IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

No. 28,508

CHERYL SCHULTZ on behalf of
KEVIN SCHULTZ (deceased),

Worker-Appellant,

v.

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

Employer/Insurer-Appellee

Appeal from New Mexico Workers' Compensation Administration
Hon. Helen L. Stirling, Workers' Compensation Judge

APPELLANT'S BRIEF IN CHIEF

Submitted by,

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The transcript of proceedings in this matter is an audio recording on 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 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 tapes. All citations to the transcript refer to the date of the hearing shown on the tape and conform to the counter indicated in official log (*e.g.*, Tr. 07/17/07, 8:9110).

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SUMMARY OF PROCEEDINGS

Kevin Schultz died a hero. That fact is undisputed. The facts surrounding his death are undisputed as well. What is disputed is whether his family will receive death benefits under the New Mexico Workers' Compensation Act. Employer denied the claim on two grounds: (1) that the accident did not arise out of and in the course of employment, and (2) that the claim was barred by the statute of limitations. A trial was held before a Workers' Compensation Judge (WCJ), who ruled for the Employer on both issues. Worker's widow filed an appeal, which was initially determined to be untimely. [MO, Sep. 23, 2008]. On certiorari, the supreme court reversed and remanded to this Court to consider the appeal on the merits. *Schultz v. Pojoaque Tribal Police Dept.*, 2010-NMSC-034, ___ N.M. ___, 242 P.3d 259.

Nobody disputes the critical facts surrounding Kevin's death that fateful day, August 17, 2002. [FF14-32; Tr. 09/21/07, 4:1176]. He drowned saving a twelve year old boy who had fallen into the swift undertow of the Rio Grande. He had taken the day off from his job as a Pojoaque Pueblo Police Officer to accompany his church youth group on a recreational outing at Pilar, New Mexico. There were four adult chaperones for the group of twelve children ranging in age from eight to fourteen. The children played, had lunch, then broke into groups. Kevin and Tommy Boylan had taken some of the older children down river to fish. Suddenly, a few children

witnessed Kevin "running pretty fast through the water," but they did not pay much attention. [Ex. K, pp. 13, 14]. When they went downstream to investigate, they found another child from their group sitting on a rock crying and Kevin face down in the water. That boy said that he fell into the river, called to Kevin for help, and Kevin came running and jumped in after him. The boy vaguely remembered being pulled up in the water, but he blacked out and did not remember how he reached the shore. When he came to, Kevin's head was in the water and he was not moving. [Ex. K, p. 15]. Kevin's wife Cheryl was summoned by the cries of the children. Although she is trained as a paramedic, she was unable to revive him. An autopsy determined that the cause of death was drowning. [Ex. 7; Ex. J].

Nobody disputes that Officer Schultz died a hero. The dispute in this case has been over why he risked his life to save that of another. At the time of his death, Kevin was not "on call," although he was required to respond if paged by the dispatcher while off duty. [FF 86; Tr. 09/21/07, 3:1038, 11:620]. His badge, his department-issued revolver and his department-issued pager were found on his body. [FF 85; Ex. K4, 8, 12; Tr. 09/21/07, 4:156]. He was not in uniform or driving a police vehicle. Regulations of the Pojoaque Tribal Police Department authorized . . and arguably required . . . him to act, even though he was off duty and outside the boundaries of the Pueblo. Several policemen who testified, including Employer's

expert witness, agreed that the profession of policing may require officers to act at their discretion in emergency situations. [Tom Jonovich, Tr. 07/17/07, 15: 170-90; Art Ortiz, Tr. 07/17/07, 5:1019; Tom Grady, Tr. 07/17/07, 8:911, 9:476-571; Frank Rael, Tr. 07/17/07, 11:1006; Mark Bralley, Ex. 27, pp. 67; Darryl Hart, Tr. 07/17/07, 15:150, 240, 300]. On the other hand, Kevin and Cheryl were deeply religious people who were committed to their church. Kevin served his church as a volunteer children's ministry leader. Early in the case, Employer sought to prove that Kevin was an employee of the church, but after extensive discovery, the church was dismissed. [RP 54, 63, 92, 95, 146]. No one will never know whether he went into the water to save a life that day because he was a cop, or whether he was a cop because he was the type of man who would go into the water to save a life.

Worker's expert witness testified that the profession of policing, with its codes of ethics, its belief systems, and its oaths, involves a duty to serve mankind. The police officer has an obligation to assist when called upon to do so. Furthermore the Standard Operating Procedures of the Pojoaque Police Department specifically incorporate this concept into the duties of its officers. Officers are trained to use their knowledge, skills and abilities to perform duties that they are capable of performing in emergency situations. The duty to serve and protect the public does not end at the boundary line of his jurisdiction nor at the end of his shift. [Ex. 27, Depo. Mark

Bralley, pp. 63-66].

Unfortunately, the WCJ did not consider any of the testimony of Worker's expert. As he was preparing the Brief in Chief in this case, Worker's counsel discovered that the deposition of Mark Bralley, which had been admitted in lieu of his live testimony [Tr. 07/17/07, 12:629-829; 09/21/07, 2:1215], was delivered to the Court of Appeals still sealed in its original envelope. Worker requests that the Court take judicial notice of the fact that the deposition has not been unsealed. The only conclusion that can be drawn from that fact is that the WCJ did not read the deposition. Unless this Court decides the issue of the course of employment as a matter of law on the undisputed facts, then Worker was prejudiced by the loss of her opportunity to persuade the fact finder of the obligations attendant to the profession of policing. *See Benavidez v. City of Gallup*, 2007-NMSC-026, ¶ 19, 141 N.M. 808, 161 P.3d 853 (even "slightest evidence of prejudice" will suffice, and all doubt is resolved in favor of complaining party); *cf.*, *Adams v. United Steelworkers of Am., AFL-CIO*, 97 N.M. 369, 375-76, 640 P.2d 475, 481-82 (1982) (erroneous exclusion of evidence reversible error); *Williams v. Miller*, 61 N.M. 326, 329, 300 P.2d 480, 481-82 (1956) (same). If this Court agrees that the WCJ committed reversible error and remands to the WCA, it will be decided by a new judge, as the WCJ who decided this case has left the agency.

While no one may dispute that Kevin Schultz died as a hero, his Employer does dispute whether his family is entitled to worker's compensation death benefits. It contends that he did not die in an accident arising out of and in the course of his employment. It also disputes whether his widow filed her claim for benefits in a timely manner. The Employer opted to participate in the New Mexico workers' compensation system by purchasing an insurance policy from New Mexico Mutual Casualty Company. Tribal sovereignty was not raised as a defense to this action. [CL 1]; *see Martinez v. Cities of Gold Casino*, 2009-NMCA-087, 146 N.M. 735, 215 P.3d 44, *cert. denied*, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

In October 2002 Employer filed applications to have Kevin recognized on the National Law Enforcement Officers Memorial and for benefits under the Public Safety Officers' Benefits Act. [Ex. 10; Tr. 09/17/07, 8:887, 1031]. In June 2003, Cheryl received notice of an award under the federal act [Ex. I], which determined that her husband "died as a direct and proximate result of a personal injury sustained in the line of duty." *See* Public Safety Officers' Benefits Act of 1976, 42 U.S.C. §3796(a) (2002). Line of duty means "[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) [Ex. 21 (denied admission)]. Officer Schultz was inducted into the national memorial following the finding that his death

was in the line of duty. [Exs. 12, 13, 14].Likewise, the State of New Mexico has honored Kevin on its Law Enforcement Memorial Wall, which also requires a finding that the death occurred in the line of duty. [Exs. 15, 16].

In June 2003, Cheryl began to work with a financial counselor, Tom Jonovich, who is a retired Phoenix police lieutenant. [FF 54]. She was not aware that she might be entitled to workers' compensation benefits until he suggested the possibility to her. [FF 49]. On July 28, 2003, Cheryl and Mr. Jonovich spoke to Pojoaque Police Chief John Garcia about any other benefits that might be available. [FF 56]. He told them that he had not thought about workers' compensation benefits, but that he would do the necessary paperwork to file a claim for her. [FF 59; Tr. 07/17/07, 11:280; Tr. 09/21/07, 6:189]. At trial, Chief Garcia admitted that. [Tr. 09/21/07, 6:189; FF 59]. Mr. Jonovich tried to contact Chief Garcia on Cheryl's behalf on several occasions thereafter, but he was never able to talk to him again. [FF 60]. In fact, Employer did nothing to initiate a claim for workers' compensation benefits for Cheryl. The Employer's First Report of Accident form required by Section 52-1-58 was not filed until October 27, 2003, after the first Complaint filed in this action. *See* [Ex. A7] ("Receipt dt: 10/27/03"); *see also* [Exs. 1, A6, A8].

Cheryl Schultz believed that Chief Garcia had done what was necessary to initiate a claim for workers' compensation benefits for her. [FF 61; Tr. 09/21/07,

6:325, 667]. Since she had received the federal line of duty death benefits, she believed that she would be qualified for the state workers' compensation benefits as well, and that she would receive them in due course. [FF 61]. She did not suspect that anything was wrong with her workers' compensation claim until the end of September 2003, when she attended a retreat for survivors of fallen officers. [FF 62; Tr. 09/21/07, 6:334-420]. Upon her return from the retreat, Cheryl contacted an ombudsman at the New Mexico Workers' Compensation Administration, who gave her the Complaint form to fill out. She filed it that same day, October 1, 2003. [FF 63; Tr. 09/21/07, 6:511]. Cheryl appeared at the Mediation *pro se*. The Mediator, indicating that she should be represented, recommended a dismissal without prejudice so she could find an attorney. The Recommended Resolution (RR) states, "Worker may immediately file an amended complaint . . . ." [RP 20; FF 43].

Cheryl continued to be lulled into complacency about her procedural rights by the actions of the Pueblo. Lieutenant Governor George Rivera wrote her a letter on behalf of the Pueblo dated October 21, 2003. It stated, "Your husband, Kevin Schultz, dies in the line of duty. The Pueblo of Pojoaque will do anything necessary for you to receive survivor's benefits, workmen's compensation or any other benefits available to you and your grieving family." [Ex. 6]. This letter was composed with and approved by a Pueblo attorney with the knowledge that Mrs. Schultz had already

filed a complaint for workers' compensation benefits. [Tr. 09/21/07, 6:1164; Ex. 25, Depo. George Rivera, pp. 18-20, 23-24]. Thereafter, Employer accepted the RR dismissing the Complaint without prejudice to allow Claimant to obtain counsel. Cheryl filed an Amended Complaint on June 18, 2004, six months after the dismissal. [RP 28].

Following a two-day trial, the WCJ entered Findings of Fact and Conclusions of Law dismissing the case. She found that the accidental death did not arise out of or in the course of employment, and that the statute of limitations barred the claim. Worker challenges both rulings on appeal.

First, Worker challenges the WCJ's conclusion, as a matter of law, that Officer Kevin Schultz's death did not arise out of or occur in the course of his employment. Worker attacks the WCJ's Findings of Fact No. 77, 86, 89-100, 103 and 104, and her Conclusions of Law No. 20, 21, 26, 27, 30 and 32. This issue was preserved by Worker's Requested Findings No. 10-79, and Requested Conclusions No. 1-43. Most of the challenged findings are actually conclusions of law, which are not entitled to any deference by the appellate court. *See* [FF 77, 90, 96, 97, 98, 99, 100, 103, 104]; *Ortiz ex rel. Baros v. Overland Express*, 2010-NMSC-021, ¶ 28, 148 N.M. 405, 237 P.3d 707. The question of whether Officer Schultz died in an accident arising out of and in the course of employment is a question of law. *See Hernandez v. Home Educ.*

Livelihood Program, 98 N.M. 125, 645 P.2d 1381 (Ct. App. 1982).

Second, Worker challenges the WCJ's conclusion that the Worker's claim is barred by the statute of limitations. Worker attacks the WCJ's Findings of Fact No. 45, 46, 52, 53, 58 and 64-71, and her Conclusions of Law No. 11, 13-15 and 17-19. This issue was preserved by Worker's Requested Findings No. 80-99, and Requested Conclusion No. 44. Once again, most of the challenged findings are actually conclusions of law that are not binding on the appellate court. *See* [FF 45, 46, 53, 68, 69, 70, 71]; *Ortiz ex rel. Baros*. The determination of whether a claim is timely filed is a question of fact, but it becomes a question of law when there is no factual dispute. *See Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 12, 135 N.M. 539, 91 P.3d 58. Appellant contends that the undisputed facts establish that the statute was tolled and the suit was timely filed. The interpretation of the workers' compensation statutes is a question of law which this Court reviews de novo. *See Jackson v. K & M Constr.*, 2004-NMCA-82, ¶ 8, 136 N.M. 94, 94 P.3d 837.

Factual findings of the WCJ are reviewed under a whole record standard. *See DeWitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 12, 146 N.M. 453, 212 P.3d 341. A whole record review means that the court "reviews both favorable and unfavorable evidence to determine whether there is evidence that a reasonable mind could accept as adequate to support the conclusions reached by the fact finder." *Wagner v. AGW*

Consultants, 2005-NMSC-016, ¶ 79, 137 N.M. 734, 114 P.3d 1050. The purpose of findings of fact is to set out the ultimate facts of the case, which must be read together to ensure that the conclusions of law flow therefrom. *See Ortiz ex rel. Baros*, 2010-NMSC-021, ¶ 24. To determine whether a challenged finding is supported by substantial evidence, "the reviewing court views the evidence in the light most favorable to the agency decision, but may not view favorable evidence with total disregard to contravening evidence." *Grine v. Peabody Natural Res.*, 2006-NMSC-031, ¶ 28, 140 N.M. 30, 139 P.3d 190 (internal quotations marks and citation omitted). To warrant reversal, this Court must be persuaded that it "cannot conscientiously say that the evidence supporting the decision is substantial, when viewed in the light that the [whole] record ... furnishes." *Tallman v. ABF (Arkansas Best Freight)*, 108 N.M. 124, 129, 767 P.2d 363, 368 (Ct. App. 1988) (internal quotation marks and citation omitted). Nevertheless, the appellate court reviews the WCJ's application of the law to the facts de novo. *Leonard v. Payday Prof'l*, 2007-NMCA-128, ¶ 10, 142 N.M. 605, 168 P.3d 177.

A few of the findings are mere speculation not supported by any evidence, and they should therefore be disregarded. *See Pacheco v. Martinez*, 97 N.M. 37, 42, 636 P.2d 308, 313 (Ct. App. 1981) (findings must rest on substantial evidence, not speculation and conjecture). Findings No. 90 and 91 indicate on their face that they

are mere speculation by the WCJ. The only evidence in the record of what a civilian would have done in the face of the child's emergency actually contradicts the WCJ's findings. Tommy Boylan, another of the chaperones that day, said he did not feel any obligation in that situation, and he was not sure what he would have done had he been in Kevin's shoes. [Tr. 07/17/07, 4:1104]. Likewise, Findings No. 65 and 66 reflect the WCJ's unsupported speculation rather than facts. By October 1, 2003, Claimant no longer had "just as much reason to rely on [Chief Garcia as before]," because she had learned from other surviving spouses that it was not reasonable for it to take so long to receive workers' compensation benefits. [FF 62; Tr. 09/21/07, 6:334-420]; *see Lee v. Hous. Fire & Cas. Ins. Co.*, 530 S.W.2d 294 (Tex. 1975) (employer's assurance that it had sent report to workers' compensation insurer was good cause for late filing, reversing court of appeals opinion that worker's failure to inquire further was not prudent).

ARGUMENT

I. WORKER'S DEATH AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT AS A POLICE OFFICER BECAUSE HE WAS RESPONDING TO A LIFE THREATENING EMERGENCY

This case presents an issue of first impression in New Mexico: Is an off-duty police officer injured while responding to an emergency outside of his jurisdiction

covered by the Workers' Compensation Act? The statute covers claims which are the result of accidental injuries arising out of and in the course of employment. § 52-1-28(A) NMSA 1978 (1987). It is well-settled that this requirement involves two separate inquiries. The term "arising out of" the employment denotes a risk reasonably incident to claimant's work. *See Losinski v. Drs. Corcoran, Barkoff & Stagnone, P.A.*, 97 N.M. 79, 636 P.2d 898 (Ct. App. 1981). The term "course of employment" relates to the time, place and circumstances under which the accident takes place. *See Velkovitz v. Penasco Indep. School Dist.*, 96 N.M. 577, 633 P.2d 685 (1981). In order to recover benefits, the worker must show that both requirements are satisfied at the same time. *See Garcia v. Homestake Mining Co.*, 113 N.M. 508, 828 P.2d 420 (Ct. App. 1992).

The phrase "course of employment" as used in workers' compensation law does not have the same meaning as the common law term. *See Ovecka v. Burlington N. Santa Fe Ry. Co.*, 2008-NMCA-140, ¶¶ 11-13, 145 N.M. 113, 194 P.3d 728, *cert. quashed*, 2009-NMCERT-005, 146 N.M. 721, 214 P.3d 792.The policies served by the two areas of law differ, so that the legal effect of identical facts may be different in a negligence case than in a worker's compensation case. *See Ahlstrom v. Salt Lake City Corp.*, 2003 UT 4, ¶ 7 n.1, 73 P.3d 315, 317 n.1. A police officer may be within the course of employment for workers' compensation purposes but not within the

scope of employment for negligence liability purposes. *See Salt Lake City Corp. v. Labor Comm'n*, 2007 UT 4, ¶ 17, 153 P.3d 179, 182.

An injury arises out of employment if the claimant "was performing acts the employer instructed the claimant to perform, acts incidental to the claimant's assigned duties, or acts which the claimant had a common law or statutory duty to perform." *Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, ¶14, 128 N.M. 601, 995 P.2d 1043. Other factors to be considered are whether the activity was reasonable and foreseeable; whether the injury occurred during a distinct departure from employment for a personal errand; whether the activity was conducted in an unreasonable or unforeseeable manner; and whether the activity giving rise to the injury conferred some benefit on the employer. *Id.* ¶¶ 15-17.

New Mexico has recognized a number of common extensions of the concepts of "arising out of" and "course of employment" to include situations where the worker was off duty, away from the employer's premises, or pursuing an activity that might seem purely personal. *See, e.g., Velkovitz*, 96 N.M. at 578, 633 P.2d at 686 (enforced lull doctrine); *Whitehurst v. Rainbo Baking Co.*, 70 N.M. 468, 374 P.2d 849 (1962) (personal comfort doctrine); *Chavez v. ABF Freight Systems, Inc.*, 2001-NMCA-039, 130 N.M. 524, 27 P.3d 1011 (mandatory rest rule); *Ramirez* (traveling employee rule); *Kloer v. Municipality of Las Vegas*, 106 N.M. 594, 595,

746 P.2d 1126, 1127 (Ct. App. 1987) (incidental recreational activity); *Barton v. Las Cositas*, 102 N.M. 312, 694 P.2d 1377 (Ct. App. 1984) (special errand rule). The common thread in all of these rules is that the activity was of some benefit to the employer. The benefit need not be pecuniary, however, and it may even be intangible. *Ramirez*, 2001-NMCA-011, ¶ 17; *see Evans v. Valley Diesel*, 111 N.M. 556, 559, 807 P.2d 740, 743 (1991).

In this case, it is undisputed that Worker had scheduled the day off from work and his death occurred outside the boundaries of Pojoaque Pueblo. However, in cases where an off-duty police officer is injured while actually performing a police function, compensation is uniformly awarded. *Wolland v. Indus. Comm'n*, 91 Ill. 2d 58, 61-62, 434 N.E.2d 1132, 1134 (1982). A discrete body of law has developed regarding workers' compensation for police officers. *Spieler v. Village of Bel-Nor*, 62 S.W.3d 457, 460 (Mo. Ct. App. 2001). The courts considering off-duty accidents when responding to a crime or an emergency have found that the employment as a law enforcement officer created a special risk of the specific injury sustained. *See Lane v. Indus. Comm'n*, 218 Ariz. 44, 178 P.2d 516, 520 (Ct. App. 2008) (department code of conduct exposed off-duty officer mountain biking with friends to "increased risk"); *Luketic v. Univ. Circle, Inc.*, 134 Ohio App. 3d 217, 224-25, 730 N.E.2d 1006, 1011 (1999) (duty as police officer to intervene in bank robbery created "special

hazard"); *Village of Butler v. Indus. Comm'n*, 265 Wis. 380, 61 N.W.2d 490, 492 (1953) (obligation of employment as marshal created "zone of special danger" out of which injury arose). The concept of a special risk has long been recognized in New Mexico workers' compensation law. *See, e.g.*, *Williams v. City of Gallup*, 77 N.M. 286, 421 P. 2d 804 (1966); *Christensen v. Dysart*, 42 N.M. 107, 76 P.2d 1 (1938); *Sena v. Continental Cas. Co.*, 97 N.M. 753, 643 P.2d 622 (Ct. App. 1982).

Department policies or statutes are often cited as the source of an officer's duty to respond to an emergency, even when off duty and outside of his jurisdiction. *See, e.g.*, *Lane*, 178 P.3d at 522; *Petrocelli v. Workmen's Comp. Appeal Bd.*, 45 Cal. App. 3d 635, 119 Cal. Rptr. 620, 621 (1975); *Spieler*, 62 S.W.3d at 459; *Jordan v. St. Louis Cnty. Police Dept.*, 699 S.W.2d 124, 126 (Mo. Ct. App. 1985); *Luketic*, 730 N.E.2d at 1010. Other cases have found that informal encouragement by the employer is enough. *See Municipality of Bethel Park v. Workmen's Comp. Appeal Bd. (Wilman)*, 161 Pa. Commw. 274, 636 A.2d 1254, 1259 (1994) ("The focus . . . is not whether there was an official policy mandating that off-duty Bethel Park Police were to consider themselves responsible to intervene to prevent a crime, but whether the Employer encouraged them to do so, even if unofficially"); *Cnty. of Del. v. Workmen's Comp. Appeal Bd. (Lang)*, 138 Pa. Commw. 276, 587 A.2d 889, 893 (1991) (off-duty officer believed that unadopted policy authorized him to apprehend

perpetrator outside his jurisdiction). Even 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 Village of Butler*, 61 N.W.2d at 493 (although employer's regulations limited duties to village limits, officer's response to automobile accident outside village was not a "frolic of his own"); *State ex rel. Wyo. Worker's Comp. Div. v. Van Buskirk*, 721 P.2d 570 (Wyo. 1986) (assisting at fire outside town limits); *see generally*, *Sawyer v. Humphries*, 82 Md. App. 72, 570 A.2d 341 (1990) (extensive discussion of policing as a profession).

In this case, the Pojoaque Tribal Police Department Standard Operating Procedures (SOPs) contain several written policies that encouraged its officers to respond to an emergency when a life was in jeopardy. The Department Goal "is to meet its responsibilities to the citizens for public safety . . . ." [Ex. N, p. 11]. The Objectives include "protection of persons . . . and . . . a multitude of tasks relating to public welfare and safety." *Id.* Among the Departmental Duties and Responsibilities are to "protect life and property." SOP § 1.2(A)(1) [Ex. N, p. 12]. Patrol officers such as Kevin Schultz are expected to "[s]erve and protect the public through proper performance of their duties," SOP § 1.7(A)(1) [Ex. N, p. 14], which include "[p]rotection of life and property" and "[a]dministering aid and relief when needed." SOP § 1.7(A)(6)(e), -(f) [Ex. N, pp. 14-15]; *see also* SOP § 2.5(A)(1) ("protect life"),

-(2) ("serve the public"), -(16) ("Act promptly with . . . decisiveness at . . . any situation requiring police attention") [Ex. N, pp. 30-32]. The Code of Conduct specifically applies to off duty actions. SOP § 3.0, 3.1(A) [Ex. N, p. 111 (inserted between pp. 33 and 34)]. These policy statements may seem general, but they are similar to provisions mentioned in other cases which have placed off-duty officers in the course of employment when responding to an emergency. *See, e.g., Lane*, 178 P.3d at 520, n.1; *Spieler*, 62 S.W.3d at 459-60. Furthermore, the findings by the U.S. Department of Justice and the New Mexico Department of Public Safety that Officer Schultz died "in the line of duty" show how the law enforcement community at large views the duties of the profession. [Ex. I, p. 3; Ex. 15].

In addition to these general statements, the SOPs specifically authorize Pojoaque officers to act when confronted with a life-threatening emergency like the one Officer Schultz faced. "On or off duty Pojoaque Pueblo police officers will refrain from initiating action outside of their jurisdiction, *except in circumstances so serious that immediate action must be taken.*" SOP § 4.3(A)(4) [Ex. N, p. 51] (emphasis added). Nobody disputes that Officer Schultz faced an emergency requiring immediate action.

Finally, had he not tried to save the drowning child, Officer Schultz could have been disciplined by his department and by the State for dereliction of duty. *See* SOP

§§ 2.5(A)(8), 3.4(A)(9) [Ex. N, pp. 31, 36]. Art Ortiz, Director of the New Mexico Law Enforcement Academy, testified at length that Officer Schultz was subject to discipline by the Academy Board. Under the circumstances of this case, his certification as a police officer could have been suspended had the Board found that he had acted in dereliction of his duty. [Tr. 07/17/07, 5:669-746, 1119]. The authority to discipline for off-duty activities indicates the Employer's interest in whether its officer attempts an emergency rescue, bringing his act within the course of his employment. *See Lane*, 178 P.3d at 522 n.5; *Luketic*, 730 N.E.2d at 222-23; *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430, 432 (1987) (benefit to employer important element in analysis of course of employment); *see also*, *Ramirez*, 2001-NMCA-011, ¶ 17 (benefit to employer important).

Officer Schultz's heroism brought his department the respect of the community and of other law enforcement agencies. *See* SOP § 3.0 [Ex. N, p. 111 (inserted between pp. 33 and 34)] ("A police officer is the most conspicuous representative of government, and to the majority of the people, he is a symbol of stability and authority upon whom they can rely"). Two days after his death, the Pueblo hosted a ceremonial press conference to honor Officer Schultz's bravery. [Ex. 25, Depo. George Rivera, pp. 12-13; Ex. 26]. The department enjoyed positive publicity due to Officer Schultz's heroism. [Tr. 09/21/07, 10:760; Ex. 25, Depo. George Rivera, p.

13]. His actions were an example for other officers in the Department and a source of pride for them all. [Ex. 10, p. 2]. These benefits, however intangible, justify the burden that the Workers' Compensation Act imposes upon the Employer. *See Ramirez*, 2001-NMCA-011, ¶ 17; 2 A. Larson and Lex K. Larson, *Larson's Worker's Compensation Law* § 27.02[2][b] (2005). Furthermore, Gov. Rivera's statement that Officer Schultz "died in the line of duty" indicates that Employer believed that Officer Schultz died in the course of employment. *See* [Ex. 6; Ex. 25, Depo. George Rivera, pp. 15, 20]; *see also Cnty. Of Del.*, 587 A.2d at 893-94 (county council's resolution honoring fallen officer showed that employer "perceived a sworn duty to protect life and property which transcended the officer's on-duty hours").

A police officer is really never off duty. *See City of El Dorado*, 729 S.W.2d at 432 (". . . it is the nature of police work that an officer might at any time be called into duty, either by his superiors or by what he observes"); *Krasnoff v. New Orleans Police Dept.*, 241 So. 2d 11 (La. Ct. App. 1970) (off-duty officer stopped at scene of automobile accident); *Jordan*, 699 S.W.2d at 127 n.1 (off-duty officer shot during robbery; fact that he was beyond his jurisdiction and had no arrest authority was not "of any consequence"); *Washington v. New York City Hous. Auth.*, 31 A.D.2d 700, 295 N.Y.S.2d 845, 847 (1968) (officer gave chase after observing criminal activity from his home). The public expects police officers to respond to emergencies

whenever and wherever they may arise. *See* Editorial, *N.M. Shortsighted to Shortchange Its Heros*, ALBUQUERQUE J., Sept. 17, 2010, at A8.

The Employer argued, and the WCJ found, that Officer Schultz's death was motivated by his duty as a chaperone of the church youth group rather than by his duty as a police officer. [FF 90; CL 21]. The common law generally imposes no duty to rescue a stranger upon one who did not cause the danger. *See Baldonado v. El Paso Natural Gas Co.*, 2008-NMSC-005, ¶14, 143 N.M. 288, 176 P.3d 277; *cf.*, § 24-10-3 NMSA 1978 (1997) ("Good Samaritan Statute"). The law may impose upon a party the affirmative duty to rescue another only when certain special relationships exist. *See Flynn v. United States*, 902 F.2d 1524 (10th Cir. 1990). Such special relationships that have been recognized include common carrier-passenger, innkeeper-guest, possessor of land-invittee, employer-employee, hospital-patient, and business-customer. *See Johnstone v. City of Albuquerque*, 2006-NMCA-119, ¶¶ 7-15, 140 N.M. 596, 145 P.3d 76 (discussing "special relationships); *Grover v. Stechel*, 2002-NMCA-049, ¶ 12, 132 N.M. 140, 45 P.3d 80 (parent does not have "special relationship" with adult son); *Hermosillo v. Leadingham*, 2000-NMCA-096, ¶ 12, 129 N.M. 721, 13 P.3d 79 (declining to extend "special relationship" duty to marital relationship); *Stangle v. Fireman's Fund Ins. Co.*, 198 Cal. App. 3d 971, 244 Cal. Rptr. 103, 105 (1988) (special relationship often based on economic considerations);

see also Restatement (Second) of Torts § 314A (1965). The duty to protect from harm may not be the same as the duty to rescue from harm, especially when the rescue requires special skills or equipment. *Cf., L.A. Fitness Int'l, LLC v. Mayer*, 980 So. 2d 550, 557-60 (Fla. Dist. Ct. App. 2008) (business had no duty to provide specialized care to customer who had heart attack). An unpaid parent chaperone on a church outing has no duty to the participants that would require him to risk his life to rescue one of them. Declaring such a policy is unnecessary to the decision in this case, and it could have unintended negative consequences for many public service organizations that rely on volunteers to supervise children's activities. Even if this court finds that Kevin Schultz was obligated to rescue the boy in his role as a chaperone, that would not extinguish his employment-related duty to help. *See Lane*, 178 P.3d at 522.

II. THE STATUTE OF LIMITATIONS WAS TOLLED BY EMPLOYER'S FAILURE TO FILE THE ACCIDENT REPORT AND BY ITS REPRESENTATIONS TO CLAIMANT

Whether a claim for compensation has been timely filed or whether good cause exists for delay in the filing of an action, is ordinarily a question of fact, and constitutes a question of law only where the facts are not in dispute. *Pena v. N.M. Highway Dept.*, 100 N.M. 408, 413, 671 P.2d 656, 661 (Ct. App. 1983). Normally,

a claim for death benefits must be filed within one year of the date of the death. *See* § 52-1-31(B) NMSA 1978 (1987). However, the employer must file an accident report, known as the Employer's First Report of Injury (E1), within ten days of the accident. *See* § 52-1-58 NMSA 1978 (1991). The statute of limitations will be tolled until thirty days after the report has been filed. *See* § 52-1-59 NMSA 1978 (1989). Employer did not file the E1 until October 27, 2003, after this action was filed. [Ex. 1, A6, A7, A8]. Employer's failure to file the E1 tolled the statute of limitations, even if the employer did not believe the death was compensable. *See Herman v. Miners' Hosp.*, 111 N.M. 550, 807 P.2d 734 (1991).

Furthermore, a late filing will be excused if the conduct of the Employer "reasonably led the [claimant] to believe the compensation would be paid." § 52-1-36 NMSA 1978 (1989); *cf.*, *Molinar v. City of Carlsbad*, 105 N.M. 628, 631, 735 P.2d 113, 1137 (1987) (statute codifies principal of estoppel against employer). The evidence in this case is clear that the course of conduct between Cheryl and the Pueblo lulled her into a false sense of security that her claim would be paid. Initially, Detective Tom Grady, told her not to worry about anything. [FF 48]. By the following summer, she received a federal benefit based on the application submitted by Det. Grady and Chief Garcia. [Ex. 10; Ex. I]. Thereafter, on July 28, 2003 (before the statute ran), Chief Garcia told Cheryl and Tom Jonovich that he would "take care of

getting the workers' compensation paperwork done," [FF 59; Tr. 07/17/07, 11:280; Tr. 09/21/07, 6:189], which Chief Garcia does not deny. [Tr. 09/21/07, 6:189; FF 59]. Cheryl continued to believe that Chief Garcia was looking after her interests until October 1, when she contacted the WCA herself.

The case of *Hutcherson v. Dawn Trucking Co.*, 107 N.M. 358, 360, 758 P.2d 308, 310 (Ct. App. 1988), held that the entire course of conduct, not just specific communications, must be considered in deciding whether the statue has been tolled by the employer's conduct. In addition, the fact that the claimant was not represented by an attorney was material to the nature of the relationship and interaction between the claimant and employer. *Id.*, 107 N.M. at 361, 758 P.2d at 311. The level of trust between the worker and the employer is an important factor in determining the reasonableness of the claimant's reliance. The undisputed facts in this case show that Employer told Cheryl not to worry about anything, she then received the federal benefit based on her husband's death in the line of duty, after which Chief Garcia said he would follow up on the workers' compensation benefit. The statute was tolled by the Employer's conduct until October 1, 2003, when Cheryl called the WCA to find out the status of her claim. In the alternative, the statute was tolled at least until July 28, 2003, when she first learned that the Employer had not yet requested workers' compensation benefits on her behalf.

There is a wealth of case law holding that the employer's assurance that it would initiate a workers' compensation claim on the worker's behalf will excuse his late filing. *See, e.g.*, *McCrary v. City of Biloxi*, 757 So. 2d 978 (Miss. 2000); *Craver v. Dixie Furniture Co.*, 115 N.C. App. 570, 447 S.E.2d 789, 795 (1994); *Herringshaw v. Travelers Aid Soc'y*, 206 Pa. Super. 219, 220-21, 212 A.2d 914, 915 (1965); *Tex. Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d 859, 861-62 (Tex. Civ. App. 1990). It is not necessary to demonstrate that the employer intentionally misled the claimant, but only that its words, action, or inaction induced the claimant to withhold suit until the time for filing had passed. *See Elsea v. Broome Furniture Co.*, 47 N.M. 356, 368, 143 P.2d 572, 579 (1943) (delay while worker believed insurer was investigating held reasonable); *see also*, *Norman v. BellSouth Telecomm.*, 888 So. 2d 340, 343-44 (La. Ct. App. 2004). As the court explained in *Dudley v. Workmen's Comp. Appeals Bd. (Twp. of Marple)*, 80 Pa. Commw. 233, 241, 471 A.2d 169, 173 (1984), *aff'd per curiam*, 510 Pa. 283, 507 A.2d 388 (1986),

> We cannot say that an injured worker, who does not file a claim because he reasonably believes his employer has done so on his behalf, is guilty of sleeping on his rights. When an employer, through its acts or statements, lulls a claimant into a false sense of security regarding the filing of a workmen's compensation claim, those actions, whether intentional or unintentional, toll the running of the limitation period . . . . That period reasonably should not begin until the claimant knows, or with reasonable diligence could know, of his deception.

Even after Chief Garcia told Claimant that he did not believe that she had a right to workers' compensation benefits, but that he would "look into it," [Tr. 07/17/07, 11:280; Tr. 09/21/07, 6:189], the statute was tolled while she reasonably believed that he was investigating the claim. *See Elsea*, 47 N.M. at 368, 143 P.2d at 579. Furthermore, an employee who has not been advised of his rights and obligations pursuant to the Workers' Compensation Act and whose employer has told the employee that his injuries were not covered, should not be expected to know more about the Workers' Compensation Act than his employer. *See Lofgren v. Pieper Farms*, 540 N.W.2d 834, 837 (Minn. 1995); *see also City of Denver v. Phillips*, 166 Colo. 312, 319, 443 P.2d 379, 383 (1968) (supervisor told officer "it would do no good" to file a claim); *Davis v. Jones*, 203 Mont. 464, 661 P.2d 859 (1983) (equitable estoppel barred employer from asserting statute of limitations because he told worker's widow she did not have a workers' compensation claim); *cf.*, *Smith v. Dowell, Corp.*, 102 N.M. 102, 104, 692 P.2d 27, 29 (1984) ("It would be patently unfair to expect the common laborer to have greater knowledge than the medical expert"). Even after she filed her complaint, Gov. Rivera assured her that the Pueblo supported her claim. Because she reasonably believed that Employer did not oppose her right to workers' compensation benefits, she did not consult with legal counsel until sometime after the Mediation Conference.

The WCJ concluded that even if the initial Complaint in October 2003 was timely, its subsequent dismissal without prejudice meant that it was not effective to stop the limitations period, so that her second Complaint filed six months later was barred. [FF 45, 46, 68, 69; CL 13, 14, 18]. This conclusion is legally incorrect. The effect of the tolling under either Section 52-1-59 or 52-1-36 is that the one-year time limit did not bar the second complaint, even if it is not automatically a continuation of the first. *See Ortega v. Shube*, 93 N.M. 584, 603 P.2d 323 (Ct. App. 1979), *overruled on other grounds*, *Bracken v. Yates Petroleum Corp.*, 107 N.M. 463, 760 P.2d 155 (1988) (Section 37-1-14 does not apply to Workers' Compensation Act). Because Employer did not file the required accident report until October 27, 2003, the statute did not expire until November 27, 2004. *See Cole v. J.A. Drake Well Serv.*, 106 N.M. 484, 745 P.2d 392 (Ct. App. 1987) (time limit is one year and thirty-one days); *see also Herman*, 111 N.M. at 556, 807 P.2d at 740 (claim filed almost two years after death held timely due to employer's failure to file E1). Likewise, where the statute was tolled by the conduct of the employer, the time limit did not begin to run until the claimant learned the truth. *See Dudley*, 479 A.2d at 173.

"Toll" denotes "to bar, defeat, or take away," as in "to toll the statute of limitations," which denotes "to show facts which remove its bar of the action." *State v. Sanchez*, 109 N.M. 313, 316, 785 P.2d 224, 227 (1989), *quoting Black's Law*

Dictionary 1334 (5th ed. 1979). A statute of limitations may be tolled for a period of time, and then recommence in such a way that the remainder of the period is extended by the period tolled. Thus, the one-year statute of limitations tolled for eleven months (at least until July 28, 2003) is extended to one year and eleven months past the starting point of the statutory period, until July 28, 2004. *Id.*; *see Elsea*, 47 N.M. at 369, 143 P.2d at 580 ("We are not disposed to fix any particular time short of one year after [date defendant clearly denied the claim]"). Therefore, the second filing in this case on June 18, 2004 was well within one year and thirty-one days of July 28, 2003, the date Claimant learned that Employer had not yet initiated her claim (but would do so), or October 1, 2003, when she knew that nothing had been filed by Employer.

In addition, the Recommended Resolution of February 19, 2003, taken as a whole, clearly intended to preserve Worker's original filing and relate a subsequent complaint back to that date. [RP 20; FF 43]. The stated purpose of the dismissal was to allow Claimant, who was still unrepresented, to obtain counsel. If the Mediator's language failed to preserve her rights, this Court should interpret his order to accomplish his obvious intent. *Cf.*, *Schultz*, 2010-NMSC-034, ¶ 23 (error on the part of the court is one example of unusual circumstances beyond control of parties that will justify late filing); *Trujillo v. Serrano*, 117 N.M. 273, 278, 871 P.2d 369, 374

(1994) ("To deny a party the constitutional right to an appeal because of a mistake on the part of the court runs against the most basic precepts of justice and fairness"); *Castillo v. Nw. Transp. Serv.*, 113 N.M. 119, 823 P.2d 919 (Ct. App. 1991) (not necessary to decide whether failure of clerk to accept filing tolled statute of limitations because refused complaint should have been filed).

CONCLUSION

Worker believes that the issues in this case can be decided as a matter of law based on the undisputed facts. The significant body of case law surrounding the duties of police officers in emergency situations compels the conclusion that Officer Schultz dies in an accident arising out of and in the course of his employment. A police officer is bound by his professional duty to try to save a life whenever and wherever he is confronted with such an emergency. The police officer serves mankind, not just the citizens of the jurisdiction that employs him.

Officer Schultz's widow reasonably relied on the representations of the employer that her claim was being asserted on her behalf. Once she had reason to suspect that was not the case, she acted promptly to file her complaint for benefits. Employer did not file the required E1 until after the Complaint had been filed. Both of these situations tolled the statute of limitations. Both her initial Complaint and her

First Amended Complaint were timely for either reason.

Worker requests this Court to reverse and remand with instructions to the WCJ to enter a judgment for the Worker. Further proceedings will be necessary to determine the amount of the benefits owed and attorney's fees. If this case cannot be decided as a matter of law, then Worker requests this Court to remand for a new trial or a reconsideration of the record including the testimony of Worker's expert witness, due to the failure of the WCJ to read that deposition. The WCJ who decided this case has left the WCA, and the matter has been reassigned to a new judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Brief In Chief** was served on the following persons by first class mail this 19th day of March, 2011:

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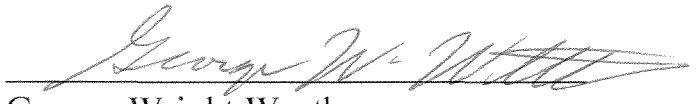

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