IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CHERYL SCHULTZ on behalf of
KEVIN SCHULTZ, a deceased,

Worker-Appellant,

vs.

POJOAQUE TRIBAL POLICE DEPARTMENT, and **NEW MEXICO MUTUAL CASUALTY COMPANY**,

Employer/Insurer-Appellee.

No. 28, 508
WCA No. 03-05866

APPEAL FROM NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION
THE HONORABLE HELEN L. STIRLING

ANSWER BRIEF OF POJOAQUE TRIBAL POLICE DEPARTMENT AND NEW MEXICO MUTUAL CASUALTY COMPANY

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TABLE OF CONTENTS

The transcript of proceedings in this matter is contained on audio tapes recorded by a Tape Monitor of the Workers' Compensation Administration. The trial was held on two separate days, July 17, 2007 and September 21, 2007. Closing arguments were held on September 24, 2007. The trial tapes were numbered separately for the two trial dates, but the closing arguments are included in the numbering for the September 21, 2007 tapes. All citations to the transcript refer to the date of the hearing shown on the tape, the specific tape number and conform to the counter indicated in the official log (*e.g.* Tr. 9/21/07, 4:465-515); *See* RP 215-228, 230-248.

TABLE OF AUTHORITIES

NEW MEXICO RULES AND STATUTES

NEW MEXICO CASES

OTHER AUTHORITY

Pursuant to Rule 12-213 NMRA, Employer/Insurer-Appellees Pojoaque Tribal Police Department and New Mexico Mutual Casualty Company, hereby respectfully submit the following Answer Brief.

I. SUMMARY OF PROCEEDINGS

This case arises from Worker-Appellant's appeal from a Workers' Compensation Administration ruling against her. The Workers' Compensation Judge ("WCJ") entered findings and conclusions on Workers-Appellant's claims on March 14, 2008, denying Worker-Appellant's workers' compensation benefits based on (1) the expiration of the statute of limitations, and (2) the non-work related nature of Worker's death. Worker's issues below, decided after a three-day trial in front of the WCJ, and her issues on appeal, have already been addressed by New Mexico Courts in settled precedent, contrary to Worker's assertion that this is an issue of first impression. Therefore, Employer/Insurer-Appellees respectfully request that this Court affirm the WCJ's decision below.

A. Factual/Procedural History

Worker-Appellant is asking this Court to disregard established New Mexico law in order to find in her favor. Worker-Appellant asks this Court to (1) hold that her Workers' Compensation Complaint was timely filed, and (2) Kevin Schultz's ("Worker's") actions on August 17, 2002 arose out of and were in the course and

scope of his employment as a Pojoaque Tribal Police Officer, as opposed to his duty as a church chaperone to protect the safety of the children attending the church event. No one, whether at the trial court level or the appellate level, has disputed that Worker died a hero on August 17, 2002. The disputed facts in this case, however, concern the timeliness of Worker's Complaint and whether Worker's accidental death arose out of and in the course of his employment with the Pueblo of Pojoaque Tribal Police Department. At the time of his death, Worker was acting as a chaperone at an outing for the Sangre de Cristo Church and in that capacity passed away after having saved the life of one of the children attending the Church's event. In fact, at the church outing, Worker had assumed the responsibility for the safety of the children who were attending.

On August 17, 2002, Worker, his wife Cheryl Schultz and another couple from the Sangre de Cristo Church, Tommy and Renee Boylan, chaperoned a church outing to Pilar, New Mexico. [Tr. 7/17/07, 4:578-614, 754-808] Altogether, they accompanied twelve children, three of which were moving up from the children's ministry in the church to the youth ministry. [Tr. 9/21/07, 4:1-51; Pastor Romero depo., Exh. B, pg. 46] The Boylans were leaders in the children's ministry and the Schultz's were leaders in the youth ministry. [Tr. 7/17/07,1144-1354; Tr. 9/21/07, 7:1-51; Pastor Romero depo., Exh. B, pg. 26] The Schultz's were in charge of and had

organized the event on August 17, 2002. [Tr. 7/17/07, 5:84-130] All four chaperones were responsible for the safety of the children at this event. [Tr. 7/17/07, 5:84; Renee Boylan depo., Exh. F, pgs. 26-27; Pastor Romero depo., Exh. B, pgs. 48-49]

Furthermore, Worker had requested the day off from his duties with Pojoaque Tribal Police, specifically to accompany the children as a chaperone to the Church outing. [Tr. 9/21/07, 8:250-281] Accordingly, during the outing, Worker was dressed in civilian clothing and was not acting on behalf of the Pojoaque Tribal Police Department. [Tr. 7/17/07, 5:84; Tr. 9/21/07, 4:1-96; Kent Liles depo., Exh. C, pgs. 42-43] Worker drove his personal vehicle to the church outing. [Tr. 9/21/07, 3:1111-1250] Worker was not subject to "on-call" status. [Tr. 9/21/07, 11:484] Moreover, upon their arrival in Pilar, Worker instructed the children in safety, making sure to remind the children that they should not stray away from the adults, that they needed to obey Worker, not to do anything stupid and not to go into the water without someone else around. [Tr. 9/21/07, 7:259-359] Additionally, Worker was not commissioned in Rio Arriba or Santa Fe counties; and thus he would only be authorized to act on behalf of the Pojoaque Tribal Police if assistance had been requested by one of those agencies. [Tr. 7/17/07, 13:1052; Tr. 9/21/07, 8:53-173, 9:964-977,11:1125]

Employer's expert witness, Darryl Hart, whose expert testimony was extremely

compelling, was a retired Director of the Law Enforcement Academy. [Tr. 7/17/07, 12:1003-1365] During his tenure as the Director of New Mexico Department of Public Safety Training Division Law Enforcement from 1990 until 2003, Mr. Hart provided basic training for police officers in the state, oversaw satellite academies that operated under Board rules, certified officers to the academy Board and advanced training programs and oversaw officer misconduct. [*Id.*]

Prior to becoming Director, Mr. Hart worked as an instructor, a bureau chief, and a deputy director. [*Id.*] As the Deputy Director, Mr. Hart oversaw the Bureau and assisted the Director; as the Bureau Chief, Mr. Hart handled the basic training program, the certification of the waiver program and the dispatcher certification program; as an Instructor, Mr. Hart instructed officers primarily in physical areas, such as driving, firearms, defensive tactics and physical fitness. [*Id.*] Prior to working for the State of New Mexico, Mr. Hart was also employed as a dispatcher, police officer and patrol sergeant with the New Mexico State University Police in Las Cruces. [Tr. 7/17/07, 13:47-55] Mr. Hart was certified as a police officer in the State of New Mexico in 1980. [*Id.*] Additionally, Mr. Hart holds an undergraduate degree in economics and political science from New Mexico State University and a Masters in Public Administration from the University of New Mexico. [*Id.*] Accordingly, Mr. Hart was qualified as an expert witness in police training, policies and procedures,

and in the performance and exercise of police duties. [Tr. 7/17/07, 13:96-152]

Mr. Hart testified that Worker was not acting under any duty as a police officer at the time he jumped into the Rio Grande to save the life of one of the children attending the Church's outing. [Tr. 7/17/07, 13:329] At the time of Worker's death, he did not have, nor was he required to have, certification for swift water rescue. [Tr. 7/17/07, 13:329-631] Moreover, there is no evidence in the record to indicate that Worker was trained or had ever received training in swift water rescue. [*Id.* (indicating that Worker had received training in basic first aid)] Mr. Hart further testified that officers who are not trained or equipped for certain activities should not put themselves (and others) in danger by attempting to perform those activities. [*Id.*] Officers are not expected to get killed in the line of duty or perform irrational acts under the oath of protecting and serving. [*Id.*, Tr. 7/17/07,14:11-81, 506-606] Moreover, nothing in the policies, guides or procedures of the Pojoaque Tribal Police directed or required Worker to act in the manner that he did on August 17, 2002. [Tr. 7/17/07, 14:81-451]

Following Worker's death, Tom Jonovich, working on behalf of Workers's widow, Cheryl Schultz, contacted Pojoaque Police Chief John Garcia on July 28, 2003 to inquire about the availability of workers' compensation benefits for Ms. Schultz. [Tr. 7/17/07, 11:667-298] At that time, Chief Garcia indicated that not only

had he not thought of the availability of workers' compensation benefits for Ms. Schultz, but that Worker's death occurred outside of the County and off of Tribal land. [Tr. 7/17/07, 11:156-350] Thus, Chief Garcia never told Ms. Schultz or Mr. Jonovich that Ms. Schultz was entitled to receive workers' compensation benefits or would receive such benefits. [Tr. 7/17/07, 12:36-237]

On October 1, 2003, Ms. Schultz filed a Complaint against Pojoaque Tribal Police ("Employer") and its insurer, New Mexico Mutual Casualty Group. [RP 1] In her Complaint, Ms. Schultz asked for payment of medical bills and survivor benefits. [*Id.*; RP 304] A second Complaint was filed on October 22, 2003, seeking the same benefits. [RP 5, 304] On December 19, 2003, a Recommended Resolution was filed, recommending that the pending Complaints be dismissed without prejudice with leave to re-file immediately. [RP 20, 304]

Complaints were filed again on June 18, 2004 and June 21, 2004, seeking death benefits and requesting a modification of the Recommended Resolution of December 19, 2003. [RP 28-30, 31-33, 304] The grounds for the request for the modification was that it was not equitable for the Recommended Resolution to have prospective application. [RP 305] The Recommended Resolution was rejected. [RP 305] A mediation conference was held on May 9, 2005; its Recommended Resolution was rejected by both parties. [RP 107-111, 305] Accordingly, a trial of this case proceeded

on July 17, 2007, with the second day of trial occurring on September 21, 2007 and closing arguments on September 24, 2007. [RP 215-228, 230-248, 305]

The WCJ made the following salient findings of fact and conclusions of law: Worker was an employee of the Pojoaque Tribal Police on the date of his death, August 17, 2002. [RP 306; FF 4] Worker was employed as a police officer for Employer, having been hired in August of 2001. [RP 306; FF 7] Worker had been employed as a police officer in Missouri but moved to New Mexico because of his church group and pastor who he had known when he lived in Missouri. [RP 307; FF 8-11] Worker had worked as a Santa Fe County deputy when he first moved to New Mexico but accepted a job with Employer because Employer wanted to develop a traffic unit and Worker was in school for traffic and accident reconstruction. [RP 307; FF 8-11]

The WCJ further found that Worker's church and Worker arranged for a church group outing to occur on August 17, 2002 in Pilar, New Mexico. [RP 308, 318; FF 17, 80] The purpose of the outing was to have a church celebration with the children who were going to be leaving the children's group and moving into the youth group. [RP 318; FF79] Worker, Ms. Schultz and Tommy and Renee Boylan were supervisors for the children attending the trip. [RP 318; FF 81] Worker drove his personal vehicle to the event. [RP 318; FF 82] Worker attended the event in casual clothes and

Worker was not "on call" that day. [RP 318-19; FF 85-86] Thus, Worker was in Pilar, New Mexico, as a church member and leader and his accident "did not occur at a time or place or in a circumstance that was part of his work for Employer." [RP 319, FF 88-89] Worker's accident happened when Worker jumped into the river to save a child because he was an adult chaperone. [RP 319, FF 91]

The WCJ concluded that at the time of his death, Worker was on a day off from work and was not near his place of employment. [RP 323, COL 7] The WCJ further concluded that Ms. Schultz's Complaint for Workers' Compensation benefits filed on October 1, 2003 was not timely pursuant to NMSA 1978, § 52-1-31. [RP 323, COL 11] Although Ms. Schultz's Complaint was dismissed without prejudice on December 19, 2003, with leave to re-file immediately, the Complaint was not re-filed until June 18, 2004. [RP 324, COL 12, 18] Ms. Schultz was unable to prove that under Section 52-1-36, her Complaint was untimely filed due to conduct by Employer. [RP 324, COL 15] Accordingly, Ms. Schultz's Complaint was barred by the statute of limitations. [RP 325, COL 19] Moreover, the WCJ concluded that Worker's accident did not arise out of his employment with Employer nor was it in the course and scope of his employment. [RP 325, COL 27] As a result of these conclusions, the WCJ ruled that Ms. Schultz did not have a cognizable claim under the Workers' Compensation Act. [RP 326, COL 32]

B. Preservation of Arguments

Employer's arguments with regard to the two (2) issues on appeal is represented throughout the record and reflected in the Workers' Compensation Judges' Findings of Facts and Conclusions of Law. [*See* RP 304-27]

II. ARGUMENT

Worker is arguing for an exception to the workers' compensation laws and Worker's arguments suggest that this Court re-write the statutes governing Workers' Compensation. Additionally, Worker's argument that he was in the course and scope of his employment at the time of his death are premised solely on the general standard adhered to by police officers around the country; namely, the duty to *protect* and serve. Beyond the general standards that officers adhere to, in this case, Worker was not required to act, whether by statute or Standard Operating Procedure. In fact, there was no statutory requirement or Employer imposed requirement for Worker to act as he did in this case.

Worker's argument suggests that a police officer is "on duty" for purposes of workers' compensation benefits 24/7/365. Worker's argument also suggests that anytime an officer acts while he is off duty, no matter the underlying events and the officer's purpose for his off duty activities, he is doing so out of his sense of duty and adherence to the oath to protect and serve. Worker's position is untenable and would

result in a unworkable and unprecedented standard for Employers and their insurers. In fact, it was never the intention of Insurer to provide 24/7/365 workers' compensation insurance to any law enforcement officer in the State of New Mexico regardless of the time, place and circumstances under which the accident takes place. Quite frankly, if such was the case, we would have no insured law enforcement entities in the State of New Mexico because these entities, as Employers, would be unable to afford the cost of such expensive workers' compensation and employers' liability insurance.

A. Standard(s) of Review

"Where the facts are not in dispute, it is a question of law whether an accident arises out of and in the course of employment." *Losinski v. Drs. Corcoran, Barkoff and Stagnone*, 97 N.M. 79, 80, 636 P.2d 898, 899 (Ct. App. 1981); *Hernandez v. Home Educ. Livelihood Program*, 98 N.M. 125, 645 P.2d 1381 (Ct. App. 1982). "It is well settled in New Mexico that the findings of a trial court in a workmen's compensation case will not be disturbed on appeal if they are supported by substantial evidence." *Marez v. Kerr-McGee Nuclear Corp.*, 93 N.M. 9, 11, 595 P.2d 1204, 1206 (1979). This Court should only consider the evidence which supports the trial court's findings. *See Schober v. Mountain Bell Telephone*, 96 N.M. 376, 379-80, 630 P.2d 1231, 1234-35 (Ct. App. 1981). "Substantial evidence is relevant evidence

which a reasonable mind accepts as adequate to support the conclusion." *Id.* at 379, 630 P.2d at 1234 (citing *Marez*, 93 N.M. 9, 595 P.2d 1204). "In deciding whether a finding has substantial support, [the reviewing court] must view the evidence, together with all inferences reasonably deducible from such evidence, in the light most favorable to support the finding." *Marez*, 93 N.M. at 11, 595 P.2d at 1206 (citing *Gallegos v. Duke City Lumbar Co., Inc.*, 87 N.M. 404, 534 P.2d 1116 (Ct. App. 1975)); *see also Tallman v. ABF (Arkansas Best Frieght)*, 108 N.M. 124, 129, 767 P.2d 363, 368 (Ct. App. 1988). "Where the testimony is conflicting, the issue on appeal is not whether there is evidence to support a contrary result, but rather whether the evidence supports the findings of the trier of fact." *Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, ¶ 13, 137 N.M. 497, 113 P.3d 320 (internal quotation marks and citation omitted); *see also Gonzalez v. Performance Painting, Inc.*, 2011-NMCA-025, ¶ 14, __ N.M. __, __ P.3d __. [1]

[1] In Worker-Appellant's Brief in Chief, Worker suggests that the WCJ did not consider the testimony of Mark Bralley and therefore, on that ground alone, this Court should remand the case to the WCA. *See* BIC, pg. 4. This is a red herring and complete speculation. Not only does the standard of review on workers' compensation claims suggest otherwise insofar as it allows this Court to uphold the WCJ if substantial evidence exists to support the WCJ's findings and conclusions, *supra*, but Worker failed to mention that Mr. Bralley did offer testimony at the trial below. [Tr. 9/21/07, 1:1-694 (Tape 2 inaudible)] Employer also submits to this Court that Mr. Bralley's proffered testimony was cumulative of the testimony of Mr. Jonovich and Mr. Ortiz.

B. Argument

I. Worker's Complaint was barred by the statute of limitations

NMSA 1978, § 52-1-31 (1987) governs claims filed for workers' compensation. Section B states as follows:

> B. In the case of the death of a worker who would have been entitled to receive compensation if death had not occurred, claim for compensation may be filed on behalf of his eligible dependents to recover compensation from the employer or his insurer. . . . No claim shall be filed, however, to recover compensation benefits for the death of a worker unless . . . *the claim is filed within one year from the date of the worker's death.*

Id. Noncompliance with this statute of limitations is jurisdictional. *Pena v. N.M. Hwy. Dept.*, 100 N.M. 408, 413, 671 P.2d 656, 661 (Ct. App. 1983). Worker's heavy reliance on out-of-state case law is misplaced since New Mexico law exists interpreting Section 52-1-31 and should therefore be applied.

Furthermore, substantial evidence exists to support the WCJ's conclusion that the statute of limitations barred Ms. Schultz's claim. [RP 325, COL 19] The evidence showed that Worker died on August 17, 2002 and Ms. Schultz did not file a Complaint for workers' compensation benefits until October 1, 2003; and thus, this Complaint was late pursuant to Section 52-1-31. [RP 323, COL 11] Ms. Schultz's original Complaint was dismissed without prejudice with leave to re-file immediately; however it was not re-filed until June 18, 2004, nearly six (6) months later. [RP 324,

COL 12] The original filing date of October 1, 2003, was not preserved for Ms. Schultz in the Recommended Resolution that dismissed the Complaint without prejudice, therefore, the statute of limitations continued to run. [RP 324, COL 14] The WCJ concluded that Ms. Schultz was not able to prove that under Section 52-1-36, Ms. Schultz's failure to timely file was caused in whole or in part by the conduct of Employer or Employer's insurer. [RP 324, COL 15] The WCJ further concluded that neither Employer nor Ms. Schultz knew that Ms. Schultz had a workers' compensation claim until the summer of 2003 when Ms. Schultz was advised such by a financial planner. [RP 324, COL 16] Moreover, Employer did not believe that Worker was covered by Workers' Compensation at the time of his death. [RP 324, COL 17]

The WCJ also relied on substantial evidence to conclude that even had Employer caused Ms. Schultz not to file a claim until October 1, 2003, it did not cause her to further delay filing of a claim between the December 19, 2003 Recommended Resolution date and June 18, 2004, the date Ms. Schultz re-filed her Complaint. [RP 324, COL 18] Even giving Ms. Schultz the benefit of the doubt that something Chief Garcia said led her to believe that he would file her workers' compensation claim for her, Ms. Schultz clearly no longer held this belief as of October 1, 2003, when she filed her Complaint. In fact, Ms. Schultz conceded in her

Brief in Chief that she no longer "believe[d] that Chief Garcia was looking after her interests" on October 1, 2003. [*See* Worker's BIC, pg. 23] Moreover, Ms. Schultz testified that she knew there was a problem and was aware that she needed to file her workers' compensation claim in September of 2003, when she attended a retreat for survivors of fallen officers. [FF 62; Tr. 9/21/07, 6:334-420] Thus, at most, there was a short tolling of the statute from July 23, 2008 until October 1, 2008. There is no evidence, and Worker has not alleged, that there was any representation made by the Pojoaque Tribal Police prior to July 23, 2008 that Pojoaque would be doing anything to assist Ms. Schultz in filing for workers' compensation benefits.

Following the dismissal without prejudice of her October 1, 2008 Complaint on December 16, 2003, Ms. Schultz waited until June 18, 2004 to re-file her Complaint. Ms. Schultz has not attempted to explain the reason for this second delay, nor has she made an argument that this second delay was caused by Employer. *Contra Elsea v. Broome Furniture Co.*, 47 N.M. 356, 368, 143 P.2d 572, 579 (1943). Moreover, Worker has not argued or alleged that Employer ever told Worker that it believed Ms. Schultz would be entitled to workers' compensation benefits. Employer maintained the position that Worker would not be entitled to workers compensation benefits on the basis that Worker was not on duty, was not in the jurisdiction of the Pueblo of Pojoaque and was not furthering the interests of Employer at the time of his

death. Accordingly, Workers' Complaint filed herein is barred by the statute of limitations.

ii. Worker's death did not arise out of the course and scope of his employment as a Pojoaque Tribal Police Officer.

There is no case law or statute in New Mexico that supports Worker's contention in support of an award of benefits in this instance. Awarding benefits in this case, where Worker was out of his jurisdiction, off duty, engaged in a church outing as a chaperone and acting beyond the scope of duty, would be unprecedented. New Mexico case law does not support compensation on the facts presented by Worker. NMSA 1978, § 52-1-28 (1987) states:

> Claims for workers' compensation shall be allowed only:
> (1) when the worker has sustained an accidental injury arising out of and in the course of his employment;
> (2) when the accident was reasonably incident to his employment; *and*
> (3) when the disability is a natural and direct result of the accident.

Id. (emphasis added). "Disability is compensable only if it results from an accidental injury 'arising out of' and 'in the course of' the worker's employment." *Schober*, 96 N.M. at 380, 630 P.2d at 1235 (Ct. App. 1981); *Meeks v. Eddy County Sheriff's Dept.*, 118 N.M. 643, 884 P.2d 534 (Ct. App. 1994) (holding that a "disability is compensable only if the injury (1) occurred in the course of the worker's employment and (2) arose out of the employment."); *Kloer v. Municipality of Las Vegas*, 106 N.M.

594, 595, 746 P.2d 685 (1981). Quoting *Williams v. City of Gallup*, 77 N.M. 286, 421 P.2d 804 (1966), the Court in *Schober* stated

> For an injury to 'arise out of' the employment, there must be a showing that the injury was *caused by a risk to which the plaintiff was subjected by his employment.* The employment *must contribute something to the hazard* of the (injury) . . . Compensation has been denied where the *risk was common to the public*, and where the risk was *personal to the claimant.*

Schober, 96 N.M. at 380, 630 P.2d at 1235 (alterations in original) (emphasis added). The Court in *Schober* also recognized that "[t]he difficulty is not in defining the test, but in applying it." *Id.* In this case, Worker's death did not occur *in the course* of Worker's employment; if this requirement is not satisfied, then no compensation may be awarded. *See Meeks*, 118 N.M. at 644, 884 P.2d at 535 ("Both requirements must be satisfied at the time of injury in order for compensation to be awarded.").

"The phrase, in the course of employment relates to the *time*, *place* and *circumstances* under which the accident takes place." *Meeks*, 118 N.M. at 644, 884 P.2d at 535 (emphasis added). This requirement "demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment." *See* Larson's Workers' Compensation, Ch. 4, § 14. "[A]n injury occurs in the course of employment when it takes place within the period of employment, at a place where the employee may reasonably be, and while the employee is reasonably fulfilling the

duties of employment or doing something incidental to it." *Kloer*, 106 N.M. at 597, 746 P.2d 685; *See also McKinney v. Dorlac*, 48 N.M. 149, 153, 146 P.2d 867 (1944). "For an injury to arise out of employment, the injury must have been caused by a risk to which the injured person was subjected in his employment." *Meeks*, 118 N.M. at 644, 884 P.2d at 535. (citing *Velkovitz v. Penasco Indep. Sch. Dist.*, 96 N.M. 577, 577, 633 P.2d 685, 685 (1981)). It is not enough that an injury arise in the course of employment. *See Walker v. Woldridge*, 58 N.M. 183, 184, 268 P.2d 579 (1954).

> For an injury to be compensable, it must 'arise out of' and in the course of employment and not wilfully suffered or intentionally inflicted. The principles 'arising out of' and 'in the course of employment' within the meaning of the Workmen's Compensation Act must coexist at the time of the injury in order that an award be sustained. These terms are not synonymous, the former relates to the cause of the injury and the latter refers to the *time, place and circumstances* under which the injury occurred. The injury must be reasonably incident to the employment or one flowing therefrom as a natural consequence.

Id. at 184, 268 P.2d at 579-80 (emphasis added). Generally, the "arising out of" component requires that the injury "was caused by an increased risk to which claimant, as distinct from the general public, was subjected by his or her employment." *See* Larson's Workers' Compensation, Ch. 3, § 6; *see also Velkovitz*, 96 N.M. 577, 633 P.2d 685.

Thus, in order to reach the conclusion that Worker seeks, this Court would have to ignore the time, place and circumstances surrounding Worker's death.

Worker acted beyond the scope of his employment with the Pojoaque Tribal Police and attempted a rescue in an area where he had not received any training, nor where there was any expectation by or on behalf of the Employer that Worker would act. Moreover, Worker's actions were taken in his capacity as a chaperone for the children attending the Church's outing, which Worker was an integral part of and had assumed responsibility for the safety of the children.

Our Courts have recognized that the "course and scope" of employment has been variously defined and although it is not controlling in workers' compensation cases, our Courts' recognition of "course and scope" in other arenas of the law may provide guidance to help direct this Court's opinion. For example, in UJI 13-407 NMRA, it is defined as follows:

> An act of an employee is within the scope of employment if:
> 1. It was something fairly and naturally incidental to the employer's business assigned to the employee, and
> 2. It was done while the employee was engaged in the employer's business with a view of furthering the employer's interest and did not arise entirely from some external, independent and personal motive on the part of the employee.

Id.

Whether an employee's act was within the course and scope of employment is not determined by any one criterion. *Narney v. Daniels*, 115 N.M. 41, 49, 846 P.2d 347, 355 (Ct. App. 1993). "Depending on the facts, various considerations or factors

may be pertinent." *Id.* Our Court of Appeals adopted the following statement of various considerations from *E. Coast Lines v. M. & C.C. of Balto*, 190 Md. 256, 285, 58 A. 2d 290, 304 (1948):

> To be within the scope of the employment the conduct must be of the kind the servant is employed to perform and must occur during a period not reasonably disconnected from the authorized period of employment in a locality not unreasonably distant from the authorized area, and actuated at least in part by a purpose to serve the master.

Narney, 115 N.M. at 49, 846 P.2d at 355. The Court then expressly set out a four-point test to be applied in a determination of whether an employee was in the course and scope of his or her employment. *Id.*

> An employee's action, although unauthorized, is considered to be in the scope of employment if the action (1) is the kind the employee is employed to perform; (2) occurs during a period reasonably connected to the authorized employment period; (3) occurs in an area reasonably close to the authorized area, and (4) is actuated, at least in part, by a purpose to serve the employer.

Id.

Our Court of Appeals has addressed whether an officer was acting in the course and scope of his employment in *Narney v. Daniels*. In *Narney*, the plaintiffs sued the City of Roswell, the Roswell Police Commissioners and Steve Widniewski, in his capacity as the chief of the Roswell Police Department on theories of respondeat superior and negligence for the actions of one of Roswell's police officer, David Daniels. *Id.* at 43, 846 P.2d at 349. Officer Daniels, a Roswell police officer, left

Roswell in his personal car to drive to Deming. *Id.* He carried with him his commission card, his personal badge and four (4) guns. *Id.* As Officer Daniels was driving, he came across plaintiffs, who passed him traveling at approximately 100 miles per hour. *Id.* Officer Daniels believed the plaintiffs were involved in some sort of illegal drug-related activity, as well as speeding. *Id.*

Officer Daniels pulled the plaintiff over and began acting very strangely, by pretending to talk on a hand-held radio, pointing his gun at plaintiffs, talking to people who were not there and eventually getting into plaintiffs' car, speeding away and wrecking the car, injuring one of the plaintiffs. *Id.* at 43-44, 846 P.2d at 349-50. Eventually, after wrecking plaintiffs' car, Officer Daniels returned to his car and drove away. *Id.* at 44, 846 P.2d at 350. The issue before the Court of Appeals was whether the district court was correct in concluding that no reasonably trier of fact could conclude that Officer Daniels was acting in the course and scope of his employment at the time of the incident. *Id.* The Court of Appeals affirmed the district court conclusion, on a motion for summary judgment, that no reasonably trier of fact could conclude that Officer Daniels was acting in the course and scope of his employment at the time and it was undisputed that Officer Daniels was taking a personal trip and was well outside the Roswell city limits when the incident occurred. *Id.* at 47, 846 P.2d at 353.

Other New Mexico cases have discussed injuries suffered by officers while off duty and engaged in personal activities. *See Meeks*, 118 N.M. at 644, 884 P.2d at 535. In *Meeks*, our Court of Appeals held that Worker, employed by the Eddy County Sheriff's Department, did not sustain an injury "arising out of and in the course of his employment" for purposes of worker's compensation when he was injured "while engaged in a self-directed fitness program." *Id.* at 643-44, 884 P.2d at 534-35. In holding that "[u]nder the present New Mexico statute[,] Worker was not entitled to compensation for suffering an injury from self-directed, off-duty athletic activity", the Court of Appeals recognized that "[i]t is for the legislature, not the judiciary, to provide employees with the type of expanded coverage advocated by Workers in this case." *Id.* at 646, 884 P.2d at 537.

The WCJ's findings of fact in this case, as well as the evidence adduced below, show that Worker was on a personal trip for entirely personal and religious reasons, organized through his church. Worker was acting as a chaperone and a youth minister at the time of his death. Worker was not "on call" and was not responding to an emergency that arose within the Pojoaque Pueblo limits or even nearby. Worker's church trip was to Pilar, New Mexico, nearly forty (40) miles away from Pojoaque, New Mexico. Worker was not trained in swift water rescue and would not have been expected by the Pojoaque Tribal Police to attempt a water rescue of this

nature, as it went beyond the scope of his employment with the Tribe. Expecting Worker to act in this case would be tantamount to expecting an off-duty, untrained, and unequipped police officer to run into a burning building to save a life. No police department in this state could possibly hold such expectations for its officers.

Moreover, there was no duty for Worker to act, whether statutorily or under the SOPs of the Pojoaque Tribal Police Department. *Contra* NMSA 1978, § 29-1-1 (2005) (making it "the duty of every sheriff, deputy sheriff, constable and every other peace officer to investigate all violations of the criminal laws of the state which are called to the attention of any such officer or of which he is aware."). Mr. Hart testified that the SOPs that were in effect at the time of Worker's death did not direct Worker to act in the manner that he did; namely, jumping into the Rio Grande to rescue one of the children at the Church's outing. [Tr. 7/17/07, 14:11-388] The SOPs did not contain anything that would have required Worker to act. [*Id.*, 14:388-506] Mr. Hart testified that Worker was not required to act in this situation because he was not trained or equipped to act and police officers are not expected to commit irrational acts under the "protect and serve" oath. [Tr. 7/17/07, 13:631-717] Mr. Hart also testified that Worker was not acting under any duty as a police officer when Worker jumped into the swift-moving Rio Grande to save one of the children attending the Church's outing. [Tr. 7/17/07, 13:329]

Worker-Appellant suggests that Worker would have been subject to discipline for not attempting the swift water rescue on August 17, 2002. Substantial evidence to the contrary exists in the record for which the WCJ could have relied on to arrive at her conclusions of law, particularly that "Worker's accident did not arise out of his employment with Employer, and was not caused by a risk incident to his employment; the accident was not within the course and scope of employment." [RP 325, COL 27] Mr. Hart testified that Worker would not have been subject to discipline for officer misconduct had he done something less than jump into the Rio Grande to attempt the rescue. [Tr. 7/17/07, 14:11-506] Chief Garcia testified that he would not have disciplined Worker if he had not attempted the swift water rescue that day. [Tr. 9/21/07, 11:53-185] Additionally, Arthur Ortiz, the Director of the Law Enforcement Academy, who was called by Worker to testify, was responsible to oversee training for law enforcement throughout the State of New Mexico as well as to oversee officer misconduct. [Tr. 7/17/07, 5:273-305] Mr. Ortiz testified that allegations of misconduct are referred to him and if they are policy violation within the department, then his agency would not take action. [Tr. 7/17/07, 5:550-582] Moreover, Mr. Ortiz did not testify that, unequivocally, Worker would have been subject to any disciplinary proceeding had he acted differently or more cautiously. Thus, for this Court to reach such a conclusion as argued by Worker would not be supported by the

evidence in this case and would be contrary to the substantial evidence in the record as provided by the testimony of Mr. Hart and Chief Garcia.

Furthermore, Worker-Appellant's citations to out-of-state case law are readily distinguishable from the facts presented herein and, in some instances, have holdings that are contrary to firmly established New Mexico law. In the cases cited by Worker-Appellant, the officer was either required to act by statute, much like New Mexico's statute that governs what occurs when an officer witnesses the commission of a crime, or by the department's standard operating procedures, of which Worker's actions were not a requirement in this case.

Worker-Appellant relies on out-of-state cases for the proposition that when an officer acts "while performing a police function, compensation is uniformly awarded." *See* BIC, pg. 14. The majority of cases relied upon by Worker-Appellant, however, relate to an officers who respond to *crimes* that are witnessed by the officer. *Id.* In New Mexico, it could be argued that an officer has a duty to respond to a crime that the officer witnesses. *See* Section 29-1-1. Section 29-1-1 makes it "the duty of every sheriff, deputy sheriff, constable and every other peace officer to *investigate* all violations of the criminal laws of the state which are called to the attention of any such officer or of which he is aware." That was not the case here. *Contra Luketic v. Univ. Circle, Inc.*, 134 Ohio App.3d 217, 224-25, 730 N.E.2d 1006, 1011 (1999)

(off-duty officer injured while attempting to prevent an armed robbery); *Petrocelli v. Workmen's Comp. Appeals Bd.*, 45 Cal. App.3d 635, 637-38 119 Cal. Rptr. 620, 621 (1975) (police officer injured while investigating criminal activity); *Jordan v. St. Louis County Police Dept.*, 699 S.W.2d 124, 125-26 (Mo. Ct. App. 1985) (officer killed during the commission of a felony of which he was under a duty to act); *Municipality of Bethel Park v. Workmen's Comp. Appeal Bd. (Wilman)*, 161 Pa. Commw. 274, 636 A.2d 1254, 1259 (1994) (officer died after investigating suspicious activity in a crime-ridden park); *County of Delaware v. Workmen's Comp. Appeal Bd. (Lang)*, 138 Pa. Cmwlth. 276, 587 A.2d 889 (1991) (off-duty officer shot while attempting to thwart a robbery); *Washington v. N.Y.C. Housing Authority*, 31 A.D.2d 700, 295 N.Y.S.2d 845, 847 (1968) (officer responded after observing criminal activity).

Worker-Appellant also cites to department policies or statutes as imposing a duty of an officer to respond to an emergency. *See* BIC, pg. 15. Once again, such is not the case here. *Supra.* Contrary to the case law cited by Worker-Appellant, Worker was not obligated or required to act in the face of a swift-water rescue emergency. *Contra Spieler v. Village of Bel-Nor*, 62 S.W.3d 457, 459 (Mo. Ct. App. 2001) (noting that the police officer's manual would reasonably lead an officer to believe its provisions would require the office to stop at the scene of an accident and

call for assistance if necessary); *Lane v. Indus. Comm'n of AZ*, 218 Ariz. 44, 48, 178 P.3d 516, 520 (Ct. App. 2008) (holding that the officer was required to act under the relevant code of conduct for his employment); *State ex rel. Wyo. Worker's Comp. Div. v. Van Buskirk*, 721 P.2d 570, 570 (Wyo. 1986) ("As a one-man police department, [worker] had an on-call schedule of seven days a week, 24 hours a day[.]"); *Krasnoff v. New Orleans Police Dept.*, 241 So.2d 11, 12 (La. Ct. App. 1970) (officer required to respond to persons needing assistance during off-duty hours).

Worker also cites to one tort claims case out of Maryland, *Sawyer v. Humphries*, 82 Md.App. 72, 570 A.2d 341 (1990) for the proposition that "[e]ven without the employer's influence, the duties inherent in the profession of policing can supply the necessary connection for both the 'arising out of' and 'in the course of' requirements." *See* BIC, pg. 16. However, Worker's citation to *Sawyer* is inappropriate as its holding has been overruled by *Sawyer v. Humphries*, 322 Md. 247, 257, 587 A.2d 467, 472 (Md. Ct. App. 1991) (holding that the officer's conduct was outside the scope of his employment).

Worker's Brief in Chief also suggests that the terms "in the course and scope of employment" and "in the line of duty" are synonymous. The WCJ correctly concluded that these terms are <u>not</u> synonymous. In this instance, Worker acted outside of his scope of employment with Pojoaque Tribal Police Department and for

personal reasons due to Worker's position as a chaperone and his involvement in the Church outing. Thus, given the *time, place and circumstances* of Worker's death, the WCJ correctly concluded that Worker was acting as a chaperone for his church as opposed to acting as an officer of the Pojoaque Tribal Police Department at the time of his death.

It is also of note that 42 U.S.C.A. § 3796 governs the payment of death benefits under the Public Safety Officers' Death Benefits Act. Section 3796(a) states that when "a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Bureau shall pay a benefit[.]" The phrase "line of duty" is a term of art and applies to the administration of the Public Safety Officers' Death Benefits Act. In the federal arena, "line of duty" may be defined as "[a]ny action which an officer . . . is obligated or authorized by rule, regulations, condition of employment or service, or law to perform[.]" 28 C.F.R. 32.2(c)(1) (2002); *but see Russell v. Law Enforcement Assistance Admin.*, 637 F.2d 1255 (9th Cir. 1980), *superceded by statute as recognized in Davis v. U.S.*, 169 F.3d 1196 (9th Cir. 1999). This definition is not congruent with the law in New Mexico regarding the application of workers' compensation benefits. *Supra.*

Moreover, the federal standard and definition of "line of duty" under the Public Safety Officers' Death Benefits Act is guided by a review of "general workers'

compensation law." *See Russell*, 637 F.2d at 1265. In analyzing the availability of benefits for a fallen officer, the Ninth Circuit noted that "Congress was concerned that states and municipalities did not provide adequate death benefits to police officers and their families and that the low level of benefits impeded the recruitment efforts and impaired morale", implicitly recognizing the institutional limitations on workers' compensation benefits. *Russell*, 637 F.2d at 1261. The Ninth Circuit recognized that one of the purposes of the Public Safety Officers' Death Benefit Act was to *increase* the level of benefits available to the families of fallen officers. *Id.* Such is not the situation in the State of New Mexico as evidenced by the specificity of NMSA 1978, § 52-1-19 (1987) and as was clearly intended by our Legislature upon enacting the aforesaid statute which sets out the "course and scope" standard for workers' compensation in the State of New Mexico.

III. CONCLUSION

The law in New Mexico is sufficiently developed so that this Court need not look beyond New Mexico's Workers' Compensation statutes in order to uphold the WCJ's substantially supported conclusion that (1) Worker-Appellant's Complaint was not timely filed, and (2) Worker's death did not arise out of the course and in the scope of his employment as a Pojaoaque Tribal Police Officer. Worker's Complaint filed on June 18, 2004 was outside the statute of limitation, even giving Worker-

Appellant the benefit of a tolling period from the time Mr. Jonovich spoke to Chief Garcia on July 28, 2003 until she filed her first Complaint on October 1, 2003. Moreover, under the facts of this case, Worker was not acting under any duty placed upon him by the Pojoaque Tribal Police Department and was not acting under any statutory duty imposed upon him by the Legislature. Given the time, place and circumstances of Worker's death, the WCJ substantially concluded that it was not a covered event for Workers' Compensation purposes. Accordingly, the decision reached by the WCJ at the trial court level should be affirmed.

Respectfully Submitted,

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I hereby certify that a true and correct copy of the foregoing Answer Brief was mailed on May 3rd, 2011 to:

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