IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

RICKY D. CASE,

Worker/Appellee/Cross/Appellant,

vs.

Docket No. 34,934
WCA No. 10-53399

HANNA PLUMBING & HEATING CO., INC. and MECHANICAL CONTRACTORS ASSOCIATION of NEW MEXICO, INC.,

Employer-Insurer/Appellants/Cross-Appellees.

REPLY BRIEF

of

WORKER/APPELLEE/CROSS APPELLANT

Civil Appeal from the Workers' Compensation Administration
Honorable Leonard Martinez, Workers' Compensation Judge
Hearing in Bernalillo County, WCA No. 10-53399

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I. STANDARD OF REVIEW

The Answer Brief of Employer-Insurer/Appellants/Cross-Appellees (hereinafter simply "Employer/Insurer" or "E/I") states on page five:

> Simply put, notwithstanding the Worker's Brief-in-Chief suggestion, liberal construction of the New Mexico Workers' Compensation Act is a thing of the past.

In his Brief-in-Chief (p. 14), Worker asserted the Judiciary has always applied a rule of liberal construction when interpreting remedial legislation, such as the Workers' Compensation Act. Worker cited two Supreme Court cases in support of liberal construction. In *Michaels v. Anglo Am. Auto Auctions, Inc.*, 1994-NMSC-015, ¶ 13, the Supreme Court applied liberal construction to the interpretation of NMSA 1978 (1990), § 52-1-28.2. Very recently, in *Benavides v. E. N.M. Med. Ctr.*, 2014-NMSC-037, ¶ 44, the Supreme Court stated:

> We also agree with the Court of Appeals that liberal construction can still be applied by this Court as it is but one of many tools employed in construing legislation.

Liberal construction is not a "thing of the past". As always, its application is necessary to effectuate the benevolent purpose of the Workers' Compensation Act. *Mascarenas v. Kennedy*, 1964-NMSC-179, *Avila v. Pleasuretime Soda, Inc.*, 1977-NMCA-079; *Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007; *Michaels,* ¶ 13; Benavides, ¶ 44.

II. ARGUMENTS

1. THE WCJ ERRED IN ASSESSING WORKER'S TOTAL IMPAIRMENT RATING.

In the Brief-in-Chief (p. 14-19), Worker asserted that the WCJ erred as a matter of law in assessing his impairment ratings. Worker is entitled to have his impairments assessed correctly pursuant to § 52-1-24(A) and the AMA Guides.

NMSA 1978 (1990), § 52-1-24(A), states:

> "Impairment" means an anatomically or functional abnormality existing after the date of maximum medical improvement as determined by a medically or scientifically demonstrable finding and based upon the most recent edition of the American medical associations's guide to the evaluation of permanent impairment or comparable publications ....

Contrary to the Answer Brief's repetitious and misleading "substantial evidence" arguments, a *de novo* standard of review should be applied when reviewing a WCJ's interpretation of statutory requirements. *Dewitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 14; *Baca v. Complete Drywall Co.*, 2002-NMCA-002, ¶ 12.

A. The Lower Extremity Impairment ratings:

On page 530 of the AMA Guides, within Chapter 16, "The Lower Extremities", it states:

> Tables in this chapter show the impairment percentages at the lower extremity level. The conversion factors for the lower extremity are:
> - 40%: Lower extremity to whole person.

Table 16-10 on page 530 of the Guides evidences that a 30% lower extremity impairment converts into a 12% whole person impairment (WPI).

Worker underwent bilateral subtalar arthrodesis (fusions) in 2011 by Dr. Haas. ***Ex. 7.*** Dr. Reeve determined that Worker had moderate malalignment to both lower extremities. Pursuant to Class 3 in Table 16-2 on page 508 of the Guides, Dr. Reeve assessed a 30% lower extremity impairment (LEI) for each subtalar arthrodesis. Dr. Reeve's two 30% LEI ratings are a matter of undisputed fact. ***Ex. 1, p. 27-28.*** It is also an undisputed fact that a 30% LEI converts to a 12% WPI. ***AMA Guides, Table 16-10.*** Dr. Reeve clearly erred by converting a 30% LEI into an 8% WPI. The WCJ clearly erred by adopting Dr. Reeve's erroneous conversion. As a matter of law, Worker was entitled to two 12% WPI ratings as a result of his bilateral subtalar arthrodesis. § 52-1-24(A).

The Answer Brief (p. 5-9) completely misleads this Court by arguing that this is an issue of substantial evidence; and that substantial evidence supports the WCJ's finding. This is simple mathematics: 30% x 40% = 12%! Simple math provides precise sums. It is preposterous to argue that substantial evidence supports an incorrect mathematical answer. Had Dr. Reeve added 2 + 2 and found 3; and had the WCJ accepted his sum, the Answer Brief would likewise argue that substantial evidence supports the conclusion that 2 + 2 = 3.

B. The Lumbar Impairment:

Table 17-4 on page 570 of the AMA Guides provides a "Lumbar Spine Regional Grid". With an intervertebral disk herniation, Class 1 provides WPI ratings in the range of 5% to 9%, with 7% being the default rating, for a single level herniation "with medically documented findings; with or without surgery".

It was undisputed that on April 10, 2012, Dr. Reeve's physical examination of Worker's lumbar spine revealed "tenderness over the lower lumbar area", "pain to palpation" and "mild restricted range of motion"; and that Dr. Reeve referred Worker for physical therapy and an MRI of the lumbar spine. ***Ex. 1.3, p. 12.*** It was undisputed that the MRI revealed a "small disc protrusion at L5-S1".

Stedman's Medical Dictionary, 26th Edition, page 790, defines "herniation" as "formation of a protrusion". Dr. Reeve agreed that the terms herniation and protrusion are equivalent. ***Ex. 1, p. 36, l. 21-25.***

It was undisputed that Dr. Reeve testified that Worker had "verifiable findings" related to his lumbar injury. ***Ex. 1, p. 36, l. 19-20; p. 37, . 1-4.*** It was undisputed that Dr. Reeve assessed Worker as suffering from "chronic low back pain". ***Ex. 1.3, p. 16.*** It was undisputed that when asked to assess impairment for Worker's lumber spine, Dr. Reeve answered:

> Well, he would fall into the Class I, intervertebral disc herniation at a single level with medically documented findings with or without surgery. So the default level would be seven. ***Ex. 1, p. 37, l. 7-10.***

Dr. Reeve then testified that he would be "comfortable" with assigning a 7% whole person impairment rating due to the lumbar injury. ***Ex. 1, p. 38, 3-5.***

Worker's lumbar spine had a disc protrusion or herniation. This is clearly an anatomical abnormality existing after the date of MMI. Dr. Reeve reported numerous medically demonstrable or "verifiable" findings related to the disc protrusion/herniation. As a matter of law, Worker was entitled to a 7% WPI rating for his lumbar injury because it was undisputed that he had a "disk herniation ... at a single level ... with medically documented findings." *§ 52-1-24(A); AMA Guides, Table 17-4.* The WCJ erred as a matter of law by finding that Worker did not suffer a permanent impairment to his lumbar spine. § 52-1-24(A).

Again, the Answer Brief (p. 10-13) attempts to distort reality by arguing that Dr. Reeve's testimony was equivocal and therefore Worker's L5-S1 disc herniation (and its impairment value) does not exist. If this Court does apply whole record review and canvasses the whole record, it should find the following facts about the lumbar impairment:

(1) Worker has a documented disc protrusion at L5-S1;

(2) A disc protrusion is an anatomical abnormality;

(3) Worker has chronic low back pain and verifiable findings relating to the disc protrusion;

(4) Dr. Reeve omitted a lumbar assessment during his initial impairment assessment;

(5) Asked to assess impairment for the lumbar injury during his testimony, Dr. Reeve readily agreed that a 7% WPI would be appropriate;

(6) A 7% WPI is in the range of WPIs for a "disk herniation ... at a single level ... with medically documented findings" pursuant to Class 1 on Table 17-4 of the Lumbar Spine Regional Grid;

(7) Dr. Reeve testified during cross-examination that he would ***not*** agree that "Mr. Case merits a zero percent impairment for his low back"; ***Ex. 1, p. 12-21.***

(8) Dr. Reeve's answer, in response to very confusing questions posed during cross-examination, was that he had not assigned a lumbar impairment at the time of his initial impairment assessment; ***Ex. 1, p. 87-88.***

Even under whole record review, this Court should conclude that the WCJ erred by finding that Worker did not suffer a permanent impairment to his low back. The only logical conclusion from the evidence presented is that Worker was entitled to an impairment rating for his lumbar injury. *Tallman v. Arkansas Best Freight*, 1988-NMCA-091; *Dewitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 12.

C. Bilateral Hip Impairments:

It was undisputed that Worker suffers from bilateral hip pain as a result of the work accident. ***Ex. 1, p. 26, Ex. 8, p. 8 & 17-19.***. It was undisputed that his

bilateral hip injuries were diagnosed as bilateral "trochanteric bursitis". ***Ex. 1, p. 31; Ex. 8, p. 17.*** Table 16-4 on page 512 of the *Guides* provides an impairment rating for "chronic trochanteric bursitis with documented, chronically abnormal gait." It was undisputed that Worker has a documented, chronically abnormal gait. ***Ex. 1, p. 32.*** The default rating for this diagnosed hip condition is a 7% LEI, which converts to a 3% WPI [7% x 40% = 3%]. ***Ex. 1.4, p. 2.*** Dr. Reeve agreed that two 3% WPI ratings were appropriate for Worker's bilateral trochanteric bursitis at the hips. ***Ex. 1, p. 33-35.***

The Answer Brief (p. 13-16) again attempts to distort reality by arguing that Dr. Reeve's testimony was "conflicting" and "confusing"; and therefore Worker's bilateral trochanteric bursitis (and impairment values) does not exist. The Answer Brief attempts to manufacture "conflicting" evidence by arguing that ***if*** Worker's hip injuries were ***not*** diagnosed as trochanteric bursitis then there would be no ratable impairments. Since it was undisputed that Worker's hip injuries were diagnosed as trochanteric bursitis, there is absolutely no merit to E/I's argument.

The WCJ erred as a matter of law by failing to find permanent impairments to both of Worker's hips, based upon the verifiable findings of injury made by Dr. Reeve and the IME physicians, and Table 16-4 of the *Guides*. § 52-1-24(A).

A review of the whole record demonstrates that Worker was not correctly assigned a 12% WPI for each foot/ankle injury; and was not properly assigned impairments for his lumbar and hip injuries. A correct interpretation of § 52-1-24(A) and the AMA Guides require findings that Worker has a 12% WPI due to his right LEI; a 12% WPI due to his left LEI; a 10% WPI for depression; a 7% WPI for his lumbar disc protrusion with medically documented findings; a 3% WPI due to trochanteric bursitis in his right hip; a 3% WPI due to trochanteric bursitis in his left hip; and a 3% WPI due to chronic pain. *Dewitt*, 2009-NMSC-032, ¶ 14; *Baca v. Complete Drywall Co.*, 2002-NMCA-002, ¶ 12.

2. THE WCJ ERRED IN ASSESSING WORKER'S IMPAIRMENT AT A LESS THAN ADDITIVE VALUE THROUGH THE "COMBINED VALUES" METHOD.

Worker's argument is set forth in the Brief-in-Chief at pages 19-24. Worker asserted that this issue was a matter of first impression.

E/I's Answer Brief (p. 17), argues that Worker did not cite any cases in "support of his assertion that this Court should summarily disavow the 'Combined Values' methodology." Since this is a matter of first impression, the contrary is also true - there is no specific legal authority adopting the "Combined Values" methodology. The Answer Brief does not cite any statute or case that mandates use of the AMA's "Combined Values" methodology.

The Answer Brief (p. 17-18) argues that the Legislature has been aware of the AMA *Guides* for quite some time now but has not made any changes to the "Combined Methods" methodology. It is true that the Legislature adopted use of the "most recent edition" of the AMA Guides in NMSA 1978 (1990), § 52-1-24(A). There is no evidence, however, that the Legislature is aware of the AMA's "Combined Values" method, or has taken any steps to ratify this method. In fact, Worker's attorney would wager that if asked which edition of the AMA Guides is currently in use and since when, not a single member of the current Legislature would provide the correct two answers (Sixth Edition, 2008). There was no Legislative review when the Fourth Edition was published in 1993, the Fifth in 1998, and the Sixth in 2008. The Sixth Edition dramatically decreased spinal impairment ratings by about 50%, which substantially decreased PPD values for all disabled workers with spinal injuries, and yet there has been no Legislative review, or even any concern, about the validity of its use.

The Answer Brief (p. 18-19) sets forth the AMA's justification for its "Combined Values" method. As stated in the Brief-in-Chief (p. 21):

> In reality, the combining of impairments in an individual can result in additive, less than additive, or greater than additive levels of functional loss. The current formula for rating multiple impairments **always results in a less than additive result, an outcome that produces mathematical consistency but not accuracy.**

The Answer Brief (p. 19) argues that "Worker seeks a methodology that would award duplicate impairments." This is not true. As stated in the Brief-in-Chief (p. 20), the seven impairment values that Worker is requesting on appeal "add" up to 50% and "combine" to 42%. This 8% difference would increase Mr. Case's permanent ***partial*** disability benefits by $53.28/week ($666.02/week x 8%). It was undisputed that Mr. Case is totally and physically unable to return to work as a plumber, his chosen career. Dr. Reeve reported that he is also "unable to work in any reasonable occupation." ***Ex. 3, p. 41.*** Under the concept of "fairness" espoused by the Answer Brief (p. 19), Ricky Case does not qualify for permanent total disability (PTD) benefits due to the severely restrictive definitions set forth in § 52-1-25; and he is not entitled to any vocational assistance or rehabilitation due to the repeal of all such benefits in 1990. § 52-1-50.

The plain language of § 52-1-24 and § 52-1-26; the legislative intent to provide greater disability benefits to Worker's with severe, multiple and/or higher impairment ratings; and the spirit of the Act; mandate an award of PPD benefits to Worker based upon the full extent of his injuries and his impairments. The WCJ erred by "combining" Worker's impairments at a less than additive value.

3. THE WCJ ERRED IN ASSESSING THE VALUE OF WORKER'S TORT DAMAGES AND IN ASSESSING E/I'S REIMBURSEMENT RIGHTS PURSUANT TO § 52-5-17 AND *GUTIERREZ V. CITY OF ALBUQUERQUE.*

In the Brief-in-Chief (p. 25-34), Worker first argued that the WCJ erred as a matter of law by not apportioning Worker's tort recovery into any elements. The WCJ simply reduced Worker's $4.3 million valuation by $1 million without any analysis other than Worker's tort attorney remained his advocate. This was improper and constitutes error as a matter of law. In *Gutierrez v. City of Albuquerque,* 1998-NMSC-027, ¶ 14, the Supreme Court held:

> A worker must be given the opportunity to show, and has the burden to prove, that in fact the tort recovery was fairly and reasonably calculated in good faith to compensate for injuries not covered by the benefits the employer has paid. If a worker does so, **the worker's compensation judge must apportion a worker's tort recovery into its reasonable elements, and compare those with a breakdown of the compensation benefits paid by employer.** An employer has an interest in those elements of the worker's tort recovery which are also covered by worker's compensation, but no interest in those elements of a worker's tort recovery that were calculated in good faith to remedy losses not covered. [emphasized]

Specifically, the WCJ failed to apportion any values for (1) past or future loss of household services, (2) past and future pain and suffering, (3) past and future loss of enjoyment of life, and (4) Mrs. Case's claim to loss of consortium. Without any values being assigned by the WCJ to these reasonable elements of tort damage, it is unclear whether the WCJ appropriately applied the *Gutierrez* analysis. At the

very least, this matter should be remanded to the WCJ for entry of specific findings assessing values to all elements of tort damage.

The Answer Brief (p. 23) argues that, by exclusion, the WCJ awarded a total sum of $625,000 for (1) past and future pain and suffering; (2) past and future loss of enjoyment of life: and (3) Mrs. Case's claim to loss of consortium. The Answer Brief (p. 23) asserts that $625,000 for "the hedonic portion of Worker's tort damages" is "something that is most certainly reasonable."

Assuming the loss of consortium claim was reasonably valued at $225,000, that leaves a total sum of $400,000 for pain and suffering and loss of enjoyment of life ("P&S/LEL"). This $400,000 represents 12% of the $3.3 million in total tort damages found by the WCJ.

Considering the testimony of Worker, Mrs. Case, Attorney McAfee, $2.115 million in loss of income, $343,000 in medical expenses and the extent of Worker's injuries (including having two 6.5 cm screws inserted from the posterior calcaneus to the talar neck in each foot/ankle, which cause pain with each and every step that Worker takes); a total valuation of $400,000 for P&S/LEL is most certainly inadequate, unreasonable and should be reversed.

Having fully accepted Worker's valuations as to past and future loss of income, and past and future medical expenses, the WCJ should likewise have

accepted Worker's conservative valuations for P&S/LEL and loss of consortium. A WCJ is not permitted to award a single penny for P&S, LEL, and/or loss of consortium; and therefore has no experience assessing the value of such tort damages. A WCJ should not be permitted to summarily discount the valuation of such tort damages by attorneys who for decades have routinely obtained such damages for their clients.

Worker's evaluation of his total tort damages at $4,300,000 is supported by the facts, the expertise of his attorneys and is reasonable. Employer/Insurer offered no evidence relating to the value of Worker's tort damages (other than past medical payments) and did not dispute McAfee's *Gutierrez* analysis. The WCJ's rejection of Worker's tort damages and reimbursement analysis was contrary to logic and reason, and should be reversed. *Gutierrez; Hernandez v. Mead Food, Inc.*, 1986-NMCA-020.

III. REQUESTED RELIEF

Worker requests that the Compensation Order entered by the WCJ be reversed and this matter be remanded with instructions to award impairment and PPD benefits, and to limit E/I's right to reimbursement, consistent with Worker's proposed findings and conclusions.

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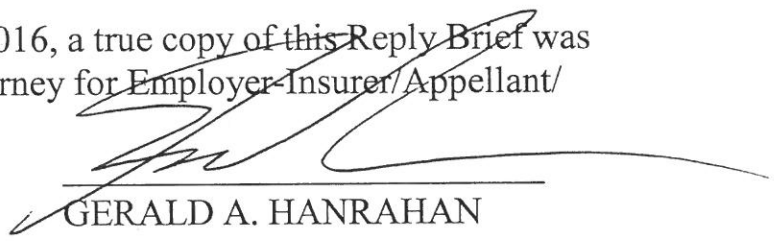
CERTIFICATE of SERVICE

I hereby certify that on June 28, 2016, a true copy of this Reply Brief was faxed and emailed to Paul Maestas, Attorney for Employer-Insurer/Appellant/ Cross-Appellee.



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