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INTRODUCTION

The acknowledged purposes of any "survey" article are to set forth a concise and objective compilation of the recent changes and developments in the field and to suggest specific approaches towards, or constructions of, existing law. With this goal in mind, the author would note that the last survey of New Mexico's Workers' Compensation Law was published in 1984. Numerous and significant decisions have since been handed down by our appellate courts. Compounding the dilemma of a survey author is the New Mexico Legislature's passage of not one, but two Workers' Compensation Acts.[1] These Acts effected sweeping procedural and substantive changes in a body of law that had not received any significant or pervasive legislative attention since 1959.[2]

Although each of the recent Acts has potential application to cases pending at the time of publication,[3] few if any claims prosecuted under these recent revisions has matured to a stage of precedential value. As a practical matter, all of the workers' compensation appellate decisions discussed herein originated within the jurisdiction of the state courts and are subject to the 1978 Act[4] and the judicial constructions of that Act. For these reasons, this survey is devoted primarily to significant changes created by judicial decision of the last few years.[5]

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1. 1986 N.M. Laws 525, Ch. 22 §§1-106 (compiled at N.M. STAT. ANN. §§52-1-1 to -69 (Cum. Supp. 1986)); 1987 N.M. Laws 1261, Ch. 235 §§1-54 (compiled at N.M. STAT ANN. §§52-1-1 to -70 (Repl. Pamphlet 1987)).

The most significant procedural change in the new Acts is that they remove jurisdiction over compensation claims from the state district courts and confer it upon a newly created Workers' Compensation Administration. N.M. CONST. art. III, §1. The Administration has exclusive jurisdiction over all claims filed on or after December 1, 1986. 1986 N.M. Laws 525, 629. The district courts ostensibly retain continuing jurisdiction over matters originally filed before them for the purpose of enforcing stipulations and judgments, approving settlements, and entertaining motions to reduce, increase, or terminate benefits previously awarded by court order or approval. *See* N.M. STAT. ANN. §§52-1-33 and -56 (1978 & Supp. 1986).

2. *See* 1959 N.M. Laws 196 (effective date July 1, 1959).

3. 1986 N.M. Laws 525, 629 (effective dates contained in §103 are July 1, 1986 and December 1, 1986); 1987 N.M. Laws 1261 (no effective date provision, therefore 90 days after date of adjournment or June 19, 1987).

4. N.M. STAT. ANN. §§52-1-1 to -69 (1978 & Supp. 1986).

5. The practitioner is encouraged to refer to the New Mexico Digest for 1984 and 1985 appellate decisions, and to a variety of resource materials that elaborate upon and suggest the likely import of the new Acts. *E.g.*, Allen, Ben M., Effect of Substantive Changes in New Mexico's Workmen's Compensation Law Upon Strategy Decisions by Practitioners (outline of topic presented at New Mexico State Bar Convention, Ruidoso, New Mexico, 1986); New Mexico Trial Lawyers' Association, Workers' Compensation (compilation of materials presented May 2, 1986). Rules and regulations governing cases filed before the Workers' Compensation Administration, together with mandatory pleadings forms, are available through the main Administration offices in Albuquerque.

A. *Exclusivity of Provisions of Act*

In most states where an injured worker's claim against his employer is governed by a legislative enactment, the workers' compensation statute includes a provision that the worker's statutory remedy against the employer is exclusive.[6] These "exclusivity provisions" operate to bar a worker covered by the statute from asserting any other type of claim against the employer, including those otherwise available at common law.[7]

In *Williams v. Amax Chemical Corp.*,[8] the New Mexico Supreme Court reiterated the generally accepted rule that the statutory provisions of the Act are *sui generis* and create exclusive rights, remedies and procedures which do not exist under the common law.[9] The Act therefore precludes a tort claim that a plaintiff brought in state court alleging that she was discharged in retaliation for filing a workmen's compensation claim.[10]

Similarly, in *Fields v. D&R Tank & Equipment Co.*,[11] the "exclusivity" rule was interpreted to preclude a worker's tort action for negligent medical treatment where such services were furnished by the employer. With its decisions in *Williams* and *Fields* the court reaffirmed its prior constructions of the exclusivity provisions by continuing to bar actions outside the Act for bad faith refusal to pay benefits or for retaliatory discharge.[12] The preclusion of a worker's tort claim against his employer, where the Act applies, has never really been seriously questioned.[13]

B. *Compensable Injuries*

An employee's injury or death is compensable under the Act if it is proximately caused by an accident arising out of and in the course of employment, unless the injury was self-inflicted.[14] "The difficulty is not in defining the test, but in applying it."[15] Several cases construing the compensability test have extended coverage under the Act to injuries with no physical manifestation, and to those which had previously been held to be independent of, or too remote from, the employment relationship to be work-related.[16]

6. *See generally*, 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, §§65.00 to 65.60 (1988). The exclusivity provisions of the 1978 Act are found at N.M. STAT. ANN. §§52-1-6(D), -8 and -9 (1978 & Supp. 1986).

7. *Id.*

8. 104 N.M. 293, 720 P.2d 1234 (1986).

9. *See* N.M. STAT. ANN. §§52-1-6(D), -8, -9 (1978 & Supp. 1986).

10. 104 N.M. at 294, 720 P.2d at 1237; *see* Lucero v. Northrip Logging Co., 101 N.M. 420, 683 P.2d 1342 (Ct. App.), *cert. denied*, 101 N.M. 419, 683 P.2d 1341 (1984) (Act is *sui generis*).

11. 103 N.M. 141, 703 P.2d 918 (Ct. App.), *cert. denied*, 103 N.M. 62, 702 P.2d 1007 (1985).

12. *See* Dickson v. Mountain States Mut. Cas. Co., 98 N.M. 479, 650 P.2d 1 (1982); Security Ins. Co. of Hartford v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975); Gonzales v. U.S.F.& G. Co., 99 N.M. 432, 659 P.2d 318 (Ct. App. 1983); Bottijliso v. Hutchison Fruit Co., 96 N.M. 789, 635 P.2d 992 (Ct. App. 1981).

13. Mountain States Tel. & Tel. Co. v. Montoya, 91 N.M. 788, 581 P.2d 1283 (1978); Roseberry v. Phillips Petroleum Co., 70 N.M. 19, 369 P.2d 403 (1962); Royal Indemn. Co. v. Southern Cal. Petroleum Corp., 67 N.M. 137, 353 P.2d 358 (1960); City of Artesia v. Carter, 94 N.M. 311, 610 P.2d 198 (Ct. App.), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980).

14. N.M. STAT. ANN. §52-1-9(C) (1978 & Supp. 1986).

15. Schober v. Mountain Bell Tel., 96 N.M. 376, 380, 630 P.2d 1231, 1235 (Ct. App. 1980).

16. *See* cases cited *infra* note 19.

In *Candelaria v. General Electric Co.*,[17] the court considered the plaintiff's allegations that he suffered anxiety attacks causing chest pain and hyperventilation as a result of a personality clash with his supervisor.[18] The plaintiff was diagnosed as having anxiety and depression disorders and paranoid ideations.[19] The court of appeals held that mental injury without physical manifestation is compensable, where the psychological injury was caused by a stress arising out of and in the course of employment, even if the stress was produced by a gradual emotional stimulus rather than a sudden, anxiety producing, on-the-job event.[20] The court distinguished between "real" and "perceived" on-the-job stress,[21] and held that because there was sufficient evidence that the workman had suffered actual stress on the job it was unnecessary to decide whether the Act would cover injuries resulting from perceived stress.[22]

The court in *Lopez v. Smith's Management Corp.*,[23] cited *Candelaria* as dispositive in holding that a work-related or exacerbated condition of schizophrenia, without attendant physical injury, was compensable.[24] The plaintiff was required to show only that the employment was a cause of his problems, since the Act "does not require the exclusion of all other possible factors."[25] Judge Bivins dissented on the issue of causation, noting the somewhat uncertain testimony of plaintiff's treating physician in support of his opinion that plaintiff failed, as a matter of law, to show that his mental injury was more likely than not related to his employment.[26]

In *Schell v. Buell ECD Co.*,[27] the court held that suicide by a workman was compensable if it resulted from a work-connected injury.[28] Language in the Act

17. 105 N.M. 167, 730 P.2d 470 (Ct. App.), *cert. quashed*, 105 N.M. 111, 729 P.2d 1365 (1986).

18. *Id.* at 169-70, 730 P.2d at 472-73.

19. *Id.* at 170, 730 P.2d at 473.

20. 105 N.M. at 172, 730 P.2d at 475. *Candelaria* reflects a rather predictable extension of prior decisions grappling with the compensability of psychological injuries. *See* Webb v. Hamilton, 78 N.M. 647, 436 P.2d 507 (1968); Ross v. Sayers Well Servicing Co., 76 N.M. 321, 414 P.2d 679 (1966); Schober v. Mountain Bell Tel., 96 N.M. 376, 630 P.2d 1231 (Ct. App. 1980).

21. "Actual stress is that stress traceable to real working conditions; imagined stress exists when a worker honestly perceives that some event, or events, occurred during the course of his employment to cause injury when, in fact, no such event or events occurred." 105 N.M. at 175, 730 P.2d at 478.

22. *Id.* at 174-75, 730 P.2d at 477-78. The court also discussed the denial of post-judgment relief to the defendants, who sought to reduce benefits after discovering that the plaintiff had returned to work. *Id.* at 175-76, 730 P.2d at 478-79. The denial of defendants' request for a reduction was based on evidence obtained in supplemental discovery that plaintiff's work was modified to accommodate his psychological disability and the testimony of his physicians that his ability to do some type of work did not affect their opinions that plaintiff remained psychologically impaired. *Id.*

23. 106 N.M. 416, 744 P.2d 544 (Ct. App. 1986), *cert. quashed*, 106 N.M. 405, 744 P.2d 180 (1987).

24. *Id.* at 417, 744 P.2d at 545.

25. *Id.* at 418, 744 P.2d at 546.

26. *Id.* at 419-20, 744 P.2d at 547-48. In a case decided under the companion statute, the Occupational Disease and Disablement Act, the court of appeals in Chadwick v. Public Serv. Co., 105 N.M. 272, 731 P.2d 968 (Ct. App. 1986), *cert. denied*, 105 N.M. 290, 731 P.2d 1334 (1987), upheld the denial of benefits to a plaintiff who, while working for defendant, developed a contact dermatitis which lessened after the plaintiff left his job. Because the plaintiff could show only that his allergic reaction was connected to the job site where the allergens were plentiful and airborne, the court held that he did not establish that his condition was a result of his occupation itself: "Adopting the argument that conditions of a particular workplace unrelated to the claimant's occupation may give rise to a compensable occupational disease would in effect transform the law's protection into health insurance." *Id.* at 274, 731 P.2d at 970.

27. 102 N.M. 44, 690 P.2d 1038 (Ct. App. 1983), *cert. quashed*, 103 N.M. 798, 715 P.2d 71 (1984).

28. *Id.* at 49, 690 P.2d at 1043.

precluding recovery for self-inflicted or intentional injuries[29] did not apply where the intentional act was a direct result of or flowed from an accidental, work-related injury.[30] Subsequently, the court of appeals held in *Shadbolt v. Schneider, Inc.*,[31] that work-related stress with physical manifestations was compensable. The plaintiff's preexisting hypertension did not affect his right to recovery.[32]

The court has, however, imposed some limitations on compensable injuries, especially with regard to the award of compensation for purely "psychic" injuries. In *Kern v. Ideal Basic Indus.*,[33] the New Mexico Court of Appeals held that plaintiff's mental breakdown sustained as a result of his termination from employment was not a risk incidental to or encountered in the course and scope of plaintiff's job and, as such, was not compensable.

C. Discovery Matters

Although the Act contemplates that the employer bears the expense of all discovery conducted by the claimant, the employer is protected from excessive or unnecessary discovery expenses by a provision requiring the trial judge to predetermine that "good cause" exists for any discovery sought by either party.[34] In *Soliz v. Bright Star Enters.*,[35] the court established that the "good cause" showing is a mandatory prerequisite to the plaintiff's recovery of discovery costs from the defendant;[36] "[e]xcept as authorized by statute, no allowance for expenses of a deposition may be made in workmen's compensation cases."[37] In a similar vein, *Smith v. City of Albuquerque*[38] held that the court will award costs for the appearance of a witness at trial only if authorized under section 52-1-35(B) of the Act.[39]

The court expanded its holding in *Soliz* in *Chadwick v. Public Serv. Co.*[40] Although the trial court had entered a general discovery order, the plaintiff had not previously established good cause specifically for the deposition of his own treating physician.[41] The trial court decided the case in favor of the defendant and awarded the defendant the cost of plaintiff's physician's deposition for which the defendant had paid.[42] The court of appeals affirmed the award of costs to the prevailing defendant.[43] Absent the prerequisite good cause showing, the court declined to effect a presumptive shift of the costs of litigation from employee to employer.[44]

29. N.M. STAT. ANN. §52-1-11 (1978).
30. 102 N.M. at 49, 690 P.2d at 1043.
31. 103 N.M. 544, 710 P.2d 738 (Ct. App.), *rev'd in part*, 103 N.M. 467, 709 P.2d 189 (1985).
32. *Id.* at 547, 710 P.2d at 741.
33. 101 N.M. 801, 689 P.2d 1272 (Ct. App.), *cert. denied*, 102 N.M. 7, 690 P.2d 450 (1984).
34. N.M. STAT. ANN. §52-1-34 (1978 & Supp. 1986).
35. 104 N.M. 202, 718 P.2d 1350 (Ct. App.), *cert. denied*, 104 N.M. 191, 718 P.2d 701 (1986).
36. *Id.* at 203, 718 P.2d at 1351.
37. *Id.* at 204, 718 P.2d at 1352.
38. 105 N.M. 125, 729 P.2d 1379 (Ct. App. 1986).
39. *Id.* at 128, 729 P.2d at 1382.
40. 105 N.M. 272, 731 P.2d 968 (Ct. App. 1986), *cert. denied*, 105 N.M. 290, 731 P.2d 1334 (1987).
41. *Id.* at 276, 731 P.2d at 972.
42. *Id.*
43. *Id.*
44. *Id.*

Sanchez v. National Elec. Supply Co.[45] concerned the extent of the employer's duty to provide a worker's attorney, prior to trial, with particular documents generated in the course of discovery. The plaintiff complained on appeal of defense counsel's failure to provide plaintiff's counsel with a copy of a report generated by a physician who conducted an independent medical examination of the plaintiff on the defendant's behalf.[46] The existence of the report was revealed at trial during the examination of another physician.[47] Defendants indicated to the court that they had not provided the report to plaintiff's counsel because defendants did not intend to call the independent medical doctor at trial.[48] In affirming the trial court's denial of benefits,[49] the court of appeals noted several factors.[50] First, plaintiff had never requested a copy of the report.[51] Second, the defense did not offer the report at trial and, therefore, it could not be considered "surprise evidence."[52] Finally, plaintiff had ample opportunity, through discovery, to ascertain the nature and results of the examination prior to trial.[53] The court thus determined there was no harmful error in the trial judge's refusal to grant a continuance to plaintiff, who had claimed prejudice in not having the report prior to trial.[54]

D. Dependents

The court in *Employers Nat'l Ins. Co. v. Winters*[55] observed that the surviving spouse and children of the employee are coequal dependents.[56] In *Garrison v. Safeway Stores,*[57] the court clarified the intent of section 52-1-17(A), which provides that some children of a decedent workman are presumed to have been financially dependent upon him, while others must establish actual dependency.[58] Although it acknowledged that requiring a worker's survivor to demonstrate actual dependency would be consistent with the Act's intended purposes,[59] the court nevertheless concluded that the legislature intended full-time college students under the age of twenty-three to be "deemed" dependent upon the decedent worker. The worker's daughter, a full-time college student under twenty-three, did not have to establish actual dependency to recover a portion of the death benefits.[60]

45. 105 N.M. 97, 728 P.2d 1366 (Ct. App. 1986).
46. *Id.* at 98, 728 P.2d at 1367.
47. *Id.*
48. *Id.*
49. *Id.* at 100, 728 P.2d at 1369.
50. *Id.* at 99, 728 P.2d at 1368.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 100, 728 P.2d at 1369.
55. 101 N.M. 315, 681 P.2d 741 (Ct. App. 1984).
56. *Id.* at 319-20, 681 P.2d at 745-46.
57. 102 N.M. 179, 692 P.2d 1328 (Ct. App.), *cert denied,* 102 N.M. 225, 693 P.2d 591 (1984).
58. *Id.* at 180-81, 692 P.2d at 1329-30.
59. *Id.* at 181; 692 P.2d at 1330. Those purposes are "to help protect the recipient of the payments against want and to avoid his becoming a public charge, [citation omitted] and to keep an injured workman and his family minimally secure financially [citation omitted]." *Id.*
60. *Id.*

E. Computation of Average Weekly Wage

Despite the inclusion in the Act of a rather detailed and specific provision setting forth the method for calculating a particular worker's average weekly wage for the purpose of paying compensation benefits,[61] the courts again had occasion during the survey period to interpret that provision in resolving disputes over how, and at what point in time, the calculation should be made. The *Varos v. Union Oil Co.*[62] court reiterated the rule that the date of the injury producing the disability is the proper basis for the calculation of plaintiff's compensation rate, not the date that the worker's benefits were wrongfully terminated.

Duran v. Albuquerque Public Schools[63] concerned how the court should calculate the average weekly wage of an educational aide whose seasonal employment with the school district was for forty weeks per year. On appeal, the aide contended that the trial court erred by dividing her annual salary by a fifty-two-week period, rather than the shorter term actually worked by the claimant.[64] The court of appeals affirmed the method that the trial court utilized to determine the aide's average weekly wage, noting that the alternative method urged by the claimant would be "fundamentally unfair" to the employer because it would result in a weekly compensation rate greater than the claimant's weekly salary prior to becoming disabled.[65]

Finally, *Romero v. General Elec. Corp.*[66] held that the appropriate compensation rate would be that which was in effect on the date when the worker knew or should have known of his disability, not the rate in effect at the time of his initial injury. The appellate court based its holding primarily on the trial court's finding that the worker had returned to his employment approximately eight months after his initial injury and worked for about two years before he was aware that his injury, or the aggravation thereof, was disabling.[67]

F. Credit for Overpayments

Carter v. Mountain Bell[68] appears mainly to have been an effort to encourage voluntary payment of benefits by employers and to discourage double recovery by the worker under certain circumstances. The *Carter* court held that the worker's compensation insurance carrier was entitled to an offset or credit to the extent that the employer paid benefits as a result of the employee's accidental injury when those benefits were "of the same general character"[69] as the worker's compensation benefits.[70] The carefully worded decision in *Carter* turned largely upon a finding that the benefits received by the plaintiff under both the company

61. N.M. STAT. ANN. §52-1-20(A)-(D) (1978 & Supp. 1986).
62. 101 N.M. 713, 688 P.2d 31 (Ct. App. 1984).
63. 105 N.M. 297, 731 P.2d 1341 (Ct. App. 1986), *cert. denied*, 105 N.M. 290, 731 P.2d 1334 (1987).
64. *Id.* at 298-99, 731 P.2d at 1342-43.
65. *Id.* at 300, 731 P.2d at 1344.
66. 104 N.M. 652, 725 P.2d 1220 (Ct. App.), *cert. quashed*, 104 N.M. 632, 725 P.2d 832 (1986).
67. *Id.* at 658-59, 725 P.2d at 1226-27. *See also* Amos v. Gilbert Western Corp., 103 N.M. 631, 711 P.2d 908 (Ct. App. 1985).
68. 105 N.M. 17, 727 P.2d 956 (Ct. App. 1986).
69. *Id.* at 21, 727 P.2d at 960.
70. *Id.*

accident and health plan and the Act were intended to compensate her for the same, single injury.[71] Noting that principles of fundamental fairness should guide its decision where the Act was silent, the court cited the incentive to the employer to institute benefits more quickly with the promise of a credit.[72] "[T]he abhorrence of the notion that a worker should get more money for being disabled than for working" also seems to have influenced the *Carter* court.[73] Employers with private insurance plans, or who are self-insured, can be expected, after *Carter*, to insist that a worker injured on the job may not collect both private and statutory benefits without some credit or offset.

G. Statute of Limitations

In *Romero v. General Elec. Corp.*,[74] the court held that the statute of limitations that applies to the Act does not begin to run until his disability is apparent to the worker.[75] The *Romero* court noted that there was substantial evidence that, because the plaintiff had returned to work and could fully perform his duties, he was unaware of his disability, even though he visited the doctor during that period.[76] The court reaffirmed the "reasonably apparent" rule which governs when a plaintiff knows or should have known of his disabling injury.[77] Under that rule, a workman who can only return to work with pain, or whose physician limits his activities, or whose job duties must be modified or restricted, will probably be charged with knowledge of his disability.[78] If the disability has been apparent for a period longer than that allowed for the filing of a claim, the worker's claim will be subject to the tolling provisions of the Act.[79]

Similarly, in *Zengerle v. City of Socorro*,[80] the plaintiff had a slow, progressive ulcer condition about which she was aware for several years before filing her compensation action.[81] The court determined, however, that the plaintiff never suffered any partial disability, and only ceased work when it became impossible to continue in her position.[82] Thus, the court held that the statute of limitations did not begin to run until plaintiff became totally disabled.[83]

H. Causation

Under the *Niederstadt*[84] rule, a doctor's testimony is insufficient to show causation as required under section 52-1-28 of the Act where a physician lacks

71. *Id.* at 21-22, 727 P.2d at 960-61.
72. *Id.* at 23, 727 P.2d at 962.
73. *Id.*
74. 104 N.M. 652, 725 P.2d 1220 (Ct. App.), *cert. quashed*, 104 N.M. 632, 725 P.2d 832 (1986).
75. *Id.* at 658-59, 725 P.2d at 1226-27.
76. *Id.* at 658, 725 P.2d at 1226.
77. *Id.* at 656, 657, 725 P.2d at 1224, 1225.
78. *Id.* at 657-58, 725 P.2d 1225-26.
79. *Id.* and cases cited therein.
80. 105 N.M. 797, 737 P.2d 1174 (Ct. App. 1986), *cert. quashed*, 105 N.M. 781, 737 P.2d 893 (1987).
81. *Id.* at 799, 737 P.2d at 1176.
82. *Id.*
83. *Id.* at 802, 737 P.2d at 1179.
84. Niederstadt v. Ancho Rico Consol. Mines, 88 N.M. 48, 536 P.2d 1104 (Ct. App.), *cert. denied*, 88 N.M. 29, 536 P.2d 1085 (1975).

knowledge of pertinent information regarding the patient's injuries.[85] In *Mendez v. Southwest Community Health Servs.*,[86] the court limited the rule by holding that it applies only when "there is uncontradicted testimony of a medical expert that the information on prior injuries is pertinent."[87]

In *Graham v. Presbyterian Hosp. Center*,[88] the court of appeals held that the "uncontroverted medical testimony" rule[89] would not apply to a determination of a worker's entitlement to payment of her past medical expenses.[90] The plaintiff sought payment by the employer for diagnostic tests her doctors had undertaken based on her representations of pain.[91] Even though the employer offered no contradictory medical testimony, the trial court found that the tests were not reasonable or necessary because the plaintiff had been dishonest with her physicians.[92] The appellate court acknowledged the plaintiff's substantive right to payment of reasonable and necessary medical expenses once she demonstrated a compensable injury.[93] Nevertheless, the court affirmed the denial of recovery by the plaintiff, noting that substantial evidence supported the conclusion that she had not been candid with her doctors.[94]

In *Clavery v. Zia Co.*,[95] the court held that it is improper to consider post-injury, non-work-related conditions—here, breast cancer in the plaintiff[96]—in determining the extent of disability,[97] even though the cancer admittedly was part of the plaintiff's general physical capacity.[98] A plaintiff must establish the causal connection between the disability and the work-related injury and should recover only to the extent that the work-related injury disables her from performing her duties.[99]

85. *Id.* at 51, 536 P.2d at 1107.

86. 104 N.M. 608, 725 P.2d 584 (Ct. App.), *cert. quashed*, 104 N.M. 632, 725 P.2d 832 (1986).

87. 104 N.M. at 612, 725 P.2d at 588.

88. 104 N.M. 490, 723 P.2d 259 (Ct. App. 1986).

89. As set out in Hernandez v. Mead Foods, Inc., 104 N.M. 67, 716 P.2d 645 (Ct. App. 1986), the rule is "an exception to the general rule that a trial court can accept or reject expert opinion as it sees fit." *Id.* at 70, 716 P.2d at 648 (citation omitted). The exception, which only applies to expert medical testimony on the issue of a causal connection between an accident and a disability, makes uncontradicted medical testimony binding upon the trier of fact. *Id.* at 70-71, 716 P.2d at 648-49.

90. 104 N.M. at 492, 723 P.2d at 261.

91. *Id.*

92. *Id.*

93. *Id.* at 491, 723 P.2d at 260.

94. *Id.* at 492, 723 P.2d at 261.

95. 104 N.M. 321, 720 P.2d 1262 (Ct. App. 1986).

96. *Id.* at 322-23, 720 P.2d at 1263-64.

97. *Id.*

98. *Id.*

99. *Id.* Where a preexisting disease or condition exacerbates or creates a disability where the work-related injury itself would not otherwise have been disabling, the injury is nevertheless compensable. Sanchez v. Homestake Mining Co., 102 N.M. 473, 697 P.2d 156 (Ct. App. 1985). On the other hand, the court of appeals has declined to consider general health and other problems unrelated to a worker's industrial injury in determining his extent of disability, even though the combination of these factors rendered him unemployable as a practical matter. Dodrill v. Albuquerque Utils. Corp., 103 N.M. 737, 713 P.2d 7 (Ct. App. 1985). *Dodrill*, however, turned primarily on the fact that the worker was still employed, such that his claim for total disability was premature. 103 N.M. at 738, 713 P.2d at 8. This leaves open the possibility that the theory for total disability urged by the plaintiff in *Dodrill*, commonly referred to as the "odd-lot doctrine," might be adopted and applied by a New Mexico court under the appropriate circumstances.

In *Grudzina v. New Mexico Youth Diagnostic & Dev. Center*,[100] the plaintiff blamed his seizure disorder on his work, but continued to represent to a third party[101] that he was seizure-free, during the same period for which he was seeking benefits.[102] The court held that the "uncontroverted medical testimony rule,"[103] originally announced in *Ross v. Sayers Well Servicing Co., Inc.*,[104] applied only to the issue of causation, and not to the issue of disability.[105] Here, because the trial court had ruled against the plaintiff on the issue of disability, plaintiff's medical testimony to the contrary, whether or not controverted, was not dispositive.[106]

The court of appeals noted in *Archuleta v. Safeway Stores, Inc.*[107] that section 52-1-28 of the Act, which requires plaintiff to demonstrate with expert medical testimony a causal connection between his industrial accident and his resulting disability, does not require that the disability be demonstrated to a reasonable medical certainty.[108] This is consistent with the court's refusal in *Candelaria v. General Elec. Co.*[109] to impose a burden on plaintiff to exclude all possible causal factors for his illness, other than those related to his work, in order to obtain benefits.

1. Diminution or Termination of Benefits[110]

Holliday v. Talk of the Town, Inc.[111] considered an employer's obligation to pay disability benefits to a worker's beneficiary after his death. The worker died of causes unrelated to his compensable injury before the trial court had ruled on his petition for an increase in previously awarded scheduled injury benefits.[112] Relying on sections 52-1-56(A) and (B),[113] the court concluded that the worker's beneficiary was entitled to pursue a claim for disability benefits to which the worker may have been entitled up to the time of his death.[114]

100. 104 N.M. 576, 725 P.2d 255 (Ct. App.), *cert. quashed*, 104 N.M. 460, 722 P.2d 1182 (1986).

101. The Federal Aviation Administration, to whom he was applying for recertification as a pilot.

102. 104 N.M. at 579-80, 725 P.2d at 258-59.

103. *See supra* note 89 and accompanying text. The practitioner cannot be reminded too often that a substantial evidence standard, and not the uncontroverted medical evidence rule, applies to all issues in a compensation claim, save the issue of causation. *See* Graham v. Presbyterian Hosp. Center, 104 N.M. 490, 723 P.2d 259 (Ct. App. 1986); Hernandez v. Mead Foods, Inc., 104 N.M. 67, 716 P.2d 645 (Ct. App. 1986).

104. 76 N.M. 321, 414 P.2d 679 (1966).

105. 104 N.M. at 581-83, 725 P.2d at 260-62.

106. *Id.* at 582, 725 P.2d at 261.

107. 104 N.M. 769, 727 P.2d at 77 (Ct. App. 1986).

108. *Id.* at 771, 727 P.2d at 79.

109. 105 N.M. 167, 730 P.2d 470 (Ct. App.), *cert. quashed*, 105 N.M. 111, 729 P.2d 1365 (1986).

110. Different provisions of the Act allow for a reduction or termination of benefits under a variety of circumstances. *See, e.g.*, §52-1-56(C) (permitting cessation of benefits upon recovery against or settlement with third-party tortfeasor by worker or his survivors), §52-1-51(G) (termination of benefits for refusal to submit to physical exam or desist injurious or unsanitary practices).

111. 102 N.M. 540, 697 P.2d 959 (Ct. App. 1985).

112. *Id.* at 541-42, 697 P.2d at 960-61.

113. (1978 & Supp. 1986).

114. 102 N.M. at 542, 697 P.2d at 961. The employer sought affirmance of its summary judgment on the additional grounds that a release executed by plaintiff prior to his seeking an increase in benefits barred the additional claims. The court rejected the arguments of both parties on this issue, concluding independently that the language of the release itself governed. The release unambiguously included all further claims of plaintiff resulting from his work-related injury. 102 N.M. at 542-43, 697 P.2d at 961-62.

In *Bower v. Western Fleet Maintenance,*[115] the court of appeals initially reversed the trial judge's order denying the employer's request for a diminution of benefits for a paraplegic who had returned to work.[116] On remand, the trial court determined that the plaintiff was ninety-nine percent disabled;[117] the court of appeals affirmed.[118] It appears that the court of appeals analyzed the issue as a substantial evidence question.[119] The *Bower* court's decision is significant because the court reaffirmed the very broad discretion a trial judge enjoys in weighing the evidence to determine the presence or percentage extent of a disability.[120]

In *Sandoval v. United Nuclear Corp.,*[121] the court of appeals expanded on its prior unreported opinion which had determined that suspected heroin trafficking, for which the plaintiff had been indicted, did not constitute "other work" under section 52-1-56.[122] This section requires the defendant to show that the plaintiff was capable of doing "other work" before benefits can be terminated or reduced.[123] The court also refused to diminish or terminate benefits being paid to plaintiff, a fugitive from justice, as a sanction for his refusal to appear for his deposition.[124]

J. Requirement of Expert Testimony Under Section 52-1-28

In *Medina v. Original Hamburger Stand,*[125] the court of appeals attempted to clarify the basis for its earlier opinion in *Fierro v. Stanley's Hardware,*[126] in which it had rejected testimony offered by the plaintiff's psychologist as inadequate to establish a causal connection between an accident and a disability because a psychologist's testimony was not expert medical testimony as required by section 52-1-28.[127] The *Fierro* opinion had compared statutory provisions separate from the Act to construe section 52-1-28 to require the testimony of a licensed medical doctor.[128] *Medina* elaborated and refined its interpretation of the independent statutes to distinguish between psychologists and osteopathic physicians, holding that the latter professionals met the requirements of section 52-1-28.[129]

In a subsequent decision in which it neither cited nor discussed *Medina,* the supreme court in *Madrid v. University of California*[130] embarked on a less tech-

115. 104 N.M. 731, 726 P.2d 885 (Ct. App. 1986).
116. *Id.* at 732, 726 P.2d at 886.
117. *Id.* at 735, 726 P.2d at 889.
118. *Id.* at 737, 726 P.2d at 891.
119. *Id.* at 735-37, 726 P.2d at 889-91.
120. *See, id.,* discussion and cases cited at 736-37, 726 P.2d at 890-91.
121. 105 N.M. 105, 729 P.2d 503 (Ct. App. 1986).
122. *Id.* at 106, 726 P.2d at 504.
123. *Id.*
124. *Id.* at 108-10, 729 P.2d 506-08.
125. 105 N.M. 78, 728 P.2d 488 (Ct. App. 1986).
126. 104 N.M. 401, 722 P.2d 652 (Ct. App. 1985), *rev'd on other grounds,* 104 N.M. 50, 716 P.2d 241 (1986).
127. (1978 & Supp. 1986).
128. 104 N.M. at 409-10, 722 P.2d at 660-61.
129. 105 N.M. at 80, 728 P.2d at 490.
130. 105 N.M. 715, 737 P.2d 74 (1987).

nical and far more general construction of pertinent legislation governing health care providers. Writing for the majority, Justice Walters held that there was no evidence of legislative intent in the Act or elsewhere to restrict the expert testimony required by section 52-1-28 to only those witnesses who are licensed physicians.[131] *Madrid* effectively overruled *Fierro* by approving the testimony of a psychologist offered by the worker at trial to establish a causal connection between her disability and her work-related injury.[132]

K. Subsequent Injury Fund[133]

Fierro v. Stanley's Hardware[134] began its sojourn through appellate courts as a challenge by the Fund to the trial court's determination that the Fund was liable for a portion of the worker's compensable eye injury.[135] The trial court determined the employer had actual knowledge[136] of the employee's preexisting eye condition, and that the employee's filing of a certificate of preexisting impairment, after the job injury but before an action was commenced against the Fund, was timely.[137] The court of appeals reversed on both issues, holding that the evidence did not show that the employer had actual knowledge of the plaintiff's pre-existing eye impairment and that the language of section 52-2-6 required that, to be effective, the certificate of pre-existing impairment had to be filed before the employee suffered a second injury.[138] Because the court's reversal of the trial court on these issues meant the Fund was not liable, the court did not reach the third issue the Fund raised regarding whether the limitations on liability contained in the "scheduled injury" provisions of the Act[139] covered the plaintiff's injury or allowed recovery against the Fund.[140]

In *Fierro II*,[141] the supreme court reversed the court of appeals. The court noted that the employer had sufficient actual knowledge of the pre-existing condition.[142] The court then cited language in the Act which it construed to allow an employee to file a certificate of pre-existing impairment after an injury.[143]

131. *Id.* at 718, 737 P.2d at 77.

132. *Id.*

133. The New Mexico Subsequent Injury Fund (hereinafter, "the Fund") is established, described, and defined at N.M. STAT. ANN. §§52-2-1 to -13 (1978 & Supp. 1986). Funded by mandatory insurance companies and self-insured employers covered by the Act, N.M. STAT. ANN. §52-2-4 (1978 & Supp. 1986), the Fund was established to create an incentive to employers to hire workers whose preexisting impairments might otherwise render them undesirable employees because of their ostensible increased risk of reinjury. N.M. STAT. ANN. §§52-2-2(A)-(C) (1978 & Supp. 1986). Arguably, the Fund also operates to encourage the employee's full disclosure of any preexisting injury at the time of hire. The cases decided in this survey period demonstrate the judicial interest in fostering both legislative goals.

134. 104 N.M. 401, 722 P.2d 652 (Ct. App. 1985) (*Fierro I*), *reversed and remanded*, 104 N.M. 50, 716 P.2d 241 (1986) (*Fierro II*), *after remand*, 104 N.M. 411, 722 P.2d 662 (Ct. App. 1986) (*Fierro III*).

135. 104 N.M. at 402-03, 722 P.2d at 653-54.

136. *Id.* at 403, 722 P.2d at 654.

137. *Id.*

138. *Id.*at 408, 722 P.2d at 659.

139. N.M. STAT. ANN. §§52-1-43(A)-(D).

140. 104 N.M. at 402, 722 P.2d at 653.

141. 104 N.M. 50, 716 P.2d 241 (1986).

142. *Id.* at 51, 716 P.2d at 242.

143. *Id.* at 53, 716 P.2d at 244.

Finally, the court remanded the case for a determination of the schedule of injury issues.[144]

On remand, the court of appeals devoted its opinion in *Fierro III*[145] to the questions of how section 52-1-43 would operate in an action against the Fund and with respect to a congenital defect,[146] and to a determination of whether the trial court's disability determination and apportionment of liability was proper.[147] The court cited its prior construction of the "scheduled injury" provisions of the Act in *Vaughn v. United Nuclear Corp.*[148] in support of its strongly worded holding that congenital defects were clearly covered under those provisions, and were actionable against the Fund despite an apparent conflict in the statutes.[149]

In *Smith v. Trailways, Inc.*,[150] the court held that because the employer was the party whose financial position stood to be improved by a contribution from the Fund, it had the duty of proving apportionment between itself and the Fund.[151] The court also observed that principles of "fundamental fairness" would affect the distribution of the reimbursement.[152] The lower court held that the Fund's liability to the employer was defined as the difference between the compensation payable for the second injury independent of the preexisting impairment and the compensation payable for the impairment resulting from the combined injuries.[153] The Subsequent Injury Fund would not be liable to the employer where (a) the claimant's disability was found not to be compensable at all, or (b) the second or subsequent injury was so severe that it alone could have caused the entire disability in the absence of a preexisting impairment.[154]

In *Superintendent of Ins. v. Mountain States Mutual Casualty Co.*,[155] the court of appeals precluded an award of attorneys' fees from the Fund directly to an employer's insurance carrier.[156] The trial court had made the award after entering a declaratory judgment that the Fund was liable for a portion of the compensation benefits charged to the employer.[157] In reversing the trial court, the court of

144. *Id.*

145. 104 N.M. 411, 722 P.2d 662 (Ct. App. 1986).

146. The plaintiff's preexisting impairment in this case was a congenital defect in one eye which substantially increased the visual impairment resulting from a work-related injury to the remaining eye.

147. 104 N.M. at 413, 722 P.2d at 664.

148. 98 N.M. 481, 650 P.2d 3 (Ct. App.), *cert. quashed*, Jasso v. Vaughn, 98 N.M. 478, 649 P.2d 1391 (1982). The court seized upon language in *Vaughn* articulating the broad purpose of the Fund to protect the handicapped worker's place in industry, 98 N.M. at 486-87, 650 P.2d at 8-9, finding no reason to exclude congenital defects from those protections. 104 N.M. at 413-14, 722 P.2d at 664-65.

149. *Id.* The conflicting provisions construed by the court are found at N.M. STAT. ANN. §§52-2-2(A) and -6, and 52-2-3 and -9(A).

150. 103 N.M. 741, 713 P.2d 557 (Ct. App. 1986).

151. *Id.* at 745, 713 P.2d at 561. "Once the worker has established his right to recovery, it makes little difference to him how he is paid." *Id. But see* Romero v. Cotton Butane Co., Inc., 105 N.M. 73, 78, 728 P.2d 483, 488 (Ct. App. 1986) (the *party* seeking recovery, whether the worker or the employer, bears the burden of establishing apportionment of Fund's liability). *See also* Duran v. Xerox Corp., 105 N.M. 277, 282, 731 P.2d 973, 978 (Ct. App. 1986), *cert. denied*, Jasso v. Duran, 105 N.M. 290, 731 P.2d 1334 (1987) (the Fund is a custodian or trustee of proceeds to which either the worker or the employer may be entitled).

152. 103 N.M. at 745, 713 P.2d at 561.

153. *Id.* at 746-48, 713 P.2d at 562-64.

154. *Id.*

155. 104 N.M. 605, 725 P.2d 581 (Ct. App. 1986).

156. *Id.* at 608, 725 P.2d at 584.

157. *Id.* at 606, 725 P.2d at 582.

appeals held that an insurance company is not a "claimant" under section 52-1-54(C).[158]

Thereafter, considering yet another issue concerning the Fund for the first time, the New Mexico Court of Appeals held in *Romero v. Cotton Butane Co.*[159] that a worker who sues both his employer and the Fund and then settles his action with the employer has a direct, and not simply a derivative right through the employer, to recover against the Fund.[160] This decision was initially puzzling to those who had always construed the Fund to exist for the benefit of employers who had "paid too much," but the decision should not preclude the efficient and equitable apportionment of Fund proceeds.[161]

L. Course and Scope of Employment

The Act contemplates payment of compensation to a worker only for injuries he sustains in the course and scope of his employment.[162] This limitation has been tested and defined in a number of ways in recent decisions.

For example, the court of appeals held in *Barton v. Las Cosita*[163] that an injury "arises" in the course and scope of a worker's employment if it results from a risk to which the employment subjected him.[164] Similarly, in *Smith v. City of Albuquerque*,[165] the court held that a claimant had a right to benefits for serious injuries she sustained in a fall over a carpet strip at a private restaurant where she was attending a business luncheon.[166] The court awarded benefits, noting that the plaintiff had her employer's permission to attend the lunch, was furthering her employer's interests in so doing, and was thus acting within the course and scope of her employment when injured.[167]

Effecting by far the most significant departure to date from the traditional notion that injuries occurring outside of business hours are not in the course of and scope of employment, the supreme court in *Dupper v. Liberty Mutual Ins. Co.*[168] overruled a long line of New Mexico cases[169] and adopted the "premises-line" liability rule.[170] In so doing, the court rejected prior interpretations of the

158. *Id.* at 608, 725 P.2d at 584.

159. 105 N.M. 73, 728 P.2d 483 (Ct. App. 1986).

160. *Id.* at 77-78, 728 P.2d 487-88.

161. *See* cases cited *supra* note 151, which clarify that the Fund exists for the benefit of the worker as well as for the employer.

162. N.M. STAT. ANN. §52-1-19 (1978 & Supp. 1986).

163. 102 N.M. 312, 694 P.2d 1377 (Ct. App. 1984), *cert denied*, 102 N.M. 293, 694 P.2d 1358 (1985).

164. *Id.* at 315, 694 P.2d at 1380.

165. 105 N.M. 125, 729 P.2d 1379 (Ct. App. 1986).

166. *Id.* at 130, 729 P.2d at 1384.

167. *Id.* at 129-30, 729 P.2d at 1383-84.

168. 105 N.M. 503, 734 P.2d 743 (1987).

169. *Id.* at 507, 734 P.2d at 747. *See also* Trembath v. Riggs, 100 N.M. 615, 673 P.2d 1348 (Ct. App. 1983), *cert denied*, 101 N.M. 11, 677 P.2d 624 (1984); Gonzales v. New Mexico State Highway Dept., 97 N.M. 98, 637 P.2d 48 (Ct. App.), *cert. quashed*, 97 N.M. 621, 642 P.2d 607 (1981); Romero v. S.S. Kresge Co., 95 N.M. 484, 623 P.2d 998 (Ct. App.), *cert. denied*, 95 N.M. 593, 624 P.2d 535 (1981); Hayes v. Ampex Corp., 85 N.M. 444, 512 P.2d 1280 (Ct. App. 1973).

170. 105 N.M. at 504, 506, 739 P.2d at 744, 746. The "premises-line" rule "allows compensation for 'injuries occurring on the premises while [employees having fixed hours and place of work] are going to and from work before or after working hours or at lunchtime.'" *Id.* (citing 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, §15.00 (1985).

"going and coming rule,"[171] which had precluded a worker from recovering for injuries that had occurred before the worker had punched in or after he had clocked out for the day even if his injuries had occurred on the employer's premises, unless the worker could show that his injuries were the result of his employer's negligence.[172] Under *Dupper's* interpretation of section 52-1-19, the "time clock" rationale has no bearing upon compensability; accidental injuries occurring on the employer's premises, whether the worker has assumed or left his duties of employment, and whether the result of the employer's negligence, henceforth will be deemed to have occurred in the course and scope of employment and thus will be compensable.[173]

M. Scheduled Injuries Section[174]

The court in *Carter v. Mountain Bell*[175] declined to hold that a shoulder injury would, in all cases, fall outside the purview of the scheduled injuries section.[176] Instead, the court remanded the case for clarification of the trial court's inconsistent findings, some of which supported the conclusion that the plaintiff had suffered a scheduled injury while others supported an award of disability benefits for an unscheduled injury.[177] However, the court cited *Hamilton v. Doty*,[178] a shoulder injury case, and was thus at least hinting that a shoulder injury probably should be analyzed as a nonscheduled injury.[179]

In *Archuleta v. Safeway Stores, Inc.*,[180] the employer urged the court of appeals to reconsider its holding in *Witcher v. Capitan Drilling Co.*,[181] which, for the first time, construed the scheduled injury provision to allow an award of total disability to a worker who had sustained only a scheduled injury. The court of appeals declined to elaborate upon, modify, or reaffirm its opinion in *Witcher*.[182] Instead, it noted that the supreme court had adopted the *Witcher* holding in

171. *Dupper*, 105 N.M. 503, 507, 734 P.2d 743, 747. *See also* cases cited *supra* note 169. This rule arose from prior judicial interpretation of N.M. STAT. ANN. §52-1-19 (1978 & Supp. 1986).

172. *See* cases cited *supra* note 169.

173. 105 N.M. 506-07, 734 P.2d 746-47. Notably, the court remedied the perceived unfairness of the temporal constraints previously imposed upon an injured worker while continuing to require that the worker's injury occur on his employer's premises unless it was otherwise work-related. *Id.*

174. Scheduled injuries—those which affect enumerated portions of the body and result in a physical impairment—and the benefits awarded therefor under the Act, are defined and set forth in N.M. STAT. ANN. §52-1-43 (1978 & Supp. 1986).

175. 105 N.M. 17, 727 P.2d 956 (Ct. App. 1986).

176. *Id.* at 25, 727 P.2d at 964.

177. *Id.*

178. 71 N.M. 422, 379 P.2d 69 (1962).

179. *Carter*, 105 N.M. at 25, 727 P.2d at 964. The scheduled injury provisions define the locus of a covered injury in very broad terms, i.e., "one arm at or near shoulder . . . ," N.M. STAT. ANN. §52-1-43A(1) (Supp. 1986); "one leg at or above the knee . . . ," N.M. STAT. ANN. §52-1-43A(30) (Supp. 1986). This may explain the confusion attending injuries which affect portions of the anatomy proximate to, but not clearly related to, the larger limb or structure with which they are associated. An injury to the kneecap is on the schedule, Maschio v. Kaiser Steel, 100 N.M. 455, 672 P.2d 284 (Ct. App.), *cert. denied*, 100 N.M. 439, 671 P.2d 1150 (1983); a reflex sympathetic dystrophy in the shoulder is probably a nonscheduled injury, *Carter*, 105 N.M. 17, 727 P.2d 956.

180. 104 N.M. 769, 727 P.2d 77 (Ct. App. 1986).

181. 84 N.M. 369, 503 P.2d 652 (Ct. App. 1972).

182. 104 N.M. at 772, 727 P.2d at 80.

American Tank and Steel Corp. v. Thompson[183] and concluded that it was bound by that supreme court precedent.[184]

N. Vocational Rehabilitation Benefits[185]

Nichols v. Teledyne Economic Dev. Co.[186] clarified that the plaintiff must demonstrate that an award of vocational rehabilitation expenses is necessary to return him to comparable employment before the court will award such benefits. The plaintiff's burden to demonstrate the need for additional training before he can return to work was reiterated in *Hernandez v. Mead Foods, Inc.*,[187] where the court refused rehabilitation benefits to a worker who had been able to return to his former job without further training after his injury.[188]

Finally, in *Garcia v. Schneider, Inc.*,[189] the court construed section 52-1-50[190] of the Act to impose no dollar limitation on plaintiff's recovery of vocational rehabilitation benefits; such benefits should be awarded to the extent that they are "reasonable."[191]

O. Attorneys' Fees

The award against the employer of fees to the claimant's attorney is generally based upon the amount of claimant's recovery, if any, and a number of other factors which vary from case to case.[192] Although the New Mexico appellate courts have previously offered substantial guidance to the trial courts charged with determining a reasonable award of fees,[193] they addressed several novel issues in this area during the survey period.

The supreme court noted in *Board of Educ. v. Quintana*[194] that attorneys' fees should not be awarded based on the amount of future medical expenses awarded to the plaintiff.[195] The value of medical care to which the plaintiff might be entitled is far too speculative to serve as a basis for the award of a specific fee.[196]

183. 90 N.M. 513, 565 P.2d 1030 (1977).

184. 104 N.M. at 772, 727 P.2d at 80.

185. The statute provides in part for an award of vocational rehabilitation benefits to a worker whose disability-resulting compensable injury precludes his return, as of the time of trial, to any employment for which he is generally suited without further training or education. *See* N.M. STAT. ANN. §52-1-50 (1978 & Supp. 1986).

186. 103 N.M. 393, 707 P.2d 1203 (Ct. App. 1985).

187. 104 N.M. 67, 716 P.2d 645 (Ct. App. 1986).

188. *Id.* at 73, 716 P.2d at 651.

189. 105 N.M. 234, 731 P.2d 377 (Ct. App. 1986).

190. (1978 & Supp. 1986).

191. 105 N.M. at 238, 731 P.2d 381.

192. *See, e.g.*, Fryar v. Johnson, 93 N.M. 485, 487, 601 P.2d 718, 720 (1979) (some of the factors generally considered are complexity of claim, time and effort expended, nature and amount of recovery obtained for claimant, skill and reputation of attorney seeking fees).

193. *E.g., id.*; Gearhart v. Edison Metal Products, 92 N.M. 763, 765, 595 P.2d 401, 403 (Ct. App.), *cert. denied*, 92 N.M. 621, 593 P.2d 62 (1979). Waymire v. Signal Oil Field Service, Inc., 77 N.M. 297, 302, 422 P.2d 34, 39 (1966).

194. 102 N.M. 433, 697 P.2d 116 (1985).

195. *Id.* at 435, 697 P.2d at 118.

196. *Id.* Two examples of how future medical expenses might be uncertain would be 1) when a claimant's condition resolved so that future care became altogether unnecessary, or 2) when the trial judge later determined that the type of medical care sought by claimant post-judgment was no longer reasonable.

Similarly, in *Davis v. Homestake Mining Co.*,[197] the court of appeals prohibited the award of attorneys' fees based on speculative elements. Applying reasoning consistent with the analysis in *Quintana*, the court determined that an attorneys' fee award should be based upon the present value of the claimant's award as of the time the legal services were rendered.[198] Benefits to be paid in the future which are subject to collateral or subsequent events that may diminish or increase their value should not factor into the attorney's compensation.[199]

In *Archuleta v. Safeway Stores, Inc.*,[200] the court of appeals held that a reasonable attorney fee, no matter how it is determined, may be awarded only for one attorney's representation of the claimant, even though the Act does not appear to preclude representation by more than one attorney.[201] The court ordered a remittitur of the $24,727.50 fee awarded to plaintiff's two attorneys, to $12,500.00 plus tax, because the case involved a single issue of normal complexity which should have been tried in one to one-and-one-half days rather than three days.[202]

Bower v. Western Fleet Maintenance[203] upheld an award of attorneys' fees to plaintiff's counsel for his representation of the claimant in a proceeding where the employer sought a reduction of the plaintiff's award of total and permanent disability benefits.[204] The attorney was compensated for his representation despite the trial court's determination that benefits should be reduced from the maximum weekly payment to ninety-nine percent of plaintiff's original award, on the rationale that plaintiff's counsel had substantially preserved his client's entitlement to such benefits.[205]

P. Recovery of Past Medical Expenses

Many workers' compensation claims are litigated because the employer refuses to pay benefits or medical bills at the outset, questions the need for medical treatment sought or obtained by the employee, or refuses to pay for unauthorized treatment previously undertaken. A claimant seeking recovery at trial for payment of such past medical expenses must demonstrate that the treatment in question was reasonably necessary, was related to his compensable injury, and that the charges incurred for the treatment were reasonable.

The plaintiff in *Hernandez v. Mead Foods, Inc.*[206] appealed the trial court's refusal to charge the employer with payment of his past medical bills. The court held that the plaintiff's failure to obtain an award of compensation benefits did not necessarily preclude him from obtaining payment of the past medical bills.[207] The court, however, denied the claim because the employee failed to establish at trial that the medical treatment was for a work-related injury.[208]

197. 105 N.M. 2, 727 P.2d 941 (Ct. App.), *cert. quashed*, 104 N.M. 702, 726 P.2d 856 (1986).
198. *Id.* at 3-4, 727 P.2d 942-43.
199. *Id.*
200. 104 N.M. 769, 727 P.2d 77 (Ct. App. 1986).
201. *Id.* at 773, 727 P.2d at 81.
202. *Id.* at 773-75, 727 P.2d at 81-83.
203. 104 N.M. 731, 726 P.2d 885 (Ct. App. 1986).
204. *Id.* at 737-38, 726 P.2d at 891-92.
205. *Id.* at 735-37, 726 P.2d at 889-91.
206. 104 N.M. 67, 716 P.2d 645 (Ct. App. 1986).
207. *Id.* at 72-73, 716 P.2d at 650-51.
208. *Id.*

Pritchard v. Halliburton Servs.[209] considered the trial court's determination that the plaintiff's own testimony concerning additional medical treatment he underwent since the beginning of the trial was sufficient to establish the reasonableness and necessity of the treatment.[210] At the beginning of the trial the plaintiff had demonstrated the necessity of the medical expenses he had incurred to that date; at the continuation of the trial the plaintiff's testimony was intended to update those expenses.[211] The appellate court held that the bills for the supplemental treatment would have to be offered into evidence for plaintiff to meet his burden of demonstrating that the bills were for care plaintiff had already shown was necessary.[212]

CONCLUSION

This survey has covered cases decided for a period immediately preceding the enactment of new legislation which profoundly affects the law of workers' compensation in New Mexico. A number of cases decided during that time reaffirmed and elaborated upon longstanding principles and policies which continue to govern this area of law. Other decisions marked significant departures from prior case law, many of which can be expected to survive, or even be "legislated into" subsequent amendments to the new statute. In any event, traditional notions of consistency, coupled with the ultimate goal of any workers' compensation scheme to provide at least some economic support for the injured laborer and his family, will likely result in reference to and reliance upon many of the decisions discussed in this article for many years to come.

209. 104 N.M. 102, 717 P.2d 78 (Ct. App.), *cert. denied*, 103 N.M. 798, 715 P.2d 71 (1986).

210. *Id.* at 106-07, 717 P.2d at 82-83. The trial continued from August 21, 1984 to December 11, 1984. *Id.* at 106, 717 P.2d at 82.

211. *Id.* at 106-07, 717 P.2d at 82-83.

212. *Id.* at 107, 717 P.2d at 83.