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Workmen's Compensation

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INTRODUCTION

This article will review appellate court cases decided during the Survey year that affected workmen's compensation law in New Mexico. The court of appeals decided the large majority of these cases.[1] Disputes with regard to attorneys' fees and the meaning of "course and scope of employment" drew the most attention. Other cases dealt with the following: (1) the constitutionality of the New Mexico Workmen's Compensation Act; (2) liability based on voluntary payment of compensation; (3) the date to be used in establishing compensation rates; (4) disability; (5) proper refusal of medical benefits by employers; (6) involuntary plaintiffs; (7) lump-sum awards; and (8) the tort of wrongful discharge.

ATTORNEYS' FEES

Eight appellate opinions focused, at least in part, on attorneys' fees. It appears that these cases have only served to further confuse lawyers and trial judges with respect to the correct method to be used in setting attorneys' fees. In order to more fully understand the controversy regarding attorneys' fees, a short history of the state of the law is helpful. N.M. Stat. Ann. §52-1-54(D) (1978),[2] requires the trial court to consider

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1. The clerk of the New Mexico Court of Appeals informed the author that workmen's compensation cases accounted for 36 percent of the entire civil docket of the court of appeals in 1981. This included 35 memorandum opinions as well as 34 published opinions for a total of 69 workmen's compensation cases out of a total of 188 civil cases.

2. N.M. Stat. Ann. §52-1-54(D) (1978) provides that:

> (D) in all cases where compensation to which any person shall be entitled under the provisions of the Workmen's Compensation Act shall be refused and the claimant shall thereafter collect compensation through court proceedings in an amount in excess of the amount offered in writing by an employer thirty days or more prior to the trial court of the cause, then the compensation to be paid the attorney for the claimant *shall be fixed by the court trying the same or the supreme court upon appeal in such amount as the court may deem reasonable and proper* and when so fixed and allowed by the court shall be paid by the employer in addition to the compensation allowed the claimant under the provisions of the Workmen's Compensation Act; provided, however, that the trial court in determining and fixing a reasonable fee must take into consideration:
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> (1) the sum, if any offered by the employer:

the following factors in setting attorneys' fees: (1) the amount of any offer made by the employer before and after the workman hired a lawyer, but before the workman filed the claim; (2) any offer made in writing at least thirty days before trial; and (3) the present value of the compensation award. In the 1979 case of *Fryar v. Johnsen*,[3] the supreme court attempted to establish objective standards for the trial court to follow in determining attorneys' fees.[4] These standards included:

> 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.[5]

In addition, the court quoted the following five guidelines contained in the Code of Professional Responsibility:

> (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;
>
> . . . .
>
> (7) the experience, reputation and ability of the lawyer or lawyers performing the services.[6]

In *Johnsen v. Fryar*,[7] the New Mexico Court of Appeals reviewed the award of attorneys' fees in light of the factors enunciated by the supreme

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> (a) before the workman's attorney was employed; and
> (b) after the attorney's employment but before court proceedings were commenced; and
> (c) in writing thirty days or more prior to the trial by the court of the cause; and
>
> (2) the present value of the award made in the workman's favor.

(Emphasis added.)

3. 93 N.M. 485, 601 P.2d 718 (1979) [hereinafter referred to as *Fryar I*]. See Casados, *Workmen's Compensation, Survey of New Mexico Law; 1979–1980*, 11 N.M.L. Rev. 236 (1981), for a more extensive discussion of *Fryar I*.

4. 93 N.M. at 486, 601 P.2d at 719.

5. *Id.* at 487, 601 P.2d at 720 (citations omitted).

6. 93 N.M. at 487, 601 P.2d at 720 (quoting N.M. Code of Professional Responsibility DR 2-106(B) (1978)).

7. 96 N.M. 323, 630 P.2d 275 (Ct. App. 1980) [hereinafter referred to as *Fryar II*].

court in *Fryar I*. The court held that the evidence did not support the trial court's award of attorneys' fees and it therefore reduced the award.[8] The court specifically disallowed one of the most time honored and traditional methods of setting attorneys' fees—basing fees on a specific percentage of the award. The court refused to allow this method of computing attorneys' fees because it found no case law or statute authorizing this procedure.[9] The court of appeals reaffirmed the *Fryar II* holding in *Anaya v. Zia Co.*[10] Although the *Anaya* court did not specifically so hold, it indicated that affidavits of attorneys could not substitute for live testimony in support of the required evidence, and that evidence based on judicial notice was insufficient if it did not comply with N.M. R. Evid. 201(b).[11]

In *Lopez v. K. B. Kennedy Engineering Co.*,[12] the defendants appealed from a judgment awarding the claimant $18,000 for attorneys' fees. The court of appeals seemed to dispose of the appeal on procedural grounds. The court stated that because the defendants failed to request findings of fact and conclusions of law, New Mexico case law prohibited appellate review of the evidence.[13] The defendants' failure to include any evidence in the record on attorneys' fees also precluded appellate review of the fees awarded.

Nevertheless, the *Lopez* court addressed the defendants' argument that the award of attorneys' fees was in error because the trial court did not

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8. *Id.* at 330–31, 630 P.2d at 282–83. The court summarized the evidence as follows:

> An attorney of good reputation . . . who presented no evidence of his ability, experience or skill . . . and no evidence, apart from the trial record of the time and effort he expended . . . recovered maximum compensation benefits . . . for the workman after a less than one day trial, involving eight witnesses. . . . The trial had contested issues of notice, disability and causation . . . but these issues were neither novel nor complex. . . . There is neither evidence nor finding as to the normal charge for similar services which the record shows [the] attorney . . . performed in this case. . . . Defendant has made no settlement offers . . . ; the present value of the total unanticipated award was $59,623.92 . . . at a time the inflation rate was twelve percent per annum. This evidence does not support an award of fees of $11,435.75.

Id.

9. *Id.* at 328, 630 P.2d at 280.

10. 21 N.M. St. B. Bull. 355 (Ct. App. Dec. 17, 1981), *cert. denied*, 98 N.M. 50, 644 P.2d 1039 (1982). This case was published in the Pacific Second advance sheets at 640 P.2d 944. On April 8, 1982, a memorandum signed by the three participating judges of the court of appeals requested that the opinion be withdrawn from publication. Authority for this procedure can be found in N.M. Sup. Ct. Misc. R. 7 (Cum. Supp. 1982), and *Anaya* cannot now be cited as precedent.

11. The relevant portion of Rule 201(b) provides that: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the community, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, or (3) notice is provided for by statute."

12. 95 N.M. 507, 623 P.2d 1021 (Ct. App. 1981).

13. *Id.* at 508, 623 P.2d at 1022. The court cited McLam v. McLam, 85 N.M. 196, 510 P.2d 914 (1973) and Kepp v. McBee, 78 N.M. 411, 432 P.2d 255 (1967).

hold an evidentiary hearing. The court of appeals held that *Fryar I* required only "evidentiary support" for attorneys' fees awarded by a trial court. It concluded that "evidentiary support" does not mean an "evidentiary hearing" and that the attorneys' statements of services supplied sufficient evidence to support the sole finding of fact that:

> Plaintiff is entitled to reasonable attorneys [sic] fees for the services of her attorneys in this action. . . .
>
> As to attorneys' fees . . . , the Court finds that no pretrial settlement offer was made, that the services of two attorneys were reasonably required in preparation and trial of the cause, that E. Ray Phelps utilized 161.1 hours on the case and Warren Reynolds utilized 52.75 hours on the case. The case involved difficult and closely contested questions of fact and law.[14]

The court of appeals referred to the factors enunciated in *Fryar I* as suggestions to guide the district court, not requirements. In contrast, the *Fryar II* court's detailed analysis of the factors suggests that that court considered the *Fryar I* factors to be requirements.[15]

The court of appeals also considered the issue of whether an evidentiary hearing is required in *Gonzales v. Bates Lumber Co.*[16] In *Gonzales,* the defendant appealed the trial court's award of attorneys' fees, because the trial court had not held a hearing on the question of attorneys' fees, although an affidavit and counteraffidavit did appear in the record. The affidavit, introduced by the plaintiff's counsel, recited the amount of time that he had spent on the case; the counteraffidavit, introduced by the defendant's counsel, also included this time record and alleged that most of the time spent by the plaintiff's counsel was unnecessary because of the unreasonable tardiness in the filing of the original complaint.[17] The trial court based its award of attorneys' fees on three findings: (1) the Workman's Compensation Act required the plaintiff to employ counsel to secure the benefits; (2) counsel expended considerable time and effort in handling the preparation and presentation of the claim; and (3) the plaintiff should be awarded reasonable attorneys' fees in the amount of $5,500.00 for the successful handling, preparation, and presentation of his claim.[18]

On appeal, the court of appeals reiterated that there must be "evidentiary support" for an award of attorneys' fees. The court recognized that, in addition to the statutory requirements in N.M. Stat. Ann. § 52-1-54(D)

14. 95 N.M. at 507–508, 623 P.2d at 1021–22.
15. *See* 96 N.M. at 329–31, 630 P.2d at 281–83.
16. 96 N.M. 422, 631 P.2d 328 (Ct. App. 1981).
17. *Id.* at 425, 631 P.2d at 331.
18. *Id.*

(1978),[19] the court must consider the six additional factors imposed by the supreme court in *Fryar I*.[20] The court omitted, however, any direct reference to the guidelines contained in the Code of Professional Responsibility.[21] Despite the small amount of evidence and the fact that the trial court based the award on findings which incorporated less than all the factors listed in *Fryar I*, the court of appeals upheld the award, stating that "[t]he attorney's reports and the trial court's first-hand knowledge of the attorneys' work on the issues' proceedings, and the outcome of that work, is sufficient evidentiary support of the award."[22]

In *Tafoya v. S & S Plumbing Co.*,[23] the court of appeals referred to but did not apply *Fryar I*. In *Tafoya*, there was one finding by the trial court: "The court previously allowed plaintiff's attorneys an attorney's fee in the amount of $1,200 plus tax and plaintiff's attorneys are now allowed an additional fee in the amount of $4,500 plus tax for a total of $5,928, including tax."[24] The defendant appealed the finding, arguing that there was insufficient evidence to support the trial court's finding. Although the court of appeals noted that it could have dismissed defendant's appeal because he had not submitted findings regarding attorneys' fees, it nevertheless addressed the merits. Recognizing that under *Fryar I*, an award must be based on findings with "evidentiary support," the court upheld the trial court's award, stating only that "[w]e find evidentiary support in the record to sustain the award."[25]

In the 1982 case of *Jennings v. Gabaldon Construction Co.*,[26] the court of appeals breathed new life into the factors enunciated in *Fryar I* and explained in *Fryar II*. In reversing the trial court's award of attorneys' fees, the court listed the eleven *Fryar I* factors and required that the findings of fact refer to all of them. The court further held that statements of counsel not under oath were not a proper basis for ultimate findings by the court unless stipulated to by opposing parties.[27]

One of the statutory requirements in setting attorneys' fees is that the court consider the present value of the award made in the workman's favor.[28] In *Fitch v. Tanksley Trucking Co.*,[29] the court of appeals held that it was improper to establish the present value of the workman's award

19. N.M. Stat. Ann. § 52-1-54(D) (1978). *See supra* note 2 for text of the statute.
20. *See supra* text accompanying note 5.
21. *See supra* text accompanying note 6.
22. 96 N.M. at 626, 631 P.2d at 332.
23. 97 N.M. 249, 638 P.2d 1094 (Ct. App. 1981), *cert. denied*, 98 N.M. 50, 644 P.2d 1039 (1982).
24. 97 N.M. at 251, 638 P.2d at 1096.
25. *Id.* at 252, 638 P.2d at 1097.
26. 97 N.M. 416, 640 P.2d 522 (Ct. App. 1982).
27. *Id.* at 421, 640 P.2d at 527.
28. N.M. Stat. Ann. § 52-1-54(D)(2) (1978). *See supra* note 2 for text of the statute.
29. 95 N.M. 477, 623 P.2d 991 (Ct. App. 1980).

by "including amounts over a figure due or to become due within six months beyond the date the award is granted"[30] without evidence that those benefits would continue beyond the six-month period. The court addressed this issue again in *Anaya v. Zia Co.*[31] The plaintiff had been permanently and totally disabled. The parties stipulated to a settlement which required the defendant to pay compensation as long as the plaintiff remained totally disabled. The court stated that "[t]he determination of the present value of the workmen's award on anticipated or escalated benefits is specifically prohibited by *Fitch v. Tanksley Trucking Co.*"[32] The court held that there was no evidence in the record to show that the benefits would continue beyond the six-month period.

The court of appeals also discussed the type of compensation that a claimant must receive before the district court can grant an award of attorneys' fees. In *Rumpf v. Rainbo Baking Co.*,[33] the plaintiff had previously filed a complaint seeking workmen's compensation benefits which was voluntarily dismissed when defendants started paying benefits. Payments ceased after several weeks and the plaintiff filed a second suit; this suit was also voluntarily dismissed after the defendants resumed payment of benefits. When those benefits ceased, the plaintiff filed a third suit. When it became clear that the plaintiff did not wish to proceed with the suit, the trial court dismissed the suit on the defendant's motion; the plaintiff's attorney consented to the dismissal. The court awarded attorneys' fees although it had not granted the plaintiff an award of compensation. The defendant appealed.

The court of appeals considered the language in N.M. Stat. Ann. § 52-1-54(D) (1978),[34] and previous appellate decisions.[35] The court held that the institution of court "proceedings" that result in the resumption of benefits was sufficient "recovery" to sustain an award of attorneys' fees.[36] Therefore, an actual award of benefits by the trial court was unnecessary.

The court of appeals followed the same approach in *Romo v. Raton Coca-Cola Co.*[37] with regard to the award of attorneys' fees by an appellate

30. *Id.* at 480, 623 P.2d at 994.

31. 21 N.M. St. B. Bull. 335 (Ct. App. Dec. 17, 1981). For further discussion of this case, *see supra* note 9 and accompanying text.

32. 21 N.M. St. B. Bull. at 357. *See supra* notes 29–30 and accompanying text for a discussion of *Fitch*.

33. 96 N.M. 1, 626 P.2d 1303 (Ct. App. 1981).

34. N.M. Stat. Ann. § 52-1-54(D) (1978). *See supra* note 2 for text of the statute.

35. The court relied on the following cases: Wuenschel v. New Mexico Broadcasting Corp., 84 N.M. 109, 500 P.2d 194 (Ct. App. 1972), *overruled on other grounds*, Schiller v. Southwest Air Rangers, Inc., 87 N.M. 476, 535 P.2d 1327 (1975); Geeslin v. Goodno, 75 N.M. 174, 402 P.2d 156 (1965); Ennen v. Southwest Potash Co., 65 N.M. 307, 336 P.2d 1062 (1959); Perez v. Fred Harvey, Inc., 54 N.M. 339, 224 P.2d 524 (1950).

36. 96 N.M. at 3, 626 P.2d at 1305.

37. 96 N.M. 765, 635 P.2d 320 (Ct. App. 1981).

court. There the claimant appealed an award by the trial court based on twenty-percent disability.[38] Subsequent to the appeal, the court of appeals ruled on a number of proceedings concerning the claimant's attempt to execute on the judgment and the defendants' attempt to quash the writ of execution. The court of appeals allowed execution.

On the question of attorneys' fees for representation during posttrial maneuvers, the court of appeals rejected the defendants' assertion that the claimant must obtain an increase in benefits before attorneys' fees would be allowed. The *Romo* court acknowledged that an increase in benefits was not the sole requirement for the allowance of attorneys' fees and reasoned that because the attorney rendered services to the claimant, attorneys' fees were appropriate.[39]

The court of appeals rejected the award of attorneys' fees in *Montoya v. Anaconda Mining Co.*[40] The trial court had determined that the employer was not liable for certain medical bills incurred by the plaintiff for doctors not authorized by the employer.[41] The court of appeals then held that the plaintiff was not entitled to an award of attorneys' fees. The court simply stated that "the award of attorneys' fees, however, must be predicated upon a successful recovery by the claimant of workmen's compensation or other medical or related benefits to which the workman is entitled under the Workmen's Compensation Act."[42] Because the appellant was unsuccessful, the court of appeals did not allow attorneys' fees. Although not expressed in the language of the Workmen's Compensation Act, it appears that under *Montoya,* courts should first determine whether the attorney was at all "successful" in helping the claimant.

The cases reviewed thus far all considered, to some extent, the issue of awarding attorneys' fees. Although the Workmen's Compensation Act clearly permits such awards, the appellate courts, in their interpretation of the Act and the *Fryar I* standards, have seemingly ignored the traditional and almost universal American rule of requiring the parties to bear their own attorneys' fees. It appears that courts are extending the award of attorneys' fees beyond the specific statutory grounds allowed.

COURSE AND SCOPE OF EMPLOYMENT

The New Mexico Workmen's Compensation Act requires that an injury "arise out of and in the course of" employment in order to be com-

38. The claimant appealed the trial court's award of attorneys' fees, arguing that they were too low. The appellate court dismissed this argument as meritless. *Id.* at 768, 635 P.2d at 323.

39. 96 N.M. at 769–70, 635 P.2d at 324–25. For a more extensive discussion of the awarding of attorneys' fees by appellate courts, see Occhialino, *Civil Procedure, ante* at 251.

40. 97 N.M. 1, 635 P.2d 1323 (Ct. App. 1981).

41. *See infra* text accompanying note 86 for a discussion of this aspect of the case.

42. 97 N.M. at 7, 635 P.2d at 1329.

pensable.[43] These are two separate requirements. "Arise out of" means that the claimant was subjected to a risk by virtue of his employment and that risk caused the claimant's injury.[44] "In the course of" means that the injury must have occurred while the claimant was doing the duty which he was employed to perform.[45] During the Survey year, the appellate courts devoted a substantial amount of time to the issue of whether a particular accident "arose out of and in the course of employment." Once again, it is difficult to find consistency in the appellate courts' treatment of this question.

In *Velkovitz v. Penasco Independent School District*,[46] the supreme court reversed the court of appeals' determination that the particular accident involved did not "arise out of and in the course of employment." The claimant was a teacher whose duties required her to chaperone the school's ski team while going to and from the ski area. Once the students were at the ski area, they were not under the chaperone's supervision or control in any way, but were under the direct supervision of the ski instructors. Apparently, a custom had arisen that allowed the teachers to ski on their own while the students were with the ski instructors. The claimant injured her knee while skiing. The supreme court relied on the "lull in work" component of the personal comfort doctrine[47] to hold that this injury was

43. There are two statutes on point, N.M. Stat. Ann. § 52-1-9, and § 52-1-28 (1978). Section 52-1-9 reads as follows:

> The right to compensation provided for in this act [52-1-1 to 52-1-69 NMSA 1978], in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur:
>
> . . . .
>
> B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and
>
> C. the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted.

Section 52-1-28 provides the following:

> A. Claims for workmen's compensation shall be allowed only:
>
> (1) when the workman has sustained an accidental injury arising out of, and in the course of, his employment;
>
> (2) when the accident was reasonably incident to his employment; and
>
> (3) when the disability is a natural and direct result of the accident.
>
> B. In all cases where the defendants deny that an alleged disability is a natural and direct result of the accident, the workman must establish that causal connection as a medical probability by expert medical testimony. No award of compensation shall be based on speculation or on expert testimony that as a medical possibility the causal connection exists.

44. Williams v. City of Gallup, 77 N.M. 286, 288, 421 P.2d 804, 806 (1966).

45. Thigpen v. County of Valencia, 89 N.M. 299, 551 P.2d 989 (Ct. App.), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976); Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964).

46. 97 N.M. 577, 633 P.2d 685 (1981).

47. *See* 1A A. Larson, Workmen's Compensation Law §§ 21.00, 21.74 (1979). The personal comfort doctrine is described in § 21.00:

> Employees who, within the time and space limits of their employment, engage

compensable. The court stated that "where the employee is required to remain in a particular place with no duties to perform, compensation may be awarded for an injury suffered in any reasonable recreational activity that the employee engaged in with the permission of his employer while waiting."[48]

In *Losinski v. Corcoran, Barkoff & Stagnone,*[49] the plaintiff appealed the trial court's denial of workmen's compensation and asked the court of appeals to extend the personal comfort doctrine. In this case, employee Losinski experienced nausea during working hours and attempted to induce vomiting by sticking a pen down her throat. She swallowed the pen, and the resulting injury required surgery. An employee must sustain an injury "arising out of" the employment before the court can consider the personal comfort doctrine. The court of appeals ruled that the injury suffered by the claimant was not a risk incident to her employment, and therefore did not "arise out of" her employment.[50] The court concluded that the plaintiff could not invoke the personal comfort doctrine and its decision sets a sensible limitation on this doctrine.

Martinez v. Stoller[51] is an example of the careful scrutiny the courts indulge in when analyzing the course and scope of employment. The trial court had granted summary judgment for the employer, holding that an employee who was off-duty and on the employer's premises only to pick up her paycheck did not suffer a compensable injury when she slipped and fell on the premises. The court of appeals held that if the employer required or established a custom that an employee must receive a paycheck at the premises on an offday, and the employee is injured while on the premises for that purpose, the court will consider the injury to be "in the course of employment."[52] In *Martinez,* the fall occurred after the plaintiff had picked up her check and had taken three steps away from the counter.

> in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

The "lull in work" component of the personal comfort doctrine is described in § 21.74. This section provides in part:

> A workman who is idle for lack of immediate work does not deviate from his employment by utilizing the idle interval for rest or sleep. He cannot be expected, in view of what we know of human nature, to remain at attention like a soldier, and, on the whole, it probably is for the employer's benefit to have him refresh himself by resting when he can do so without interfering with his active work.

48. 96 N.M. at 578, 633 P.2d at 686.

49. 97 N.M. 79, 636 P.2d 898 (Ct. App.), *cert. denied,* 97 N.M. 483, 641 P.2d 514 (1981).

50. 97 N.M. at 80, 636 P.2d at 899.

51. 96 N.M. 571, 632 P.2d 1209 (Ct. App. 1981).

52. *Id.* at 572, 632 P.2d at 1210. *See* 1A A. Larson, Workmen's Compensation Law § 26.30 (1979).

The court of appeals determined as a matter of law that she would have been in the course of employment while going to pick up the check, but remanded the matter to the trial court to determine whether she was still in the "course of her employment" after picking up the check.

In *Adamcheck v. Gemm Enterprises, Inc.*,[53] an officer of the employer corporation accidentally shot the employee cook while the cook was on duty. The supreme court held that the shooting was not a risk incident to the employment.[54] Therefore, workmen's compensation was not an exclusive remedy, and the plaintiff could pursue his common law remedies against the employer.

In *Salazar v. City of Santa Fe*,[55] the court of appeals reversed a summary judgment for the employer city. Salazar was a city maintenance employee who drove a city truck home because he was on call at all hours. On the day in question, he stopped at a bar after work and stayed for approximately two hours. After leaving the bar, Salazar continued on the normal route home and was killed in an automobile accident. The central issue was whether his trip to the bar constituted a major deviation, thereby precluding coverage under the Workmen's Compensation Act.[56] The court of appeals determined as a matter of law that the trip to the bar did not constitute a major deviation and that because the employee had returned to the normal route he followed to go home, he was once again in the scope of his employment. The supreme court reversed the court of appeals[57] and held that although the granting of summary judgment by the trial court was improper, it was also improper for the court of appeals to determine as a matter of law that the decedent was in the course of his employment.[58] The court therefore remanded the matter for trial on that issue.

In *Gonzales v. New Mexico State Highway Department*,[59] the court of appeals affirmed, although reluctantly, the trial court's dismissal of a claim for compensation by an employee of the State Highway Department who slipped and fell on ice in the state highway parking lot on her way to work. The court felt constrained by N.M. Stat. Ann. § 52-1-19 (1978), which specifically states that an injury does not arise out of or in the course of employment if the employee is injured "while on his way to

53. 96 N.M. 24, 627 P.2d 866 (1981). For further discussion of this case, see Otten and McBride, *Torts, ante* at 473.

54. 96 N.M. at 27, 627 P.2d at 869.

55. 20 N.M. St. B. Bull. 1265 (Ct. App. Aug. 6, 1981), *rev'd* and *reprinted in* City of Santa Fe v. Hernandez, 97 N.M. 765, 766, 643 P.2d 851, 852 (1982) (Sosa, J., dissenting).

56. See 1A A. Larson, Workmen's Compensation Law §§ 19.00, 19.63 (1978), for a discussion of deviations from employment.

57. City of Santa Fe v. Hernandez, 97 N.M. 765, 643 P.2d 851 (1982).

58. *Id.* at 766, 643 P.2d at 852.

59. 97 N.M. 98, 637 P.2d 48 (Ct. App.), *cert. denied*, 97 N.M. 621, 642 P.2d 607 (1981).

assume the duties of his employment or after leaving such duties." The court of appeals pointed out that allowing compensation to an employee who is hurt while on a coffee or lunch break, or to an off-duty employee who was generally on call, is not consistent with denying compensation in the fact situation before the court.[60] The court, however, followed the established precedent[61] "[u]ntil the issue is reconsidered and overturned by the Supreme Court. . . ."[62]

OTHER SIGNIFICANT DECISIONS

Casillas v. S.W.I.G.[63] is a significant decision in the workmen's compensation field. In *Casillas,* the plaintiff claimed that the Workmen's Compensation Act of New Mexico was unconstitutional. He argued that the statutory scheme violated his rights to due process because it did not provide sufficient compensation. His argument was based on the fact that his benefits were less than the minimum wage in effect at the time of his injury. The court of appeals analyzed the New Mexico Workmen's Compensation Act in light of the requirements of substantive due process. The court concluded that the amount of the disability benefit did not violate due process either on the face of the statute or as applied to the plaintiff because the "amount paid for disability does have a reasonable relation to the economic purpose of our statute. . . ."[64]

The *Casillas* court also held that N.M. Stat. Ann. § 52-1-10(B) (1978),[65] did not entitle the plaintiff to a ten percent increase in his compensation payments. That statute allows for additional compensation when the employer has failed to provide a reasonable safety device. The plaintiff's theory was that the Occupational Health and Safety Act[66] required the safety device. That Act states in pertinent part that "[n]othing in . . . [OSHA] shall be construed or held to supersede or in any manner effect

60. 97 N.M. at 99, 637 P.2d at 49.

61. In Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973), the New Mexico Supreme Court held that the court of appeals was to be governed by precedent of the New Mexico Supreme Court.

62. 97 N.M. at 99, 637 P.2d at 49.

63. 96 N.M. 84, 628 P.2d 329 (Ct. App. 1981).

64. *Id.* at 87, 628 P.2d at 332.

65. N.M. Stat. Ann. § 52-1-10(B) (1978), provides:

> B. In case an injury to or death of a workman results from the failure of an employer to provide safety devices required by law, or in any industry in which safety devices are not prescribed by statute, if an injury to, or death of, a workman results from the negligence of the employer in failing to supply reasonable safety devices in general use for the use or protection of the workmen, then the compensation otherwise payable under the Workmen's Compensation Act shall be increased ten percent.

66. N.M. Stat. Ann. §§ 50-9-1 to -25 (1978 & Cum. Supp. 1982).

the Workmen's Compensation Act. . . ."[67] The court held that because the plaintiff did not submit any other evidence on whether the safety devices were required, the trial court was correct in dismissing the safety device claim.[68]

In *Wilson v. Richardson Ford Sales, Inc.*,[69] the supreme court finally decided the effect of an employer's voluntary payment of workmen's compensation benefits on the issue of liability. In *Perea v. Gorby*,[70] the court of appeals had held that admissions by the defendants that they voluntarily paid the plaintiff's workmen's compensation benefits for eight consecutive months constituted an admission that the disability was the direct and natural result of the accident. This decision relieved the plaintiff of the burden of establishing as a medical probability, and by expert medical testimony, a causal connection between the disability and the accident.[71] In *Romero v. S. S. Kresge Co.*,[72] the court of appeals had held that *Perea* was not binding because two members of the court of appeals panel only concurred in the result. The two concurring judges in *Perea* had stated that voluntary payment of compensation benefits was merely competent evidence as to any issue in a workmen's compensation suit and did not create any presumption or shift in the burden of proof.[73]

In *Medrano v. Ray Willis Construction Co.*,[74] the court of appeals refused to find that *Romero* had resolved the issue. Although the court acknowledged that payment of compensation is merely "competent evidence," the court argued that because competent evidence is sufficient to allow a workman to sustain his burden, the showing of payment of compensation provided the "competent evidence that proved every relevant fact necessary under §52-1-28. . . ."[75] Further, the court noted that section 52-1-28(B) states the following: *"In all cases where the defendants denied that an alleged disablity is a natural and direct result of the accident,* the workman must establish that causal connection as a

67. N.M. Stat. Ann. §50-9-21(A) (1978). This section reads as follows:
A. Nothing in the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] shall be construed or held to supersede or in any manner affect the Workmen's Compensation Act [52-1-1 to 52-1-69 NMSA 1978], the New Mexico Occupational Disease Disablement Law [52-3-1 to 52-3-54 NMSA 1978], or to enlarge or diminish or affect in any other manner the common-law or statutory rights, duties or liabilities of employers and employees under the laws of this state with respect to injuries, occupational or other diseases or death of employees arising out of or in the course of employment.

68. 96 N.M. at 87, 628 P.2d at 332.

69. 97 N.M. 226, 638 P.2d 1071 (1981).

70. 94 N.M. 325, 610 P.2d 212 (Ct. App. 1980).

71. *See* N.M. Stat. Ann. §52-1-28(B) (1978). *See supra* note 43 for the text of the statute.

72. 95 N.M. 484, 623 P.2d 998 (Ct. App. 1981).

73. *Id.* at 486, 623 P.2d at 1000.

74. 96 N.M. 643, 633 P.2d 1241 (Ct. App. 1981).

75. *Id.* at 646, 623 P.2d at 1244.

medical probability by expert testimony."[76] Therefore, the *Medrano* court held that the employer must alert the claimant of his denial by either an affirmative defense or some other pleading.

In *Wilson v. Richardson Ford Sales, Inc.*,[77] the supreme court affirmed the court of appeals' determination in *Medrano* that voluntary payment of workmen's compensation does not create a presumption that the employer is liable. The supreme court stated the following: "Voluntary payment is only one factor to be considered with other evidence. To impose the presumption would not only be contrary to the remedial nature of workmen's compensation but would also discourage prompt payment of benefits which might be essential for the worker's survival."[78]

The date of accidental injury is usually the same as the date on which the calculation to determine the rate of compensation is based. In *Purcella v. Navaho Freight Lines, Inc.*,[79] the court modified this method. In *Purcella*, the defendant had admitted that the plaintiff was disabled and that it had wrongfully terminated payments. The *Purcella* court held that where an employer voluntarily pays compensation benefits and then wrongfully terminates them, causing the workman to seek relief in the court, the court will set the rate of compensation as of the date the court determines disability, not the date of the accidental injury. Because the rate of compensation is based on the average weekly wage of employees, and this wage increases over a period of time, basing the compensation on the later date of determination of disability results in increased benefits to the employee and increased costs to the employer.

In *Sing v. Duval Corp.*,[80] the trial court imposed the *Purcella* rule and the defendant appealed. The court of appeals reversed, noting that the trial court did not make any findings that the defendant had admitted either disability or fault in terminating compensation benefits. The court ruled that *Purcella* requires the payment of workmen's compensation to be wrongfully terminated as a condition precedent for the application of the *Purcella* rule.[81] To apply the *Purcella* rule where the right to compensation was in dispute would result in the absurd situation that every time an employer terminated a workmen's compensation payment, the court would deem that the employer acted wrongfully and the rate of compensation would escalate. The court also noted that in order for a trial court to obtain jurisdiction of a workmen's compensation case, there must be a termination of workmen's compensation. Therefore, if the

76. *Id.* (quoting N.M. Stat. Ann. § 52-1-28(B) (1978)) (emphasis by the court).
77. 97 N.M. 226, 638 P.2d 1071 (1981).
78. 97 N.M. at 228, 638 P.2d at 1073.
79. 95 N.M. 306, 621 P.2d 523 (Ct. App. 1980).
80. 97 N.M. 84, 636 P.2d 903 (Ct. App. 1981).
81. *Id.* at 86, 621 P.2d at 905.

Purcella rule were applied anytime employers terminated benefits, it would mean that "in every compensation case filed in the district court, the rate of compensation would automatically change to the date of judicial determination from the date of disability."[82]

During the Survey year, two cases held that the fact that an employee earned more after an injury than before did not preclude a finding of disability. In both cases, there was evidence of the claimants' inability to perform work. In the first case, *Smith v. Trailways Bus System*,[83] the court of appeals held that a bus driver who made more money after the accident was entitled to twenty-five percent partial permanent disability. The court observed that because of his injury, the employee was required to work on a shorter route and that his increased pay was due to a general wage increase.

In the second case, *Perez v. International Minerals and Chemical Corp.*,[84] the plantiff miner returned to the same duties he had before his accident. He was unable, however, to work a second shift, called a "double over shift," because of pain caused by the injury. Although the employer did not require the double over shift (and there was no evidence relating the double shift to the employee's work at the mine), the court assumed that the defendant ordered the plaintiff to do the double over shift whenever the defendant's production demanded it. The court of appeals held that the plaintiff's inability to work the double over shift was a disability because it affected his capacity to work.[85]

In *Montoya v. Anaconda Co.*,[86] the court of appeals clarified those situations in which an employer can properly refuse to pay medical expenses incurred by an employee otherwise entitled to compensation. By statute, the employer must furnish all reasonable medical services.[87] A qualifying section of the relevant statute provides the following:

> In case the employer has made provision for, and has at the service of the workmen at the time of the accident, adequate surgical, hospital and medical facilities and attention and offers to furnish these services during the period necessary, then the employer shall be under no

82. *Id.*
83. 96 N.M. 79, 628 P.2d 324 (Ct. App. 1981).
84. 95 N.M. 628, 624 P.2d 1025 (Ct. App. 1981).
85. *Id.* at 634, 624 P.2d at 1031. Compensation is based on disability and disability is based on one's ability to perform work. *See* Cardenas v. United Nuclear Homestake Partners, 97 N.M. 46, 636 P.2d 317 (Ct. App. 1981). Because the plaintiff could not perform the work required by the second shift, he was "disabled" and could be compensated. *See* N.M. Stat. Ann. §§ 52-1-24 -25 (1978).
86. 97 N.M. 1, 635 P.2d 1323 (Ct. App. 1981).
87. N.M. Stat. Ann. § 52-1-49(A) (1978).

> obligation to furnish additional surgical, medical or hospital services or medicine than those so provided. . . .[88]

The court of appeals noted that there are exceptions which would require the employer to pay for medical services not specifically provided by him. These exceptions include emergency situations in which medical services are not otherwise available and situations in which the medical services provided by the employer are not adequate. In these cases, the employee is entitled to seek his own medical services without prior express demand made on the employer. The employee is also entitled to reimbursement where the employer has indicated a willingness to furnish medical treatment but fails to do so. The court acknowledged that the employer must pay for medical services if the employee has initially and justifiably engaged a doctor on his own in spite of belated attempts by the employer to provide a doctor.[89] The employer also must pay when it has expressly or impliedly authorized the employer to incur such medical expense.

In the *Montoya* case, the court of appeals held that the employer was not liable for the employee's medical expenses. The plaintiff had accepted medical treatment furnished by the employer, but a doctor of his own choice also simultaneously treated him. The court of appeals held that substantial evidence supported the trial court's determination that the medical services provided by the employer were adequate.[90]

In *Continental Casualty Co. v. Wueschinski*,[91] the court of appeals held that the employer's insurer may join the injured employee as an involuntary plaintiff in its action against a negligent third party. There is only one cause of action, which is in the employee. Without the employee's presence, the employers' insurer could not bring the reimbursement suit.

Two cases discussed the propriety of a lump-sum settlement. In the first case, *Spidle v. Kerr-McGee Nuclear Corp.*,[92] the supreme court reversed the court of appeals and upheld the trial court's determination that a lump-sum award was in the best interest of the claimant. The supreme court acknowledged that periodic payments are the general rule and that lump-sum awards are the exception; it also noted that the burden is on the claimant to show that it would be in his best interest to receive a lump-sum award.[93] The claimant satisfies this burden if he shows that

88. *Id.* § 52-1-49(B).

89. The court cited 2 A. Larson, Workmen's Compensation Law § 61.12(b), at 10-683 (1981).

90. 97 N.M. at 6, 635 P.2d at 1328. See also Tafoya v. S & S Plumbing Co., 97 N.M. 249, 638 P.2d 1094 (Ct. App. 1981), *cert. denied*, 98 N.M. 50, 644 P.2d 1039 (1982), in which the court of appeals held that there was substantial evidence to uphold the trial court's determination that the defendant employer had provided adequate medical treatment.

91. 95 N.M. 733, 625 P.2d 1250 (Ct. App. 1981).

92. 96 N.M. 290, 629 P.2d 1219 (1981).

93. *Id.* at 291, 629 P.2d at 1220.

the lack of a lump-sum award would create a manifest hardship on him and that relief is essential to either protect him and his family from want and privation, or to facilitate the production of income, or to help in a rehabilitation program.[94] In affirming the lump-sum award, the supreme court relied on language from previous cases: "[E]ach case stands or falls on its own merits. As each request for a lump-sum payment is unique, a precise enumeration of what factual ingredients constitute special circumstances is impossible."[95] In *Spidle,* the claimant was a widow who argued that the crowded living conditions and lack of privacy in the family home were sufficient special circumstances to grant her a lump-sum award in order to purchase or build a larger home for herself, her four children, and her grandchildren. The trial court found that the widow and her husband had made plans for this new home prior to his death, and held that there were sufficient special circumstances to allow the lump-sum award. The supreme court agreed and held that the trial court did not abuse its discretion.

In *Padilla v. Frito Lay, Inc.,*[96] the court of appeals, perhaps reacting to the *Spidle* decision, affirmed the trial court's determination that a lump-sum award was proper to allow a blind claimant to buy a laundromat.

In *Bottijliso v. Hutchinson Fruit Co.,*[97] the court of appeals held that in New Mexico there is no cause of action in tort against a prior employer for discharging an employee due to the exercise of his rights under the New Mexico Workmen's Compensation Act. The court recognized that in New Mexico "our courts have long adhered to the rule that an employee is terminable by an employer at will."[98] The court acknowledged that under the proper fact situation a breach of contract claim would be proper, but there was no basis for a tort claim except in certain limited situations. For instance, if the employer discharged the employee because the employee exercised a constitutionally protected right, a cause of action under 42 U.S.C. § 1983[99] might be appropriate.[100] The court of appeals refused to create a new cause of action, stating that that was a matter that the legislature could best evaluate.

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94. *Id; see also* N.M. Stat. Ann. § 52-1-30(B) (1978).

95. 96 N.M. at 292, 629 P.2d at 1221 (quoting Codling v. Aztec Well Servicing Co., 89 N.M. 213, 216, 549 P.2d 628, 631 (Ct. App. 1976)).

96. 97 N.M. 354, 639 P.2d 1208 (Ct. App. 1981), *cert. denied,* 98 N.M. 50, 644 P.2d 1039 (1982).

97. 96 N.M. 789, 635 P.2d 992 (Ct. App.), *cert. denied,* 97 N.M. 483, 641 P.2d 514 (1981). For further discussion of this case, see Isbell-Sirotkin, *Defending the Abusively Discharged Employee: In Search of a Judicial Solution,* 12 N.M.L. Rev. 711 (1982).

98. 96 N.M. at 791, 635 P.2d at 994.

99. 42 U.S.C. § 1983 (Supp. IV 1980).

100. 96 N.M. at 794, 635 P.2d at 995.