IN THE NEW MEXICO COURT OF APPEALS

NOE RODRIGUEZ,

Worker/Appellant

v.

Ct. App. No. 33,104
WCA No. 13-00562

BRAND WEST DAIRY, uninsured employer and **UNINSURED EMPOYER'S FUND,** Statutory Payer,

Employer/Insurer/Appellees

On Appeal From The Workers' Compensation Administration,
Workers' Compensation Judge Victor Lopez

REPLY BRIEF OF APPELLANT NOE RODRIGUEZ,

Gail Evans
Maria Martinez Sanchez
New Mexico Center on Law and Poverty
924 Park Ave. SW, Suite C
Albuquerque, NM 87102
Phone: (505) 255-2840

Counsel for Appellant

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

New Mexico Cases

State Constitutional and Statutory Provisions

INTRODUCTION TO THE REPLY

This appeal challenges the dismissal of Appellant's workers' compensation claim by the Workers' Compensation Judge (WCJ) who refused to give effect to the district court judgment holding unconstitutional the farm and ranch laborer exclusion contained in NMSA 1978, § 52-1-6 (A)—a judgment that was subsequently affirmed by this Court. *See* citations to the *Griego* cases in BIC at 1 & 3. Appellant's Brief in Chief presented two arguments requiring reversal of this case: (1) that those prior rulings apply to this case, BIC at 6; and (2) that the record in this case demands a definitive ruling by this Court that the exclusion is unconstitutional and must be applied in this case and to all claims for benefits brought subsequent to the *Griego* ruling. BIC at 8.

Appellee, Uninsured Employers' Fund ("UEF"),[1] contends in response that the prior rulings in the *Griego* case are not binding on it, AB at 7, and "invites this Court to decide the constitutional issue, and if need be, its application." AB at 15. In the process of its arguments, the Answer Brief makes several fundamental errors that demonstrate the failure of its approach. First, Appellee erroneously seeks to disconnect itself from the Workers' Compensation Administration ("WCA"), and thereby avoid the effect of the *Griego* judgment against the WCA. *See* Point I, *infra.* Second, Appellee mischaracterizes the effect of this Court's

[1] The co-defendant uninsured employer, Brand West Dairy, never appeared in this matter.

Memorandum Opinion in *Griego*. *See* Point II, *infra*. Third, and finally, while inviting the Court to render a ruling on the constitutional question, Appellee misperceives and misapplies New Mexico retrospectivity /prospectivity principles. *See* Point III, *infra*.

I. APPELLEE ERRONEOUSLY SEEKS TO DISCONNECT ITSELF FROM THE WORKERS' COMPENSATION ADMINISTRATION AND THEREBY AVOID THE EFFECT OF THE *GRIEGO* JUDGMENT AGAINST THE WCA

The UEF insists that it is "a separate entity apart and separate from the WCA," AB at 8, and that "it should not be bound by the *Griego* ruling" against the WCA. *Id.* at 12. Ignoring the key legislative provisions that place the responsibility for the operation and administration of the UEF within the WCA, and relying on the sole fact that the financial resources for the UEF are maintained in a separate state treasury fund, Appellee contends that this segregation of its funding allows it to rely on the farm and ranch laborer exclusion in workers' compensation claims brought before WCJs within the Workers' Compensation Administration system, even though that provision has been declared unconstitutional.

Even a cursory review of the statutory scheme governing workers compensation cases confirms that the opposite is true—i.e., that the UEF is inextricably linked to, and under the authority of, the WCA. The UEF is one of several divisions within the agency over which the director of the WCA has

authority. *See* NMSA 1978, § 52-1-9.1(A). Furthermore, § 52-1-9.1 (C) expressly provides that money in the UEF "is appropriated to the workers' compensation administration to pay...benefits to a person entitled to the benefits when that person's employer has failed to maintain workers' compensation coverage..." Similarly, § 52-1-9.1 (D) authorizes the director of the WCA to allow for payments to a person from the UEF if the individual is injured in New Mexico and would otherwise be covered by the Act, and § 52-1-9.1 (F) bestows on the director of the WCA the responsibility to approve the adjusting company responsible for discharging the UEF's obligations.

Even the case upon which the UEF relies, *Johnson v. Hoyt & Son Tree Service and the New Mexico Uninsured Employers Fund*, 2007-NMCA-072, 141 N.M. 849, 161 P.3d 894, belies the UEF position. In *Johnson*, this Court specifically recognized that "after the UEF has paid benefits, the *WCA director* or a [workers' compensation judge] must order the employer to reimburse the UEF for all benefits paid..." (emphasis added), thus acknowledging the critical role the UEF plays in the proper determination of workers' compensation claims within the WCA, and the importance that it—like all other arms of the WCA—perform its functions consistent with the Act, as properly interpreted by our courts. *Johnson*, 2007-NMCA-072, ¶ 11.

Thus, contrary to Appellee's assertion that there is a "bright line" separating the UEF and the WCA, AB at 8, quite the opposite is true. It is obvious from a fair reading of the entire Workers' Compensation Act that the director of the WCA possesses broad authority over the UEF and that the UEF is a division of the WCA. Indeed, the *sole* purpose of the UEF is to provide a source of compensation under the Act when an employer illegally fails to provide workers' compensation to its employees. The UEF is inextricably joined with the WCA. It is, thus, bound by the *Griego* ruling which means it can no longer rely on the farm and ranch laborer exclusion as a defense to liability for payment of an otherwise compensable claim under the Act.

II. APPELLEE MISCHARACTERIZES THE EFFECT OF THIS COURT'S MEMORANDUM OPINION IN *GRIEGO*

This Court in *Griego* noted that because "the three individual plaintiffs each settled their claims" and because "the issues appealed [by the WCA in that case] relate to the district court's jurisdiction over and rulings relevant *to the individual plaintiffs,* we conclude that these issues are moot and dismiss the appeal." *Griego v. New Mexico Workers' Compensation Admin.,* Ct. App. No. 32,120, Memorandum Opinion, filed Nov. 25, 2013 at ¶ 1 (emphasis added). Appellee contends that given that there was resolution of the jurisdictional issue and rulings relevant to the individual plaintiffs, everything that follows in that opinion "are 'dicta' which is neither binding on the UEF in the case at bar, nor for that matter

binding on farm/ranch employees for claims filed after the *Griego* decision." AB at 13.

What Appellee fails to recognize is that this Court's declaration of mootness and its dismissal *only* related to the "treatment of the individual plaintiffs' claims." The other rulings relied upon by Appellants here deal with claims of the remaining "organizational plaintiffs," to which the declaration of unconstitutionality certainly extends. Critical to that claim with respect to the remaining organizational plaintiffs, the Court made clear that its mootness determination does not apply to the organizational plaintiffs, ruling explicitly:

> [S]ince Appellants failed to appeal the district court's ruling on constitutionality or challenge the district court's jurisdiction over the organizational plaintiffs, *the district court's ruling on this issue stands.*

Griego Mem. Op. at ¶ 9 (emphasis added). Similarly, on the non-moot constitutional issue, this Court went further, and gave effect to the district court's burial of *Cueto v. Stahmann Farms, Inc.,* 1980-NMCA-036, 94 N.M. 223, 608 P.2d 535:

> To the extent Appellants maintain that 'the district court's ruling [that the exclusion is unconstitutional invited] chaos' because it appears to conflict with an earlier Court of Appeals holding that the workers' compensation judges will have to choose whether to follow the district court's order or other case law, *we disagree.*

Griego Mem. Op. at ¶ 10 (emphasis added). This Court emphasized again on that point, "[i]f Appellants believed that the district court ruled contrary to established

binding precedent, their remedy was to seek review of that decision in this Court. They did not," and as a result "Appellants cannot now escape the effect of unchallenged parts of the district court's decision." *Id.* at ¶ 11.

Thus, the ruling on the unconstitutionality of the exclusion stands, as does the district court's rejection of *Cueto*. Neither are affected by the mootness and dismissal of the jurisdictional claims relative to the individual plaintiffs who settled their claims.

III. A RULING FINDING THE FARM AND RANCH LABORER EXCLUSION UNCONSTITUTIONAL SHOULD BE GIVEN A MODIFIED PROSPECTIVE APPLICATION

After its unsuccessful attempt to avoid the final resolution by the district court that the farm and ranch laborers exclusion is unconstitutional, Appellee, invites an additional resolution of that question. Anticipating a further determination of unconstitutionality by this Court, Appellee urges a "purely prospective" application of what it characterizes as entirely "new" doctrine. *See* AB at 15-27. In doing so, Appellee properly articulates the framework for retrospective/prospective analysis, but then misperceives that body of law and errs in how those principles apply in the present circumstances.

A. The New Mexico Retrospectivity/Prospectivity Framework

As acknowledged by Appellee, New Mexico courts start with an established presumption that "a new rule adopted by a judicial decision in a civil case will

operate retroactively", *Padilla v. Wall Colmonoy Corp,* 2006-NMCA-137, ¶ 12, 140 N.M. 630, 145 P.3d 110, with application to causes of action accruing before the announcement of a new rule; to the case at bar pending before the court for decision; to similar pending cases, and to cases arising in the future after announcement of the new rule. The reason for that presumption and its strength is "[b]ecause of the compelling force of the desirability of treating similarly situated parties alike." *Beavers v. Johnson Controls World Servs., Inc.*, 1994-NMSC-094, ¶ 22, 118 N.M. 391, 881 P.2d 1376. This strong presumption may be overcome only if the following three *Beavers* guidelines or factors provide sufficient justification for avoiding retroactive application:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.
>
> Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and, effect, and whether retrospective operation will further or retard its operation."
>
> Finally, we have weighed the inequity imposed by retroactive application, for "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship' by a holding of nonretroactivity."

Id. at ¶ 23 (citations and emphasis omitted).

B. Appellee's Misperception and Misapplication of the Foregoing Principles

First, and foremost Appellee erroneously contends that the three-factor analysis adopted by our Supreme Court in *Beavers* comes into play in the present context if this Court were to resolve anew the unconstitutional principle that had been resolved by the district court's *Griego* judgment. The unconstitutional ruling in *Griego* against the WCA occurred in December, 2011, a declaration that was fully incorporated in this Court's Final Order and Judgment of March 3, 2012. Thus the invalidity of the farm and ranch laborer exclusion was clear more than a year and a half prior to the docketing of this case in this Court. At this point, an independent reaffirmation of the district court's prior judgment by a further judgment of this Court would not be the kind of "overruling clear past precedent" or the "deciding an issue of first impression whose resolution was not clearly foreshadowed," from which the *Beavers* factors were designed to shield unsuspecting defendants. Here, the entire workers' compensation community—the WCA, all of its constituent parts, and the employer community which is subject to WCA control—had ample notice that the "old" law of farm and ranch laborer exclusion was not to be relied upon. Indeed, since the district court judgment, many prudent employers have expanded their workers' compensation insurance to cover workers previously deemed subject to the exclusion. And those that have

refused to do so do not merit the protection that might otherwise be afforded by the application of pure prospectivity to a further unconstitutional ruling of this Court.

Second, even if the *Beavers* factors were applicable to a further, additional holding by this Court that the exclusion is unconstitutional, a fair application of those guidelines would result in a holding that the unconstitutional ruling should be applied retroactively or as this court has called it, with "modified prospectivity". More specifically, Appellant requests that this Court utilize a modified prospective approach, applying a ruling of unconstitutionality to: 1) the case before the Court; 2) pending claims of farm and ranch laborers; and 3) future claims of farm and ranch laborers.

Our Supreme Court has demonstrated a willingness to be creative in its application of modified prospectivity. In *Scott v. Rizzo*, 1981-NMSC-021, 96 N.M. 682, 634 P. 2d 1234, the court was tasked with deciding to which cases the newly adopted principal of comparative negligence would apply. It concluded that the new legal principal would be applied to the case before the court, those cases in which trial would commence after the date on which the opinion became final, and any case pending in the appellate courts at the time of the decision and in which the issue had been preserved.

In *Boudar v. Buenette*, 1987-NMSC-077,106 N.M. 279, 742 P. 2d 491, the Supreme Court adopted a modified prospective application of the newly-defined

public policy exception to New Mexico's termination-at-will rule. The Court ruled that the parties in cases filed before the date in which the new rule emerged must be allowed to rely on the new rule, so long as trial of the case had not been completed. The court reasoned that "plaintiffs asserting a cause of action based on the public policy exception should not be denied access to the courts on this issue simply because of the date on which their attorneys reach the courthouse with their clients' complaints." *Boudar*, 1987-NMSC-077, ¶ 4.

Finally, and most recently, in *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, 149 N.M. 162, 245 P.3d 1214, although "detail[ing] for the first time the technical requirements for a valid rejection of UM/UIM coverage in an amount equal to liability limits," *id.* ¶ 25, the Court applied the three factor test of *Beavers* and held that "[o]n balance, the equities do not favor any form of prospective-only application." *Id.* ¶ 29.

As in *Scott*, *Boudar*, and *Jordan,* either some form of retroactive or modified prospective application is appropriate in the current case. Those farm and ranch laborers who have cases pending either in the Workers' Compensation Administration or the Court of Appeals should be allowed to avail themselves of the ruling that the farm and ranch labor exclusion is unconstitutional. An analysis of the *Beavers* factors leads to the same conclusion here—that some form of retrospectivity or modified prospectivity should apply with respect to any further

ruling by this Court that the exclusion is unconstitutional. The first factor requires "an evaluation of whether a new principle of law has been announced by overruling past precedent and an evaluation of the extent to which the parties or others may have relied on the state of the law before the law changing decision was issued." *Padilla,* 2006-NMCA-137, ¶ 14. As previously explained, the state of the law had been changed more than a year and a half before this case was docketed in this Court, meaning that, as was the case in *Beavers*, *see* 1994-NMSC-094, ¶¶ 31-33, there was no basis for legitimate reliance on the old rule, and indeed many prudent employers had already obtained the necessary insurance coverage in the wake of the *Griego* judgment.

With respect to the second factor—"whether retrospective operation will further or retard the operation of the rule considering the new rule's history, purpose and effect," *Padilla,* 2006-NMCA-137, ¶ 20—Appellee here advances the very same justification that was rejected in *Padilla*. Appellee here asserts that the new rule (i.e. the absence of the exclusion) "will thwart . . . the quick and efficient delivery of benefits, [by expanding] the number of farm/ranch claims that could efficiently be resolved." AB at 23. That is the precise argument rejected in *Padilla* as "beg[ging] the question" to be resolved in the case. *Padilla*, 2006-NMCA-137, ¶ 20.

With respect to the third factor—the court must consider "the inequity imposed by retroactive application", *Jordan,* 2010-NMSC-051, ¶ 29—the *Jordan* court rejected the insurer's argument that the reformation of insurance policies to provide statutorily authorized coverage "will necessarily result in an unplanned cost to insurers." *Id.* In doing so, the court reasoned in a way that is particularly applicable in the present context:

> On balance, we deem it more equitable to let the financial detriments be borne by insurers, who were in a better position to ensure meaningful compliance with the law, than to let the burdens fall on non-expert insureds, who are the Legislature's intended beneficiaries.
>
> *Id.*

Furthermore, the court in *Beavers* points out that the inequity analysis should not solely focus on the inequity imposed on a litigant against whom the retroactivity is targeted, "but also the potential unfairness to other claimants who have been victimized by conduct occurring before the law-changing decision…". *Beavers*, 1194-NMSC-094, ¶ 40. Thus, this Court should consider the fact that farm and ranch laborers in New Mexico are amongst the poorest of the working poor in New Mexico [*see* RP 46, 82 (¶144), 83 (¶150)] and likely some of the least capable of paying for the medical attention they need when injured on the job.

Thus, under any fair application of the *Beavers* factors, none of them standing alone, nor all of them in the aggregate, merit rejection of a modified

retrospective or modified prospective approach to whatever additional unconstitutional ruling may issue from this Court.

Finally, there is no crush of cases from which the UEF or the employers of this state need to be protected. Contrary to the wild speculations of Appellee, AB at 23, to the best of Appellant's counsel's knowledge, there are few pending workers' compensation cases involving farm and ranch laborers whose employers did not have workers' compensation insurance. It is only staff counsel at the New Mexico Center on Law and Poverty (Appellant's counsel herein) who are, on a regular basis, currently representing injured farm and ranch workers whose employers did not have the requisite insurance. At the present time the Center only has four open cases, two of which are currently in the Workers' Compensation Administration and two of which (including this one) are in the Court of Appeals. Thus, a flood of farm and ranch laborer cases, and the parade of horribles that Appellee suggests will occur from any retrospective holding of this Court is fanciful in the extreme.

What is required, however, is that the WCA eliminate the exclusion defense in all WCA cases involving on-the-job injuries of farm and ranch laborers, and through the necessary directives of the WCA, that all farm and ranch employers, obtain the requisite insurance under the law to cover those workers on the same basis as other workers.

CONCLUSION

For the foregoing reasons, and those put forward in his Brief in Chief, Appellant urges this Court to:

1. Declare the farm and ranch laborer exclusion contained in NMSA 1978, § 52-1-6(A) unconstitutional in violation of the equal protection clause of Art. II, § 18 of the New Mexico Constitution;

2. Reverse the decision of the workers' compensation judge, and remand Appellant's case for a decision on the merits of his compensation claim without any consideration or application of the unconstitutional "farm and ranch laborer" exclusion; and

3. Direct the WCA and all its components, including its workers' compensation judges and those responsible for the operation and administration of the UEF, to carry out their functions without any application of the invalid exclusion.

Respectfully submitted,

Gail Evans
Maria Martinez Sanchez
N.M. Center on Law and Poverty
924 Park Ave. SW, Suite C
Albuquerque, NM 87102
Phone: (505) 255-2840
Fax: (505) 255-2840

Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via First Class mail on this 20th day of May, 2014 to:

Richard Crollett
Counsel for Appellee, Uninsured Employers Fund
Workers' Compensation Administration
P.O. Box 27198
Albuquerque, NM 87125

Benjamin J. Doyle and Lynn Tate
Attorneys for Appellee, Brand West Dairy
P.O. Box 9158
Amarillo, TX 79102-9158

Maria Martinez Sanchez