NEW MEXICO LAW REVIEW

Volume 11
Issue 1 *Winter 1981*

Winter 1981

Workmen's Compensation

J. E. Casados

Recommended Citation

J. E. Casados, *Workmen's Compensation*, 11 N.M. L. Rev. 235 (1981).
Available at: https://digitalrepository.unm.edu/nmlr/vol11/iss1/14

This Article is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the *New Mexico Law Review* website: www.lawschool.unm.edu/nmlr

WORKMEN'S COMPENSATION

J. E. CASADOS*

INTRODUCTION

In the past year numerous decisions in the area of workmen's compensation have made new law or clarified existing law. Two decisions deserve special consideration because of their potential impact on every claim for compensation filed in the state. *Casias v. Zia Company*[1] concerned the amount of compensation for the worker. *Fryar v. Johnson*[2] concerned the fees due the claimant's attorney.

Placing special emphasis on these two cases does not mean that other developments are unimportant, but merely that they do not have a general impact upon the law in this area. Therefore, other decisions will be discussed in less detail.

I. COMPENSATION TO CLAIMANT

Ramon Casias was involved in an on-the-job accident on October 7, 1976 and became totally and permanently disabled on August 28, 1977. During the ten months between the accident and the disability, the percentage of the average weekly wage in New Mexico, upon which maximum compensation is based, increased from 78% to 89%.[3]

In *Casias I*,[4] the sole issue before the court of appeals was whether Mr. Casias was entitled to benefits based on the ratio in effect at the time of the accident or at the time of disability. The trial court held that benefits should be calculated at the time of disability, and the

---

*Gallagher, Casados & Martin, P.C., Albuquerque, New Mexico.

1. 93 N.M. 78, 596 P.2d 521 (Ct. App.), *cert. denied*, 93 N.M. 8, 595 P.2d 1203 (1979) [hereinafter *Casias I*], *appeal after remand*, ___N.M. ___, 616 P.2d 436 (Ct. App. 1980) [hereinafter *Casias II*].

2. 93 N.M. 485, 601 P.2d 718 (1979).

3. 93 N.M. at 79, 596 P.2d at 522. The computation of compensation benefits is governed by N.M. Stat. Ann. § § 52-1-20, -41 (1978). The latter section provides that the workman who is totally disabled shall receive benefits for up to 600 weeks. The same section previously limited the benefits to two-thirds of the workman's average weekly wage. As of January 1, 1976, however, the benefits, even if they were less than two-thirds of his salary, could not exceed two-thirds of the average weekly wage in the state. Effective July 1, 1976 the most a workman could collect would have been 78% of the state average weekly wage. The benefits rose to 89% of the state average weekly wage as of July 1, 1977 and 100% of the average weekly wage as of July 1, 1978.

4. 93 N.M. 78, 596 P.2d 521 (Ct. App.), *cert. denied*, 93 N.M. 8, 595 P.2d 1203 (1979).

court of appeals affirmed. Although neither party raised the issue of escalating benefits on appeal, the court said that under certain conditions an employee's compensation could be increased every year until compensation for the full 600 weeks had been paid: (1) the average weekly wage in the state must have increased by at least two dollars during the year, and (2) two-thirds of the claimant's average weekly wage must be greater than the average weekly wage in New Mexico.[5]

In finding that the legislature intended to provide escalating benefits as part of the Workmen's Compensation Act,[6] the court noted that section 52-1-20 requires the determination of the statewide average weekly wage "at the time of the accident," rather than at the time of the disability.[7] Furthermore, if a claimant is involved in an accident which leads to a later disability, "the continuing pain and degenerating ability to function constitute the operative 'accident' which brings about the compensable 'accidental injury' on the date of disability. . . ."[8] The court also considered section 52-1-29, which requires that a workman notify his employer "of the accident *and* of the injury within thirty days after *their* occurrence, but . . . not . . . later than sixty days after the occurrence of the *accident.*"[9] This section has been interpreted as equating "accident" with "injury" when the claimant's problem is not detected until more than sixty days after the on-the-job incident.[10] Finally, the court found that the legislature has intended to provide for escalating benefits when it amended section 52-1-20 to increase the percentage of the state average weekly wage, which would limit the maximum benefits allowed, to 100%.[11] After the court's decision, Mr. Casias asked the trial judge for a corresponding increase in his benefits, but his request was denied. Casias then appealed again.

Casias II,[12] decided after the end of the *Survey* year, considered the issue of escalating benefits.[13] The court found that it really had not decided this issue in *Casias I*[14] and held that the trial court's

5. *Id.* at 82, 596 P.2d at 525.

6. N.M. Stat. Ann. § § 52-1-1 to -69 (1978).

7. 93 N.M. at 79, 596 P.2d at 522.

8. *Id.*

9. *Id.* at 80, 596 P.2d at 523 (citing N.M. Stat. Ann. § 52-1-29 (1978)) (emphasis in original).

10. *Id.* If the worker's injury were not viewed as the "accident," in cases of latent symptoms section 52-1-29 would bar many claimants from recovery for failing to file notice within the requisite time period. *See* Montell v. Orndorff, 67 N.M. 156, 353 P.2d 680 (1960).

11. 93 N.M. at 82, 596 P.2d at 525.

12. ___N.M. ___, 616 P.2d 436 (Ct. App. 1980).

13. The date on which benefits should be calculated was not an issue before the court.

14. The court in *Casias II* (Judges Wood, Hendley, and Hernandez) noted that in *Casias I* Judges Hendley and Sutin concurred only in the result—that compensation benefits should

denial of Casias' petition for increased benefits based on this theory was correct. The court also held that section 52-1-48 meant what it said: "The benefits that a workman shall receive during the entire period of disability . . . shall be based on, and limited to, the benefits in effect on the date of the accidental injury resulting in the disability. . . ."[15] Consequently, Mr. Casias was entitled only to the lower rate of compensation. If *Casias II* had upheld *Casias I* on the issue of escalating benefits, it could have eliminated lump-sum settlements.[16]

Of course, the legislature could allow some increase in benefits by tying it, for example, to the cost-of-living index. Such legislation, however, should be drafted carefully to avoid the problems frequently found in escalating benefit plans, and which probably would have resulted from any judicially imposed system. Escalating benefit legislation should insure that claimanats who have equal wages and equal disabilities and who normally receive identical awards of weekly benefits, actually receive equal income from any lump-sum settlement. The legislation also should provide that any decrease in the cost of living (admittedly an unlikely situation) results in an accompanying decrease in benefits.

II. COMPENSATION TO CLAIMANT'S ATTORNEY

In *Fryar v. Johnson*,[17] the supreme court prohibited the practice of awarding a fee based on a percentage of the present value of the award made by the trial court to a successful claimant's attorney, and required attorneys to present some justification for their fees. Attorney's fees cannot be awarded unless they are supported by evidence in the record.[18]

Fryar may be the first decision which expressly has balanced the interest of the plaintiff's lawyer in receiving just compensation and the public's interest in minimizing the cost of workmen's compensa-

---

be calculated as of the date that disability begins. They did not agree with Judge Walters' conclusion that Mr. Casias should be entitled to escalating benefits. Therefore, that portion of the *Casias I* opinion addressing the question of escalating benefits was not a decision of the court of appeals. Although the court of appeals could have disposed of Mr. Casias' case on these technical grounds in *Casias II*, it chose to answer the issue of escalating benefits, since this question was an issue in other cases before the court.

15. ____N.M. at ____, 616 P.2d at 439.

16. The potential problem was that the courts would have been obliged to consider testimony from economists on the issue of how much the weekly wage would have increased. Because these opinions could vary greatly depending upon the expert, totally different results might be reached in cases where the claimants normally would receive the same amount of weekly benefits.

17. 93 N.M. 485, 601 P.2d 718 (1979).

18. 93 N.M. at 487-88, 601 P.2d at 720-21.

tion insurance. The supreme court recognized that unjustified fees result in higher premiums for the employer as the cost is passed on to other purchasers of insurance. In cases of uninsured entities such as some public school systems, municipalities, and large businesses, the cost is passed on to the taxpayer or consumer.

Fryar does not require an attorney who successfully represents a claimant to benefit the general public by reducing the amount he is entitled to receive. It does say, however, that the interest of the general public is strong enough to preclude awarding unsupported attorney's fees.

First, the court notes that the Workmen's Compensation Act requires the trial court to consider several factors in setting attorney's fees.[19] These include the amount of any offer made by the employer before and after the workman had hired a lawyer, but before the claim was filed; any offer made in writing at least thirty days before trial; and the present value of the compensation award.[20]

Additional standards for determining attorney's fees were set out in *Fryar*.[21]

> (1) the relative success of the workman in the court proceedings;
> (2) the extent to which the issues were contested;
> (3) the complexity of the issues;
> (4) the ability, standing, skill, and experience of the attorney;
> (5) the rise in the cost of living; and
> (6) the time and effort expended by the attorney in the particular case.

The court also expressly applied the fee guideline contained in the Code of Professional Responsibility[22] to workmen's compensation cases.[23] Factors to consider include:

> (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
> . . . .
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> . . . .

19. *Id.* at 486, 601 P.2d at 719.
20. N.M. Stat. Ann. § 52-1-54(D) (1978).
21. 93 N.M. at 487, 601 P.2d at 720 (citations omitted).
22. N.M. Code of Professional Responsibility, Rule 2-106 (1978).
23. 93 N.M. at 487, 601 P.2d at 720.

(7) the experience, reputation and ability of the lawyer or lawyers performing the service.

The court did not indicate that any one factor was more significant than another. Each factor, therefore, should be considered. The tenor of the decision is such that more than success at trial must be proved.[24] Any other analysis could be unfair to the claimant's attorney. For example, if only the time spent on the case were considered, the more experienced attorney would receive a lower fee because he would spend less time on a matter than would an inexperienced attorney. On the other hand, if the attorney's experience were the only consideration, it would be unfair to the competent, hard-working but inexperienced attorney to award him less.

The experience under *Fryar* has been mixed. On occasion it has resulted in a flood of paperwork for the claimant's attorney, surely in part to show that some time has been spent on the case. Some matters that previously were handled informally now cannot be accomplished without a motion and an order. Doubtless the *Fryar* case also has led to inadequate compensation for the claimant's attorney. For example, if the attorney did everything that he could to prepare the claim and obtain every benefit to which his client was entitled, but the recovery was nominal, the trial court usually would find it difficult to award more to the attorney than it did to the claimant.

III. OTHER WORKMEN'S COMPENSATION DECISIONS

In another important decision, the supreme court determined that a person is now entitled to compensation for anxiety neurosis under the New Mexico Occupational Disease Disablement Law.[25] In *Martinez v. University of California,*[26] Mr. Martinez had worked with

24. All the factors to be considered may be summarized as follows:
    1. The amount of any offer made by the employer under Section 52-1-54(D) of the Act;
    2. the statutory requirement to consider the present value of the award;
    3. the chilling effect of miserly fees upon the ability of an injured workman to obtain adequate representation;
    4. the time and effort expended by the attorney;
    5. the extent to which the issues were contested;
    6. the novelty and complexity of the issues involved;
    7. the fees normally charged in the locality for similar legal services;
    8. the ability, experience, skill and *reputation* of the attorney;
    9. the relative success of the workman in the court proceeding;
    10. the amount involved (presumably in the attorney's fee issue);
    11. the rate of inflation.

93 N.M. at 486, 488, 601 P.2d at 719, 721.

25. N.M. Stat. Ann. § § 52-3-1 to -59 (1978).

26. Martinez v. University of California, 93 N.M. 455, 601 P.2d 425 (1979).

radioactive materials for thirty years as a foundry technician at Los Alamos Scientific Laboratories. He had a cancerous growth removed from one eye in 1976. His doctors did not believe that the growth had been caused by exposure to radioactive materials, but Mr. Martinez thought it had and, after returning to work, suffered headaches, nausea, fatigue, and anxiety until, finally, he had to stop working.

The supreme court held that Mr. Martinez was entitled to compensation under the Occupational Disease Act because the neurosis was: (1) peculiar to his occupation; (2) due to something beyond the ordinary hazards of employment; (3) attributable to his on-the-job contact with radioactive materials; and (4) proximately caused by his working conditions. The court rejected the University's argument that Mr. Martinez could not recover compensation because the neurosis was not "peculiar to" the radiation industry. The court ruled that "peculiar to," as used in section 52-3-33, is not

> used in the sense that the disease must be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather in the sense that the conditions of that employment must result in a hazard which distinguished it in character from the general run of occupations.[27]

In *Galles Chevrolet Co. v. Chavez,*[28] the supreme court clarified the coming-and-going rule. The New Mexico Workmen's Compensation Act[29] contains a unique provision which permits recovery of workmen's compensation benefits by an employee injured while going to or coming from work if his injury is caused by the negligence of the employer.[30] No other section of the Workmen's Compensation Act requires a showing of negligence. The question left unanswered by the provision was whether, under the coming-and-going rule, the claimant could elect his remedy and sue his employer in tort, or whether his only option was to sue under the Workmen's Compensation Act.

Mr. Chaney, a mechanic for Galles, injured his back when he fell on

---

27. 93 N.M. at 457, 601 P.2d at 427 (citations omitted).
28. 92 N.M. 618, 593 P.2d 59 (1979).
29. N.M. Stat. Ann. § § 52-1-1 to -69 (1978).
30. N.M. Stat. Ann. § 52-1-19 (1978):
> As used in the Workmen's Compensation Act . . . unless the context otherwise requires, "injury by accident arising out of and in the course of employment" shall include accidental injuries to workmen, and death resulting from accidental injury, as a result of their employment and while at work in any place where their employer's business requires their presence, but shall not include injuries to any workman occurring while on his way to assume the duties of his employment or after leaving such duties, the proximate cause of which is not the employer's negligence.

the premises. He tried to recover both under workmen's compensation and in negligence against Galles. The workmen's compensation claim was settled and the trial court granted summary judgment for Galles on the negligence claim, finding that Mr. Chaney was on his way to work when the accident occurred. The supreme court held, however, that since Mr. Chaney was on his way to work the provisions of the Workmen's Compensation Act applied, and that Galles was not subject to further liability.

In *Pedrazza v. Sid Fleming Contractor, Inc.*[31] the supreme court considered the rights of alien dependents in a death claim under the Workmen's Compensation Act. The court concluded that alien dependents have no claim under the act, although alien workmen do.

In *Rollins v. Albuquerque Public Schools,*[32] the court of appeals held that an individual receiving 100% of allowable benefits as a result of an on-the-job injury, cannot file suit for total disability as a result of another on-the-job injury, because no further disability is possible. A person cannot be more than 100% disabled at any one time. In *Clauss v. Electronic City,*[33] the court of appeals also held that on the death of a claimant benefits under the Workmen's Compensation Act do not accrue to his estate, but are payable only to the dependents enumerated in the Act.[34]

CONCLUSION

In the area of workmen's compensation, the courts have assumed an active role. Such an approach is not always appropriate. There is

31. 94 N.M. 59, 607 P.2d 597 (1980). The mother of the workman's children filed for benefits after the father was killed on the job. The children were residents of Mexico. The supreme court said the trial court did not deprive the children of due process of law by dismissing the claim because there is no vested property right to compensation. The court also ruled that the children's equal protection claim failed because they were residents of Mexico rather than of the United States. Because the rights of dependents under the Act are not derived from those of the worker, the children could not use their father's residence as a basis for their claim. The court also noted, however, that they were not barred from bringing other types of actions.

32. 92 N.M. 795, 595 P.2d 765 (Ct. App.), *cert. denied,* 92 N.M. 675, 593 P.2d 1078 (1979). The plaintiff suffered a knee injury on February 2, 1976 and received compensation until March 8, 1976, when she returned to work. She was injured again on January 7, 1977, when she broke her hip and required surgery. Albuquerque Public Schools paid maximum benefits for temporary total disability and the plaintiff retired, but she developed post-traumatic arthritis in her knees. This condition became disabling on August 1, 1977. The court held that the claim for the arthritis disability was premature because at the time she filed, the plaintiff still was receiving maximum compensation for the hip injury.

33. 93 N.M. 75, 596 P.2d 518 (Ct. App. 1979). Allen Clark, the workman, suffered a fatal on-the-job accident. His widow, Marilyn Clark, was awarded benefits on September 21, 1976 for 500 weeks beginning March 1, 1974 and amounting to $28,750. She died on September 13, 1977. The court rejected the argument that the estate was entitled to the remaining benefits.

34. N.M. Stat. Ann. § 52-1-17 (1978).

something to be said for following the clear letter of the law although a particular result may seem unfair. The coming year should bring a slight, but noticeable, shift toward less activism on the part of the courts.