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.

ANSWER BRIEF 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. ARGUMENT

A. Summary of Worker's Arguments.

Worker Ricky D. Case ("Worker") initially challenges Workers' Compensation Judge Leonard J. Padilla's ("WCJ") determination regarding the Worker's foot/ankle impairments, determination that the Worker did not suffer permanent impairments to his low back and hip and the "Combined Values" concept in determining a whole body impairment utilized by the *AMA Guides to the Evaluation of Permanent Impairment – Sixth Edition* ("*AMA Guides*"). When peeled to their core, Worker first invites this Honorable Court to reweigh the evidence regarding the Worker's permanent impairments and to resolve any conflicting evidence in the Worker's favor. Additionally, after relying on the *AMA Guides* to support his arguments regarding WCJ's impairment determinations, the Worker invites this Court to act as a super Legislature and adopt a methodology in assessing whole body impairments that is contrary to what is contained in the *AMA Guides* and NMSA 1978, § 52-1-24(A) (1990).

Worker then seeks to convince this Court that the WCJ's determination regarding the Worker's tort damages was incorrect merely because the WCJ chose not to adopt the assessment of the attorney who represented the

Worker in his third-party lawsuit. Again, Worker invites this Court to reweigh the evidence and resolve any conflicts in the evidence in the Worker's favor.

In short, Employer/Insurer Hanna Plumbing & Heating Co., Inc. and Mechanical Contractors Association of New Mexico, Inc. Workers' Compensation Group Fund ("Employer/Insurer") submit that the WCJ's determinations challenged by the Worker in connection with this appeal are supported by the record and substantial evidence. Moreover, this Court should decline Worker's invitation to act as a super Legislature and disavow the "Combined Values" concept contained in the current version of the *AMA Guides*.

B. Standard of Review.

"We review workers' compensation orders using the whole record standard of review." *Leonard v. Payday Professional and Bio-Cal Comp.*, 2007 NMCA 128, ¶ 10, 142 N.M. 605, 608, 168 P.3d 177, 180, *citing Tallman v. ABF (Arkansas Best Freight), 108 N.M. 124, 126, 767 P.2d 363, 365 (Ct. App. 1988), modified on other grounds by Delgado v. Phelps Dodge Chino, Inc., 2001 NMSC 34, 131 N.M. 272, 34 P.3d 1148.* "Whole record review

'contemplate[s] a canvass by the reviewing court of all the evidence bearing on a finding or decision, favorable and unfavorable, in order to determine if there is substantial evidence to support the result.' Id. at 128, 767 P.2d at 367. We may not 'substitute [our] judgment for that of the administrative agency,' and we view 'all evidence, favorable and unfavorable, . . . in the light most favorable to the agency's decision.' Id. at 129, 767 P.2d at 368. We will affirm the agency's decision if, after taking the entire record into consideration, 'there is evidence for a reasonable mind to accept as adequate to support the conclusion reached.' Id. at 128, 767 P.2d at 367." *Leonard*, 2007 NMCA at ¶ 10, 142 N.M. at 608, 168 P.3d at 180.

"If substantial evidence exists upon which a reasonable mind would have made such a decision, the court should affirm the administrative officer's decision, without reweighing the evidence or resolving any conflicts in evidence." *Cass v. Timberman Corp.*, 111 N.M. 184, 187, 803 P.2d 669, 672 (1990). "We will not, however, substitute our judgment for that of the agency; although the evidence may support inconsistent findings, we will not disturb the agency's findings if supported by substantial evidence on the record as a whole." *Herman v. Miners' Hospital*, 111 N.M. 550, 552, 807 P.2d 734, 736 (1991).

Moreover, although not entirely clear, the Worker's Brief-in-Chief also appears to advocate using the pre-1990 liberal construction analysis in addressing the issues presented by this appeal. This suggestion effectively invites this Court to ignore the clear pronouncement of the New Mexico Legislature in revising the New Mexico Workers' Compensation Act in 1990. NMSA 1978, § 52-5-1 (1990) which states:

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

Moreover, this suggestion invites this Court to ignore its own prior pronouncements. "Liberal construction has historically been tempered by attention to legislative intent and balanced against sound reason and policy... (Citation omitted). Fundamental fairness to both the workers and employers has long been a guideline." *Garcia v. Mt. Taylor Millwork, Inc.*, 1989-NMCA-100, ¶ 11, 111 N.M. 17, 19, 801 P.2d 87, 89. *See also Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, ¶ 8, 128 N.M. 601, 605, 995 P.2d 1043, 1047 ("Section 52-5-1 [simply] calls for a balanced and evenhanded construction of

the Workers' Compensation Act.") and *Gurule v. Dicaperl Minerals Corp.*, 2006-NMCA-054, ¶ 9, 139 N.M. 521, 524, 134 P.3d 808, 810 ("See Garcia v. Mt. Taylor Millwork, Inc. .... (stating that when the courts interpret the Act, the guideline is fundamental fairness to both the worker and employer.")). Simply put, notwithstanding the Worker's Brief-in-Chief suggestion, liberal construction of the New Mexico Workers' Compensation Act is a thing of the past. Evenhandedness should be applied in addressing the issues presented by this appeal.

C. The WCJ's Foot/Ankle Conversions are Supported by Substantial Evidence.

Worker first asserts that the WCJ erred in not finding that the Worker suffered a twelve percent (12%) whole person impairment rating to each foot/ankle as a result of his March 17, 2010 accident.[1] Worker argues that

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1 Please refer to the briefs submitted by Employer/Insurer in regard to their appeal from the WCJ's decision. Employer/Insurer submit that, because the Worker's foot/ankle injuries are separate and distinct from the Worker's whole body injuries that are compensated under the scheduled injury section of the New Mexico Workers' Compensation Act ("the Act"), it really doesn't matter what lower extremity or whole body impairment rating is assigned to the Worker's foot/ankle injuries. This Court's prior authorities make it clear that, for purposes of determining the amount of a scheduled injury, it is the "loss of use" to the scheduled member that matters, not the impairment rating.

Dr. Anthony P. Reeve changed his opinion regarding what the thirty percent (30%) lower extremity impairments assigned to the Worker's foot/ankle injuries should be when converted to a whole body impairment and that, therefore, the WCJ should have adopted Dr. Reeve's equivocal and contradictory testimony on this point that supports the Worker's position and ignore the remainder of Dr. Reeve's opinions and evidence. This is nothing more than a request by the Worker for this Court to reweigh the evidence.

Dr. Reeve's impairment report admitted into evidence as part of Worker's Exhibit No. 3 supports the WCJ's decision. More specifically, Dr. Reeve's impairment report, pages 17 and 18, outlines Dr. Reeve's impairment opinions regarding the Worker's foot/ankle injuries and assigns both lower extremity and whole body impairments for each foot/ankle injury. The report indicates that the thirty percent (30%) lower extremity impairment assigned to each foot/ankle converts into an eight percent (8%) whole body impairment for each foot/ankle. Dr. Reeve's impairment report provides substantial evidence that supports the WCJ's determination in regard to this issue and cannot be ignored.

Moreover, the WCJ clearly made his decision regarding whole body

impairment conversion for each ankle/foot injury after reviewing and considering conflicting evidence. First, as noted above, Dr. Reeve's impairment report indicates that each 30% lower extremity impairment translates into an eight percent (8%) whole body impairment for each foot/ankle. Additionally, a careful review of the pages from Dr. Reeve's deposition cited at p. 16 of Worker's Brief-in-Chief, when considered as a whole, demonstrate that Dr. Reeve's testimony was tentative, hesitant and conflicting. Moreover, it appeared as if Dr. Reeve was uncomfortable with Worker's counsel's approach to and interpretation of the pertinent provisions of the *AMA Guides*.

To illustrate, Dr. Reeve was asked the following questions and gave the following answers:

"Q. So a 30% lower extremity impairment, wouldn't that be a 12% whole person impairment? (Objection omitted).

A. I think I have to look at the table. We use the table to do the conversion. I don't do it like – if the table shows – what does the table show?" Worker's Exhibit 1, Dr. Anthony P. Reeve Deposition, P. 28, L. 17-23.

"Q. But I just want to verify from the record, from the Table 16-2, what the impairment is to the lower extremity of 30%, and that converts to 12%

whole person? (Objection omitted).

A. That would be that. If we're doing that, we're incorporating the entire lower extremity, not just the ankle and the foot. Agreed?

Q. No. For the condition, that's what the rating is.

A. Right, but what I'm saying is that would include the hip and the knee then, because now it's the whole lower extremity converts to 8. But if you're doing it by the ankle, then this is correct.

It other words, if – if the -- if you do an ankle – if you consider this an ankle to the lower extremity whole body, then that'll be an 8%, and then if we're going to break out the knee and hip again, that would be incorporated in the total 30%. Agreed?" Worker's Exhibit 1, Dr. Anthony P. Reeve Deposition, P. 30, L. 7-24.

"Q. And in this case you used the ankle and the foot injuries that you impaired to come up with an 8% whole-body impairment for each lower extremity?

A. Yes." Exhibit 1, Dr. Anthony P. Reeve Deposition, P. 76, L. 11-14.

"Q. Well, 12% whole-person impairment rating as a result of each subtalar arthrodesis? (Objection omitted).

A. Well, I think the point I'm trying to make is this is a left and a right

subtalar arthrodesis, which is ankle and foot, so the rating that it should have been given would have been – I guess it would depend on what we started with. **If, indeed, we started with a 30% foot and ankle rating, right, then the whole body would have been 8%.**" Exhibit 1, Dr. Anthony P. Reeve, Deposition, P. 50, P. 14-23.

See also pages 51-52 of Dr. Reeve's deposition testimony. This testimony supports the WCJ's determination.

Clearly, Dr. Reeve was confused and his testimony was conflicting and equivocal on this point. Therefore, in exercising his discretion in weighing the evidence, the WCJ's determination that the 30% lower extremity impairments assigned to the Worker's feet/ankles converts into a twelve percent (12%) whole person impairment rating is supported by substantial evidence. The WCJ properly considered all of the evidence on the issue, not just the evidence that supports the Worker's position regarding this issue and should not be disturbed. Moreover, as noted in the footnote above, the impairment rating assigned to the Worker's feet/ankles is not relevant in determining the scheduled injury/loss of use that the Worker suffered to each foot/ankle.

D. The Worker Did not Suffer a Permanent Impairment to

his Low Back.

Continuing his substantial evidence motif without calling it "substantial evidence," Worker next asserts that the WCJ erred in not assigning an impairment rating to the Worker's low back. Again, the fallacy with Worker asserting is that it focuses only on the evidence that supports the Worker's position and not all of the pertinent evidence. "Whole record review 'contemplate[s] a canvass by the reviewing court of all the evidence bearing on a finding or decision, favorable and unfavorable, in order to determine if there is substantial evidence to support the result.' *Id.* at 128, 767 P.2d at 367. We may not 'substitute [our] judgment for that of the administrative agency,' and we view 'all evidence, favorable and unfavorable, . . . in the light most favorable to the agency's decision.' Id. at 129, 767 P.2d at 368. We will affirm the agency's decision if, after taking the entire record into consideration, 'there is evidence for a reasonable mind to accept as adequate to support the conclusion reached.' *Id.* at 128, 767 P.2d at 367." *Leonard*, 2007 NMCA at ¶ 10, 142 N.M. at 608, 168 P.3d at 180.

The analysis regarding this issue begins with a review of Dr. Reeve's impairment report. Worker's Exhibit 3. At page 16 of his impairment report,

Dr. Reeve diagnoses "chronic low back pain" for the Worker's low back complaints. Dr. Reeve did not diagnose a herniated disc or, importantly, a radiculopathy for purposes of the impairment evaluation. Moreover, the following are some additional pertinent aspects of Dr. Reeve's deposition testimony:

"Q. Okay. You stated that the MRI reveals a herniated disc at L5-S1?

A. Yes. **He doesn't actually have a herniated disc.** He has a disc protrusion at L5-S1. It's not a clear herniated disc, as I recall. I think he has a verifiable finding, yes." Exhibit 1, Dr. Anthony P. Reeve Deposition, P. 15-20. (Emphasis added.)

"Q. You did not even diagnose a chronic low-back pain with nonverifiable radicular complaints?

A. No." Exhibit 1, Dr. Antony P. Reeve Deposition, P. 73, L. 23-25.

"Q. So at the time of the impairment rating, and you haven't done any additional work since then, your opinion is – or you have not assigned an impairment rating to Mr. Case's low back?

A. Yes, that's correct.

Q. We can engage in a lot of speculation and conjecture about what might

be going on with Mr. Case, but your best medical judgment at the time you did the impairment rating here today is not impairment for the low back?

A. Yes.

Q. And that's based upon a reasonable degree of medical probability?

A. Yes." Worker's Exhibit 1, Dr. Anthony P. Reeve's deposition, P. 87, L. 22-P. 88, L. 14.

As is obvious from the above, there is substantial evidence in the records to support the WCJ's determination that the Worker did not suffer a permanent impairment to his low back as a result of his March 17, 2010 accident. Again, the Worker invites this Court to focus almost exclusively on the evidence that supports the position advocated by the Worker at the Formal Hearing and nothing more. The WCJ's duty to the parties was to objectively consider ALL evidence submitted at the Formal Hearing and to make a decision based upon a consideration of all evidence. The WCJ's duty was not to consider mostly the evidence favorable to just one party and make a decision based upon that type of analysis. Similarly, in addressing this issue, this Court, with all due respect, may not reweigh the evidence or even consider if there is substantial evidence in the record that may support a

different result. The question is whether the WCJ's decision is supported by substantial evidence. As demonstrated above and in the record, it is. Therefore, the WCJ's decision in regard to whether the Worker suffered a permanent impairment to his low back should not be disturbed.

E. The Worker did not Suffer a Permanent Impairment to his Hips.

The Worker next challenges the WCJ's determination that the Worker did not suffer a permanent impairment to his hips as a result of his March 17, 2010 accident. Again, this presents a substantial evidence question and, once again, the Worker focuses mostly on the evidence that would support the result his seeks essentially requesting that this Court sit as the trial judge and reweigh the evidence to resolve this issue in favor of the Worker. Unfortunately, this is not the way a substantial evidence question is reviewed by this Court as the case law cited above indicates.

In short, there is substantial evidence in the record to support the WCJ's decision that the Worker did not suffer a permanent impairment to his hips. The starting point is again Dr. Reeve's impairment report which, with respect to the Worker's hips diagnosed "chronic bilateral hip pain." Exhibit 3, Dr. Reeve's impairment report, p. 16. The impairment report does

not diagnose the "bursitis" referenced in the Worker's Brief-in-Chief. Thus, "bursitis" was not the diagnosis as the time Dr. Reeve performed his impairment rating. The following testimony is also contained within Dr. Reeve's deposition:

"Q. Now, in terms of the hip, you also, on January 2, 2014 diagnosed bilateral hip impairment?

A. Yes.

Q. Without a bursitis there's no basis to assigning an impairment rating to Mr. Case's left hip?

A. Yes.

Q. And you agree with that?

A. Yes.

Q. And that's based upon a reasonable degree of medical probability?

A. Yes." Exhibit 1, Dr. Anthony P. Reeve Deposition, P. 88, L. 17-P. 89, L. 6.

"Q. I understand. All I'm trying to establish, Dr. Reeve, is if we look at Table 16-4, and the diagnosis is left hip pain, if the diagnosis is left hip pain then he fits into a class zero, and that means a zero percent impairment.

A. Well, if you just go with a diagnosis of hip pain, but if you go with the diagnosis of bursitis, he should have some form of – he could have a formal impairment rating.

A. And that's based upon a reasonable degree of medical probability? (Objection omitted.)

Yes.

Q. And you have the same answer for the right hip?

A. Yes."

Q. Based upon a reasonable degree of medical probability?

A. Yes." Exhibit 1, Dr. Anthony P. Reeve Deposition, P. 91, L. 14-P. 92, L. 7.

Unquestionably, Dr. Reeve's testimony about whether the Worker suffered an impairment to his hips as a result of his March 17, 2010 accident was conflicting and, at times, confusing and was largely dependent on what assumptions Dr. Reeve was asked to make. Moreover, Dr. Reeve's testimony about this issue may have also supported the conclusion the Worker seeks. However, as with the other substantial evidence questions raised by this appeal, this Court's function is not to reweigh the evidence even if it believes that the WCJ could have reached a different result. The evidence outlined

above and in the record demonstrates that the WCJ's determination that the Worker did not suffer an impairment to his hips as a result of his March 17, 2010 accident is supported by substantial evidence and should not be disturbed.

F. The WCJ Properly Utilized the AMA Guides "Combined Values" Methodology.

The next issue raised by Worker appeal is whether the WCJ properly utilized the "Combined Values" methodology in calculating the Worker's final whole body impairment in this case. The Worker argues that this Court should interject itself as a super legislature and redefine NMSA 1978, § 52-1-24(A) (1990) which reads:

> "'impairment' means an anatomical 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 medial association's guide to the evaluation of permanent impairment or comparable publications of the American medical association."

Worker's Brief-in-Chief acknowledges that this issue is a matter of first impression "and without prior case law guidance." Worker's Brief-in-Chief, p. 23, Moreover, other than the reference to a statute that relates to statutory

interpretation[2], Worker's Brief-in-Chief cites no other authorities in support of his argument that this Court should summarily disband the "Combined Values" methodology outlined in the *AMA Guides* in addressing workers' compensation cases in New Mexico contrary to what Section 52-1-24(A) provides.

"We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority." *Lee v. Lee*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984). Importantly, Worker's Brief-in-Chief does not cite any workers' compensation cases authored by a New Mexico appellate court in support of his assertion that this Court should summarily disavow the "Combined Values" methodology. Thus, when stripped to its essence, Worker's argument regarding this issue is supported mostly by Worker's self-interest and inclination that the Legislature surely did not intend to adopt the "Combined Values" approach. These arguments fail for several reasons.

First, the Legislature has been aware of the *AMA Guides* for quite some time now but has not made any changes to the "Combined Methods"

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2 Worker's equal protection argument will be addressed below.

methodology. "[w]here there is a judicial interpretation of words in a statute that the legislature has not taken steps to change we are reluctant to assume that the legislature disagrees with that interpretation." *State v. Henderson*, 116 N.M. 537, 541, 865 P.2d 1181, 1185 (1993). Even though the Legislature may not have been aware of the "Combined Values" methodology when it originally enacted Section 52-1-24(A) as asserted by the Worker, it certainly has become aware of it when the applicable version of *AMA Guides* came out in 2007 but has taken no steps to modify the "Combined Values" approach.

Next, Worker ignores the reasons for the "Combined Values" methodology. More specifically, the Glossary to the *AMA Guides* notes:

> "Combined Values Chart A method used to combine 2 or more impairment percentages, derived from the formula A + B (1 – A) = Combined Values of A and B. Combining, as opposed to adding, ensures that the total value will not exceed 100% whole person impairment and takes into account the impact of impairment from one body part on impairment of another body part." *AMA Guides*, p. 610.

> "Various organ system impairments in the same individual can be accounted for with 1 numerical values by using the **Combined Values Chart** (in the Appendix), which enables the physician to account for the effects of multiple impairments with a summary value. The method of combining impairments is based on the idea that a second or a succeeding impairment should apply not to the whole but only the part that remains after the first and other impairment have been applied. *AMA Guides*,

p. 22-23.

In other words, the "Combined Values" methodology is designed to fairly assess the impact of each separate impairment on the body as a whole with due consideration to the fact that the impact to the body as a whole is considered when the first impairment is assigned i.e. to avoid duplication and assigning an additional percentage for the whole body impact where one has already been assigned. Moreover, this concept is designed to avoid additive impairments that could exceed 100% to the body as a whole.

Thus, Worker's argument that "logic and reason" dictate that the "Combined Values" methodology should be summarily discarded by this Court is nothing more than a transparent attempt to impose a methodology that would assign additive whole body impairments where the whole body impact has already been considered, and awarded, when the first impairment is assigned. Put another way, the Worker seeks a methodology that would award duplicate impairments. This is contrary to the concept of fairness contained in NMSA 1978, § 52-5-1 (1990). "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."

Finally, Worker argues that the "Combined Values" methodology violates equal protection because it does not award an additive value. This assertion is unsupported. First, the Worker's Brief-in-Chief is devoid of an equal protection analysis as required by the case law.

"Equal protection, both federal and state, guarantees that the government will treat individuals similarly situated in an equal manner." *Breen v. Carlsbad Municipal Schools*, 2005-NMSC-028, ¶ 7, 138 N.M. 331, 335, 120 P.3d 413, 417. Following the analytical frame work articulated by this Court in *Breen* "[p]etitioners must first prove that they are similarly situated to another group but are treated dissimilarly." *Breen*, 2005-NMSC at ¶ 8, 138 N.M. at 335, 120 P.3d at 417. "If Petitioners are successful in proving this, then a court must determine what level of scrutiny should be

applied to the legislation they are challenging. In equal protection challenges, a court will apply different levels of scrutiny depending on either the rights that the legislation affects or the status of the group of people it affects." *Id.* "Different levels of scrutiny also dictate which party has the burden of proof. Either the person challenging the legislation must prove that the statute is unconstitutional, or the party defending the legislation must prove that the statute is constitutional or comports with equal protection." *Id.*

"The threshold question in analyzing all equal protection challenges is whether the legislation creates a class of similarly situated individuals who are treated dissimilarly." *Breen*, 2005-NMSC at ¶ 10, 138 N.M. at 335, 120 P.3d at 417. Absent the required equal protection analysis, this Court cannot even address the Worker's equal protection argument.

Next, as demonstrated above, what the Worker is really seeking is to have the same whole body impact portion of the impairment rating reassigned with each new impairment as the impairments are combined. This is duplicative. The "Combined Values" considers that whole body impact with due consideration for avoiding duplication and nothing more. It does not deny the Worker his true impairment as provided by the *AMA*

Guides. In short, the Worker is seeking to have his impairment and another one too. In a nutshell, this notion is antithetical to the concepts provided by and fundamental underpinnings of the Act.

G. The WCJ Correctly Valued the Worker's Tort Damages.

Once again, Worker makes a substantial evidence challenge to the WCJ's determination regarding the value of the Worker's tort damages and, once again, Worker seeks to have this Court reweigh the evidence and reach a result consistent with Worker's interpretation of the evidence. As noted above, this is not this Court's role in addressing this additional substantial evidence question.

As an initial proposition, it is worth noting that Worker's position about the value of his tort damages is supported mostly by the "expert" testimony of the attorney who represented the Worker in his tort litigation. Employer/Insurer objected to the testimony of the Worker's tort attorney but it was admitted over their objections below. Moreover, Sean McAfee acknowledged that he was testifying in a "duel role" as an advocate for the Worker and expert at the trial. In other words, the testimony upon which the Worker relies in connection with this issue on appeal came from his tort attorney, a person with an obvious bias. As such, the WCJ could and should

have considered his testimony in that vein.

Putting aside Worker's almost exclusive reliance on the testimony of his tort attorney, the record reflects that the WCJ's decision about the value of the Worker's tort claim is supported by substantial evidence which Worker's Brief-in-Chief seems to acknowledge. "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 the 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 by Worker tort attorneys." Worker's Brief-in-Chief, p. 34-35. In other words, assuming the WCJ's, $3.3 million valuation of the Worker's tort damages, Worker concedes that an amount of $625,000 would remain for the hedonic portion of the Worker's tort damages – something that is most certainly reasonable.

The record reflects that the WCJ independently and objectively assessed the evidence presented at the Formal Hearing and, importantly, made an independent determination regarding the value of the Worker's

remaining indemnity/disability benefits and need for future medical care and treatment based upon the evidence submitted at the Formal Hearing and not necessarily what was presented by Worker's tort attorney and tort lawsuit experts, or what may have been developed in the Worker's tort lawsuit. This is precisely his role. For instance, the WCJ heard testimony from the Worker about his pain and suffering, loss of enjoyment of life and the overall impact of the injuries suffered on March 17, 2010 on his life and made an independent determination regarding those elements of the Worker's tort damages. There is nothing in the law that required the WCJ to accept, without considering all of the evidence in the record and what was presented at the Formal Hearing, the biased opinions of Worker's tort attorney in regard to this issue as argued by the Worker's Brief-in-Chief.

Worker argues that Employer/Insurer did not present evidence regarding the value of Worker's tort damages below to refute the testimony of Worker's tort attorney. This is incorrect. Employer/Insurer's counsel cross-examined Worker and his wife, and Worker's tort attorney, extensively and, in connection therewith developed evidence about the impact the Worker's March 17, 2010 accident had on the Worker that the WCJ properly considered. The law does not require Employer/Insurer to hire an expert to

testify about the value of the Worker's tort claim. Thus, Worker's argument about application of the equivalent of an "uncontradicted evidence rule" is off point. The evidence regarding Worker's tort damages was not uncontradicted as the record demonstrates.

Like most of the other issues raised by this appeal except for one, Worker's substantial evidence challenge to the WCJ's determination regarding the value of the Worker's tort damages and reimbursement analysis fails. Although the Worker presented evidence at the Formal Hearing to support his claimed value of his tort damages, other evidence was also presented and considered by the WCJ. There is nothing in the Act or the case law construing same that requires a WCJ to consider only the evidence presented by one party in rendering a decision. All evidence must and should be considered. Here, considering all of the evidence regarding the Worker's tort damages and the WCJ's reimbursement analysis, substantial evidence supports the WCJ's decision.[3]

H. Conclusion.

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3 Employer/Insurer acknowledge that this Court's decision regarding Employer/Insurer's appeal may require the WCJ to address the reimbursement analysis consistent with the Court's Opinion.

Contrary to the Worker's apparent belief, a substantial evidence review of the several issues raised by this appeal does not require this Court to reweigh the evidence and reach a decision based solely on the evidence that supports the result Worker seeks. The question is whether the WCJ's decision is supported by substantial evidence. It is, as is demonstrated above. Moreover, this Court should also decline Worker's invitation to sit as a super Legislature and eliminate a key concept of the *AMA Guides* in assessing whole body impairment ratings for injured workers that is designed to eliminate and account for duplication with more than one impairment that impacts the whole body. In short, Employer/Insurer submit that the WCJ's decisions regarding all issues raised by this appeal should be affirmed.

II. Prayer for Relief

FOR THE FOREGOING REASONS, Employer/Insurer-Appellants/Cross-Appellees Hanna Plumbing & Heating Company, Inc. and Mechanical Contractors Association of New Mexico, Inc. Workers' Compensation Group Fund hereby request an order from this Honorable Court affirming the WCJ's decision with respect to all issues raised by Worker's appeal.

Respectfully submitted,

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

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

this 25th day of May, 2016.

MAESTAS & SUGGETT, P.C.

By: _____
Paul Maestas
Case.Answer.Brief