IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

KRISTOPHER MAY,

Plaintiff-Appellant,

vs. **Case Nos. 29,331 and 29,490**

DCP MIDSTREAM, L.P. F/K/A DUKE ENERGY FIELD SERVICES, L.P., and DUKE ENERGY FIELD SERVICES, INC.,

Defendants-Appellees.

APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT
LEA COUNTY
THE HONORABLE GARY L. CLINGMAN

ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEW MEXICO DECISIONS

DECISIONS FROM OTHER JURISDICTIONS

NEW MEXICO STATUTES

NEW MEXICO RULES

STATEMENT OF COMPLIANCE

I hereby certify that the body of the brief is thirty-two (32) pages long and consists of approximately 7,660 words and that Microsoft Word 2007 indicates that the body of the brief uses the proportionally-spaced typeface of Times New Roman 14.

SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE AND COURSE OF PROCEEDINGS.

This Delgado action revolves around injuries sustained by Kristopher May ("Plaintiff" or "KM") while employed by DCP Midstream, L.P.[1] ("Defendant" or "DCP"), when a pipeline inspection gauge ("pig") that he was attempting to retrieve from Defendant's Eddy Pipeline Receiver (the "Receiver") at Defendant's Linam Ranch Plant was suddenly and unexpectedly released under pressure. In an effort to meet the extraordinarily high burden imposed upon Delgado claims, Plaintiff contended that Defendant knew that regular pigs were becoming stuck in the Receiver, that the Receiver was not equipped with adequate safety devices, and that Plaintiff had received inadequate training. Based upon Plaintiff's testimony, DCP established that it did not know that pigs were becoming stuck in the Receiver or that the Receiver was dangerous, that the Receiver was equipped with safety devices and could be and was operated regularly, routinely, and safely for over one year by Plaintiff and others, and that Plaintiff had been trained to retrieve pigs by a more experienced fellow employee. Under these facts the trial court appropriately held that, although DCP's conduct may have been negligent, the conduct did not rise to the level necessary to sustain a Delgado action. Based upon

[1] For the purposes of this appeal, Defendants refer to DCP Midstream, L.P., Duke Energy Field Services, Inc., and their predecessors as DCP Midstream, L.P.

the factual summary and legal argument below, the trial court's grant of summary judgment should be affirmed.

II. STATEMENT OF FACTS

A. PIG LAUNCHING AND RECEIVING

Pigging operations involve launching a pig through an operating pipeline and retrieving the pig from a receiver. [RP 385] This case involves two types of pigging operations. First, regular pigging operations involve running an approximately three (3) foot long pig through a pipeline to push iron sulfide and other debris out of the pipeline. [RP 2, ¶¶ 11 and 14; RP 474, Dep. MS 95.13-95.25] The shorter and lighter (45 lbs) regular pigs take approximately four (4) hours to travel from their launch point at Defendant's Artesia Plant to the Receiver. [RP 2, ¶ 10; RP 361, Dep. WH 113.18-113.20] Second, smart pigging operations involve running a series of specialized pigs through a pipeline with the ultimate goal of assessing the structural integrity of the pipeline. [RP 146, Dep. RG 32.13-33.3] Smart pigging operations themselves involve three specialized forms of pigs. [RP 138, Dep. KM 105.16-105.23] First, a caliper pig is run to measure the narrowest interior diameter of the pipeline to be inspected. [RP 855] Second, a dummy pig, virtually identical to the subsequent smart pig, is run through the pipeline to ensure that the smart pig can travel the length of the pipeline without becoming stuck in an inaccessible portion of the pipeline. [RP 852] Third, a smart

pig containing embedded electronic sensors is run through the pipeline to measure the structural integrity of the pipeline walls. [Id.] Smart pigs and the virtually identical dummy pigs are approximately ten (10) feet long, [RP 2, ¶ 12], and because of their heavier weight (800 lbs) and requirement for reduced gas flow, travel more slowly and take approximately twelve (12) hours to travel the same distance. [RP 850 and 852] As noted by Plaintiff, smart pigs and regular pigs are not retrieved in the same way. [RP 625, Dep. KM 174.3-174.19]

B. PIGGING OPERATIONS PRIOR TO PLAINTIFF'S ACCIDENT.

1. THE RECEIVER WAS INITIALLY OPERATED BY DCP'S FIELD OPERATORS BEGINNING IN 1995.

In 1995, the Receiver was installed at the Linam Ranch Plant. [RP 292] From 1995 through the second quarter of 2005, DCP Field Operators retrieved pigs from the Receiver. [RP 294] DCP did not provide training through formal coursework or testing materials and instead its less-experienced field operators received on-the-job training in pig retrieval procedures from more experienced operators. [RP 147, Dep. RG 39.6.-40.3] This on-the-job training included the use of long hooks to retrieve pigs in order to avoid becoming filthy by coming into contact with iron sulfide and other debris pushed out of pipelines and into receivers. [RP 149, Dep. RG 58.14-59.15; RP 292] Prior to the accident that is the subject of this lawsuit, DCP's pig receivers were not uniformly configured and

instead reflected "a lot of different configurations of pig receivers." [RP 148, Dep. RG 56.22-57.5] Consequently, DCP's field operators would sometimes retrieve pigs from receivers that didn't have a pig signal or a pressure gauge upstream from a received pig. [RP 148, Dep. RG 56.15-56.21]

2. DCP Implemented a Required Practice Policy for New Receiver Design Effective February 19, 2001.

Effective February 19, 2001, approximately six (6) years after the Receiver's installation, DCP adopted a Required Practice for Launcher and Receiver Design. [RP 380 and 414] The Required Practice provided a uniform standard for the design, operation, and maintenance of pipeline launchers and receivers and applied to both permanent and temporary installations for DCP-operated facilities installed after February 19, 2001. [Id.] The Required Practice did not apply to receivers modified after but installed prior to February 19, 2001. [RP 466-67, Dep. MS 65.12-69.14]

3. DCP's Plant Operators Began Receiving Pigs at the Receiver in the Second Quarter of 2005.

Sometime during the second quarter of 2005, but prior to the Receiver's modification to accept smart pigs, DCP Plant Operators began retrieving pigs from the Receiver. [RP 294] DCP provided pig retrieval training to Plant Operators at approximately three (3) safety meetings. [RP 352, Dep. MS 77.6-77.24] Although Plaintiff disputes that he attended any of these meetings, [RP 599, Dep. KM 73.20-

73.22], Plaintiff admitted that he received training regarding pig retrieval from a more experienced DCP plant operator, [RP 600, Dep. KM 75.6-76.2], and that he received training regarding the construction and purpose of blow-down valves. [RP 132, Dep. KM 46.5-46.23] Prior to and during the time that Plant Operators, including Plaintiff, retrieved pigs from the Receiver, the Eddy Pipeline was usually pigged once a week during the day shift. [RP 292; RP 599-600, Dep. KM 70.12-70.15, 76.15-76.24]

4. DCP Modified the Receiver to Accept Smart Pigs in June of 2005.

In May of 2005, approximately two (2) months after Plant Operators began retrieving pigs from the Receiver, DCP modified the Receiver to accept smart pigs in order to detect anomalies, corrosion, and thin locations in the pipeline. [RP 146, Dep. RG 32.13-32.23; RP 292] The modified Receiver was equipped with blow-down valve safety devices that are used to relieve pressure behind a pig. [RP 160, Dep. MS 87.16-88.5] The modified Receiver could be and was operated safely for over a year without incident. [RP 160, Dep. MS 87.3-87.13] Plaintiff admitted that prior to June 7, 2006, neither Plaintiff nor any other plant operator informed DCP management that they thought the modified Receiver was dangerous, [RP 136, Dep. KM 89.20-89.24, 90.21-91.3], or informed DCP management that regular pigs were becoming stuck six or seven feet behind the modified Receiver's cap end. [RP 138, Dep. KM 103.2-103.18] Although never reported to DCP

management, Plaintiff admitted that when pigs had become stuck in the modified Receiver prior to June 7, 2006, it was due to pressure insufficient to force the pig to the end of the Receiver. [RP 138, Dep. KM 103.2-103.6]

5. DCP WAS NOT AWARE THAT THE RECEIVER WAS DANGEROUS OR THAT REGULAR PIGS WERE BECOMING LODGED IN THE RECEIVER PRIOR TO PLAINTIFF'S ACCIDENT.

Plaintiff admitted that DCP was not aware that the Receiver was dangerous prior to Plaintiff's accident.[2] First, prior to his accident, no one, including Plaintiff, informed DCP management that they thought the Receiver was dangerous. [RP 136-37, Dep. KM 89.20-89.24, 90.21-91.7] Second, prior to his injury, no one informed DCP management that regular pigs were becoming lodged six or seven feet behind the Receiver's cap end for any reason. [RP 138 and 141, Dep. KM 103.2-103.18, 134.1-134.12] Putting Plaintiff's admission aside, Plaintiff's additional claims that DCP management was aware that the Receiver was dangerous are solely based upon Plaintiff's hearsay testimony.

[2] The reports and affidavits of Dr. Way Johnston do not satisfy the requirements for expert affidavits under Rule 1-056 NMRA and are incompetent. An expert's affidavit "must explain how he arrived at his opinion, setting forth such supportive facts as would properly be admissible in evidence," Trujillo v. Treat, 107 N.M. 58, 752 P.2d 250 (Ct. App. 1988), and its failure to include a satisfactory explanation of the opinions therein renders them incompetent. Pedigo v. Valley Mobile Homes, Inc., 97 N.M. 795, 798, 64 P.2d 1247, 1250 (Ct.App. 1982); Smith v. Klebanoff, 84 N.M. 50, 53, 499 P.2d 368, 371 (Ct. App. 1972) (citing Dahl v. Turner, 80 N.M. 564, 568, 458 P.2d 816, 820 (Ct. App. 1969); City of Albuquerque v. Chapman, 76 N.M. 162, 168-69, 413 P.2d 204, 208-09 (1966)). Neither Dr. Johnston's affidavit, Supplementary Report, nor his Preliminary Report indicate how he arrived at any of his opinions, including his unsupported *ipse dixit* that Defendant "knew" that the Receiver exposed operators to an extreme degree of risk.

a. DCP Management Did Not Observe or Express Concern Regarding a Lodged Regular Pig As Argued by Plaintiff.

Plaintiff's Brief in Chief repeatedly and inaccurately contends that DCP employee Tony Lee observed and expressed concerned regarding a lodged "regular pig" by equating regular pigs with dummy pigs. [BIC 8-9, 20, and 30] Ignoring that the sole bases for these allegations is Plaintiff's inadmissible hearsay testimony, [RP 631, Dep. KM 199.17-199.18 ("Like I said, I wasn't out there.")],[3] Plaintiff's representation that "dummy pigs" are regular pigs is not supported by any evidence and contradicts the allegations in Plaintiff's Complaint, Plaintiff's testimony, and the record evidence. [BIC 20 n.2] Dummy pigs, unlike regular or normal pigs, are virtually identical to smart pigs and are used to prove that a pipeline has sufficient clearances so that a smart pig will not become stuck. [RP 852] As noted generally by Plaintiff, "[s]mart pigs are several feet longer than [] normal pig[s]...." [RP 2, ¶ 11] More specifically, Plaintiff stated that the pig that injured him was approximately three (3) feet long, [RP 2, ¶ 14], whereas the smart pig (and therefore the virtually identical dummy pig) utilized in smart pigging operations was approximately ten (10) feet long. [RP 2, ¶ 12] Additionally, Plaintiff testified that smart pigs are not pulled in the same way as regular pigs. [RP 625, Dep. KM 174.3-174.19] Also as noted by Plaintiff, within the Eddy

[3] Hearsay is inadmissible at trial and cannot be considered when deciding a motion for summary judgment. Seal v. Carlsbad Independent School Dist., 116 N.M. 101, 105, 860 P.2d 743, 747 (1993); Griffin v. Thomas, 2004-NMCA-088, ¶ 42, 136 N.M. 129, 95 P.3d 1044.

Pipeline regular pigs take about four (4) hours to travel the length of the pipeline, [RP 2, ¶ 10], whereas the longer, heavier smart pig requires reduced gas flow, [RP 850], and therefore travels more slowly, taking approximately twelve (12) hours to travel the same distance. [RP 852]

b. Prior to Plaintiff's Accident, DCP Management Was Never Alerted That Regular Pigs Were Becoming Lodged in the Receiver.

Plaintiff's Brief in Chief repeatedly and inaccurately contends that, prior to Plaintiff's accident, DCP management was aware of pigs becoming lodged in the Receiver and refused to address the problem. [BIC 10, 17-18, 22, 27] In support of this erroneous theory Plaintiff offers two separate pieces of hearsay evidence. First, Plaintiff claims that, after he returned to work following his accident, he heard that Ronnie Gilchrest had offered to take down the Receiver and had stated that it was dangerous, and that two other employees had also offered to take down the receiver. [RP 608, Dep. KM 108.15-108.25] Plaintiff admitted that he could not recall who told him that information and that he heard it after his accident. [Id.] Second, Plaintiff offered the affidavit of Rusty Forest that contained an alleged hearsay statement that, after Plaintiff's accident, Mr. Gilchrest stated that he offered to take down the receiver but was told that Mr. Holt would do it. [RP 661-62, ¶ 4] The Forest Affidavit in no way reflects that Mr. Gilchrest or anyone else was aware that the Receiver presented a hazard and Plaintiff has no competent

evidence that, prior to Plaintiff's accident, that anyone informed DCP management that the Receiver was dangerous.

C. PLAINTIFF WAS INJURED ON JUNE 7, 2006, WHILE ATTEMPTING TO RETRIEVE A PIG AT THE RECEIVER.

Prior to his accident of June 7, 2006, Plaintiff worked at the Linam Ranch facility on a seven (7) day on, seven (7) day off, twelve (12) hour schedule. [RP 597, Dep. KM 63.7-63.22] During that time, Plaintiff received approximately ten (10) regular pigs at the Receiver without incident. [RP 142, Dep. KM 171.22-172.20; RP 135, Dep. KM 74.11-74.14] Although Plaintiff testified that he had some trouble remembering his training the first time he retrieved a pig at the Receiver, he had no trouble retrieving approximately nine (9) pigs thereafter. [Id.] Plaintiff never informed anyone that he did not want to retrieve a pig from the modified Receiver, [RP 143, Dep. KM 175.11-175.19], or that he thought retrieving pigs from the modified Receiver was dangerous. [RP 143, Dep. KM 175.24-176.9] Plaintiff never requested assistance from DCP or anyone else to retrieve pigs from the modified Receiver. In fact, immediately prior to the accident and while Plaintiff prepared to retrieve a pig from the Receiver, Plaintiff testified that he declined a DCP relief operator's unsolicited offer to retrieve the pig for Plaintiff. [RP 140, Dep. KM 128.24-129.15] Plaintiff was injured when the pig was expelled from the Receiver under pressure and struck his right arm. [RP 141, Dep. KM 134.14-135.10]

D. FOLLOWING PLAINTIFF'S ACCIDENT, DCP CONDUCTED AN INVESTIGATION INTO THE CAUSE OF PLAINTIFF'S ACCIDENT THAT RESULTED IN ALL OF DEFENDANT'S PIG RECEIVERS BEING MODIFIED.

Following Plaintiff's injury, DCP conducted a TapRoot investigation of Plaintiff's accident in order to determine the root cause of the accident.[4] [RP 292-300] The draft TapRoot investigation report opined that the accident was caused by two root causes: (1) the smart-pig modified receiver was left in service for normal pigging operations and (2) operations personnel were unable to know with certainty the location of a pig in the receiver and were unable to detect pressure behind the pig. [RP 297] The draft report also identified two contributing factors: (1) management of change procedures were not followed,[5] and (2) operations personnel lacked adequate training. [RP 298]

E. PLAINTIFF HAS RECEIVED AND IS RECEIVING WORKERS COMPENSATION BENEFITS AND IS CAPABLE OF REPAYING DCP'S RECOVERABLE COSTS.

Between June 2006 and December 2007, Plaintiff received $1,171.78 per month in Workers' Compensation Act benefits related to the accident and has received or will receive between $503.00 and $1,171.78 per month for those

[4] Although the draft TapRoot investigation report indicates that it is a privileged & confidential attorney client-privileged document, no such privilege actually attached to the report.

[5] Management of Change and Process Safety Hazard requirements did not apply to the Receiver because the Receiver was not a process safety management facility. [RP 350, Dep. WH 68.16-68.19, RP 622, Dep. KM at 162.16-163.13]

injuries over the following six (6) years.[6] [RP 166; RP 144, Dep. KM 181.2-181.8; RP 1121, ¶ 6] In defeating Plaintiff's unavailing Delgado action, DCP incurred $2,800.36 in recoverable costs. [RP 1104-15] Plaintiff testified that his excess annual household income was more than double those recoverable costs. [RP 1120-21; see also RP 1131 (summarizing Plaintiff's income and expenses)]

[6] On July 8, 2008, Plaintiff testified that he was presently receiving $503.00 per month in Workers' Compensation Benefits. [RP 144, Dep. KM 181.2-181.8] However, on February 5, 2009, Plaintiff testified that his Workers' Compensation Benefits had been increased back to $1,171.78 every two weeks. [RP 1121, ¶ 6]

STANDARDS OF REVIEW

Summary Judgment. Summary judgment is reviewed on appeal *de novo*. Ulibarri v. State of New Mexico Corrections Academy, 2006-NMSC-009, ¶ 7, 139 N.M. 193, 131 P.3d 43. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 1-056 NMRA 2007; Salazar v. Torres, 2007-NMSC-019, ¶ 5, 141 N.M. 559, 158 P.3d 449 (Salazar II); Salazar v. Torres, 2005-NMCA-127, ¶ 4, 138 N.M. 510, 122 P.3d 1279 (Salazar I). On appeal, the Court considers the whole record for evidence that puts a material fact at issue. Roth v. Thompson, 113 N.M. 331, 335, 825 P.2d 1241, 1245 (1992). An issue of fact is "material" if the existence (or non-existence) of the fact is of consequence under the substantive rules of law governing the action. Romero v. Phillip Morris, Inc., 2008-NMCA-022, ¶ 12, 145 N.M. 658, 203 P.3d 873. Arguments by counsel are not evidence and cannot be used to create a material issue of fact to defeat summary judgment. Cain v. Champion Window Co. of Albuquerque, L.L.C., 2007-NMCA-085, ¶ 14, 142 N.M. 209, 164 P.3d 90. In motions for summary judgment in actions brought pursuant to Delgado v. Phelps Dodge Chino, Inc., 2001-NMSC-034, 131 N.M. 77, 73 P.2d 215, like all motions for summary judgment, the Court must view the evidence in the light most favorable to the employee opposing summary judgment. Morales v. Reynolds, 2004-NMCA-093, ¶ 22, 136 N.M. 280, 97 P.3d 612. Unlike

typical motions for summary judgment, however, once an employer has made a prima facie showing of entitlement to summary judgment, the burden of proof shifts to the employee who must then "present evidence that the employer met each of the three Delgado elements through actions that exemplify a comparable degree of egregiousness as the employer in Delgado in order to survive" summary judgment. Id. ¶ 14. In order to maintain the balance of interests embodied in the Workers' Compensation Act's bargain, it is appropriate to grant summary judgment to an employer when an employee "cannot demonstrate willful conduct that approximates the employer's conduct under the three-prong [Delgado] test." Id. ¶ 17. Additionally, when no evidence supports even one of the three prongs or when reasonable jurors could not differ on them, summary judgment for the employer is appropriate and in keeping with the intent of the Act. Id.

Costs Bill. An award of costs is reviewed on appeal for an abuse of discretion. Key v. Chrysler Motors Co., 2000-NMSC-010, ¶ 7, 128 N.M. 739, 998 P.2d 575; Dunleavy v. Miller, 116 N.M. 353, 362-63, 862 P.2d 1212, 1221-22 (1993); Pioneer Sav. & Trust, F.A. v. Rue, 109 N.M. 228, 231, 784 P.2d 415, 418 (1989). Under New Mexico law, trial courts properly exercise their discretion in awarding costs when their awards are consistent with logic and reason, capable of defense, and consistent with the effect of facts and circumstances before them. See Martinez v. Martinez, 1997-NMCA-096, ¶ 20, 123 N.M. 816, 945 P.2d 1034.

ARGUMENT

I. SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE DEFENDANT'S CONDUCT WAS NEITHER EGREGIOUS NOR WILLFUL, AND BECAUSE THE EXCLUSIVE REMEDY FOR PLAINTIFF'S CLAIMS IS FOUND WITHIN THE WORKERS' COMPENSATION ACT.

The trial court's grant of summary judgment in this Delgado case should be affirmed because DCP's conduct does not approximate the egregious employer conduct exemplified in Delgado v. Phelps Dodge Chino, Inc., 2001-NMSC-034, ¶ 12, 131 N.M. 77, 73 P.2d 215, and does not warrant exception from the exclusive remedies provided by the Workers' Compensation Act. Plaintiff's injuries are the result of an unlooked for and unexpected accident that occurred while Plaintiff was engaged in a regular and routine activity that he had performed at least ten (10) times previously incident and that had performed by others for approximately one (1) year. Even if the Receiver safety devices were not ideally located and if Plaintiff's training could have been better, the facts of this case establish that the Receiver was equipped with safety devices and that Plaintiff had received training in pig retrieval. No evidence exists that Plaintiff's injuries were the result of a profit-motivated disregard for safety or that Plaintiff was forced into peril; to the contrary, the facts of this case establish that DCP was unaware of the Receiver's potential hazard and that Plaintiff declined offers to assist in pig retrieval. These facts establish that DCP's conduct in this case does not approach the horrific

conduct demonstrated in Delgado and, consistent with its post-Delgado decisions, the Court should affirm the grant of summary judgment.

A. SUMMARY JUDGMENT WAS APPROPRIATE BECAUSE DEFENDANT'S CONDUCT DID NOT APPROXIMATE THE EGREGIOUS EMPLOYER CONDUCT IN DELGADO.

Under New Mexico law, when an employee suffers an accidental injury and a number of other preconditions are satisfied, the Workers' Compensation Act provides a scheme of compensation that affords profound benefits to both employees and employers. Delgado, 2001-NMSC-034, ¶ 12. The injured employee receives compensation quickly, without having to endure the rigors of litigation or proving fault on behalf of the employer. Id. The employer, in exchange, is assured that an employee accidentally injured, even by the employer's own negligence, will be limited to compensation under the Act and may not pursue the unpredictable damages available outside its boundaries. Id. (citing NMSA 1978, § 52-1-9 (1973)). The Act represents the result of a bargain struck between employers and employees. In return for the loss of a common tort claim for accidents arising out of the scope of employment, the Act ensures that employees are provided some compensation. Id. This bargain is based upon a mutual renunciation of common law rights and defenses by employers and employees alike. Id. The Act does not, however, insulate employers from non-accidental injuries that they actually intended to inflict upon employees or where the

employee's injury was the result of the employer's willful conduct. Id. ¶¶ 16 and 24. Willfulness renders an employee's injury non-accidental, and therefore outside the scope of the Act, when

> (1) the employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker;
>
> (2) the employer expects the intentional act or omission to result in the injury, or has utterly disregarded the consequences; and
>
> (3) the intentional act or omission proximately causes the injury.

Id. ¶ 26. Delgado actions represent a "very, very narrow exception" to the exclusive remedies afforded by the Act, and "[t]he burden to establish a Delgado claim is high." Chairez v. James Hamilton Const. Co., 2009-NMCA-093, ¶¶ 29-30. So as not to eviscerate the essential provisions of the Act and to preserve the bargain in a meaningful way, plaintiffs must present evidence that the employer met each of the above three elements through actions that exemplify a comparable degree of egregiousness as the employer in Delgado in order to survive a motion for summary judgment. Dominguez v. Perovich Properties, Inc., 2005-NMCA-050, ¶ 16, 137 N.M. 401, 111 P.3d 721; Morales v. Reynolds, 2004-NMCA-093, ¶¶ 14 and 17, 136 N.M. 280, 97 P.33 612, cert. denied, 2004-NMCERT-008, 136 N.M. 491, 100 P.3d 197; Cordova v. Peavey Co., 111 Fed.Appx. 992, 995 (10th Cir. 2004) (Cordova II) (unpublished opinion); Cordova v. Peavey Co., 273 F.Supp.2d 1213, 1219 (D.N.M. 2003) (Cordova I).

1. DCP's Conduct Does Not Approach the Benchmark of Horrific Employer Conduct in Delgado Necessary for Liability Outside of the Act.

The facts of Delgado are helpful to illustrate the type of employer conduct the New Mexico Supreme Court sought to address in broadening the non-accidental exception, Morales, 2004-NMCA-093, ¶ 9, and to contrast with the circumstances of Plaintiff's accidental injury. In Delgado the employee was employed at a smelting plant that distilled copper ore by heating rock to temperatures greater than 2,000 degrees so that usable ore would separate from unusable slag. Delgado, 2001-NMSC-034, ¶ 3. The slag drained into a 15–foot tall, 35–ton iron cauldron known as a "ladle," which workers would ordinarily empty on a regular basis by using a "mudgun" to stop the flow of molten slag long enough for a specialized device called a "kress-haul" to remove the ladle. Id. On the night that Delgado died, the work crew was shorthanded and was under pressure to work harder to recoup recent losses. Id. ¶ 4. The ladle was filling at an unusually fast pace and had reached the point where it would normally need to be emptied, but the mudgun was not working. Id. Although the employer's supervisors had the option of shutting down the furnace in order to stop any more molten slag from accumulating in the ladle while the workers emptied it, they did not. Id. Instead, they ordered Delgado to remove the ladle of molten slag using the kress-haul alone, despite the fact that molten slag was continuing to accumulate

in the ladle and spilling over its brim and despite the fact that he had never done such a task before. Id. When Delgado saw the situation, he radioed for help, explaining that he was neither qualified nor able to perform the removal task. Id. ¶ 5. Delgado's requests were denied. Id. He again protested and asked for help, and again his supervisors insisted that he perform the dangerous operation. Id. He eventually came up from the tunnel "fully engulfed in flames" and sustained third-degree burns all over his body that led to his death. Id. This combination of deadly conditions, profit-motivated disregard for easily-implemented safety measures, complete lack of worker training or preparation, and outright denial of assistance to an employee in a terrifying situation exemplifies the egregious employer conduct necessary to sustain a Delgado cause of action. Morales, 2005-NMCA-050, ¶ 10.

DCP's conduct in this case does not approximate or even approach the Delgado defendant's egregious behavior. In Delgado, the decedent was compelled to attempt to empty a cauldron of overflowing molten slag by operating unfamiliar machinery directly underneath the overflowing cauldron. In contrast, Mr. May was tasked with retrieving a pig from a receiver just as he had done at least ten (10) times earlier without incident. In Delgado, the employer, motivated to recover from recent financial losses, affirmatively chose not to shut down the furnace for the employee's attempted slag removal despite the fact that it knew that the cooling

mudgun was not working. In this case, DCP management was not aware that any safety device was not functioning properly and no evidence exists that its failure to better configure the Receiver was motivated by profit. To the contrary, the only relevant evidence reflects that had DCP been aware of the hazard, it could have reconfigured the receiver at little cost. In Delgado, the plaintiff had absolutely no training or preparation to empty the overflowing ladle. Mr. May, in contrast, received training regarding the operation of blow-down valves from DCP, received training in pig retrieval from a more experienced DCP plant operator, and had successfully retrieved at least ten (10) pigs from the Receiver without incident. Finally, unlike the Delgado plaintiff whose pleas for help were repeatedly and callously rebuffed, Mr. May testified that he never requested assistance of DCP and assistance was never denied him. To the contrary, on the day of his accident, a fellow employee volunteered to retrieve the pig for Plaintiff and Plaintiff declined that offer. DCP's conduct in no way exemplifies or approaches the horrific conduct made actionable by Delgado. Although manifest based upon comparing the facts of Delgado this case, the trial court's grant of summary judgment is also appropriate when considered along the continuum of employer conduct reflected in the Chairez, Morales, Cordova, and Dominguez decisions.

2. POST-DELGADO DECISIONS ILLUSTRATE THAT PLAINTIFFS CANNOT SURVIVE SUMMARY JUDGMENT BASED UPON NEGLIGENT PROVISIONING OF SAFETY DEVICES OR TRAINING IN REGULAR AND ROUTINE ACTIVITIES.

a. Chairez v. James Hamilton Const. Co.

In Chairez v. James Hamilton Const. Co., 2009-NMCA-093, an employee's injury and death resulting from his employer's modification of a portable rock crusher did not demonstrate "the gravity of harm and the certainty of injury...required by Delgado." Id. ¶ 33. In that case the employer utilized a rock crusher that had been modified so that an employee could descend into the operating machine and come into contact with a large flywheel that had been covered by a large metal shield. Id. ¶ 9. The employer was aware of the danger inherent in a person being in the presence of the operating machinery and trained its employees to observe "lock-out/tag-out" procedures before maintaining the machine. Id. ¶ 10. Despite that training, the employee entered the operating rock crusher to clear rocks that had jammed its operation. Id. A supervisor observed the employee in the hazardous area and, before the machine could be turned off, the employee came into contact with the spinning flywheel, broke his leg, and later died from a blood clot. Id. The employee contended that an issue of fact existed as whether the employer had engaged in an intentional act that it reasonably expected to result in injury by removing the metal cover protecting the flywheel. Id. ¶ 31. On appeal, the Court disagreed, noting that there was no evidence that the

employer intended the employee to be in a position where he would be exposed the flywheel while it was in operation, id., and additionally noted that the employer did not require the employee to face an obvious hazard by entering the machine while it was operating, id. ¶ 32, and that the employee's testimony that it was common practice to remove jams while the machine was running suggested that it was normally performed without incident. Id. ¶ 33. Under these facts, the Court held that the employee had failed to introduce evidence that the employer had engaged in intentional conduct that resulted in the employee's injury. Id.

b. Morales v. Reynolds

In Morales v. Reynolds, 2004-NMCA-098, 136 N.M. 280, 97 P.3d 612, an employee was injured when a chemical pump he was repairing released toluene diisocynanate ("TDI"), dislodged his protective hood, and exposed him to the chemical. Id. ¶ 2. The employee contended that the employer had willfully or intentionally caused his injury by ordering him to repair the pump because, among other things, the employee's safety hood had failed on other occasions, he had suggested to his employer that the repair should have been done with the assistance of a self-contained breathing apparatus ("SCBA"), his employer knew the SCBA was safer than a safety hood, and his employer knew that TDI was a dangerous chemical. Id. ¶¶ 3, 22. In support of its motion for summary judgment, the employer established that the employee was not inexperienced because he had

performed the same job with the same equipment six to twelve times previously, that the employee had never been told not to use standard safety procedures, that the employee did not remember whether he followed standard safety procedures, and that there was no pressure from the employer to get the job done quickly. Id. ¶ 20.

In affirming summary judgment, id. ¶¶ 3 and 31, the Court noted that the employee had performed the same task numerous times before and had previously encountered problems with his safety hood with no injury, id. ¶ 23, that the mere fact that TDI is a dangerous chemical did not render the employer's actions willful, id., that the availability of other, better safety equipment did not equate with showing that a reasonable person would have anticipated that the performance of a routine job using routine equipment would cause injury, id., and that there was no evidence that the employer had failed to consider the consequences of the employee working on the pump or had disregarded known risks; instead, the evidence demonstrated that the employer made rational decisions based upon a number of safety factors, id., and that the events surrounding the employee's injury did "not approach the type of incidents that Delgado sought to prevent. *The acts or omissions that [the employee alleged] did not cause the injurious event in the way that the acts of the employer in Delgado caused Delgado to be set on fire.*" Id. ¶ 24 (emphasis added).

c. *Cordova v. Peavey Co.*

In Cordova v. Peavey Co., 111 Fed.Appx. 992 (10th Cir. 2004) (unpublished opinion) ("Cordova II"), the Tenth Circuit Court of Appeals addressed a Delgado claim where an employee was injured due to missing safety devices and a complete lack of training. There, the employer hired the employee through a temporary staffing company. Cordova v. Peavey, 273 F.Supp.2d 1213, 1215 (D.N.M. 2003) ("Cordova I") The staffing company repeatedly reminded the employer of the temporary staffing contract's requirement that employees' labors be limited to "sweeping and shoveling" and its specific prohibitions of requiring employees to "work on or around machines, at heights, or at any task" not specifically permitted. Cordova II at 993. Nevertheless, the employer instructed the employee to service a grain truck and to then help load the grain. Id. When another temporary employee finished lubricating a grain-loading auger, he walked to an area between the auger and the truck. Id. The plaintiff employee noticed some debris in the auger and, as he reached in to clear it, the other temporary employee engaged the auger causing the plaintiff employee's arm to be crushed and ultimately amputated. Cordova I at 1215-16. At the time of the accident, there was no guard on the auger, there were no lock-out/tag-out procedures to prevent the auger from being engaged, and neither temporary employee had received (and the employer did not offer) any training with regard to the operation or maintenance of the auger. Id. at 1216.

After the plaintiff was injured, the employer admitted that it had not been aware of any regulations with regard to employee training or any industry standards related to grain augers. Id. Relying in part upon Morales, the Tenth Circuit Court of Appeals affirmed summary judgment and specifically noted that that the acts and omissions that the plaintiff complained of, such as failure to install safety devices, failure to insist on certain safety practices, failure to train, and failure to supervise, did not rise to the level of the employer's actions in Delgado and were much more similar to the conduct discussed in Morales. Id.

d. Dominguez v. Perovich Properties, Inc.

This Court's decision in Dominguez v. Perovich Properties, Inc., 2005-NMCA-050, 137 N.M. 401, 111 P.3d 721, held that an employer's intentional disregard of safety requirements that were in place to prevent injury and death in connection with the performance of an employee's routine work was insufficient to give rise to Delgado liability. Id. ¶ 22. In that case the employee worked at a gravel processing facility operating a front-end loader to feed raw gravel and rock into screening equipment for processing. Id. ¶ 2. On the day of his injury, the employee performed regular and routine maintenance on the equipment by clearing rocks that were jammed in one of the screens. Id. ¶¶ 3-4. When the employee motioned to his employer while clearing the jammed rocks, the employer, mistakenly perceiving the motions as a signal to restart the equipment, turned the

equipment on and caused the employee to be pulled into the equipment and crushed. Id. ¶ 4. The employee brought suit under Delgado contending that the employer's failure to provide mandatory safety devices and failure to comply with applicable regulations demonstrated that the employer's conduct was willful or intentional. Id. ¶ 5. Specifically, the employer did not provide mandatory and available lock-out devices that would have prevented the equipment from operating while the employee was performing maintenance. Id. The employer had also avoided regulatory safety inspections by affirmatively operating without a permit, had refused to hold legally-required safety meetings, and had refused to permit the employee to obtain safety certifications. Id. Additionally, the employee relied upon the United States Mine Safety and Health Administration's post-accident conclusion that under those circumstances "injury to an employee was reasonably likely to happen in a given time." Id. ¶ 9.

The New Mexico Court of Appeals affirmed the trial court's grant of summary judgment. Id. ¶ 25. After acknowledging that requiring an employee to perform a familiar and routine task that he had performed before was "hardly the equivalent of sending Plaintiff into certain injury" as in Delgado, the Court went on to note that the employer's failure to utilize appropriate safety measures did not demonstrate an inherent probability of injury nor did it demonstrate a modicum of intent on the employer's part to put the employee in harm's way. Id. ¶ 21. The

Court rejected, for the purposes of Delgado, the argument that in the absence of lock-out safety devices, it was foreseeable that a co-employee could negligently start the equipment and cause injury. Id. Even the employer's intentional failure to provide mandatory safety devices did not rise to the level of egregious conduct necessary to sustain a Delgado action. Id. Instead, although finding the employer's disregard for safety requirements appalling, the Court found that the employer's conduct did not establish that the employer had "specifically and willfully caused the employee to enter harm's way [and face] virtually certain serious injury or death...." Id. ¶ 22. Ultimately, the Court concluded that the possibility that an accident might occur related to the employer's failure to implement necessary safety precautions did not meet the Delgado standard. Id.

e. DCP's Conduct is More Akin to the Employers' Conduct in Post-Delgado Decisions and Does Not Give Rise to Delgado liability.

The trial court's grant of summary judgment should be affirmed consistent with the holdings of Chairez, Morales, Cordova, and Dominguez. DCP did not force Plaintiff into an obvious perilous situation in the same way that the Delgado employer compelled its employee toward certain injury. Like Morales, it is undisputed that retrieving pigs from the Receiver was a regular and routine weekly task that Plaintiff had performed at least ten (10) times earlier without incident. Unlike Delgado, where the employee had never received any training to perform a

uniquely dangerous operation, Plaintiff had received training from a more experienced employee and, despite having trouble remembering his training the first time he retrieved a pig, had no trouble recalling his training nine (9) times thereafter. Unlike Delgado, Plaintiff never asked DCP for assistance or stated that he was unable to retrieve a pig; in fact, Plaintiff regularly retrieved pigs from the Receiver and declined an unsolicited offer of help in retrieving the pig involved in his accident. Distinct from both Delgado and Dominguez, DCP did not affirmatively elect to avoid implementing mandated safety equipment or affirmatively choose not to train its employees. In this case, the Receiver was equipped with safety devices, was capable of being and had been safely operated for over one (1) year without incident, and DCP's employees had been offered and had received training. Unlike Delgado and Dominguez, where the employers were alerted of the hazards that ultimately caused their employees' injuries, DCP was never alerted by anyone, including Plaintiff, that the Receiver presented a hazard. DCP's conduct in this case is most akin to the negligent conduct reflected in Morales and does not rise to the level of the appalling, but non-actionable, conduct in Dominguez. Put simply, the facts of this case do not meet the extraordinarily high burden necessary to sustain a Delgado action. The trial court's grant of summary judgment should be affirmed.

B. ALTERNATIVELY, SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE THE SOLE REMEDY FOR PLAINTIFF'S SAFETY DEVICE CLAIM IS FOUND UNDER THE WORKERS' COMPENSATION ACT.

Reduced to its essence and at its best, the only relief that Plaintiff may be entitled to in addition to the benefits he has already received and is presently receiving is a 10% increase in benefits pursuant to the Act's safety device penalty provision based upon his allegation that Defendant failed to ideally locate the Receiver's blow down valve safety device. The Act is the exclusive remedy for employees whose accidental injuries arise from and in the course of their employment. NMSA 1978, § 52-1-9(B)-(C) (1973). In relevant part, the Act provides that where "an injury to...a worker results from the negligence of the employer in failing to supply reasonable safety devices in general use for the use or protection of the worker, then the compensation otherwise payable under the Workers' Compensation Act shall be increased ten percent." NMSA 1978, § 52-1-10(B) (1989). This section was passed to compel employers to supply reasonable safety devices in general use for protection of employees where safety devices are not specified by law. Apodaca v. Allison & Haney, 57 N.M. 315, 320, 258 P.2d 711, 714 (1953). Only by observing their duty to supply reasonable safety devices may employers avoid liability under it for compensable injuries to their employees. Id. Unlike Delgado, where the employer sent its employee to his certain injury over his repeated protests that he was incapable of performing a perilous task, in

this case the evidence suggests, at most, that Defendant failed to provide an ideally located blow down valve on a modified Receiver that might have reduced the chance of Plaintiff being injured at his routine task. If Plaintiff is entitled to any monies in addition to the benefits he presently receives, his exclusive additional remedy is a 10% increase in Workers' Compensation Act benefits and not compensation under Delgado.

II. THE TRIAL COURT'S AWARD OF $2,800.36 IN COSTS SHOULD BE AFFIRMED BECAUSE PLAINTIFF'S OWN EVIDENCE DEMONSTRATED THAT HE IS ABLE TO PAY THOSE COSTS.

Defendant, as the prevailing party, is entitled to recover $2,800.36 in deposition costs from Plaintiff's excess annual household income of $6,990.72. Under New Mexico law, prevailing parties are presumptively entitled to recover the costs of depositions used in successful support of a motion for summary judgment. Rule 1-054(D)(2)(e) NMRA; NMSA 1978, § 39-2-7 (1882); NMSA 1978, § 39-3-30 (1966); Key v. Chrysler Motors Co., 2000-NMSC-010, ¶ 7, 128 N.M. 739, 998 P.2d 575; Apodaca v. AAA Gas Co., 2003-NMCA-085, ¶ 103, 134 N.M. 77, 73 P.3d 215; Gallegos v. Sw. Cmty. Health Srvcs., 117 N.M. 481, 489, 872 P.2d 899, 907 (Ct. App. 1994). Unsuccessful litigants bear the burden of proving that circumstances justify the denial or reduction of costs. Key, 2000-NMSC-010, ¶ 6; Marchman v. NCNB Texas Nat'l Bank, 120 N.M. 74, 94, 898 P.2d 709, 729 (1995); Sw. Cmty. Health Srvcs., 117 N.M. at 490, 872 P.2d at 908;

see also Murphy v. Strata Production Co., 2005-NMCA-008, ¶ 9, 138 N.M. 809, 126 P.3d 1173 (argument of counsel is not evidence). New Mexico's trial courts are vested with discretion to assess costs and their rulings will not be disturbed on appeal absent an abuse of discretion. Key, 2000-NMSC-010, ¶ 7; Dunleavy v. Miller, 116 N.M. 353, 362-63, 862 P.2d 1212, 1221-22 (1993); Pioneer Sav. & Trust, F.A. v. Rue, 109 N.M. 228, 231, 784 P.2d 415, 418 (1989). Under New Mexico law, trial courts properly exercise their discretion in awarding costs when their awards are consistent with logic and reason, capable of defense, and consistent with the effect of facts and circumstances before them. See Martinez v. Martinez, 1997-NMCA-096, ¶ 20, 123 N.M. 816, 945 P.2d 1034.

The trial court appropriately exercised its discretion in awarding $2,800.36 in costs to Defendant as the prevailing party in this matter. Plaintiff unsuccessfully sued Defendants for money damages in excess of the exclusive remedies provided by the Workers' Compensation Act. [RP 1102] Defendants, as prevailing parties who incurred $2,800.36 in recoverable deposition costs to obtain summary judgment, applied for those costs as permitted by law. [RP 1104-15] Plaintiff submitted evidence that his excess annual household income was more than double the recoverable deposition costs incurred by Defendants in defending the case. [RP 1120-21; see also RP 1131 (summarizing Plaintiff's income and expenses)] Plaintiff did not introduce any evidence regarding his alleged curtailed earning

capacity or Defendant's alleged gross revenue and relied solely upon unsubstantiated non-evidentiary arguments of counsel. [RP 1120-21; CB Tr. 4.12-5.20] The trial court's award of costs was logical, reasonable, defensible, and consistent with the facts and circumstances of the case. The trial court's award of costs should be affirmed.

CONCLUSION

Summary judgment in this case is appropriate because DCP's conduct in this case does not exemplify the egregious conduct demonstrated in Delgado. Plaintiff's injuries are the result of an accident. Reduced to its essence, Plaintiff was injured while engaged in a regular and routine activity that had been performed for a year without incident and that he had successfully completed ten (10) times prior. No one knew or suspected that the Receiver was capable of ejecting a pig under pressure – in fact Plaintiff testified that the only problem he was aware of with the Receiver was that pigs would sometimes become stuck in the Receiver because of a lack of pressure. No credible argument exists that DCP's conduct caused Plaintiff's injury in the same way that the Delgado employer's conduct of putting its untrained employee beneath an overflowing cauldron of molten rock caused its employee's death. Post-Delgado decisions make clear that Delgado reflects a very, very narrow exception to the exclusive remedies provided in the Workers' Compensation Act and the burden of sustaining

a Delgado action is extraordinarily high. Plaintiff has not and cannot meet that burden. To the extent that Plaintiff is entitled to any additional remedy, however, it may be found within the exclusive remedies provided in the Workers' Compensation Act's safety device enhancement provisions. For whatever reason, Plaintiff elected not to pursue that avenue and instead pursued this unavailing suit. As a result, DCP incurred $2,800.36 in recoverable costs that, based upon Plaintiff's sworn affidavit, he is able to pay from his excess household income. The trial court's grant of summary judgment was appropriate as was its award of costs in this matter and both should be affirmed.

WHEREFORE, Defendants respectfully request that the Court affirm the trial court's grant of summary judgment and its award of costs.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2009, I caused a true and correct copy of the foregoing Answer Brief to be mailed to the following counsel of record:

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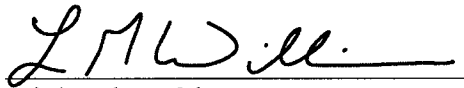
By: 

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