycle duty. And Appeals Officer found to the contrary without substantial evidence in violation of NRS 233B.135(3)(e).

ii. Intent of Employer's express orders are known and those orders exposed Respondent to the "actual street-risk rule"

Second, another reason the Respondent being "on the clock" is significant and further demonstrates the "significant control" exercised by the Employer over the Respondent is the express reason *why* the Respondent was released early and the risk occasioned by Respondent due to that order.

It is an uncontroverted fact that the Respondent was released for the express purpose to get additional "seat time" and to engage in practice riding preparation for his imminent transfer back to the traffic bureau. See Appx. Vol. 1, p. 36, lines 24-25, p. 37, lines 1-10, p. 38, 19-25, and p. 39, lines 18-20. The Appeals Officer

attempt to refute the importance of his orders by finding no "…evidence that Respondent's sergeant explicitly required him to 'get some seat time' **as a condition of his employment**". See Appx. Vol. 1, p. 86, lines 1-3 (Emphasis added). This clearly erroneous conclusion by the Appeals Officer infers it would have been entirely reasonable for the Respondent to refuse.

Carrying the Appeals Officer finding to its logical conclusion could the Respondent state to his superior, with no concern for employment discipline the following: *"No Sergeant, I will not do you as command and acquire additional 'seat time' by engaging in practice maneuver riding on my similarly designed motorcycle to that of my duty motorcycle, in express preparation for my imminent return and reassignment to the traffic bureau as our Captain has ordered; further I will not stay near my phone in the event you need to summon me back to the station and may upon my discretion stop at a bar and get drunk despite the fact I will still be 'on the clock' being paid as police officer. I hereby expressly refuse your orders"*? The absurdity of the hypothetical lays bare the absurdity of the Appeals Officer's clearly erroneous finding that following the express orders of his superiors was "not a condition of his employment".

Furthermore, it was that very order by his superior that Respondent could not refuse, that subjected Respondent to the "actual-street risk rule". As this Court is aware the "actual street-risk rule" in Nevada stands for the legal construction

that "[w]hen an employee is required to use the streets and highways to carry out his employment obligations, the risks of those streets and highways are thereby converted to risks of employment.". See *Bob Allyn Masonry v. Murphy*, 124 Nev. 279, 284 (2008). Thus, the risks inherent to driving on the streets when one's job so requires, are squarely employment related risks. At the express command of his superior while "on the clock" to acquire additional riding practice, placed him upon those roads when and where the accident happened.

Yet another clearly erroneous finding as to *why* the Respondent was released early was reliance on irrelevant information of a fellow police officer. Namely, by making a finding that officer Tyler McMeans was also released early from the station that "...McMeans was not released early from his shift because Respondent was ordered to 'get some seat time' ". See Appx. Vol. 1, p. 85, lines ¶ 25, lines 18-24. McMeans did not testify nor did his superiors testify as to the employment reason why Officer McMeans was released. For all we know the reason could have been that he was expressly ordered to follow and observe Respondent and report back to his superiors on Respondent's riding practice performance. Regardless, it is irrelevant why Officer McMeans was released early. What is relevant is *why the Respondent* was released early as it applies to *his* industrial claim. He was released early by his superiors expressly to get additional "seat time" in order to engage in practice riding in preparation for his imminent return to the traffic bureau; as

admittedly found by the Appeals Officer "...there is no evidence to the contrary..." on that subject. See Appx. Vol. 1, p. 85, ¶ 21, lines 18-27.

iii. While "on the clock" the Respondent could not consume alcohol demonstrating "significant control" over their employee and conferring a "distinct benefit" to the Employer of not having drunken police officers

Third, another reason being "on the clock" is important factor here is that it further demonstrates the "significant control" the Employer exercised over the Respondent. While "on the clock" Respondent could not drink alcohol and if he had it would subject him to Employer discipline. See Appx. Vol. 1, p. 15, lines 4-14, p. 55, lines 17-19. Thus, Respondent was still under the "significant control" of the Employer at the time of his accident. And that "significant control" that confers "distinct benefit" to his Employer, which, while obvious to the District Court and Respondent (yet eluded the Appeals Officer who avoided analysis of this topic entirely) is that police departments do not allow their police officers to drink while "on the clock". Thus, if he had and caused accident injuries to others while drunk would not the holding in *Evans* confer liability to not only Respondent, but to his police Employer? Indeed, it would. And if controlling the alcohol consumption of police officers while "on the clock" is not a "distinct benefit" conferred to a police employer, then nothing is.

2. "Distinguishable" findings by Appeals Officer between *Tighe* and Respondent are clearly erroneous

Being "on the clock" and subject to being summoned back to the station, is effectively to be "on call" as outlined by *Tighe* as a basis regarding the attachment of industrial compensability for the "law enforcement" exception to the "going and coming" rule:

> *...the unique nature of law enforcement requires us to distinguish it from other types of traditional employment. As Professor Larson noted:*
>
> > *It has been recognized that policemen are "on call" in a special sense. That is, while the usual on-call employee is subject to the possibility of a specific summons emanating directly from his employer, the policeman may be at any moment "called" into duty by events taking place in his presence, whether or not he is technically off duty. Awards have accordingly been made to policemen injured in the course of ordinary going or coming journey.*

Tighe v. Las Vegas Metro. Police Dept., 110 Nev. 632, 636 (1994)(citing 1 Arthur Larson, Larson's Workmen's Compensation Law § 16.17 (1993)).

While *Tighe* did not adopt an all-inclusive rule to justify the conclusion that all law enforcement are always excluded from the going and coming rule, it did find sufficient facts to support upholding compensability of *Tighe's* claim. But as read that exception is quite broad, not narrow as advanced by Appellants.

Here the Respondent was "on call" because Respondent was still "on the clock" and remained under the "significant control" of his Employer because his

supervisors had the power to summon him back to the station. See Appx. Vol. 1, p. 10, lines 4-6.

Yet despite these two strikingly similar fact patterns (indeed Respondent being arguably under *more* control than *Tighe*) the Appeals Officer stated:

> *The instant case is distinguishable from Tighe. To begin with, claimant was operating his own personal vehicle at the time of the incident while wearing civilian clothes. Claimant would have been indistinguishable from any other civilian motorcycle rider. The Employer received no benefit by claimant simply being on the road, unlike Tighe. Further, although he 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 the Tighe court found dispositive (i.e. employer provided vehicle and a mandatory form of radio from the employer) are not present in this case. Claimant even testified that he is never required to use his personal motorcycle while he is on duty (Transcript p. 41:19-22) and only carriers his radio out of personal habit. At the time of the accident, claimant was not providing any distinct benefit to his employer and was simply driving home just as any non-law enforcement employee would.*

See Appx. Vol. 1, p. 84, ¶17, lines 14-25.

That paragraph is the beating heart of the Appeals Officer's flawed analysis to distinguish *Tighe* (compensable) from Respondent (not compensable). Yet it is stunning in what the Appeals Officer does not analyze and thus, leading the Decision into the "clearly erroneous" realm of NRS 233B.135(3)(e) as ruled by the District Court.

According to the Appeals Officer to distinguish *Tighe* from Respondent, it is noted that he was operating his personal vehicle (i.e. unmarked) and in "civilian

clothes" making Respondent "indistinguishable" from any other member of the public. See Appx. Vol. 1, p. 84, ¶17, lines 14-25. These were not relevant factors in *Tighe*. And even if they were relevant, how then is it a basis to distinguish *Tighe* from Respondent? *Tighe* was operating an unmarked vehicle, and an "undercover" officer (i.e. civilian clothed) rendering *Tighe* "indistinguishable" from any other member of the public. *Tighe* at 632. The facts from *Tighe* render him no more distinguishable from a member of the public than Respondent. Yet, this was *the* leading point raised by the Appeals Officer as the basis to distinguish the two cases.

Next, the Appeals Officer simply concluded that "[t]he Employer received no benefit by claimant simply being on the road, unlike *Tighe*." See Appx. Vol. 1, p. 84, ¶17, lines 16-17. How so? *Tighe* was an off-duty (for more than 2.5 hours at the time of his accident) undercover narcotics officer that had engaged in drinking beer at a restaurant with co-workers and superiors. *Id* at 633. He was in an unmarked police vehicle equipped with police radio and he had a police beeper. *Id* at 633. He was driving home. *Id* at 633. His claim was compensable because of the "law enforcement" exception as the employer received the benefit of *Tighe* being able to respond to emergencies upon the road. In contrast, Respondent is an actual traffic police officer, the very job exists to enforce the traffic laws. See Appx. Vol. 1, p. 8, lines 10-13 and p. 11, lines 13-16. Respondent has a duty to intervene

should he encounter an accident or crime upon the roads, and especially so while still "on the clock". See Appx. Vol. 1, p. 16, lines 9-20. Respondent was "on the clock", being paid, following orders (practice riding his motorcycle and expressly commanded to be "close to his phone" should the station need him back). See Appx. Vol. 1, p. 12, lines 1-25, p. 13 lines 1-25, p. 14, lines 1-8. Respondent could not engage in drinking alcohol as *Tighe* freely was able to engage in because *Tighe* was technically off the clock during the 2.5 hours before his accident. See Appx. Vol. 1, p. 14 20-25, p. 15, lines 1-14. See also *Id* at 633. And Respondent was only few minutes from the station when his accident happened. Thus, how is this "no benefit" to the Employer "unlike *Tighe*"? Answer? The Appeals Officer clearly erred. Of course, the Respondent conveyed several "distinct benefits" to the Employer; indeed far more benefit then *Tighe* provided to the Employer, yet *Tighe* was compensable and Respondent is not according to this Appeals Officer. This was but one of the several reasons the District Court reversed the Appeals Officer.

Next the Appeals Officer seems to myopically focus on the ownership issue of chattels; personal ownership v. employer ownership. Yet is that really the underlying important factor as to when to apply the "law enforcement" exception? The ownership of the vehicles and the ownership of the communication devices? No, it is not. *Tighe* as a policeman "may be at any moment 'called' into duty by events taking place in his presence whether or not he is technically off duty." *Id* at

636, citing 1 Arthur Larson, Larson's Workmen's Compensation Law § 16.17 (1993). This is also true of Respondent as a traffic officer who was still "on the clock" and carrying out the express orders of his superiors. The issue isn't ownership of the vehicle these men drove, or who owned the communication device by which the police employer sends its commands to the sub-ordinate officer. Of course, while not in a company vehicle equipped with a company radio, here Respondent was specifically ordered to "...be close to your phone" in the event he was needed back at the station. *See* Appx. 1, p. 39 lines 13-20. It is axiomatic that beepers are no longer part of our modern communication systems like they were back in the days of *Tighe*; but cell phones are. So a police owned beeper supports compensability but a personal cell phone (or police radio carried by choice) that can effectuate the same purpose is how we distinguish compensability between these two cases? Of course not. The legal issue of being controlled by and summonable by the police employer and compel Respondent to act in furtherance of employment duties is what matters. To be able to do so is a "distinct benefit" being conferred to the police employer for "on call" officers. And because he was still "on the clock" Respondent was most certainly an "on call" police officer at the time of the accident. Thus, there is no meaningful distinction between *Tighe* and Respondent here, despite the Appeals Officer's finding the two

cases were "distinguishable" based on the ownership issues of the chattels in their possession at the time of the accident.

Finally, the Appeals Officer concludes the "distinguishable" facts between *Tighe* and Respondent noting that he was "...simply driving home just as any non-law enforcement employee would". See Appx. Vol. 1, p. 84, ¶17, lines 23-25. But was not *Tighe* "...simply driving home just as any non-law enforcement employee would"? *Id* at 632. *Tighe's* shift had ended 2.5 hours before his accident and *Tighe* had already met with his supervisors at a restaurant to discuss the previous night's events, plan a future narcotics buy, drink beer and eat dinner... his work over, he left the restaurant and drove home. *Id* at 632. Thus, the Appeals Officer's focus on *that* factor is entirely irrelevant and misplaced to "distinguish" *Tighe* from Respondent.

Accordingly, nothing in the Appeals Officer's analysis *substantively* distinguishes the facts from *Tighe* and the Respondent in a manner that demonstrates why *Tighe* is a compensable claim and Respondent's is not.

B. IN NEVADA *TIGHE* IS BINDING PRECEDENT FOR THE "LAW ENFORCEMENT" EXCEPTION, AND NOT HOLDINGS FROM OTHER JURISDICTIONS. ALL NON-NEVADA CASES CITED BY APPELLANT ARE EITHER DISTINGUISHABLE OR SUPPORT RESPONDENT

The *Tighe* case is the seminal binding authority in Nevada with regard to the application of the "law enforcement" exception to the "going and coming" rule.

Yet, Appellant's cite five cases from four other jurisdictions (Colorado, California, Georgia and Illinois). See Appellant's Opening Brief, p. 23 lines 1-2, p. 24, lines 5-6 and lines 26-27, p. 25 lines 22-24 and p. 27, lines 1-2. Three of the five cases cited predate the Nevada holding in *Tighe* and thus were already in circulation when *Tighe* was decided by the Court. Also, two of the four jurisdictions cited by the Appellants (Colorado and California) have later reported decisions from same jurisdictions that undermine the Appellants' argument. The Georgia case cited by Appellants, if applied in Nevada would significantly undermine the holding in *Tighe*. Finally, upon close reading of the Illinois cases, one supports Respondent and the other is manifestly distinguishable.

1. *Rogers v. Indus. Com.* is distinguishable from Respondent's case, and there is a more recent holding in Colorado that supports Respondent's claim

The Appellant's first citation from a jurisdiction outside of Nevada was to *Rogers v. Indus. Com.*, 574 P.2d 116 (1978), a Colorado case decided 16 years before *Tighe*.

There a police officer's commute to work was not on the clock and was not engaging in any employment activities. *Id* at 117. In *Rogers* the officer sought to expand compensability to a general rule that all police officers are "always on duty" for the purposes of industrial compensability. *Rogers* at 117.[1] The Colorado

---

[1] It should be noted this is *not* the argument being advanced by Respondent here.

Court disagreed and relied upon the Colorado rule at the time of the accident the employee must be "engaged in doing an act, or performing a duty, which he is definitely charged with doing as part of his contract of service, **or under the express or implied direction of his employer**." *Rogers* at 118 (Emphasis added). Contrasting *Rogers* with Respondent, Respondent was "on the clock" and acting at express direction of his employer at the time of his accident to improve his job related skills, that he had to remain in contact with his Employer to be summoned back if commanded and he could not drink while doing so.

The Appellant omitted citing a more recent case from the same state (Colorado) that conferred industrial compensability by specifically distinguishing itself from *Rogers* by invoking a broader test; namely *Mineral County v. Industrial Commission of Colorado*, 649 P.2d 728 (1982). There, Colorado adopted a "totality of circumstances" test, that was not referenced in *Rogers*. *Mineral County* at 730.

In *Mineral County* the police officer was killed, apparently by falling and hitting his head outside of an Elks Lodge where he was on a personal errand and drinking alcohol. *Id* at 729. Further, the police officer's wife was waiting in his patrol car as they had intended to go to dinner. However, because the decedent was in uniform, had a police radio at home (and in his car), was the only deputy in the county, the "totality of the circumstances" made it such that he was "on duty" 24

hours a day. While the 24 hours a day on duty was not itself the controlling factor, the Court adopted a "totality of circumstances" test by examining at all the circumstances regarding the industrial claim (which included the fact he was on a personal errand and was doing no specific police duties when he died). *Id* at 730.

Similarly, the "totality of the circumstances" for Respondent that have been exhaustively addressed hereinabove throughout this brief would also likely confer compensability under Colorado's test.

2. *State Comp. Ins. Fund v. Workmen's Comp. App. Bd.*, 29 Cal.App.3d (1973) cited by Appellants is distinguishable from Respondent, and there are two more recent California holdings in further support of Respondent

The Appellant's second citation from a jurisdiction outside of Nevada was to *State Comp. Ins. Fund v. Workmen's Comp. App. Bd.,* 29 Cal.App.3d (1973) a California case decided 21 years before *Tighe.*

There *State Comp. Ins. Fund* the police officer in his commute to work while he was wearing a uniform (not at the command of a superior officer), and was not on the clock at the time of his accident. *Id* at 903-904. There the officer was engaged in commuting only that was not "…conduct reasonably directed toward the fulfillment of his employer's requirements, performed for the benefit and advantage of the employer". *State Comp Ins. Fund* at 907-908. Contrasting *State Comp. Ins. Fund* the Respondent was engaging in conduct toward the fulfillment

of his job and for the benefit of his employer (exhaustively addressed hereinabove throughout this brief).

In more recent ruling in California not referenced by Appellants is *Petrocelli v. Workmen's Comp. App. Bd.,* 45 Cal.App.3d 635 (1975). There the officer was off the clock following his shift and went to a movie theater but was still in uniform. *Id* at 636-637. After he exited the theater he noticed young men that "didn't look right" so he began to approach, and as he did so he tripped over a divider and was injured *Id* at 636-637. The Court held he was engaging in law enforcement duties (about to investigate what was going on in the parking lot) thus compensation was due.

Similarly, Respondent was engaging in conduct toward the fulfillment of his job and for the benefit of his employer (exhaustively addressed hereinabove).

In the second more recent ruling in California that was also not referenced by Appellants was *Carrillo v. Workers' Comp. App. Bd.*, 149 Cal.App.3d 1177 (1983). There a reserve deputy sheriff while off the clock and commuting in her personal vehicle was wearing her uniform heading the county woman's jail where she was assigned, noting there was no place change to her police uniform. *Id* at 1178. However, the Court ruled that essentially the deputy there had "...in substance performed for her employer the function of a uniformed officer in an unmarked patrol car..." compensability was granted because this conferred a

"substantial benefit" when she drove to work in her own vehicle that morning for her employer "...whether or not she was acting as a peace officer during the commute". *Id* at 1180-1181.

Similar to the "substantial benefits" the California reserve deputy provided to her employer in *Carrillo* are the "distinct benefits" that Respondent's employer received from him (exhaustively addressed hereinabove throughout this brief).

3. *Mayor and Alderman of the City of Savanah v. Stevens*, 598 S.E.2d 456 (2004) if adopted would undermine *Tighe* and is distinguishable from Respondent

The Appellant's cite a 2004 case from Georgia, *Mayor and Alderman of the City of Savanah v. Stevens*, 598 S.E.2d 456 (2004) to support their position. There a police officer was commuting in her personal vehicle from home to the station, was in uniform, was not "on the clock" at the time and was involved in a motor vehicle accident. *Id* at 457. Appellants rely on the holding which states:

> *Stevens's 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 casual connection between her employment and her accident, Stevens' injuries did not arise out of her employment.*

Id at 458.

Thus, a more conservative "engaged in actual police work or actual risk from police work" test is required in Georgia for a police officer "going and

coming" exception to apply. What if that Georgia analysis were applied to *Tighe*? *Tighe* was not actively engaged in police work at the time of his accident. In fact, he had been drinking beer and had been off the clock for nearly 2.5 hours. *Tighe* at 633. *Tighe* was also not responding to a law enforcement problem. Nor were the hazards he encountered occasioned by his job as a police officer. Thus, if applied, the *Stevens* reasoning would effectively undermine the reasoning in Nevada's approach to the "law enforcement" exception of the "going and coming" rule.

In any event if the Appellant's desire to undermine *Tighe* by having this Court adopt Georgia's more stringent *Stevens* analysis, the Respondent here is distinguishable from *Stevens* as well. Respondent was being paid and "on the clock" at time of his accident and *Stevens* was not. Respondent was following the express orders of his superiors to practice his maneuvering and riding skills to prepare him for his imminent return to his traffic bureau assignment all while the Respondent was ordered to stay close to his phone such that he could be commanded back to the station if needed by his superiors. Contrastingly, *Stevens* was not under any express orders of her employers that she was expressly obeying at the time of her accident.

///

///

///

4. *Springfield v. Indus. Comm'n*, 614 N.E.2d 478 (1993) supports Respondent, and *Allenbaugh v. Ill. Workers' Comp. Comm'n*, 58 N.E.3d 872 (2016) is distinguishable

The Appellants final two out of state cases both arise from Illinois. One supports Respondent and the other is distinguishable.

First, in *Springfield v. Indus. Comm'n*, 614 N.E.2d 478 (1993)(also cited in *Tighe* at 636) the police officer there was in an unmarked police car equipped with a police radio and was at lunch at home. Id at 479. He also had his police beeper with him 24 hours a day and was expected to respond to calls 24 hours a day. *Id* at 479. Upon returning from lunch driving to the station he was in an accident. *Id* at 479. He was not responding to any calls at the time. *Id* at 479. But the Illinois court reasoned that "all the circumstances" specifically "[a]ctively 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 those injuries arose". *Id* at 480-481 (Emphasis added). Similarly, here, the Employer here expressly commanded Respondent to remain close to his phone such that Respondent could be called back into duty, coupled with the other facts of Respondent's claim (exhaustively addressed hereinabove throughout this brief) render support for Respondent.

Finally, the Employer relies on another Illinois case to advance its position, namely *Allenbaugh v. Ill. Workers' Comp. Comm'n*, 58 N.E.3d (2016). The facts of that case are distinguishable from Respondent's claim.

There, the officer was driving from home to a training assignment when he was involved in an accident. *Id* at 874. He was off the clock and intending to arrive at the local expo center to engage in training once he arrived. *Id* at 874. The Illinois court distinguished *Allenbaugh* from *Springfield* due to the fact that all Allenbaugh was doing was commuting, nothing more. *Id* at 875-876. For the upcoming training the officer had his nightstick, gun belt, handcuffs, tazer and training uniform, but he did not have a radio or beeper. *Id* at 876. The Illinois court reasoned that "**[u]nlike a radio and beeper, none of these items allowed [the police employer] to maintain control over claimant**." Id at 876 (Emphasis added). Illinois distinguished *Allenbaugh* and *Springfield* on the basis of "control" over the police employee being the critical factor in denying coverage. Thus, the Respondent's claim is nothing like *Allenbaugh*'s claim because here, the Employer here expressly commanded Respondent to remain close to his phone such that Respondent could be called back into duty, other facts of Respondent's claim (exhaustively addressed hereinabove throughout this brief).

VIII. CONCLUSION

Respondent, a LVMPD police officer was severely injured during a traffic accident. This accident happened, because his employer expressly ordered him to leave the station early to engage in practice riding on his motorcycle such that Respondent could prepare for his imminent return to his motorcycle patrol duties. Respondent remained "on the clock" being paid and operating under his on-duty call sign. His supervisor expressly ordered him to "be close to your phone" in the event his supervisor needed to call him back to the station. And because Respondent remained "on the clock" he could not refuse such an order. Further, if he did refuse to comply with such an order he would suffer employment discipline. Also, Respondent could not consume alcohol while "on the clock", even if he so desired and would suffer employment discipline if he did.

At the time of the accident "substantial benefits" were being conferred to the Employer as it had "significant control" over the Respondent. Also, the unique nature of law enforcement (specifically here a traffic officer under a duty to render aid if he came upon traffic accidents) renders this Respondent's accident well within the "law enforcement" exception to the "going and coming" rule.

Accordingly, the District Court found the Appeals Officer's decision was not supported by "substantial evidence" and was riddled with factual and legal errors. Further, distinctions advanced by the Appeals Officer with regard to the holding in

Tighe and Respondent were not based upon the factors that are actually salient to Nevada precedent found in *Evans* and *Tighe.* And failure by the Appeals Officer to do so, further demonstrates the "clear error" rampant throughout the decision.

DATED this 27th day of November 2019.

/s/ Jason D. Mills
JASON D. MILLS, ESQ.
Nevada Bar No. 7447
JASON D. MILLS & ASSOCIATES, LTD.
2200 S. Rancho Dr., Ste 140
Las Vegas, NV 89102
Attorney for Respondent,
DAVID FIGUEROA

ATTORNEY'S CERTIFICATE OF COMPLIANCE

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) has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 font, Times New Roman.

I further certify that this brief complies with the type volume limitations set forth in NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), because it is proportionally spaced, has a typeface of Times New Roman in 14 points or more, contains 6,966 words and 640 lines of text.

I further certify that I have read the foregoing 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 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.

DATED this 27th day of November 2019.

/s/ Jason D. Mills
JASON D. MILLS, ESQ.
Nevada Bar No. 7447
JASON D. MILLS & ASSOCIATES, LTD.
2200 S. Rancho Dr., Ste 140
Las Vegas, NV 89102
Attorney for Respondent,
DAVID FIGUEROA

///

///

///

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on the 27th of November 2019, I served the foregoing **RESPONDENT DAVID FIGUEROA'S ANSWERING BRIEF** on the following parties by electronic transmission through the Court's e-filing system and/or via U.S. Mail, postage pre-paid thereon from Las Vegas, Nevada as follows:

LVMPD Health Detail
400 S. Martin Luther King Blvd., Ste. B
Las Vegas, NV 89106

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

Daniel L. Schwartz, Esq.
Joel P. Reeves, Esq.
Lewis Brisbois Bisgaard & Smith, LLP
2300 W. Sahara Ave., Ste. 300
Box 28
Las Vegas, NV 89102

/s/Veronica A. Salas
An Employee of Jason D. Mills & Associates