IN THE SUPREME COURT OF THE STATE OF NEVADA

VANCE TAYLOR, Appellant, v. TRUCKEE MEADOWS FIRE PROTECTION DISTRICT; AND ALTERNATIVE SERVICE CONCEPTS, LLC Respondents.	)	Supreme Court 78971 District Case No. CV18-00673

APPELLANT'S 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(1), and must be disclosed:

Appellant Vance Taylor is an individual.

The attorneys who have appeared on behalf of appellant/respondent in this Court and in district court are:

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

DATED this 8 day of November, 2019.

HUTCHISON & STEFFEN, PLLC

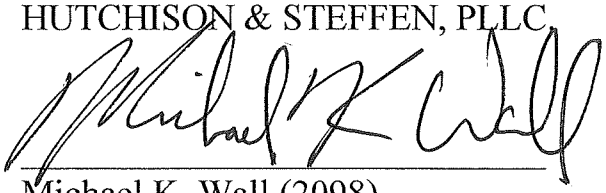

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TABLE OF CONTENTS

AUTHORITIES CITED
RULES AND STATUTES

CASE LAW

OTHER

JURISDICTIONAL STATEMENT

This is an appeal from an order of the district court denying appellant Vance Taylor's petition for judicial review of a decision of the Nevada Department of Administration Appeals Officer Sheila Y. Moore in a case arising under the Nevada Industrial Insurance Act ("NIIA"), commonly referred to as worker's compensation. AA 586.[1] The order is appealable pursuant to NRS 233B.150 and NRAP 3A(b)(1).

The district court's order was entered on May 10, 2019. AA 586. Notice of entry of the order was served by appellant on all respondents by mail or electronic means on May 15, 2019. AA596. Appellant filed his notice of appeal on June 7, 2019. AA 610. The notice of appeal is timely pursuant to NRAP 4(a).

ROUTING STATEMENT

Pursuant to NRAP 17(b)(9) (appeals from administrative agency cases), this appeal is presumptively assigned to the Court of Appeals. This case involves error correction based on established law. Thus, the presumptive assignment may be appropriate.

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[1]Most of the documents in the appendix were part of the record on appeal in the district court. To avoid confusion, the record of the appeal in the district court is reproduced in the appendix in its entirety and in the format and order it was presented in district court. AA 25-388. Consequently, the documents in this section of the appendix are in reverse chronological order.

However, appellant also requests that this Court construe and possibly expand or explain its construction of the NIIA regarding when a person on Temporary Total Disability ("TTD") is released for light duty work, what type of of light duty work must be offered to relieve the employer of its duty to continue paying TTD if the offer is rejected. This issue in general has only been addressed by this Court in a very few instances, and it has never been addressed in a context similar to the facts of this case. Therefore, this Court may want to consider retaining this case to address this issue of first impression and state-wide interest regarding this Court's construction of the NIIA. *See* NRAP 17(a)(11) (matters of first impression involving common law, or court construction of the law).

STATEMENT OF THE CASE

This is an appeal from an order of the district court denying appellant Vance Taylor's petition for judicial review of a decision of the Nevada Department of Administration Appeals Officer Sheila Y. Moore in a case arising under the NIIA, worker's compensation. AA 586. Second Judicial District Court, Washoe County, Department 6, the Honorable Lynne K. Simons, District Judge.

PARTIES

The Claimant in this matter is Captain Vance Taylor. AA 122-24. Captain Taylor's employer in this matter is the Truckee Meadows Fire Protection District

("TMFPD"). AA 122. The Third-Party Administrator ("TPA") in this matter is Alternative Service Concepts ("ASC"). AA 149. The Public Agency Compensation Trust ("PACT"), was the insurer of Captain Taylor's worker's compensation claim. *Id.* At all relevant times below, ASC acted for and on behalf of, and as the agent of, PACT. *Id.* They are, essentially, together, the insurer. No distinction between PACT as the insurer, and ASC as the TPA acting solely on behalf of PACT as the insurer, was made in the action before the Appeals Officer.[2]

INTRODUCTION[3]

Appellant Vance Taylor is employed by Respondent Truckee Meadows Fire Protection District ("TMFPD") as a Fire Suppression Captain with 25 years of experience. He was injured on the job, and rendered totally disabled for a period of time. Although he needed surgery, he needed time to recuperate and gain strength before the surgery could be performed. His treating physician released

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[2]This is evidenced by every document in the record sent by ASC, of which there are many. However, PACT moved to dismiss the petition for judicial review because it was not named as a party to the action. AA 392. The district court denied that motion, finding that there was no distinction between ASC and PACT, and that ASC had been properly named and noticed. AA 483 & 540. We do not believe this is an issue in this appeal.

[3]Because this section is intended as argument, no citations to the record appear here. Citations to the record supporting the assertions of this introduction will be set forth in the appropriate sections of the brief, *infra*.

him for light duty work. TMFPD assigned him to be a secretary, and to answer to an underling, rather than assigning him available light duty work as a fireman, and a Captain, although such work was available.

Captain Taylor complied. But the disruption and financial strain to his family was intolerable.

Captain Taylor then underwent surgery, which again rendered him temporarily totally disabled. When he was later released to light duty work, TMFPD again assigned him to be a secretary. This time, he refused. TMFPD stopped paying Captain Taylor his disability payments.

TMFPD has maintained throughout these proceedings that TMFPD "does not mean to be demeaning" to Captain Vance Taylor. But offering him a secretary's job which is acquiescent to a separate and disparate logistical operation and supervisory structure is, in fact, demeaning. More importantly, it is a violation of the law and should not have been tolerated by the Appeals Officer.

This case is one of four challenges to the actions of TMFPD that Captain Taylor was required to pursue. The other three are in various stages of process in the system. Although the amount of money involved in this matter may not seem much, the principle is far more important than the principal. What happened here to Captain Taylor is not acceptable.

STATEMENT OF THE ISSUE

I. Whether The Light Duty Job Offered to Captain Taylor by the Employer Satisfied the Requirements of NRS 616C.475(8) and NAC 616C.583.

In order to qualify as a proper offer of light duty employment sufficient to excuse an employer's obligation to pay temporary total disability benefits, the offer must comply with all of the requirements of NRS 616C.475(8) and NAC 616C.583, and be appropriate to the circumstances of the individual case, the individual employee, and the individual circumstances. The job offered in this case did not comply with the law.

STATEMENT OF FACTS

Appellant Vance Taylor works for Truckee Meadows Fire Protection District as a Fire Suppression Captain. AA 46. He has been with the TMFPD since 2012, and is currently employed as a fireman by Washoe County, employment that he has had for over 20 years. AA 47. He has been a Captain for over five years. *Id.* He described his duties as follows:

> My duties are to supervise my crew. To respond with my crew to all incidents within the District, including structure fires, vehicle fires, wildlife fires, EMS incidents, avalanche, search and rescue, water rescue. It's an all-risk department. So, if you can think of it, we do it. I'm Incident Commander. I'm the Engine Incident Commander for that fire engine.

> So, when we get on scene, I take command and command the scene until the Battalion Chief or my supervisor gets on scene and I pass command to him.

AA 47.

The job is physically demanding. The firemen "go from 0-100 miles an hour when they go on these calls." AA 48. It is very strenuous; they are required to "[throw] around a lot of gear. Very heavy gear." *Id.* When they are at a structure fire, their gear that they have to wear weighs in excess of 100 pounds. *Id.*

And their work schedule is also demanding. Firemen must be on call twenty four hours a day, seven days a week. When working, they eat and sleep at the fire station. This requires a special work schedule.

At all times relevant herein, Captain Taylor was working a six day rotating schedule on a 48/96 hour schedule. AA 33; 73-80. That means he would work 48 hours straight, then have 96 hours off, and then repeat that schedule. The schedule rotates because 144 hours equals six, not seven days. So if Captain Taylor began a 48/96 hour work schedule on a Monday, it would end on Saturday, and the next 48/96 hour work schedule would begin on Sunday. *Id.*[4]

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[4]The facts regarding Captain Taylor's pre-injury work schedule are not specifically and clearly stated in the record. Most, if not all of the documents begin their discussion of the facts with Captain Taylor's injury. Nevertheless, the

These schedules were set a year in advance, which allowed Captain Taylor and his family to plan their vacation schedules, their child care schedules, his wife's work schedule (which required pre-planned travel to appear at conferences and other events), and other schedules in advance. AA 82-84. This flexible schedule was both a part of the burden and of the benefit of Captain Taylor's life (and the lives of his wife and children) as a firefighter and first responder. *Id.* It is an attribute and benefit of his job that the Appeals Officer regarded and weighed far too lightly.

On April 19, 2016, Captain Taylor was doing a HazMat training drill at work when he severely injured his shoulder. AA 48-50 (detailed description of accident in transcript); AA 122-24.

Captain Taylor stated,

> While participating in the Triad's monthly Haz-Mat training I injured my left shoulder during one of the exercises. Drill in turnouts and SCBA (with partner). Rescue a downed firefighter (Haz-Mytech) in a level A suit on the second floor using asked device. While carrying the 200 pound mannequin down the stairs, I was holding the Sked with my left hand and the handrail with my right felt a "pop" followed by intense pain in my left shoulder. Pain did not subside.

AA 122.

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facts regarding a fireman's work schedule are assumed throughout the record, are generally discussed at AA 73-80, are discussed in most of the motion papers and briefs, and are not disputed.

Captain Taylor reported the injury to his employer immediately. T 21. AA 121; 251. On April 25, 2016, ACS on behalf of PACT notified Captain Taylor that the insurer had accepted the claim. AA 149. On April 26, 2016, ASC issued their letter informing Captain Taylor of his right to receive TTD benefits. AA 155. Captain Taylor was paid for five days of TTD at that time. *Id.*

Although the record is not clear on the dates and details of Captain Taylor's first return to work on light duty assignment, it appears that he returned at approximately this time and continued until his surgery. *Id.* Caption Taylor testified regarding this time. Prior to surgery, he had to wait three months to gain strength. AA 51. He was offered a job as secretary on a schedule of 8 to 5, Monday through Friday. AA 52. Captain Taylor requested a job that would maintain his fire schedule of 48/96, but his request was denied. *Id.* He was supervised by the Office Secretary, who gave him filing type projects and menial tasks to complete. AA 53-54. Captain Taylor complied, but he was disappointed because he could have been assisting at the fire station for the for the fire Chief, and performing duties more appropriate to his rank and station. AA 54. Captain Taylor testified: "Because I'm a supervisor and I could actually be working for the Chief, because I knew the Chief had many things that he was doing." AA 55.

More importantly, the daily schedule was a burden for his family and their

accustomed lifestyle. Captain Taylor's wife is a published author. Her livelihood depends on travel for conferences, book signings and other appearances. The schedule for caring for the children during Captain Taylor's "on days," and during his wife's preplanned business travels was worked out a year in advance. This schedule could not be maintained on a daily schedule from 8 to 5. Captain Taylor testified, after explaining the fire schedule used by every fire department:

> Light duty is 8:00 to 5:00, Monday through Friday. 40 hours. That's it. Not a fire schedule, whatsoever. It's an office staff schedule, which is understandable when you're the Chief, or the Deputy Chief, or a secretary, you work 8:00 to 5:00, Monday through Friday because that's the time that the office is open 8:00 to 5:00. But that is not a fire schedule.

AA 56.

> . . . .
>
> When—when—even clear as back as when we start dating [the Taylors], there's understandable that our fire schedule is completely different than any other schedule that everybody's worked, you know, used to working. It's because it rotates. It's not always the same. It's nice for a family setting because you don't have to put as much day care in. There's four days off that the dad can be home with the kids.
>
> So, the—our whole lives, the whole family, the whole family dynamic is set up around this fire schedule that we know in advance, a year in advance to know what the schedule looks like because it's set. In fact, I can show you what our schedule looks like for the next 20 years, because it's set. It's two days on; four days off and it rotates every six days. That's just how it is.
>
> . . . .
>
> So, everything about the life, our life, our home life is set up around that. Daycare is set up around it. The fact that I'm off–the

days my wife knows that I'm off is set up around it. She's going to attest–she's going to tell you that she books–she's a writer, author, published author. She goes on business trips and she does book signings and she does consulting work with publishing–with publishers and everything else. That's what she does to make money. Those days, being that my schedule is so set, she plans out her entire–you know, basically her entire year about what conferences she can go to, what conferences she can't go to, around my schedule. Every–all vacations, you know, everything is set up around that schedule.

So, if–once you change that and once you go from that schedule that we've designed our entire lives around, and you change it to 8:00 to 5:00, Monday through Friday, that becomes a hardship because now, she can no longer–she can no longer expect me home during the day, Monday through Friday. I'm at work.

So, she had to change–she'll attest, how much she had to change in her life and it was a financial impact, a great financial impact for us. Then, on top of it, we had to increase our daycare cost. We had to double our daycare costs. Now we had to cover full time daycare instead of me being home taking care of the little one.

AA 57-60.

Staci Taylor, Captain Taylor's wife, testified:

Well, it impacted us both financially and emotionally. Financially, we had to hire childcare to accommodate his schedule because he was no longer able to assist in the four-days. I also–I'm an author, editor and a consultant for a publishing house and a lot of my income is traveling and going to book signings and I go to the publishers to do a lot of different projects that they hire me for. Because of his schedule going from Monday through Friday 8:00 to 5:00, I was forced to cancel all of those.

AA 83.

Captain Taylor's medical treatment to the time of his surgery proceeded as follows.

On April 19, 2016, Captain Taylor presented at the emergency room at Renown South Meadows Medical Center. He was seen by Leland Sullivan, MD, who diagnosed left shoulder strain. AA 128-40. The following day, April 20, 2016, Captain Taylor was evaluated by Dr. Scott Hall at Specialty Health. Dr. Hall ordered an MRI of Captain Taylor's left shoulder and placed Captain Taylor on light duty. AA 141-42.

Captain Taylor then went to Reno Diagnostics Center for an x-ray of the left shoulder, which showed severe glenohumeral osteoarthritis, hydroxyapatite deposition along the greater tuberosity, no visible fracture or dislocation. AA 144.

When re-evaluated by Dr. Hall on April 22, 2016, Dr. Hall again recommended an MRI and placed Captain Taylor on light duty. AA 145-48.

On April 29, 2016, Dr. Vijay Sekhon of Reno Diagnostic Center performed an MRI of Captain Taylor's left shoulder. The MRI findings were:

1. Severe glenohumeral joint degenerative changes posteriorly with large areas of full-thickness chondromalacia, bulky osteophytes, and subchondral cysts.
2. Large tear of the posterior labrum with associated cartilage delamination.
3. Large loose body in the subcoracoid space.
4. Calcific tendinitis of the supraspinatus tendon insertion without

evidence of rotator cuff tear.

5. Degenerative type tear of the superior labrum extending into the biceps anchor.

AA at 172.

On May 2, 2016, Captain Taylor again presented to Dr. Hall for a follow up appointment. Dr. Hall referred him to physical therapy and placed him on light duty. AA at 173-77.

Captain Taylor commenced physical therapy on May 10, 2016 and continued 2 to 3 times a week for 4 to 6 weeks. AA 178-79.

During the next follow up appointment with Dr. Hall on May 17, 2016, Captain Taylor was referred to an orthopedic specialist for further treatment. AA at 181-83.

On May 20, 2016, Captain Taylor attended an initial evaluation at Nevada Orthopedics where he was seen by Dr. Hilary Malcarney. Dr. Malcarney diagnosed osteoarthritis in the left shoulder, left shoulder strain, labral tear, and rotator cuff calcific tendinopathy of the left shoulder. AA at 185-88. She also placed him on restricted duty and referred him to physical therapy. AA 189-90.

On June 13, 2016, Captain Taylor again presented to Dr. Malcarney. At this time, she recommended left shoulder arthroscopy. AA 191-93.

On June 16, 2016, ASC sent a letter to Dr. Malcarney with questions for her

to answer regarding the recommended surgery. AA at 195. Then on June 29, 2016, ASC sent a letter denying surgery pending the response of Dr. Malcarney to the letter with questions they had sent to her. AA 197-98. Also on June 29, 2016, Dr. Malcarney sent her response stating, "Yes, exacerbation of pre-existing osteoarthritis and calcific tendinopathy. Also, exacerbation and likely extension of labral tear." AA 199.

On July 18, 2016, Dr. Malcarney noted her plan to proceed with left shoulder arthroscopy, SAD, labral debridement, chondroplasty, possible biceps tendonesis. AA 200-03.

On July 21, 2016, surgery was performed on Captain Taylor at Surgery Center of Reno. AA 207-11.

At his follow-up appointment with Dr. Malcarney on August 3, 2016, Captain Taylor's sutures were removed and he was referred to physical therapy. AA 216-17. Captain Taylor was released to restricted duty on August 15, 2016. AA at 220.

On September 9, 2016, TMFPD sent a letter to Captain Taylor with an offer of temporary light duty employment. AA 225-26. The letter offering the light duty job provided as follows:

Your treating physician/medical facility has released you to

light duty employment. The purpose of this communication is to document an offer of temporary light duty employment immediately available that is compatible with the physical limitations imposed by your treating physician or chiropractor.

Light duty may be performed with a modification of your current duties and current work location. Your gross wage will either be equal to the gross wage you were earning at the time of your injury, or substantially similar to the gross wage you were earning at the time of your injury, should you be working in a different classification of employment. This position has the same employment benefits as the position you held at the time of your injury.

You will be assigned to the administrative office and your scheduled hours will be Monday Through Friday 8am to 5 pm with an hour lunch. To align the schedule change with the beginning of the FLSA cycle, you will report to the administrative offices on Monday, September 12, 2016 at 8am.

You remain subject to all of Truckee Meadows Fire Protection District's terms and conditions of employment and are to follow procedures and policies related to your employment as you would if you were not working a light duty assignment.

Please complete the Acknowledgment by Workers' Compensation Claimant attached to this letter and return to me no later than.

Captain Taylor refused to accept this offer of light duty employment because it was not substantially similar to his pre-injury job. Specifically, Captain Taylor responded as follows to the offer:

Sandy,

In response to your light duty job offer dated September 9, 2016, offering me light duty as a clerical office assistant at the administrative office from 8:00 am to 5:00 pm Monday through Friday, I hereby respectfully reject your offer of light-duty as written and expected because it does not satisfy the requirements of NRS 616C.475(8) and related case law. I have been in contact with my lawyer as well as the union and have been instructed to address your request as such.

As a 25-year veteran of the Fire Service, I have worked extremely hard to achieve the rank of Captain for the Truckee Meadows Fire Protection District (TMFPD). I feel that your current offer of light duty or TMFPD's current expectations of light duty do not follow the law as outlined in NRS 616C.475(8). Your expectations as set forth in your letter are as follows:

- Dramatically change my work schedule from a 48/96 pay scale which includes FLSA pay to an 8 to 5 Monday thru Friday administration schedule with no FLSA pay and no ability to bank Holiday Comp Time.

- Instead of performing light duties that reflect the position and duties of our normal position, you expect me to complete tasks and duties that reflect that of an office secretary which is humiliating and unlawful. *See Dillard Dept. Stores. Inc. v Beckwith*, 115 Nev. 372, 989 P.2d 882 (1999) (Court awarded claimant $2,496,112 in damages and $518,455 in attorney fees and costs for constructive discharge claims because employer placed employee in entry level position, which included document filing, rather than being returned to her management position with the company.)

- You replaced my normal supervising Battalion Chief with an appointed office secretary, which in turn, breaks the normal chain of command established by the fire department.

[Quotes NRS 616C.475(8)]

Your light duty job offer does not comply with the requirements of Nevada law. Moreover, I further object to your light duty job offer for the following reasons:

[There follows a long list of reasons Captain Taylor considered the offer improper]

Sandy, please do not misconstrue this letter as me saying I won't accept a valid light duty job offer that conforms to my rights under the statute. If you would let me to return to my regular schedule, at my assigned station, working under my duty Battalion Chief, I would be more than happy to do so. I cannot lift more than 5 pounds, but I do feel I could still offer some assistance in a capacity that better reflects the duties of my assigned position.

AA 324-26.

Thereafter, on September 26, 2016, ASC sent a letter stating that, due to Captain Taylor's refusal to accept the light duty offer, his TTD benefits were discontinued. AA 227-28.

On September 29, 2016, Captain Taylor filed his request for hearing before the Hearing Officer. AA 228. On November 23, 2016, the Hearing Officer rendered her Decision and Order, "remanding" CCMSI's September 26, 2016 determination. AA 346-48. The decision upheld the determination of the insurer to terminate benefits.

On December 1, 2016, Captain Taylor requested an appeal of the Hearing

Officer's Decision and Order. AA at 349. On December 6, 2016, the Appeals Officer set the appeal for hearing on February 9, 2017. AA at 350. After several continuances, the matter was heard by the Appeals Officer on March 2, 2017. AA 38 (Transcript).

A year later, on February 28, 2018, the Appeals Officer finally rendered her Decision and Order, affirming the insurer's and employer's determination. AA 30-37.

On March 30, 2018, Captain Taylor petitioned the district court for judicial review of the Appeals Officer's decision under NRS 233B.135(3) because the final decision of the Appeals Officer prejudiced Captain Taylor's rights under the Nevada Industrial Insurance Act ("NIIA"), violated statutory provisions governing the delivery of total temporary disability benefits under the NIIA, was been affected by other grievous errors of law, and is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, and is otherwise arbitrary, capricious or characterized by abuse of discretion. AA 1-18.

On June 4, 2018, respondents TMFPD, ASC and PACT moved to dismiss the petition for judicial review on the sole basis that PACT had not been named as a party respondent to the petition as required by NRS 233B.130(2)(a), which requires that all parties to the administrative action be named as respondents to a

petition for judicial review. AA 392. Claiming that PACT, the insurer, had been a party to the action below, respondents argued that the failure to name PACT as a respondent to the petition for judicial review deprived the district court of subject matter jurisdiction to consider the petition. *Id.*

Captain Taylor opposed the motion on the ground that ASC acted as the insurer throughout the administrative proceeding, and it had been properly included as a respondent to the petition for judicial review. AA 429. Respondents relied, pointing out that ASC was the administrator for PACT, that PACT was the only insurer, that it had been a party, and that its exclusion as a respondent was fatal to the petition. AA 613.[5] The district court denied the motion to dismiss. AA 483. The district court concluded that it was not clear whether ASC was a servicer for PACT or was an insurer, whether PACT was a successor to ASC, and whether or when PACT became a party to the administrative action. AA 487. The district court noted that PACT was only mentioned once in the appellate record, and that ASC was referred to at all other times in the appellate documents as the insurer. *Id.* At the district court's invitation, the parties filed supplements to their motion papers. AA 489 (Captain

[5]This document is out of chronological order in the appendix due to a clerical error.

Taylor's supplement); AA 494 (respondent's supplement). Having considered the supplements, the district court again denied the motion, AA 540, concluding that although PACT had an interest in the outcome of the action, it had not been identified in the administrative action as a party, that the Appeals Officer had treated ASC as the insurer, that the Appeals Officer's decision did not even mention PACT, and that by naming ASC, Captain Taylor had sufficiently named the insurers for purposes of the statute. AA 545-47.

No party requested a hearing, and on May 10, 2019, following briefing, the district court entered an order denying Captain Taylor's petition for judicial review. AA 586. This timely appeal followed. AA 610.

SUMMARY OF ARGUMENT

Captain Taylor, a Fire Suppression Captain with 25 years of experience, sustained a work-related injury while directly engaged in intensive training designed to be both mentally and physically exerting. Captain Taylor and his crew were simulating a hazardous material crisis to test their readiness and to assess the strength of their tactical responses. This was Captain Taylor's position, earned by a lifetime of service. He was a boots-on-the-ground leader who worked side by side with the fire crews, actively directing and coordinating daily deployment of TMFPD's officers. When injured and limited in his ability to work, he was

offered a light duty job as a secretary, answering to a subordinate in a complete upheaval of the established chain of command. He had no duties similar to those of a Captain. He was subjected to a drastically altered work schedule and locale, which was disruptive and placed a financial strain on his family. Captain Taylor perceived the demotion as retaliation for his having filed a worker's compensation claim. This light duty position was insulting. The Appeals Officer was wrong to have held that the offer was a valid light duty job, satisfactory under NRS 616C.475(8).

DISCUSSION

I. Standard of Appellate Review.

The district court had jurisdiction to review the findings of fact and conclusions law of the Appeals Officer. *See* NRS 617.405; NRS 233B.130. This Court has jurisdiction to review the Appeals Officer's decision following denial of judicial review by the district court. *See* NRS 233B.150.

> When reviewing a district court's denial of a petition for judicial review of an agency decision, this court engages in the same analysis as the district court: we " 'determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion.' " *Bob Allyn Masonry v. Murphy*, 124 Nev. 279, 282, 183 P.3d 126, 128 (2008) (quoting Weaver v. State, Dep't of Motor Vehicles, 121 Nev. 494, 498, 117 P.3d 193, 196 (2005)). We defer to an agency's findings of fact as long as they are supported by substantial evidence. *Law Offices of Barry Levinson v. Milko*, 124

> Nev. 355, 362, 184 P.3d 378, 383–84 (2008). Questions of law are reviewed *de novo*. *Bob Allyn Masonry*, 124 Nev. at 282, 183 P.3d at 128.

Rio All Suite Hotel & Casino v. Phillips, 126 Nev. 346, 349, 240 P.3d 2, 4 (2010).

In *Bob Allyn Masonry*, this Court stated:

> In reviewing administrative decisions, "this court's role is 'identical to that of the district court: to review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion.' " This court is limited to the record before the agency and cannot substitute its judgment for that of the agency on issues concerning the weight of the evidence on questions of fact. This court does, however, review questions of law *de novo*.

Bob Allyn Masonry v. Murphy, 124 Nev. 279, 282, 183 P.3d 126, 128 (2008) (citations omitted); *see* NRS 233B.135.

In this case, there is no dispute as to the facts. Captain Taylor submits that as a matter of law, the temporary light duty job offered to him did not satisfy the requirements of the law.

This Court has authority and responsibility to independently review the Appeals Officer's application of the statutes governing the payment of worker's compensation benefits. *See Amazon.com v. Magee*, 121 Nev. 632 (Nev. 2005); *Washoe Co. School Dist. v. Bowen*, 114 Nev. 879, 882, (1998). Therefore, this Court should address the legal issues in this matter anew, without deference to the

district court's or the Appeals Officer's legal conclusions.

II. The Light Duty Job Offered to Captain Taylor Failed to Comply with NRS 616C.475(8) and NAC 616C.583.

If an employer decides to offer a claimant a light duty job, the job offer must be in writing and comply with the provisions of NRS 616C.475(8). NRS 616C.475(8) provides:

> Any offer of temporary, light-duty employment made by the employer must specify a position that:
>
> (a) Is substantially similar to the employee's position at the time of his or her injury in relation to the location of the employment and the hours the employee is required to work;
>
> (b) Provides a gross wage that is:
>
> (1) If the position is in the same classification of employment, equal to the gross wage the employee was earning at the time of his or her injury; or
>
> (2) If the position is not in the same classification of employment, substantially similar to the gross wage the employee was earning at the time of his or her injury; and
>
> (c) Has the same employment benefits as the position of the employee at the time of his or her injury.

NAC 616C.583 elaborates on the requirements for a valid light duty job offer as follows:

1. An offer of employment at light duty to an injured employee by

his or her employer must:

(a) Be in writing;
(b) Be mailed to both the insurer and the injured employee; and
(c) Include:

(1) The net wage to be paid the injured employee;
(2) The hours which the injured employee will be expected to work;
(3) A reasonable description of the physical requirements of the employment;
(4) A reasonable description of the duties the injured employee will be expected to perform;
(5) A description of any fringe benefits of the employment; and
(6) The geographical location of the employment.

2. If the insurer finds that the actual requirements of the employment at light duty materially differ from the offer of employment and the employer fails to take corrective action, the insurer may provide vocational rehabilitation services.

3. The injured employee must be allowed a reasonable time, not to exceed 7 days after the date the offer of the employment at light duty is made, within which to accept or reject the offer.

4. If the employment at light duty offered to the injured employee is expected to be of limited duration, the employer shall disclose that fact to the injured employee in the offer of employment and state the expected duration.

5. An employer must not offer temporary or permanent employment at light duty which he or she does not then expect to be available to the injured employee as offered.

6. An employer does not have to comply with the requirements in

subsections 1 to 5, inclusive, if the employer offers the injured employee temporary employment at light duty which is:

(a) Immediately available;
(b) Compatible with the physical limitations of the injured employee as established by the treating physician or chiropractor; and
(c) Substantially similar in terms of the location and the working hours to theposition that the injured employee held at the time of the injury.

7. Temporary employment at light duty offered pursuant to subsection 6 must cease within 30 days after the injured employee's physical restrictions are determined to be permanent. Any subsequent offers of employment at light duty by the employer must comply with the requirements of subsections 1 to 5, inclusive.

In this case, the Appeals Officer failed to apply the statutory and legal requirements in four clear ways: (1) the light duty job offer dramatically changed Captain Taylor's work schedule and associated pay scale; (2) the light duty job offer changed the location of Captain Taylor's employment; (3) the light duty job offer changed Captain Taylor's job duties dramatically and effectively demoted Captain Taylor from a Captain to an office secretary; and (4) the light duty job offer replaced Captain Taylor's normal supervising Battalion Chief with an appointed office secretary, which broke the normal chain of command established by the fire department.

A. The Light Duty Job Offer Dramatically Changed Captain Taylor's Work Schedule.

The light duty job offer changed Captain Taylor's work schedule from a 48/96 schedule and pay scale, which includes FLSA pay, to a forty hour administrative schedule from 8:00 am to 5:00 pm Monday thru Friday with no FLSA pay and no ability to bank Holiday Comp Time. This imposed a hardship on Captain Taylor and his family by causing them to incur increased day care expenditures for childcare, increased fuel and maintenance costs for daily commutes, and increased stress on the family due to an unfamiliar, unforgiving, and inconvenient work schedule.

The fundamental shift from a fire crew schedule to an office staff schedule was not only a decrease in Captain Taylor's hours, which the employer lauds as an advantage to Captain Taylor, it represented a decrease in pay. The light duty job was therefore not substantially similar to Captain Taylor's pre-injury work schedule or benefits.

Captain Taylor is an emergency responder. When he was working, he was on call around the clock, ready to instantaneously react should the need arise. When working he was at the fire station, ensuring that all gear and equipment was prepared, in good repair, and ready to deploy. These and other administrative

tasks could have been performed by Captain Taylor had he been assigned to light duty at the fire station to assist the Battalion Chief. AA 76-77. Instead, he was sent to an office to assist a secretary.

Below, TMFPD marginalized the fact that Captain Taylor and his colleagues work for two days straight (48 hours) by asking Captin Taylor whether, while on duty, he sleeps "like normal people, sometimes you sleep for 6-8 hours." AA 73. But TMFPD ignored the fact that even during non-emergency periods, during a shift, Captain Taylor and his crews are not only expected to be actively working for at least 12-hours, and even if there is down-time, they are never able to relax due to the on-call nature of the position.

In district court TMFPD relied heavily on *Amazon v. Magee*, 121 Nev. 632,636, 119 P.3d 732, 735(2005) for the proposition that an offer of light duty employment need only offer a job that is similar to the job the claimant was working pre-injury. Captain Taylor does not question the validity of that statement. But in its attempts to demonstrate that the job that was offered in this case is similar to Captain Taylor's prior position, TMFPD compared only the superficial aspects of the employment, rather than the substance of the offer. As TMFPD admitted, this Court has not addressed directly what may be considered similar in a situation like this, and Captain Taylor submits that this will necessarily

be a case by case analysis. But the suggestion that a job as a fire Captain is similar to a job as a secretary's assistant should at the very least raise a few eyebrows.

TMFPD's reliance on *Magee* to attempt to justify its actions fails because not only was Captain Taylor's weekly schedule changed from that of an emergency responder to that of an office assistant, the offer also decreased the number of hours he was working each week, his pay, and his benefits. There is nothing similar about TMFPD's offer to allow Captain Taylor work as a secretary, and his work as a fire Captain..

In a typical week, as a firefighter, Captain Taylor would work two consecutive days around the clock, (48 hours), and then have four days off. The firefighter's schedule rotates on a six day period, not a seven day period. On the light duty schedule, Captain Taylor was required to work eight hours a day for five days (40 hours), and then have two days off, rotating on a seven day schedule. It does not make the two schedules similar that the hours per period are close to the same. The schedules could not be more dissimilar. Any argument to the contrary is disingenuous.

The most glaring difference is the number of days during the week when Captain Taylor would be required to report to an office. As a long-term firefighter and a Captain, Captain Taylor and his family were accustomed to the 48/96

schedule, and had built their lives around it. They were accustomed to both the benefits and the burdens of the fireman's schedule, and this was a part of their benefit package.

Because the shift-change was not substantially similar, Captain Taylor's family was seriously affected. TMFPD argued to the district court that there are no documents to show hardship on the Taylor family and even reminded the district court that the parties are confined to the record. TMFPD overlooked that both Captain Taylor and his wife testified under oath as to the strain of the modified schedule. Their testimony is evidence, and it is part of the record. (Set forth, *supra*, at 9-11.)

Mrs. Taylor testified that the change "impacted us both financially and emotionally." AA 83. Captain Taylor and his wife both testified that they were required to hire childcare to accommodate his schedule because he was no longer able to assist in the 96 hour off period. Because Mrs. Taylor travels a lot (which directly determines her income), Captain Taylor's schedule is of paramount importance to allow Mrs. Taylor to schedule out her travel. AA 84. And even though Captain Taylor's kids are in school for part of the day, Mrs. Taylor testified that their oldest child is on a unique schedule and has two months off in the summer, three weeks off in April, and is out of school all of October.

AA 85. Even when school is in session, the school hours are 9:00am to 3:00pm, starting one hour after Captain Taylor was required under the offer to report to the office and ending two hours before his shift conclude. This awkward time necessitated daily childcare in order to ensure the kids were able to get home safely and receive proper care.

The Taylors gave this schedule a try the first time around, and found the situation to be intolerable. The Hearing Officer and the Appeals Officer found this to be evidence that the offer was reasonable. AA 347 (Hearing Officer rejects Captain Taylor's testimony about how intolerable the first light duty job was to his family, calling this only "his personal feelings"); AA 35 (Appeals Officer finds Captain Taylor's acceptance of the light duty job the first time around as evidence the job was not demeaning). But Captain Taylor's good faith attempt to cooperate the first time the unfair schedule was imposed on his family is not a basis for concluding that his refusal to again put his family through that intolerable situation was unreasonable. And it does not make the job offer more reasonable, nor does it make the offending offer compliant with the statute. The fact that cannot be denied here is that the offer was for employment so dissimilar to Captain Taylor's pre-injury employment as to make the offer invalid as a matter of law.

The Appeals Officer and the district court recited that there was no evidence in the record to support Captain Taylor's claim that the light duty job was a financial burden to him and his family. This was a rallying cry of TMPFD below. But no reason has been suggested to ignore the testimony of the Taylors as to the strain and burden this altered schedule placed on their family and finances. TMPFD never offered any conflicting evidence, nor dit it provide any reason to ignore the testimony of a long-term civil servant and his spouse. The Taylor's testimony is evidence of this burden, and it is in the record.

Generally any person who has experienced a need to call the fire department appreciates that the officers are on call at the station 24/7. This is the nature of emergency services. Even young children appreciate the lightening response associated with lights and sirens of bright red fire trucks whizzing through city streets. Consequently, as the light duty job's schedule was not substantially similar to Captain Taylor's pre-injury schedule, it was a violation of the statute. This alone justifies overturning the Appeals Officer's decision.

B. The Light Duty Job Offer Changed the Location of Captain Taylor's Employment.

The light duty job offer changed the location of Captain Taylor's employment from Station 15 at 110 Quartz Lane, Reno, Nevada 89433, to a

location six miles away at 1001 East Ninth Street, Building D, Reno, Nevada 89512. Compared to Captain Taylor's normal work location, Fire Station 15, there is a significant difference in distance and function of the location of the office building for the light duty Job.

Further, not only is there a distance issue, but also a proximity and function issue to address. As Captain Taylor testified, his duties "are to supervise my crew. To respond with my crew to all incidents within the District, including structure fires, vehicle fires, wildlife fires, EMS incidents. Avalanche, search and rescue, water rescue. It's an all risk department. So, if you can think of it, we do it. I'm [an] Incident Commander." AA 47. Captain Taylor would also supervise the maintenance and readiness of all equipment at Fire Station 15. *Id.* As a Fire Suppression Captain, Captain Taylor's entire world revolved around the ability of his crews to respond to emergencies. This is why he worked out of Fire Station 15 and not an administrative building. The light duty offer changed Captain Taylor's workplace from a fire station to an office complex removed from Fire Station 15.

Interestingly this office was not specific to the Fire Department and also shared space with the Washoe County WIC Office, Washoe County Assessor's Office, Washoe County Recorder's Office, Washoe County Clerk, Washoe County

Building & Safety Office, Washoe County Social Services Department, and even shared a parking lot with the Washoe County Public Library. There is nothing substantially similar about these two locations.

More importantly, there were alternatives to the office position offered that would have kept Captain Taylor on-site, at Fire Station 15, in a modified role that would easily conform to the statute. The Record on Appeal establishes that Captain Taylor could have remained at Fire Station 15 in a logistics capacity wherein he could have been assigned to his normal supervisor (the Battalion Chief), and could have beeen assigned various non-physical logistic duties including: mechanical assistance, assisting the logistics chief in disseminating supplies and equipment, assigned to the Fire Prevention Chief doing business inspections, complete 30-foot clearance inspections, complete fire hydrant inspection/maintenance. AA at 76-77. All of these jobs could easily have been done with limited physical exertion.

Based on the nature of his position, it was a mistake for Captain Taylor's light duty job to be so far removed from Fire Station 15. Therefore, the Appeals Officer's decision should be overturned.

C. The Light Duty Job Offer Changed Captain Taylor's Job Duties.

The light duty job offer changed Captain Taylor's job duties dramatically.

It effectively demoted Captain Taylor from a Captain to an office secretary, which was both humiliating and unlawful. *See Dillard Dept. Stores, Inc. v. Beckwith*, 115 Nev. 372, 989 P.2d 882 (1999) (court awarded claimant $2,496,112 in damages and $518,455 in attorney fees and costs for constructive discharge claims because employer placed the employee in an entry level position, which included document filing, rather than being returned to her management position with the company).

Changing the job duties expected to be performed while Captain Taylor was on light duty from his normal position to that of an office secretary was humiliating, demoralizing and degrading to a person who was trained and regularly worked as a fire fighter, and a Captain. By allowing the employer and the insure to provide this type of a light duty assignment, the Appeals Officer erroneously allowed them to punish Captain Taylor for sustaining a work-related injury and filing a worker's compensation claim. And both the Appeals Officer and the district court improperly discounted this element of Captain Taylor's objection to the job that was offered. They may consider the humiliation and the inappropriateness of the assignment to be minor from their positions in their ivory towers, but if the district judge were to be injured and released to light duty work, and was assigned to be a project assistant to a law clerk, rather than to perform her

judicial functions, she might feel differently. One might argue that if the district judge were able to perform the duties of a project assistant or law clerk, she could also perform her duties as a judge, but that is the point. Captain Taylor was not able to perform the difficult obligations of a firefighter, such as carrying heavy equipment and responding to a fire scene, but he was able to perform many of the other functions of a firefighter. Such work was available and could have been assigned to him, but instead he was assigned to be a secretary's assistant and to perform menial tasks. This was not a proper assignment.

TMFPD repeatedly stated below that it did not mean to be demeaning to Captain Taylor. But offering him a secretary's job which is acquiescent to a separate and disparate logistical operation and supervisory structure was, in fact, demeaning.

D. The Light Duty Job Offer Replaced Captain Taylor's Normal Supervising Battalion Chief with an Appointed Office Secretary.

TMFPD's light duty job offer replaced Captain Taylor's normal supervising Battalion Chief with an appointed office secretary. This breaks the normal chain of command established by the fire department. Further, this assignment was confusing and restrictive for Captain Taylor and his Battalion Chief. The break in the chain of command adds to the humiliating feeling that Captain Taylor was

being punished because he sustained a work-related injury and filed a worker's compensation claim. A similar job would not have included a demotion and answering to a subordinate.

III. The Employer's Offer of a Light Duty Job Was Not Reasonable.

The light duty job offer was unreasonable and degrading to Captain Taylor, a 25-year veteran of the Fire Service, and a Captain for the TMFPD.

In *EG & G Special Projects, Inc. v. Corselli*, 102 Nev. 116, 715 P.2d 1326 (1986), this Court held that an offer of light duty work must not impose an unreasonable burden on the injured worker. In that case, prior to injury, the employee had lived for twenty-five years in Riverside, California, and commuted by air at government expense to the Nevada Test Site to work three days a week, with four days off at home in Riverside. The new light duty job found for the employee substantially changed the hours, days and location of the injured worker's employment by requiring him to work five days per week in Las Vegas. This Court found that the light duty job offered to the injured worker was unreasonable, and remanded with an order to pay the claimant benefits.

TMFPD discounted *Corselli* because the distances and changes there, in TMFPD's opinion, were greater than the changes here. But the principle applies nonetheless, and although the question of reasonableness is always one of degree,

in this case, looking at all of the circumstances, the Appeals Officer should have concluded as a matter of law that the light duty job offer was not reasonable, and thus did not comply with the statute.

The requirement of reasonableness articulated by this Court in *Corselli* is also found in the legislative history of the NRS 616C.475(8). At a February 25, 1993, meeting of the Senate Committee on Commerce and Labor, Scott Young, General Counsel for the Nevada State Industrial System (SIIS), explained the temporary light duty language as follows:

> As long as the offer is reasonable, in terms of those three categories (pay rate, shift, hours of employment) my understanding is the injured worker could not refuse it. . . . As long as the job offer was reasonable in terms of the location and hours, the workers should be required to take the job.

Minutes of the Senate Committee on Commerce and Labor, 67th Sess., Feb 25, 2993.

In this case, the September 9, 2016, letter to Captain Taylor offering temporary light duty employment stated: "You will be assigned to the administrative office and your scheduled hours will be Monday through Friday 8am to 5pm with an hour lunch. To align the schedule change with the beginning of the FLSA cycle, you will report to the administrative offices on Monday September 12, 2016 at 8am." AA 225. One can only imagine what Captain

Taylor must have thought and felt when he read the letter, and realized that TMPFD was again attempting to change him from a firefighter and Captain to an office assistant secretary with hours that could not possibly work for the lifestyle he and his family had established based on his 25 years of service to the County.

The light duty job was unreasonable because the job duties were dramatically different and completely unrelated to the job for which Captain Taylor had trained and which he had faithfully performed for decades. The offer effectively demoted Captain Taylor, removed him from the chain of command, and placed him in an unfair and unfamiliar working environment for which he was not prepared. Captain Taylor is an Engine Incident Commander who arrives on a scene and takes command. He is not a filing clerk.

All of the factors and circumstances of this case scream out that an offer of an office job as a secretary's assistant from 8 to 5 was not a reasonable offer to Captain Taylor. The Appeals Officer's decision to the contrary is wrong as a matter of law.

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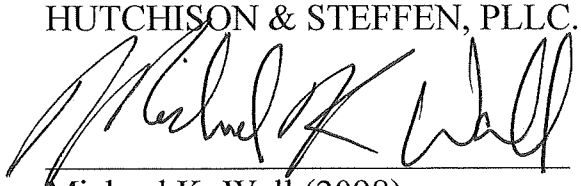
CONCLUSION

This Court should reverse the Appeals Officer's decision.

DATED this 8 day of November, 2019.

HUTCHISON & STEFFEN, PLLC.



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ATTORNEY'S CERTIFICATE

1. I 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 it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 8,758 words.

3. Finally, I 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 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 the

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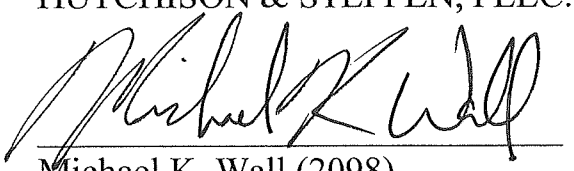
accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8 day of November, 2019.

HUTCHISON & STEFFEN, PLLC.



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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **APPELLANT'S OPENING BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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