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WORKERS' COMPENSATION LAW

I. INTRODUCTION

During the survey period, September 1, 1987, through August 31, 1989, three workers' compensation acts governed workers' compensation cases.¹ This survey will discuss the three acts and appellate court interpretations of those acts. The survey covers scope of coverage, requirements for compensation, appellate review, attorney fees, the Subsequent Injury Act and the Occupational Disease Disablement Law.

II. SCOPE OF COVERAGE

New Mexico's Workers' Compensation Act (the Act) requires most businesses which employ three or more workers to provide workers' compensation insurance or be subject to civil liability.² Employers of private domestic servants and farm and ranch laborers are expressly excepted.³ One case decided during the survey period addressed an issue of first impression: under what circumstances may an employer terminate coverage which is strictly voluntary.

In *Castillo v. Weatherly*,⁴ plaintiff was injured when he fell from a haystack while working at a dairy.⁵ Prior to the accident, the employer had elected coverage under the Act, purchased insurance, and notified his employees that they were covered.⁶ A dairy, however, does not have to participate as an insured employer.⁷ Later, the employer allowed his compensation coverage to expire but gave no written notice to his employees.⁸ The employer, however, alleged that verbal notice was given.⁹

The court of appeals held that an employer who elects to purchase workers' compensation coverage and then allows that coverage to lapse

1. N.M. STAT. ANN. §§ 52-1-1 to -6-25 (Repl. Pamp. 1987 and Cum. Supp. 1989); Act approved Feb. 21, 1986, ch. 22, 1986 N.M. Laws 525-629 (effective dates July 1, 1986 [§§ 1, 26-30, and 76] and Dec. 1, 1986 [§§ 2, 8-12, 14, 19-25, 31-45, 47-52, 54-74, and 77])(Interim Act); Act approved March 13, 1959, ch. 67, 1959 N.M. Laws 196-22 (effective date July 1, 1959).

2. N.M. STAT. ANN. §§ 52-1-2 and -6 (Repl. Pamp. 1987 and Cum. Supp. 1989). The state, each county, municipality, school district, drainage, irrigation or conservatory district, public institution and administrative board thereof, charitable organization, private person, and firm must cover workers. *Id.* § 55-1-2.

3. N.M. STAT. ANN. § 52-1-6(A) (Repl. Pamp. 1987 and Cum. Supp. 1989). These employers, as well as others, may elect coverage under the Act. *Id.* § 52-1-6(B).

4. 107 N.M. 135, 753 P.2d 1323 (Ct. App. 1988).

5. *Id.* at 136, 753 P.2d at 1324.

6. *Id.* at 137, 753 P.2d at 1325.

7. N.M. STAT. ANN. § 52-1-6(A) (Repl. Pamp. 1987); *Varela v. Mounho*, 92 N.M. 147, 584 P.2d 194 (Ct. App.), *cert. denied*, 92 N.M. 180, 585 P.2d 324 (1978).

8. *Castillo*, 107 N.M. at 137, 753 P.2d at 1325. The employer had elected to be covered by the Act by a filing which certified coverage until May 12, 1985. *Id.* The plaintiff was injured on January 6, 1985. A second alleged incident occurred on March 14, 1985. *Id.* at 136, 753 P.2d at 1324. At some time after June 14, 1984, the employer permitted the insurance policy to lapse. *Id.* at 137, 753 P.2d at 1325.

9. *Id.*

must give thirty days prior written notice that the coverage has been terminated to all employees and the superintendent of insurance.¹⁰ Under the Act, any agreement between an employer and an employee to be bound by the Act may be terminated with thirty days written notice prior to any accidental injury.¹¹ The court, therefore, held that mere lapse of the insurance policy and oral notice of termination are insufficient to terminate the employer's elective coverage.¹²

III. REQUIREMENTS FOR COMPENSATION

A. *Exclusive Remedy*

A statutory workers' compensation scheme generally provides a worker his exclusive means of recovery for an on-the-job injury.¹³ The exclusive remedy provision prohibits an injured worker from bringing a claim for work-related personal injury or death against a fellow worker, the employer, or the employer's workers' compensation carrier.¹⁴ Prior to 1988, New Mexico allowed an injured worker to recover only under the Act.¹⁵

The courts decided six exclusive remedy cases during the survey period.¹⁶

10. *Id.* (citing N.M. STAT. ANN. §§ 52-1-6(B), -13 (Repl. Pamp. 1987)).

11. N.M. STAT. ANN. § 52-1-13 (Repl. Pamp. 1987).

12. *Castillo*, 107 N.M. at 137, 753 P.2d at 1325.

13. See 2A A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 65.00 to 65.60 (1978).

14. N.M. STAT. ANN. § 52-1-6(D) (Repl. Pamp. 1987 & Cum. Supp. 1989) provides:

Such compliance with the provisions of the Workers' Compensation Act, including the provisions for insurance, shall be, and construed to be, a surrender by the employer and the employee to any other method, form or amount of compensation or determination thereof or to any cause of action at law, suit in equity or statutory or common-law right to remedy or proceeding whatever for or on account of such personal injuries or death of such employee than as provided in the Workers' Compensation Act and shall be an acceptance of all the provisions of the Workers' Compensation Act and shall bind the employee himself and, for compensation for his death, shall bind his personal representative, his surviving spouse and next of kin, as well as the employer and those conducting his business during bankruptcy or insolvency. Nothing in the Workers' Compensation Act, however, shall affect, in any way, the existence of any claim or cause of action which the worker has against any person other than his employer or another employee of his employer, including a management or supervisory employee, or the insurer, guarantor or surety of his employer.

15. See *Gonzales v. United States Fidelity and Guar. Co.*, 99 N.M. 432, 659 P.2d 318 (Ct. App. 1983) (a worker had no independent cause of action against an insurer who allegedly acted in bad faith by coercing the worker to accept a disfavorable compensation settlement); *Dickson v. Mountain States Mut. Casualty Co.*, 98 N.M. 479, 650 P.2d 1 (1982) (denied recovery against a compensation carrier for bad faith refusal to pay an employee's medical expenses); *Mountain States Tel. & Tel. Co. v. Montoya*, 91 N.M. 788, 581 P.2d 1283 (1978) (a worker struck in the head with a night stick by a security guard had no tort claim against his employer for negligently hiring the guard). These cases were decided prior to the enactment of N.M. STAT. ANN. § 59A-16-30 (Repl. Pamp. 1988) which explicitly grants a private right of action for bad faith.

16. *Russell v. Protective Ins. Co.*, 107 N.M. 9, 751 P.2d 693 (1988); *Shores v. Charter Services, Inc.*, 106 N.M. 569, 746 P.2d 1101 (1987); *Montney v. State ex rel. State Highway Dep't*, 108 N.M. 326, 772 P.2d 360 (Ct. App.), *cert. denied*, 108 N.M. 197, 769 P.2d 731 (1989); *Garcia v. Smith Pipe & Steel Co.*, 107 N.M. 808, 765 P.2d 1176 (Ct. App.), *cert. denied*, 107 N.M. 673, 763 P.2d 689 (1988); *Salswedel v. Enerpharm, Ltd.*, 107 N.M. 728, 764 P.2d 499 (Ct. App. 1988); *Redhouse v. Public Serv. Co.*, 107 N.M. 389, 758 P.2d 803 (Ct. App. 1988).

In *Russell v. Protective Insurance Co.*,¹⁷ the employee, Richard Russell, filed a complaint stating that Protective Insurance Co. (Protective) refused "to attempt in good faith to effectuate a prompt, fair, and equitable settlement of his workers' compensation claim."¹⁸ Protective filed a motion to dismiss, asserting that the exclusivity provision of the Workers' Compensation Act precluded Russell's claim.¹⁹ The trial court denied Protective's motion but granted leave to file an interlocutory appeal.²⁰ The court of appeals reversed the trial court and dismissed Russell's bad faith claim, holding that the exclusivity provisions of the Act precluded an injured worker from suing an insurer for its bad faith refusal to settle a workers' compensation claim.²¹

The supreme court addressed two issues. First, the court addressed whether the Trade Practices and Frauds article (Article 16) of the Insurance Code²² created a private right of action for an insured against an insurer who refuses in bad faith to pay compensation benefits.²³ Second, the court considered whether a worker may be an insured under Article 16.²⁴

The supreme court ruled in Russell's favor on both issues. In finding a private right of action, the court specifically addressed the interrelationship between Article 16 and the interim Workers' Compensation Act. The court held that when the legislature enacted Article 16 it intended to broaden the Workers' Compensation Act so as to create a private right of action for an insured against an insurer who refuses, in bad faith, to pay compensation benefits.²⁵ However, that private right of action only arises from an intentional, willful refusal to pay benefits, not from a negligent or dilatory refusal to pay. The Workers' Compensation Act itself provides a remedy for a negligent or dilatory refusal to pay.²⁶

The court held that an employee was a third-party beneficiary to his employer's workers' compensation insurance contract thereby rejecting

17. 107 N.M. 9, 751 P.2d 693. In *Russell*, the supreme court reconsidered and withdrew an earlier opinion on the same case. *Id.* at 10, 751 P.2d at 694. Although *Russell* was decided under the Interim Act, its holdings should remain in force. A complete discussion of *Russell* and its impact will appear in the next issue of the New Mexico Law Review.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 11, 751 P.2d at 695.

22. N.M. STAT. ANN. §§ 59A-16-1 to -30 (Repl. Pamph. 1988). Section 59A-16-30 provides a private right of action to "[a]ny person covered by [Article 16] who has suffered damages as a result of a violation of Article 16 of the Insurance Code by an insurer or agent." The relief "is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state." *Id.* § 59A-16-30.

23. *Russell*, 107 N.M. at 10, 751 P.2d at 694.

24. *Id.* at 12, 751 P.2d at 696. Section 59A-16-20(E) specifies an insured is covered under the article for violation of unfair claims practices. Specifically, the section provides that prohibited practices by insurers include "not attempting in good faith to effectuate prompt, fair and equitable settlements of an insured's claims in which liability has become reasonably clear." (Emphasis added.)

25. *Russell*, 107 N.M. at 11, 751 P.2d at 695.

26. *Id.* at 12, 751 P.2d at 696.

Protective's contention that only an employer is a named insured for purposes of Article 16.²⁷ The court first noted that a section of Article 16 equates a "claimant" with an "insured."²⁸ Accordingly, the supreme court reasoned that the legislature intended to expand the protection of Article 16 beyond those parties who have signed the insurance contract.²⁹ Second, the court stated that courts have expanded contract law beyond the traditional, strict limitations of privity of contract.³⁰ Third, the terms of the contract did not limit Russell's status as a third-party beneficiary since "the paramount indicator of third party beneficiary status is a showing that the parties to the contract intended to benefit the third party, either individually or as a member of a class of beneficiaries."³¹

In *Montney v. State ex rel. State Highway Department*,³² the court of appeals considered whether a state employee may be entitled to both workers' compensation benefits and benefits under the State Public Employees Retirement Act (PERA).³³ Montney was working as a mechanic and equipment operator for the State Highway Department when he jumped from a dump truck and severely injured his left knee.³⁴ The district court awarded Montney compensation benefits of \$208.60 per week for 600 weeks but gave the State Highway Department a credit of \$450.07 per month for each month Montney would receive PERA disability retirement benefits.³⁵

Citing the absence of a specific statutory provision, the court of appeals disallowed an offset in workers' compensation benefits for PERA benefits the worker received.³⁶ In so ruling, the court of appeals distinguished *Montney* from *Carter v. Mountain Bell*.³⁷ In *Carter*, the court allowed an offset against the employer's private benefits plan for those benefits obtained under workers' compensation insurance, even though the Workers' Compensation Act did not expressly allow the setoff.³⁸ In *Carter*, the language of the private benefit plan itself provided for

27. *Id.* at 13, 751 P.2d at 697.

28. *Id.* The court used as an example section 59A-16-20(J) which includes as an unfair trade practice "making known to insured or *claimants* a practice of insurer of appealing from arbitration awards in favor of insured or *claimants* for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration." (Emphasis added.)

29. *Id.*

30. *Id.*

31. *Id.* (quoting *Valdez v. Cillessen & Son*, 105 N.M. 575, 581, 734 P.2d 1258, 1264 (1987)).

32. 108 N.M. 326, 772 P.2d 360 (Ct. App.), *cert. denied*, 108 N.M. 197, 769 P.2d 731 (1989).

33. N.M. STAT. ANN. §§ 10-11-1 to -140 (Repl. Pamph. 1987).

34. *Montney*, 108 N.M. at 327, 772 P.2d at 361.

35. *Id.* at 328, 772 P.2d at 362.

36. *Id.* at 328-29, 772 P.2d at 362-63.

37. 105 N.M. 17, 727 P.2d 956 (Ct. App. 1986). Plaintiff Geraldine Carter worked for Mountain Bell which carried its own "Sickness and Accident Disability Benefit Plan." The plan provided that an employee could not receive both sickness and accident benefits at the same time. The plan also provided that any workers' compensation benefits would be deducted from those benefits provided by the plan. The trial court allowed Mountain Bell to deduct the amount of Carter's workers' compensation benefits from the benefits owed her under the "Sickness and Accident Disability Benefit Plan." *Id.* at 19, 727 P.2d at 958.

38. *Montney*, 108 N.M. at 329, 772 P.2d at 363.

a setoff.³⁹ In *Montney*, the court found no statutory requirement for an offset or some other method to avoid overlapping or double payments of benefits under both PERA and the Workers' Compensation Act.⁴⁰ The court declined to require an offset by judicial construction.⁴¹

In *Salswedel v. Enerpharm, Ltd.*,⁴² the court of appeals considered whether the "dual persona" doctrine presents another exception to the exclusive remedy provision of the Act. Salswedel worked for Nuclear Pharmacy, one of three partners comprising Enerpharm, Ltd.⁴³ While she was walking in the parking lot Nuclear rented from Enerpharm, the plaintiff slipped on layers of ice formed because of Enerpharm's alleged negligence.⁴⁴

At trial, Enerpharm pointed to the exclusivity provision of the Workers' Compensation Act⁴⁵ and claimed that Salswedel's only remedy lay in a workers' compensation claim.⁴⁶ Salswedel argued that the Workers' Compensation Act itself contemplates an exception to the exclusivity provision.⁴⁷ Salswedel maintained she had a negligence action against Enerpharm because Enerpharm was a "person other than [her] employer."⁴⁸ The trial court granted summary judgment against Salswedel because it believed the employer, Nuclear Pharmacy, and the partnership, Enerpharm, were essentially the same.⁴⁹ The court of appeals reversed, remanding the case for further findings on Salswedel's relationship with Enerpharm and Enerpharm's relationship with Nuclear Pharmacy.⁵⁰

The court outlined three analyses necessary to a determination of whether Salswedel could bring a negligence action against Enerpharm.⁵¹ First, the trial court must determine whether an employment relationship existed between Salswedel and Enerpharm.⁵² If an employment relationship existed, the exclusivity provision of the Workers' Compensation

39. *Id.*

40. *Id.* at 330, 772 P.2d at 364. The court found no requirement to offset PERA benefits from workers' compensation benefits under PERA or under the Workers' Compensation Act. *Id.* Under N.M. STAT. ANN. § 52-1-65 (Repl. Pamp. 1987), benefits awarded under the workers' compensation law of other jurisdictions are to be credited to benefits the worker is entitled to under New Mexico's Act. Under N.M. STAT. ANN. § 52-1-70 (Repl. Pamp. 1987), benefits received for unemployment compensation offset benefits the worker is entitled to for total disability under New Mexico's Workers' Compensation Act.

41. *Montney*, 108 N.M. at 330, 772 P.2d at 364.

42. 107 N.M. 728, 764 P.2d 499 (Ct. App. 1988).

43. *Id.* at 729, 764 P.2d at 500.

44. *Id.*

45. The exclusive remedy provision only bars claims against a worker's employer, a fellow employee, or insurer. N.M. STAT. ANN. § 52-1-6(D) (Repl. Pamp. 1987).

46. *Salswedel*, 107 N.M. at 729, 764 P.2d at 500.

47. *Id.* at 730, 764 P.2d at 501. Salswedel pointed to the following language: "Nothing in the . . . Act, however, shall affect or be construed to affect, in any way, the existence of or the mode of trial of any claim or cause of action which the worker has against any person other than his employer." N.M. STAT. ANN. § 52-1-6(D) (Repl. Pamp. 1987).

48. *Salswedel*, 107 N.M. at 729, 764 P.2d at 500 (citing N.M. STAT. ANN. § 52-1-6(D) (Repl. Pamp. 1987)).

49. *Id.*

50. *Id.* at 733, 764 P.2d at 504.

51. *Id.* at 732-33, 764 P.2d at 503-04.

52. *Id.* at 730, 764 P.2d at 501.

Act would bar the suit.⁵³ In determining the relationship, the trial court should consider "whether Enerpharm had a right to control [Salswedel's] performance and whether there was a corresponding right in [Salswedel] to seek remuneration from Enerpharm."⁵⁴

Because a partnership is only liable for the commission of a tort by a member partner or other agent, a third inquiry is necessary.⁵⁵ The court stated that although the claim alleged a tortious act by the partnership, Salswedel "is actually asserting negligence on the part of an agent of the partnership, which may be imputed to the other partners."⁵⁶ If the negligence is attributable to Nuclear Pharmacy, the partner-employer, then the trial court must determine whether Enerpharm derives immunity under the Workers' Compensation Act from Nuclear Pharmacy.⁵⁷

Derivative immunity first depends on the immunity of Nuclear Pharmacy.⁵⁸ Nuclear Pharmacy may not be immune under the "dual persona" doctrine.⁵⁹ Under this doctrine, "an employer may become a third person, vulnerable to a tort suit by an employee, if, and only if, he possesses a second persona completely independent from and unrelated to his status as an employer."⁶⁰

Derivative immunity also depends on whether the immunity of the partner extends to the partnership.⁶¹ Immunity does not extend from the individual partner to the partnership.⁶² Immunity will not extend under the "dual persona" doctrine to a legal entity separate from the employer and without a reasonable expectation of immunity.⁶³ Immunity may extend to the partnership, however, when the partnership is the alter ego of the employer partner.⁶⁴

Other cases during the survey period upheld the traditional exclusivity of the Workers' Compensation Act as a remedy.⁶⁵

53. *Id.*

54. *Id.*

55. *Id.* at 730-31, 764 P.2d at 501-02 (citing *Gatley v. Detero*, 128 Misc. 2d 209, 489 N.Y.S.2d 684 (1985); Uniform Partnership Act, N.M. STAT. ANN. § 54-1-13 (Repl. Pamp. 1988)).

56. *Id.* at 731-32, 764 P.2d at 502-03.

57. *Id.* at 730, 764 P.2d at 501.

58. *Id.*

59. *Id.* at 731, 764 P.2d at 502.

60. *Id.* (citing *Henning v. Gen. Motors Assembly Div.*, 143 Wis. 2d 1, 419 N.W.2d 551 (1988); 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.81(a) (1988)).

61. *Id.*

62. *Id.* at 732, 764 P.2d at 503 (citing *Mathews v. Wosek*, 44 Mich. App. 706, 205 N.W.2d 813 (1973); *Eule v. Eule Motor Sales*, 34 N.J. 537, 170 A.2d 241 (1961); RESTATEMENT (SECOND) OF AGENCY § 217(b) (1958) (a principal is not entitled to rely on the immunity of its agent)).

63. *Id.*

64. *Id.*

65. *Garcia v. Smith Pipe & Steel Co.*, 107 N.M. 808, 765 P.2d 1176 (Ct. App.), *cert. denied*, 107 N.M. 673, 763 P.2d 689 (1988) (temporary help service's purchase of coverage at the expense of an employer suffices to invoke the protection of the exclusive remedy provisions of the Workers' Compensation Act); *Redhouse v. Pub. Serv. Co. of N.M.*, 107 N.M. 389, 758 P.2d 803 (Ct. App.), *cert. denied*, 107 N.M. 308, 756 P.2d 1203 (1988) (a worker is not entitled to both paid accident leave and workers' compensation benefits); *Shores v. Charter Serv., Inc.*, 106 N.M. 569, 746 P.2d 1101 (1987) (an employer's failure to comply with the Act does not allow the worker both a workers' compensation action and an action for common law remedies).

B. Accidental Injury

New Mexico's Workers' Compensation Act makes an employer liable for an employee's accidental injury.⁶⁶ An "accidental injury" need not be sudden but may arise without the usually attending factors of a narrow time frame between the beginning and completion of the injury.⁶⁷ An accidental injury is distinguishable, however, from an occupational disease.⁶⁸ Traditionally, the term "accidental injury" was liberally construed in favor of the compensation claimant.⁶⁹

One case during the survey period addressed accidental injury. In *Cisneros v. Molycorp*,⁷⁰ the employee worked at the Molycorp plant for 31 years and was exposed to frequent, continuous, excessive noise. The court of appeals held that Cisneros' gradual, noise-induced hearing loss was a compensable accidental injury.⁷¹ The court adopted a foreseeability test, allowing for recovery for accidental injuries if either the cause or effect of the injury was unexpected.⁷² In so doing, the court rejected the test of other jurisdictions requiring the worker to prove the specific time, place, and cause of his injury.⁷³

C. Arising Out Of and In Course Of Employment

For an accidental injury to be compensable, the Act requires that the claim arise out of and in the course of a worker's employment.⁷⁴ "Arising

66. N.M. STAT. ANN. § 52-1-2 (Repl. Pamp. 1987) provides:

[Every employer] shall become liable to and shall pay to any . . . worker injured by accident arising out of and in the course of his employment and, in case of his death being occasioned thereby, to such person as may be authorized by the director or appointed by a court to receive the same for the benefit of his dependents, compensation in the manner and amount at the times herein required.

67. *Aranbula v. Banner Mining Co.*, 49 N.M. 253, 257, 161 P.2d 867, 869 (1945).

68. An occupation or industry disease is one which arises from causes incident to the profession or labor of the party's occupation or calling. It has its origin in the inherent nature or mode of work of the profession or industry, and it is the usual result or concomitant. If, therefore, a disease is not a customary or natural result of the profession or industry, per se, but is the consequence of some extrinsic condition or independent agency, the disease or injury cannot be imputed to the occupation or industry, and it is in no accurate sense an occupation or industry disease.

Id. at 257, 161 P.2d at 869 (quoting *Victory Sparkler & Specialty Co. v. Francks*, 147 Md. 368, 128 A. 635 (Ct. App. 1925)).

69. *Gilbert v. E.B. Law & Son*, 60 N.M. 101, 287 P.2d 992 (1955). Under the current Act the courts may no longer liberally construe the Workers' Compensation Act. See N.M. STAT. ANN. § 52-2-1 (Cum. Supp. 1989).

70. 107 N.M. 788, 765 P.2d 761 (Ct. App.), *cert. denied*, 107 N.M. 785, 765 P.2d 758 (1988). For a discussion of this case in the context of the Occupational Disease Disablement Law, see *infra* notes 425-32 and accompanying text.

71. *Id.* at 790, 765 P.2d at 763.

72. *Id.* at 792, 765 P.2d at 765.

73. *Id.*

74. N.M. STAT. ANN. § 52-1-28(A) (Repl. Pamp. 1987) provides: "Claims for workers' compensation shall be allowed only: (1) when the worker has sustained an accidental injury arising out of and in the course of 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." N.M. STAT. ANN. § 52-1-19 (Repl. Pamp. 1987) provides:

As used in the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978],

out of" means the injury resulted from a risk reasonably incident to the claimant's work.⁷⁵ "Course of employment" means the injury occurred in the time, place and circumstances of the claimant's employment.⁷⁶ Both of these requirements must be met.⁷⁷

The courts addressed the scope of these two separate requirements in several cases during the survey period.⁷⁸ The cases concerning whether an injury meets the limitations of "arising out of" and "course of employment" indicate the results are fact dependent and vary from case to case. These cases have not changed the previous definitions of "arising out of" and "course of employment" but have augmented those definitions with situational and evidentiary refinements.

In *Kloer v. Municipality of Las Vegas*,⁷⁹ the court of appeals held that a worker's injuries from a heart attack, which occurred while the worker was playing basketball on the employer's premises during lunch break, arose out of and in the course of employment. The employer knew of and encouraged the basketball playing.⁸⁰ The court found that the death was a compensable injury since it satisfied both the "arising out of" and "course of employment" requirements.⁸¹ A recreational activity satisfies the "arising out of" requirement when the activity is "part of the working conditions of the particular place of employment, and a risk the employee is exposed to by virtue of his employment."⁸² Basketball playing was a risk of employment because it was an accepted and established feature of the workplace, acquiesced in and condoned by the employer.⁸³

The court adopted a three prong test to analyze whether an injury has occurred in the course of employment.⁸⁴ The injury must take "place

unless the context otherwise requires, "injury by accident arising out of and in the course of employment" shall include accidental injuries to workers 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 worker occurring while on his way to assume the duties of his employment or after leaving such duties, the proximate cause of which is not the employer's negligence.

75. *E.g.*, *Losinski v. Drs. Corcoran, Barkoff, & Stagnone, P.A.*, 97 N.M. 79, 80, 636 P.2d 898, 890 (Ct. App.), *cert. denied*, 97 N.M. 483, 641 P.2d 514 (1981).

76. *E.g.*, *Velkovitz v. Penasco Indep. School Dist.*, 96 N.M. 577, 633 P.2d 685 (1981).

77. *Velkovitz*, 96 N.M. 577, 633 P.2d 685; *Losinski*, 97 N.M. 79, 80-81, 636 P.2d 898, 899-900.

78. *Mortgage Inv. Co. of El Paso v. Griego*, 108 N.M. 240, 771 P.2d 173 (1989); *Oliver v. City of Albuquerque*, 106 N.M. 350, 742 P.2d 1055 (1987); *Urioste v. Sideris*, 107 N.M. 733, 764 P.2d 504 (Ct. App. 1988); *Kloer v. Municipality of Las Vegas*, 106 N.M. 594, 746 P.2d 1126 (Ct. App. 1987).

79. 106 N.M. 594, 746 P.2d 1126 (Ct. App. 1987).

80. *Id.* at 595, 746 P.2d at 1127.

81. *Id.* at 597, 746 P.2d at 1129. In *Kloer*, the court stated that the judicial approach in New Mexico is to liberally construe the Act toward expanding, rather than constricting, compensability. *Id.* at 596, 746 P.2d at 1128.

82. *Id.*

83. *Id.* City funds paid for the backboard and rim which the city installed on a city building. The city also fenced in the basketball court and kept basketballs for its employees' use during breaks. *Id.* at 595, 746 P.2d at 1127.

84. *Id.* at 597, 746 P.2d at 1129 (citing *McNamara v. Town of Hamden*, 176 Conn. 547, 398 A.2d 1161 (1979)).

within the period of employment, at a place where the employee may reasonably be, and while the employee is reasonably fulfilling the duties of employment or doing something incidental to it.''⁸⁵ Basketball playing was incidental to Klover's employment duties because of his employer's acquiescence and the regularity of the activity on the employer's premises during work hours.⁸⁶

In *Urioste v. Sideris*,⁸⁷ the court of appeals held that an insulation installer's injury, which occurred while the installer was helping plumbers to lift a bathtub, arose out of the worker's employment. The plumbers were not employed by the claimant's employer, but the plumbers asked the claimant to help them move the tub.⁸⁸ There was testimony that, on other occasions, the employer had instructed the worker to help plumbers.⁸⁹ Further, the employer's work was a rush job requiring the worker to do whatever was necessary to complete the work and he could not complete his work until the plumbers were done.⁹⁰

The court stated that if the ultimate effect of an employee's work advances his employer's interest and the employee is not specifically prohibited from assisting nonemployees, then the injury suffered while helping others is compensable.⁹¹ Because assisting the plumbers enabled the worker to finish his employer's work sooner and the worker was not prohibited from doing such, the injury arose out of the employment.⁹²

In *Mortgage Investment Co. of El Paso v. Griego*,⁹³ the supreme court held that the death of a worker who was shot in his office did not "arise out of" his employment.⁹⁴ In *Griego*, the decedent's office was not in a high crime area and no motive for his death was known.⁹⁵ There is no indication that the claimant offered any evidence establishing the death was caused by a risk incidental to or that it arose out of the employment.⁹⁶

Generally, under workers' compensation law, there is a presumption that the death arose out of the employment, where there is no evidence of cause of death and the death happened at the place of work during the period of employment.⁹⁷ Under the Rules of Evidence,⁹⁸ however,

85. *Id.*

86. *Id.* at 597, 746 P.2d at 1129.

87. 107 N.M. 733, 764 P.2d 504 (Ct. App. 1988).

88. *Id.* at 735, 764 P.2d at 506.

89. *Id.* at 736, 764 P.2d at 507.

90. *Id.*

91. *Id.*; cf. 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 27.20 (1985) (when a worker removes obstacles in furtherance of the employer's work, it should not matter that the beneficiary is a complete stranger).

92. See *Urioste*, 107 N.M. at 736, 764 P.2d at 507.

93. 108 N.M. 240, 771 P.2d 173 (1989).

94. The parties stipulated that the death occurred in the course of employment. *Id.* at 243, 771 P.2d at 176.

95. *Id.* at 242, 771 P.2d at 175.

96. *Id.*

97. *Ensley v. Grace*, 76 N.M. 691, 695, 417 P.2d 885, 887 (1966); 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 10.32 (1985).

98. SUP. CT. RULES ANN. 11-301 (Recomp. 1986) (formerly N.M. STAT. ANN. 1978, R. Evid.

a presumption does not shift the burden of persuasion.⁹⁹ Even if the presumption is not rebutted, the claimant must produce sufficient credible evidence to meet the burden of persuasion that the death arose out of the employment.¹⁰⁰ The court held that the claimant failed to meet the burden of persuasion that the death was from a risk incidental to the employment and therefore "arose out of" the employment.¹⁰¹

D. Causal Connection

In addition to the requirements that accidental injuries arise out of and in the course of employment, the disability must be a natural and direct result of the accident.¹⁰² The issue of whether there is a causal connection between a disability and the accident may arise when the employer or his insurance carrier denies that "an alleged disability is a natural and direct result of the accident."¹⁰³ Under section 52-1-28(B) of the Act, a claimant must establish through expert medical testimony that an alleged disability is the result of a work-related accident and is causally connected to the accident.¹⁰⁴

In *Oliver v. City of Albuquerque*,¹⁰⁵ the supreme court considered the relationship between causal connection and the requirement that the accident arise out of and in the course of employment. In *Oliver*, a fireman suffered a fatal heart attack in his sleep while he and his fire company were on alert, backing up another company that was called to extinguish a fire.¹⁰⁶ At the trial, the causal connection between job-induced stress and the fireman's heart attack was established by competent medical testimony.¹⁰⁷

301 (Repl. Pamp. 1983)) states:

In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

This rule is more fully discussed in the context of *Griego* in Survey, *Evidence*, 20 N.M.L. REV. 329, 339-40 (1990) (this issue).

99. *Griego*, 108 N.M. at 244, 771 P.2d at 177.

100. *Id.* at 240, 771 P.2d at 173.

101. *Id.* at 244-45, 771 P.2d at 177-78. The claimant is required to show that the injury was caused by a risk the worker was reasonably subjected to during his employment. *Id.* at 242, 771 P.2d at 175.

102. N.M. STAT. ANN. § 52-1-28(A) (Repl. Pamp. 1987). The statute also requires that the accident be "reasonably incident" to the worker's employment. *Id.*

103. N.M. STAT. ANN. § 52-1-28(B) (Repl. Pamp. 1987) provides:

In all cases where the employer or his insurance carrier deny that an alleged disability is a natural and direct result of the accident, the worker must establish that causal connection as a probability by expert testimony of a health care provider, as defined in Section 52-4-1 NMSA 1978, testifying within the area of his expertise.

The issue of whether there is a causal connection also arises when an employer alleges that a worker misrepresented his physical condition on his employment application. See *Tallman v. ABF* (Arkansas Best Freight), 108 N.M. 124, 767 P.2d 363, cert. denied, 109 N.M. 33, 781 P.2d 305 (1988), discussed *infra* at notes 325-48 and accompanying text.

104. N.M. STAT. ANN. § 52-1-28(B) (Repl. Pamp. 1987).

105. 106 N.M. 350, 742 P.2d 1055 (1987).

106. *Id.* at 351, 742 P.2d at 1056.

107. *Id.*

The court stated in dictum that when the causal connection between the death and the job-induced stress is established by competent medical testimony under section 52-1-28(B), it is then unnecessary to determine whether the death arose out of and in the course of employment under section 52-1-28(A).¹⁰⁸ The court, however, based its opinion on abundant evidence that stress, specifically related to decedent's job, induced the heart attack that caused his death.¹⁰⁹ The court also noted the un rebutted presumption that a worker's death arises out of his employment.¹¹⁰ Furthermore, the requirement that the injury arose in the course of employment was satisfied when an unexpected injury occurred while, as in this case, the worker was on duty.¹¹¹ Thus, the death of a fireman by a heart attack caused by job-induced stress while sleeping on duty was compensable under the Act.

In two other cases, *Tallman v. ABF (Arkansas Best Freight)*¹¹² and *Nunez v. Smith's Management Corp.*,¹¹³ the courts addressed additional issues concerning the causal connection between the accident and the disability. In *Tallman*, the claimant, Tallman, had a preexisting congenital back problem, first diagnosed in 1977.¹¹⁴ In September 1986, Tallman was diagnosed as having a disk protrusion which resulted from his continual lifting as a dock worker.¹¹⁵ The doctor, however, could not find a definite point in time when the spinal disk ruptured.¹¹⁶ The employer argued two points. First, the medical testimony and "medical causation" did not set a specific time for when the worker suffered a bulging disk.¹¹⁷ Second, no competent medical testimony indicated that the bulging disk, as opposed to a congenital problem, rendered the worker disabled.¹¹⁸

In answering the first issue, the court of appeals upheld the hearing officer's finding which set the date of disability at the time the doctor discovered the bulging disk from a CT scan, after which the worker could not return to work.¹¹⁹ The doctor's testimony also established as a medical probability that the injury was caused by continuous lifting

108. *Id.* The court was concerned that the court of appeals consistently first approved the medical testimony that job-related stress caused the heart attack and then questioned whether the stress was specifically job-related. *Id.* at 351-52, 742 P.2d at 1056-57. The court broadly stated that when an employer denies that a disability is a consequence of an accident, "then it is pointless to proceed backwards to a determination of the requirements" that the injuries arose out of and in the course of employment and that the accident was reasonably incident to the employment. *Id.* at 351, 742 P.2d at 1056.

109. *Id.* at 352, 742 P.2d at 1057.

110. *Id.*

111. *Id.* See *supra* notes 93-101 and accompanying text.

112. 108 N.M. 124, 767 P.2d 363 (Ct. App.), *cert. denied*, 109 N.M. 33, 781 P.2d 305 (1988).

113. 108 N.M. 186, 769 P.2d 99 (Ct. App. 1988).

114. 108 N.M. at 126, 767 P.2d at 365.

115. *Id.* at 130-31, 767 P.2d at 369-70.

116. *Id.* at 131, 767 P.2d at 370.

117. *Id.* at 130, 767 P.2d at 369.

118. *Id.* at 131, 767 P.2d at 370.

119. *Id.*

at the worker's job.¹²⁰ The court reasoned that the worker's disability from continuous lifting was similar to an injury which is gradual, progressive and not immediately obvious, so that the precise date would be uncertain.¹²¹ In such a situation, the cause and manifestation of the injury need not be simultaneous events.¹²² As such, the date of the work-related accidental injury will be the date of diagnosis or the date that the injury becomes known.¹²³

In answering the second issue, whether the bulging disk injury or the congenital problem disabled the claimant, the court reasoned that once a causal connection between the accidental injury and the disability is established, it does not matter if a preexisting injury may have contributed to the ultimate disability.¹²⁴ The underlying theory for allowing compensation for a work-related accident when the worker had a pre-existing impairment is the employer takes the employee as he finds him.¹²⁵ The court held that Tallman's preexisting impairment, separate from and aggravated by the accidental injury, did not prevent recovery.¹²⁶

In *Nunez*, the court of appeals addressed the effect of ambiguous medical testimony as support for a finding of causal connection.¹²⁷ In *Nunez*, a worker claimed he fell and struck his shoulder on a knife sharpener at his place of employment in February 1985.¹²⁸ One doctor who testified for the worker stated the worker "could have injured himself in such a fall" and the pain "probably was from an injury such as a fall."¹²⁹ Generally, when the employer denies the "causal connection," uncontradicted medical opinion based on facts is conclusive evidence.¹³⁰ The court of appeals upheld the hearing officer's finding that the worker failed to meet his burden of proving causal connection.¹³¹ The court ruled that ambiguous testimony is an exception to the uncontradicted medical testimony rule.¹³² When there is ambiguous medical testimony, the court is not bound to accept it.¹³³ Also, a factfinder is not bound by a medical expert's opinion if the factfinder did not accept

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 12.21 (1989); see also *Reynolds v. Ruidoso Racing Ass'n*, 69 N.M. 248, 365 P.2d 671 (1961).

126. *Tallman*, 108 N.M. at 131, 767 P.2d at 370; see also *Reynolds*, 69 N.M. 248, 365 P.2d 671; *Christensen v. Dysart*, 42 N.M. 107, 76 P.2d 1 (1938).

127. 108 N.M. at 188-90, 769 P.2d at 101-03.

128. *Id.* at 187, 769 P.2d at 100.

129. *Id.* at 189, 769 P.2d at 102.

130. *Id.* at 188, 769 P.2d at 101 (quoting *Ross v. Sayers Well Servicing Co.*, 76 N.M. 321, 326, 414 P.2d 679, 683 (1966)).

131. *Nunez*, 108 N.M. at 190, 769 P.2d at 103.

132. *Id.* at 189, 769 P.2d at 102 (citing *Hernandez v. Mead Foods*, 104 N.M. 67, 716 P.2d 645 (Ct. App. 1986)).

133. *Id.*

the factual basis of the opinion.¹³⁴ Furthermore, in *Nunez*, other medical testimony contradicted the proposition that the disability resulted from a February 1985 accident.¹³⁵

The cases concerning establishment of causal connection by expert medical testimony indicate that the court will liberally construe some requirements, such as date of disability,¹³⁶ but will strictly construe the requirement of establishing causal connection by medical testimony.¹³⁷ Also, the probability of causal connection cannot be supported by ambiguous medical testimony.¹³⁸

E. Safety Devices

New Mexico's Workers' Compensation Act provides for a ten percent reduction of benefits when an employee fails to use safety devices provided by his employer.¹³⁹ To invoke this defense, the device must be one generally used in the particular industry¹⁴⁰ and must be tangible and concrete.¹⁴¹ One case during the survey period raised a procedural issue concerning an award for failure to use a safety device.

Cisneros v. Molycorp,¹⁴² involved a worker whose hearing was impaired 54.96 percent due to almost thirty years of continuous exposure to noise at the Molycorp Plant.¹⁴³ Molycorp supplied hearing protection for its employees which Cisneros did not use.¹⁴⁴ Molycorp did not raise the

134. *Id.* There was testimony from several sources indicating diagnosis and treatment of the same or related disability prior to February 1985. Additionally, the "hearing officer may have decided that Nunez' version of the date [of the injury] was guided . . . by statute of limitations considerations." *Id.* at 190, 769 P.2d at 103.

135. *Id.* Other doctors described the disability as a chronic condition, possibly of arthritic origin. *Id.*

136. See *Tallman*, 108 N.M. 124, 767 P.2d 363.

137. See *Nunez*, 108 N.M. 186, 769 P.2d 99.

138. *Id.*

139. N.M. STAT. ANN. § 52-1-10(A) (Cum. Supp. 1989) states:

In case an injury to, or death of, a worker results from his failure to observe statutory regulations appertaining to the safe conduct of his employment or from his failure to use a safety device provided by his employer, then the compensation otherwise payable under the Worker's Compensation Act . . . shall be reduced ten percent.

140. *E.g.*, *Dickerson v. Farmers' Elec. Coop.*, 67 N.M. 23, 350 P.2d 1037 (1960). Farmers' Electric introduced uncontroverted evidence that rubber insulated gloves designed to withstand 15,000 volts of electricity for three minutes were generally used in the electrical industry. *Id.* at 25-26, 350 P.2d at 1039-40. However, the particular gloves supplied to the plaintiff had not been tested within 208 days of the accident, when they should have been tested within 90 days of the accident. Also, one of the gloves failed that test. *Id.* Therefore, the defendant's claim to reduce the award for failure to use safety devices failed. The question of general use within an industry must be resolved against the employer. *Id.* at 26, 350 P.2d at 1040.

141. *Montoya v. Kennecott Copper Corp.*, 61 N.M. 268, 299 P.2d 84 (1956). Montoya argued that a work practice is a safety device. Thus, the defendant's failure to store detonators and explosives in separate areas represented a failure to provide the plaintiff a safety device provided by law. *Id.* at 270, 299 P.2d at 86. The plaintiff would have been entitled to an additional 50% compensation had that argument succeeded. *Id.* at 271, 299 P.2d at 87. The argument failed, however, on the ground that a "reasonably safe place of employment" is not tangible and is therefore not a "safety device." *Id.* at 273, 299 P.2d at 89.

142. 107 N.M. 788, 765 P.2d 761 (Ct. App.), *cert. denied*, 107 N.M. 785, 765 P.2d 758 (1988).

143. *Id.* at 790, 765 P.2d at 763.

144. *Id.* at 794, 765 P.2d at 767.

issue of safety devices in the pleadings but testified about them at trial.¹⁴⁵ Cisneros did not object to the testimony and cross-examined the witness on the matter of hearing protectors.¹⁴⁶ Therefore, the court of appeals held that the issue was tried by consent and a ten percent reduction of the worker's benefits was proper despite its absence from the pleadings.¹⁴⁷

F. Disability

The Interim Workers' Compensation Act changed New Mexico's definition of disability.¹⁴⁸ The definition then returned to its original form after the Interim Act expired.¹⁴⁹ Under the 1965 amendment to the 1959 Workers' Compensation Act, a totally disabled worker was wholly unable to perform the usual tasks of his work and wholly unable to perform any work for which he was fitted.¹⁵⁰ A partially disabled worker, under the 1965 amendment, was a worker unable to a "percentage-extent" to perform his usual work or other work for which he was fitted.¹⁵¹ To determine what work a worker was fit for, the court looked at age, education, training, general physical and mental capacity, and previous work experience.¹⁵²

The Interim Act complicated the picture by defining three categories of disability: permanent total disability,¹⁵³ partial

145. *Id.* N.M. STAT. ANN. § 52-1-10(E) (Repl. Pamp. 1987) places the burden on the employer to allege the specific safety device it claims an employee failed to use before the employer may claim a reduction in compensation. The plaintiff claimed that the statute requires an employer to raise the safety device defense in its pleadings. *Cisneros*, 107 N.M. at 794, 765 P.2d at 767.

146. *Cisneros*, 107 N.M. at 794, 765 P.2d at 767.

147. *Id.* (distinguishing *Salazar v. City of Santa Fe*, 102 N.M. 172, 692 P.2d 1321 (Ct. App. 1983) and applying SUP. CT. RULES ANN. 1-015(B) (Recomp. 1986) (pleadings to be amended to conform to evidence regarding issues not raised)).

148. Act approved Feb. 21, 1986, ch. 22, 1986 N.M. Laws 525.

149. The Act approved Apr. 9, 1987, ch. 235, §§ 10-12, 1987 N.M. Laws 1261, 1267-68, repealed the sections under the Interim Act relating to permanent total disability, partial disability, and temporary total disability and amended the Act with sections on the definition of impairment, total disability, and partial disability. These amendments are codified at N.M. STAT. ANN. §§ 52-1-24 to -26 (Repl. Pamp. 1987).

150. As used in the Workmen's Compensation Act, 'total disability' means a condition whereby a workman, by reason of an injury arising out of, and in the course of, his employment, is wholly unable to perform the usual tasks in the work he was performing at the time of his injury, and is wholly unable to perform any work for which he is fitted by age, education, training, general physical and mental capacity, and previous work experience.

Act approved Apr. 2, 1965, ch. 295, § 18, 1965 N.M. Laws 945-55 (codified at N.M. STAT. ANN. § 59-10-12.18 (1953)).

151. As used in the Workmen's Compensation Act, 'partial disability' means a condition whereby a workman, by reason of injury arising out of and in the course of his employment, is unable to some percentage-extent to perform the usual tasks in the work he was performing at the time of his injury and is unable to some percentage-extent to perform any work for which he is fitted by age, education, training, general physical and mental capacity and previous work experience.

Id. § 19 at 955 (codified at N.M. STAT. ANN. § 59-10-12.19 (1953)).

152. *Id.*

153. Act approved Feb. 21, 1986, ch. 22, § 4, 1986 N.M. Laws 525, 529 (effective dates July 1, 1986 and Dec. 1, 1986) (codified at N.M. STAT. ANN. § 52-1-24 (Repl. Pamp. 1989)) defined

disability,¹⁵⁴ and temporary total disability.¹⁵⁵ All three definitions required the factfinder to determine the worker's "date of maximum medical improvement,"¹⁵⁶ a concept which did not survive the 1987 Act. Thus, the more complicated scheme of disability was short-lived; the 1987 Act returned to the traditional definitions.

The 1987 Act, in effect since June 19, 1987, eliminated the concept of temporary total disability and reinstated, with several modifications, the original definitions of total and partial disability. Two major modifications were enacted. First, loss or permanent loss of the use of both hands, both arms, both feet, both legs, both eyes, or loss of any of two of the foregoing body parts constitutes total disability.¹⁵⁷ Second, a Workers' Compensation hearing officer now has the power to determine the percentage of a worker's disability by considering the work the worker can perform or could perform if vocational rehabilitation is required.¹⁵⁸

The body of New Mexico law interpreting the 1965 statutory amendment developed a two-question test for determining total disability.¹⁵⁹ First, is the worker totally unable to perform the work he was performing at the time of the injury? Second, is the worker totally unable to perform work for which he is fitted by age, training, or experience?

"Permanent Total Disability" as:

[A] permanent physical impairment to a workman resulting by reason of an accidental injury arising out of and in the course of employment whereby a workman is wholly unable to earn comparable wages or salary. In determining whether a workman is able to earn comparable wages and salary, the hearing officer shall consider the benefits the worker is entitled to receive under Section 52-1-43 NMSA 1978. If the benefits to which the workman is entitled under Section 52-1-43 NMSA 1978 and the wage he is able to earn after the date of maximum medical improvement and vocational rehabilitation as provided in this act is comparable to the wage the worker was earning when he was injured, he shall be deemed to be able to earn comparable wages or salary. 'Physical impairment' does not include impairment of function due solely to psychological or emotional conditions, including mental stress.

154. Act approved Feb. 21, 1986, ch. 22, § 5, 1986 N.M. Laws 525, 529-30 (effective dates July 1, 1986 and Dec. 1, 1986) (codified at N.M. STAT. ANN. § 52-1-26 (Cum. Supp. 1989)) defined "Partial Disability" as:

[A] permanent physical impairment to a workman resulting from an accidental injury arising out of and in the course of employment, whereby a workman has any anatomic or functional abnormality existing after the date of maximum medical improvement as determined by a medically or scientifically demonstrable finding as presented in the American Medical Association's guide to the evaluation of permanent impairment, copyrighted 1984, 1977 or 1971, or comparable publications by the American Medical Association.

155. Act of Feb. 21, 1986, ch. 22, § 6, 1986 N.M. Laws 525, 530 (effective dates July 1, 1986 and Dec. 1, 1986) (codified at N.M. STAT. ANN. § 52-1-26 (Cum. Supp. 1989)) defined "Temporary Total Disability" as "the inability of the workman, by reason of accidental injury arising out of and in the course of his employment, to perform his duties prior to the date of his maximum medical improvement."

156. See *supra* notes 153-55 and *infra* notes 168-71 and accompanying text.

157. N.M. STAT. ANN. § 52-1-25(B) (Repl. Pamp. 1987).

158. *Id.* § 52-1-26.

159. See, e.g., *Dodrigill v. Albuquerque Utilities Corp.*, 103 N.M. 737, 713 P.2d 7 (Ct. App. 1985); *Sanchez v. Homestake Mining Co.*, 102 N.M. 473, 697 P.2d 156 (Ct. App. 1985); *Medina v. Wicked Wick Candle Co.*, 91 N.M. 522, 577 P.2d 420 (Ct. App.), *cert. denied*, 91 N.M. 249, 572 P.2d 1257 (1977).

Similarly, cases interpreting the 1965 amendment developed a two-question test for determining partial disability.¹⁶⁰ First, is the worker totally or partially unable to perform the work he was performing at the time of the injury? Second, is the worker totally or partially unable to perform work for which he is fitted by age, training, or experience?

Five cases during the survey period addressed the various definitions of disability.¹⁶¹ Two of those five cases demonstrate the shifting burden of proof requirements under the Interim Act and the present law.

*Hensler v. Clarke Oil Well Service*¹⁶² was decided under the 1965 amendment to the 1959 Workers' Compensation Act. Hensler appealed a hearing officer's finding, later upheld by the court of appeals, that he was ten percent disabled.¹⁶³ The supreme court remanded the case to the hearing officer to determine Hensler's capacity to work.¹⁶⁴ In doing so, the supreme court reiterated the doctrine that a worker bears the burden of establishing the disability and his age, education, training, and physical and mental capacity.¹⁶⁵ The burden then shifts to the employer to prove that the worker is not totally disabled by proving that the worker is employable to do some work for which he is qualified.¹⁶⁶ Even if the hearing officer finds the worker able to perform available work, that available work must satisfy any restrictions the worker's physician places on him.¹⁶⁷

In *Baca v. Bueno Foods*,¹⁶⁸ decided under the Interim Act, the court addressed the question of the worker's date of maximum medical

160. *E.g.*, *Smith v. City of Albuquerque*, 105 N.M. 125, 131, 729 P.2d 1379, 1385 (Ct. App. 1986).

161. *Hensler v. Clarke Oil Well Serv.*, 108 N.M. 51, 766 P.2d 311 (1988); *Baca v. Bueno Foods*, 108 N.M. 98, 766 P.2d 1332 (Ct. App. 1988); *Urioste v. Sideris*, 107 N.M. 733, 764 P.2d 504 (Ct. App. 1988); *Tallman v. ABF (Arkansas Best Freight)*, 108 N.M. 124, 767 P.2d 363 (Ct. App.), *cert. denied*, 109 N.M. 33, 781 P.2d 305 (1988); *Harrison v. Animas Valley Auto & Truck Repair*, 107 N.M. 373, 758 P.2d 787 (1988).

In *Urioste*, decided under the Interim Act, the court held that post-injury employment does not necessarily preclude a finding of total temporary disability. Rather, the facts of each particular case determine whether post-injury employment evidences the worker's ability to perform. *Urioste*, 107 N.M. at 737-38, 764 P.2d at 508-09.

In *Tallman*, decided under the Interim Act, the court stated that even if the accidental injury results in only five percent impairment of the worker's ability, the injury may still be termed "temporary total disability" if the worker can establish his inability to perform his duties prior to the date of maximum medical improvement. *Tallman*, 108 N.M. at 132, 767 P.2d at 371.

In *Harrison*, decided under the 1959 Act, the Supreme Court of New Mexico upheld a trial court determination that a worker who is unable to perform 80% of the work for which he is fit is 80% disabled and thus entitled to 600 weeks of benefits. *Harrison*, 107 N.M. at 374-75, 758 P.2d at 788-89.

162. 108 N.M. 51, 766 P.2d 311.

163. *Id.* at 52, 766 P.2d at 312. Hensler injured his back while descending from an oil derrick. *Id.* at 53, 766 P.2d at 313.

164. *Id.* at 52, 766 P.2d at 312.

165. *Id.* (citing *Brown v. Safeway Stores, Inc.*, 82 N.M. 424, 427, 483 P.2d 305, 308 (Ct. App. 1970)).

166. *Id.* If the worker cannot do the work he was doing before the injury and is unable to do work he is qualified to do, he is totally disabled. *Id.* at 51, 766 P.2d at 312 (citing *Quintana v. Trotz Const. Co.*, 79 N.M. 109, 112, 440 P.2d 301, 304 (1968)).

167. *Id.* at 52, 766 P.2d at 313.

168. 108 N.M. 98, 766 P.2d 1332 (Ct. App. 1988).

improvement. Baca injured her finger and back while working for Bueno Foods, and after the accident she was unable to perform her job duties.¹⁶⁹ A hearing officer granted Baca temporary total disability benefits because her injury had not yet reached maximum medical improvement.¹⁷⁰ The court of appeals reversed, finding that the worker had the burden of proving she had not reached the date of maximum medical improvement and had failed to meet her burden.¹⁷¹

While the holdings in *Hensler* and *Baca* appear contradictory with regard to burden of proof, their difference can be attributed to the fact that they were decided under the auspices of different statutory schemes. With the elimination of the "maximum medical improvement" language in the current Act and the return to definitions of disability similar to those before the Interim Act, *Hensler* and its predecessors¹⁷² should remain in force.

G. Notice

The Worker's Compensation Act requires a worker to give written notice of his injury within thirty days or within sixty days if prevented from doing so by reason of the injury itself or some other cause beyond his control.¹⁷³ However, no notice is required if the employer has actual knowledge of the injury.¹⁷⁴ Predictably, the question of whether an employer had actual knowledge of an injury has been the subject of much litigation.¹⁷⁵

Cases prior to the survey period held that a determination of actual knowledge must be based on the totality of facts and circumstances surrounding the injury.¹⁷⁶ While a verbal report of the injury may suffice, casual conversation does not meet the notice requirement.¹⁷⁷

The cases decided during the survey period addressing the notice issue failed to clearly define "actual knowledge" but did grant a liberal amount of discretion to the judge or hearing officer to determine whether an employer had actual knowledge of an injury. *Urioste v.*

169. *Id.* at 99, 766 P.2d at 1333.

170. *Id.*

171. *Id.* at 103, 706 P.2d at 1337.

172. *E.g.*, *Sanchez v. Homestake Mining Co.*, 102 N.M. 473, 697 P.2d 156 (Ct. App. 1985); *Brown v. Safeway Stores*, 82 N.M. 424, 483 P.2d 305 (Ct. App. 1970).

173. N.M. STAT. ANN. § 52-1-29(A) (Cum. Supp. 1989) states:

Any worker claiming to be entitled to compensation from any employer shall give notice in writing to his employer of the accident and of the injury within thirty days after their occurrence unless by reason of his injury or some other cause beyond his control the worker is prevented from giving notice within that time, in which case he shall give notice as soon as may reasonably be done and at all events not later than sixty days after the occurrence of the accident.

174. *Id.* § 52-1-29(B) (Repl. Pamp. 1987). For a discussion of the actual knowledge doctrine as it relates to the Subsequent Injury Act, see *infra* notes 393-96 and accompanying text.

175. *See, e.g.*, *Powers v. Riccobene Masonry Constr., Inc.*, 97 N.M. 20, 636 P.2d 291 (Ct. App. 1980).

176. *See id.*; *Rohrer v. Eidal Int'l*, 79 N.M. 711, 449 P.2d 81 (Ct. App. 1968).

177. *Loranzo v. Archer*, 71 N.M. 175, 376 P.2d 963 (1962); *Marez v. Kerr-McGee Nuclear Corp.*, 93 N.M. 9, 595 P.2d 1204 (Ct. App.), *cert. denied*, 92 N.M. 532, 591 P.2d 286 (1979).

*Sideris*¹⁷⁸ involved a worker who injured his back while moving a bathtub at a construction site.¹⁷⁹ Urioste presented corroborated evidence that he told Sideris, his employer, of the injury and how it happened and gave Sideris a doctor's note excusing him from work.¹⁸⁰ Sideris acknowledged that he knew Urioste injured his back, but he maintained he did not know the circumstances surrounding the injury.¹⁸¹ The court of appeals, under the "totality of the facts and circumstances" rule, upheld the hearing officer's determination that Sideris had actual knowledge of Urioste's injury.¹⁸²

In *Nunez v. Smith's Management Corp.*,¹⁸³ the court again examined the issue of sufficiency of verbal notice. Nunez claimed that he fell off a stack of pallets while working and struck his right shoulder on a knife sharpener.¹⁸⁴ He offered uncontroverted testimony that he informed his employer about the accident.¹⁸⁵ Nunez contended that he told his supervisor about his injury "like the next day."¹⁸⁶ That testimony was discredited by the impeachment of other testimony about the circumstances of the accident.¹⁸⁷ Therefore, the court did not require the hearing officer to adopt Nunez' testimony on notice.¹⁸⁸ Nunez did not satisfy his burden of proving compliance with the statutory notice requirement.¹⁸⁹

H. Scheduled Injuries

The Workers' Compensation Act prescribes the number of weeks of compensation allowable for the loss or loss of the use of specific bodily members.¹⁹⁰ The worker is then entitled to at least \$36.00 per week but not more than eighty-five percent of the state's average

178. 107 N.M. 733, 764 P.2d 504 (Ct. App. 1988).

179. *Id.* at 735, 764 P.2d at 506. See *infra* notes 393-96 and accompanying text.

180. *Id.*

181. *Id.*

182. *Id.* at 736, 764 P.2d at 507. While the testimony conflicted, substantial evidence in the whole record supported the hearing officer's finding. *Id.* For a discussion of the standard of review, see *infra* notes 349-54 and accompanying text.

183. 108 N.M. 186, 769 P.2d 99 (Ct. App. 1988).

184. *Id.* at 187, 769 P.2d at 100.

185. *Id.* at 191, 769 P.2d at 104.

186. *Id.*

187. *Id.* Although Nunez claimed his injury occurred in February 1985, there was evidence placing the date of the accident as early as August 1979. *Id.* at 190, 769 P.2d at 103.

188. *Id.* at 191, 709 P.2d at 104.

189. *Id.*

190. N.M. STAT. ANN. § 52-1-43(A) (Cum. Supp. 1989) provides: "For disability resulting from an accidental injury to specific body members, including the loss or loss of use thereof, the worker shall receive the weekly maximum and minimum compensation for disability as provided in Section 52-1-41 NMSA 1978, for [certain listed] periods[.]" For example, loss of one arm at or near the shoulder entitles the worker to 200 weeks of compensation benefits. *Id.* N.M. STAT. ANN. § 52-1-43(B) (Cum. Supp. 1989) provides:

For a partial loss of use of one of the body members or physical functions listed in Subsection A of this section, the worker shall receive compensation computed on the basis of the degree of such partial loss of use, payable for the number of weeks applicable to total loss or loss of use of that body member or physical function.

weekly wage for the specified number of weeks.¹⁹¹ If a worker is partially disabled and his disability is limited to bodily members specified in the scheduled injuries statute, his compensation is determined by the statute.¹⁹² Otherwise, the workers' compensation officer determines the extent of the worker's disability.¹⁹³

Three cases during the survey period examined whether the scheduled injuries statute applied to the claimants in question.¹⁹⁴ *Nelson v. Nelson Chemical Corp.*¹⁹⁵ involved the president and director of a chemical corporation who twice fell from a truck and injured his back and hip.¹⁹⁶ The trial court held that Nelson suffered a fifty percent impairment to his leg at the hip and awarded compensation under the scheduled injuries statute.¹⁹⁷ The court of appeals reversed the award of scheduled injury benefits and remanded the case to the district court to determine the amount of partial disability benefits due the plaintiff.¹⁹⁸

The court of appeals outlined the appropriate test for determining whether the scheduled injury provision covers a particular injury.¹⁹⁹ First, the court or hearing officer must determine if the injury is covered by the scheduled injuries provision.²⁰⁰ Only if the answer to that threshold question is "yes" does the factfinder proceed to determine whether the impairment resulting from that injury extends to other parts of the body or otherwise renders the claimant totally disabled.²⁰¹ If the injury is not specifically provided for in the schedule, then compensation for partial disability may be awarded under section 52-1-42.²⁰²

The court determined that Nelson's injury was not covered by the scheduled injury provision.²⁰³ Nelson's injury was to the hip itself as opposed to a leg "at or near the hip joint."²⁰⁴ An injury to the hip

191. N.M. STAT. ANN. § 52-1-41 (Cum. Supp. 1989). The Employment Security Division of the Labor Department determines the average weekly wage in the state each year. *Id.*

192. *Id.* § 52-1-43(B) (Cum. Supp. 1989).

193. *See id.* §§ 52-1-26, -42 (Cum. Supp. 1989).

194. *Harrison v. Animas Valley Auto and Truck Repair*, 107 N.M. 373, 758 P.2d 787 (1988); *Beltran v. Van Ark Care Center*, 107 N.M. 273, 756 P.2d 1 (Ct. App. 1988); *Nelson v. Nelson Chemical Corp.*, 105 N.M. 493, 734 P.2d 273 (Ct. App. 1987).

195. 105 N.M. 493, 734 P.2d 273 (Ct. App. 1987).

196. *Id.* at 494-95, 734 P.2d at 274-75.

197. *Id.* at 495, 734 P.2d at 275.

198. *Id.* at 497, 734 P.2d at 277. The court of appeals affirmed the trial court's denial of benefits for the aggravation of Nelson's preexisting back injury, finding sufficient evidence to support a finding of no causal connection. *Id.*

199. *Id.* at 496, 734 P.2d at 276 (citing *Hise Constr. v. Candelaria*, 98 N.M. 759, 652 P.2d 1210 (1982)).

200. *Id.*

201. *Id.*

202. N.M. STAT. ANN. § 52-1-42 (Cum. Supp. 1989) provides in part: "For partial disability, the workers' compensation benefits not specifically provided for in section 52-1-43 NMSA 1978 shall be a percentage of the benefit payable for total disability."

203. *Id.*

204. *Id.* N.M. STAT. ANN. § 52-1-43(A) (Cum. Supp. 1989) allows a claimant 200 weeks of compensation for injury to one leg at or near the hip joint so as to preclude the use of an artificial limb.

itself is an injury to the body as a whole, even when it results in pain or impairment of one of the specified bodily members, in this case, a leg.²⁰⁵ The court of appeals did not address the question of whether Nelson's impairment due to the hip injury extended to other parts of his body or otherwise totally disabled him.²⁰⁶ The court remanded with instructions to determine the percentage of partial disability suffered by Nelson.²⁰⁷

In *Harrison v. Animas Valley Auto and Truck Repair*,²⁰⁸ the supreme court considered whether the worker was entitled to either total or partial disability instead of the scheduled injury compensation.²⁰⁹ The court's analysis, similar to the second prong in *Nelson*, considered whether the injury extends to other parts of the body.²¹⁰ Unlike the second prong in *Nelson*, the court expressly considered whether the disability or impairment was partial as well as total.²¹¹

The court adopted the two-part test from *Aragon v. Mountain States Construction Co.*²¹² for deciding whether a worker is entitled to either partial or total disability instead of the scheduled injury benefit.²¹³ In *Aragon*, the court first considered whether the loss of a specific body member "caused a separate and distinct 'disability' or 'impairment'" to other parts of the body.²¹⁴ The court then inquired whether the worker was partially or totally disabled because he or she could not wholly or partially do the prior work or other suitable work.²¹⁵

In his concurring opinion in *Harrison*, Justice Ransom stated the general rule that a worker who suffers an injury listed in the Act's schedule is limited to recovery under the schedule unless the injury renders the worker totally disabled.²¹⁶ The scheduled injury provisions are not exclusive, however, if there is additionally "separate and distinct impairment to other parts of the body" resulting in partial disability.²¹⁷

In *Harrison*, the trial court found injuries to the worker's right arm, right wrist, and right hand.²¹⁸ The supreme court affirmed the trial court's partial disability award, explicitly finding that the injuries extended to the "whole man."²¹⁹ Justice Ransom considered the finding of "incapacitating pain" persuasive as a separate and distinct im-

205. *Nelson*, 105 N.M. at 496, 734 P.2d at 276.

206. *Id.* at 497, 734 P.2d at 277.

207. *Id.*

208. 107 N.M. 373, 758 P.2d 787 (1988).

209. *Id.* at 374, 758 P.2d at 788.

210. *Id.* See *supra* text accompanying note 201.

211. *Harrison*, 107 N.M. at 374, 758 P.2d at 788.

212. 98 N.M. 225, 230, 647 P.2d 427, 432 (Ct. App.), *rev'd on other grounds*, 98 N.M. 194, 647 P.2d 396 (1982).

213. *Id.*

214. *Id.*

215. *Id.*

216. 107 N.M. at 375, 758 P.2d at 789 (citing *Hise Constr. v. Candelaria*, 98 N.M. 759, 652 P.2d 1210 (1982)).

217. *Id.*

218. *Id.* at 373, 758 P.2d at 787.

219. *Id.* at 374-75, 758 P.2d at 788-89.

pairment allowing compensation under partial disability instead of the schedule.²²⁰

In *Beltran v. Van Ark Care Center*,²²¹ the court combined unrelated injuries to the worker's knee and shoulder and awarded partial disability compensation.²²² The injuries, separated by fourteen months, occurred at the same place of employment but were covered by different compensation insurers.²²³ The insurer covering the first injury to the knee argued that compensation must be limited to the scheduled injury provision covering loss or loss of use of specific body members.²²⁴ The court of appeals remanded for the worker to establish separate and distinct impairment to a body part other than the knee in order to obtain partial disability compensation.²²⁵

I. Lump Sum Payments

The Act permits lump sum payments, in lieu of periodic payments, only when the parties agree to lump sum payments or "lump sum payments are clearly in the best interests of the parties."²²⁶ For a hearing officer to approve a commutation from periodic payment to lump sum payment, the hearing officer must find the agreement to be fair, equitable, and consistent with the provisions of the Act or the Occupational Disease Disablement Law.²²⁷

In *Raines v. W.A. Klinger & Sons*,²²⁸ the court addressed whether a worker who was receiving maximum compensation benefits could petition for lump sum payment. The court specifically overruled previous cases precluding petitions for lump sum payments when the worker was receiving maximum benefits.²²⁹ The supreme court stated that a petition for lump sum payment is not a separate claim, but is a request for modification of the method of payment.²³⁰ Thus, the

220. *Id.* at 375, 758 P.2d at 789.

221. 107 N.M. 273, 756 P.2d 1 (Ct. App. 1988).

222. *Id.* at 274, 756 P.2d at 2.

223. *Id.*

224. *Id.* at 275, 756 P.2d at 3.

225. *Id.*

226. N.M. STAT. ANN. § 52-5-12(A) (Repl. Pamp. 1987). The courts have adopted a stringent two-prong test for determining whether a lump sum award will be in the party's best interest. The petitioner must prove that the lump sum commutation is in his best interest and denial of lump sum would create "manifest hardship." *E.g.*, *Codling v. Aztec Well Servicing*, 89 N.M. 213, 216, 549 P.2d 628, 631 (Ct. App. 1976).

227. N.M. STAT. ANN. § 52-2-14 (Repl. Pamp. 1987). The Occupational Disease Disablement Law is discussed *infra* at notes 421-55 and accompanying text.

228. 107 N.M. 668, 763 P.2d 684 (1988).

229. *Id.* at 669, 763 P.2d at 685. *Raines* expressly overruled *Neuman v. A.S. Horner, Inc.*, 99 N.M. 603, 661 P.2d 503 (Ct. App. 1983), *Minnerup v. Stewart Bros. Drilling*, 93 N.M. 561, 603 P.2d 300 (Ct. App. 1979), and *Armijo v. Co-Con Constr.*, 92 N.M. 295, 587 P.2d 442 (Ct. App.), *cert. denied*, 92 N.M. 260, 586 P.2d 1089 (1978).

230. *Raines*, 107 N.M. at 670, 763 P.2d at 686. *Raines* was decided under the Act prior to the 1986 revision and reenactment. *Id.* at 668, 763 P.2d at 684 n.1.

court held that section 52-1-69,²³¹ prohibiting claims brought by workers who are receiving maximum benefits, does not preclude petitions for lump sum payment.²³²

In *Rojo v. Loeper Landscaping*,²³³ the supreme court considered whether a hearing officer improperly disapproved payment of a lump sum after one of the parties attempted to repudiate an agreement that had been fairly negotiated, signed, and filed.²³⁴ In *Rojo*, a worker who was receiving periodic compensation payments agreed to a lump sum settlement with the employer's insurer.²³⁵ The worker signed the agreement and was murdered the next day.²³⁶ Before the insurance company knew of the worker's death, the insurer also signed the agreement.²³⁷ The worker's attorney, who did not yet know of the murder, filed the agreement the same day.²³⁸ When the insurance company found out about the worker's death, it decided to repudiate the agreement.²³⁹

The court held that the hearing officer's finding that the settlement would provide for substantial justice left the hearing officer without grounds to deny approval of the settlement agreement.²⁴⁰ Further, the death of a party after an agreement is made is not a ground for disapproving payment of the settlement.²⁴¹ Thus, the court read section 52-5-14(A) as allowing a hearing officer to disapprove a lump sum settlement agreement only when there is a finding that the settlement would not provide for substantial justice.²⁴² The court also reasoned that the insurance company gambled that the lump sum would be less than the total amount of periodic payments, thus taking the risk that

231. N.M. STAT. ANN. § 52-1-69 (1953) (repealed 1986) provided:

No claim shall be filed by any workman who is receiving maximum compensation benefits; provided, however, a workman claiming additional compensation benefits, because of his employer's alleged failure to provide a safety device, may file suit therefor, but in such event only the safety device issue may be determined therein.

The current provision, N.M. STAT. ANN. § 52-5-18 (Cum. Supp. 1989), provides:

No additional claim shall be filed by any worker who is receiving maximum compensation except that a worker claiming additional compensation because of his employer's alleged failure to provide a safety device may file claim for that compensation, but in that event, only the safety devices issue may be determined in the claim.

232. *Raines*, 107 N.M. at 669, 763 P.2d at 685. In a previous case, *Zamora v. CPK Contracting Company*, 106 N.M. 309, 742 P.2d 521 (Ct. App.), *cert. quashed*, 106 N.M. 353, 742 P.2d 1058 (1987), the court of appeals held that section 52-1-69 did not bar petitions for lump sum payment by dependents of a deceased worker.

233. 107 N.M. 407, 759 P.2d 194 (Ct. App. 1988).

234. *Id.* at 409, 759 P.2d at 196.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 410, 759 P.2d at 197. N.M. STAT. ANN. § 52-5-14(A) (Repl. Pamp. 1987) allows a hearing officer to disapprove an agreement for lump sum payment when the hearing officer determines that the agreement will not provide substantial justice.

241. *Rojo*, 107 N.M. at 410, 759 P.2d at 197.

242. See *supra* note 240.

death will not occur.²⁴³ *Rojo* makes clear that appellate courts will require hearing officers to strictly abide by section 52-1-14(A) when they approve or deny lump sum agreements.

J. Time Limitations

A claim for workers' compensation benefits must be filed within a maximum of two years and thirty-one days²⁴⁴ from the date of an accidental work-related disability if the worker remains employed by the employer from the time of the injury.²⁴⁵ The maximum period is computed from an aggregation of statutory limits.²⁴⁶ The employer has thirty-one days after the date of disability to pay the first installment.²⁴⁷ If the employer refuses or fails to pay, the claimant has one year to file a claim from the date of refusal or failure to pay.²⁴⁸ In addition, if the worker remains employed with his employer, the statute of limitations is tolled for a maximum of one year.²⁴⁹ The statute of limitations does not apply to claims for medical expenses²⁵⁰ nor to vocational rehabilitation expenses.²⁵¹

During the survey period, the courts addressed issues concerning when the statute of limitations for claiming workers' compensation benefits begins to run and when it is tolled.²⁵² Also, the legislature enacted a specific statute of limitations for claims against the Subsequent Injury Fund (the Fund).²⁵³

In *Salazar v. Albuquerque Tribune*,²⁵⁴ the court of appeals addressed the issue of when the statute of limitations commences if the disability arises sometime after the injury. *Salazar* fell and injured his left foot

243. *Rojo*, 107 N.M. at 410, 759 P.2d at 197.

244. The time periods of sections 52-1-30 and -31(A) are added together to compute the maximum period in which a compensation claim may be brought. Section 52-1-30 states that the first installment payment of benefits shall be paid no later than 31 days after the date of disability. Section 52-1-31(A) requires a claimant to file within one year after the failure or refusal of an employer or its carrier to pay compensation. Section 52-1-31(A) has a tolling provision for one year when the worker remains employed with that same employer. See *ABF Freight System v. Montano*, 99 N.M. 259, 657 P.2d 115 (1982); *Cole v. J.A. Drake Well Serv.*, 106 N.M. 484, 745 P.2d 392 (Ct. App. 1987). Section 52-1-31 makes clear that the notice provisions of section 52-1-29, requiring the worker claiming entitlement to compensation to provide written notice to the employer of the accident and injury, must be complied with. N.M. STAT. ANN. §§ 52-1-29, -30, -31(A) (Repl. Pam. 1987).

245. *Salazar v. Albuquerque Tribune*, 107 N.M. 674, 763 P.2d 690 (Ct. App. 1988); *Cole v. J.A. Drake Well Serv.*, 106 N.M. 484, 745 P.2d 392.

246. See *supra* note 244.

247. N.M. STAT. ANN. § 52-1-30 (Repl. Pam. 1987).

248. *Id.* § 52-1-31(A).

249. *Id.*

250. *Nasci v. Frank Paxton Lumber Co.*, 69 N.M. 412, 367 P.2d 913 (1961); *Salazar v. Albuquerque Tribune*, 107 N.M. 674, 763 P.2d 690 (Ct. App. 1988); *Hutcherson v. Dawn Trucking Co.*, 107 N.M. 358, 758 P.2d 308 (Ct. App. 1988).

251. *Maitlen v. Getty Oil Co.*, 105 N.M. 370, 733 P.2d 1 (Ct. App. 1987).

252. *Salazar v. Albuquerque Tribune*, 107 N.M. 674, 763 P.2d 690; *Hutcherson v. Dawn Trucking Co.*, 107 N.M. 358, 758 P.2d 308.

253. N.M. STAT. ANN. § 52-2-14 (Cum. Supp. 1989). This development is discussed in the Subsequent Injury Act section of the survey, *infra* notes 388-92 and accompanying text.

254. 107 N.M. 674, 763 P.2d 690.

on August 25, 1984.²⁵⁵ The fall aggravated a preexisting, non-work related infection and led to the immediate amputation of a toe and, on April 15, 1985, of the leg.²⁵⁶ The worker filed his claim on April 10, 1987.²⁵⁷ The court concluded that when the disability happens some time after the injury, the statute of limitations runs from the date of disability, Salazar's leg amputation, and not from the date of the worker's awareness of his injury.²⁵⁸

To answer the question of when the statute of limitations began to run, the court applied the two-prong test articulated in *Noland v. Young Drilling Co.*²⁵⁹ The court must determine when a worker was or should have been aware he suffered a compensable injury and when the employer failed or refused to pay compensation.²⁶⁰ To answer both prongs, the court considered when the disability occurred. First, under a modification of the initial prong, where the disability occurs after the worker is aware of a compensable injury, the limitation period begins to run after the occurrence of the disability.²⁶¹ Second, the next prong of the test cannot be met until a disability occurs.²⁶²

In *Salazar*, the worker and the insurer's claims adjuster believed at the time of the initial injury that the worker was only entitled to medical benefits.²⁶³ The court of appeals found that the hearing officer's implicit finding that there was no partial disability before April 1985 was supported by substantial evidence.²⁶⁴ Thus, the worker's only valid claim was for the loss of his leg on April 15, 1985, under the scheduled injury provision.²⁶⁵ Therefore, his claim was timely filed on April 15, 1987, two years later.²⁶⁶

In *Hutcherson v. Dawn Trucking Co.*,²⁶⁷ the issue concerned the tolling of the statute of limitations by the "course of conduct" of the employer or insurer. The hearing officer granted summary judgment to the employer and its insurer based on a determination that the

255. *Id.* at 676, 763 P.2d at 692.

256. *Id.* at 675, 763 P.2d at 691.

257. *Id.*

258. *Id.* at 676, 763 P.2d at 692.

259. 79 N.M. 444, 444 P.2d 771 (Ct. App. 1968).

260. *Salazar*, 107 N.M. at 676, 763 P.2d at 692.

261. *Id.* In *Noland*, the court of appeals stated that a worker should not lose a benefit for failing to file "a claim for a non-compensable injury which he has no reason to believe will result in a serious and compensable injury." 79 N.M. at 446-47, 444 P.2d at 773-74. The court rejected, however, any tolling once a compensable injury is discernable until a more serious disability is ascertainable. *Id.* at 447, 444 P.2d at 774. In *Noland*, the worker lost circulation in a finger due to a December, 1964 wrist injury. *Id.* at 448, 444 P.2d at 775. The finger was amputated in 1966. *Id.* The court found that Noland knew the seriousness of the injury as early as March, 1965, and that he was entitled to compensation for a period beginning June, 1965. *Id.* at 446, 444 P.2d at 773. The court affirmed the dismissal of the complaint, filed February 8, 1967, as untimely. *Id.* at 447, 444 P.2d at 774.

262. *Salazar*, 107 N.M. at 677, 763 P.2d at 693.

263. *Id.*

264. *Id.*

265. *Id.* at 678, 763 P.2d at 694.

266. *Id.*

267. 107 N.M. 358, 758 P.2d 308 (Ct. App. 1988).

statute of limitations barred the claim.²⁶⁸ The worker argued that the insurer's conduct tolled the period of limitations under section 52-1-36 of the Act.²⁶⁹ To successfully rebut the movant's prima facie case for summary judgment, the worker was required to establish "reasonable doubt that a material issue of fact existed"²⁷⁰ as to each element²⁷¹ of his claim that the statute of limitations was tolled.²⁷²

In *Hutcherson*, the court of appeals held that the worker sufficiently satisfied his burden of establishing reasonable doubt.²⁷³ The court ruled that a determination of whether a claimant relied on the employer's or insurer's course of conduct is not limited to communications with the claimant.²⁷⁴ The claimant may prove the elements of the course of conduct by inference.²⁷⁵ Thus, in evaluating the course of conduct the factfinder may consider an internal insurance memorandum indicating the insurance company's anticipation of settlement.²⁷⁶ The court also considered that the claimant was not familiar with workers' compensation law, that the claimant was not represented by an attorney until just prior to his claim, and that the claimant relied on an insurance adjuster who was a law school graduate with experience in workers' compensation claims.²⁷⁷ The court remanded for a trial on the merits of the limitations issue.²⁷⁸

During the survey period the legislature revised section 52-1-58 to an extent that commentary is necessary on the current requirements for filing accident reports to the workers' compensation director. Currently, section 52-1-58²⁷⁹ requires an employer to file an accident report for accidental injuries resulting in the loss of more than seven days of work.²⁸⁰ The amendment tolls the period of limitations only when

268. *Id.* at 359, 758 P.2d at 309.

269. N.M. STAT. ANN. § 52-1-36 (Cum. Supp. 1989) provides:

The failure of any person entitled to compensation under the Workers' Compensation Act to give any notice or file any claim within the time fixed by the Workers' Compensation Act shall not deprive such person of the right to compensation where the failure was caused in whole or in part by the conduct of the employer or insurer which reasonably led the person entitled to compensation to believe the compensation would be paid.

270. *Hutcherson*, 107 N.M. at 360, 758 P.2d at 310 (citing *Koenig v. Perez*, 104 N.M. 664, 726 P.2d 341 (1986)).

271. To toll the statute of limitations under section 52-1-36 the claimant must prove he reasonably believed that compensation would be paid, and his belief was based, in whole or in part, on the employer's or insurer's conduct. *Hutcherson*, 107 N.M. at 360, 758 P.2d at 310.

272. *Id.* at 360, 758 P.2d at 310.

273. *Id.* at 361, 758 P.2d at 311.

274. *Id.* at 360, 758 P.2d at 310.

275. *Id.*

276. *Id.*

277. *Id.* at 361, 758 P.2d at 311.

278. *Id.* at 362, 758 P.2d at 312.

279. N.M. STAT. ANN. § 52-1-58 (Repl. Pamp. 1987).

280. In one case during the survey period, *Cisneros v. Molycorp*, 107 N.M. 788, 765 P.2d 761 (Ct. App.), *cert. denied*, 107 N.M. 785, 765 P.2d 758 (1988), the court held that the statute of limitations for filing a claim for compensation benefits was tolled when the employer failed to file an accident report. *Id.* at 793, 765 P.2d at 766. Prior to the 1987 amendment, the statute required an employer to file an accident report for any accidental injuries which occurred to any employee

the worker has lost more than seven days of work and the employer has not filed an accident report.²⁸¹ Previously, section 52-1-58 tolled the period of limitations when the employer did not file an accident report regardless of whether the worker missed any work.²⁸²

K. Medical Expenses

Section 52-1-49 of the Workers' Compensation Act requires an employer to provide appropriate, reasonably necessary, and adequate treatment in a timely manner.²⁸³ A claimant seeking reimbursement of past medical expenses must prove the expenses were reasonably necessary, the fees were reasonable charges, and the expenses were directly related to the worker's disability.²⁸⁴ During the survey period, the courts addressed whether workers who obtained medical services other than those offered by the employer were entitled to reimbursement,²⁸⁵ whether claimants offered sufficient proof of medical expenses,²⁸⁶ and the scope of reasonable, necessary, and timely medical services.²⁸⁷

In *Eldridge v. Aztec Well Servicing Co.*,²⁸⁸ the court of appeals considered whether an employer provided appropriate, reasonable, and adequate medical services with sufficient promptness, or whether the employer should reimburse the worker for unauthorized medical treatment.²⁸⁹ In *Eldridge*, the worker was hit in the back while working on a drilling rig. The next day, he performed his usual duties until he strained his back picking up a water cooler.²⁹⁰ This second incident was not reported to the employer until the third day, and the worker did not directly complain of the injury to anyone, nor did he request emergency treatment, though it was readily apparent to the worker that he "could not move around."²⁹¹ The court stated that when considering whether medical services were timely depends on the nature of the injury and the circumstances of both the accident and the

during the course of their employment. Because *Cisneros* concerned a complaint filed before the effective date of the 1987 amendment, the statute of limitations was tolled. *Id.*; see also N.M. STAT. ANN. § 52-1-58 (Cum. Supp. 1986) (amended 1987).

281. N.M. STAT. ANN. § 52-1-58 (Repl. Pamp. 1987).

282. *Id.* § 52-1-58 (Cum. Supp. 1986) (amended 1987).

283. *Eldridge v. Aztec Well Servicing Co.*, 105 N.M. 660, 663, 735 P.2d 1166, 1169 (Ct. App.), *cert. denied*, 105 N.M. 644, 735 P.2d 1150 (1987).

284. N.M. STAT. ANN. § 52-1-49 (Repl. Pamp. 1987).

285. *Baca v. Bueno Foods*, 108 N.M. 98, 766 P.2d 1332 (Ct. App. 1988); *Eldridge v. Aztec Well Servicing Co.*, 105 N.M. 660, 735 P.2d 1166.

286. *Baca v. Bueno Foods*, 108 N.M. 98, 766 P.2d 1332; *Lea County Good Samaritan Village v. Wojcik*, 108 N.M. 76, 766 P.2d 920 (Ct. App. 1988); *Mares v. Valencia County Sheriff's Dep't*, 106 N.M. 744, 749 P.2d 1123 (Ct. App. 1988).

287. *Davis v. Los Alamos Nat'l Lab.*, 108 N.M. 587, 775 P.2d 1304 (Ct. App.), *cert. denied*, 108 N.M. 433, 773 P.2d 1240 (1989); *Montney v. State ex rel. State Highway Dep't*, 108 N.M. 326, 772 P.2d 360 (Ct. App.), *cert. denied*, 108 N.M. 433, 773 P.2d 1240 (1989); *Eldridge v. Aztec Well Servicing Co.*, 105 N.M. 660, 735 P.2d 1166.

288. 105 N.M. 660, 735 P.2d 1166.

289. *Id.* at 661, 735 P.2d at 1169.

290. *Id.*

291. *Id.* at 663, 735 P.2d at 1169.

employer's knowledge of the accident.²⁹² Since both the worker and the employer did not perceive the extent of the injury, or the existence of an emergency, the employer did not fail to provide emergency treatment.²⁹³

The *Eldridge* court also considered whether the worker was entitled to reimbursement for unauthorized medical services. On the day of the second incident, the worker saw a chiropractor before notifying his employer.²⁹⁴ The employer, after being informed of the injury, gave the chiropractor notice that it would not pay for further treatments and instructed the worker to see a company-authorized doctor.²⁹⁵ The worker later discontinued seeing the employer's doctors and resumed treatment with the chiropractor.²⁹⁶ The worker then attempted to recover the expenses paid to the chiropractor.²⁹⁷ The court held that since the employer provided adequate and reasonable medical services, the employer was not required to pay for the unauthorized charges.²⁹⁸ The court reasoned that the employer provided reasonable and adequate medical services under the circumstances because the employer furnished medical services as soon as it knew treatment was necessary.²⁹⁹ The case was not one where the employer was late in asserting its statutory right or where the medical services were inadequate.³⁰⁰ Thus, in *Eldridge*, there was no exception to the rule that a worker is precluded from seeking independent medical treatment when the employer is willing to provide treatment and actively makes medical services available.³⁰¹

In *Baca v. Bueno Foods*,³⁰² the court of appeals again addressed whether a worker was entitled to recover medical expenses for unauthorized medical services. In *Baca*, a worker who injured her finger was examined by three doctors furnished by the employer.³⁰³ The worker made no complaint to the doctors about a back injury but independently obtained chiropractic services for the back injury.³⁰⁴ First, the court found that the medical expenses, based on the chiropractor's bill, were reasonable charges.³⁰⁵ In workers' compensation cases, chiropractor's bills are considered prima facie proof of reasonable charges.³⁰⁶ Second,

292. *Id.*

293. *Id.*

294. *Id.* at 664, 735 P.2d at 1170.

295. *Id.* at 662, 735 P.2d at 1168. The employer's insurer paid for the two initial visits to the chiropractor. *Id.*

296. *Id.* The chiropractor also referred the worker to a physician who ordered hospitalization, tests, and physical therapy. *Id.*

297. *Id.*

298. *Id.* at 664, 735 P.2d at 1170.

299. *Id.*

300. *Id.*

301. *Id.* at 662, 735 P.2d at 1168.

302. 108 N.M. 98, 766 P.2d 1332 (Ct. App. 1988).

303. *Id.* at 103, 766 P.2d at 1337.

304. *Id.*

305. *Id.* at 103-04, 766 P.2d at 1337-38.

306. *Id.* at 104, 766 P.2d at 1338.

the court found the chiropractor's bill also constituted prima facie evidence that the services were reasonably necessary.³⁰⁷ Third, the court addressed whether the worker gave the employer a reasonable opportunity to furnish medical services and whether the employer provided adequate medical services.³⁰⁸ The court remanded the case for further determination because the basis of the hearing officer's ruling was ambiguous.³⁰⁹ In New Mexico, a worker must first give the employer a reasonable opportunity to furnish medical services unless the medical services offered by the employer are inadequate.³¹⁰

When a party seeks to recover medical expenses in a workers' compensation or subsequent injury proceeding, that party bears the burden of proving the expenses were reasonably necessary and directly related to the worker's disability.³¹¹ A court of appeals panel addressed whether stipulations of medical expenses between claimants, employers (or their insurers), and the Fund were sufficient proof that the medical expenses were reasonably necessary and directly related to the injury. In *Lea County Good Samaritan Village v. Wojcik*,³¹² the court of appeals held that a stipulation of medical expenses dealt only with the fact of payment and was not proof that the payment was reasonable, necessary, or directly related to a compensable injury.³¹³

The courts also specifically addressed the scope of reasonable and necessary medical expenses. In *Davis v. Los Alamos National Laboratories*,³¹⁴ the court held that when a less expensive, reasonable alternative is available and would serve the same beneficial purpose, a more expensive item is an unreasonable and unnecessary medical expense.³¹⁵

In *Montney v. State Highway Department*,³¹⁶ a worker suffered a compensable knee injury, and a medical expert testified that the worker also suffered from depression due to the injury.³¹⁷ The court held that the state was required to furnish reasonable and necessary psychological services to the worker because the psychological condition was causally related to the accident.³¹⁸ The court found that medical testimony showed the psychological expenses were necessary and reasonable.³¹⁹

307. *Id.*

308. *Id.*

309. *Id.* at 105, 766 P.2d at 1339.

310. *Id.*

311. *Lea County Good Samaritan Village v. Wojcik*, 108 N.M. 76, 82, 766 P.2d 920, 926 (Ct. App. 1988); *Mares v. Valencia County Sheriff's Dep't*, 106 N.M. 744, 750, 749 P.2d 1123, 1129 (Ct. App. 1988).

312. 108 N.M. 76, 766 P.2d 920 (Ct. App. 1988).

313. *Id.* at 83-84, 766 P.2d 927-28.

314. 108 N.M. 587, 775 P.2d 1304 (Ct. App.), *cert. denied*, 108 N.M. 433, 773 P.2d 1240 (1989).

315. *Id.* at 589-90, 775 P.2d at 1306-07. In *Davis*, the court found a jacuzzi tub attachment less expensive and more reasonable than a hot tub. *Id.*

316. 108 N.M. 326, 772 P.2d 360 (Ct. App.), *cert. denied*, 108 N.M. 197, 169 P.2d 731 (1989).

317. *Id.* at 331-32, 772 P.2d at 365-66.

318. *Id.* at 332, 772 P.2d at 366.

319. *Id.* The state argued that the court failed to find that the knee injury was causally related

When a worker has a compensable injury, the worker is entitled to reasonable and necessary future medical expenses.³²⁰ The court or hearing officer cannot restrict or limit future expenses once the worker establishes that he has a compensable injury.³²¹ In *Beltran v. Van Ark Care Center*,³²² the court considered whether a worker was entitled to future medical expenses. In *Beltran*, medical testimony indicated the worker's permanent knee injury would become worse and future surgery was probable.³²³ Thus, the trial court's award of future medical expenses was upheld because the future treatment was reasonable and necessary.³²⁴

L. Falsified Employment Application

In several cases, the courts considered whether workers were prevented from recovering under the Worker's Compensation Act or the Subsequent Injury Act³²⁵ when the employee misrepresented his physical condition on his employment application.³²⁶ Generally, in New Mexico, when a worker provides false information on an employment application regarding the worker's physical condition, the worker may be barred from recovering workers' compensation or subsequent injury benefits.³²⁷

The New Mexico courts have consistently required an employer to prove three factors to bar a worker's recovery for falsifying his or her application. First, the employee must have knowingly and willfully made a false representation of this physical condition.³²⁸ Second, the employer must have substantially relied on the false representation when hiring the employee.³²⁹ Third, there must be a causal connection between the false representation and the injury,³³⁰ established by expert medical testimony.³³¹

to the mental depression. The court of appeals reasoned that the failure of the trial court to make an express finding is not fatal to the award when other findings of the trial court are sufficient to support the ultimate finding on the issue. *Id.*

320. *Graham v. Presbyterian Hosp. Center*, 104 N.M. 490, 491, 723 P.2d 259, 260 (Ct. App. 1986).

321. *Id.*; *Beltran v. Van Ark Care Center*, 107 N.M. 273, 276, 756 P.2d 1, 4 (Ct. App. 1988).

322. 107 N.M. 273, 276, 756 P.2d 1, 4.

323. *Id.* at 276, 756 P.2d at 4.

324. *Id.*

325. N.M. STAT. ANN. §§ 52-2-1 to -14 (Repl. Pamp. 1987 & Cum. Supp. 1989). For a discussion of this Act, see *infra* notes 380-420 and accompanying text.

326. *Tallman v. ABF (Arkansas Best Freight)*, 108 N.M. 124, 767 P.2d 363 (Ct. App.), *cert. denied*, 109 N.M. 33, 781 P.2d 305 (1988); *Jaynes v. Wal-Mart Store No. 824*, 107 N.M. 648, 763 P.2d 82 (Ct. App. 1988); *see also Padilla v. Chavez*, 105 N.M. 349, 732 P.2d 876 (Ct. App.), *cert. denied sub nom. Jasso v. Chavez*, 105 N.M. 358, 732 P.2d 1381 (1987).

327. *See Padilla*, 105 N.M. at 351, 732 P.2d at 878 (citing *Martinez v. Driver Mechenbier, Inc.*, 90 N.M. 282, 562 P.2d 843 (Ct. App. 1977)).

328. *Tallman*, 108 N.M. at 132, 767 P.2d at 371; *Jaynes*, 90 N.M. at 283, 562 P.2d at 83.

329. *Tallman*, 108 N.M. at 132, 767 P.2d at 371; *Jaynes*, 90 N.M. at 283, 562 P.2d at 83.

330. *Tallman*, 108 N.M. at 132, 767 P.2d at 371; *Jaynes*, 90 N.M. at 283, 562 P.2d at 83.

331. *Tallman*, 108 N.M. at 132-33, 767 P.2d at 371-72 (citing *Chavez v. Lectrosonics*, 93 N.M. 495, 601 P.2d 728 (Ct. App. 1979)). In *Jaynes*, the court rejected an argument that the test for causal connection between the injury and false representation should be based on ability to perform

In *Tallman v. ABF (Arkansas Best Freight)*,³³² the court resolved the issue of whether there was a knowing and willful misrepresentation by finding no causal connection between the alleged misrepresentation on the employment application and the worker's injury. Tallman's claim was for a bulging disk injury resulting from continual lifting as a dock worker.³³³ The employer argued that the worker knowingly and willfully misrepresented his physical condition, a congenital vertebrae abnormality, on his employment application.³³⁴ Both medical experts who testified agreed that the congenital vertebrae abnormality and the bulging disk injury were separate and distinct.³³⁵ No medical evidence showed a causal connection between the alleged misrepresentation and the worker's compensable injury.³³⁶ Since no evidence supported a causal connection, the court of appeals upheld the hearing officer's finding that Tallman did not willfully and knowingly misrepresent his physical condition.³³⁷ Thus, Tallman was not barred from recovering under the Workers' Compensation Act.³³⁸

In *Jaynes v. Wal-Mart Store No. 824*,³³⁹ the worker attempted to challenge the hearing officer's finding of a causal connection between the false representation in her employment application and her injury.³⁴⁰ Jaynes suffered an accidental back injury arising out of and in the course of her employment with Wal-Mart.³⁴¹ Jaynes also suffered a back injury at a previous job, but denied any history of back injury in her employment application with Wal-Mart.³⁴² Expert medical testimony established that Jaynes was at an increased risk of injury due to her undisclosed prior injury.³⁴³

On appeal, Jaynes argued that recovery for the present injury was not barred as a result of her false representation, because she was able to perform the duties of her prior employment, as well as her work at Wal-Mart without physical difficulties.³⁴⁴ The court of appeals rejected the worker's argument.³⁴⁵ The court upheld the hearing officer's

the same duties in prior employment without physical difficulties. The worker must introduce evidence, medical expert's testimony, to refute causal connection. *Jaynes*, 107 N.M. at 649-50, 763 P.2d at 83-84.

332. 108 N.M. 124, 767 P.2d 363 (Ct. App.), *cert. denied*, 107 N.M. 785, 765 P.2d 768 (1988).

333. *Id.* at 133, 767 P.2d at 372.

334. *Id.* at 132, 767 P.2d at 371.

335. *Id.* at 133, 767 P.2d at 372.

336. *Id.*

337. *Id.*

338. *Id.* at 134, 767 P.2d at 373.

339. 107 N.M. 648, 763 P.2d 82 (Ct. App. 1988).

340. *Id.* at 649, 763 P.2d at 83.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.* at 649-50, 763 P.2d at 83-84. The worker relied on a test set out in Judge Sutin's opinion in *Chavez v. Lectrosonics, Inc.*, 93 N.M. 495, 601 P.2d 728 (Ct. App. 1979). The test established causal connection by proof of a previous disability and medical testimony of an increased risk of injury or, on the other hand, found no causal connection if the worker could perform the

finding of a causal connection between the false representation and the injury because there was substantial evidence supporting the three percent physical impairment from the previous disability and the worker's increased risk of injury, as established by expert medical testimony.³⁴⁶ Furthermore, if the court adopted the worker's argument, it would have had to inconsistently find both causal connection³⁴⁷ and no causal connection in the same case.³⁴⁸

IV. APPELLATE REVIEW

The New Mexico Legislature granted the Workers' Compensation Division exclusive jurisdiction over all workers' compensation claims filed after December 1, 1986.³⁴⁹ In *Tallman v. ABF (Arkansas Best Freight)*,³⁵⁰ the court established that the whole record standard of review applies to review of findings of fact from the Workers' Compensation Division. In *Tallman*, the court described the whole record standard as allowing the appellate court to review all the evidence, both favorable and unfavorable to the findings.³⁵¹ Only evidence having little or no worth is disregarded.³⁵² The court articulated the test as whether "there is evidence for a reasonable mind to accept as adequate to support the conclusion reached."³⁵³ In effect, the whole record standard is the substantial evidence standard applied to the whole record.³⁵⁴

V. ATTORNEY FEES

Another aspect of workers' compensation law which underwent drastic change during the survey period was that of attorney fees. The practitioner must examine each workers' compensation claim to determine which of the several attorney fees provisions apply. The 1959

same duties at her prior employment before applying for the job and was able to perform those duties at her subsequent employment. *Id.* at 498, 601 P.2d at 731. Judge Sutin stated this rule was limited to *Chavez*, and his opinion was not an opinion of the court under the rule requiring a quorum. *Jaynes*, 107 N.M. at 649, 763 P.2d at 83 (citing *Casias v. Zia Co.*, 94 N.M. 723, 616 P.2d 436 (Ct. App. 1980) and N.M. STAT. ANN. § 34-5-4 (Repl. Pamph. 1982)). Of the three-member panel in *Chavez*, one judge concurred in the result and one specially concurred. *Chavez*, 93 N.M. at 499, 601 P.2d at 732.

346. *Jaynes*, 107 N.M. at 649, 763 P.2d at 83.

347. See *supra* text accompanying note 415.

348. *Id.* at 649-50, 763 P.2d at 83-84.

349. N.M. STAT. ANN. § 52-5-1 (Repl. Pamph. 1987).

350. 108 N.M. 124, 767 P.2d 363 (Ct. App.), *cert. denied*, 109 N.M. 33, 781 P.2d 305 (1988).

351. *Id.* at 128, 767 P.2d at 367. Under the substantial evidence standard, governing review of district court findings of fact, an appellate court will view the evidence in the light most favorable to the findings and disregard any unfavorable evidence. *Nelson v. Nelson Chemical Corp.*, 105 N.M. 493, 734 P.2d 273 (Ct. App. 1987).

352. *Tallman*, 108 N.M. at 128, 767 P.2d at 367.

353. *Id.*

354. *Id.* The substantial evidence standard of review is modified and supplemented with the whole record standard of review for findings of fact from administrative agencies. See *Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.*, 101 N.M. 291, 681 P.2d 717 (1984).

Act³⁵⁵ provided that a worker could collect attorney fees from the employer as part of the cost of the proceeding.³⁵⁶ The Interim Act,³⁵⁷ in effect from July 1, 1986, to June 18, 1987, established restrictions on the amount of fees that could be awarded to a worker's attorney: twenty-five percent of the first \$5,000 of the award, fifteen percent of the next \$5,000 of the award, and ten percent of the remainder of the award. The Interim Act also described the particular circumstances under which a worker could recover attorney fees.³⁵⁸ Only under those circumstances, all involving some degree of bad faith on the part of the employer or carrier, could a worker recover attorney fees.

The current Workers' Compensation Act, which took effect on June 19, 1987, provides that the employer will pay three-fourths of a worker's attorney fees while the worker will pay the remaining one-fourth.³⁵⁹ A flat \$12,500 ceiling applies to an attorney fees award, regardless of the number of lawyers a worker hires on his behalf.³⁶⁰ All the cases decided during the survey period concerned the 1959 Act or the 1986 Interim Act.³⁶¹ Nonetheless, some of the language in those cases may help interpret the 1987 Act.

355. 1959 N.M. Laws 196 (effective July 1, 1959).

356. *Woodson v. Phillips Petroleum Co.*, 102 N.M. 333, 695 P.2d 483 (1985). Section 52-1-54 (1978) provided that the court should fix the amount of the fee and tax that amount as a part of the proceeding.

357. 1986 N.M. Laws 547 (effective date July 1, 1986).

358. Act approved Feb. 21, 1986, ch. 22, § 52-3-47C(1), 1986 N.M. Laws 599-600 allows the worker attorney fees under the following circumstances:

- (1) When the worker applied for medical benefits only and the employer refused to pay those benefits without reasonable basis.
- (2) When the employer or carrier acted in bad faith, resulting in economic loss to the employee.
- (3) When the employer denies that an injury occurred then the worker prevails on that issue at the hearing or trial.

359. N.M. STAT. ANN. § 52-1-54(H) (Cum. Supp. 1989).

360. N.M. STAT. ANN. § 52-1-54(G) (Cum. Supp. 1989) states:

Neither the workers' compensation judge nor the courts on appeal shall award an amount of attorneys' fees on behalf of a claimant in excess of twelve thousand five hundred dollars (\$12,500). This limitation applies whether the claimant has one or more attorneys representing him and applies as a cumulative limitation on compensation for all legal services rendered in all proceedings and other matters directly related to a single accidental injury to the claimant. The workers' compensation judge may exceed the maximum amount stated in this subsection in awarding a reasonable attorney's fee if he finds that an employer acted in bad faith with regard to handling the injured worker's claim and the injured worker has suffered economic loss as a result thereof. As used in this subsection, "bad faith" means conduct by the employer in the handling of a claim which amounts to fraud, malice, oppression or willful, wanton or reckless disregard of the rights of the worker. Any determination of bad faith shall be made by the workers' compensation judge through a separate fact-finding proceeding.

N.M. STAT. ANN. § 52-1-54(D) (Cum. Supp. 1989) also considers "the failure of a party or parties to participate in a good faith manner in informal claim resolution methods adopted by the director" as a factor in the fee determination.

361. *Strong v. Sysco Corp./Nobel Sysco*, 108 N.M. 639, 776 P.2d 1258 (Ct. App. 1989); *Tallman v. ABF (Arkansas Best Freight)*, 108 N.M. 124, 767 P.2d 363 (Ct. App. 1989); *Davis v. Los Alamos Nat'l Lab.*, 108 N.M. 587, 775 P.2d 1304 (Ct. App.), *cert. denied*, 108 N.M. 433, 773 P.2d 1240

In *Tallman v. ABF (Arkansas Best Freight)*,³⁶² the question before the court of appeals was whether Tallman's attorney fees award was made under the wrong statute and, if so, whether the court lacked jurisdiction to make the award.³⁶³ Tallman injured his back, apparently as a result of continuous, heavy lifting.³⁶⁴ Tallman claimed the injury could have occurred at any time since 1977.³⁶⁵ The Workers' Compensation Division found that Tallman sustained an injury on September 5, 1986, and awarded him \$2,500 in attorney fees.³⁶⁶ Tallman maintained that the award should have been made under the 1959 Act rather than under the Interim Act because he suffered pain since 1977.³⁶⁷ Under the 1959 Act, Tallman's attorney fees award would not be tied to his compensation award.³⁶⁸

The court of appeals granted Tallman an extension of time to file a cross-appeal regarding the attorney fees issue, but he failed to file a docketing statement.³⁶⁹ Therefore, his cross-appeal was deemed abandoned, and the court of appeals did not resolve the question on the merits. However, the court did hold that there was jurisdiction to award fees under the wrong statute.³⁷⁰

Strong v. Sysco Corp./Nobel Sysco,³⁷¹ involved the manner of payment of attorney fees, not the amount. A hearing officer awarded the worker \$67.33 per week in compensation benefits and awarded his attorney \$4,523.95 in attorney fees, to be paid out of the weekly compensation benefits.³⁷² The attorney complained that he should be awarded a lump sum deducted from the worker's total award.³⁷³ The

(1989); *Urioste v. Sideris*, 107 N.M. 733, 764 P.2d 504 (Ct. App. 1988); *Beltran v. Van Ark Care Center*, 107 N.M. 273, 756 P.2d 1 (Ct. App. 1988). *Tallman* and *Strong* are discussed in the text.

Davis involved a plaintiff who slipped and fell at work. He asked to be reimbursed for a captain's chair installed in his truck and a hot tub installed in his home. 108 N.M. at 588, 775 P.2d at 1305. The employer paid compensation but denied that the other expenses were necessary. *Id.* at 588-89, 775 P.2d at 1305-06. The hearing officer awarded Davis \$500, the cost of the captain's chair. *Id.* at 589, 775 P.2d at 1306. Prior to the hearing, the employer accepted a recommended solution to pay Davis an amount greater than \$500. *Id.* at 590, 775 P.2d at 1307. Accordingly, the court of appeals denied Davis his attorney fees. *Id.* at 591, 775 P.2d at 1308.

In *Urioste*, a case decided under the Interim Act, the court precluded an employer from challenging an attorney fees award unless the employer had submitted findings of fact and conclusions of law. 107 N.M. at 739, 764 P.2d at 510.

In *Beltran*, a case decided under the 1959 Act, the court held that attorney fees should be apportioned between successive insurance carriers in a manner reflecting each carrier's liability to a worker who suffers two, unrelated injuries. 107 N.M. at 276-77, 756 P.2d at 4-5.

362. 108 N.M. 124, 767 P.2d 363.

363. *Id.* at 133, 767 P.2d at 372.

364. *Id.* at 130, 767 P.2d at 369.

365. *Id.* at 131, 767 P.2d at 370.

366. *Id.* at 126, 134, 767 P.2d at 365, 373.

367. *Id.*

368. 1959 N.M. Laws 219 (effective date July 1, 1959) allowed a court to fix whatever amount the court deemed reasonable and proper.

369. *Tallman*, 108 N.M. at 133, 767 P.2d at 372.

370. *Id.* at 134, 767 P.2d at 373.

371. 108 N.M. 639, 776 P.2d at 373 (Ct. App. 1989).

372. *Id.* at 640, 776 P.2d at 1259.

373. *Id.*

worker would receive the same weekly amount, but for a shorter period of time.³⁷⁴ The court of appeals held that Tallman's hearing officer acted within his discretion in refusing to award a lump sum award.³⁷⁵ The *Strong* court recognized that prorating an attorney fees award works a hardship on the attorney and could possibly have a chilling effect on attorneys' desire to represent workers' compensation claimants, but the court nonetheless affirmed the hearing officer's decision.³⁷⁶

The Interim Act purported to limit an employer's responsibility for paying compensation to the injured worker.³⁷⁷ Just as a lump sum attorney fee would benefit the recipient by avoiding lost interest or lost opportunities to use the money, so would a lump sum payment burden the employer. In *Strong*, the court stated that the burden was contrary to the spirit of the Interim Act which squarely placed the burden of paying attorney fees on the worker.³⁷⁸ Also, the hearing officer had discretion to order payment of the award in the manner he thought most consistent with the Interim Act.³⁷⁹

VI. SUBSEQUENT INJURY ACT

A. Statutory Change

The Subsequent Injury Act³⁸⁰ (SIA) underwent significant statutory revisions during the survey period. The major changes include legislation concerning payments from the Subsequent Injury Fund (the Fund),³⁸¹ an enactment of a period of limitations on claims,³⁸² and legislation governing who may bring a claim against the Fund.³⁸³

374. *Id.*

375. *Id.*

376. *Id.* at 641, 776 P.2d at 1260.

377. *Id.*

378. *Id.* at 640, 776 P.2d at 1259.

379. *Id.* at 641, 776 P.2d at 1260.

380. N.M. STAT. ANN. §§ 52-2-1 to -14 (Repl. Pamp. 1987 & Cum. Supp. 1989). The Subsequent Injury Act created the Subsequent Injury Fund for the purpose of encouraging the employment of the handicapped by equitably adjusting an employer's liability for subsequent injuries. N.M. STAT. ANN. § 52-2-2 (Cum. Supp. 1989). For a discussion on the requirements of the Act, see Note, *Workmen's Compensation: The Procedural Requirements of the Subsequent Injury Act*, Fierro v. Stanley's Hardware, 18 N.M.L. REV. 269 (1988).

381. N.M. STAT. ANN. § 52-2-5(A) (Cum. Supp. 1989); cf. 1988 N.M. Laws, ch. 109, § 3; 1986 N.M. Laws, ch. 22, § 47.

382. N.M. STAT. ANN. § 52-2-14 (Cum. Supp. 1989). There was no previous period of limitations.

383. N.M. STAT. ANN. § 52-2-5(B) (Cum. Supp. 1989) provides:

Subject to the requirements of Section 52-2-14 NMSA 1978, an employer or its insurance carrier may assert a claim against the subsequent injury fund under the following circumstances only:

(1) if a worker asserts a claim against the employer under the Worker's Compensation Act, the employer or its insurance carrier may join the subsequent injury fund as an additional party and assert a right to reimbursement from the subsequent injury fund; and

(2) if the worker is receiving compensation benefits from the employer, the employer or its insurance carrier may continue to make the payments and file a claim pursuant to the Subsequent Injury Act against the subsequent injury fund for apportionment

The 1988 enactment of section 52-2-5(A)(1) of the Act limits the Fund's reimbursement liability to an employer or its insurance carrier according to the Fund's apportioned liability.³⁸⁴ The current provision encompasses case law preceding the enactment of the provision which also limited the Fund's liability to its apportioned liability.³⁸⁵ When a worker settles with his employer or its insurer, the Fund is not bound by the terms of the settlement.³⁸⁶ The Fund's liability must be adjudicated.³⁸⁷

An important statutory development was the enactment of periods of limitations for the SIA.³⁸⁸ In 1988 the New Mexico Legislature enacted a two-year period of limitations for claims against the Fund.³⁸⁹ Section 52-2-14 requires a claimant against the fund to file within two years "after the employer receives notice of a compensation claim . . . or has actual knowledge of a compensation claim."³⁹⁰ The two-year limitation presumably operates against a worker who files against the

of compensation benefits between the employer or its insurance carrier and the subsequent injury fund.

See also *id.* §§ 52-2-5(D) & (E) (Cum. Supp. 1989) (a worker may file a claim against the Fund only when the employer is no longer doing business in New Mexico or is bankrupt). The previous statute did not contain any provisions governing who may bring a claim against the Fund. See *id.* § 52-2-5 (Repl. Pam. 1987).

384. *Id.* § 52-2-5(A)(1) (Cum. Supp. 1989). In *Urioste v. Sideris*, 107 N.M. 733, 764 P.2d 504 (Ct. App. 1988), the court held that the employer and carrier at the time of the first accident remain liable to a claimant for benefits payable to the extent of any future disability resulting from the initial injury. In *Urioste*, the subsequent injury was related to the initial injury. *Id.* at 735, 764 P.2d at 506. The employer and carrier at the time of the second injury are liable for compensation for the disability resulting from that injury, but that amount is subject to reduction to the extent of benefits paid or payable for a disability resulting from the first accidental injury. *Id.* at 738, 764 P.2d at 509.

385. *Mares v. Valencia County Sheriff's Dep't*, 106 N.M. 744, 749 P.2d 1123 (Ct. App. 1988); *Romero v. Cotton Butane Co.*, 105 N.M. 73, 728 P.2d 483 (Ct. App. 1986); *Duran v. Xerox Corp.*, 105 N.M. 277, 731 P.2d 973 (Ct. App.), *cert. denied*, 105 N.M. 290, 731 P.2d 1334 (1987).

386. *Romero*, 105 N.M. at 77, 728 P.2d at 487.

387. See *Mares*, 106 N.M. at 746, 749 P.2d at 1125.

388. Prior to enactment, there was no specific statute of limitations for claims against the Fund. An employer's suit against the Fund was governed by the four-year statute of limitations of N.M. STAT. ANN. § 37-1-4 for "all other actions not . . . otherwise provided for and specified by law." *Hernandez v. Levi Strauss, Inc.*, 107 N.M. 644, 763 P.2d 78 (Ct. App.), *cert. denied*, 107 N.M. 673, 763 P.2d 689 (1988).

389. N.M. STAT. ANN. § 52-2-14 (Cum. Supp. 1989) provides:

A. An employer or its insurance carrier shall assert a claim against the fund within two years after the employer receives notice of a compensation claim under Subsection A of Section 52-1-29 NMSA 1978 or has actual knowledge of a compensation claim under Subsection B of Section 52-1-29 NMSA 1978; otherwise, the employer's claim and its insurance carrier's claim against the fund are barred.

B. The superintendent of insurance shall be notified in writing by an employer or its insurance carrier of the employer's or its insurance carrier's intent to file a claim against the fund at least ninety days before the employer or its insurance carrier files a claim against the fund. The written notice shall be a condition precedent to filing any claim. If an employer or its insurance carrier fails timely to provide the written notice required by this subsection, an employer's claim and its insurance carrier's claim against the fund are barred.

390. *Id.* § 52-2-14(A).

Fund,³⁹¹ since the worker assumes the status of the employer.³⁹²

In addition to the two-year limitation on claims against the Fund, the legislature enacted a "notice of claim" requirement.³⁹³ There was no previous notice requirement. Section 52-2-14(B) now mandates a ninety-day written notice of "intent to file a claim" for claims against the Fund.³⁹⁴ Failure to submit the written notice will bar a claim against the Fund.³⁹⁵

B. Reduction of Apportioned Liability

In one case during the survey period, *Lea County Good Samaritan Village v. Wojcik*,³⁹⁶ the court of appeals considered whether the Fund was entitled to a reduction in its apportioned liability for an alleged payment on a prior injury. Good Samaritan knew the worker was injured previously when it hired him.³⁹⁷ In September 1984, while working for Good Samaritan, the worker fell from a roof and injured the same part of the body and same function as was affected by the initial injury.³⁹⁸ At trial, the Fund attempted to reduce its apportioned liability under section 52-1-47(D) by the amount paid by the previous employer, Y.M.C.A., for injuries suffered to the same body members and functions.³⁹⁹ The court of appeals upheld the trial court's denial of a reduction in the Fund's apportioned liability because the Fund did not meet the burden of proof required for a reduction in liability.⁴⁰⁰

391. A worker may bring an action against the Fund only when the employer is no longer doing business in New Mexico or cannot bring an action against the Fund due to bankruptcy or cessation of business. *Id.* § 52-2-5(D) and (E).

392. N.M. STAT. ANN. § 52-2-5(D) provides, "The worker takes the place of and assumes the status of the worker's employer on the claim against the Fund."

393. *Id.* § 52-1-14(B).

394. *Id.*

395. *Id.*

396. 108 N.M. 76, 766 P.2d 920 (Ct. App. 1988).

397. *Id.* at 79, 766 P.2d at 923.

398. *Id.*

399. *Id.* at 80, 766 P.2d at 924; N.M. STAT. ANN. § 52-1-47(D) states:

[T]he compensation benefits payable by reason of disability caused by accidental injury shall be reduced by the compensation benefits paid or payable on account of any prior injury suffered by the worker if compensation benefits in both instances are for injury to the same member or function or for disfigurement and if the compensation benefits payable on account of the subsequent injury would, in whole or in part, duplicate the benefits paid or payable on account of such prior injury.

400. *Lea County*, 108 N.M. at 82, 766 P.2d at 926. The Fund must establish:

(1) the extent and nature of the worker's disability at the time of the settlement of his claim for the prior accidental injury; (2) the amount of the settlement for the prior injury, including the amount which is attributable to an award for compensation benefits, and the specific amount, if any, included in the settlement for payment of medical or vocation rehabilitation benefits, attorney fees, or other specific benefits; (3) the number of weeks of compensation benefits which were paid or payable to the worker for permanent or partial disability; and (4) the extent to which payments for the second injury will duplicate payments previously made to the worker. The court may also take into consideration any other relevant factors.

Id. at 81, 766 P.2d at 925. The Fund failed to delineate what portion of benefits were allocated for compensable injuries, future medical expenses, vocational rehabilitation, or other specific benefits.

Id. at 82, 766 P.2d at 926.

Ordinarily, when a second employer seeks a reduction from reimbursement for payments on a previous injury, the second employer and the Fund share the burden of proof to establish a right to reduction.⁴⁰¹ However, in *Lea County*, Good Samaritan withdrew its request for a reduction in liability.⁴⁰² In that situation, the Fund must establish its right to a reduction and the amount by a preponderance of the evidence.⁴⁰³ In *Lea County*, the prior settlement agreement between the worker and the first employer did not contain any itemized amounts of expenses or apportionment.⁴⁰⁴ Since the Fund did not offer any other proof for a reduction in benefits, the Fund did not meet its burden of proof.⁴⁰⁵

C. Post-Judgment Interest

In *Mares v. Valencia County Sheriff's Department*,⁴⁰⁶ the court of appeals addressed the question of post-judgment interest under the SIA, an issue of first impression in New Mexico.⁴⁰⁷ The Fund argued it was a state entity for the purpose of a statutory exemption from an award of interest in civil cases.⁴⁰⁸ However, because of the remedial nature of the SIA and its beneficent purposes, the court concluded the legislature intended to permit the trial court to allow interest on benefits owed to a worker.⁴⁰⁹ The court held that the trial court in its discretion could allow interest on compensation benefits payable by the Fund, subject to the limitation that such interest be allowed for the portion of judgment against the Fund in favor of the worker.⁴¹⁰ The court also concluded that any post-judgment interest from the Fund does not commence to run until the time set for the payment.⁴¹¹

D. Certificate of Preexisting Impairment

The SIA requires an employer to file a certificate of preexisting impairment for apportionment of liability under the SIA.⁴¹² The filing requirement serves a dual purpose. First, the certificate gives an em-

401. *Id.* at 80, 766 P.2d at 924.

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.* at 82, 766 P.2d at 926.

406. 106 N.M. 744, 749 P.2d 1123 (Ct. App. 1988).

407. *Id.* at 751-52, 749 P.2d at 1130-31; see *Lea County*, 108 N.M. 76, 766 P.2d 920 (Ct. App. 1988) (Fund is not liable for the post-judgment interest on amounts of reimbursement payable to either the employer or its insurer).

408. *Mares*, 106 N.M. at 751, 749 P.2d at 1130; see N.M. STAT. ANN. § 56-8-4(D) (Repl. Pamph. 1986) (specifically exempting the state from payment of post-judgment interest).

409. *Mares*, 106 N.M. at 75, 749 P.2d at 1130 (citing *Vaughn v. United Nuclear Corp.*, 98 N.M. 481, 486-87, 650 P.2d 3, 8-9 (Ct. App. 1982)); cf. N.M. STAT. ANN. § 52-5-1 (Cum. Supp. 1989). The legislature stated that the Workers' Compensation Act and the Occupational Disease Disablement Law were not remedial in any way and that liberal construction does not apply to interpretations of those particular statutory sections. *Id.* § 52-5-1 (Cum. Supp. 1989).

410. *Mares*, 106 N.M. at 751, 749 P.2d at 1130.

411. *Id.* at 752, 749 P.2d at 1131.

412. N.M. STAT. ANN. § 52-2-6 (Cum. Supp. 1989).

ployer notice of a preexisting injury and, second, the certificate documents the nature and extent of the impairment.⁴¹³ The certificate requirement also promotes the hiring of the handicapped by allowing the employer to limit its liability for a worker's second injury.⁴¹⁴ The 1988 amendment to the certificate provision made sections A and D consistent and now requires filing a certificate before the SIA will apply.⁴¹⁵ The 1988 amendment provides:

A. *Subject to the limitations on the applicability of the Subsequent Injury Act in Subsection D of this section, any worker may file and any employer may require a worker as a condition of employment or continued employment to file with the superintendent of insurance a certificate of pre-existing permanent physical impairment.*

D. *The Subsequent Injury Act shall only be applicable to a disability arising out of an accident or occurrence taking place after the date a certificate of pre-existing impairment exists, is executed and filed with the superintendent of insurance.*⁴¹⁶

The prior provision allowed a worker to file "at any time" and permitted the SIA to apply when the certificate was executed but not filed.⁴¹⁷ The revision's execution and filing requirement eliminates the actual knowledge exception to timely filing of preexisting impairment certificates.⁴¹⁸

The effect of the amendment is to allow a reduction in an employer's liability only when a preexisting injury or impairment is known and a certificate is on file.⁴¹⁹ The revision also obligates employers to file certificates before the second injury. If an employer hires a worker

413. *Padilla v. Chavez*, 105 N.M. 349, 351, 732 P.2d 876, 878 (Ct. App.), *cert. denied sub nom. Jasso v. Chavez*, 105 N.M. 358, 732 P.2d 1381 (1987).

414. *Id.* at 350, 732 P.2d at 877 (citing N.M. STAT. ANN. § 52-2-2 (1978)).

415. The prior inconsistency between section (D) and section (A) permitted certificates to be filed and executed after a second injury if the employer had actual knowledge of the preexisting impairment. *Fierro v. Stanley's Hardware*, 104 N.M. 50, 716 P.2d 241 (1986); *Duran v. Xerox Corp.*, 105 N.M. 277, 731 P.2d 973 (Ct. App.), *cert. denied sub nom. Jasso v. Duran*, 105 N.M. 290, 731 P.2d 1334 (1987); *Vaughn v. United Nuclear Corp.*, 98 N.M. 481, 650 P.2d 3 (Ct. App.), *cert. quashed*, 98 N.M. 478, 649 P.2d 1391 (1982).

416. N.M. STAT. ANN. §§ 52-2-6(A) and (D) (Cum. Supp. 1989) (emphasis added).

417. Prior to the 1988 amendment subsections (A) and (D) provided:

A. Any worker *may at any time file* and any employer may require a worker as a condition of employment or continued employment to file with the superintendent of insurance a certificate of pre-existing permanent physical impairment.

B. In the event the certificate of pre-existing permanent physical impairment certifies that the impairment exists, the Subsequent Injury Act shall be *applicable to any disability arising out of an accident or occurrence taking place after the date a certificate is filed.*

N.M. STAT. ANN. §§ 52-2-6(A) and (D) (Repl. Pam. 1987) (emphasis added).

418. During the survey period, several cases analyzed and applied the actual knowledge exception under the prior version of this section, N.M. STAT. ANN. § 52-2-6 (Repl. Pam. 1987). See *Padilla v. Chavez*, 105 N.M. 349, 732 P.2d 876; *Duran v. Xerox Corp.*, 105 N.M. 277, 731 P.2d 973. Under the current provision, the actual knowledge doctrine as developed in these cases is no longer valid.

419. N.M. STAT. ANN. § 52-2-6 (Cum. Supp. 1989).

who suffered a previous injury but the employer did not have knowledge of that injury, the employer may attempt to eliminate his liability through the falsified employment application defense.⁴²⁰ The revision of section 52-2-6 clearly made major changes in certificate requirements, the actual knowledge doctrine, and the basis for reimbursement from the Fund.

VII. OCCUPATIONAL DISEASE DISABLEMENT LAW

The New Mexico Occupational Disease Disablement Law⁴²¹ (ODDL) provides compensation for work-related diseases as opposed to the accidental injuries compensated under the Workers' Compensation Act.⁴²² The ODDL mandates that an injury cannot be compensable as both a work-related injury and an occupational disease.⁴²³ Further, the ODDL also distinguishes between occupational diseases and common diseases otherwise not associated with employment.⁴²⁴

In *Cisneros v. Molycorp*,⁴²⁵ the court of appeals articulated the distinction between accidental injuries and occupational diseases. In *Cisneros*, the worker suffered a gradual loss of hearing from continuous exposure to excessive noise.⁴²⁶ The worker was prescribed hearing aids in 1984 and informed his foreman that the hearing loss was work-related.⁴²⁷ In 1987, the worker brought a workers' compensation claim against Molycorp.⁴²⁸ The employer argued that the worker was not entitled to benefits because the hearing loss was an occupational disease.⁴²⁹

Because the gradual, noise-induced hearing loss was an unforeseen result of the worker's routine performance of duties, the court concluded that the hearing loss was an accidental injury.⁴³⁰ In distinguishing between occupational diseases and accidental injuries, the court applied

420. *Jaynes v. Wal-Mart Store No. 824*, 107 N.M. 648, 763 P.2d 82 (Ct. App. 1988); *Padilla v. Chavez*, 105 N.M. 349, 351, 732 P.2d 876, 878. For a general discussion of the falsified employment application defense, see *supra* notes 325-48 and accompanying text.

421. N.M. STAT. ANN. §§ 52-3-1 to -60 (Repl. Pamp. 1987 & Cum. Supp. 1989).

422. N.M. STAT. ANN. § 52-3-46 (Cum. Supp. 1989) provides:

In all cases where injury results by reason of an accident arising out of or in the course of employment, no compensation under the New Mexico Disease Disablement Law shall be payable nor shall any compensation under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] for any occupational disease.

423. *Id.* § 52-3-46 (Cum. Supp. 1989). This statute prevents double recovery. *Martinez v. University of Cal.*, 93 N.M. 455, 601 P.2d 425 (1979); *Cisneros v. Molycorp*, 107 N.M. 788, 790, 765 P.2d 761, 763 (Ct. App.), *cert. denied*, 107 N.M. 785, 765 P.2d 758 (1988).

424. N.M. STAT. ANN. § 52-3-33 (Repl. Pamp. 1987) provides: "[An] 'occupational disease' includes any disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment."

425. 107 N.M. 788, 765 P.2d 761 (Ct. App.), *cert. denied*, 107 N.M. 785, 765 P.2d 758 (1988).

426. *Id.* at 790, 765 P.2d at 763.

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.* at 791-93, 765 P.2d at 764-66.

only a foreseeability test.⁴³¹ If the injury was not foreseeable, it was an accidental injury and not an occupational disease.⁴³²

In determining whether a disease is occupational, the courts must determine whether there is a recognizable link between the disease and some distinctive feature of the job.⁴³³ In *Chadwick v. Public Service Co. of New Mexico*,⁴³⁴ the court of appeals applied the recognizable link test to a situation where a worker suffered from a rash while he was working at a power generating station.⁴³⁵ After the worker stopped working at the generating station the rash eventually disappeared.⁴³⁶ The trial court found the rash was caused by an airborne substance at the generating station, although no one was able to identify the substance causing the allergy.⁴³⁷ The court of appeals upheld the trial court's conclusion that the allergy was a disease, but held it was not a compensable occupational disease.⁴³⁸ The court of appeals reasoned that an allergy caused by airborne substances found in the workplace, but not as a result of carrying out the occupation, is not a compensable occupational disease.⁴³⁹ The disease must result from the nature of the occupation, not from the conditions of the workplace.⁴⁴⁰ Furthermore, the worker's ability to perform the same work elsewhere precluded his eligibility to receive occupational disease compensation.⁴⁴¹

In *Tapia v. Springer Transfer Co.*,⁴⁴² the court of appeals decided within what time limitation a surviving dependent spouse may sue for death benefits resulting from an occupational disease. In *Tapia*, the dependent of a worker who died from silicosis filed for benefits one year after the worker died, but sixteen years after his last day of employment.⁴⁴³ Section 52-3-10(B)(3) of the ODDL states that an employer is not liable "for death from silicosis . . . unless the death results within two years from the last day upon which the employee actually worked for the employer" and within five years if the death

431. *Id.* at 792, 765 P.2d at 765. New Mexico has rejected additional tests such as the specific time, place and cause requirements. The various jurisdictions are split on how to distinguish an accidental injury from an occupational disease, which has lead to different results for nearly identical situations. See *id.* (citing *Martinez v. Taylor Forge & Pipe Works*, 174 Ind. App. 514, 368 N.E.2d 1176 (1977)).

432. *Cisneros*, 107 N.M. at 792, 765 P.2d at 765.

433. *Martinez v. University of Cal.*, 93 N.M. 455, 457, 601 P.2d 425, 427 (1979); *Chadwick v. Public Serv. Co. of N.M.*, 105 N.M. 272, 274, 731 P.2d 968, 970 (Ct. App. 1986), *cert. denied*, 105 N.M. 290, 731 P.2d 1334 (1987).

434. 105 N.M. 272, 731 P.2d 968 (Ct. App. 1986).

435. *Id.* at 273, 731 P.2d at 969.

436. *Id.*

437. *Id.*

438. *Id.* at 275, 731 P.2d at 971.

439. *Id.*

440. *Id.*

441. *Id.* (citing N.M. STAT. ANN. § 52-3-4(A) (Cum. Supp. 1986), amended and recodified at N.M. STAT. ANN. § 52-3-4(D) (Cum. Supp. 1989)).

442. 106 N.M. 461, 744 P.2d 1264 (Ct. App.), *cert. quashed*, 106 N.M. 405, 744 P.2d 180 (1987).

443. *Id.* at 462, 744 P.2d at 1265.

occurs during a period of continuous disablement, and a claim is filed with the director or compensation has been paid or awarded.⁴⁴⁴

The spouse argued that her claim was timely under section 52-3-42(C)⁴⁴⁵ of the ODDL which requires dependents to file claims for death benefits from an occupational disease within one year after the date of death.⁴⁴⁶ The court held that if the time limits of section 52-3-10(B)(3) are not met, the claim is untimely, even if the dependent filed within one year of death pursuant to section 52-3-42(C).⁴⁴⁷ The spouse argued that the time for filing her claim was tolled under section 52-3-25 by the "course of conduct" of the employer and the insurer.⁴⁴⁸ She further argued this was a genuine issue of fact and appealed the summary judgment denying her claim.⁴⁴⁹ The court of appeals stated the issue was not material and the supporting affidavit contained inadmissible hearsay.⁴⁵⁰ Section 52-3-25 tolls the time requirement for notice and filing under section 52-3-16(B).⁴⁵¹ The court conceded that section 52-3-25 may result in the case being governed by the five-year, rather than the two-year, limitation.⁴⁵² Section 52-3-10(B)(3), however, establishes a "condition precedent" to recovery.⁴⁵³ In *Tapia*, the conditions of section 52-3-10(B)(3) were not met because the death from silicosis occurred sixteen years after the last day of employment.⁴⁵⁴

Cases construing the ODDL did not alter or expand the rules distinguishing occupational diseases from either accidental injuries or diseases not associated with the occupation. The difficulty in most cases is not whether a disease is compensable, but whether it is compensable as an accidental injury or occupational disease.⁴⁵⁵

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444. N.M. STAT. ANN. § 52-3-10(B)(3) (Repl. Pamp. 1987).

445. *Id.* § 52-3-42(C) (Repl. Pamp. 1987).

446. *Tapia*, 106 N.M. at 463, 744 P.2d at 1266.

447. The court noted the irony that the decedent's ability to survive in spite of his disabling disease for sixteen years was fatal to his widow's claim. *Id.*

448. *Id.* at 462, 744 P.2d at 1265. N.M. STAT. ANN. § 52-3-25 provides that benefits shall not be denied for failure to give timely notice or file a timely claim through conduct of the insurer or the employer. For a discussion of tolling by "course of conduct" under the Workers' Compensation Act, see *supra* notes 267-78 and accompanying text.

449. *Tapia*, 106 N.M. at 463, 744 P.2d at 1266.

450. *Id.*

451. N.M. STAT. ANN. § 52-3-16(B) bars any recovery if a worker fails to provide notice under section 52-3-19 or if the worker fails to file a timely claim and give actual notice.

452. *Tapia*, 106 N.M. at 463, 744 P.2d at 1266.

453. *Id.*

454. *Id.*

455. See *Cisneros v. Molycorp*, 107 N.M. 788, 765 P.2d 761 (Ct. App.), *cert. denied*, 107 N.M. 785, 765 P.2d 758 (1988); *Chadwick v. Public Serv. Co. of N.M.*, 105 N.M. 272, 731 P.2d 968 (Ct. App.), *cert. denied*, 105 N.M. 290, 731 P.2d 1334 (1987).