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.

ANSWER BRIEF

of

WORKER/APPELLEE/CROSS APPELLANT

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

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I. SUMMARY OF PROCEEDINGS

Worker/Appellee/Cross-Appellant, Ricky D. Case ("Worker") was awarded workers' compensation benefits 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. His former employer, Hanna Plumbing & Heating Co., Inc. ("Employer"), and its workers' compensation insurer, Mechanical Contractors Association of New Mexico, Inc. ("Insurer"), filed a *Notice of Appeal* on August 26, 2015. Worker timely filed his *Notice of Cross-Appeal* on September 10, 2015.

A. Worker's Background.

Ricky D. Case was born on September 1, 1973, and is currently 42 years of age. He is a high school graduate. He is a journeyman welder/pipefitter. He commenced employment with employer in 2008 and worked primarily as a welder.

Prior to the accident on March 17, 2010, Mr. Case was in great health and had tremendous strength. He would occasionally lift 400 pounds of steel pipe by himself. 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).

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 bone (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. ***Ex. 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.

His attempts to continue working were unsuccessful. He 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 experiences 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.

On August 26, 2011, Worker's drivers license was revoked due to the Child Support Enforcement Division (CSED) reporting that he was failing to pay his monthly child support. Worker had previously agreed to have Insurer withhold $141 per week and to send direct payment to CSED. When Worker requested proof of payments, Insurer failed to respond.

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 and failure to timely forward payments to CSED, 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. 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. Worker and his wife, Diana Case, testified about his injuries, medical treatment and resulting disability. Sean McAfee, Attorney at Law, 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. The WCJ entered his *Compensation Order* on July 27, 2015, more than eight months after the trial. ***RP 282-292.***

E. The 2015 Compensation Order:

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 has challenged the findings relating to his impairment in his cross-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 challenged the PPD rating in his cross-appeal.

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.***

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, ("We are firmly committed to the doctrine that the Workmen's Compensation Act is remedial legislation and must be liberally construed to effect its purpose."); *Avila v. Pleasuretime Soda, Inc.*, 1977-NMCA-079 ("It requires no citation of authority that the Workmen's Compensation Act must be liberally construed to accomplish beneficent purposes for which it was enacted, and that all reasonable doubts must

be resolved in favor of employees."); *Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007 ("We are committed to the view that, as remedial legislation, the Workmen's Compensation Act must be liberally construed, with all doubts resolved in favor of the worker."). Interpreting a post-1990 provision of the WC Act, the Supreme Court stated in *Michaels v. Anglo Am. Auto Auctions, Inc.*, 1994-NMSC-015, ¶ 13:

> Finally, the legislature enacted Section 52-1-28.2 as remedial legislation in derogation of the common law. ... "Where a statute is both remedial and in derogation of the common law it is usual to construe strictly the question of whether it does modify the common law, but its application should be liberally construed." [citation omitted]

In *Benavides v. E. N.M. Med. Ctr.*, 2014-NMSC-037, ¶ 44, the Supreme Court recently held that "liberal construction can still be applied by this Court as it is but one of many tools employed in construing legislation."

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; *Chavez v. Mountain States Constructors*, 1996-NMSC-70; *Smith v. Arizona Public Service Company*, 2003-NMCA-097; *Grine v. Peabody Natural Res.*, 2006-NMSC -031, ¶ 17.

4. The "plain meaning rule" for interpreting statutes should be cautiously applied in the workers' compensation context, due to the noted imprecision of the Act. Great weight should be given to plain meaning, but consideration should also be given to the Act as a whole. *Benny v. Moberg Welding*, 2007-NMCA-124; *Flores v. J.B. Henderson Construction*, 2003-NMCA-116; *Chavez v. Mountain States Constructors*, 1996-NMSC-070, ¶ 25; *Coslett v. Third Street Grocery*, 1994-NMCA-046.

III. WC ECONOMICS 101

On July 18, 2012, to support Worker's application for total disability benefits, Dr. Reeve reported that Worker was "unable to work in any reasonable occupation". ***Ex. 3, p. 41.*** Worker was awarded total disability benefits - from the Social Security Administration. Due to his inability to work at gainful employment, Worker would have been awarded total disability benefits under all prior Workers' Compensation Acts in New Mexico. However, in 1990 the Legislature drastically "reformed" the Act as a result of an alleged "Insurance Crisis". The major WC insurance carriers were threatening to pull out of our small market state. They claimed to be paying out $1.40 or more for every $1.00 received for premium payment. They claimed that something drastic had to be done to save the WC system in New Mexico.

In 1990, the Legislature created a Workers' Compensation Task Force and then held a Special Session to address WC reform. The current WC Act came into being during the Special Session. There were sweeping changes made to the WC Act. Almost every change was for the benefit of WC insurance carriers. Few and far between were any new provisions that benefitted the injured worker.

Permanent total disability (PTD) and permanent partial disability (PPD) were re-defined beyond prior recognition in NMSA 1978 (1990), § 52-1-25 and -26, -26.1, -26.2, -26.3 and -26.4. The traditional and multi-state concept of awarding PTD to injured workers who are physically or mentally unable to return to gainful employment was tossed aside. The new PTD definition required blindness, paraplegia, quadriplegia, or multiple amputations before an injured worker was deemed totally disabled. NMSA 1978 (1990), § 52-1-25(A)(1) (PTD means "the permanent and total loss or loss of use of both hands or both arms or both feet or both legs or both eyes or any two of them"). Thirteen years later workers with severe traumatic brain injuries were also considered worthy of PTD benefits. NMSA 1978 (2003), § 52-1-25(A)(2).

PPD was re-defined through the use of cold algebraic expressions: (a) PPD = I + (A+E+S+T)(LPC); or (b) without wage loss, PPD = I. Entitlement to any PPD benefits was conditioned upon having evidence of an impairment pursuant to the American Medical Association's guide book. § 52-1-26(B). The Legislature

ignored the fact that the guide book expressly stated that it was not intended to make direct estimates of disability. Further, most doctors, the vast majority of attorneys, and almost the entire judiciary and legislature were unfamiliar with this guide book. The Legislature further declared that PPD benefits should be provided such that injured workers would have "minimal dependence on compensation awards". § 52-1-26(A). The benevolent purpose for enacting WC legislation was not only ignored, it was disemboweled.

With the almost extinction of PTD benefits and with "minimal dependence" being the guide for awarding the only remaining (PPD) benefits, insurance profits soared and tremendous economic hardships ensued for disabled workers. Prior to 1990, maximum medical improvement (MMI) was the starting point for assessing whether permanent disability was total or partial. The injured worker had healed, restrictions/limitations were reported, and determinations were then made as to whether the injured worker: (1) could return to work at the same job; (2) could return to work with the same employer at a different job; (3) needed assistance in finding work with another employer using transferrable skills; or (4) needed vocational retraining. Typically, an injured worker continued to receive total disability benefits until returning to work or until there was evidence of the ability to return to work.

In 1990, new provisions defining MMI and temporary total disability (TTD) were enacted; and every form of vocational rehabilitation assistance was repealed. NMSA 1978 (1990), § 52-1-24.1, -25.1 and -50. TTD benefits were automatically terminated upon MMI, which was assessed by the doctor being paid by the WC insurer. The disabled worker's base disability percentage (impairment) was also assessed by a doctor, not a judge. The transition from total to partial benefits, and the base disability rating, were now based upon medical opinions, rather than facts relating to a disabled worker's ability to work and earn a living.

The WC Act is in derogation of the common law, and by definition, is remedial legislation. In 1990, the Legislature declared that the WC Act was not remedial legislation. NMSA 1978 (1990), § 52-5-1 ("... based on the supposed "remedial" basis of workers' benefits legislation ..."). This pronouncement was totally ignorant of the fundamental purpose of workers' compensation legislation and Orwellian (remedial legislation is not remedial legislation?). Adding insult to injury, once the rules were completely changed in favor of the WC insurers, the Legislature decreed that the Judiciary, a separate power, had to discard its own rules of interpretation (remedial legislation had always been subject to liberal construction) and interpret its new Act without favoring either side. The *quid pro quo* of WC - no fault coverage exchanged for limited/exclusive liability - became *di minimis pro quo*.

There were a few legislators and others who expressed a concern that the 1990 WC reforms had gone way too far in favor of the insurers. As a result, there was a tacit agreement that the WC Act would be reviewed after five years. That was 20 years ago. The tacit agreement wasn't worth the paper it wasn't written on.

In 1994, without causing a stir, the National Council of Commerce and Industry (NCCI) reported that there were major accounting errors made by WC Insurers in New Mexico in 1990. The major WC carriers had simply "over-reserved". Reserves are the funds an insurer sets aside to honor its liabilities under its policies. One carrier alone over-reserved by about $50 million. Reserves that are not payable become profit. The truth is that there was no crisis. There were not any weapons of mass destruction within the prior WC Act. The New Mexico Legislature had been played for a fool.

The one thing the Legislature did right in 1990 was to create a system for monitoring the WC experience in New Mexico. Due to a healthy skepticism about the accounting practices of insurance companies, the legislature created our own little mutual company - just like Jimmy Stewart did in "It's A Wonderful Life". We formed New Mexico Mutual Casualty Company ("NM Mutual") through NMSA 1978 (1990), § 52-9-1 to -25. We did so to "generate data" as to New Mexico's own WC system, due to the "serious lack of relevant data based on the New Mexico experience alone". NMSA 1978 (1990), § 52-9-2(E).

The taxpayers (the vast majority of which are workers) loaned NM Mutual $10 million to start and run an honest WC insurance company for the good of all New Mexicans. In return, NM Mutual agreed to keep the legislature informed as to the actual cost of WC insurance in New Mexico. § 52-9-18. Unfortunately, the Legislature hasn't paid attention. When there is no legislative therapy, judicial surgery is often necessary.

NM Mutual came into being in 1991 with zero assets, one policyholder and a $10 million debt obligation. The debt was completely repaid by 1996. By 2001, NM Mutual had $156 million in assets, 7,000 policyholders and $57 million in savings. They held another $50 million in reserves. NM Mutual's 2001 Annual Report.

From 1993 through 2000, WC Insurers in New Mexico reaped annual profits that averaged more than 30% per year. WCA's 2001 Annual Report, p. 25, Figure 10. This substantial profit margin was obtained within a mandatory market. The employer/consumer is compelled by law to buy WC insurance. If the employer does not purchase WC insurance, the WCA takes action to shut down the employer's business.

In 1998, New Mexico became the #1 state in the union for WC insurance profits. The average profit in NM was 35%. Nationally, WC insurers earned an average profit of 7%. In 1998, premium rates dropped 50% below their 1991 value.

Despite charging 50% less for WC premiums, NM Mutual reported an 80% profit margin in 1998.

Yes, an EIGHTY PERCENT (80%) PROFIT MARGIN!

NM Mutual reported receiving $24.3 million in earned premiums and net income of 19.3 million. In other words, for every $1.00 worth of premiums received from 7,000 NM employers, it paid out 17 cents in losses ($4 million) and 33 cents in expenses ($8 million); earned 30 cents from investments ($7.2 million) and declared a profit of 80 cents. NM Mutual's 1998 Annual Report.

Premium:	$24,300,000	$1.00
Losses:	$ 4,000,000	$0.17
Expenses:	$ 8,000,000	$0.33
	---	---
Net:	$12,300,000	$0.50
Investments:	$ 7,200.000	$0.30
	---	---
Profit:	$19,500,000	$0.80

Of the 17 cents paid out in losses, the majority of those funds went to the healthcare providers. That left a few cents from the premium dollar to dole out to disabled workers. It's a wonderful life ... if you're a WC insurer in New Mexico.

The current NM Mutual website states: "Today, New Mexico businesses enjoy a competitive workers' compensation market and rates that are less than 47% of what they were in 1991." Under NM Mutual's 16 year comparison, rates were 31% of their 1991 value in 2000.

According to their most recent financial reporting, the 2012 Income Statement, NM Mutual had loss ratios of 83.2% in 2008 (16.8% profit); 78.1% in 2009 (21.9% profit); 74.2% in 2010 (25.8% profit); 79.8% in 2011 (20.2% profit); and 73.6% in 2012 (26.4% profit).

According to the WCA's 2014 Annual Report, p. 33, Figure 4.7, WC Insurers in New Mexico in 2008 received $263.4 million in direct earned premiums and paid losses of $161.9 million. Excluding investment income, that's a 38.5% profit in 2008. In 2014, direct earned premiums were $287.1 million and paid loss were 216.8 million. Excluding investment income, that a 24.5% profit.

More amazing than the profit margins is the mythology that evolved from the 1990 WC reforms. Due to national and global factors that had nothing to do with WC reform in New Mexico, our state economy soared and flourished during the 1990s. The locals who reformed the WC Act claimed credit for the economic hay days and disabled workers became the sacrificial lamb for a vibrant economy. Even organized labor turned its back to the pleas for help uttered by disabled workers. The WCJs and appellate court judges routinely issued WC decisions in which the harshness of the 1990 WC Act was affirmed with myopic focus upon "reducing costs to employers" (and therefore improving the economy for everyone else).

The Supreme Court stated in *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 25, that the Legislature's principal objectives in enacting the 1990 WC Act were: (1) maximizing the limited recovery available to injured workers, in order to keep them and their families at least minimally financially secure; (2) minimizing costs to employer; and (3) ensuring a quick and efficient system. The fact that Employer's costs decreased by 50% by 1998 and have consistently remained about the same since then should end any further concern about the need for "minimizing costs to employers". For the benefit of New Mexico and its workers, the focus should now be upon "maximizing the limited recovery available to injured workers" and "ensuring a quick and efficient system".

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. ... The Act represents a quid pro quo in which the employee gives up his or her common law rights in exchange for compensation, and the employer has limited potential liability in exchange for providing compensation. ... 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. Id. (stating that the purpose of the Act is not advanced by adopting technical or overly restrictive constructions that impede an injured worker's ability to obtain compensation).

Hard-working and dedicated employees in New Mexico who sustain-career ending injuries quickly learn that "inability to work" is not a factor for awarding permanent total disability, § 52-1-25; and the most astute immediately apply for Social Security disability benefits and Medicare coverage (a/k/a medical insurance without a litigation premium). These government funded benefits were previously provided secondary to WC benefits. They are now primary disability benefits for folks with career-ending injuries. These folks generally get beaten into submission and accept whatever partial disability benefits the WC insurers provide as a secondary or supplemental source. Almost every state, including New Mexico, initially enacted WC laws to place the burden of providing disability benefits for injured workers upon their employers; and to keep the financial burden of caring for disabled workers off the back of the taxpayers. The 1990 reforms deformed the WC Act into schemes providing total disability benefits only until a date of maximum medical improvement (often quickly declared by an insurer-pleasing physician); and essentially, only partial disability benefits thereafter at typically a very low percentage derived from an impairment rating scheme that shrinks with the publication of each new edition of the AMA's impairment book. Despite constitutional prohibitions against *ex post facto* laws, thousands of disabled workers in New Mexico have had their impairment ratings assessed by an AMA

guide book that was published years after their accidents. § 52-1-24 mandates that the "most recent edition" of the guide book be used. With the current 6th edition, impairment ratings for spinal impairments (the most common injury) were reduced by roughly 50% across the board from the 5th edition. The 6th edition has been so successful at lowering PPD benefits that it is now the longest running edition (published in 2008) since the 1980s and no 7th edition is on the horizon.

Accordingly, most disabled workers end up with PPD ratings from 1% to 50%, rather than 1% to 99%. A 50% PPD rating (of 2/3rds of former wages) equates with 33% of former wages. A 25% PPD rating = 16.75%. The wage percentage for high wage earners (more than $1,200/week) is even less due to a maximum weekly compensation cap. Workers with career-ending injuries, frequently receiving only 1/3rd or less of their former wages from the WC Insurers, are typically awarded total disability by the Social Security Administration without the necessity of a trial; without having their credibility and work ethic constantly attacked by the WC adjuster and defense attorney; and without being involuntary patients to uncaring, inept or corrupt doctors. Instead of employers being liable for total disability for ten years or so, the current WC Act allows the employer to pay for total disability for only the few months or years it takes to reach MMI. The taxpayer is burdened with paying for total disability about a full decade earlier than the pre-reform days.

On July 23, 2015,the *Albuquerque Journal* reported that Social Security disability is now facing a real and severe financial crisis. This news came with no surprise to WC attorneys. With all due respect to Hamlet and Denmark, there is something even more rotten in the State of New Mexico - two and one-half decades of WC insurers reaping profits from a state mandated insurance program while heaping the real costs onto the taxpayers.

IV. ARGUMENTS

1. THE WCJ PROPERLY AWARDED SCHEDULED INJURY BENEFITS BASED UPON "PARTIAL LOSS OF USE" AND PPD BENEFITS BASED UPON IMPAIRMENTS. THERE WAS NO DUPLICATION OF BENEFITS.

Worker sustained severe and multiple injuries as a result of the work accident. On July 18, 2012, Dr. Reeve reported that Worker was "unable to work in any reasonable occupation". ***Ex. 3, p. 41.*** The WCJ found that as a result of the work accident, Worker's future wage loss will amount to $1,907,000.00. ***RP 286, ff #45.*** The WCJ found that his award of both future permanent partial disability (PPD) and scheduled injury (SI) benefits amounted to $293,713.30. ***RP 287, ff #47.*** Of this amount, the WCJ ordered Worker to reimburse $216,415.04 to Employer/Insurer from his tort settlement. ***RP 291, cl #13.*** E/I are appealing a net award of less than $78,000 in PPD benefits. E/I claim that Worker received too much compensation, received a duplication of benefits, and that the PPD award was

"fundamentally unfair" to them. Employer/Insurer obviously do not understand the essence of fairness.

Employer/Insurer's Brief-in-Chief does not dispute Worker's entitlement to PPD benefits, only the extent of the award. Worker has filed a cross-appeal asserting that the WCJ erred in assessing his impairment ratings; erred by combining his impairment ratings to a "less than additive value" through the "combined values" method; and erred in his reimbursement analysis.

A review of the 1990 Legislative amendments to the WC Act is necessary to understanding the interplay and distinctions between PPD and SI benefits. Our current WC Act was enacted in 1990. The prior WC Acts in New Mexico were consistent with laws across the nation. There were three types of disability benefits: (1) total disability pursuant to § 52-1-25; (2) partial disability pursuant to § 52-1-26; and (3) scheduled injury benefits pursuant to § 52-1-43.

Under the Act in place from 1978 through 1986, total disability was determined by a two-prong test: (1) can the injured worker return to work at the pre-injury job? (2) can the injured worker return to work at any other work for which s/he is fitted by age, education, experience, and general mental and physical capabilities? If both questions are answered "no", then total disability benefits would be awarded until the worker was retrained for gainful employment. If one question was answered "yes", then partial disability benefits would be awarded.

In *Aranda v. Mississippi Chem. Corp.*, 1979-NMCA-097, ¶ 30, this Court stated:

> "ANY work" for an engineer, plant foreman, department head or mine employee who labors in production does not mean such sedentary work or activity such as that of a janitor, filling station attendant, raker of leaves , one who can sell pencils or 25 other sedentary jobs. "ANY work" means a workman's ordinary employment, or such other employment, if any, approximating the same livelihood the workman might be expected to follow in view of his circumstances and capabilities. To conclude that an electrical engineer is partially disabled because he is capable of raking leaves or performing janitorial services destroys the spirit of the Workmen's Compensation Act. He has no other skills or training to draw upon. Total disability does not mean that a workman must be a helpless invalid.

In *Barnett & Casbarian, Inc. v. Ortiz*, 1992-NMCA-071, ¶ 24, this Court held that partial disability was to be measured by the "reduction in the spectrum of job opportunities" that the worker sustained. This Court stated:

> These representative cases illustrate that the percentage of partial disability is based on the reduction in the spectrum of work for which the injured worker is fitted. The reduction may be the result of the elimination of certain jobs that the worker can no longer perform (carpenter, heavy laborer, etc.) or a reduction in the worker's ability to perform certain tasks associated with the worker's current job (handling forms, etc.), which presumably reduces the worker's job opportunities.

If both prongs were answered "no", and the injured worker sustained permanent injuries listed in § 52-1-43, then scheduled injury benefits would be awarded. The schedule injury section was essentially enacted to provide limited compensation to an injured worker who was not disabled but who nevertheless sustained a work-related permanent injury for which some compensation was due.

However, if the scheduled injury rendered the worker unable to perform the work for which he was fitted, the worker was awarded total disability benefits. *American Tank & Steel Corp. v. Thompson*, 1977-NMSC-052. For example, a surgeon suffering a thumb amputation would be awarded total disability because she could no longer work as a surgeon. If the surgeon was able to work elsewhere (chief of staff of hospital), appellate courts were divided as to whether the surgeon should be awarded partial disability benefits or be limited to SI benefits. In *Aragon v. Mountain States Constr. Co.*, 1982-NMCA-041, ¶ 6, Chief Judge Mary Walters authorized an opinion that summarized the then current case law on the division and stated: "The cases on limitation or extension of scheduled injury disabilities can be described as inconsistent, at best, and as hopelessly irreconcilable, at worst."

Under the Third Act (1987-1990), PTD was defined in § 52-1-25 as follows:

> A. ... "total disability" means an impairment to a worker resulting by reason of an accidental injury arising out of in the course of employment which prevents the worker from engaging, for remuneration or profit, in any occupation for which he is or becomes fitted by age, training or experience.
>
> B. It shall be conclusively presumed that the loss or permanent loss of use of both hands or both arms or both feet or both legs or both eyes or any two of them constitutes total disability.

The 1990 Legislature's solution to a fake "insurance crisis" was to delete Subsection A in its entirety; and have the former conclusive presumption become the only definition of total disability. This quick fix eliminated the right to even

apply for PTD benefits to 99.9% of the workforce. Only those truly unfortunate workers who become blind, paraplegic, quadriplegic or suffer multiple limb amputations were deemed worthy of PTD benefits. NMSA 1978 (1990), § 52-1-25, which governed PTD benefits from 1991 through 2003, stated:

> A. ... "permanent total disability" means the permanent and total loss or loss of use of both hands or both arms or both feet or both legs or both eyes or any two of them.

This change completely wiped out any consideration of wage loss, job loss, career loss; and such factors as age, education, training or experience. Ironically, Captain Hook with an additional peg leg or patch over a blind eye would be awarded PTD benefits for the "duration of his life" - even while commanding his ship and pirates, fighting like a crusty old sea dog, and accumulating great treasure.

The elimination of "inability to work" within the truncated PTD definition had another disastrous consequence for disabled workers. It became impossible for a worker with an injury causing a complete inability to work to obtain even "permanent ***partial*** disability" benefits if the injury resulted from a body part or parts appearing within § 52-1-43. Captain Ahab would be denied both PTD and PPD benefits with a solitary whale bone prosthesis, even if stripped of command of the Pequod and left ashore in Nantucket. With PTD and PPD amendments and without an SI amendment, the SI section became an anachronism unfairly limiting

compensation whenever a worker's wage loss and/or disability was more than nominal.

Under the 1990 Act, to obtain anything other than SI benefits, a disabled worker had to prove (1) total disability; or (2) a permanent impairment to a non-scheduled body part. *Jurado v. Levi Strauss & Co.*, 1995-NMCA-129; *Jurado V. Levi Strauss & Co.*, 1996-NMCA-112. A single scheduled injury does not meet either the PTD or PPD definitions. Even two scheduled injuries disabling a 60 year old female failed to meet the PPD definition. *Gomez v. Bernalillo County Clerk's Office*, 1994-NMCA-102.

The interpretation of § 52-1-43 became so draconian that WC insurers were granted summary judgment affirming their denial of permanent benefits if a worker could not prove an "impairment" to a scheduled injury. *Lucero v. Smith's Food & Drug Ctrs., Inc.*, 1994-NMCA-076. In *Lucero,* a grocery bagger developed work-related lateral epicondylitis, or "tennis elbow", from repetitive trauma. He was sent for an IME by Barry Diskant, M.D. Dr. Diskant reported a causal connection between his work and his injury. Dr. Diskant permanently restricted him from bagging groceries repetitively and limited lifting to 20 pounds because an inflamed elbow is "really painful". He was physically unable to perform his job. At the time, the applicable AMA *Guides* allowed an impairment for an elbow injury only with limited range of motion. When Lucero was evaluated he had not been

working for weeks, his elbow was not inflamed and his motion was normal. Dr. Diskant reported a 0% impairment. The adjuster denied SI and all other disability payments. Lucero filed a WC claim. The WCJ granted Smith's motion for summary judgment. SI benefits were denied because Lucero had a 0% impairment. Lucero appealed and claimed that the entire WC Act was unconstitutional because it failed to provide permanent disability benefits for a work-related permanent disability. This Court avoided addressing the constitutional challenge through statutory construction. The opinion noted that an interim WC Act had adopted the use of the AMA *Guides* for assessing both PPD and SI benefits; that the subsequent or Third Act deleted all references to the *Guides* in assessing any disability; and that the 1990 Act re-incorporated use of the *Guides* for assessing PPD benefits, but not for SI benefits. The Court gleaned a legislative intent to award SI benefits "computed on the basis of the degree of such partial loss of use" to the scheduled body part and without reference to the *Guides*. § 52-1-43(B). The Court rejected the employer's argument that SI benefits could not be awarded without evidence of an impairment rating from the *Guides*; and that "partial loss of use" could only be measured by the *Guides*. The holding in *Lucero* is that partial loss of use is not measured by the *Guides*; and a 0% impairment is not equal to a 0% partial loss of use. A corollary principle is that impairment does not equal loss of use.

Unfortunately, in response to *Lucero*, most WCJs adopted a policy of awarding SI benefits at two times the impairment rating (three times if they liked the worker) rather than conducting a real loss of use analysis.

After more than decade of extreme hardship caused by §§ 52-1-25, -26 and -43, this Court offered some relief to workers in *Baca v. Complete Drywall Co.*, 2002-NMCA-002; and affirmed the holding in *Gutierrez v. Intel Corporation*, 2009-NMCA-106. Both of these cases gave the WC insurers exactly what they had been serving up - scheduled injuries a la carte! The basic holding of each case is that scheduled injury benefits stand alone, separate and distinct from PPD benefits; and if both SI and PPD benefits are warranted, workers are to be awarded both sets of benefits independent of each other. A fair result after years and years of WC insurers denying PPD benefits on the grounds that there was no supporting whole person impairment.

Now, of course, a WC insurer returns to this Court and requests a hyper-technical, overly restrictive construction of the SI and PPD provisions and requests a penurious interpretation of the two disability concepts. Such a request does not serve the workers of New Mexico, the spirit of the WC Act, or the State of New Mexico. Their request is simply to gouge even more profit from the mandatory WC insurance system.

Pursuant to § 52-1-43, for a partial loss of use of an ankle "the worker shall receive compensation computed on the basis of the degree of such partial loss of use". Here, pursuant to *Lucero*, the WCJ found that Worker had a 70% partial loss of use to each of his ankles; and he made this finding without any reference to any impairment from the AMA *Guides*. According to the plain language of § 52-1-43, the WCJ's bilateral 70% scheduled injury awards did not include consideration of any impairment to Worker's ankle.

The WCJ found that Worker had a 10% whole person impairment due to depression, and a 3% whole person impairment due to chronic pain. Worker's chronic pain was due, in part, to his low back pain and the pain in both hips. Neither of these impairments resulted from a specific body member listed in § 52-1-43. Both of these impairments are from whole body injuries. *Nelson v. Nelson Chemical Corporation*, 1987-NMCA-024, ¶ 10 ("The hip is not a specific member. Therefore, an injury to the hip is an injury to the body as a whole, even if it results in pain, impairment, etc., to a member, i.e., the leg. This is the plain meaning of the statute."). *Harrison v. Animas Valley Auto and Truck Repair*, 1988-NMSC-055, ¶'s 12-13; *Gordon v. Dennisson Doors, Inc.*, 1992-NMCA-136.

In *Harrison* an automobile mechanic's right hand was crushed when a vehicle slipped off a jackstand. In attempting to free himself, he fell through a glass partition and suffered "severe and disabling injuries to his right arm, right

wrist, and right hand." Our Supreme Court affirmed the award of 80% PPD, stating in ¶ 8: "In short, the trial court found that Harrison's injuries were to the **whole man** and not simply to his hand, wrist and elbow." Justice Ransom, specially concurring, stated as follows:

> What I find persuasive is that the court specifically found that the worker had "incapacitating pain in his arm, wrist and right hand." "Incapacitating pain" is a disability to the whole and not the type of impairment for which compensation is scheduled when loss or loss of use of a specific body member results from an accidental injury.
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> * * *
>
> Incapacitating pain is an impairment related to the central nervous system. Cases from other jurisdictions recognize that incapacitating pain is separate and distinct from the loss or loss of use of the specific body member which was injured.

In *Gordon*, ¶ 6, this Court affirmed an award of non-scheduled PPD benefits based on a combination of amputation of an index finger and part of a thumb, phantom pain, and secondary depression, stating:

> Where there is evidence indicating that pain associated with a physical injury is disabling in nature, such pain may constitute a separate and distinct impairment. * * * It affects the whole person and limits or prevents a claimant from doing the work he or she did prior to the physical injury.
>
> We hold that incapacitating pain can be an impairment separate and distinct so as to remove a disability from the scheduled injury section of the statute. Here, there was sufficient evidence for the WCJ to have found that the pain claimant suffered was incapacitating and, therefore, a separate and distinct impairment removing the claim for benefits from the scheduled injury section. The WCJ's award of permanent partial disability benefits is affirmed.

In 2003 the Legislature added traumatic brain injuries to the definition of permanent total disability. NMSA 1978 (2003), § 52-1-25(A)(2). In doing so, the Legislature declared that PTD means "a brain injury resulting from a single traumatic work-related injury that causes, **exclusive of the contribution to the impairment rating arising from any other impairment to any other body part, or any preexisting impairments of any kind**, a permanent impairment of thirty percent or more as determined by the current American medical association guide to the evaluation of permanent impairment." [Emphasis supplied].

§ 52-1-26(C) mandates that a WCJ determine a worker's permanent partial disability by "calculating the worker's impairment as modified by his age, education and physical capacity." In "calculating the worker's impairment", the plain language of § 52-1-26(C) does not allow the WCJ to exclude any impairments. Impairment is defined in § 52-1-24. Impairment is not defined as a worker's whole body impairment exclusive of any contribution from scheduled members. Had the Legislature intended to do so, it would have said so within either or both of these provisions as it did in § 52-1-25(A)(2).

Accordingly, the WCJ calculated Worker's impairment by "combining" the 10% WPI for depression, the 3% WPI for chronic pain, the 8% WPI for the right ankle and the 8% WPI for the left ankle. The combined value was a 26% WPI. In

calculating Worker's combined WPI, the WCJ did not consider the 70% loss of use of Worker's ankles. Accordingly, there was no duplication of the SI award within the PPD award.

NMSA 1978 (1990), § 52-1-26.4 provides for the physical capacity modification within the PPD formula. Physical capacity has four classifications: heavy, medium, light and sedentary. The classifications are generally distinguished by the capacity for frequent and occasional lifting. There are, however, additional descriptions within the light and sedentary classifications that relate to the ability to walk, stand or use arm or leg controls or both. A job is within light capacity if "it requires walking or standing to a significant degree or when it involves sitting most of the time with a degree of pushing and pulling of arm or leg controls or both". § 52-1-26.4(C)(3). Jobs are sedentary "if walking and standing are required only occasionally". § 52-1-26.4(C)(4). § 52-1-26.4 does not direct a WCJ to exclude consideration of any injuries within the physical capacity determination. By including factors such as walking, standing, arm controls and leg controls, it stands to reason that the Legislature specifically intended that a WCJ consider injuries to arms, legs, and feet in assessing physical capacity modification. Accordingly, the WCJ did not err by considering the limitations imposed by the injuries to Worker's feet and ankles, knee, hips and low back.

E/I's Brief-in-Chief (p. 14) argues that the only impairment that was not related to Worker's feet/ankle injuries was for mental impairment; and that such an impairment does not justify a loss of physical capacity. This is not correct. Dr. Reeve assigned a 3% WPI due to chronic pain. Dr. Reeve explained his reasoning to E/I's attorney on page 90 of his deposition, as follows:

> And that's why I incorporated all of these pain diagnoses into – he has hip pain; he has back pain. That's why we gave him a 3% pain impairment rating. ***Ex. 1, p. 90.***

Dr. Reeve further explained his reasoning on page 85:

> I think the patient merits a rating because I think he does have a lot of pain and has a significant gait pattern abnormality because of his pain. So – that would be my opinion, though.

Accordingly, the WCJ's decision to award modifier benefits based upon a loss of physical capacity from heavy to sedentary was due to Worker's "significant gait pattern abnormality" due to his 3% WPI due to chronic pain.

Further, as argued in Worker's Brief-in-Chief (p. 17-18), the WCJ erred by not finding that Worker had ratable WPIs due to the permanent injuries to Worker's low back and hips. Any of these three WPIs would also support the finding of a loss of physical capacity due to a WPI.

The WCJ properly assessed Worker's SI benefits through a partial loss of use analysis. The WCJ properly assessed Worker's PPD benefits through the statutory mandated factors. Worker did not receive a double recovery of any benefits. Worker received an award totaling about $294,000 for permanent disability benefits when his wage loss will amount to $1,907,000.00. The award of PPD benefits at 56%, plus the two awards of SI benefits at 70%, will partially compensate Worker for his future wage loss at the rate of 15%.

2. THE WCJ PROPERLY AWARDED PPD BENEFITS FOR 500 WEEKS FROM THE MMI DATE.

In *Baca v. Complete Drywall Co.,* 2002-NMCA-002, this Court held:

> We hold that the number of weeks Worker received benefits for the disabilities caused by the scheduled injuries cannot be deducted from the number of weeks he is entitled to receive benefits for his permanent partial disability.

Worker was injured on March 17, 2010. The WCJ found that Worker's foot and ankle injuries reached MMI on June 13, 2012. ***RP 288, ff 58.*** The WCJ also found:

> Worker's low back, left hip and ***right knee*** injuries reached MMI on January 2, 2014. ***RP 288, ff 60*** (emphasized).

Injuries to the foot and ankle are listed in § 52-1-43(A)(31) and (32). An injury to the right knee is listed in § 52-1-43(30). Accordingly, Worker received TTD benefits for scheduled injuries from March 17, 2010 through January 2, 2014.,

The WCJ awarded 500 weeks of PPD benefits commencing on January 2, 2014. The WCJ's award is fully supported by *Baca v. Complete Drywall Co.*, 2002-NMCA-002, ¶ 25 ("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").

V. REQUESTED RELIEF

Worker requests that Compensation Order entered by the WCJ be affirmed in response to the two issues raised on appeal by Employer/Insurer. Worker requests that the Compensation Order be reversed in response to the three issues raised within his cross-appeal.

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CERTIFICATE of SERVICE

I hereby certify that on April 1, 2016, a true copy of Worker's Answer Brief was faxed and e-mailed to Paul Maestas, Attorney for Employer/Insurer-Appellant-Cross-Appellee.

GERALD A. HANRAHAN