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

Vance Taylor,
Appellant,

Case No. 78971



VS.

Truckee Meadows Fire Protection District; and Alternative Service Concepts, LLC,

Res ondents.

On Appeal from Final Order Denying Appellant's Petition for Judicial Review by
The Second Judicial District of the State of Nevada
In and for the County of Washoe

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# RESPONDENTS' ANSWERING BRIEF

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Robert F. Balkenbush, Esq.
State Bar No. 1246
Michael Winn, Esq.
State Bar No. 12556
THORNDAL ARMSTRONG DELK
BALKENBUSH & EISINGER
6590 S. McCarran Blvd., Suite B
Reno, NV 89509
Tel. (775) 786-2882
Facsimile (775) 786-8004
rfb@thorndal.com

*Attorneys for Respondents*

## NRAP RULE 263 DISCLOSURE

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

Robert F. Balkenbush

The names of the law firms whose partners or associates have appeared for Respondent are as follows: THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER, 6590 S. McCarran Blvd., Suite B, Reno, Nevada 89509.

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

There are no other known interested parties.

DATED this 10TH day of January 2020.

*/s/ Robert F. Balkenbush*
An employee of Thomdal Armstrong Delk Balkenbush & Eisinger

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## I. Statement of the Issue Presented for Review

Under NRS 616C.475(8) and NAC 616C.583, was the district court's denial for judicial review concerning temporary total disability payments improper after Appellant declined his employer's offer of light duty employment that was substantially similar to his pre-injury occupation?

## II. Statement of the Case

Appellate asks this Court to review the Second Judicial District Court's denial of his petition for judicial review involving a workers' compensation claim.

The claimant or injured employee involved in the referenced workers' compensation claim is Appellant Vance Taylor (hereinafter "Taylor"). AA 121. Taylor's employer at the time of the accident forming the basis of his claim was the Truckee Meadows Fire Protection District (hereinafter "TMFPD"). AA 121. The workers' compensation insurer of the TMFPD at the time Taylor's claim was made was the Public Agency Compensation Trust (hereinafter "PACT"). AA 149. The third-party administrator ("TPA") of Taylor's workers' compensation claim herein at issue is Alternative Service Concepts, LLC ("ASC"). AA 121.

On April 19, 2016 while working as a fire captain for TMFPD during a training drill, Taylor suffered an injury to his left shoulder. AA 121, 125. On the same date and occasion, Taylor reported the injury and received initial treatment for a shoulder strain. AA 122.

On September 9, 2016 and by written correspondence, TMFPD offered Taylor a temporary, light-duty job that accommodated physical restrictions imposed on Taylor by his treating orthopedic surgeon. AA 225. This employment was set to begin September 12, 2016. AA 225, 227.

In response via email, Taylor rejected his employer's offer of temporary, light-duty employment. AA 324-26. In turn and in a letter dated September 26, 2016, ASC notified Taylor he would receive no further payments of temporary total disability (TTD) past September 11, 2016. AA 328.

Taylor appealed ASC's TTD determination by filing a request for hearing on September 29, 2016. AA 346. On November 23, 2016 by way of written order after a hearing held November 8, 2016, Hearing Officer Sondra Amodei affirmed the ASC's denial of TTD payments. AA 347.

On December 6, 2016, Taylor filed a notice of appeal and request for hearing with the State of Nevada Department of Administration Hearings Division. AA 350. On February 27, 2018, by written order and after hearing, Appeals Officer Sheila Moore affirmed the denial. AA 408.

March 30, 2018, Taylor filed a Petition for Judicial Review with the Second Judicial District Court in Case No. CV18-00673. May 10, 2019, the District Court by way of written decision, denied Taylor's Petition for Judicial Review. AA 594.

This appeal follows.

## III. Statement of Relevant Facts

On April 19, 2016, Taylor injured his left shoulder while conducting a training exercise at work. AA 121. Taylor was employed by TMFPD. AA 121.

In his pre-injury position, Taylor was working a 48/96 rotation, which is a 48 hour (2-day) work shift, followed by 96 hours (4 days) off work. AA 55-6. Under that schedule, Taylor was required to work, sleep, and reside at the station for the entirety of the shift. AA 73-4. Taylor's work location at the time of injury was Station 15 at 110 Quartz Lane, Reno, Nevada 89433. AA 372.

A number of events followed whereby Taylor was released back to work on a restricted light duty on August 15, 2016. AA 220. On September 9, 2016, TMFPD sent a letter to Taylor with an offer of light duty employment. AA 322. The offer of light duty provided, in part, as follows:

> You will be assigned to the administrative office and your scheduled hours will be Monday through Friday Sam 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 322. Taylor subsequently rejected the offer of light duty employment via email correspondence on September 9, 2016. AA 324-6.

Accordingly, on September 26, 2016, ASC sent a letter to Taylor informing him that based on his refusal to accept the light duty offer his TTD benefits would be terminated and would not be paid beyond September 11, 2016. AA 328.

## IV. Summary of the Argument

Taylor's rejection of his employer's, TMFPD, offer of light duty employment was unreasonable given the offer for employment was substantially similar in terms of working hours, compensation, and location.

Any argument Taylor advances for his refusal related to lack of prestige or subjective value of the temporary assignment finds no support in the law.

Because TMFPD's offer for light duty employment met the statutory and regulatory requirements, the Second District Judicial Court's denial of his petition for judicial review was correct.

## V. Argument

### a. Standard of Review

This Court independently reviews the application of statutes governing disability payments and addresses these matters anew and without deference to the district court's conclusions. *Amazon.com v. Magee*, 121 Nev. 632, 635, 119 P.3d 732, 734 (2005). The Court has expressly noted it will uphold the plain meaning of the statutory scheme in workers' compensation laws. *Id.* 734-5. Therefore, this analysis turns to the application of statutory and administrative codes.

### b. The Appeal Officer's Decision Denying Taylor TTD payments was proper.

The statutory and administrative code both require an offer for temporary employment be substantially similar to the employee's position at the time of

injury in respect to location, hours, pay, and benefits. NRS 616C.475(8) reads in relevant part:

> If...physical limitations or restrictions are temporary, the employer...may offer temporary, light-duty employment to the employee...[a]ny offer of temporary, light-duty employment must specify a position that: (a) [i]s 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)** [p]rovides a gross wage that is...substantially similar to the gross wage the employee was earning at the time of his or her injury; and (c) [h]as the same employment benefits as the position of the employee at the time of his or her injury.

NRS 616C.475(8). Additionally, "[a]n offer of employment at light duty to an injured employee by his or her employer must... [be] [s]ubstantially similar in terms of the location and the working hours to the position that the injured employee held at the time of the injury." NAC 616C.583.

Taylor argues in this appeal the light-duty designation does not comply with NRS 616C.475(8) because the offer changes Taylor's (1) work schedule, (2) associated pay, (3) work location, (4) job duties, and (5) "chain of command established by the fire department." Appellant's Opening Br., p. 24, ¶ 3. Each of these assertions is now considered in turn.

i. <u>The light-duty assignment was substantially similar in terms of working hours.</u>

The hours offered by the temporary assignment required Taylor to work in total fewer hours than before his injury occurred. Prior to his injury, Taylor was

**required to work 48 hour (2-day) work shifts, followed by 96 hours (4 days) off work; this work shift obligated Taylor to work, sleep, and reside at the station for the entirety of the his shift. In contrast, the temporary, light-duty employment assignment required him to work Monday-Friday, 8:00 a.m. to 5:00 p.m. for a total of 40 hours. This administrative schedule provided the same wages at a lower minimum hour requirement. While the administrative schedule did require Taylor to work a different schedule, the hour requirement was lower than the 48 hour threshold of his previous schedule.**

**Furthermore, while Taylor contends that the temporary, light-duty position caused him and his family to incur additional expenses related to daycare, Taylor did not offer into evidence any financial records demonstrating any alleged financial hardship. Accordingly, Taylor fails to provide substantial evidence that the schedule of the temporary, light-duty job caused significant financial hardship on him or his family.**

**ii. <u>Taylor's wages remained the same as before the injury during the temporary assignment.</u>**

**Taylor fails to demonstrate any variance in wages caused by the temporary assignment. Taylor argues that he was not afforded the same employment benefits under the temporary, light-duty position, specifically FLSA overtime pay and access to Holiday Comp Time. However, for all his assertions, Taylor did not offer into evidence any contractual documentation that established any differences in the**

benefits. Moreover, Taylor fails to cite to anything in the record that would support such contention. *See* NRS 233B.135 ("Judicial review of a final decision of an agency must be...[c]onfined to the record.")

In *Amazon.com*, this Court has made clear "[w]hen read in conjunction with the other sections of NRS 616C.475, NRS 616C.475(8) merely allows an employer to make productive use of an injured employee in lieu of paying that employee 66 2/3 percent of the employee's gross pay while the employee remains temporarily totally disabled. This use is accomplished by offering a properly classified, temporarily totally disabled employee a position similar in location, pay and hours [sic] to the job held pre-injury." 121 Nev. at 637-38. Accordingly, the temporary light-duty position need not meet or exceed all the specifics of the pre-injury position, just so long as it is similar in location, pay and hours.

The temporary, light-duty job offered to Taylor by TMFPD, paid his pre-injury monthly wage of $10,115.39. AA 36. Taylor's average monthly wage under his claim was $5,426.25, the state maximum allowed for the date of his work-related injury. AA 36. Further, under his claim, Taylor's daily compensation and TTD rate were the maximum allowed by Nevada law for his date of injury, respectively $118.84 and $1,663.76. AA 36. Conversely, his hourly rate as a fire captain was $67,00 per hour. AA 446.

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iii. The temporary assignment was substantially similar to Taylor's pre-injury employment location.

Next, Taylor argues the offer of light-duty employment failed to comply with NRS 616C.475(8) or is otherwise unreasonable because the location of the temporary employment was six (6) miles away from where his pre-injury position was located. Taylor's argument focuses on the nature of his pre-injury employment and response. However, the change in location was relatively minor and was actually closer to Taylor's residence, than the location of his pre-injury position.

The Court's decision in *EG&G Special Projects v. Corselli is* instructive on this issue. 102 Nev. 116, 715 P.2d 1326 (1986). In *Corselli*, this Court concluded that a temporary, light-duty position was not substantially similar to the employee's pre-injury position based primarily on the change of location for his employment. *Id.* at 118. Prior to his injury, the employee, who resided in Riverside, California, made arrangements with his employer to commute by air at government expense to his place of employment, the Nevada Test Site, where he worked three days on, four days off. *Id.* at 117. Following an injury, his employer made available to him a position as a security officer in Las Vegas, Nevada, even though he had worked as a firefighter at the Nevada Test Site and had lived continuously in Riverside, California for twenty-five years. *Id*. The Nevada Supreme Court concluded "[a]n offer of employment cannot be considered legitimate if the location of the job imposes an unreasonable burden on the

worker." *Id.* at 119. "The requirement of reasonableness is especially applicable to the location of the job offer." *Id.*

Here, the burden placed on Taylor is arguably non-existent and certainly not unreasonable. While Taylor focuses on the change between the two sites of employment, it must be noted that the location of the temporary, light-duty position, which is located in downtown Reno, is actually closer to Taylor's residence. AA 121. Furthermore, in comparison to *Corselli*, the difference in location is relatively minor and does not place a burden on Taylor to a degree that the temporary, light-duty position was not "substantially similar" to the pre-injury employment. The temporary, light-duty employment offered in *Corselli* required the claimant (a long time resident of Riverside, California), to reside in Las Vegas five days per week, whereas here, the change of location was a mere six miles. This clearly satisfies the "substantially similar" standard.

iv. The nature of the temporary assignment does not render it illegitimate.

Taylor contends that the temporary, light duty position dramatically and effectively demotes Taylor from a Captain to an office secretary, which he alleges is humiliating and unlawful and therefore does not comply with NRS 616C.475(8).

Nevada law does not require that an employee personally approve his post-injury job duties. *Amazon.com*, 121 at 637-38. Nothing in Nevada's jurisprudence

suggests that an employee's dislike for his post-injury job is sufficient to contest an employer's compliance with NRS 616C.475(8). *Id.*

While Taylor may subjectively believe the temporary, light duty position is beneath him, his refusal to accept the position was not justified. The position was one that is routinely offered to injured employees and complied with all physical restrictions imposed by his treating physician. *See* NAC 616C.586(2)(a) ("Temporary employment at light-duty offered by an employer which is part of the employer's regular business operation is deemed by law not to be demeaning or degrading or to subject the employee to ridicule or embarrassment.")

Taylor's reliance on *Dillard Dept Stores, Inc. v. Beckwith* to demonstrate retaliatory or constructive discharge is misguided. 115 Nev. 372, 989 P.2d 882 (1999). This Court in *Beckwith* held a tortious discharge occurs when: (1) an employee's resignation was induced by action and conditions that are violative of public policy; (2) a reasonable person in the employee's position at the time of resignation would have also resigned because of the aggravated and intolerable employment actions and conditions; (3) the employer had actual or constructive knowledge of the intolerable actions and conditions and their impact on the employee; and (4) the situation could have been remedied. *Id.* at 377. In *Beckwith,* the employer acknowledged it permanently demoted the plaintiff to an entry-level position because of her workers' compensation claim, the employer requested the

**plaintiff return to work against the treating physician's orders, there was open speculation between the plaintiff's co-workers about the demotion, and the employer ignored the plaintiffs complaints about her harmful work environment. *Id. at* 378.**

**The facts of *Beckwith* do not apply to Taylor. At no point did TMFPD indicate this was a permanent "demotion." Rather, it was communicated to him that this was a "temporary light duty employment immediately available that is compatible with the physical limitations imposed by your treating physician or chiropractor." AA 322. Moreover, Taylor returned to his pre-injury position in November 2016. AA 11-12. There is absolutely no evidence that this position was imposed on Taylor in retaliation for him filing a workers' compensation claim. Finally, at no point did TMPFD require Taylor to return to work against his treating physician's orders. Accordingly, the *Beckwith* decision is inappropriate, and Taylor's reliance upon this decision is misguided and misplaced, the evidence does not support a cognizable constructive discharge claim.**

**v. <u>Whether an offer for light-duty employment breaks a previously established chain of command is not relevant to this Court's analysis.</u>**

**Taylor's final contention is that TMPFD's light-duty offer replaced his supervisor from the supervising Battalion Chief to an appointed office secretary. As a result, Taylor alleges this assignment breaks the established chain of**

command, is extremely confusing and restrictive, and adds to the humiliating feeling that he is being punished because he sustained a work-related injury and filed a workers' compensation claim. However Taylor feels about the temporary, light duty assignment is not a consideration set forth by NRS 616C.475(8). Taylor cites no authority to support this position. Accordingly, his refusal to accept the position was not justified as the offer clearly complied with NRS 616C.475(8).

**c. The light-duty offer was reasonable and lawful.**

Taylor now argues the light-duty job offer was unreasonable and degrading. Taylor relies on *Corselli* and Minutes of the Senate Committee on Commerce and Labor for this proposition. Taylor once again argues his job duties were different, unrelated, removed him from the chain of command, and caused him to be a filing clerk as opposed to someone "who arrives on scene and takes command." Appellant's Opening Brief, p. 37, **113.** Each of these contentions was herein previously addressed and none render illegitimate the temporary, light duty position.

## VI. Conclusion

The temporary, light duty position that was offer to Taylor by TMFPD on September 9, 2016, met all the statutory and regulatory requirements and was part of the employer's regular business operations, essentially immediately available, and compatible with the restrictions imposed by his treating physician.

**Furthermore, the position was substantially similar to Taylor's pre-injury position in relation to the location of the employment, the hours he was required to work, and the wages that he was earning prior to injury. Accordingly, based on the foregoing, the Respondents respectfully request this Court affirm the Second Judicial Court's decision denying the petition for judicial review.**

**DATED this 10th day of January 2020.**

***/s/ Robert F. Balkenbush***
**An employee of Thorndal Armstrong Delk Balkenbush & Eisinger**

## VII. CERTIFICATE OF COMPLIANCE

I. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word, Version 7, size 14, Times New Roman.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(A) 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 2,801 words.

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. 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 10th day of January, 2020.**

**Thorndal Armstrong**
**Delk Balkenbush & Eisinger**

***/s/ Robert F. Balkenbush***
**An employee of Thorndal Armstrong**
**Delk Balkenbush & Eisinger**

## CERTIFICATE OF SERVICE

**Pursuant to NRAP 25(a)(2), I certify that I am an employee of Thorndal Armstrong Delk Balkenbush & Eisinger, and that on this date I caused the foregoing RESPONDENTS' ANSWERING BRIEF to be served via the Supreme Court's e-filing system, a true and correct copy of the foregoing document, addressed to the following e-mail addresses:**

**Michael K. Wall, Esq.**
**Hutchison & Wall, PLLC**
**10080 West Alta Drive, Suite 200**
**Las Vegas, NV 89145**
**mwaWhutchlegal.com**

**DATED this 10th day of January 2020.**

***/s/ Sam Baker*_____**
**An employee of Thorndal Armstrong Delk Balkenbush & Eisinger**