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

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

7 Appellants,

8 vs.

9 DAVID FIGUEROA,

10 Respondent.

Supreme Court Case No.: 78926
District Court Case No.: A-18-779790-J
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11 **APPELLANTS' REPLY BRIEF**

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1. The Appellant, CANNON COCHRAN MANAGEMENT SERVICES, INC., states that it does not have any parent corporation, or any publicly held corporation that owns 10% or more of its stock, nor any publicly held corporation that has a direct financial interest in the outcome of the litigation. NRAP 26.1(a).

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

3
4 DATED this 10 day of January 2020.

5 LEWIS BRISBOIS BISGAARD & SMITH LLP

6
7
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I.

REPLY

1. Substantial Evidence Supports The Appeals Officer's Decision

Adoption of Respondent's argument would nullify the holding in Tighe v. Las Vegas Metropolitan Police Dept., 110 Nev. 632, 877 P.2d. 1032 (1994). If the subject claim is deemed compensable, then police officers are always afforded workers' compensation coverage when they are driving to and from work, despite Tighe's pronouncement that the law enforcement exception "is not sufficiently broad and all-inclusive to justify the conclusion that 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." What's more, the reason why the Appeals Officer in Tighe was affirmed was because "there [was] substantial evidence in the administrative record to find that Tighe's injuries occurred within the course of his employment." Id. Here, there is substantial evidence in the record to affirm the present Appeals Officer.

The Appeals Officer in this case weighed the evidence and determined that the only fact in this case that differentiates Respondent's commute from almost any other police officer driving to/from work is the fact that Respondent was still on the clock for five (5) more minutes when he was involved in the subject accident. Indeed, it cannot be overstated that Respondent was not doing anything

1 other than driving home from work. He was not performing work and he was not
2 charged with the duty of law enforcement at the time of the accident. He was
3 simply driving home just as any other worker would, police officer or not.
4

5 Respondent has provided several arguments as to why he believes that this
6 claim should be deemed compensable. However, Respondent's arguments hinge on
7 the fact that Respondent was still technically on the clock at the time of the
8 incident. And indeed, it is true that Respondent was released early from his shift
9 and was still technically on the clock at the time of the subject accident. However,
10 simply being on the clock is not enough for a compensable claim in Nevada.
11 Indeed, "Nevada looks to whether the employee is in the employer's control in
12 order to determine whether an employee is acting within the scope of employment
13 when an accident occurs outside of the actual period of employment or off the
14 employer's premises." MGM Mirage v. Cotton, 121 Nev. 396, 399-400, 116 P.3d
15 56, 58 (2005). Thus, the central inquiry in this case is not whether Respondent still
16 had five (5) minutes left in his shift at the time of the accident; the central inquiry
17 is whether Respondent was performing a task at the direction of his employer.
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22 The dispositive fact in this case is that Respondent was released early from
23 his shift because his work for the day was completed:
24

25 DANIEL SCHWARTZ: Okay. On this particular day,
26 you said your supervisor told you, you could leave early,
27 correct?

1 DAVID FIGUEROA: Yes.

2 DANIEL SCHWARTZ: Did he radio you, were you
3 already in the Bolden Command Building? How did he
4 tell you that logistically?

5 DAVID FIGUEROA: Inside the Area Command
6 Building.

7 DANIEL SCHWARTZ: So, you had already come back
8 from patrolling?

9 DAVID FIGUEROA: We had came back early and he
10 advised us to go.

11 DANIEL SCHWARTZ: And, just so I understand, he
12 and the Captain also told you that you had done enough
13 acclimation from your injury to go back to Traffic, is
that—

14 DAVID FIGUEROA: So, I was on a call that he
15 showed up on, a patrol-related call.

16 DANIEL SCHWARTZ: Okay, which he?

17 DAVID FIGUEROA: I'm sorry, my Sergeant.

18 DANIEL SCHWARTZ: Okay.

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20
21 DAVID FIGUEROA: And so, he advised me that he
22 had a conversation with the Captain. He said that you
23 were telling my guys who—in this re-acclimation
24 program, you were being kind of overseen as—as, I
25 guess the word that I would use, by a field training
26 officer. He said that you are telling my guys things that
27 they should know. There's no reason you should be here.
So, the Captain and I had a conversation and he signed
your release papers effective—I don't recall if it was the
shift or the shift after, but it was in close proximity, that
you would be reporting back to the Traffic Bureau and

1 there's no reason you should be there for the 12-16 week
2 duration.

3 DANIEL SCHWARTZ: And, are those two individuals,
4 your Sergeant and the Captain, are they the ones who
5 have the authority to release you back from, to your old
6 position?

7 DAVID FIGUEROA: I don't know for sure in terms
8 of the Sergeant. I would assume he has to go through his
9 chain of command, but the Captain of that Bureau is the,
10 I guess would make the decision based on the
11 information he receives from my immediate supervisor.

12 DANIEL SCHWARTZ: Okay. And, just so I
13 understand, in essence, he was saying to you that you
14 know more than the people who are supervising you—

15 DAVID FIGUEROA: I don't want to word it that
16 way—

17 DANIEL SCHWARTZ: I'm wording it that way. Is that
18 a fair statement?

19 DAVID FIGUEROA: Okay.

20 DANIEL SCHWARTZ: I'm not trying to breach the
21 chain of command for you, I just want to understand—

22 DAVID FIGUEROA: I would like to put it that,
23 there's nothing for you to re-acclimate to. You are up to
24 speed and you shouldn't be here.

25 (APP pp. 36:3-38:6)

26 Respondent goes on to claim that his sergeant also told him to “go get some
27 seat time” on his personal motorcycle because he would be returning to traffic duty
28 soon. However, the Director of Risk Management for LVMPD, Jeff Roch, who

1 had been with LVMPD for twenty years and had previously been a motorcycle
2 officer for the traffic bureau gave the following testimony:

3
4 JASON MILLS: You heard [Respondent] testify what
5 the reason was that he was given an early out was, right?

6 JEFF ROCH: Yes.

7 JASON MILLS: And that was to get additional seat
8 time because he was getting transferred back to Motors.

9 JEFF ROCH: That's what I heard

10 JASON MILLS: Would that make sense?

11
12 JEFF ROCH: I've never heard it quite like that,
13 where they say, go get seat time, but if he represents that
14 the Sergeant said that, I don't know, I wasn't there.

15 JASON MILLS: That's not against company policy or
16 Metro's policy to do that.

17 JEFF ROCH: I don't—it would be because I don't
18 know why you would mix personal with work, but seat
19 time on a personal bike is a whole lot different than seat
20 time on a Metro bike.

21 (APP pp. 62:21-63:15)

22 Here, there was a conflict between the testimony regarding the intent of
23 Respondent's sergeant telling Respondent to "get some seat time." Respondent
24 claims that he was released from work early so that he could commute home on his
25 personal motorcycle as a condition of his employment. Mr. Roch questioned the
26 same and the Appeals Officer agreed with Mr. Roch.
27

1 Indeed, just as was stated in the Appeals Officer's Order, neither the
2 Appellant nor the Appeals Officer questioned whether Respondent's sergeant said
3 something to the effect that Respondent should "get some seat time" referring to
4 riding his personal motorcycle on the day in question. However, that does not
5 mean that it was a condition of his employment. Mr. Roch questioned this and so
6 did the Appeals Officer. Just because Respondent offers testimony does not mean
7 that the Appeals Officer is obligated to accept it at face value. Especially when
8 there is evidence to contradict the same in the form of a veteran safety officer.
9 Based on Mr. Roch's testimony, there was substantial evidence for the Appeals
10 Officer to conclude that Respondent riding his personal motorcycle home on his
11 regular commute was not a condition of his employment.
12

13 The Appeals Officer weighed the evidence and determined that
14 Respondent's testimony regarding his sergeant's instruction to "get some seat
15 time" was not a mandate from the employer to perform work. Indeed, there was
16 absolutely nothing to differentiate Respondent's commute on the subject day from
17 any other day. Respondent was simply driving home from work at the time of the
18 subject incident. If he had been instructed to practice evasive maneuvers or make
19 an employment related detour to deliver an item, this case would likely be squarely
20 compensable. However, the only thing Respondent was doing at the time of the
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1 subject accident was driving home from work just as any other employee would,
2 police officer or otherwise.

3 4 **2. Respondent Could Have Been Summoned At Any Time**

5 Respondent argues that when he is “on the clock” he cannot refuse a
6 summon back to perform work. Appellants do not dispute that. However, what
7 Appellants also do not dispute is that, per his own testimony, Respondent and
8 every other police officer on LVMPD’s payroll is *always* subject to being
9 summoned back to perform work:
10

11
12 DANIEL SCHWARTZ: And that—the same question I
13 asked you about the radio earlier, I just want to make
14 sure I'm clear, if you were to get a call at 2:30 in the
15 morning, which is clearly not your shift on, on your
16 personal cell phone that you need to come back, you
17 don't have a choice but to come back, correct?

18
19 DAVID FIGUEROA: If my supervisor says, we need
20 you back, I am going.

21
22 DANIEL SCHWARTZ: In your 10 years on the force,
23 how many times has that happened?

24
25 DAVID FIGUEROA: Um. [pause] Count on one
26 hand, five maybe-ish.

27
28 (APP p. 40:1-12)

29 Thus, notwithstanding the fact that it would have indeed been impossible for
30 Respondent to traverse the ten (10) minutes worth of distance from the crash site to
31 his employer’s premises had he been summoned within the five (5) minutes prior

1 to his shift expiring, the fact that Respondent could have arguably been called back
2 to the station for five (5) more minutes after the subject accident happened
3 effectively has no import: Respondent could *always* be called back into the station.
4

5 This underscores the citation of Hanstein v. City of Ft. Lauderdale, 569 So.
6 2d 493, 494 (Fla. Dist. Ct. App. 1990) in Tighe. This Court cited Hanstein for the
7 proposition that “because police officers are generally charged with a duty of law
8 enforcement while traveling on public thoroughfares, it has long been established
9 that injuries which such officers sustain while traveling to and from work may be
10 compensated under the Florida Workers' Compensation law.” Appellants would
11 submit that this is point where the law enforcement exception deviates from the
12 general going and coming rule – when the duty of law enforcement is manifested.
13 If the law enforcement exception is applied whenever a police officer is subject to
14 being recalled into work, there would be no exception as police officers are always
15 subject to recall. The exception would swallow the rule and police officers would
16 always be able to claim that injuries sustained on their commute to-and-from work
17 were compensable under the Nevada industrial insurance code.
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22 Appellants would urge this Court to adopt a rule similar to what is enforced
23 in Colorado: “The controlling factor is whether, at the time of the accident, the
24 officer was actually engaged in the performance of law enforcement activities.
25 Where the policeman is not engaged in police work when the injury occurred, no
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1 compensation is awarded.” Rogers v. Indus. Com., 40 Colo. App. 313, 315, 574
2 P.2d 116, 118 (1978). This comports with the ruling in Tighe wherein Officer
3 Tighe was operating a police vehicle and “was prepared to respond to any public
4 emergency he may have encountered.” Tighe, 110 Nev. at 636, 877 P.2d at 1036
5 (1994).
6

7
8 Here, Mr. Roch testified to the following regarding an officer’s duty to
9 enforce the law:

10 DANIEL SCHWARTZ: Okay. You've also heard
11 Officer Figueroa testify about a duty to assist implicit in
12 his oath. Is there—as the Director of Risk Management,
13 is there something in policies or procedures for Las
14 Vegas Metropolitan Police Department that an officer,
15 off-duty, we'll start there, must assist if they see
16 something happening?

17 JEFF ROCH: It's not a must. The policy doesn't call
18 for 'must'. It actually gives guidance.

19 There is no mandatory carrying of a weapon off-duty.
20 However, if the event, something happened in front of
21 you, the expectation is, you would be a good witness.
22 You would call it in and your obligation would stop at
23 calling it in. It becomes a personal preference whether
24 you wish to involve yourself in that. In which case you
25 would identify yourself and take police action. It really is
26 dictated by the threat or the situation that is presented.

27 DANIEL SCHWARTZ: But what is required is that you
be a good witness and that you call whatever is going on
in.

JEFF ROCH: Yes.

1 DANIEL SCHWARTZ: And, this is 24/7, correct? I
2 mean, this is not, during those 15 minutes or 20 minutes,
3 when you're let go early. This is as an officer, this is a
4 requirement.

5 JEFF ROCH: Correct.

6 (APP pp. 57:19-58:19)

7 This case is different than Tighe and the difference is the control exhibited
8 by the employer. Officer Tighe was equipped and expected to be called into
9 service at any time while he was driving the employer's vehicle. Therefore, it was
10 reasonable to conclude that officer Tighe was charged with the general duty of law
11 enforcement at the time of his injuries. Here, Respondent had just concluded
12 retraining to be released back to regular police officer work and was released early
13 from his shift because of his exemplary performance in retraining. There is no
14 indication anywhere in this record that, at the time of the accident, Respondent was
15 charged with anything more than taking his regular commute home and, that on
16 that regular commute home, he had no more duty than the general duty to be a
17 good witness. There was substantial evidence for the Appeals Officer to conclude
18 that the police officer exception to the going and coming rule was not indicated.
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23 **3. The Street Risk Rule Has No Place In This Case**

24 Respondent advances that the "actual street risk" rule should apply in this
25 case based on the fact that Respondent testified that his sergeant gave him an
26 "early out" on the day in question and said something to the effect that Respondent
27

1 should “get some seat time,” referring to claimant riding his personal motorcycle
2 home. However, the Appeals Officer made a factual determination as to the
3 meaning behind the phrase “get some seat time.” Based on the fact that
4 Respondent was riding his personal motorcycle on the commute that he takes
5 everyday¹ and the fact that Respondent was actually released early because his
6 sergeant believed that Respondent had completed his re-acclimation program², the
7 Appeals Officer concluded that the Respondent was not being required to do
8 anything beyond a commute that he would have taken on any other day.
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11
12 Respondent has taken the interesting position that Respondent was somehow
13 in a position wherein he was *required* to commute home on his personal
14 motorcycle or risk being disciplined. Therefore, counsel alleges that the actual
15 street risk rule should apply because the Respondent was “required to use the
16 streets and highways to carry out his employment obligations.” Bob Allyn
17 Masonry v. Murphy, 124 Nev. 279, 281, 183 P.3d 126, 127 (2008). The obligation
18 in this case being that Respondent was *required*, by virtue of his employment, to
19 drive his personal motorcycle home, just as he would on any other day. This is
20 absurd.
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26 ¹ Note that Respondent also explicitly testified that he is *never* required to use his personal
motorcycle while on duty. (APP p. 44:16-20)

27 ² See APP pp. 36:24-37:10

1 It was Respondent's personal choice to own and drive a motorcycle to and
2 from work. Based on his own testimony, Respondent was not required by his
3 employer to own and/or drive a motorcycle (or any other type of vehicle for that
4 matter) for his commute to/from work. Respondent could have driven a sedan if he
5 desired. (APP pp. 44:24-45:20) Mr. Roch confirmed the same. (APP pp. 61:2-62:3)
6
7 Further, the Appeals Officer concluded that Respondent driving his personal motor
8 cycle home from work was not a condition of his employment. If Respondent
9 owned a mini van, would he have been fired because he could not comply with the
10 sergeant's statement that Respondent should "get some seat time?" Of course not.
11
12 There is no indication that commuting home on his personal motorcycle just as he
13 would on any other day supplied any additional "obligations" to the employer. The
14 citation to Bob Allyn Masonry has no place in this case.
15
16

17 **4. Respondent's Commute Provided No Benefit to His Employer**

18 Respondent has argued that this case is not distinguishable from Tighe
19 because both Respondent and officer Tighe were providing a distinct benefit to
20 their employer. However, there is one salient fact that definitively separates this
21 case from Tighe: officer Tighe was an undercover narcotics officer and "was
22 prepared to respond to any public emergency he may have encountered." Here,
23
24 Respondent was driving his own personal vehicle with no reasonable expectation
25 to respond to any public emergency he may have encountered. (See Mr. Roch's
26
27

1 testimony above regarding LVMPD policy to be a good witness) Respondent was
2 providing no more benefit to his employer than any other officer would have been
3 providing on his/her commute home.
4

5 Thus, if This Court accepts Respondent's argument, the law enforcement
6 exception in Tighe would swallow the going and coming rule. If simply driving
7 your personal vehicle to and from work triggers the law enforcement exception,
8 then there is no going and coming rule for police officers and the LVMPD is
9 always "[liable] for the dangers [its] employees encounter in daily life." Cotton,
10 121 Nev. at 399-400, 116 P.3d at 58.
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II.

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 10 day of January 2020.

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 2,985 words and 342 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.

...

...

...

1 4. I understand that I may be subject to sanctions in the event that the
2 accompanying brief is not in conformity with the requirements of the Nevada
3 Rules of Appellate Procedure.
4

5 Respectfully submitted,
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1 **CERTIFICATE OF MAILING**

2 Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on
3 the 10th day of January 2020, service of the attached **APPELLANTS'**
4 **REPLY BRIEF** was made this date by depositing a true copy of the same for
5 mailing, first class mail, and/or electronic service as follows:

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