IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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.

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

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I. SUMMARY OF PROCEEDINGS

A. Proceedings before the WCA.

This appeal arises out of proceedings conducted before the New Mexico Workers' Compensation Administration ("WCA") in regard to Worker Ricky D. Case's Workers' Compensation Complaint ("WCC") against Employer/Insurer-Appellants Hanna Plumbing & Heating Company, Inc. and Mechanical Contractors Association of New Mexico, Inc. Workers' Compensation Group Fund ("Employer/Insurer") filed by the Worker-Appellee/Cross-Appellant Ricky D. Case ("Worker") on September 6, 2013. The Formal Hearing pertinent to Worker's WCC was held on November 18, 2014, after which the assigned Workers' Compensation Judge Leonard J. Padilla ("WCJ") entered a Compensation Order ("Compensation Order") on July 27, 2015.

Employer/Insurer filed a Notice of Appeal with this Court on August 26, 2015. This appeal arises from the Compensation Order entered by the WCJ on July 27, 2015. Therefore, Employer/Insurer's Notice of Appeal was timely filed in accordance with Rules 12-201(A)(2), 12-202 and 12-601(B) NMRA 2015.

B. Facts presented for review.

The Worker was involved in an accident on March 17, 2010 while working for Employer Hanna Plumbing & Heating Company, Inc. ("Employer"). Record Proper ("RP"), 192 (Pre-Trial Order ("PTO"), ¶ B (5)). The Worker sustained injuries to both feet and ankles and later developed problems with his low back, left hip, right knee and also developed depression as a result of his March 17, 2010 accident. RP, 192-93, (PTO, ¶ B (12)). The Worker's foot/ankle injuries reached maximum medical improvement ("MMI") on June 13, 2012. RP, 193, (PTO, ¶ B (19)). The Worker's depression reached MMI on February 7, 2013. RP, 192, (PTO, ¶ B (18)). The Worker's low back, left hip and right knee injuries reached MMI on January 2, 2014. RP 194, (PTO, ¶ B (20)).

The WCJ determined that the Worker suffered a twenty-four (24) whole person impairment as a result of his March 17, 2010 accident including an 8% impairment for the left lower extremity, an 8% impairment for the right lower extremity, a 3% gait impairment and a ten (10) percent secondary mental impairment. RP 288, (Compensation Order, Finding of Fact No. 62). The WCJ determined that the Worker did not suffer permanent impairments to his low back, left hip and right knee as a result of the Worker's March 17, 2010 accident. RP 288, (Compensation Order, Finding of Fact No. 63).

The WCJ then awarded the Worker the following additional indemnity/disability benefits:

a. A 70% loss of use to the left lower extremity. RP 288, (Compensation Order Finding of Fact No.64) and RP, 290-91, (Conclusion of Law Nos.10 and 12).

b. A 70% loss of use to the right lower extremity. RP 288, (Compensation Order Finding of Fact No. 65) and RP 290, (Conclusion of Law Nos. 10 and 11).

c. Permanent partial disability ("PPD") benefits at the rate of 56%. RP 289, (Finding of Fact No. 78 and RP 290), (Conclusion of Law No. 9).

In awarding PPD benefits to the Worker at the rate of 56%, the WCJ included the impairments assigned to the Worker as a result of his right foot/ankle and left foot/ankle injuries and gait impairment in the PPD calculation. RP 288-89, (Compensation Order, Findings of Fact Nos. 62 and 69 and 70-78). The WCJ also determined that the Worker's residual physical capacity is sedentary in nature. RP 289, (Compensation Order, Finding of Fact No. 75).

Moreover, the WCJ restarted the 500 week PPD benefit period as of January 2, 2014. RP 289 and 290, (Compensation Order, Finding of Fact

No. 78 and Conclusion of Law No. 9).

The Worker filed an earlier WCC on September 7, 2011 wherein he claimed injuries to his low back, right knee and left hip. RP 2-3, (September 7, 2011 WCC, ¶¶ 7e and 7g). That WCC was resolved by a Compensation Order that was entered on October 22, 2012 that accepted the Worker's right knee, low back and left hip injuries as being compensable. RP 138, (October 22, 2012 Compensation Order, ¶ 3).

The Worker filed a third-party lawsuit against a third-party tortfeasor after his March 17, 2010 accident and obtained a recovery in connection therewith in the amount of $1,850,000. RP 193, (PTO, ¶ B (14)). The November 18, 2014 Formal Hearing also addressed Employer/Insurer claim for reimbursement out of the Worker's third-party recovery and whether the Worker has a continuing entitlement to workers' compensation benefits as a result of and in light of his third-party recovery. RP 294-95, (PTO, ¶ D(1)). The WCJ's determination in regard to these issues is not being challenged by Employer/Insurer's appeal of the July 27, 2015 Compensation Order except to the extent that the reimbursement analysis may be affected by this Court's disposition of the issues presented by this appeal.

II. ARGUMENT

A. Introduction.

This appeal flows from this Court's prior decisions 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. In these cases, this Court determined that scheduled injuries are separate and distinct from non-scheduled injuries giving rise to separate and distinct entitlements to permanent disability benefits and corresponding time periods of benefit entitlement.

"We rejected the employer's contention, holding that scheduled injuries are separate and distinct from non-scheduled injuries. *Gutierrez v. Intel Corp.*, 2009-NMCA at ¶ 12, 147 N.M. at 270, 219 P.3d at 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 at ¶ 21, 131 N.M. at 418, 38 P.3d at 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.

The question left unanswered by these cases is how an injured worker's entitlement to permanent partial disability benefits and scheduled injury benefits are calculated/determined when the scheduled and non-scheduled injury benefits overlap and exist contemporaneously. In this case, the Worker initially complained of injuries to his feet but, within months from his March 17, 2010 accident, began complaining of problems with his low back, left hip and right knee. RP, 2-3 (September 7, 2011 WCC, ¶7(f) and (g)). The Worker also later developed psychological problems/depression. RP, 138, (PTO, ¶ 3).

The Worker's foot/ankle injuries reached MMI on June 13, 2012. RP, 193, (PTO, ¶ B (19)). The Worker's depression reached MMI on February 7, 2013. RP, 192, (PTO, ¶ B (18)). The Worker's low back, left hip and right knee injuries reached MMI on January 2, 2014. RP 194, (PTO, ¶ B (20)).

As noted above, the WCJ determined that the Worker suffered a

twenty-four (24) whole person impairment as a result of his March 17, 2010 accident including an 8% impairment for the left lower extremity, an 8% impairment for the right lower extremity, a 3% gait impairment and a ten (10) percent secondary mental impairment. RP 288, (Compensation Order, Finding of Fact No. 62). The WCJ determined that the Worker did not suffer permanent impairments to his low back, left hip and right knee as a result of the Worker's March 17, 2010 accident. RP, 288, (Compensation Order, Finding of Fact No. 63).

The WCJ then awarded the Worker the following additional indemnity/disability benefits:

a. A 70% loss of use to the left lower extremity. RP 288, (Compensation Order Finding of Fact No. 64) and RP, 290-91, (Conclusion of Law Nos. 10 and 12).
b. A 70% loss of use to the right lower extremity. RP 288, (Compensation Order Finding of Fact No. 65) and RP 290, (Conclusion of Law Nos. 10 and 11).
c. Permanent partial disability ("PPD") benefits at the rate of 56%. RP 289, (Finding of Fact No. 78 and RP 290), (Conclusion of Law No. 9).

In awarding PPD benefits to the Worker at the rate of 56%, the WCJ included the impairments assigned to the Worker as a result of his right foot/ankle and left foot/ankle injuries and gait impairment in the PPD calculation. RP 288-89, (Compensation Order, Findings of Fact Nos. 62 and 69 and 70-78). Moreover, the WCJ did not separate out any permanent restrictions and limitations assigned to the Worker because of his bilateral foot and ankle problems.

In first awarding the Worker scheduled injury benefits based upon the impairment ratings assigned to the Worker's feet and ankles and subsequently including the impairment ratings assigned to the Worker's lower extremities in the PPD calculation, the WCJ failed to keep the Worker's scheduled and non-scheduled injuries separate and distinct for permanent disability purposes as required by this Court's holdings in *Gutierrez* and *Baca*. Furthermore, the WCJ awarded the Worker both scheduled injury and PPD benefits for his feet/ankle problems.

More specifically, the WCJ first awarded scheduled injury benefits to the Worker for his lower extremity/foot/ankle impairments and then used those same impairments and the gait impairment assigned to the Worker as a result of his foot injuries in determining the amount of PPD benefits to

which the Worker is entitled as a result of his March 17, 2010 accident. This results in a comingling of scheduling and non-scheduling injuries and, in essence, requires Employer/Insurer to pay the Worker twice for the same injuries and conflicts with this Court's pronouncements in *Gutierrez* and *Baca* that scheduled and non-scheduled injures are separate and distinct.

Moreover, despite the fact that the Worker clearly suffered from low back, left hip and depression (non-scheduled injuries) well before January 2, 2014, the WCJ restarted the 500 week PPD benefit period as of January 2, 2014 and did not give Employer/Insurer credit, as against the 500 week PPD benefit time period, for the temporary total disability ("TTD") benefits the Employer/Insurer paid to the Worker between March 17, 2010 and January 2, 2014. See NMSA 1978, § 52-1-42(B) (1990) ("If an injured worker receives temporary disability benefits prior to an award of permanent partial disability benefits, the maximum period of permanent partial disability benefits shall be reduced by the number of weeks the worker actually receives temporary disability benefits."). In short, the WCJ improperly restarted the 500 week PPD benefit period on January 2, 2014 after all of the Worker's work related injuries reached MMI despite the fact that the Worker's entitlement to TTD benefits prior to January 2, 2014 was related, at least in

part, to his non-scheduled injuries.

B. The Impairment Ratings Assigned to the Worker's Feet and Ankles, and for which the Worker received Scheduled Injury Benefits, may not be used for Purposes of Determining the Worker's PPD Award.

Employer/Insurer are not aware of a reported New Mexico Appellate Court decision that addresses the first issue raised by this appeal after this Court's decisions in *Baca* and *Gutierrez*. However, the WCJ's decision to award scheduled injury benefits to the Worker for his bilateral foot/ankle injuries and then to use the impairment ratings assigned by the Worker's authorized treating physicians for the same foot/ankle injuries and gait impairment for purposes of the PPD award calculation conflicts with this Court's decisions in *Baca* and *Gutierrez*. Moreover, the WCJ's decision effectively awards the Worker both scheduled injury and PPD benefits for the same foot injuries and resulting physical limitations.

Before *Gutierrez* and *Baca*, most practitioners in the New Mexico Workers' Compensation Community assumed and used the standard PPD calculation outlined in NMSA 1978, § 52-1-26 (1990) in situations where an injured worker suffered injuries to both a scheduled member and non-scheduled member in an work related accident, and did not consider a

separate award of scheduled injury benefits in this circumstance. *Baca* and *Gutierrez* changed that practice and instruct and make clear that scheduled injuries are separate and distinct from non-scheduled injuries with separate and distinct benefits periods and methods of calculating the corresponding permanent disability benefits entitlement in each situation.

"We rejected the employer's contention, holding that scheduled injuries are separate and distinct from non-scheduled injuries. *Gutierrez v. Intel Corp.*, 2009-NMCA at ¶ 12, 147 N.M. at 270, 219 P.3d at 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 at ¶ 21, 131 N.M. at 418, 38 P.3d at 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.

If, as *Baca* and *Gutierrez* instruct, scheduled injury and non-scheduled injuries are "separate and distinct" and subject to different benefit periods, shouldn't the WCJ have calculated the Worker's scheduled injury and PPD benefit award in this case separately without using the impairments and gait impairment assigned because of the Worker's foot/ankle injuries, and for which the Worker has been awarded scheduled injury/loss of use benefits, in calculating the Worker's PPD award? In using the foot/ankle and gait impairments assigned to the Worker in calculating the Worker's PPD award, the WCJ has, in effect, awarded the Worker's both scheduled injury and PPD benefits for his foot/ankle injuries – something *Baca* and *Gutierrez* say in improper.

Moreover, the WCJ's decision to award both scheduled injury and PPD benefits for the Worker's foot/ankle injuries effectively elevates the rights of the Worker above those of Employer/Insurer. "Unequipped with legislative guidance on the matter, we apply NMSA 1978, § 52-5-1 (1990) and conclude that worker and employer rights under the Act must be subject to the same standard of conduct and equivalent consequences for misconduct." *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, ¶ 1, 131 N.M. 272, 274, 34 P.

3d. 1148, 1150. *See also* 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."

If *Baca* and *Gutierrez* are still good law, which they are, the WCJ cannot award both scheduled injury/loss of use benefits and PPD benefits to the Worker as a result of same bilateral foot injuries (scheduled injuries). Moreover, in using the restrictions and limitations imposed upon the Worker primarily because of his bilateral foot injuries for the PPD calculation, the WCJ is further compounding the duplication of benefits. *See* NMSA 1978, § 52-1-26.4 (1990). Stated differently, if scheduled injury/loss of use benefits have been awarded to the Worker because of the loss of use he suffered to his feet and ankles as a result of his March 17, 2010 injuries as done by the WCJ in this case, it is duplicative to also use any reduction in the Worker's physical capacities caused by those injuries in determining the Worker's entitlement to PPD benefits. After awarding scheduled injury/loss of use benefits for the Worker's bilateral foot/ankle injuries, the WCJ should be compelled to

separate out any reduction in the Worker's residual physical capacities related to the Worker's bilateral foot injuries. Otherwise, any PPD award that also factors in any reduction in the Worker's residual physical capacities based upon the Worker's bilateral foot injuries (scheduled injuries) would duplicate the award of scheduled injury/loss of use benefits benefits based upon a loss of use to both feet.

This is particularly important in a case such as this on where the only whole body impairment rating assigned to the Worker that was not related to the Worker's feet/ankle injuries was for a mental impairment (depression). RP, 288, (Compensation Order, Finding of Fact No. 62). The WCJ found that the Worker did not suffer a permanent impairment to his low back as a result of his March 17, 2010 accident. RP, 288, (Compensation Order, Finding of Fact No. 63).

In short, in this case, the Worker was awarded both scheduled injury/loss of use benefits and PPD benefits for the "separate and distinct" bilateral foot/ankle injuries that the Worker suffered in his March 17, 2010 accidents. This determination is inconsistent with this Court's decisions in *Baca* and *Gutierrez,* is duplicative and is fundamentally unfair to Employer and should, therefore, be reversed.

C. The WCJ Decision to Start the 500 Week PPD Benefit Period on January 2, 2014 is Incorrect.

The WCJ compounded his error in awarding the Worker duplicate scheduled injury/loss of use and PPD benefits for his bilateral foot injuries, by restarting the 500 week PPD benefit period on January 2, 2014 – the date the Worker's low back, left hip and right knee injuries reached MMI. RP 288-89, (Compensation Order, Findings of Fact No. 60 and 78).

The record reflects that the Worker clearly suffered from low back, left hip and depression (non-scheduled injuries) well before January 2, 2014, the date that the WCJ restarted the 500 week PPD benefit period as of January 2, 2014. Yet, the WCJ did not give Employer/Insurer credit, as against the 500 week PPD benefit time period, for the TTD benefits the Employer/Insurer paid to the Worker between March 17, 2010 and January 2, 2014. See NMSA 1978, § 52-1-42(B) (1990) ("If an injured worker receives temporary disability benefits prior to an award of permanent partial disability benefits, the maximum period of permanent partial disability benefits shall be reduced by the number of weeks the worker actually receives temporary disability benefits.").

To illustrate, within several months after March 17, 2010, the Worker

was complaining of low back, left hip and right knee injuries. RP 2, (Worker's September 7, 2011 WCC, ¶¶ 7€ and (f)). The Worker also later developed depression. RP 138, (October 22, 2012 Compensation Order, ¶3.) Moreover, the WCJ determined that the Worker's foot and ankle injuries reached MMI by June 13, 2012. RP 288, (Compensation Order, Finding of Fact No. 58). This record reveals that the Worker experienced both scheduled and non-scheduled injuries from March 17, 2010 or shortly thereafter and that, at the very minimum, the Worker was being paid TTD benefits after March 17, 2010 for both scheduled and non-scheduled injuries. Moreover, because the Worker's foot and ankle injuries reached MMI by June 13, 2012, any TTD benefits paid to the Worker after June 13, 2012 were not paid to the Worker because of those scheduled injuries.

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*.

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 injury benefits. 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.

In short, the WCJ improperly restarted the 500 week PPD benefit period on January 2, 2014 after all of the Worker's work related injuries reached MMI despite the fact that the Worker's entitlement to TTD benefits prior to January 2, 2014 was related, at least in part, to his non-scheduled injuries. As such, the WCJ's decision to restart the 500 PPD benefit period is, therefore, clearly erroneous.

III. Conclusion.

If permanent disabilities caused by scheduled injury and non-scheduled injuries are truly separate and distinct concepts as noted by this Court in *Baca*, *Gutierrez* and *Livingston*, then the WCJ clearly erred in awarding the Worker scheduled injury benefits for his bilateral foot and

ankle injuries and then using the impairments assigned to the Worker for his bilateral foot and ankle injuries and restrictions and limitations caused by the Worker's bilateral foot/ankle injuries for purposes the PPD calculation in awarding the Worker's PPD benefits. "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. This approach effectively awards the Worker both scheduled injury and PPD benefits for the same injuries and disabilities cause by separate and distinct scheduled injuries and is not only inconsistent with *Baca* and *Gutierrez*. It is also fundamentally unfair to Employer/Insurer and interprets the New Mexico Workers' Compensation Act in a manner that improperly favors injured workers. The WCJ's determination in regard to these issues must be reversed.

The WCJ compounded his error that unfairly favors the Worker by restarting the 500 week PPD period provided by Section 52-1-42(A)(2) on January 2, 2014, the date the last of the Worker's scheduled and non-scheduled injuries reached MMI. This is also an incorrect determination under *Baca* and *Gutierrez* and improperly fails to effectuate the provisions

of NMSA 1978, § 52-1-42(B) (1990) ("If an injured worker receives temporary disability benefits prior to an award of permanent partial disability benefits, the maximum period of permanent partial disability benefits shall be reduced by the number of weeks the worker actually receives temporary disability benefits."). The record reflects that the 500 week PPD period was triggered by the Worker's March 17, 2010 accident so the WCJ should be instructed to use the Worker's accident date of March 17, 2010 to begin the 500 week PPD benefit period.

IV. 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,

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By: _____

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

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this 8th day of February, 2016.

MAESTAS & SUGGETT, P.C.

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