COPY

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

MAY 02 2016

RICKY D. CASE,

Worker-Appellee/Cross-Appellant,

vs. **WCA No. 10-53399**
COA No. 34,934

HANNA PLUMBING & HEATING COMPANY, INC. AND MECHANICAL CONTRACTORS ASSOCIATION OF NEW MEXICO, INC. WORKERS' COMPENSATION GROUP FUND,

Employer/Insurer-Appellants/Cross-Appellees.

REPLY BRIEF OF EMPLOYER/INSURER-APPELLANTS HANNA PLUMBING & HEATING COMPANY, INC. MECHANICAL CONTRACTORS ASSOCIATION OF NEW MEXICO, INC. WORKERS' COMPENSATION GROUP FUND

Paul Maestas, Esq.
Maestas & Suggett, P.C.
Sun Valley Commercial Center
316 Osuna Road, NE, Suite 103
Albuquerque, New Mexico 87107-5950
Telephone: (505) 247-8100
Facsimile: (505) 247-8125
E-Mail: paul@maestasandsuggett.com
Attorneys for Employer/Insurer Hanna Plumbing & Heating Company, Inc. and Mechanical Contractors Association of New Mexico, Inc. Workers' Compensation Group Fund

TABLE OF CONTENTS

I. Argument 1

A. Introduction 1

B. Standard of Review 3

C. The Fact that Section 52-1-26(C) Does Not Allow a WCJ to Exclude Impairments is Irrelevant 4

D. The Inclusion of Standing and Walking Abilities in the Residual Physical Capacities Modifier is Irrelevant 7

E. The Only Impairment Found by the WCJ not Related to the Worker's Foot Injuries is the Mental Impairment 9

F. Worker did not Respond to Employer/Insurer's Second Issue 9

G. Conclusion 11

II. Prayer for Relief 12

TABLE OF AUTHORITIES

New Mexico Statutes

NMSA 1978, § 52-1-26 (1990) 8

NMSA 1978, § 52-1-26(C) (1990) 2, 4, 5, 6

NMSA 1978, § 52-1-42(A)(2) (1990) 10, 12

NMSA 1978, § 52-5-1 (1990) 3

New Mexico Cases

Baca v. Complete Drywall Co., 2002-NMCA-002, 131 N.M. 413, 38 P.3d 181 .... 2, 3, 5, 7, 9, 10, 11, 12

Garcia v. Mt. Taylor Millwork, Inc., 1989-NMCA-100, 111 N.M. 17, 801 P.3d 87 4

Gurule v. Dicaperl Minerals, Corp., 2006-NMCA-054, 139 N.M. 521, 134 P.3d 808 4

Gutierrez v. Intel Corp., 2009-NMCA-106, 147 N.M. 267, 219 P.3d 524 .... 3, 5, 7, 9, 10, 11, 12

Livingston v. Envtl. Earthscapes, 2013-NMCA-099, ¶ 10, 311 P.3d 1196, 1197 .... 3, 6, 7, 9, 11, 12

Ramirez v. Dawson Prod. Partners, Inc., 2000-NMCA-011, 128 N.M. 601, 995 P.2d 1043 4

I. ARGUMENT

A. Introduction.

Worker Ricky D. Case's Answer Brief ("the Answer Brief"), while long on self-serving and mostly irrelevant rhetoric, provides little, if anything, to support Worker Ricky D. Case's assertion that Workers' Compensation Judge Leonard J. Padilla ("WCJ") did not award duplicate permanent partial disability ("PPD") and scheduled injury ("SI") benefits to the Worker Ricky D. Case ("Worker") for the same foot injuries. Moreover, the Answer Brief fails to address Employer/Insurer-Appellants Hanna Plumbing & Heating Company, Inc. and Mechanical Contractors Association of New Mexico, Inc. Workers' Compensation Group Fund's assertion that the WCJ erred in restarting the 500 week PPD benefit period on January 2, 2014.

The Answer Brief, although 35 pages long and littered with social commentary, only devotes approximately three pages to address the first issue raised by Employer/Insurer-Appellants Hanna Plumbing & Heating Company, Inc. and Mechanical Contractors Association of New Mexico, Inc. Workers' Compensation Group Fund ("Employer/Insurer") in connection with this appeal. None of Worker's arguments are persuasive.

First, without citing to any case law, Worker argues that the WCJ did

not err in including the Worker's foot related impairments in the PPD calculation because NMSA 1978, § 52-1-26(C) (1990) "does not allow the WCJ to exclude any impairments." Answer Brief, p. 31. Worker then argues that, because the WCJ did not consider the loss of use to the Worker's ankles there is no duplication of PPD and SI benefits. Worker's Answer Brief, p. 32.

The Answer Brief then asserts that there is no duplication between PPD and SI benefits, when considering the residual capacities modifier ("RPC"), because NMSA 1978, § 52-1-26.4(C) (1990) allows a WCJ to consider an injured worker's ability to walk, stand and use leg controls in determining the appropriate RPC. Answer Brief, p. 32. Next, the Answer Brief argues that the 3% gait impairment found by the WCJ is really due to "chronic pain" which would be a body as a whole injury so it was correctly used for purposes of the RPC aspect of the PPD calculation. Answer Brief, p. 34. Finally, in addressing the second issue raised by Employer/Insurer's appeal, the Answer Brief merely indicates that "[t]he WCJ's award is fully supported by *Baca v. Complete Drywall Co.*, 2002-NMCA-002, ¶25..." without explaining how *Baca* supports the WCJ's decision in regard to this issue.

Importantly, the Answer Brief does not challenge the core underpinning of Employer/Insurer's appeal i.e. that the WCJ awarded the

Worker both PPD and SI benefits for the same foot injuries. Rather, the Answer Brief focuses its limited arguments that directly address these issues in an attempt to demonstrate that the duplicative awards are allowed notwithstanding this Honorable Court's pronouncements in *Gutierrez v. Intel Corp.*, 2009-NMCA-106, 147 N.M. 267, 219 P.3d 524, *Baca v. Complete Drywall Co.*, 2002-NMCA-002, 131 N.M. 413, 38 P.3d 181 and *Livingston v. Envtl. Earthscapes*, 2013-NMCA-099, ¶ 10, 311 P.3d 1196, 1197. Worker's arguments are unpersuasive.

B. Standard of Review.

Although not entirely clear, the Answer Brief (at least certain portions of it) appears to advocate using the pre-1990 liberal construction analysis in addressing the issues presented by this appeal. This suggestion effectively invites this Court to ignore the clear pronouncement of the New Mexico Legislature in revising the New Mexico Workers' Compensation Act in 1990. NMSA 1978, § 52-5-1 (1990) which states:

> "The workers' benefit system in New Mexico is based on the mutual renunciation of common law rights and defenses by employers and employees alike. Accordingly, the legislature declares that the Workers' Compensation Act and the New Mexico Occupational Disease Disablement Law are not remedial in any sense and are not to be give a broad liberal construction in favor of the claimant or employee on the one hand, nor are the

rights and interests of the employer to be favored over those of the employee on the other hand."

Moreover, this suggestion invites this Court to ignore its own prior pronouncements. "Liberal construction has historically been tempered by attention to legislative intent and balanced against sound reason and policy... (Citation omitted). Fundamental fairness to both the workers and employers has long been a guideline." *Garcia v. Mt. Taylor Millwork, Inc.*, 1989-NMCA-100, ¶ 11, 111 N.M. 17, 19, 801 P.2d 87, 89. *See also Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, ¶ 8, 128 N.M. 601, 605, 995 P.2d 1043, 1047 ("Section 52-5-1 [simply] calls for a balanced and evenhanded construction of the Workers' Compensation Act.") and *Gurule v. Dicaperl Minerals Corp.*, 2006-NMCA-054, ¶ 9, 139 N.M. 521, 524, 134 P.3d 808, 810 ("See Garcia v. Mt. Taylor Millwork, Inc. .... (stating that when the courts interpret the Act, the guideline is fundamental fairness to both the worker and employer.")). Simply put, notwithstanding the Answer Brief's nostalgic musings, liberal construction of the New Mexico Workers' Compensation Act is a thing of the past. Evenhandedness should be applied in addressing the issues presented by this appeal.

C. The Fact that Section 52-1-26(C) Does Not Allow A WCJ to Exclude Impairments is Irrelevant.

Worker argues that the plain language of NMSA 1978, ¶ 52-1-26(C) (1990) does not allow a WCJ to exclude any impairments in performing a PPD calculation. While technically correct, this observation is irrelevant and meaningless in the context of this appeal. Meaningless because this Court has already determined that PPD benefits are separate and distinct from SI benefits. "We rejected the employer's contention, holding that scheduled injuries are separate and distinct from non-scheduled injuries. *Gutierrez v. Intel Corp.*, 2009-NMCA-106, ¶ 12, 147 N.M. 267, 270, 219 P.3d 524, 527. "Thus, we agree with Worker that disabilities caused by scheduled injuries and disabilities caused by injuries to non-scheduled members are separate and distinct concepts." *Baca v. Complete Drywall Co.*, 2002-NMCA-002, ¶ 21, 131 N.M. 413, 418, 38 P.3d 181, 186. "It is clear that the Act treats scheduled injury benefits and PPD benefits differently." *Baca*, 2002-NMCA at ¶ 24, 131 N.M. at 418, 38 P.3d at 186. "We see no reason to include the weeks of TTD received in connection with a scheduled injury in calculating the weeks that a worker may receive permanent partial disability benefits. *Baca*, 2002-NMCA at ¶ 25, 131 N.M. at 419, 38 P.3d at 187. "In *Baca*, we explained that 'disabilities caused by scheduled injuries and disabilities

caused by injuries to non-scheduled members are separate and distinct concepts.'" *Livingston v. Envtl. Earthscapes*, 2013-NMCA-099, ¶ 10, 311 P.3d 1196, 1197.

Because, as this Court has already determined, PPD and SI benefits are separate and distinct, the only logical reading of Section 52-1-26(C) is that it references only PPD benefits and not an impairment related to a SI. Moreover, the plain language of Section 52-1-26(C) does not address the question presented by this appeal i.e. can a WCJ use the Worker's foot injuries and resulting restrictions/limitations caused by the foot injuries in calculating an injured worker's entitlement to SI benefits and then use the same impairment rating assigned to the Worker's foot injuries in determining an injured worker's entitlement to PPD benefits that may arise from the same accident? Moreover, if he does isn't the award duplicative?

In short, in this case the Worker suffered injuries to his body as a whole (psychological) for which he was awarded a whole body permanent impairment rating. The Worker also suffered injuries to his feet for which he received an impairment rating and SI benefits. The WCJ's subsequent decision to also use the impairment ratings assigned for the Worker's foot injuries (scheduled members) and the physical limitations caused by the

Worker's foot injuries in calculating the Worker's entitlement to PPD benefits awards the Worker two separate and distinct type of benefits for the same injuries. This is plainly duplicative and inconsistent with this Court's prior determination that PPD and SI benefits are separate and distinct.

Similarly, the Worker's assertion that the WCJ did not consider the 70% loss of use to the Worker's feet in awarding PPD benefits to the Worker and that, therefore, there is no duplication is like saying that getting paid twice for the same thing is not duplicative because one payment was made in cash and the other was made in cash. The SI/loss of use benefits compensated the Worker for his separate and distinct foot injuries and resulting restrictions. Also using the impairments and limitations assigned to the Worker's feet for the PPD calculation pays him a separate and distinct type of benefits for the same injuries. Getting paid twice for the same thing is duplicative and inconsistent with *Baca*, *Gutierrez* and *Livingston*.

D. The Inclusion of Standing and Walking Abilities in the Residual Physical Capacities Modifier is Irrelevant.

Worker next argues that the inclusion of walking and standing restrictions in the New Mexico Workers' Compensation Act's definition of an injured worker's residual physical capacities leads to the conclusion that the

WCJ did not err in considering the restrictions imposed upon the Worker. "By including factors such as walking, standing, arm controls and leg controls, it stands to reason that the Legislature specifically intended that a WCJ consider injuries to arms, legs, and feet in assessing physical capacity modification." Answer Brief, p. 32. Again, this argument is misplaced.

First, Section 52-1-26 and its sub-parts relates to the Worker's potential entitlement to PPD benefits and only that aspect of his claim. It does not apply to the Worker's entitlement to SI benefits. Again, PPD and SI benefits are separate and distinct as this Court has made clear. Second, the fact that Section 52-2-26 allows a WCJ to consider an injured worker's ability to walk, stand and use his/her arms and legs does not support an argument that a WCJ can use the injuries and loss of use cause by the injuries to the Worker's feet in awarding duplicative PPD and SI benefits in this case. Section 52-1-26 is intended to address only the PPD aspect of this case. Finally, this argument does not in any manner address the duplication concern raised by this appeal. Section 52-1-26 does not in any manner, by its plain language, support the WCJ's decision to award SI benefits to the Worker for his foot injuries and then use the same injuries to support an additional entitlement to PPD benefits – a separate and distinct benefits.

Regardless of how the Answer Brief spins it, awarding PPD and SI benefits for the same injuries is duplicative and inconsistent with this Court's prior pronouncements in *Baca*, *Gutierrez* and *Livingston*.

E. The Only Impairment Found by the WCJ not Related to the Worker's Foot Injuries is the Mental Impairment.

Employer/Insurer understands that the Worker is challenging the impairment ratings assigned by the WCJ in his Cross-Appeal. However, this does not change the argument on the issues raised by Employer/Insurer's appeal. Even if this Court finds that the WCJ should have different whole body impairment ratings to the Worker, those impairments cannot be used in awarding the Worker's SI benefits. Moreover, the WCJ found a 3% whole person impairment (not a chronic pain impairment) based upon the Worker's gait issues – something directly related to the Worker's foot injuries. Moreover, Worker's assertion that "... the WCJ's decision to award modifier benefits based upon a loss of physical capacity from heavy to sedentary was due to Worker's 'significant gait pattern abnormality' due to his 3% WPI due to chronic pain" is simply not supported by what the WCJ concluded in this case or the record.

F. Worker did not Respond to Employer/Insurer's Second Issue.

The Answer Brief devotes only one paragraph in addressing the second issue raised by Employer/Insurer's appeal and simply asserts that the WCJ's decision to restart the 500 week PPD benefits period on January 2, 2014 is supported by *Baca*. Answer Brief, p. 35. This assertion is not correct and the fact that the Worker did not even attempt to defend the WCJ's decision on this point speaks volumes. Like *Gutierrez*, the Worker's scheduled and non-scheduled injuries developed contemporaneously and shortly after the Worker's March 17, 2010 accident. As a result, the Worker was paid TTD benefits for both scheduled and non-scheduled injuries that manifested themselves on March 17, 2010 or shortly thereafter. Thus, the 500 week PPD benefit period provided by NMSA 1978, § 52-1-42(A)(2) (1990) was triggered by the Worker's March 17, 2010 accident and not the date the Worker's last work related injuries reached MMI.

This situation is similar to the issue addressed by this Court in *Gutierrez*, where this Court noted:

> "This case, however, is factually distinguishable. Unlike the situation in *Baca*, Worker's back was injured in the accident and continued to be consistently symptomatic from the time of the accident until back surgery and even after surgery. Therefore, the whole record supports the WCJ's decision to use the date of the accident as the trigger for the benefits for Worker's back. The

> back surgery, performed approximately eight years after the accident, is not like the development of shoulder problems experienced by the Worker in *Baca*.

Gutierrez, 2009-NMCA at ¶ 20, 147 N.M. at 272, 219 P.3d at 529. Simply put, the Worker's scheduled and non-scheduled injuries developed contemporaneously after the Worker's March 17, 2010 accident. Therefore, the 500 week benefit period started to run on March 17, 2010 and the WCJ's decision to restart the 500 benefit period on January 2, 2014 was plainly erroneous.

G. Conclusion.

Given that the WCJ clearly erred in awarding the Worker both PPD and SI benefits for the foot injuries the Worker suffered in his March 17, 2010 accident, it is understandable why the 35 page Answer Brief only tangentially addresses the arguments put forth in Employer/Insurer's Brief-in-Chief. The record clearly reflects that the WCJ awarded the Worker separate and distinct PPD and SI benefits for his foot injuries. This is inconsistent with this Court's determination in *Baca*, *Gutierrez* and *Livingston* that PPD and SI benefits are separate and distinct and that, because PPD and SI benefits are separate and distinct, injured workers are entitled to separate benefits for each distinct type of injury. These cases hold that injured workers are

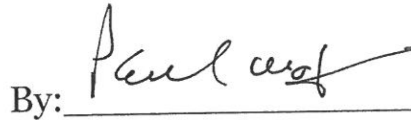
entitled to separate and distinct PPD and SI benefits if the facts warrant such an award. *Baca, Gutierrez* and *Livingston* do not stand for the proposition that injured workers are entitled to **duplicative benefits** for separate and distinct injuries. The WCJ erred in awarding the Worker SI benefits for his foot injuries and then utilizing the impairment ratings and physical limitations caused by those same foot injuries in again awarding the Worker PPD benefits for those same injuries. The WCJ's decision should be reversed.

II. Prayer for Relief

FOR THE FOREGOING REASONS, Employer/Insurer-Appellants/Cross-Appellees Hanna Plumbing & Heating Company, Inc. and Mechanical Contractors Association of New Mexico, Inc. Workers' Compensation Group Fund hereby request an order from this Honorable Court reversing the WCJ's determination that the impairment ratings assigned to the Worker's bilateral foot and ankle injuries and resulting permanent restrictions related to the Worker's foot and ankle injuries may be used in calculating the Worker's PPD award and the WCJ's determination to restart the 500 week PPD benefit period provided by Section 52-1-42(A)(2) on January 2, 2014.

Respectfully submitted,

MAESTAS & SUGGETT, P.C.



By:____________________________________

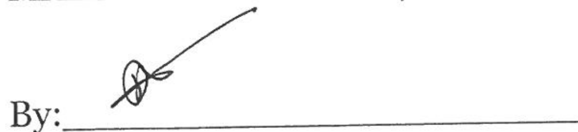
PAUL MAESTAS
Attorneys for Employer/Insurer, Hanna Plumbing & Hearing Inc. and Mechanical Contractors Association of New Mexico, Inc. Workers' Compensation Group Fund
Sun Valley Commercial Center
316 Osuna Road NE, Suite 103
Albuquerque, New Mexico 87107-5950
Telephone: (505) 247-8100
E-Mail: paul@maestasandsuggett.com

WE HEREBY CERTIFY that a true and correct copy of the foregoing pleading was mailed via U.S. Mail to:

Gerald A. Hanrahan, Esq.
203 Hermosa, NE
Albuquerque, New Mexico 87108

this 2nd day of May, 2016.

MAESTAS & SUGGETT, P.C.



By:________________________
Paul Maestas
Case.Reply.Brief