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.

BRIEF-IN-CHIEF

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

GERALD A. HANRAHAN
Attorney for Worker/Appellee/
Cross-Appellant
203 Hermosa Drive NE
Albuquerque, NM 87108
Telephone: (505) 255-2229
Fax: (505) 255-5604
Email: hanrahanlaw@comcast.net

TABLE of CONTENTS

TABLE OF AUTHORITIES

NEW MEXICO CASES **Page**

NEW MEXICO STATUTES **Page**

I. SUMMARY OF PROCEEDINGS

Worker/Appellee, Ricky D. Case ("Worker") cross-appeals from the *Compensation Order* entered by the Workers' Compensation Judge ("WCJ") on July 27, 2015. This order was entered about eight months after the trial on November 18, 2014. Worker's cross-appeal is taken against Hanna Plumbing & Heating Co., Inc. ("Employer"), and its workers' compensation insurer, Mechanical Contractors Association of New Mexico, Inc. ("Insurer"). Worker timely filed his *Notice of Cross-Appeal* on September 10, 2015. Worker's Brief-in-Chief is being timely filed on Monday, March 28, 2016, pursuant to Rule 12-213 (I), NMRA.

A. Worker's Background.

Ricky D. Case was born on September 1, 1973, and is currently 42 years of age. He graduated from Moriarty High School in 1992. In 2003, Mr. Case joined Local Union #412, a union for plumbers and pipefitters, and commenced employment with Employer, working primarily as a welder. He typically worked 8 to 10 hours shifts for Employer and then attended classes for three hours for two evenings each week at the union hall. In 2008, Mr. Case became a Journeyman Welder/Pipefitter and was honored to receive the "Best Welder" award from Local Union #412.

Prior to the accident on March 17, 2014, Mr. Case was in great health and had tremendous strength. He would occasionally lift "schedule 40" steel pipe by himself. A schedule 40 steel pipe, six inches in diameter and 21 feet long, weighs about 400 pounds (19# per foot). He would also occasionally lift Acetylene and Oxyacetylene fuel tanks which weighed in excess of 200 pounds. He frequently lifted boxes of steel fittings which weighed in excess of 100 pounds and boxes of pump motors which weighed in excess of 200 pounds. His job duties required "very heavy" physical capacity, a capacity not recognized within NMSA 1978 (1990), § 52-1-26.4, of the Workers' Compensation Act.

Mr. Case's job duties also required him to stand and walk during his entire work shift (except for lunch and breaks). He routinely stood or walked for 8 to 9 hours per shift. He would then continue to stand or walk for an additional 4-5 hours most evenings after work.

Ricky Case routinely arrived at Employer's premises at 5:20 a.m. He would prepare for the day's work and load equipment and supplies. He was not paid for his work until 7:00 a.m. He was a dedicated, loyal and hard-working employee. When Mr. Case's eldest daughter turned 16 and needed a car to drive, he asked Bob Hanna, Employer's founder and owner, if he could purchase a used truck from Employer's fleet of vehicles. Demonstrating his appreciation for Ricky Case's hard work, Mr. Hanna gave him a 1992 Cummins truck as a gift for his daughter.

Mr. Case earned wages of about $61,500.00 per year, or $1,183.65 per week. In addition, he was provided with a company truck to drive, insurance coverage and gasoline. His weekly compensation payments for temporary total disability (TTD) were capped at the 2010 maximum rate of $666.02, which represents less than 50% of his wages and fringe benefits. His permanent partial disability (PPD) award of 56% represents less than 28% of his former wages and benefits. He was awarded total disability benefits from the Social Security Administration (taxpayers primarily bear the burden for compensating injured workers in New Mexico).

Ricky Case is married to Dianna Case. They have two children, ages 13 and 17, from their marriage. Mr. Case is also step-father to Dianna's three other children. He and Dianna are also raising a nephew, currently age 8. The family resided in Los Lunas prior to the work accident. They now reside in Lindrith, as they can no longer afford to live in their leased residence.

B. The Accident on March 17, 2010 & Medical Treatment.

Worker was injured on March 17, 2010, while working for Employer at the CNM Library. While ascending a fixed ladder of about 18 feet and while his head was about three rungs from the top, his boots slipped off the rungs of the ladder and he fell downward onto concrete. As he was falling, he pushed himself outward, struck the wall behind him, and then landed hard on both heels. The heel bones

(calcaneus) in both feet were shattered (comminuted fractures). Worker was in excruciating pain and transferred by ambulance to the University of New Mexico Hospital for emergency treatment.

Worker was physically unable to work following the accident. He returned to work at restricted duty from June 14 through July 12, 2010. He commenced rehabilitation treatment with Anthony Reeve, M.D., on July 19, 2010. ***Exhibit 3, p. 1.*** Dr. Reeve prescribed strong narcotic medications due to the high level of pain Worker was experiencing. The medications caused him to experience alternating bouts of diarrhea and constipation.

Worker again returned to work at restricted duty from September 13 through December 20, 2010. His attempt to continue working was unsuccessful. As a result of his work-related injuries, Worker has been physically unable to work since December 20, 2010.

Worker underwent a right subtalar fusion on February 8, 2011; and a left subtalar fusion on June 3, 2011. Two 6.5 cm screws were inserted from the posterior calcaneus to the talar neck in each foot/ankle. The surgeries were performed by Zachary Haas, D.P.M. ***Ex. 7, p. 5-6, 16-17 & 19.*** Worker has had difficulty walking and standing, and continued severe pain, ever since.

On June 17, 2011, Dr. Reeve reported that Worker was experiencing pain in his left hip and right knee. Dr. Reeve causally related the pain in these areas to the work accident. ***Ex. 3, p. 28-30.*** Dr. Reeve ordered MRI scans of the left hip and right knee. Employer/Insurer ("E/I") denied authorization for the MRI scans. On August 17, 2011, Dr. Reeve again reported that the hip and knee pain were causally related to the work accident and in need of further study; and also reported that Worker had lumbar spine pain related to the accident. E/I denied coverage for all three of these work-related injuries.

In December 2014, Worker commenced treatment with Gerald Fredman, M.D., a psychiatrist. ***Ex. 6.*** Dr. Fredman diagnosed Worker as suffering from a "Major Depressive Disorder, Single Episode, Severe". He related the disorder to the work accident. Dr. Fredman reported that Worker reached MMI on February 7, 2013, and had a 10% whole person impairment (WPI) as a result of the work-related depression. **Ex. 4 & 5.**

C. Initial WCA Proceedings:

Due to E/I's denial of medical treatment, Worker filed his first *Workers' Compensation Complaint* on September 7, 2011. *RP 1-67.* E/I rejected a *Recommended Resolution* that proposed coverage and the claims proceeded to trial on April 9, 2012.

Prior to trial, Worker was ordered to undergo an independent medical examination (IME) by a panel consisting of Victoria Matt, M.D., an orthopaedic surgeon, and Christopher Patton, D.O. a physiatrist. After examining Worker in February 2014, the IME physicians reported their opinion that the injuries to Worker's feet/ankles, right knee, bilateral hips and low back were causally connected to the work accident. ***Ex. 8, p. 17.*** Nevertheless, E/I continued to dispute the connection until the morning of trial on April 9, 2012. A stipulated *Compensation Order* was subsequently entered on October 22, 2012. ***RP 137-141.***

The trial on April 9, 2012, was limited to the issue of which party made the initial selection of the health care provider (HCP). E/I disputed that they made the initial selection. The previous WCJ found that they did. A *Compensation Order* was entered to this effect on October 22, 2012. ***RP 135-136.***

On July 18, 2012, Dr. Reeve reported that Worker was "unable to work in any reasonable occupation". ***Ex. 3, p. 41.***

D. Worker's Tort Settlement.

Worker filed a tort claim against the third parties that he alleged caused his accident on March 17, 2010. Worker was represented by attorneys Brian Branch and Sean McAfee of The Law Office of Brian K. Branch. In January 2013, the tort

claims were settled during a mediation conference for a compromised amount of $1,850,000.00.

On January 28, 2013, McAfee wrote a four page letter to Paul Maestas, E/I's attorney. McAfee advised Maestas of the terms of settlement, discussed liability issues, itemized Worker's tort damages and set forth a reimbursement analysis pursuant to *Gutierrez v. City of Albuquerque*, 1998-NMSC-027. ***Ex. 13.*** In addition, McAfee enclosed copies of the "Forensic Economic Analysis" of Philip T. Ganderton, Ph.D.; and the "Life Care Plan for Rick Case" by Anita A. Kelly, a certified life care planner. ***Ex. 14 & 15.***

Maestas never responded to McAfee's letter. On or about August 1, 2013, E/I terminated all workers' compensation benefits, including medical coverage.

E. Subsequent WCA Proceedings.

Worker's Second Workers' Compensation Complaint was filed on September 6, 2013, seeking reinstatement of TTD and medical benefits. ***RP 143-148.*** In their *Response and Counterclaim*, E/I alleged that Worker had been made whole by the tort recovery; and they requested reimbursement of all workers' compensation benefits paid or provided to Worker and termination of any additional entitlement to workers' compensation benefits. ***RP 154-158.***

Due to the retirement of WCJ Griego, the claims were assigned to WCJ Leonard Padilla. The claims were tried on November 18, 2014. The contested issued included: (1) whether Worker was made whole by his third-party tort recovery and the extent of E/I's right of reimbursement; (2) whether Worker was entitled to any additional WC benefits, and if so, the extent of entitlement to TTD, PPD, scheduled injury and medical benefits. ***RP (Pre-Trial Order), 191-199.***

Worker and his wife, Diana Case, testified about his injuries, medical treatment and resulting disability. Sean McAfee testified as an expert witness as to Worker's tort claims, tort damages, the terms of settlement and the reimbursement analysis. Dr. Reeve testified through deposition testimony taken on September 11, 2014, ***Ex. 1***; and August 24, 2012, ***Ex. 2***. Employer/Insurer did not call any live witnesses and did not offer any expert opinions relating to tort damages.

As directed by the WCJ, Worker and E/I filed requested findings and conclusions on December 9, 2014. By an order entered on January 23, 2015, *Workers' Amended Requested Findings of Fact and Conclusions of Law* ("W's Amended Findings") filed on December 10, 2014, were accepted by the WCJ. ***RP 248-279 (findings), RP 280-281 (order).*** The WCJ entered his *Compensation Order* on July 27, 2015, more than eight months after the trial. ***RP 282-292.***

NMSA 1978 (1986), § 52-5-7(B) provides that a WCJ shall issue a decision within 30 days following the presentation of evidence.

F. The 2015 Compensation Order:

The WCJ concluded that Worker was not made whole by the tort settlement, and that Employer should be reimbursed pursuant to the analysis outlined in *Gutierrez v. City of Albuquerque*. ***RP 290, conclusions of law ("cl"), #2-3.*** The WCJ found that Worker's entitlement to future indemnity benefits was $293,713.30; and that Employer was due reimbursement of $216,415.04. **RP 287, findings of fact ("ff") #47-50.** Worker challenges these findings on appeal.

The WCJ awarded TTD benefits through January 2, 2014. ***RP 290, cl 5.***

The WCJ found: "Worker suffered a combined 24% whole person impairment as a result of the accident: 8% for left lower extremity; 8% for right lower extremity; 3% for altered gait; and 10% for secondary mental." ***RP 288, ff #62.*** The WCJ found that Worker did not suffer permanent physical impairment to his low back, hips and right knee. ***Id., ff #63.*** The WCJ concluded: "Worker's impairment is 24%.". ***RP 290, cl #7.*** Worker challenges the findings relating to his impairment on appeal.

The WCJ found that Worker was entitled to permanent partial disability (PPD) benefits at 56% "from January 2, 2014, and continuing for 500 weeks". ***Id., ff #68-78, cl #9.*** Worker challenges this PPD rating.

The WCJ found: "Worker suffers a 70% loss of use for his left foot/ankle injury", and awarded scheduled injury (SI) benefits at 70% for 115 weeks for the loss of use to his left ankle. ***RP 288, ff #64, RP 291 #12..*** The WCJ also found a 70% loss of use for his right foot/ankle and also awarded SI benefits at 70% for 115 weeks. ***RP 288, ff #65, RP 290, cl #11.*** It should be noted that the sum in parentheses, $45,955.15, in conclusions #11 and #12, is incorrect. The compensation rate ($666.02) multiplied by 70% multiplied by 115 weeks equals $53,614.61.

The WCJ found that Worker was entitled to past and continuing medical treatment for his compensable injuries; that past medical treatment "has been reasonable and necessary;" and that future medical treatment is under the direction of Dr. Reeve. ***RP 289, ff #79, 80 & 85.***

The WCJ also found that Worker was a credible witness; and the facts providing the basis for expert medical testimony on causation were credible. ***RP 290, ff #87-88.***

G. Impairment ratings and the testimony of Dr. Reeve.

Dr. Reeve prepared a 21 page "Impairment Rating Evaluation for Rick D. Case" on January 2, 2014. This report was Exhibit 3 to his September 11, 2014 deposition testimony. ***Ex. 1.3.*** He reported that Worker had a 26% whole person impairment rating pursuant to the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Sixth Edition ("*Guides*"). ***Ex. 1.3, p. 18.*** Dr. Reeve assessed Worker's left foot/ankle injury as "left subtalar arthrodesis with moderate malalignment". Pursuant to Table 16-2, on page 508 of the *Guides* 6th, he assigned a 30% lower extremity rating. ***Id., p. 17.*** He assigned the same rating for the right foot/ankle injury. ***Id., p. 18.*** He then reported: "Using Table 16-10, this converts to an 8% Whole Person Impairment Rating." He then assigned a 3% whole person impairment ("WPI") rating for "pain related to mechanical strain due to altered gait" using Table 3-1. Dr. Reeve then noted that Dr. Fredman had assigned a 10% WPI for depression. ***Ex. 4.*** Dr. Reeve then used the "Combined Values Chart" on page 604 of the *Guides*, and assigned a "combined" 26% WPI. [otherwise, 8+8+3+10=29]. ***Ex. 1.3, p. 18.***

Dr. Reeve accurately assessed a 30% lower extremity impairment (LEI) for each subtalar arthrodesis with moderate malalignment pursuant to Table 16-2 on page 508 of the *Guides*. Dr. Reeve, did not, however, correctly "convert" the two

30% LEI ratings to a WPI rating. Table 16-10 on page 530 provides that a 30% LEI converts to a 12% WPI. As set forth on the top of page 530, there is a 40% conversion factor from a LEI to a WPI [30% x 40% = 12%]. Worker was entitled to two 12% WPI ratings due to his two 30% LEI ratings. ***Ex. 1, p. 29-30.*** These two 12% WPI ratings "combine" into a 23% WPI. With an additional 3% WPI (chronic pain from altered gait), the combined WPI would be 25%; and 25% combined with a 10% WPI (depression) results in a 33% WPI. Had Dr. Reeve accurately converted his 30% LEI to 12% WPI , the final combined rating would have been 33% WPI. Worker submitted requested findings of fact #85-88 on this issue. ***RP 267-268, #85-87.*** Worker asserts that the WCJ erred by failing to correct Dr. Reeve's mathematical error. The WCJ took administrative (judicial) notice of the ***Guides***. ***RP 283, ff #6.***

Dr. Reeve also testified that Worker's complaint of low back pain radiating down from his left buttock to the heel of his foot was consistent with the disc protrusion at L5-S1 shown on the MRI. Dr. Reeve described these complaints as "verifiable radiculopathy". ***Ex. 1, p. 22-23 & 36-37; Ex. 1.3, p. 12.*** Dr. Reeve testified that a 7% WPI was an appropriate rating for this injury pursuant to Class 1 within Table 17-4, "Lumbar Spine Regional Grid", on page 570 of the *Guides*. ***Ex. 1, p. 37-38.***

As stated above, the WCJ found that Worker did not suffer a permanent impairment to his low back. ***RP 288, ff #63.*** Worker challenges this finding. Worker requested appropriate findings on this issue. ***RP 268-269. #89-90.***

Worker suffers from bilateral hip pain. His condition has been diagnosed as "trochanteric bursitis". Dr. Reeve causally related Worker's bilateral hip pain to the work accident. ***Ex. 1, p. 26; Ex. 1.3, p. 16; Ex. 3, p. 59.*** The IME Panel (Dr. Matt & Dr. Patton) causally related Worker's bilateral hip pain to the work accident. ***Ex. 8, p. 8 & 17-19.*** Table 16-4 on page 512 of the Guides #6 provides an impairment rating for "chronic trochanteric bursitis with documented, chronically abnormal gait." The default rating is a 7% LE impairment. This converts [x 40%] to a 3% WPI. ***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.*** He questioned whether he should subtract the 3% WPI for pain due to altered gait. ***Ex. 1., p. 35.***

As stated above, the WCJ found that Worker did not suffer a permanent impairment to his hips. ***RP 288, ff #63.*** Worker challenges this finding. Worker requested appropriate findings on this issue. ***RP 269,#91-93.***

II. STANDARD OF REVIEW

1. When interpreting remedial legislation, such as the WC Act, the Judiciary has always applied a rule of liberal construction to effectuate the benevolent purpose of the legislation. *Mascarenas v. Kennedy*, 1964-NMSC-179, *Avila v. Pleasuretime Soda, Inc.*, 1977-NMCA-079; *Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007; *Michaels v. Anglo Am. Auto Auctions, Inc.*, 1994-NMSC-015, ¶ 13; *Benavides v. E. N.M. Med. Ctr.*, 2014-NMSC-037, ¶ 44.

2. Factual findings of the WCA are subject to a whole record standard of review. *Tallman v. Arkansas Best Freight*, 1988-NMCA-091; *Dewitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 12.

3. A *de novo* standard of review is applied when reviewing a WCJ's interpretation of statutory requirements. *Dewitt*, 2009-NMSC-032, ¶ 14; *Baca v. Complete Drywall Co.*, 2002-NMCA-002, ¶ 12.

III. ARGUMENTS

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

Despite Dr. Reeve's report that Worker was "unable to work in any reasonable occupation", Worker does not qualify for permanent total disability (PTD) benefits pursuant to Worker's right to any permanent partial disability (PPD) benefits is dependent upon suffering "a permanent impairment". § 52-1-

26(B). The extent of impairment is to be "determined by" and "based upon" the most recent edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*". § 52-1-24(A). The 6th Edition is the most recent edition. Use of the *Guides* was found to be constitutionally acceptable in *Madrid v. St. Joseph Hospital*, 1996-NMSC-064. The Supreme Court stated in ¶ 20:

> The AMA Guide is a general framework, requiring flexibility in its application. While the AMA Guide was intended to help standardize the evaluation of a worker's impairment, it was not intended to establish a rigid formula to be followed in determining the percentage of a worker's impairment. Where evidence is conflicting, the ultimate decision concerning the degree of a worker's impairment and disability rests with the workers' compensation judge.

Worker asserts that the WCJ erred in assessing his impairment rating pursuant to § 52-1-24 and the AMA *Guides*.

Dr. Reeve prepared a 21 page "Impairment Rating Evaluation for Rick D. Case" on January 2, 2014. This report was Exhibit 3 to his September 11, 2014 deposition testimony. ***Ex. 1.3.*** He reported that Worker had a 26% whole person impairment rating pursuant to the *Guides*. ***Ex. 1.3, p. 18.*** Dr. Reeve assessed Worker's left foot/ankle injury as "left subtalar arthrodesis with moderate malalignment". Pursuant to Table 16-2, on page 508 of the *Guides*, he assigned a 30% lower extremity rating. ***Id., p. 17.*** He assigned the same rating for the right

foot/ankle injury. ***Id., p. 18.*** He then reported: "Using Table 16-10, this converts to an 8% Whole Person Impairment Rating." He then assigned a 3% whole person impairment ("WPI") rating for "pain related to mechanical strain due to altered gait" using Table 3-1. Dr. Reeve then noted that Dr. Fredman had assigned a 10% WPI for depression. ***Ex. 4.*** Dr. Reeve then used the "Combined Values Chart" on page 604 of the *Guides* and assigned a "combined" 26% WPI. [8+8+3+10=29]. ***Ex. 1.3, p. 18.***

Dr. Reeve accurately assessed a 30% lower extremity impairment (LEI) for each subtalar arthrodesis with moderate malalignment pursuant to Table 16-2 on page 508 of the *Guides*. Dr. Reeve, did not, however, accurately "convert" the two 30% LEI ratings to a WPI rating. Table 16-10 on page 530 provides that a 30% LEI converts to a 12% WPI. As set forth on the top of page 530, there is a 40% conversion factor from a LEI to a WPI [30% x 40% = 12%]. Dr. Reeve made a mathematical mistake by multiplying the 30% LEI by 70% and then by 40% to arrive at only an 8% WPI. ***Ex. 1, p. 28-30 ("Q. So would you amend the opinions set forth on page 137 of your report accordingly? A. Yes.").*** Worker was entitled to two 12% WPI ratings due to his two 30% LEI ratings. ***Ex. 1, p. 29-30.*** These two 12% WPI ratings "combine" into a 23% WPI [.12+(.12)(.88)=.23]. With an additional 3% WPI (chronic pain from altered gait), the combined WPI would be

25% [.23+(.03)(.77) =.25]; and 25% combined with a 10% WPI (depression) results in a 33% WPI [.25+(.10)(.75)=.33]. Had Dr. Reeve accurately converted his 30% LEI to 12% WPI , the final combined rating would have been a 33% WPI.

The WCJ took administrative (judicial) notice of the Guides. ***RP 283, ff #6.*** Pursuant to § 52-1-24, Worker is entitled to a correct use of the Guides. Worker asserts that the WCJ erred as a matter of law by failing to correct Dr. Reeve's mathematical error. Worker submitted requested findings of fact #85-88 on this issue. RP 267-268, #85-87.

Dr. Reeve also testified that Worker's complaint of low back pain radiating down from his left buttock to the heel of his foot was consistent with a "disc protrusion at L5-S1" and that Worker had "verifiable findings" of a lumbar injury. **Ex. 1, p. 26.** Dr. Reeve described these complaints as "verifiable radiculopathy". ***Ex. 1, p. 22-23 & 36-37.*** Dr. Reeve testified that a 7% WPI was an appropriate rating for this injury pursuant to Class 1 within Table 17-4, "Lumbar Spine Regional Grid", on page 570 of the Guides. ***Ex. 1, p. 37-38; Ex. 1.4.*** On cross-examination, Dr. Reeve admitted that he did not assign a lumbar impairment at the time of his evaluation. ***Ex. 1, p. 87-88.***

The WCJ found that Worker did not suffer a permanent impairment to his low back. ***RP 288, ff #63.*** Worker asserts that the WCJ erred as a matter of law by

failing to find a permanent impairment to his lumbar spine, based upon Dr. Reeve's verifiable findings of injury and Table 17-4 of the *Guides*. Worker requested appropriate findings on this issue. ***RP 268-269. #89-90.***

Worker suffers from bilateral hip pain. His condition has been diagnosed as "trochanteric bursitis". ***Ex. 1, p. 31; Ex. 8, p. 17.*** Dr. Reeve causally related Worker's bilateral hip pain to the work accident. ***Ex. 1, p. 26; Ex. 1.3, p. 16; Ex. 3, p. 59.*** The IME Panel (Dr. Matt & Dr. Patton) causally related Worker's bilateral hip pain to the work accident. ***Ex. 8, p. 8 & 17-19.*** Table 16-4 on page 512 of the *Guides* provides an impairment rating for "chronic trochanteric bursitis with documented, chronically abnormal gait." The default rating is a 7% LE impairment. This 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.*** He questioned whether he should subtract the 3% WPI for pain due to altered gait. ***Ex. 1., p. 35.*** He then testified that chronic pain was a "separate and distinct condition" and that "The AMA Guides would say that you have to give them the maximum impairment rating". ***Ex. 1, p. 56.*** On cross-examination, Dr. Reeve explained that he thought the 3% WPI rating he assigned for chronic pain encompassed the hips. ***Ex. 1, p. 88-91.*** He confirmed, however, that Worker's hip injuries had been diagnosed as bursitis and

that "he would have some form of – he could have a formal impairment rating". ***Ex. 1, p. 91.***

The WCJ found that Worker did not suffer a permanent impairment to his hips. ***RP 288, ff #63.*** Worker asserts that the WCJ erred as a matter of law by failing to find a permanent impairment to his hips, based upon Dr. Reeve's and the IME physician's verifiable findings of injury and Table 16-4 of the *Guides*. Worker requested appropriate findings on this issue. ***RP 269, #91-93.***

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 requires a finding that Worker has a 12% WPI for his right foot/ankle injury; a 12% WI for his left foot/ankle injury; a 10% WPI for depression; a 7% WPI for his lumbar disc protrusion with radiating pain; a 3% WPI for his right hip injury; a 3% WPI for his left hip bursitis; 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.

The *Guides* utilize a "Combined Values" method for combining multiple impairment ratings. The Combined Values Chart is found in Appendix A on pages

604-606 of the *Guides*. "The values are derived from the formula A + B(1-A) = combined value of A and B, where A and B are the decimal equivalents of the impairment ratings." ***Guides, p. 604.*** Impairments to the upper extremity (UEI) and lower extremity (LEI) must first be expressed as a whole person impairment (WPI) before combining.

Worker's WPI impairment ratings "add" up to at least a 50% WPI, to wit: 12+12=24; +10=34; +7=41; +3=44; +3=47; +3=50. Pursuant to the "Combined Values Chart" on pages 604-606 of the *Guides*, these very same impairment ratings "combine" into a 42% WPI, to wit: 12+12(88%)=23; +10(77%)=31; +7(69%)=36; +3(64%)=38%; +3(62%)=40%; +3(60%)=42.

At $666.02 per week, a 1% change in PPD benefits will reduce benefits by $6.66 per week, or by $3,330.10 over 500 weeks. An 8% loss in the WPI rating is $26,640.80 less in PPD benefits over 500 weeks.

The *Guides* have been consistently criticized for devaluing disability assessments. In "*Recommendations to Guide Revision of the Guides to the Evaluation of Permanent Impairment*", an article published in the Journal of the American Medical Association (JAMA) on January 26, 2000, among numerous criticisms, the most profound were the following:

Defining 100%. The top of an impairment scale (100%) should reflect a level of functional loss related to inability to perform the specific tasks that are necessary for independent daily life. Instead, the Guides defines 95% to 100% impairment as "a state that is approaching death". The high level of impairment required for a 100% WPI rating results in the devaluation of significant physical and mental impairments. For example, in the fourth edition of the Guides, a mental status impairment that "requires directed care under continued supervision and confinement in home or other facility" is rated at 30% to 49% WPI; severe paroxysmal disorder of such frequency that it limits activities to those that are supervised, protected or restricted is also rated at 30% to 49% WPI; a patient capable of spontaneous respiration but to such a limited degree that he/she is confined to bed can be rated as low as 50% WPI.

The setting of an excessively high standard for 100% impairment essentially depresses the entire scale so that individuals' functional losses are not accurately reflected in their numerical ratings. The practical result in 2-fold: The Guides consistently underrates impairments as they are perceived by patients and independent observers, and benefit systems that place great weight on impairment ratings value some impairments at inappropriately low levels.

Furthermore, the current scale leads to the adoption of the asymptotic formula for combining impairments. Given the definition of 100% WPI, clearly no one can be more than 100% impaired. Therefore, the Guides requires that each subsequent impairment be reduced in value. Thus, the loss of a foot is valued at 25% WPI and the loss of the second foot results in a total rating of 44% WPI. 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.

Logic and reason dictate that multiple impairments can result in "additive", "less than additive" or "greater than additive" levels of functional loss. The

"combined values" method utilized by the *Guides* never results in a "greater than additive" value; almost always results in a "less than additive" value whenever the sum of two impairments of at least 5% each exceeds 15%; and only results in the "additive" value whenever one impairment is small or the sum is about 15% or less. For example: (a) a 10% WPI and a 5% WPI combine to 15%, but so do a 10% WPI and a 6% WPI [.10+.05(.90)=15; .10+.06(.90)=15; (b) four 10% impairments combine to 34% [.10+.10(.90)=.19; .19+(.10)(.81)=.27; .27+.10(.73)=.34]; (b) two 50% impairments combine to 75% [.50+.50(.50)=.75]; a 70% WPI and a 30% WPI combine to 79% [.70+.30(.30)=.79].

This "combined values" or "less than additive" method of compensating a disabled worker with multiple impairments was not specifically approved by the Legislature, is fundamentally unfair to disabled workers with multiple impairments, and denies workers with substantial and multiple impairments equal protection under the Workers' Compensation Act.

"Impairment" is defined in § 52-1-24. It is referred to singularly. Similarly, the definition of permanent partial disability also refers to impairment singularly. Subsection B defines partial disability as a condition whereby a worker "suffers a permanent impairment". Subsection C provides that PPD benefits are to be "determined by calculating the worker's impairment". Subsection D provides for a PPD rating "equal to his impairment" in the event a worker earns wages in excess

of the pre-injury wage after the accident. The rules of statutory construction provide: "Use of the singular number includes the plural, and use of the plural number includes the singular." NMSA 1978 (1997), § 12-2A-5(A). Applying this rule to § 52-1-25, Worker should be compensated for PPD at a rating equal to his impairments, rather than the less than additive value, plus modifier values.

Worker asserts that this issue is a matter of first impression and without prior case law guidance. Worker believes that legislative intent supports his construction. First, it would be fool-hardly to believe that any members of the Legislature in 1990 had any inkling of the inner workings of the AMA's *Guides*. But we do know that in enacting the current law in 1990 the Legislature intended to give greater compensation to the disabled workers with the most severe disabilities. While § 52-1-25 severely restricts the award of permanent total disability benefits, § 52-1-41(B) grants such benefits for the "remainder of the worker's life". *Fowler v. Vista Care*, 2014-NMSC-019. All other disabled workers are limited to 700, 500 or a scheduled number of weeks of benefits. § 52-1-42(A)(1) grants 700 weeks of PPD benefits to Worker's with PPD ratings of 80% or more, while (A)(2) grants only 500 weeks to those with ratings less an 80%. Logic and reason dictate that the Legislature would likewise have intended to fully compensate disabled workers with multiple and substantial impairment ratings the full additive value of their

impairments, rather than a less than additive value. It would be absurd and unreasonable to deny an otherwise totally disabled worker the full value of his permanent impairments because of the AMA's computation system equates a 100% impairment with death, rather than the inability to work. Likewise, it is contrary to the spirit of the Act to deny a worker with substantial and multiple impairments the full value of his permanent impairments while granting full value to those with minor impairments. Further, the loss of even a 1% value could be critical to a severely disabled worker on the cusp of an 80% PPD rating. At the maximum compensation rate of $666.02, the difference in value of PPD at 80% versus 79% is at least $106,563.20 due to the additional 200 weeks.

Finally, another rule of statutory construction is to avoid an unconstitutional result. § 12-2A-18(3). Worker asserts that an interpretation of § 52-1-24 and -26 that would create two classes of individuals: (1) those with single and/or minor impairment ratings who receive full value for PPD benefits; and (2) those with multiple impairment ratings who receive "less than additive value" for PPD benefits; would violate the equal protection clause of the New Mexico *Constitution*, Article II, § 18. There is no rational basis for discriminating against workers who have multiple impairments and have a greater need for full benefits. *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶'s 21-29.

In *Aranda v. Mississippi Chemical Corporation*, 1979-NMCA-097, ¶ 32, this Court stated: "The primary purpose of the Workmen's Compensation Act is to keep an injured workman and his family at least minimally secure financially. Public policy demands it." In *Gutierrez v. Intel Corporation*, 2009-NMCA-106, ¶ 15, this Court stated: "The point of the Act is to compensate workers for injuries caused by their employment while being fair to the employer. ... We do not favor constructions of the Act that limit a worker's ability to recover for the full extent of his or her injuries."

The plain language of § 52-1-24 and § 52-1-26, legislative intent, 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 IN ASSESSING E/I'S REIMBURSEMENT RIGHTS PURSUANT TO § 52-5-17 AND *GUTIERREZ V. CITY OF ALBUQUERQUE.*

Worker filed a lawsuit against third parties that he alleged negligently caused his personal injuries sustained on March 17, 2010. Worker dealt with the tortfeasors in good faith and at arm's length. The tort claim was resolved by settlement in January 2013 just a few months prior to trial and after extensive discovery was conducted. There was no admission of liability by the tortfeasors.

Several individuals who used the ladder were deposed and they described it as being in a safe condition. Worker received a gross settlement amount of $1,850,000. He was represented by The Law Office of Brian K. Branch. His attorney fees, gross receipts tax and costs amounted to $814,000.00, or 44% of the gross settlement. Worker received a net sum of $1,036,000 from the settlement.

Attorney Branch promptly notified E/I's Attorney of the settlement and agreed to hold $95,000.00 in his trust account until E/I's claim to reimbursement was resolved. Attorney Branch also offered to meet with E/I's Attorney to discuss potential and informal resolution of E/I's claims. E/I's Attorney declined to meet with Attorney Branch. Instead, E/I terminated all payments to Worker after August 1, 2013 and the reimbursement dispute proceeded to trial on November 18, 2014.

Attorney Sean McAfee of The Law Office of Brian K. Branch wrote to E/I's Attorney on January 28, 2013. ***Exhibit 13.*** In his four page letter, Attorney McAfee advised E/I's Attorney of the terms of settlement, discussed liability issues, itemized Worker's tort damages and set forth a reimbursement analysis pursuant to *Gutierrez v. City of Albuquerque*, 1998-NMSC-027. In addition, he enclosed copies of the Forensic Economic Analysis of Philip t. Ganderton, Ph.D., and the Life Care Plan for Rick Case by Anita A. Kelly, a certified life care planner. ***Ex. 14 & 15.***

McAfee wrote in his letter, and similarly testified, that the reasonable value of Worker's tort damages was $4,300,000.00. He itemized the damages as follows:

	Elements of Damage	*Value*	*% of claim*
1.	Payment Medical Expenses	$ 122,000.00	2.8%
2.	Past Lost Earnings	$ 208,000.00	4.8%
3.	Past Loss of Household Services	$ 15,000.00	0.3%
4.	Future Loss of Household Services	$ 202,000.00	4.7%
5.	Future Medical Expenses	$ 221,000.00	5.1%
6.	Future Lost Earnings	$1,907,000.00	44.4%
7.	Pain and Suffering	$ 750,000.00	17.4%
8.	Loss of Enjoyment of Life	$ 650,000.00	15.2%
9.	Loss of Consortium (Dianna Case)	$ 225,000.00	5.2%
	Total Case Value	*$4,300,000.00*	*100%*

McAfee then set forth his analysis pursuant to *Gutierrez v. City of Albuquerque,* 1998-NMSC-027. His proposal included reimbursement for future medical expenses estimated at $221,000.00 and future indemnity benefits overly valued at $366,300.00. McAfee over-estimated the value of future indemnity benefits by assuming that total disability benefits would continue at $666.02 per week for 550 weeks. The WCJ awarded $293,713.30. ***RP 287, ff #47.*** The value of future medical expenses was probably over-estimated as well.

Employer/Insurer never responded to McAfee's letter. On or about August 1, 2013, E/I terminated all workers' compensation benefits, including all weekly disability payments and all medical coverage.

As a result of the accident on May 17, 2010, Worker sustained multiple, severe and permanent injuries that prevent him from working as a pipe-fitter/welder or at any other gainful employment. ***Exhibit 1 (Dr. Reeve depo), p. 21.***

Worker's average annual earnings for the full years 2007, 2008 and 2009 was $56,834. He had a work life expectancy of 25.7 additional years. The total present discounted value of his loss of wages and associated mandatory fringe benefits is $207,711 for the three years after the accident, and $1,906,924 for the future years to expected end of work life. These sums total $2,114,635, are supported by the facts, Dr. Ganderton's expert analysis and are reasonable. ***Ex. 14, p. 2.***

As a result of the work-related injuries, Worker is physically unable to perform some or all aspects of numerous and valuable household services (child care, automotive maintenance and repairs, lawn mowing, cleaning, cooking, dishwashing, shopping, breaking in and caring for horses, etc.). The present discounted value of the loss of Worker's past and future household services is $216,596. ***Ex. 14, p. 3.*** This sum is supported by the facts, Dr. Ganderton's expert analysis and is reasonable.

At the time of settlement, Worker had incurred medical expenses of about $122,000.00. Employer/Insurer paid about $82,000.00 for these medical expenses

pursuant to WCA Rules, including the maximum allowable payment (MAP) schedules. E/I paid 67.2% of Worker's medical bills. ***Ex. 12.***

Worker's future medial expenses were assessed at $221,000 by Anita Kelly, a certified life care planner. This amount is supported by the facts, Ms. Kelly's expertise and is reasonable. ***Ex. 15.***

The values assigned for pain and suffering and loss of enjoyment of life together amounted to only 33% of Worker's total damages. This percentage is very reasonable.

Worker's pain and suffering was assessed at $750,000 by Worker's attorneys. Worker experienced excruciating pain immediately after his fall from the ladder. Both calcaneal bones were shattered. Two 6.5 cm screws were inserted from the posterior calcaneus to the talar neck in each foot/ankle. ***Ex. 7, p. 5-6, 16-17 & 19.*** Worker experiences pain with each step that he takes, and even at rest. Worker walks with an abnormal and antalgic gait (his wife describes it as "waddling"). He has pain in his right knee, both hips and low back as a result of his abnormal gait. His pain in constant and severe. His left hip occasionally pops out of socket. His right hip and right knee grind with movement. His low back pain requires frequent chiropractic manipulation. He has frequent pain along the sciatic nerve down each leg. He requires frequent massages and hot baths. He was

unable to sleep for more than 3 to 4 hours at a time due to waking from pain. He was prescribed very strong narcotic pain medications by Dr. Reeve. These medications caused alternating bouts of diarrhea and constipation. The valuation of $750,000 in tort damages for pain and suffering is supported by the facts, the legal expertise of Mr. McAfee and Mr. Branch, and is reasonable.

Worker's loss of enjoyment of life was assessed at $650,000 by Worker's attorneys. Worker is physically unable to work at his chosen occupation as a pipefitter/welder, work that he enjoyed doing, was good at and was proud of. Worker is unable to stand or walk for more than one hour per day or longer than about 150 feet. He needs assistive devices (cane, walker, wheelchair) when ambulating. He needs assistance putting on and taking off his shoes and socks (as demonstrated at trial). He needs assistance with showering. Engagement in sexual and romantic activities with his wife Dianna has decreased. Formerly an avid dancer, he no longer dances with his wife and he lasted for only half a dance with his daughter at her wedding. He is physically unable to engage in sports and recreational activities with his children. He avoids crowds due to the fear of being pushed over. He has not golfed since undergoing surgeries. He no longer fishes in steams. He can no longer go hunting (without a handicap permit). The valuation of $650,000 in tort damages for loss of enjoyment of life is supported by the facts, the legal expertise of his attorneys, and is reasonable.

Dianna Case's loss of consortium claim was assessed at $225,000 by Worker's attorneys. Dianna testified that she and Rick danced (jitterbug and country swing) twice a week before the accident, and now they don't dance at all. She described Rick as having a very calm demeanor prior to the accident, and now describes him as "angry", "short fused", "bickering" and not his old self. She described how she has to awake at night to massage Rick's feet. She stated that the frequency of sexual, romantic and intimate activities have decreased. The valuation of $225,000 in tort damages for loss of consortium is supported by the facts, the expertise of his attorneys, and is reasonable.

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 and did not dispute McAfee's *Gutierrez* analysis. Employer/Insurer's position was that Worker was made financially whole by the tort settlement, that Worker was obligated to fully reimburse E/I for all WC benefits paid or provided to Worker (and without contribution for Worker's attorney fees) and that all WC benefits should be terminated. ***RP 212-213, #2-9.*** With loss of earnings of $2.115 million and a $1.85 million settlement with 40% attorney fees (net recovery of $1.036 million), E/I's position was extremely unreasonable and properly rejected by the WCJ.

The WCJ made the following material findings of fact relating to the reimbursement issue:

27. Damages such as pain and suffering, loss of enjoyment of life, and loss of consortium are nebulous and difficult to assess by an outsider after the fact, based only by what the outsider sees on paper or during a short hearing lasting only a few hours.

28. Worker's expert on damages was Worker's tort attorney, who admittedly was still acting as an advocate for Worker and not without bias.

29. The WCJ assesses the value of Worker's case to be $3,300,000.

30. Worker received $1.85 M, or 56% of the amount needed to make Worker whole ($3.3 million).

Employer/Insurer are "entitled to only that part of the tort recovery which represents monies paid that **duplicate** compensation it has paid or is liable to pay." *Gutierrez*, ¶ 14 (original emphasis). "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." Id., (original emphasis). Worker did so. "If a worker does so, the workers' 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." Id.

Worker asserts that the WCJ erred as a matter of law by not apportioning Worker's tort recovery into any elements. Eight months after the evidence was presented, the WCJ simply knocked $1 million off of Worker's valuation without any analysis other than Worker's tort attorney remained his advocate. This was improper and constitutes error as a matter of law. *Gutierrez*, ¶ 14.

Worker further asserts that the WCJ erred as a matter of law by not accepting the reasonable and conservative valuation of Worker's tort damages that were made by Worker's experts, his tort attorney, economist and certified life planner. Employer/Insurer failed to rebut these assessments and offered no other expert opinions.

In *Hernandez v. Mead Foods, Inc.*, 1986-NMCA-020, this Court established the "uncontradicted medical evidence" rule. This rule is an exception to the general rule that a trial court can accept or reject expert opinion as it sees fit. The rule is based on NMSA 1978, § 52-1-28(B), which requires the worker to prove causal connection between disability and accident as a medical probability by expert medical testimony. Because the statute requires a certain type of proof, uncontradicted evidence in the form of that type of proof is binding on the trial court. However, uncontradicted medical testimony does not have to be "accepted as true if (1) the witness is shown to be unworthy of belief, or (2) his testimony is equivocal or contains inherent improbabilities, (3) concerns a transaction

surrounded by suspicious circumstances, or (4) is contradicted, or subjected to reasonable doubt as to its truth or veracity, by legitimate inferences drawn from the facts and circumstances of the case." *Hernandez*, ¶ 14.

Worker asserts that a similar rule, the uncontradicted tort damages rule, be established in proceedings before the WCA. It was a tremendous hardship to Worker to have all of his WC benefits terminated based on the absurd position taken by Employer/Insurer that he was made financially whole by a tort settlement that was less than just one element of his damages. It is a tremendous hardship for this attorney to essentially work for free on this appeal and then have to perform further work if this issue is remanded. Worker presented his evidence as required by § 52-5-17 and *Gutierrez*. Employer/Insurer failed to present any evidence as to the value of Worker's tort damages. Worker's expert opinions were not shown to be unworthy of belief, were not equivocal or suspicious, were not contradicted, and were not subject to any reasonable doubts as to their veracity.

Worker's valuation of his lost earnings, household services and medical expenses, past and future, were fully supported by the facts and expert opinions of an economist and certified life planner. These damages totaled $2.675 million. If the WCJ accepted these amounts, that left only $625,000 for past and future pain and suffering, past and future loss of enjoyment of life and loss of consortium for Worker's spouse. This amount is less than 39% of the conservative valuations

made by Worker's tort attorneys. Due to the extent of Worker's injuries, pain and suffering, and loss of enjoyment, Worker asserts that this possible valuation is inherently unreasonable. It is also absurd that a WCJ - who is not permitted to award a single penny for pain and suffering, loss of enjoyment of life and loss of consortium - without any expressed findings of fact, can summarily discount the valuation of such tort damages by attorneys who for decades have routinely obtained such damages for their clients.

The WCJ's rejection of Worker's tort damages and reimbursement analysis was contrary to logic and reason, and should be reversed. *Gutierrez; Hernandez.*

IV. 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.

GERALD A. HANRAHAN
Attorney for Worker/Appellee/
Cross-Appellant
203 Hermosa Drive NE
Albuquerque, NM 87108
Telephone: (505) 255-2229
Fax: (505) 255-5604
Email: hanrahanlaw@comcast.net

CERTIFICATE of SERVICE

I hereby certify that on March 28, 2016, a true copy of this Brief-in-Chief was faxed and e-mailed to Paul Maestas, Attorney for Employer/Insurer-Appellant-Cross-Appellee.

GERALD A. HANRAHAN