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

APPELLANT NOE RODRIGUEZ'S RESPONSE TO THE AMICUS BRIEF OF CATTLE GROWERS' ASSOC. ET AL.,

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The Cattle Growers' Association, et al. have filed an *amicus* brief which contains four points in support of Appellee. Each of their four points fail for the following reasons:

I. JUDGE HULING'S *GRIEGO* RULING IS BASED ON HER CONSIDERED FINDINGS AND CONCLUSION THAT WERE FULLY SUPPORTED BY THE RECORD BEFORE HER

Amici first contend that because the record in *Griego v. New Mexico Workers' Compensation Admin.,* Ct. App. No. 32,120, Memorandum Opinion, filed Nov. 25, 2013 was largely based on stipulated facts, Judge Huling did not make "any independent findings upon which her decision to declare the farm and ranch worker exception to be unconstitutional were based." Amicus Brief at 2. *Amici* go on to attempt to undermine Judge Huling's decision by taking the stance that the *Griego* case was not "truly litigated by the WCA and Plaintiffs ..." *Id.*

Nothing could be further from the truth. The *Griego* matter was fully litigated over several years and included extensive discovery. Judge Huling gave careful consideration to all of the issues before her, including the stipulations of the parties, and extensive argument, before making her own judgment on both the facts and law presented by the parties. She did not merely adopt all the stipulations or all of the suggestions of the parties. Rather, Judge Huling gave careful and

thoughtful analysis to all that was before her, making the following critical factual findings:

- "The parties stipulated to almost four hundred facts," but the district court focused on a limited number of those stipulated facts which it found "relevant to the issues presented by this matter." [("Record Proper") RP 44]

- "As of 2009, 687, 239 individuals were covered by workers' compensation in New Mexico. The inclusion of farm and ranch laborers would result in approximately 10,000 additional people or 1.4% more workers, being eligible for coverage." [RP 49]

- "If farm and ranch employers were required to provide coverage for these employees, the number of claims to the Workers' Compensation Administration would likely increase by less than one percent." *Id.*

- "It would be administratively feasible to administer the workers' compensation system with the addition of farm and ranch laborers, including those who work for multiple employers, those who work seasonally, and those who are employed by farm labor contractors." *Id.*

- "Approximately twenty-nine percent of New Mexico farm and ranch employers voluntarily provide coverage for their workers. Those agricultural laborers that are already covered do not pose any special difficulties for the Workers' Compensation Administration." *Id.*

- "The wages of injured farm and ranch laborers, for purposes of workers' compensation benefits, can be calculated as those for workers who are currently covered. It is no more difficult to administer workers' compensation to farm and ranch laborers than it is to administer the program to other covered workers, some of whom are migrant and seasonal, work for multiple employers, or are employed by farm labor contractors." *Id.*

- "The range of total costs to the New Mexico agricultural industry for mandatory workers' compensation for farm and ranch laborers would be between five and seven million dollars." [RP 52]

- "One method of evaluating whether an industry can absorb the overhead of a new cost, such as workers' compensation premiums, is to calculate the current profitability based on the sales minus costs." *Id.*

- "Because the agricultural industry has averaged a profit of $667 million over the past eight years, the total cost to the industry would be less than one percent of its annual profit." *Id.*

- "The cost of workers' compensation insurance for the agricultural industry is reasonable and comparable to that of other industries." *Id.*

- "The term 'farm and ranch laborer' has been defined by the New Mexico courts as laborers who work primarily harvesting crops or with animals. Other agricultural workers—those who do not work primarily harvesting crops or with animals—are already required to be covered by workers' compensation. Thus, the Workers' Compensation Administration already deals with cases concerning these other agricultural employees that are covered by workers' compensation, and they do not pose any special difficulties for the Administration." [RP 49-50]

- "Employers of food-sector workers who are required to be covered by workers' compensation, i.e., employers of food-processing workers, are subject to the same market forces as employers of farm and ranch laborers. However, the onion shed worker is required to be covered by workers' compensation but the onion field worker is not." [RP 51]

It is largely on the basis of the foregoing factual record that Judge Huling made the following conclusions:

- "Plaintiffs have demonstrated that the purported difficulty in administration of the additional claims is not supported by the record." [RP 59-60]

- In rejecting Defendant's argument that the government had a legitimate purpose in protecting an important state industry from additional overhead costs, Judge Huling found: "Agriculture accounts for only 1.45% of the New Mexico's total state production. The industry averages over $667 million in profit per year, generating a net profit in 2010 of over one billion dollars. Of the 20,000 farms in New Mexico, only nine percent have enough employees

to require coverage. Eighty-three percent of farm and ranch laborers are employed by these farms. In the last twenty years, the dairy industry has changed, becoming more industrialized, and New Mexico currently has the largest dairies in the country. The estimate cost to the agricultural industry for providing workers compensation is between five and seven million dollars; these figures represent less than one percent of the industry's annual profit. [RP 61]

- "The distinction made by Section 52-1-6(A) between agricultural workers in the field and those in the shed is artificial and irrelevant, unrelated to the goal of lowering employer costs." *Id.*

- "[T]he agricultural industry is the only industry allowed to shift the burden of its injured workers from the industry to taxpayers. Determinatively the exclusion does so in an arbitrary manner, creating an artificial distinction that lacks a reasonable basis in fact." [RP 62]

- "Although the legislative intent of the farm and ranch exclusion, protection of the agricultural industry, is a legitimate goal, the exclusion is an arbitrary classification plainly at odds with the articulated purpose of the Act." *Id.*

Furthermore, *Amici's* argument, if accepted, would leave no venue for agricultural workers to develop a record to substantiate a constitutional challenge to the Workers' Compensation Act ("Act"). *Amici* first argues that the development of a factual record on a constitutional issue is inappropriate in a workers' compensation court because workers' compensation judges lack authority over constitutional questions, *Amicus* brief at 1. They proceed to argue that a district court is also an inappropriate venue because district courts do not have jurisdiction over workers' compensation complaints. *Amicus* brief at 4. So where do *Amici* propose that a worker develop a record? By these standards a worker is

completely foreclosed from doing so, and thus, from making a strong constitutional challenge.

There is no question that the constitutional question was fully and fairly litigated by the parties in *Griego*, and the district court performed its duty to weigh and consider the presented stipulations, *see Griego* Amended Opinion and Order at RP 44-53 (delineating only a portion of the stipulated facts as "relevant to the issues presented,") and RP 53- 62 (engaging in an independent analysis of those relevant facts of record to fully resolve the factual and legal questions presented to it.)

II. JUDGE HULING'S *GRIEGO* RULING, FINALIZED BY THIS COURT'S DECISION ON THE WCA'S APPEAL FROM THAT JUDGMENT, TO WHICH THE UEF WAS A PARTY, IS DISPOSITIVE HERE

Amici make three arguments in support of their position that the *Griego* ruling is not dispositive: (1)"[T]he Employer and UEF were not parties to the *Greigo* litigation and, therefore, are not bound by that decision," *Amicus* Brief at 3; (2) Because Judge Huling, as a District Court Judge, cannot overrule *Cueto v. Stahmann Farms, Inc.,* 1980-NMCA-036, 94 N.M. 223, 608 P.2d 535, that case is still good law and binding on the parties, *Id.* at 5; and (3) Because this Court's Memorandum Opinion refused to expressly "address the constitutional question" it did not overturn *Cueto. Id.* Each of those contentions fail of their own weight.

First, as fully explained in Appellant's briefing, the UEF is an integral part of the WCA and bound by the judgment of the district court, as was the WCJ who chose to ignore the court in this case. *See* BIC at 6-8, and RB at 2-5. Furthermore, while, of course, the Employer affected here was not a party in *Griego*, the essence of that case was to compel the WCA and all of its entities to see that they and all of the employers they regulate follow the law. Furthermore, with full notice of this case, the Employer made a conscious choice not to appear in any of the proceedings either below or in this Court.

Second, as made clear in her judgment, Judge Huling did not overturn *Cueto,* but merely found it inapplicable, RP 59, and as Appellant has fully explained in his briefs, the casual equal protection comment in *Cueto* was neither briefed nor argued there, and was not essential to the non-constitutional holding upon which that case turned, thus it is not binding precedent. *See* BIC at 7; RB at 5-6.

Third, there was no need for this Court in its *Griego* Memorandum Opinion to expressly rule on the constitutional question, since the district court did rule on the question and the WCA failed to seek review of that question. [1] Thus, the ruling

[1] In its brief, *Amici* points to the following statement from this Court's Memorandum Opinion in *Griego* for the proposition that *Cueto* is still good law: "As [the constitutional] issue is not before us, we neither examine nor draw any conclusions about it." However, *Amici* fails to include the subsequent critical sentence which states that "having chosen to focus their appeal only on the

of the district court that Section 52-1-6 (A) is unconstitutional and unenforceable is a final judgment which governs the WCA, all of its entities, and its regulated employers. *See* BIC at 6-8.

III. THE FARM AND RANCH EXCLUSION IS PATENTLY UNCONSTITUTIONAL

The WCJ in this case fully understood that he had no authority to rule on the constitutional question, [RP 204, ¶ 11], and therefore allowed the full development of that issue by the district judge in *Griego* to be made a part of the record in this case, [RP 44-139], without any objection from the Appellee. Given that reality, Appellee ultimately took no position on the constitutional question in this Court, but instead sought a fully prospective ruling by this Court on the constitutional question.

Ignoring much of that reality—including the independent substantial findings of fact and fulsome analysis of those facts by the district court in *Griego*—*Amici* erroneously contend that "Judge Huling did not make any factual findings to support her decision in *Griego*..." *Amicus* Brief at 11. *Amici* then remarkably concludes that:

> Other than the stipulations entered into by the WCA and the plaintiffs in the *Griego* Litigation . . . the record below is devoid of a factual basis for this

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jurisdictional and authority issues discussed above, [ ] Appellants cannot now escape the effect of unchallenged parts of the district court's decision." *Griego v. New Mexico Workers' Compensation Admin.*, Ct. App. No. 32,120, Memorandum Opinion, filed Nov. 25, 2013 at 7.

> Court to conclude that Section 52-1-6(A) and its exclusion of farm and ranch workers from coverage under the Act is not rationally related to a legitimate governmental purpose.

Id. at 10-11.

As noted above, *Amici* ignore Judge Huling's extensive legal analysis of the facts she found relevant to establish that farm and ranch laborers are similarly situated to other workers in New Mexico and to the asserted governmental purposes that *Amici* concede are at issue here—the proper administration of the workers' compensation system and protection of the economically important agricultural industry. See Point I, *supra.* With respect to the former purpose of the legislation, Judge Huling concluded that "Plaintiffs have demonstrated that the purported difficulty in administration of the additional claims is not supported by the record." *See* RP 59-60 and Point I, *supra* (detailing the factual predicates for that conclusion).[2]

With respect to the "legitimate interest in lowering employer costs, particularly for smaller farms," Judge Huling concluded the distinction worked by the statute which "distinguishes between workers who pick chile in the fields and

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[2] Amicus contend that many agricultural workers are seasonal and/or transient, which will make administering workers' compensation to them difficult. However, *Amici* fail to acknowledge that this argument was raised in *Griego* and ultimately rejected. *See* RP 59. *Amici* further suggests that providing workers' compensation benefits to undocumented farm workers would be overly burdensome and difficult but fails to acknowledge New Mexico's policy that undocumented workers are entitled to workers' compensation benefits. *See Gonzales v. Performance Painting, Inc.*, 2013-NMSC-021, ¶ 42, 303 P.3d 802.

those that pack it" or the "the onion shed worker [who] is required to be covered by workers' compensation but the onion field worker is not," is a distinction that is "artificial and irrelevant, unrelated to the goal of lowering employer costs," and is therefore an "arbitrary" distinction. [RP 61] Judge Huling also concluded that this arbitrary classification [is] plainly at odds with the articulated purpose of the Act which is "to provide a humanitarian and economical system of compensation for injured workers" [RP 62]

Thus, contrary to the position of the *Amici*—and as virtually conceded by Appellee—the findings and conclusions made by the *Griego* district court are heavily supported by the record in that case, and establish that the farm and ranch worker exclusion is unconstitutional. That ruling became final by virtue of the relevant rulings in this Court's Memorandum Opinion on appeal from that judgment. Furthermore, the extensive record in that case was properly included in the record of this case, and provides an ample record for this Court to independently reaffirm the final judgment in *Griego.*

IV. THE PURE PROSPECTIVITY ARGUMENT PRESENTED BY APPELLEE AND ITS SUPPORTING *AMICI* MISPERCEIVES AND MISAPPLIES THE NEW MEXICO LAW ON THE SUBJECT

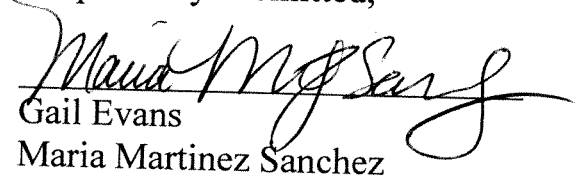
Finally, the *Amicus* Brief "agrees with the UEF's position . . . [that] [s]hould this Court declare Section 52-1-6(A) to be unconstitutional, . . . the decision should only be applied prospectively..." *Amicus* Brief at 15. In doing so *Amici* merely

reiterate Appellee's argument. Appellant has already demonstrated that Appellee's argument represents both a misperception and misapplication of the New Mexico law on the subject, *see* RB at 8-13, and that demonstration applies with equal force to defeat *Amici's* similar attempt to garner for Appellee and the Employer the protection of pure prospectivity where it is not warranted. *See* RB at 8-13.

CONCLUSON

For the foregoing reasons, and for the reasons articulated in Appellant's previously filed Briefs, the relief requested by *Amici* should be denied, along with the relief requested by Appellee, and that requested by Appellant in his Brief and Chief and Reply Brief should be granted.

Respectfully submitted,



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