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INDIAN LAW

July 14, 2014

HAND-DELIVERED

Supreme Court Clerk
New Mexico Supreme Court
237 Don Gaspar
Santa Fe, NM 87501

**RE: ADDITIONAL AUTHORITIES SUBMITTED RE NO. 34,447; LOYA
V. GUTIERREZ V. COUNTY OF SANTA FE**

Dear Sir or Madam:

Pertinent and significant authorities have come to the attention of counsel for Petitioner/Third Party Plaintiff Glen Gutierrez since the filing of Officer Gutierrez' Brief in Chief and his Reply Brief. Officer Gutierrez hereby submits these additional authorities to the Court pursuant to NMRA Rule 12-213D(2).

Those authorities are:

- *State of New Mexico v. Sanchez*, __ P.3d __, 2014 WL3048231, N.M.App., July 3, 2014 (No. 33,008). (Copy enclosed). The Sanchez case bears on points argued by Officer Gutierrez in his Brief in Chief at pages 38-40; and, in his Reply Brief at pages 6-10
- *Schultz v. Pojoaque Tribal Police Department*, 2014-NMCA-019, 317 P.3d 866. (Copy enclosed). The Schultz case bears on points argued by Officer Gutierrez in his Reply Brief at pages 6-10.

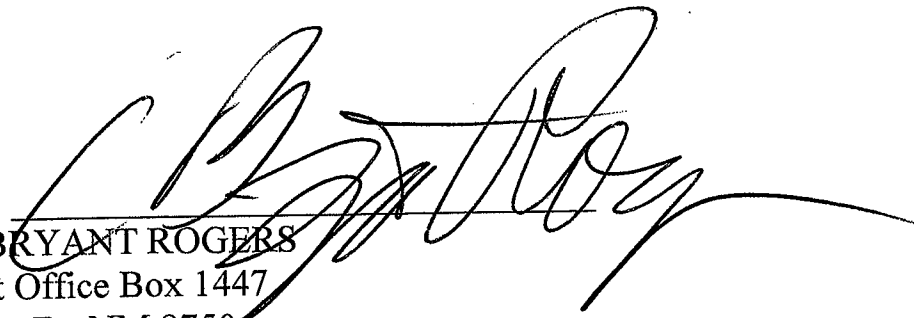
Respectfully submitted,

SUPREME COURT OF NEW MEXICO
FILED

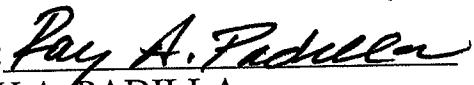
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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: _____

Filing Date: July 3, 2014

Docket No. 33,008

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

RONALD SANCHEZ,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY

Michael E. Vigil, District Judge

Gary K. King, Attorney General
Santa Fe, NM
Sri Mullis, Assistant Attorney General
Albuquerque, NM

for Appellee

Ben A. Ortega
Albuquerque, NM

for Appellant

OPINION

WECHSLER, Judge.

{1} Defendant Ronald Sanchez was arrested by a Tesuque Pueblo police officer on property of the Tesuque Pueblo and charged in Santa Fe County Magistrate Court with aggravated driving while under the influence of intoxicating liquor or drugs (DWI), first offense, contrary to NMSA 1978, Section 66-8-102 (2010). The officer was cross-commissioned as a Santa Fe County special deputy sheriff. His salary was paid by the Tesuque Pueblo Police Department, and it included incremental pay financed from a grant to assist the department in targeting the motoring public. On appeal to the district court,

Defendant was again convicted. He appeals his conviction to this Court, contending that the district court (1) erred in denying his motion to suppress by holding that the tribal officer who conducted the arrest was properly cross-commissioned and had authority to arrest Defendant under the Motor Vehicle Code; and (2) erred in denying Defendant's defense, pursuant to NMSA 1978, Section 66-8-137(B) (1978), and holding that the tribal officer did not have financial incentive motivating his arrest of Defendant. We hold that (1) the tribal officer was properly cross-commissioned and could properly arrest Defendant while wearing the uniform of and receiving his salary from the Tesuque Pueblo Police Department, and (2) the tribal officer's receipt of pay from a grant and his obligation under the grant to make monthly statistical reports did not give rise to a defense under Section 66-8-137(B). We affirm Defendant's conviction.

BACKGROUND

{2} There does not appear to be any dispute as to the facts. Defendant is presumably a non-Indian, charged with his first offense of DWI. Defendant was in the parking lot of Camel Rock Casino, within the territorial boundaries of Tesuque Pueblo in Santa Fe County, New Mexico, when either his "vehicle came into contact with another vehicle . . . while in the process of parking[.]" or he "crashed his car into a parked car." In either event, Officer Joe Vigil of the Tesuque Pueblo Police Department arrived at the scene, determined that alcohol appeared to be present, conducted a DWI investigation, arrested Defendant, and ultimately charged Defendant with aggravated DWI in Santa Fe County Magistrate Court.

{3} The magistrate court conducted a bench trial, and Defendant was convicted of aggravated DWI, first offense. Defendant appealed the conviction to the First Judicial District Court. In the district court, Defendant filed a motion to suppress, arguing that Officer Vigil was not properly cross-commissioned by the Santa Fe County Sheriff's Office and, therefore, had no authority to arrest Defendant. The district court denied Defendant's motion to suppress, and the parties proceeded to a bench trial. During the trial, Defendant argued that, because the Tesuque Pueblo Police Department participated in a grant program that included a requirement that Officer Vigil report on citations and arrests relevant to the Motor Vehicle Code, Officer Vigil's compensation depended "in a way" on his arrests for Motor Vehicle Code violations, and Defendant should be acquitted in accordance with the defense afforded by Section 66-8-137(B) (providing a defense to defendants if the compensation of the arresting officer depends in any way upon the arrest or conviction). The district court denied Defendant's oral motion and found Defendant guilty of aggravated DWI. Defendant timely filed a notice of appeal.

CROSS-COMMISSION AND AUTHORITY TO ARREST

{4} The first issue Defendant raises is whether Officer Vigil was properly cross-commissioned by the Santa Fe County Sheriff and, therefore, authorized to arrest Defendant for DWI. Defendant argues that the Santa Fe County Sheriff failed to comply with the statutory commission and arrest requirements of the Motor Vehicle Code when he purported

to cross-commission Officer Vigil. Defendant therefore asserts that his motion to suppress the evidence gathered by and testimony of Officer Vigil should have been granted pursuant to Article II, Section 10 of the New Mexico Constitution, which protects against the use of evidence obtained pursuant to unreasonable search and seizure. *See State v. Gutierrez*, 1993-NMSC-062, ¶ 45, 116 N.M. 431, 863 P.2d 1052. Defendant argues both that Officer Vigil was not properly cross-commissioned as a special deputy and, more broadly, that no tribal officer could be properly cross-commissioned as a special deputy by any county sheriff unless the tribal officer was paid by the State of New Mexico and wore a New Mexico State Police Department uniform. We address Defendant's arguments below.

Standard of Review

{5} "A ruling on a motion to suppress evidence presents a mixed question of law and fact." *State v. Rivera*, 2008-NMSC-056, ¶ 10, 144 N.M. 836, 192 P.3d 1213. Our review is de novo. *State v. Attaway*, 1994-NMSC-011, ¶¶ 6-7, 117 N.M. 141, 870 P.2d 103.

{6} Although New Mexico courts have addressed various issues dealing with Indian and non-Indian defendants and officers and other circumstances of commissioning of officers, this appeal presents a novel inquiry. In this case, a victimless crime (DWI) was committed by a non-Indian in Indian Country, and the arresting officer was a tribal officer cross-commissioned by the Santa Fe County Sheriff's Office. It is well-settled that the state has jurisdiction over victimless crimes committed by non-Indians in Indian Country, including DWI offenses. *State v. Harrison*, 2010-NMSC-038, ¶ 14, 148 N.M. 500, 238 P.3d 869; *see also State v. Romero*, 2006-NMSC-039, ¶ 12, 140 N.M. 299, 142 P.3d 887 ("[P]ueblos are Indian [C]ountry."). *But see Branham*, 2004-NMCA-131, ¶¶ 9-10, 13 (stating that the state does not have authority to enforce tribal laws on tribal lands, absent a written agreement to the contrary). Indeed, Defendant does not dispute that a Santa Fe County law enforcement officer would have had authority to investigate the DWI and arrest Defendant. Rather, the dispute is whether Officer Vigil was properly cross-commissioned by the Santa Fe County Sheriff and, as such, authorized to make the arrest.

Cross-Commissioning Deputies/Special Deputies

{7} NMSA 1978, Section 4-41-5 (1975) authorizes sheriffs in all counties of New Mexico to appoint deputies. NMSA 1978, Section 4-41-10 (2006) authorizes the sheriff to appoint "regular or permanent deputy sheriff[s]," as well as "respectable and orderly persons as special deputies." Although Section 4-41-10 does not expressly mention whether a sheriff may appoint as special deputies individuals who are already full-time law enforcement officers of an Indian nation, tribe, or pueblo, such officers fall within the subset of the permitted "respectable and orderly persons" category and are, therefore, included. Moreover, the Legislature has indirectly recognized this authority. In enacting NMSA 1978, Section 29-1-11 (2005), the Legislature authorized duly commissioned officers of the police or sheriff's department of any New Mexico Indian nation, tribe, or pueblo to act as New Mexico peace officers when commissioned by the chief of the New Mexico State Police

according to procedures set forth in that statute. The Legislature specifically provided in Section 29-1-11(G) that nothing in Section 29-1-11 "limits, impairs or nullifies the authority of county sheriffs to appoint pursuant to Chapter 4, Article 41 NMSA 1978 duly commissioned state or federally certified officers who are employees of a police or sheriff's department of an Indian nation, tribe or pueblo in New Mexico" (emphasis added). *See also* N.M. Att'y Gen. Op. 57-83 (1957) ("[A] sheriff can commission as a special deputy sheriff a full-time law enforcement officer employed by a municipality, the Navajo Tribe or the Federal Government[, so long as t]he applicants . . . secure the appointment from the sheriff . . . and qualify in accordance with [New Mexico law] pertaining to the qualification of deputy sheriffs.").

Cross-Commission of Officer Vigil as a Special Deputy for Santa Fe County

{8} No contention has been made by Defendant below or on appeal that Officer Vigil was not a "respectable and orderly person[.]" Section 4-41-10. It is undisputed that Officer Vigil secured a written appointment from the Santa Fe County Sheriff. *See* NMSA 1978, § 29-1-9 (2006) (requiring an appointment in writing from a person authorized by law to appoint special deputy sheriffs in order to assume or exercise the "functions, power, duties, and privileges" of the position). Officer Vigil signed an oath of office, also signed by the Santa Fe County Sheriff, and carried a card issued by the Santa Fe County Sheriff's Office indicating Officer Vigil's cross-commissioning status. *See* § 29-1-9; N.M. Att'y Gen. Op. 57-83. It is also undisputed that Officer Vigil was a properly commissioned, full-time Tesuque Pueblo tribal officer. Therefore, Officer Vigil was properly commissioned as a special deputy for the Santa Fe County Sheriff's Office. What Officer Vigil was entitled to do as a special deputy for the Santa Fe County Sheriff's Office is a separate inquiry.

{9} The scope of Officer Vigil's authority depends on the authority given to him by the Santa Fe County Sheriff. Section 4-41-10 states that special deputies, as appointed by a county sheriff, may serve a particular order, writ, or process or, if the sheriff has so deemed "necessary and required for the purpose of preserving the peace," may act as otherwise authorized. NMSA 1978, Section 4-41-9 (1855-1856) confirms that "[t]he said deputies are hereby authorized to discharge all the duties which belong to the office of sheriff, that may be placed under their charge by their principals[.]" *See Novak v. Dow*, 1970-NMCA-104, ¶¶ 5-7, 82 N.M. 30, 474 P.2d 712 (discussing the potential authority of a special deputy in accordance with Section 4-41-9 (citing its prior codification at NMSA 1953, Section 15-40-11 (1865), identical to the current statute), and holding that the special deputy had "such authority as had been conferred upon him by [the] Sheriff" and that "[t]he extent of [the special deputy]'s authority was a question of fact").

{10} The Santa Fe County Sheriff testified in this case that he gave Officer Vigil the authority to enforce criminal and traffic laws, including DWI, within Santa Fe County. There was no conflicting evidence, and, consequently, Officer Vigil was authorized to investigate and arrest Defendant for any violations of DWI law occurring in Santa Fe County.

Additional Requirements Unnecessary

{11} Defendant additionally argues that the Legislature has imposed several other requirements for proper cross-commissioning of officers that have not been met in this case. We address each of these arguments.

{12} First, Defendant contends that Officer Vigil's commission was not valid because, even though he signed an oath of office, the oath of office was not filed. However, Section 4-41-10 expressly states that it is "not . . . necessary to give or file any notice of such special appointment[.]" No notice of Officer Vigil's cross-commissioning as special deputy needed to be given or filed regarding his appointment.

{13} Second, Defendant argues that Officer Vigil was neither wearing a uniform nor paid the salary of a Santa Fe County deputy sheriff, and, therefore, he was not properly commissioned. However, as set forth above, neither of these requirements has been included in New Mexico statutory or case law for proper cross-commissioning of a special deputy. Although there are statutory requirements that an arresting officer be commissioned, salaried, and in uniform, the statutes do not specify that the uniform or the salary be from the cross-commissioning authority. NMSA 1978, Section 66-8-124(A) (2007) simply states that arrests for violations under the Motor Vehicle Code or other law relating to motor vehicles punishable as a misdemeanor must be made by "a commissioned, salaried peace officer who, at the time of arrest, is wearing a uniform clearly indicating the peace officer's official status." Similarly, under NMSA 1978, Section 66-8-125(C) (1978), members of the New Mexico State Police, sheriffs, and their salaried deputies and members of any municipal police force, may arrest without warrant any person present at the scene of a motor vehicle accident, but they "may not make arrest for traffic violations if not in uniform[.]" We note that traffic stops, as temporary detentions, are included within the term "arrest" as used in Section 66-8-124(A) and Section 66-8-125. *State v. Slayton*, 2009-NMSC-054, ¶ 20, 147 N.M. 340, 223 P.3d 337.

{14} We have addressed the requirements of Section 66-8-124(A) in *State v. Archuleta*, 1994-NMCA-072, 118 N.M. 160, 879 P.2d 792. In that case, the defendant contended that his traffic citation should have been dismissed because the officer making the stop was not in uniform. *Id.* ¶ 1. When he engaged the emergency equipment on his police car to stop the defendant, the officer was off-duty and wearing civilian clothes. *Id.* ¶ 2. Before approaching the defendant, the officer put on a police department windbreaker with a police department cloth shield and the State of New Mexico emblem. *Id.* We noted in *Archuleta* that the intent of the Legislature in requiring the officer making a traffic stop to wear a uniform that plainly indicated the officer's status "was to enable the motorist to be certain that the officer" making the stop "is, in fact, a police officer." *Id.* ¶ 9. We adopted alternative tests to determine whether an officer is "in uniform" for the purposes of Section 66-8-124(A): an objective one—"whether there are sufficient indicia that would permit a reasonable person to believe the person purporting to be a peace officer is, in fact, who he claims to be"; and a subjective one—"whether the person stopped and cited either personally

knows the officer or has information that should cause him [or her] to believe the person making the stop is an officer with official status.” *Archuleta*, 1994-NMCA-072, ¶ 11. Defendant does not dispute that Officer Vigil was wearing his Tesuque Pueblo Police Department uniform at the time of the arrest. A reasonable person would thus believe that Officer Vigil was a peace officer, which is sufficient to satisfy the requirement that the arresting officer be in uniform.

{15} We additionally observed in *Archuleta* that the Legislature had amended Section 66-8-124 in 1968 in order to recognize modern practices with respect to police uniforms. *Id.* ¶ 10. Likewise, we do not believe that the Legislature intended to restrict the ability of cross-commissioned officers to perform their dual responsibilities. The purpose of cross-commissioning law enforcement officers is to promote a functional law enforcement process across jurisdictional boundaries. See Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 Harv. L. Rev. 922, 927 (1999) (observing that “numerous states and tribes have responded to the common need for effective law enforcement by developing cross-deputization” and other agreements). It would be absurd to expect that a cross-commissioned officer with authority in two jurisdictions would need to change uniforms when the officer needs to make a traffic stop or an arrest and is wearing the uniform of the other jurisdiction. See *State v. Davis*, 2003-NMSC-022, ¶ 13, 134 N.M. 172, 74 P.3d 1064 (stating that we do not construe statutes in a manner leading to absurd results).

{16} We reach the same result with respect to Officer Vigil’s salary. While, as Defendant argues, Section 66-8-124(A) and Section 66-8-125(C) grant the authority to arrest to “a commissioned, salaried peace officer” and “New Mexico state police, sheriffs and their salaried deputies, and members of any municipal police force” respectively, neither section requires the officer’s salary be from the authority cross-commissioning the officer. For the purposes of Section 66-8-124(A), Officer Vigil was a “salaried peace officer” of the Tesuque Pueblo. For Section 66-8-125(C), the Tesuque Pueblo Police Department is comparable to a municipal police force. See N.M. Att’y Gen. Op. 57-83 (treating similarly municipalities and the Navajo Nation for purposes of commissions as deputy sheriffs under New Mexico law). Indeed, the source of an officer’s salary, although administratively significant, is not relevant to the purposes of cross-commissioning law enforcement officers to jointly perform law enforcement responsibilities. Cf. *Archuleta*, 1994-NMCA-072, ¶¶ 9, 10 (stating that “[i]t seems clear enough that the intention of the [L]egislature in requiring the officer to wear a uniform plainly indicating his official status was to enable the motorist to be certain that the officer who stops him is, in fact, a police officer”). And the fact that Santa Fe County did not also provide Officer Vigil with a salary, above and beyond the salary he received from the Tesuque Pueblo Police Department, has no bearing on whether Officer Vigil was properly cross-commissioned. Cf. § 4-41-10 (stating, after authorizing sheriffs to appoint special deputies, that “[t]here shall be no additional fees or per diem paid by the counties for any additional deputies other than as provided by law”). Moreover, it would be absurd to require the salary of a cross-commissioned officer to correspond to the authority the officer is exercising at the time of a traffic stop or arrest.

{17} Third, Defendant asserts that Officer Vigil was not authorized to carry a concealed weapon because he was not a “fully certified or full-time certified sheriff[] deput[y].” However, Officer Vigil was independently authorized to carry his concealed weapon in connection with his job as a Tesuque tribal police officer. If Officer Vigil had not already been a commissioned police officer with another agency or was not otherwise entitled to carry a concealed weapon, perhaps the issue might have bearing on this case. As it is, the issue of whether Officer Vigil carried a concealed weapon does not appear to be relevant to the issues in this case and does not provide information necessary to determine whether Officer Vigil was properly cross-commissioned as a special deputy.

State v. Slayton and State v. Bricker

{18} Because Defendant extensively relies on *Slayton*, 2009-NMSC-054, and *State v. Bricker*, 2006-NMCA-052, 139 N.M. 513, 134 P.3d 800, to argue that Officer Vigil did not have the authority to arrest Defendant for DWI because Officer Vigil was not a “commissioned peace officer”, we take the opportunity to explain why those cases do not bear on this appeal.

{19} The issue in *Slayton* was different from the issue in this case. At issue here is whether a cross-commissioning was effective; in *Slayton*, the issue was whether a police service aide was commissioned at all or had authority to make an arrest. See 2009-NMSC-054, ¶¶ 1, 12, 15. Our Supreme Court held in *Slayton* that the police service aide was not commissioned and was not authorized to make a misdemeanor arrest under the Motor Vehicle Code. *Id.* ¶ 17. Whether a police service aide is commissioned is not relevant to this case. In *Bricker*, the custodial arrest of the defendant was unlawful because the defendant should have been issued a summons and released. 2006-NMCA-052, ¶ 14; see *Slayton*, 2009-NMSC-054, ¶ 28. At issue in *Bricker* was whether the unlawful custodial arrest violated either the New Mexico or United States Constitutions, which would require suppression of evidence obtained consequent to the arrest. 2006-NMCA-052, ¶ 14. Neither *Slayton* nor *Bricker* speaks to whether Officer Vigil was properly cross-commissioned or, if cross-commissioned, the limits of his authority.

COMPENSATION FOR DWI ARRESTS

{20} The second issue Defendant raises on appeal is whether Defendant was entitled to a defense under Section 66-8-137(B) because Officer Vigil “was working under a grant that targets the motoring public[, and which] has the effect of incentivizing the officers to increase their rate of pay[.]” Defendant concludes that Officer Vigil’s conduct in making efforts to maintain the grant “was grounds for an acquittal under the statute and [Defendant] should have been found not guilty.”

The Grant: A Portion of Officer Vigil’s Compensation

{21} The underlying facts regarding the grant, pursuant to which Officer Vigil received

a portion of his pay, are undisputed, although the characterizations of those facts differ. Officer Vigil testified that he received a salary from the Tesuque Pueblo Police Department and that, as part of his job duties as a police officer, he was charged with arresting and convicting individuals for offenses that included DWI. The department received a grant from the Bureau of Indian Affairs for dedicated DWI police officers, which provided the salaries for traffic officers and overtime for other officers. Officer Vigil submitted monthly statistics as information that was used to apply for the grant. As a result of the department's receipt of the grant, Officer Vigil's pay increased approximately two dollars per hour. His pay, however, did not fluctuate with the number of arrests he made. He was included within the grant at the time he arrested Defendant.

{22} The question for our review is whether the Tesuque Pueblo Police Department's receipt of the grant and Officer Vigil's resulting increase in compensation constituted the type of "compensation" depending upon arrest or conviction prohibited by Section 66-8-137(B). We review "factual findings under a substantial evidence standard, viewing the facts in the light most favorable to the prevailing party, and we review de novo whether the district court correctly applied the law to the facts." *Slayton*, 2009-NMSC-054, ¶ 11.

Compensation Depending Upon Arrest or Conviction

{23} Section 66-8-137(B) states:

If any person is arrested or brought to trial for violation of the Motor Vehicle Code or other law, ordinance or regulation relating to motor vehicles punishable as a misdemeanor by any officer, agent or employee of any political subdivision, or before any municipal judge, whose compensation depends in any way upon the arrest or conviction of persons violating these laws, ordinances or regulations, the fact of such compensation or that the person making the arrest was not in uniform at the time is a defense to the charge.

{24} Defendant argues that he was entitled to an acquittal based on Section 66-8-137(B) because Officer Vigil's pay depended "in a way" on his arrest of persons violating the Motor Vehicle Code. In making this argument, Defendant does not rely on the fact that Officer Vigil received a salary for duties that included arresting and convicting individuals for offenses that included DWI. Defendant bases his defense on the increase in Officer Vigil's pay in connection with the grant in which the department was obligated to report the number of automobile accidents investigated and DWI arrests made. According to Defendant, the consequence of the grant was that Officer Vigil's compensation "in a way" depended on his arrests and convictions.

{25} The question presented by Section 66-8-137(B) ultimately is, for what did Officer Vigil receive his compensation. If Officer Vigil received any compensation for arresting or convicting individuals for violations under the Motor Vehicle Code or other law, ordinance,

or regulation relating to motor vehicles punishable as a misdemeanor, or if he received any compensation for increasing his arrests or convictions for such violations, Defendant would be entitled to the defense under Section 66-8-137(B). However, none of these circumstances appears to be the case here.

{26} As stated by Defendant, “[t]o receive the money, the officers turn in to the police captain information on numbers of arrests and citations, the number of DWI arrests, and the grant writers know the department is compliant because of the statistics and number of arrests.” In his reply brief, Defendant reiterates that “[the] Tesuque [Pueblo Police Department] had to submit enforcement statistics to keep [the grant], this is clear.” In other words, according to Defendant, to be entitled to the grant, all that appears to be required is that the Tesuque Pueblo Police Department turn in data. Defendant has not pointed to anything in the record to indicate that Officer Vigil was required to actually arrest or convict a certain number of individuals in order for the department to be eligible for the grant, that Officer Vigil was required to meet certain quotas to be eligible for the grant, or that Officer Vigil’s pay was linked to the number of arrests or convictions. Rather, Officer Vigil’s pay increased because he agreed to report statistics. The mere fact that Officer Vigil’s pay increased pursuant to a grant that was given to the department because Officer Vigil, presumably among others, *reported* on the number of arrests and convictions does not trigger the Section 66-8-137(B) defense.

CONCLUSION

{27} For the foregoing reasons, we hold that Defendant has not met his burden of demonstrating error and affirm the district court’s conviction of Defendant. *See State v. Aragon*, 1999-NMCA-060, ¶ 10, 127 N.M. 393, 981 P.2d 1211 (recognizing that there is a presumption of correctness in the rulings of the trial court, and the party claiming error bears the burden of showing such error). We affirm Defendant’s conviction for aggravated DWI, first offense, contrary to Section 66-8-102.

{28} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

J. MILES HANISEE, Judge

317 P.3d 866, 2014 -NMCA- 019
(Cite as: 317 P.3d 866)

H

Court of Appeals of New Mexico.
Cheryl SCHULTZ on behalf of Kevin SCHULTZ
(deceased), Worker-Appellant,

v.

POJOAQUE TRIBAL POLICE DEPARTMENT,
and New Mexico Mutual Casualty Company, Em-
ployer/Insurer-Appellees.

No. 28,508.
Aug. 19, 2013.

Background: Claimant, the widow of a tribal po-
lice officer who drowned in an attempt to rescue a
child, appealed from order of the Workers' Com-
pensation Administration (WCA), Helen L. Stirling,
Workers' Compensation Judge, denying claims for
benefits in connection with officer's death. The
Court of Appeals dismissed the appeal as untimely.
On certiorari review, the Supreme Court, 148 N.M.
692, 242 P.3d 259, Maes, J., remanded for consider-
ation of merits of appeal. On remand, the Court of
Appeals, — N.M. —, 269 P.3d 14, Fry, J., af-
firmed WCA's order. The Supreme Court granted
certiorari. The Supreme Court, 2013 WL 1482949,
Bosson, J., reversed and remanded to the Court of
Appeals.

Holding: On remand, the Court of Appeals, Fry, J.,
held that in an apparent matter of first impression, a
sufficient nexus occurred between the rescue under-
taken by claimant, and his duties as a tribal public
safety officer, to support a workers' compensation
award on the basis claimant's death arose out of and
in the course of his employment as a tribal police
officer.

Reversed and remanded.

West Headnotes

[1] Workers' Compensation 413 ↪52

413 Workers' Compensation

413I Nature and Grounds of Employer's Liabil-
ity

413k44 Construction and Operation of Stat-
utes in General

413k52 k. Construction in favor of em-
ployee or beneficiary. Most Cited Cases

Any judicial analysis under the Workers' Com-
pensation Act must balance equally the interests of
the worker and the employer without showing bias
or favoritism. West's NMSA § 52-1-1 et seq.

[2] Workers' Compensation 413 ↪610

413 Workers' Compensation

413VIII Injuries for Which Compensation May
Be Had

413VIII(C) Injuries Arising Out of and in
Course of Employment in General

413k607 Arising Out of Employment in
General

413k610 k. What injuries arise out of
employment in general. Most Cited Cases

The "arising out of" employment requirement
for an injury to be compensable under the Workers
Compensation Act relates to the cause of the acci-
dent. West's NMSA § 52-1-9.

[3] Workers' Compensation 413 ↪610

413 Workers' Compensation

413VIII Injuries for Which Compensation May
Be Had

413VIII(C) Injuries Arising Out of and in
Course of Employment in General

413k607 Arising Out of Employment in
General

413k610 k. What injuries arise out of
employment in general. Most Cited Cases

Typically, accidents satisfying the requirement
that compensable injury under the Workers' Com-
pensation Act "arise out of" employment will in-
clude those occurring during acts the employer has
instructed the employee to perform, acts incidental
to the worker's assigned duties, or acts that the

317 P.3d 866, 2014 -NMCA- 019
(Cite as: 317 P.3d 866)

worker had a common law or statutory duty to perform. West's NMSA § 52-1-9.

[4] Workers' Compensation 413 ⚡617

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(C) Injuries Arising Out of and in Course of Employment in General

413k614 In Course of Employment in General

413k617 k. What are injuries in course of employment in general. Most Cited Cases

The term "course of employment," for purposes of determining whether an injury is compensable under the Workers' Compensation Act, relates to the time, place, and circumstances under which the accident takes place. West's NMSA § 52-1-9.

[5] Workers' Compensation 413 ⚡604

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(C) Injuries Arising Out of and in Course of Employment in General

413k604 k. In general. Most Cited Cases

In order for a workers' compensation claimant to be awarded compensation, both of the requirements for "arising out of" and "in the course of employment" must co-exist at the time of the injury. West's NMSA § 52-1-9.

[6] Municipal Corporations 268 ⚡189(1)

268 Municipal Corporations

268V Officers, Agents, and Employees

268V(B) Municipal Departments and Officers Thereof

268k179 Police

268k189 Rights, Duties, and Liabilities of Policemen

268k189(1) k. In general. Most

Cited Cases

Police officers fulfill a unique role in society

that coincides with increased responsibilities and a greater sense of duty to their employment than the average citizen; this sense of duty can arise both from official dictates of **police** officer conduct or from societal expectations that the amount of authority with which **police** officers are imbued corresponds to the public's reliance that they at all times effectively fulfill their mission to protect and serve.

[7] Workers' Compensation 413 ⚡604

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(C) Injuries Arising Out of and in Course of Employment in General

413k604 k. In general. Most Cited Cases

Placing too much emphasis on broadly worded regulations to support a finding of an attenuated benefit to the employer in order to fit a **police** officer's actions into traditional workers' compensation jurisprudence, which was developed in accordance with more traditional employment environments, would dampen the reliance society places on **police** officers to respond to circumstances in which they are expected to intervene.

[8] Workers' Compensation 413 ⚡627

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(D) Particular Causes, Circumstances, and Conditions of Injury

413VIII(D)2 Acts Done Under Direction or Permission, or in Emergency

413k627 k. Acts in emergencies. Most Cited Cases

Workers' Compensation 413 ⚡630

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(D) Particular Causes, Circum-

317 P.3d 866, 2014 -NMCA- 019
(Cite as: 317 P.3d 866)

stances, and Conditions of Injury

413VIII(D)3 Negligent, Unreasonable, or
Voluntary Acts, and Incurrence of Risk

413k629 Voluntary Act or Incurrence
of Risk Outside of Employment

413k630 k. In general. Most Cited
Cases

Given the small distinction between society's expectations of an on and off-duty **police** officer faced with an emergency, the focus under the "arising out of" employment prong in a workers' compensation case should be the nature of the incident in relation to risks generally faced by on-duty officers in which they would be expected to respond, albeit with due regard for those actions or circumstances in which an off-duty officer has been instructed not to act or intervene; this inquiry would therefore include a determination of the reasonable expectations of an on-duty officer confronted by the same or similar circumstances, regardless of whether an on-duty officer's responsibility to act would arise from statute, **police** department regulation, or a common sense expectation that the circumstances surrounding the incident necessitated a response. West's NMSA § 52-1-9.

[9] Workers' Compensation 413 ⚡617

413 Workers' Compensation

413VIII Injuries for Which Compensation May
Be Had

413VIII(C) Injuries Arising Out of and in
Course of Employment in General

413k614 In Course of Employment in
General

413k617 k. What are injuries in course
of employment in general. Most Cited Cases

The "in the course of employment" prong of a compensable injury under the Workers' Compensation Act considers the time, place, and circumstances under which the accident takes place. West's NMSA § 52-1-9.

[10] Workers' Compensation 413 ⚡706

413 Workers' Compensation

413VIII Injuries for Which Compensation May
Be Had

413VIII(D) Particular Causes, Circumstances, and Conditions of Injury

413VIII(D)16 Injuries Before or After
Working Hours or Before Entering on or After
Leaving Employment

413k705 Injuries Before or After
Working Hours

413k706 k. In general. Most Cited
Cases

When determining a **police** officer's workers' compensation eligibility for injuries sustained in circumstances not traditionally arising from or in the course of predictable employment activities, the proper focus should be on the circumstances giving rise to the accident, specifically the nature of the officer's actions and the manner of their performance in relation to a similarly situated on-duty officer. West's NMSA § 52-1-9.

[11] Workers' Compensation 413 ⚡706

413 Workers' Compensation

413VIII Injuries for Which Compensation May
Be Had

413VIII(D) Particular Causes, Circumstances, and Conditions of Injury

413VIII(D)16 Injuries Before or After
Working Hours or Before Entering on or After
Leaving Employment

413k705 Injuries Before or After
Working Hours

413k706 k. In general. Most Cited
Cases

Workers' Compensation 413 ⚡710

413 Workers' Compensation

413VIII Injuries for Which Compensation May
Be Had

413VIII(D) Particular Causes, Circumstances, and Conditions of Injury

413VIII(D)17 Place of Injury with Reference to Plant or Premises of Employer

413k710 k. In general. Most Cited

317 P.3d 866, 2014 -NMCA- 019
(Cite as: 317 P.3d 866)

Cases

The more attenuated an off-duty **police** officer's law enforcement relationship is to the jurisdiction in which an accident arises, the more relevant the place of the accident should become to the workers' compensation judge's conclusion as to an officer's eligibility for benefits; nevertheless, the relationship between the circumstances of the incident and the off-duty officer's response in relation to a similarly-situated on-duty officer should remain paramount. West's NMSA § 52-1-9.

[12] Workers' Compensation 413 ¶630

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(D) Particular Causes, Circumstances, and Conditions of Injury

413VIII(D)3 Negligent, Unreasonable, or Voluntary Acts, and Incurrence of Risk

413k629 Voluntary Act or Incurrence of Risk Outside of Employment

413k630 k. In general. Most Cited

Cases

The workers' compensation "arising out of" and "in the course of employment" standard for injuries to off-duty **police** officers occurring in response to an incident that reasonably called for **police** assistance constitutes a case-by-case, pragmatic determination of the nexus between the nature of the incident giving rise to the accident and the resulting injury and the person's duties as a public safety officer. West's NMSA § 52-1-9.

[13] Workers' Compensation 413 ¶627

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(D) Particular Causes, Circumstances, and Conditions of Injury

413VIII(D)2 Acts Done Under Direction or Permission, or in Emergency

413k627 k. Acts in emergencies. Most Cited Cases

Emergency actions that on-duty **police** officers would take in the course of their employment that are taken by off-duty **police** officers can be considered reasonably incidental to their employment responsibilities for purposes of a workers' compensation claim. West's NMSA § 52-1-9.

[14] Workers' Compensation 413 ¶627

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(D) Particular Causes, Circumstances, and Conditions of Injury

413VIII(D)2 Acts Done Under Direction or Permission, or in Emergency

413k627 k. Acts in emergencies. Most Cited Cases

Workers' Compensation 413 ¶631

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(D) Particular Causes, Circumstances, and Conditions of Injury

413VIII(D)3 Negligent, Unreasonable, or Voluntary Acts, and Incurrence of Risk

413k629 Voluntary Act or Incurrence of Risk Outside of Employment

413k631 k. Particular acts. Most Cited Cases

A sufficient nexus occurred between the rescue undertaken by workers' compensation claimant, and his duties as a tribal public safety officer, to support a workers' compensation award on the basis claimant's death arose out of and in the course of his employment as a tribal **police** officer, regardless of whether claimant had been trained to attempt a swift-water rescue, was off-duty and not on call, the accident occurred outside claimant's jurisdiction, and the trip claimant was on was purely personal in nature; rendering assistance to a child in danger of drowning was among those risks to which common sense dictated that an on-duty officer faced with a similar circumstance would be expected to respond,

317 P.3d 866, 2014 -NMCA- 019
(Cite as: 317 P.3d 866)

claimant was not prohibited by employer regulations from undertaking the rescue in his official capacity, and employer regulations stated an officer could initiate extra-jurisdictional action in circumstances so serious that immediate action must be taken.

[15] Workers' Compensation 413 ⚡630

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(D) Particular Causes, Circumstances, and Conditions of Injury

413VIII(D)3 Negligent, Unreasonable, or Voluntary Acts, and Incurrence of Risk

413k629 Voluntary Act or Incurrence of Risk Outside of Employment

413k630 k. In general. Most Cited

Cases

Society generally expects an off-duty officer to act in circumstances reasonably calling for immediate police assistance when such matters come to his or her attention, unless specifically instructed to refrain from taking the action that led to the injury for which the off-duty officer is seeking workers' compensation benefits.

[16] Workers' Compensation 413 ⚡627

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(D) Particular Causes, Circumstances, and Conditions of Injury

413VIII(D)2 Acts Done Under Direction or Permission, or in Emergency

413k627 k. Acts in emergencies. Most Cited Cases

Workers' Compensation 413 ⚡630

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(D) Particular Causes, Circum-

stances, and Conditions of Injury

413VIII(D)3 Negligent, Unreasonable, or Voluntary Acts, and Incurrence of Risk

413k629 Voluntary Act or Incurrence of Risk Outside of Employment

413k630 k. In general. Most Cited Cases

Regardless of the officer's chosen means of intervening, an off-duty officer's decision to act in emergency matters coming to his or her attention, as opposed to the officer being dispatched in accordance with "on-call" status, is not ultimately conditioned on whether the officer was expected to be available to the employer for other emergencies and, thus, neither should the officer's ability to recover workers' compensation benefits when the officer is injured in the course of personally initiating such action. West's NMSA § 52-1-9.

[17] Workers' Compensation 413 ⚡627

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(D) Particular Causes, Circumstances, and Conditions of Injury

413VIII(D)2 Acts Done Under Direction or Permission, or in Emergency

413k627 k. Acts in emergencies. Most Cited Cases

Workers' Compensation 413 ⚡630

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(D) Particular Causes, Circumstances, and Conditions of Injury

413VIII(D)3 Negligent, Unreasonable, or Voluntary Acts, and Incurrence of Risk

413k629 Voluntary Act or Incurrence of Risk Outside of Employment

413k630 k. In general. Most Cited Cases

The relevant inquiry in a workers' compensation case when an off-duty police officer chooses to

317 P.3d 866, 2014 -NMCA- 019
(Cite as: 317 P.3d 866)

respond to emergency and is injured is whether there is a nexus between the circumstances surrounding the officer's decision to act and the duties of the officer's employment. West's NMSA § 52-1-9.

[18] Workers' Compensation 413 ⚡630

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(D) Particular Causes, Circumstances, and Conditions of Injury

413VIII(D)3 Negligent, Unreasonable, or Voluntary Acts, and Incurrence of Risk

413k629 Voluntary Act or Incurrence of Risk Outside of Employment

413k630 k. In general. Most Cited Cases

Workers' Compensation 413 ⚡710

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(D) Particular Causes, Circumstances, and Conditions of Injury

413VIII(D)17 Place of Injury with Reference to Plant or Premises of Employer

413k710 k. In general. Most Cited Cases

Whether a **police** officer is injured while acting outside his or her jurisdiction could be material in a workers' compensation case when the **police** officer is acting in a law enforcement capacity without authorization to do so.

[19] Workers' Compensation 413 ⚡706

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(D) Particular Causes, Circumstances, and Conditions of Injury

413VIII(D)16 Injuries Before or After Working Hours or Before Entering on or After

Leaving Employment

413k705 Injuries Before or After

Working Hours

413k706 k. In general. Most Cited

Cases

While a **police** officer, in a sense, is never off-duty, it does not mean that a **police** officer is covered by the workers' compensation law at all times regardless of the circumstances of the injury; there must be a correlation between the injury sustained and the employment. West's NMSA § 52-1-9.

*869 Academy Compensation Clinic, P.C., George Wright Weeth, Albuquerque, NM, for Appellant.

Riley, Shane & Keller, P.A., Richard J. Shane, Kristin J. Dalton, Albuquerque, NM, for Appellees.

OPINION

FRY, Judge.

{1} In this workers' compensation case, the issue before us is whether Officer Kevin Schultz's accidental death arose out of and within the course of his employment with the Pueblo of **Pojoaque Tribal Police** Department (Employer). The workers' compensation judge (WCJ) concluded that Officer Schultz's death did not arise out of and in the course of his employment because he was off-duty, outside his jurisdiction, and on a personal day trip near the Rio Grande at the time of the accident. Because of the unique nature of law enforcement duties, we conclude that law enforcement officers may recover workers' compensation benefits in some instances for off-duty injuries occurring in response to circumstances reasonably calling for **police** officer assistance. Accordingly, because we also hold that there was a sufficient nexus between Officer Schultz's actions in undertaking the rescue of a drowning child and the duties of his employment as a **police** officer, we reverse.

BACKGROUND

{2} The tragic facts of this case are not in dispute. Officer Schultz drowned while saving a

317 P.3d 866, 2014 -NMCA- 019
(Cite as: 317 P.3d 866)

twelve-year-old boy who had fallen into the Rio Grande. Officer Schultz responded to the child's cry for help and jumped into the swift-moving water to rescue him. While Officer Schultz was able to get the child to safety, he did so at the peril of his own life and suffered an unknown injury in the course of the rescue that rendered him unable to save both himself and the child.

{3} On the day of the rescue, Officer Schultz was off-duty and voluntarily chaperoning a church youth group trip to a recreational area on the Rio Grande near Pilar, New Mexico. There were four adult chaperones on the trip, including Officer Schultz and his wife, Cheryl. The child Officer Schultz rescued was one of the children under their supervision. Officer Schultz was not "on-call" that day, nor was he in uniform, although his badge and department-issued pager and firearm were found on his body. The incident also took place outside the boundaries of the Pueblo of Pojoaque reservation. Nevertheless, whether Officer Schultz believed his duty to rescue the child arose from his responsibilities as a police officer, a chaperone, or some measure of both, the parties agree that Officer Schultz died a hero.

{4} Consistent with public expectations that police officers may be required to act in their official capacity while off-duty, Officer Schultz's sacrifice was honored at both the national and local levels. Officer Schultz is recognized on the National Law Enforcement Officers Memorial and the State of New Mexico Law Enforcement Memorial, both of which require for inclusion a finding that the officer died in the line of duty. Cheryl and the couple's son were also awarded survivor benefits under the Public Safety Officers' Benefits Act. *See* 42 U.S.C. § 3796(a) (2006) (providing for survivor benefits where the public safety officer "died as the direct and proximate result of a personal *870 injury sustained in the line of duty"). Indeed, the lieutenant governor of the Pueblo of Pojoaque sent Cheryl a letter recognizing that "[y]our husband, Kevin Schultz, died in the line of duty" and that the

"Pueblo of Pojoaque will do anything necessary for you to receive survivor's benefits, [workers'] compensation or any other benefits available to you and your grieving family."

{5} Cheryl subsequently filed a workers' compensation claim for medical and survivor benefits against Employer and its insurer, New Mexico Mutual Insurance Company. Following the trial, the WCJ barred recovery by concluding, in part, that Officer Schultz's death did not arise out of and occur in the course of his employment.^{FN1}

FN1. The WCJ also concluded that Cheryl's claim was barred by the statute of limitations. [RP 325] Discussion of the procedural issues related to Cheryl's complaint and initial appeal can be found in our Supreme Court's prior decisions in this case. *See Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't*, 2010-NMSC-034, 148 N.M. 692, 242 P.3d 259; *Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't*, 2013-NMSC-013, —P.3d —, 2013 WL 1482949.

DISCUSSION

Standard of Review

[1] {6} Because the material facts in this case are not in dispute, we review de novo. *See Losinski v. Drs. Corcoran, Barkoff, & Stagnone, P.A.*, 1981-NMCA-127, ¶ 4, 97 N.M. 79, 636 P.2d 898 ("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."). In reviewing this issue, we are mindful that the Workers' Compensation Act (WCA) represents a "delicate balance between the rights and interests of the worker and the employer." *Gonzalez v. Performance Painting, Inc.*, 2013-NMSC-021, ¶ 9, 303 P.3d 802 (2013). Thus, "any judicial analysis under the [WCA] must balance equally the interests of the worker and the employer without showing bias or favoritism." *Id.*

317 P.3d 866, 2014 -NMCA- 019
(Cite as: 317 P.3d 866)

(alteration in original) (internal quotation marks and citation omitted).

{7} Given the unique nature of law enforcement duties, including the fact that in some circumstances an off-duty **police** officer may be required to respond in an official capacity to incidents arising in the officer's presence, courts have struggled with determining the compensability of off-duty **police** officer injuries using traditional interpretations of the "arising out of and in the course of employment" test. Below, we discuss the traditional analysis, the unique risks faced by **police** officers both on- and off-duty, application of the traditional "arising out of and in the course of employment" test to off-duty **police** officer injuries, and why the traditional analysis is an inadequate benchmark for determining the compensability of off-duty **police** officer injuries. We conclude by formulating the proper inquiry for injuries to off-duty **police** officers responding to incidents reasonably calling for **police** assistance and hold that Officer Schultz's death arose out of and in the course of his employment.

The Historical "Arising Out of and in the Course of Employment" Test in New Mexico

[2][3][4][5] {8} "For an injury to be compensable it must be caused by an accident 'arising out of and in the course of employment.' " *Velkovitz v. Penasco Indep. Sch. Dist.*, 1981-NMSC-075, ¶ 2, 96 N.M. 577, 633 P.2d 685 (quoting NMSA 1978, Section 52-1-9 (1973)). "Arising out of" and "in the course of employment" are two distinct requirements. *Hernandez v. Home Educ. Livelihood Program, Inc.*, 1982-NMCA-079, ¶ 9, 98 N.M. 125, 645 P.2d 1381. The "arising out of" prong relates to the cause of the accident. *Id.*; see *Velkovitz*, 1981-NMSC-075, ¶ 2, 633 P.2d 685 ("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."); *Kloer v. Municipality of Las Vegas*, 1987-NMCA-140, ¶ 3, 106 N.M. 594, 746 P.2d 1126 ("The term 'arising out of' the employment denotes a risk reasonably

incident to claimant's work."). Typically, accidents satisfying this prong will include those occurring during acts the employer has instructed the employee to perform, acts incidental to the worker's assigned duties, or acts that the worker 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. The term "course of employment," *871 on the other hand, "relates to the time, place, and circumstances under which the accident takes place." *Velkovitz*, 1981-NMSC-075, ¶ 2, 96 N.M. 577, 633 P.2d 685. We have stated before that "an 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*, 1987-NMCA-140, ¶ 7, 106 N.M. 594, 746 P.2d 1126. In order for a claimant to be awarded compensation, both of the requirements for "arising out of" and "in the course of employment" must co-exist at the time of the injury. *Garcia v. Homestake Mining Co.*, 1992-NMCA-018, ¶ 6, 113 N.M. 508, 828 P.2d 420.

{9} New Mexico's use and construction of the "arising out of and in the course of employment" standard in workers' compensation jurisprudence is not novel. See 1 Arthur Larson & Lex Larson, *Larson's Workers' Compensation Law* § 3.0, at 3-1, -4 (2012) (referring to the "arising out of and in the course of employment" standard as the "almost-universal coverage formula" with the "arising out of portion construed to refer to causal origin, and the course of employment portion to the time, place, and circumstances of the accident in relation to the employment" (internal quotation marks omitted)). Although the term is used in both workers' compensation and tort cases, the differing policy objectives generally weigh against recognizing an overlap between the two diverging constructions of this single phrase. See *Ovecka v. Burlington N. Santa Fe Ry. Co.*, 2008-NMCA-140, ¶¶ 11-13, 145 N.M. 113, 194 P.3d 728; *Lessard v.*

317 P.3d 866, 2014 -NMCA- 019
(Cite as: 317 P.3d 866)

Coronado Paint & Decorating Ctr., Inc., 2007-NMCA-122, ¶ 9, 142 N.M. 583, 168 P.3d 155.

Off-Duty Police Officers and the “Arising Out of and in the Course of Employment” Standard

[6] {10} A distinctive body of workers' compensation law has arisen surrounding injuries to off-duty **police** officers. This is because **police** officers fulfill a unique role in society that coincides with increased responsibilities and a greater sense of duty to their employment than the average citizen. *Luketic v. Univ. Circle, Inc.*, 134 Ohio App.3d 217, 730 N.E.2d 1006, 1011 (1999) (stating that a **police** officer's duty to protect the public “is distinctive in nature and quantitatively greater than the risk common to the public”). This sense of duty can arise both from official dictates of **police** officer conduct or from societal expectations that the amount of authority with which we imbue **police** officers corresponds to our reliance that they at all times effectively fulfill their mission to protect and serve the public. *Jordan v. St. Louis Cnty. Police Dep't*, 699 S.W.2d 124, 126 (Mo.Ct.App.1985) (“In a sense, a **police** officer is never off-duty.”); see *Lane v. Indus. Comm'n of Ariz.*, 218 Ariz. 44, 178 P.3d 516, 521 (App.2008) (“[F]ew other fields of employment require the employee, during non-working hours, to risk his or her own safety to protect others.”). Rarely do a **police** officer's duties begin and end at the time clock. *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430, 432 (1987) (“[I]t 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.”).

{11} Often, however, the nature of law enforcement duties and the varying environments where an officer may be called upon to exercise those duties have created difficulties in applying the traditional “arising out of and in the course of employment” analysis to off-duty activities that result in injury. See *Cooper v. Dayton*, 120 Ohio App.3d 34, 696 N.E.2d 640, 646, 648 (1997) (noting the difficulty in applying the traditional

workers' compensation factors, such as “time, place, and circumstances,” to an instance where a **police** officer was moonlighting as a grocery store security guard and was injured attempting to arrest shoplifters). In some cases, the circumstances surrounding the off-duty officer's injury call for the officer to act in a role consistent with a primary responsibility of crime interdiction. For example, in *Luketic*, an off-duty **police** officer visiting a bank on a personal errand was shot by a bank robber while attempting to prevent a robbery. 730 N.E.2d at 1008. The court held that the officer was entitled to workers' compensation for his injuries, despite the officer being on injury leave and outside his *872 jurisdiction at the time of the incident. *Id.* at 1011; see *City of Phoenix v. Indus. Comm'n of Ariz.*, 154 Ariz. 324, 742 P.2d 825, 830 (App.1987) (affirming an award of survivor benefits to the family of an off-duty **police** officer who was killed while moonlighting as a hotel security guard where the officer was shot while investigating a robbery that occurred at the hotel). In more difficult cases, the off-duty officer's injury arises while rendering assistance to members of the public but not necessarily in ways that implicate **police**-specific duties. For instance, in *Spieler v. Village of Bel-Nor*, the off-duty **police** officer was returning from a party with his date when they came upon a car accident outside his jurisdiction. 62 S.W.3d 457, 458 (Mo.Ct.App.2001). The officer approached the accident to check on the passengers and then used his date's cellular phone to call 911. *Id.* While standing in the street, the officer was struck by a passing car and severely injured. *Id.* The court affirmed the award of workers' compensation benefits. *Id.* at 461; see *Lane*, 178 P.3d at 518–19 (awarding benefits to an off-duty **police** officer who was shot when, following a mountain bike excursion with his friends, random strangers began firing on the group when the officer was attempting to pull an imperiled friend to safety); *Traveler's Ins. Co. v. Hobbs*, 222 S.W.2d 168, 170–71 (Tex.Civ.App.1949) (affirming the award of workers' compensation benefits where an off-duty **police** officer was walking with his wife and was struck by

317 P.3d 866, 2014 -NMCA- 019
(Cite as: 317 P.3d 866)

a car on the basis that the officer assumed the role of a **police** officer prior to being struck by pushing his wife out of the way of the vehicle).

{12} While these cases present widely different factual scenarios consistent with the myriad of risks faced by **police** officers on a daily basis, the ultimate determination in most cases is typically rooted in statutes or **police** department regulations compelling or authorizing the off-duty action, or, at the least, an implicit expectation that **police** officers will take some action not required of the general public when emergencies arise. *See Lane*, 178 P.3d at 520 (stating that the **police** department code of conduct requiring officers to act in an official capacity if confronted with an incident “requiring **police** action ... [to] safeguard life, property, or prevent the escape of a felon” exposed the officer to “an increased risk of being injured by gunfire if a crime or other threat to life occurred in his presence than would be faced by a similarly situated non-officer” (omission and alteration in original) (footnote and internal quotation marks omitted)); *Spieler*, 62 S.W.3d at 459 (“An officer reading [the provisions of the **police** manual] would certainly think his superiors would expect him to stop at the scene of an accident, wherever occurring, to determine whether people at the scene needed immediate assistance, and to call for such assistance when necessary.”); *Luketic*, 730 N.E.2d at 1011 (“[The appellant had a legal and moral duty, pursuant to statutory authority and his oath as a **police** officer, to protect the public and attempt to prevent a violent felony. This duty placed [the] appellant in his ‘zone of employment’ when he was shot while intervening in the armed bank robbery, notwithstanding that [the] appellant was off duty and outside his jurisdictional authority as a **police** officer.”). Courts construing these statutory and regulatory provisions to encompass a **police** officer's conduct at the time of the injury have concluded either that there was a benefit flowing to the employer from the officer's actions or that the officer's conduct furthered the interests of the employer so as to justify the award of compensation. *See City of El Dorado*, 729 S.W.2d at 432

(concluding that an off-duty officer involved in an altercation with a belligerent man at a bar “was motivated by the public interest, and that the attack upon his person, and the subsequent disturbance of the peace ... constituted a serious criminal offense or threat to life ... [and] that the City of El Dorado obtained a benefit from the appellee's actions”); *Municipality of Bethel Park v. Workmen's Comp. Appeal Bd.*, 161 Pa.Cmwlth. 274, 636 A.2d 1254, 1259–60 (1994) (holding that an unofficial policy encouraging off-duty officers to investigate criminal activity was sufficient to conclude that the officer was acting “in furtherance of the [e]mployer's interests when he suffered his heart attack” after investigating a potential disturbance near his backyard).

*873 {13} However, insofar as these cases purport to apply the traditional arising out of and in the course of employment test, they remain largely unpersuasive. Many of the statutory or **police** department provisions that have been relied upon speak only generally of a **police** officer's duty to act. *See City of Pittsburgh v. Workmen's Comp. Appeal Bd.*, 108 Pa.Cmwlth. 477, 529 A.2d 1196, 1197 (1987) (“All members, although relieved from actual performance of duty, are still held to be on duty at all times and must be prepared to act immediately ... in all cases needing immediate action coming to their attention.” (internal quotation marks and citation omitted)); *see also Lane*, 178 P.3d at 523 (“Off[-]duty officers shall act in an official capacity if they observe an incident requiring **police** action ... if such action will safeguard life[.]” (omission in original) (emphasis, internal quotation marks, and citation omitted)). Similarly, the benefit flowing to the **police** department from an off-duty officer's actions seems an attenuated basis on which to ground compensation where it is members of the public, specifically those receiving the **police** officer's assistance, who actually benefit from the officer's decision to take action.^{FN2}

FN2. We note that in some jurisdictions, a finding of a direct or indirect benefit to the

317 P.3d 866, 2014 -NMCA- 019
(Cite as: 317 P.3d 866)

employer or that the employee's actions at the time of the injury furthered the interests of the employer is a prerequisite to compensability. *See, e.g., City of El Dorado*, 729 S.W.2d at 431-32; *Cooper*, 696 N.E.2d at 644.

[7] {14} While we recognize, in accordance with these cases, that regulations governing off-duty officer conduct can aid in determining the parameters of the compensability of an officer's off-duty injury, especially in circumstances where an officer is instructed *not* to act, we believe that an overly technical or singular focus on such provisions fails to account for the amount of discretion the public expects an off-duty officer to exercise in the face of a potential emergency. The immediacy of action often called for in such circumstances would hardly permit officers the time to consider whether they are obligated to act under their respective **police** department regulations and, thus, whether the circumstances would entitle them to compensation should they be injured. *See City of Pittsburgh*, 529 A.2d at 1197 (“[W]e would [be] loath to hold that [the] claimant should sit by idly while a fellow officer must fend for himself against a crowd of ruffians because he would go uncompensated if seriously injured because of his entry into a fracas.”). Instead, **police** officers just act. Therefore, placing too much emphasis on often broadly worded regulations to support a finding of an attenuated benefit to the employer in order to fit the officer's actions into traditional workers' compensation jurisprudence, which was developed in accordance with more traditional employment environments, would dampen the reliance our society places on **police** officers to respond to circumstances in which we expect them to intervene. *See Tighe v. Las Vegas Metro. Police Dep't*, 110 Nev. 632, 877 P.2d 1032, 1035 (1994) (“[T]he unique nature of law enforcement requires us to distinguish it from other types of traditional employment.”).

{15} Instead, what we gather from these cases is an implicit recognition that the traditional inter-

pretations of the “arising out of and in the course of employment” standard are inadequate benchmarks for determining whether an injured off-duty **police** officer is entitled to compensation. Given the unique nature of law enforcement duties and the various circumstances calling for the exercise of those duties, strict application of the “time, place, and circumstances” factors or attempts to delineate what risks off-duty **police** officers are likely to face incidental to their employment strains the function these factors have served in our workers' compensation law in other contexts. Therefore, we think it is necessary to reexamine our application of the “arising out of and in the course of employment” standard in the context of off-duty law enforcement officers injured while responding to circumstances that reasonably call for immediate **police** assistance.

Formulation of the Proper Inquiry

[8] {16} Traditionally, the “arising out of” prong has looked to the causal connection between the risk giving rise to the injury and the worker's employment responsibilities. *See *874Velkovitz*, 1981-NMSC-075, ¶ 2, 96 N.M. 577, 633 P.2d 685. As noted above, construing this prong too narrowly would threaten to introduce unforeseen and potentially inequitable results due to the seriousness of the risks both on- and off-duty **police** officers encounter on a routine basis. However, given the small distinction between society's expectations of an on- and off-duty **police** officer faced with an emergency, the focus under this prong should be the nature of the incident in relation to risks generally faced by on-duty officers in which they would be expected to respond, albeit with due regard for those actions or circumstances in which an off-duty officer has been instructed not to act or intervene. This inquiry would therefore include a determination of the reasonable expectations of an on-duty officer confronted by the same or similar circumstances, regardless of whether an on-duty officer's responsibility to act would arise from statute, **police** department regulation, or a common sense expectation that the circumstances surrounding the incident

317 P.3d 866, 2014 -NMCA- 019
(Cite as: 317 P.3d 866)

necessitated a response.

[9] {17} The “in the course of employment” prong, on the other hand, considers “the time, place, and circumstances under which the accident takes place.” *Id.* Similar to the “arising out of” requirement, traditional interpretations of the “in the course of employment” prong are difficult to apply to a type of employment that recognizes little distinction between the responsibilities of its on-duty and off-duty workers. It is therefore nearly impossible to formulate adequate parameters on the time, place, and circumstances factors sufficient to encompass the various occasions, locales, and circumstances where an off-duty officer's injury could take place and still entitle him or her to compensation.

[10][11] {18} We believe that when determining a **police** officer's eligibility for injuries sustained in circumstances not traditionally arising from or in the course of predictable employment activities, the proper focus should be on the *circumstances* giving rise to the accident, specifically the nature of the officer's actions and the manner of their performance in relation to a similarly situated on-duty officer. That is not to say that some inquiry into the time and place of the accident is irrelevant. But given that the issue before us concerns an *off-duty police* officer, the “time” factor is of little analytic value insofar as this factor relates to injuries occurring on duty, where we have already concluded that **police** officers are entitled to recovery for off-duty injuries in some circumstances. *See, e.g., Municipality of Bethel Park*, 636 A.2d at 1255–56, 1259–60 (affirming the award of the compensation benefits where an officer suffered a heart attack after investigating a potential criminal activity during his vacation leave time). Furthermore, consistent with previously cited case law, we decline to place an explicit jurisdictional limitation on an off-duty **police** officer's entitlement to compensation. *See, e.g., Jordan*, 699 S.W.2d 124; *Luketic*, 134 Ohio App.3d 217, 730 N.E.2d 1006; *City of Pittsburgh*, 108 Pa.Cmwlth. 477, 529 A.2d 1196; .

We note, however, that the more attenuated the officer's law enforcement relationship to the jurisdiction in which the accident arises, the more relevant the place of the accident should become to the workers' compensation judge's conclusion. Nevertheless, the relationship between the circumstances of the incident and the off-duty officer's response in relation to a similarly-situated on-duty officer should remain paramount.

[12][13] {19} In sum, the “arising out of” and “in the course of employment” standard for injuries to off-duty **police** officers occurring in response to an incident that reasonably called for **police** assistance constitutes a case-by-case, pragmatic determination of the nexus between the nature of the incident giving rise to the accident and the resulting injury and the person's duties as a public safety officer. Stated generally, determining the connection between the incident and the employment is the goal of any “arising out of and in the course of employment” analysis. *See* 2 Arthur Larson & Lex Larson, *Larson's Workers' Compensation Law* § 29.0 (2012) (“In practice, the ‘course of employment’ and ‘arising out of employment’ tests are not, and should not be, applied entirely independently; they are both parts of a single test of work-connection[.]”). But given the unique expectation placed upon **police** officers to officially *875 act while off-duty in some circumstances, we must recognize the various, and often serious, risks faced by **police** officers when fulfilling their broader duty to protect and serve the public. In our view, emergency actions that on-duty **police** officers would take in the course of their employment that are taken by off-duty **police** officers can be considered reasonably incidental to their employment responsibilities. Thus, to the extent our conclusion broadens the traditional construction of the arising out of and in the course of employment standard in this unique employment context, it does so in accordance with the “special, unpredictable [.] and emergency situations that are typical of **police** work[.]” *Pounds v. Board of Trustees of Fire and Police Disability and Retirement Fund*, 89 Or.App.

317 P.3d 866, 2014 -NMCA- 019
(Cite as: 317 P.3d 866)

552, 749 P.2d 1227, 1229 (1988), and the recognition that **police** officers “are often under a continuous duty to protect the public, even when not at work.” *Davis v. United States*, 50 Fed.Cl. 192, 201 (2001).

Officer Schultz's Death Arose Out of and in the Course of His Employment

[14] {20} Turning to the circumstances surrounding Officer Schultz's death, we conclude that there was a sufficient nexus between the incident—the rescue undertaken by Officer Schultz—and his duties as a public safety officer to support an award of compensation.

{21} The arising out of prong is satisfied here by the critical nature of the incident. The extent of a **police** officer's duty to protect and serve the public is not limited to crime prevention. *See Spieler*, 62 S.W.3d at 459–60 (“[T]he interdiction of felonies does not fully define the duty of **police** officers in providing protection to members of the public who need assistance, wherever they find them.”). Rendering assistance to a child in danger of drowning is among those risks to which common sense dictates that an on-duty officer faced with a similar circumstance would be expected to respond. Furthermore, we note that Officer Schultz was not prohibited by Employer regulations from undertaking the rescue in his official capacity. The regulations caution officers against acting outside their jurisdiction but state that an officer can initiate extra-jurisdictional action in “circumstances so serious that immediate action must be taken.” No one can seriously dispute that the circumstances giving rise to Officer Schultz's death required immediate action.

{22} Employer argues, however, that Officer Schultz's death was not in the course of his employment because he was acting outside the scope of his training in undertaking a swift-water rescue. Under the circumstances in this case, we reject Employer's argument to the extent that it asks this Court to second-guess Officer Schultz's decision to enter the water in order to save the child. There may be some

circumstances in which a **police** officer's response to an emergency would be so incongruent with the expected response of a similarly situated on-duty officer as to remove the officer's actions from his or her “course of employment.” This could be evidenced, in part, by deviations from **police** department regulations, training, or other specific instructions. But Officer Schultz's response does not fall into that category. Employer points us to no regulation that prohibits its **police** officers from taking action beyond their specific skill set. Rather, the regulations invest officers with discretion in their response to incidents and directs officers to “[a]ct promptly with energy, firmness, and decisiveness at ... any situation requiring **police** attention.”

{23} It is also apparent that for Officer Schultz to have taken any other action than to attempt to personally rescue the child would have been the equivalent of taking no action at all. Simply stated, notifying the proper authorities, especially dispatching persons with swift-water rescue skills, would likely have resulted in the child's death. Although there was conflicting testimony as to whether Officer Schultz could have been subject to discipline for not taking action that day, we note that the regulations consider “[c]owardice or failure to perform **police** duties because of danger” a dereliction of duty. Thus, we are confident that Officer Schultz exercised the same degree of discretion and decisiveness as would a similarly situated on-duty officer under the circumstances, despite his lack of swift-water rescue training.

*876 {24} The WCJ focused on three key factors in concluding that Officer Schultz's death did not arise out of and in the course of his employment. The WCJ found it determinative that Officer Schultz had requested the day off and was not on call, that the accident was outside his jurisdiction, and that Officer Schultz was not in an area where his employment required him to be because the purpose of the trip was purely personal. We disagree that these factors preclude compensation in this case.

317 P.3d 866, 2014 -NMCA- 019
(Cite as: 317 P.3d 866)

[15][16][17] {25} First, although some courts have utilized an officer's "on-call" status as a basis for awarding compensation, Officer Schultz's status as not "on-call" is not determinative of the issue before us. Society generally expects an off-duty officer to act in circumstances reasonably calling for immediate **police** assistance when such matters come to his or her attention, unless specifically instructed to refrain from taking the action that led to the injury. See *Stebens v. K-Mart Corp.*, 1983-NMCA-044, ¶ 5, 99 N.M. 720, 663 P.2d 379 ("The fact that a worker, at the time of injury, was disobeying an instruction from his employer may, under some circumstances, deprive him of the right to compensation[.]"); see also *Tighe*, 877 P.2d at 1035 (stating that "**police**[officers] may be at any moment 'called' into duty by events taking place in [their] presence, whether or not [they] are technically off duty" (quoting 1 Arthur Larson, *Larson's Workmen's Compensation Law* § 16.17 (1993))). Depending on the circumstances, the officer's responsibility to act may involve the off-duty officer personally intervening or simply taking action to notify the proper authorities. See *Spieler*, 62 S.W.3d at 458 (awarding compensation where an off-duty officer was injured while notifying the authorities of a car accident). Regardless of the officer's chosen means of intervening, an off-duty officer's decision to act in emergency matters coming to his or her attention, as opposed to the officer being dispatched in accordance with "on-call" status, is not ultimately conditioned on whether the officer was expected to be available to the employer for other emergencies and, thus, neither should the officer's ability to recover when the officer is injured in the course of personally initiating such action. Instead, the relevant inquiry when an off-duty officer chooses to respond to such an incident is that stated above—whether there is a nexus between the circumstances surrounding the officer's decision to act and the duties of the officer's employment.

[18] {26} Second, it is not determinative that the accident occurred outside Officer Schultz's jurisdiction. See *Jordan*, 699 S.W.2d 124; *Luketic*,

134 Ohio App.3d 217, 730 N.E.2d 1006; *City of Pittsburgh*, 108 Pa.Cmwlth. 477, 529 A.2d 1196. Employer has not directed us to a case in which this fact has been material to the court's determination. Arguably, whether a **police** officer is injured while acting outside his or her jurisdiction could be material when the **police** officer is acting in a law enforcement capacity without authorization to do so. See *Cooper*, 696 N.E.2d at 648 ("[G]iven [the worker's] statutory responsibility as a peace officer to stop crime, his 'place of employment' for law enforcement purposes reasonably could be viewed as anywhere he lawfully exercises his authority."). But that was not the case here. Officer Schultz took action in an emergency to rescue a child in need of immediate assistance and was authorized to do so by Employer's policies permitting off-duty and extra-jurisdictional action in "circumstances so serious that immediate action must be taken."

{27} Third, Officer Schultz's reason for being at the river and whether he had a personal motivation to undertake the rescue as a chaperone on the trip is similarly immaterial. See *Lane*, 178 P.3d at 521, 523 (noting the officer's testimony that he would have attempted to rescue his friends despite his employment as a **police** officer and concluding, "[W]e decline to hold that when an employee is injured under such circumstances, that injury becomes noncompensable merely because the worker may have taken the same action in the absence of the employment-related duty"). While we agree with the WCJ that other chaperones may have taken the same action as Officer Schultz, the fact is that it was Officer Schultz who undertook the rescue. It is not dispositive that an off-duty **police** officer may have both an official and a personal motivation in taking the action that led to the injury. See *id.* at 523.

{28} The WCJ's conclusion on this point highlights the inadequacy of strictly applying *877 traditional workers' compensation factors to the exceptional duties of **police** officers. The WCJ stated that being a **police** officer may "bring with it a

317 P.3d 866, 2014 -NMCA- 019
(Cite as: 317 P.3d 866)

higher duty to act in an emergency ... but that does not convert to one's being at work or in any place where their employer's business requires their presence anytime they take some emergency action." However, rarely will an off-duty officer facing an emergency be simultaneously in a location where "their employer's business requires their presence."

FN3 It is the nature of emergencies that they are often unanticipated, and it is the nature of **police** work to render assistance when and where the need arises. Strict application of this traditional analysis would thus defeat recovery in nearly every instance, and it would disregard the expectations of **police** departments and the public that some circumstances will call for an off-duty **police** officer's response regardless of why the officer is in the best position to provide the assistance.

FN3. It is unclear whether the WCJ's use of this phrase was intended to reference a separate analysis under NMSA 1978, Section 52-1-19 (1987). To the extent that it does, we emphasize that the circumstances surrounding Officer Schultz's death did not warrant a "going-and-coming" analysis. *Ramirez*, 2000-NMCA-011, ¶ 7, 128 N.M. 601, 995 P.2d 1043 (explaining that "workers injured while traveling between home and work are generally not eligible for compensation" (internal quotation marks and citation omitted)). Furthermore, New Mexico courts have long considered the phrases "while at work" and "in the course of employment" as synonymous, and we have already concluded that Officer Schultz's death occurred in the course of his employment. See *Whitehurst v. Rainbo Baking Co.*, 1962-NMSC-126, ¶ 20, 70 N.M. 468, 374 P.2d 849; *McKinney v. Dorlac*, 1944-NMSC-017, ¶ 12, 48 N.M. 149, 146 P.2d 867.

[19] {29} We therefore hold that Officer Schultz's death arose out of and in the course of his employment as an officer for Employer. If it is our

expectation as a society that **police** officers put themselves in harm's way, sometimes irrespective of their on-duty status, then it should also be our expectation that such officers be compensated when they are injured in the course of doing so. See *Davis*, 50 Fed.Cl. at 208 ("The grave physical risks facing public safety officers are imminent whenever an officer is under a duty to take actions to protect the public.... [T]he potential for physical risk pervades their daily lives, both on and off the clock. Placing officers under such a continuous duty with its inherent risks confers a significant benefit on society."). We caution, however, that our conclusion should not be construed as holding that all off-duty **police** officer injuries are compensable. We agree with the court in *Jordan*, which stated, "In a sense, a **police** officer is never off-duty.... That does not mean, however, that a **police** officer is covered by the [w]orker[s] c[ompensation] [l]aw at all times regardless of the circumstances of the injury. There must be a correlation between the injury sustained and the employment." 699 S.W.2d at 126 (citations omitted). For instance, in appropriate circumstances, the traditional application of our "going-and-coming" rule will be the proper standard for analyzing the compensability of an off-duty officer's injury. See § 52-1-19; see, e.g., *Kunze v. Columbus Police Dep't*, 74 Ohio App.3d 742, 600 N.E.2d 697, 699-700 (1991) (holding that an off-duty **police** officer is not entitled to **police** officer exception to the "going-and-coming" rule when they are involved in an accident driving home). Similarly, our conclusion does not affect this Court's previous holding in *Meeks v. Eddy County Sheriff's Department*, 1994-NMCA-134, ¶ 14, 118 N.M. 643, 884 P.2d 534 (holding that the **police** officer was not entitled to the workers' compensation benefits "for suffering an injury from self-directed, off-duty athletic activity"). Instead, our holding is limited to emergency circumstances to which an off-duty law enforcement officer responds, providing those circumstances are the kind to which an on-duty officer would respond.

CONCLUSION

317 P.3d 866, 2014 -NMCA- 019
(Cite as: 317 P.3d 866)

{30} For the foregoing reasons, we reverse the WCJ's judgment and remand for proceedings consistent with this Opinion.

{31} IT IS SO ORDERED.

WE CONCUR: JONATHAN B. SUTIN, Judge, and
J. MILES HANISEE, Judge.

N.M.App.,2013.
Schultz ex rel. Schultz v. Pojoaque Tribal Police
Dept.
317 P.3d 866, 2014 -NMCA- 019

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