COPY

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

SARAH QUINTERO,

Plaintiff,

v.

Ct. App. No. 28875
No.: CV 2007 01927

STATE OF NEW MEXICO DEPARTMENT OF TRANSPORTATION;
1 through 5, inclusive,

Defendants.

PLAINTIFF/APPELLANT'S REPLY BRIEF

Civil Appeal from the First Judicial District, County of Santa Fe
The Honorable James A. Hall, District Court Judge

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Plaintiff/Appellant Sarah Quintero ("Appellant"), by and through her counsel of record **THE BRANCH LAW FIRM** (Turner W. Branch, Frank Balderrama), submits the following reply brief in support of her appeal. As set forth below, the July 24, 2008 Order dismissing Appellant's tort claims against Defendant/Appellee New Mexico Department of Transportation (the "NMDOT") for lack of subject matter jurisdiction should be reversed and vacated, and her claims against the NMDOT should be remanded to the District Court.

I. PRELIMINARY STATEMENT

The NMDOT erroneously asserts that just because Appellant was an employee of a State agency and was injured while on state-owned property, the District Court correctly ruled that her claims are preempted by workers' compensation. However, the NMDOT astonishingly ignores this Court's recent opinion in *Harkness v. McKay Oil Co., 2008 NMCA 123, 144 N.M. 782* (*Harkness* is neither discussed nor cited in the Response), which specifically upholds the going and coming rule that commuting to work is the *employee's* business, not the employer's, and therefore any injury suffered while commuting is not compensable in workers' compensation. Further, the NMDOT does not discuss or distinguish *Ramirez v. Dawson Prod. Partners, Inc., 2000 NMCA 11, 128 N.M. 601,* which echoes the statutory language in the Workers' Compensation Act that an injury

occurring while an employee is simply commuting is not covered by the Act. Thus, the NMDOT's multi-page discussion about whether its motion to dismiss was converted to a summary judgment below (Appellant does not contend that this is an "issue" subject to appeal, as the NMDOT asserts), or whether the NMDOT is, for all intents and purposes, Appellant's employer since she was employed by another State agency, is beside the point. The facts undisputedly show that Appellant was *not* acting within the course or scope of her employment when she suffered the injury at issue in this case. She was simply walking through a state-operated parking lot in order to catch a privately-owned bus in order to commute to her job in Santa Fe.

Accordingly, the Order granting the NMDOT's motion to dismiss Appellant's claims on the grounds that they are subject to the exclusivity provisions of the Workers' Compensation Act should be reversed and vacated.

II. ARGUMENT

A. Appellant Does Not Assert That the District Court Erred in Considering Deposition Testimony; Rather, Appellant Argues That the District Court Erred in Dismissing Her Case Based on the Facts It Had Before It

In its Response, the NMDOT claims that Appellant somehow "failed" to preserve on appeal the issue as to whether the District Court erred in considering Appellant's deposition testimony when ruling on the NMDOT"s motion to dismiss.

The NMDOT misconstrues Appellant's argument concerning *de novo* review, in which she states that the Court erroneously granted judgment in favor of the NMDOT based on both the allegations of the Complaint *and* Appellant's deposition testimony.[1] Appellant does not call into question the District Court's "handling" of the motion to dismiss; as such, it is not an "issue" on appeal. In fact, as the NMDOT states in the Response at p. 8, the Court properly considered Appellant's deposition testimony in determining whether her claim falls within the parameters of the Workers' Compensation Act "regardless of whether Rule 56 or Rule 12(b)(1) applies." However, as discussed more fully below and in the opening brief, the facts submitted in support of, and in opposition to, the motion clearly showed that Appellant was *not* acting within the scope of her employment when she was injured as a result of the NMDOT's negligence. The error lies in the granting of the motion, not in the procedure in arriving there.

Moreover, *Protection Advocacy Sys. v. City of Albuquerque, 2008 NMCA 149, ¶ 17, 195 P.3d 1, 17,* cited in the Response, is not applicable to the facts present here and is irrelevant to whether the District Court erred in finding that Appellant's claims are preempted by workers' compensation. In *Protective Advocacy*, the issue was whether the court properly considered affidavits relating

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[1] The NMDOT does not dispute that this Court is to review the granting of the motion to dismiss *de novo*.

to standing, not preemption, when ruling on a motion to dismiss pursuant to *Rule 1-012(b)(1)*. In that case, the plaintiff challenged a city ordinance relating to mental ill individuals. The defendant city filed a motion to dismiss claiming that the mental health advocacy group lacked standing to advance the claims of its constituents. In response to the motion, four constituents of the advocacy group submitted affidavits *in camera* showing that they met the criteria of persons affected by the ordinance. The court considered the affidavits and found that the advocacy group had standing to challenge the ordinance, thereby denying the motion to dismiss. *Id., ¶ 19*. The Court of Appeals did *not* hold, as the NMDOT implies in its response, that a *Rule 12(b)(1)* motion cannot be converted to a summary judgment motion when extrinsic evidence is considered by the district court.

Therefore, the real discussion in this case hinges on the District Court's finding that Appellant's claims are subject to the exclusivity provisions of the Act "based on the going and coming rule." *R.P. 084*.

B. The NMDOT Completely Ignores This Court's Recent Ruling in *Harkness v. McKay Oil* That the Going and Coming Rule Precludes Workers' Compensation Coverage to Claims by Commuters Like Appellant

Curiously absent from the response brief is any attempt by the NMDOT to distinguish this Court's recent ruling in *Harkness v. McKay Oil Co., 2008 NMCA*

123, 144 N.M. 784, writ. quashed, 2009 N.M. LEXIS 222 (Mar. 10, 2009), and to recognize that the District Court incorrectly viewed the going and coming rule to support workers' compensation coverage rather than as an exclusionary provision of the Act.

The *Harkness* Court recognized that "the going and coming rule exists to make every day commuting between home and the workplace the employee's business rather than the employer's . . . ." *Id., ¶ 14, 144 N.M. 783.* Reiterating that the going and coming rule is codified in the Workers' Compensation Act,[2] the *Harkness* Court held that if the injury arose out of and in the course of his or her employment, the going and coming exclusion does not apply and the employee is then entitled to recover benefits under the Act. *Id., ¶ 10, 144 N.M. 782-83.* Thus, the *Harkness* Court concluded that for an employee's injury claim to be covered by workers' compensation, the parties must demonstrate that the circumstances of the injuries (in that case, the employees' deaths) occurred "*outside the domain* of the going and coming rule." *Id. at ¶ 8, 144 N.M. at 787 (emphasis added).*

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[2] The Workers' Compensation Act, *NMSA 1978, § 52-1-19,* states that "injury by accident arising out of and in the course of employment . . . shall not include injuries to any worker occurring while on his way to assume the duties of his employment or after leaving such duties, the proximate cause of which is not the employer's negligence."

The *Harkness* Court also held that the term "arisen out of" in section *52-1-19* of the statute means that the employment denotes a risk reasonably *incident* to the claimant's work, and requires that the employment be *a contributing proximate cause* of the injury. *Id. See also Ramirez v. Dawson Prod. Partners, Inc., 2000 NMCA 11, ¶ 7, 128 N.M. 601, 605 (holding that "workers injured while traveling between home and work are generally not eligible for compensation.").* In addition, as the New Mexico Supreme Court held in *Velkovitz v. Penasco Indep. Sch. Dist., 96 N.M. 577, 577, 633 P.2d 685, 685 (1981)*, the phrase "in the course of employment" in section *52-1-19* relates to "the time, place, and circumstances under which the accident takes place." Therefore, in order for the injury to be covered by workers' compensation, the accidental injury must have its origin in a risk connected with the employment and have flowed from the risk as a rational consequence. *Id.*

In this case, Appellant's injury clearly falls within the going and coming rule because the facts unequivocally demonstrate that Appellant was merely on her way to board a commuter bus when she injured. Because her injury occurred in a parking lot maintained by a state agency, it was incidental to her employment by another state agency in Santa Fe and was not a foreseeable risk of employment. Appellant was not reasonably fulfilling any duty of her employment that morning

as she walked through the lot and tripped and fell in a hole. Consequently, she was not in the course and scope of her employment at the time of her injury. *See Gutierrez v. Artesia Pub. Sch., 92 N.M. 112, 114, 583 P.2d 476, 478 (Ct. App. 1978.* Thus, her injuries are not compensable through the workers' compensation scheme.

In its Response, the NMDOT erroneously focuses solely on the fact that Appellant was a state employee at the time of her injury and was injured while she walked through a state-operated parking lot. What the NMDOT and the District Court failed to recognize, however, is the *Harkness* Court's finding that the risks encountered daily by commuters like Appellant are *not* risks which are connected with employment. *Id., ¶ 14, 144 N.M. at 783.* The NMDOT failed to submit any facts demonstrating an exception to the rule. That Appellant would trip and fall in a poorly maintained parking lot 55 miles south of her place of employment is certainly not a risk that Appellant or her employer contemplated as part of Appellant's employment. *See Constantineau v. First Nat'l Bank, 112 N.M. 38, 810 P.2d 1258 (Ct. App. 1991) (holding that the Workers' Compensation Act does not cover injuries sustained while traveling to workplace from off-premises parking lot not specifically designated by employer for employee's use).*

In fact, there were *no facts* presented to the District Court--nor does the NMDOT cite to any--showing that Appellant's employer even knew that Appellant commuted daily from Albuquerque to Santa Fe, that she traveled to work on a privately-owned commuter bus, or that the pick-up point for the commuter bus was changed just weeks before her injury from a privately-owned lot to a state-owned lot. Nor are there any facts showing that Appellant's employer designated the parking lot as a pick-up point for its employees commuting from Albuquerque, required its employees to park in the lot, or encouraged its employees to use the commuter buses. Therefore, walking through a "Park 'n' Ride" lot near Balloon Fiesta Park "must be something more essential" to Appellant's clerical work for a state agency in Santa Fe "than mere commuting to and from work." *Harkness, at ¶ 20, 144 P.3d at 786; see also Nabors v. Harwood Homes, Inc., 77 N.M. 406, 408, 423 P.2d 602, 603 (1967) (Supreme Court holding "that an employee enroute [sic] to, or returning from, his place of employment, using his own vehicle[,] is not within the scope of his employment absent additional circumstances evidencing control by the employer at the time of the negligent act or omission of the employee.") (citations omitted).* In this case, it clearly it not.

As the New Mexico Supreme Court found in *Barrington v. Johnn Drilling Co., 51 N.M. 172, 177, 181 P.2d 166, 169 (1947) (Cited by Harkness, at ¶ 21, 144*

P.3d at 786), "the hazards of traveling to and from work are not hazards of the job but hazards that are faced by all travelers that are unrelated to the employer's business."

Further, to the extent that it has any applicability to the facts in this case, the NMDOT's reliance on *Espinosa v. Albuquerque Publ. Co., 1997 NMCA 072, 123 N.M. 605,* is misplaced. In its response brief, the NMDOT states that *Espinosa* stands for the proposition that a "worker's exclusive remedy in *any* going-and-coming situation, regardless of time, place or circumstance" is covered by the Act "as long as the injury was caused by the employer's negligence." *Response at 10 (emphasis added)*. This rule applies "as long as the injury was caused by the employer's negligence." In *Espinosa*, the plaintiff employee was struck by a vehicle driven by a co-employee who was on a "mail run" for the employer. *1997 NMCA at ¶ 1, 123 N.M. at 605*. There was also no dispute that the co-employee/driver was acting within the scope of his employment and was negligent when he injured the plaintiff. *Id.*

Here, however, there are no facts showing that Appellant's employer was negligent with respect to the unmarked construction hole in the Albuquerque parking lot. The NMDOT attempts to bootstrap Appellant's employer into the workers' compensation arena by asserting that, because Appellant, a state

employee, was injured in a parking lot maintained by another state agency, her employer's negligence was a proximate cause of Appellant's injury. *Response at 12*. Its reliance on *Singhras v. New Mexico State Hwy. Dept., 120 N.M. 474, 902 P.2d 1077 (Ct. App. 1995) ("Singhras I")*[3], does not support this argument. The *Singhras I* and *Singhras II* decisions presuppose the undisputed fact and finding--absent here--that the occurrence in that case; *i.e.*, an automobile accident that killed and injured the plaintiffs, was "within the employment relationship." *Singhras I, 120 N.M. at 475, 902 P.2d at 1078; Singhras II, 1997 NMSC at ¶ 4, 124 N.M. at 43.*

In this case, however, it is firmly disputed that Appellant was within the course and scope of her employment when she tripped and fell in the "Park 'n' Ride" parking lot while walking toward the pick-up spot for the commuter bus. The NMDOT has not presented any facts showing otherwise, either in its Response or to the District Court in connection with its *Rule 1-012(b)(1)* motion. Therefore, the *Singhras* decisions are not applicable to this case because, as stated above and in the Brief in Chief, there was absolutely no causal connection between Appellant's employer and Appellant's clerical duties, on the one hand, and the

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[3] The NMDOT fails to point out in its brief that the appellate *Singhras* decision was affirmed by the Supreme Court in *Singhras v. New Mexico State Hwy. Dept., 1997 NMSC 054, 124 N.M. 42 ("Singhras II").*

unmarked construction hole in which Appellant fell, on the other hand, in order to satisfy any exception to the going and coming rule as it pertains to commuters.

C. The District Court Failed to Find That the NMDOT Waived Its Right to Assert Workers' Compensation as an Affirmative Defense

The NMDOT has not successfully challenged Appellant's assertion that it waived workers' compensation preemption because was not asserted as an affirmative defense. In its response, the NMDOT claims that it did not waive the defense because (1) subject matter jurisdiction is never waived; and (2) the exclusivity of workers' compensation remedies was raised by in the NMDOT's motion to dismiss, which the District Court granted. Neither of these two reasons supports the Court's ruling, however.

Although as a general rule subject matter jurisdiction can never be waived, such is not the rule with respect to a workers' compensation defense. The NMDOT fails to adequately distinguish the Court of Appeals' holding in *Taylor v. Van Winkle's IGA Farmer's Mkt., 1996 NMCA 111, 122 N.M. 486, writ denied, 122 N.M. 416, 925 P.2d 882 (N.M. 1996)*, which specifically discusses whether workers' compensation preemption can be waived if not raised as an affirmative defense. In *Taylor*, the defendant employer failed to plead workers' compensation as an affirmative defense and judgment was entered in favor of the employee. In upholding the judgment, the appellate court specifically held that the defendant's

argument that the plaintiff's tort claim is limited to a claim for compensation benefits is an affirmative defense because it is a matter in avoidance and, because the defendant did not raise it as an affirmative defense, it was waived. *Id. at* ¶ *7, 122 N.M. at 488 (citing Berry v. Meadows, 103 N.M. 761, 768, 713 P.3d 1016, 1024 (Ct. App. 1086) ("An affirmative defense is that state of facts provable by defendant which may bar plaintiff's right to recover."); see also United Nuclear Corp. v. General Atomic Co., 93 N.M. 105, 120, 597 P.2d 290, 305, cert. denied, 444 U.S. 911 (1979)).*

The NMDOT has offered no valid excuse for failing to raise workers' compensation as an affirmative defense in its Answer to the Complaint. It claims that it did not assert the defense prior to its motion to dismiss because Appellant's Complaint did not allege the identity of her employer or that she was going to work at the time of the injury. However, the NMDOT took Appellant's deposition on December 10, 2007--almost a year and a half before it filed its motion to dismiss.[4] At no time after the deposition and prior to its motion to dismiss did the NMDOT amend its Answer, or attempt to amend its Answer, in order to assert the exclusivity provisions of the Act. That the NMDOT suggested in its reply brief in

[4] At her deposition, Appellant disclosed that at the time of her injury she was employed by the Department of Public Safety and was at the NMDOT's lot in Albuquerque in order to board the commuter bus to her workplace in Santa Fe.

support of its motion that its Answer could be amended *(R.P. 80-81)* is insufficient and would result in any defense being raised for the first time in a dispositive motion. Therefore, the District Court abused its discretion in permitting the NMDOT to argue the defense when it had already clearly been waived.[5]

Finally, the NMDOT's attempt to distinguish the cases cited in the Brief in Chief for the proposition that workers' compensation preemption is an affirmative defense that must be timely asserted is without merit and underscores its unwillingness to concede waiver. For example, in *Doyle v. Rhodes, 101 Ill. 2d 1, 12-13, 461 N.E.2d 382, 386-87 (Ill. 1984)*, in which the Illinois Supreme Court held that workers' compensation preemption is an affirmative defense which is waived it not asserted, the Court recognized that on occasion the employer may choose not to raise the affirmative defense in the hope that the plaintiff will be unable to prove negligence to a jury's satisfaction. *Id. at 13, 461 N.E.2d at 387.* Perhaps for this very reason the NMDOT did not attempt to amend its Answer in order to allege workers' compensation preemption. The NMDOT's argument that *Doyle* is distinguishable because the case at bar is not a third party action for

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[5] On page 14 of its Response, the NMDOT states that Appellant "has identified no abuse of discretion in the trial court's consideration of [the workers' compensation] defense before trial." Nothing is farther from the truth: had the District Court correctly found that the defense had been waived, Judgment in favor of the NMDOT and against Appellant would not have been entered, and this appeal would not have been taken.

contribution based on the Illinois' Workers Compensation statute (*see* Response at p. 16) is of no critical significance because the *Doyle* holding is not based on that fact.

Similarly, the NMDOT incorrectly states that *Radil v. Sanborn W. Camps, Inc., 384 F.3d 1220 (10th Cir. 2004)*, also cited by Appellant in the Brief in Chief "did not concern waiver." However, the Tenth Circuit held in *Radil* that workers' compensation is a "waivable" affirmative defense. *Id. at 1125-1126.* The same principle was enunciated by the courts in *Popovich v. Irlando, 811 P.2d 379, 385 (Colo. 1991), Bigby v. Big 3 Supply Co., 937 P.2d 794, 799 (Colo. Ct. App. 1996), Green v. City of Oceanside, 194 Cal. App. 3d 212, 239 Cal. Rptr. 470 (1987), Northeast Health Mgmt., Inc. v. Cotton, 56 S.W.3d 440 (Ky. Ct. App. 2001),* and in *Brown v. Ehlert, 255 Mont. 140, 841 P.2d 510 (Mont. 1992)*, and was not adequately addressed by the NMDOT in its Response.

Therefore, because the NMDOT failed to assert the Workers' Compensation Act as an affirmative defense in it Answer to Appellant's Complaint, it is waived as a matter or law. *See Taylor, 1996 NMCA 111.* Accordingly, the District Court erred in granting the NMDOT's motion and dismissing Appellant's negligence claims.

III. CONCLUSION

WHEREFORE, by reason of the premise described herein and in the Brief in Chief, Plaintiff/Appellant Sarah Quintero respectfully requests that this Court reverse the District Court's July 24, 2008 Order granting Defendant/Appellee New Mexico Department of Transportation's motion to dismiss, remand the case to the District Court, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

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