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WORKMEN'S COMPENSATION: The Procedural Requirements of the Subsequent Injury Act, *Fierro v. Stanley's Hardware*

I. INTRODUCTION

The purpose of the New Mexico Subsequent Injury Act¹ is to encourage employment of handicapped persons by equitably adjusting the employer's workmen's compensation liability for injuries to a disabled employee.² The thrust of the Act is to limit the employer's liability to the amount of disability solely attributable to a job-related injury occurring subsequent to employment of the handicapped person or retention in employment of a previously disabled employee.³ The Subsequent Injury Fund⁴ is usually liable for the difference between the compensation payable for the disability resulting from the combined effect of a pre-employment disability and a subsequent job-related injury and that which would be payable for the subsequent job-related (second) injury alone.⁵

The Subsequent Injury Fund is generated from contributions made by insurance companies and self-insured employers.⁶ If the Subsequent Injury Act is applicable in a workmen's compensation case, the liability for

1. N.M. STAT. ANN. §§ 52-2-1 to -13 (1987 Repl. Pam.).

2. [T]he policy and intent of this legislature is declared to be as follows:

A. that every person in this state who must work for a living should have a reasonable opportunity to maintain his independence and self-respect through self-support if he has been physically handicapped;

B. that a plan which will reasonably, equitably and practically operate to remove obstacles to the employment of physically handicapped persons honorably discharged from the armed forces of the United States or any other physically handicapped person is of vital importance to the state, its people and this legislature; and

C. that it is the considered judgment of this legislature that the provisions embodied in the Subsequent Injury Act, which make a logical and equitable adjustment of employer's liability under the Workmen's Compensation Act [Chapter 52, Article 1 NMSA 1978], constitute a reasonable approach to the solution of the problem of employing physically handicapped persons.

N.M. STAT. ANN. § 52-2-2 (1987 Repl. Pam.).

3. *Duran v. Xerox Corp.*, 105 N.M. 277, 282, 731 P.2d 973, 978 (Ct. App. 1987).

4. N.M. STAT. ANN. § 52-2-4 (1987 Repl. Pam.).

5. *Smith v. Trailways, Inc.*, 103 N.M. 741, 746, 713 P.2d 557, 562 (Ct. App. 1986).

6. *Fierro v. Stanley's Hardware*, 104 N.M. 50, 53, 716 P.2d 241, 244 (1986). Pursuant to regulations prescribed by the superintendent of insurance, each employer or his insurance carrier pays quarterly to the Fund, an amount not to exceed three percent of the compensation benefits paid out each quarter, exclusive of medical and related benefits and attorneys fees, and a fixed amount for death benefits paid. N.M. STAT. ANN. § 52-2-4(B) (1987 Repl. Pam.). The current percentage is three percent, Certificate of Assessment, In the Matter of Subsequent Injury Fund Assessment Rates for Fiscal Year Beginning July 1, 1987, and Subsequent Fiscal Years (1987).

payments for injuries is apportioned by an administrative hearing officer or the court between the employer or its insurance carrier and the Subsequent Injury Fund.⁷ The Subsequent Injury Act has provided since its inception that in order for the Act to be applicable, a handicapped employee must execute a certificate of pre-existing permanent physical impairment prior to any subsequent job-related injury.⁸ The certificate provides documentation of the nature of the impairment and the percentage of disability as defined in the Workmen's Compensation Act.⁹ The certificate is filed with the superintendent of insurance.¹⁰

7. Prior to 1987, the liability for payments for injuries was judicially apportioned. N.M. STAT. ANN. § 52-2-11 (1978). The liability for payments is now administratively apportioned by the Workmen's Compensation Division. N.M. STAT. ANN. § 52-2-11 (1987 Repl. Pam.). See also N.M. STAT. ANN. §§ 52-5-1 to -19 (1987 Repl. Pam.). A decision of a hearing officer is reviewable by the court of appeals. *Id.* at § 52-5-8. For an analysis of apportionment of liability under the Subsequent Injury Act, see *Smith*, 103 N.M. at 745-48, 713 P.2d at 561-64.

8. N.M. STAT. ANN. § 59-10-133 (1961 Repl. Pam.) provides:

After January 1, 1962, the Subsequent Injury Act [59-10-126 to 59-10-138] shall be applicable only in those cases where there has been filed with the superintendent of insurance prior to the injury or occurrence causing the subsequent disability a certificate of existing physical impairment, or where a true copy of a certificate duly executed prior to the date of the alleged cause of increased physical impairment is attached to the pleading asserting liability of the fund. Such certificate shall specifically describe the existing impairment, the nature, and the extent thereof expressed in a percentage, and shall be signed by the employee, his employer and a physician licensed to practice in the state of New Mexico, and shall be acknowledged by each. . . .

9. N.M. STAT. ANN. §§ 52-2-5(C) and 52-2-6 (1978) were applicable when *Fierro* was decided. Section 52-2-5(C) (1978) stated in pertinent part:

In cases of persons who have begun a new employment after January 1, 1962, no judgement authorizing disbursement from said fund shall be entered unless the person claiming permanent physical impairment has given written notice to the employer of the nature and extent of such prior physical impairment prior to beginning his employment by his execution of the certificate required by Section 8 of the Subsequent Injury Act. . . .

N.M. STAT. ANN. § 52-2-6 (1978) states:

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

B. Said certificate shall set forth the nature of the impairment, expressed both as a description of the impairment, and as a percentage of disability as defined in the Workmen's Compensation Act [52-1-1 to 52-1-69 NMSA 1978]; it shall be signed and acknowledged by the workman and a physician duly licensed to practice medicine in the state of New Mexico. The certificate shall state whether the pre-existing impairment was caused by accidental injury.

C. In the event any workman suffers compensable injury as defined by the Workmen's Compensation Act, said certificate shall have the effect of limiting the employer's liability under the Workmen's Compensation Act to that disability attributable to the current injury.

D. In the event the certificate of preexisting physical impairment certifies that the impairment was the result of an accidental injury, the Subsequent Injury Act shall be applicable to any disability arising out of accident or occurrence taking place after the date a certificate is executed.

See *infra* at footnote 94 for discussion of the 1987 amendment to Section 52-2-6.

10. N.M. STAT. ANN. § 52-2-6(A) (1987 Repl. Pam.).

In *Fierro v. Stanley's Hardware*,¹¹ the New Mexico Supreme Court held that when an employer had actual knowledge of the employee's prior disability, the certificate of pre-existing physical impairment could be executed and filed after an employee incurred a second injury.¹² This note will examine the *Fierro* decision and its impact on the procedural requirements and application of the Subsequent Injury Act.

II. STATEMENT OF THE CASE

The defendant, Stanley's Hardware, hired the plaintiff, Jimmy Fierro, as a truckdriver in 1981.¹³ Fierro had been legally blind in his right eye since birth.¹⁴ Stanley's was not aware of the impairment when it hired Fierro, and Fierro never told the manager he had a disability.¹⁵ The manager learned indirectly "through the grapevine" that Fierro had "some sort of problem," but the manager never inquired about the nature and extent of the problem.¹⁶

In 1982, Fierro was helping his foreman jumpstart a vehicle at work when the battery exploded in his eye.¹⁷ As a result of the explosion, Fierro was virtually blinded in his left eye.¹⁸ Fierro brought suit against his employer, its insurance carrier, the New Mexico Subsequent Injury Fund (the "Fund"), and the superintendent of insurance, who is the administrator of the Fund, claiming workmen's compensation and subsequent injury fund benefits.¹⁹

The Fund appealed the judgment in favor of Fierro against the Fund.²⁰ Fierro had not executed and filed a certificate of pre-existing physical impairment until after the job-related injury.²¹ The Fund raised the question of whether Stanley's had sufficient actual knowledge of Fierro's right eye blindness to support a claim against the Fund.²²

11. 104 N.M. 50, 716 P.2d 241 (1986).

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

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

14. Plaintiff suffered from a condition known as "Descemet's folds" or "corneal folds." *Id.* The condition is caused by birth trauma and cannot be corrected by lenses. *Id.*

15. *Fierro v. Stanley's Hardware*, 104 N.M. 401, 404, 722 P.2d 652, 655 (Ct. App. 1985).

16. The manager testified at trial that he never inquired about the problem "because it in no way impaired his efficiency as an employee." *Id.* When asked if Stanley's ever took steps to "get rid" of plaintiff after learning of the problem, the manager responded, "Oh no, no, no, he was a very adequate employee." *Id.*

17. *Id.* at 402, 722 P.2d at 653.

18. *Fierro*, 104 N.M. at 51, 716 P.2d at 242.

19. *Id.*

20. *Id.*

21. *Id.* at 52, 716 P.2d at 243.

22. *Fierro*, 104 N.M. at 402, 722 P.2d at 653. The court of appeals created the "actual knowledge rule" in *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). Under the actual knowledge rule, the employee may execute and file a certificate of pre-existing physical impairment after a second job-related injury to make the Act apply to the second injury retroactively if the employer had actual knowledge of the employee's

The New Mexico Court of Appeals held that the evidence did not support the trial court's finding that Stanley's had prior actual knowledge of Fierro's disability and had retained Fierro in employment in spite of that knowledge.²³ The court also reversed its prior holding²⁴ that the certificate could be executed and filed *after* the job-related injury when the employer had actual knowledge of the employee's pre-existing disability (hereinafter the "actual knowledge rule"). Instead, the court held that the filing of the certificate must occur *before* the second injury regardless of the employer's prior actual knowledge of a pre-existing disability.²⁵

The New Mexico Supreme Court reversed the court of appeals and reaffirmed the actual knowledge rule.²⁶ The court also held that the trial court was correct in finding that Stanley's had sufficient actual knowledge of Fierro's pre-existing disability, and that the accident resulted in a subsequent injury compensable under the New Mexico Subsequent Injury Act.²⁷

III. HISTORICAL BACKGROUND

Handicapped persons encounter employment discrimination because of employer's fear of increased workmen's compensation liability which can result from the combined effect of a pre-existing permanent physical impairment²⁸ and a job-related injury.²⁹ For example, if an employee blind in one eye prior to employment loses the remaining eye in a job-related accident, there are three ways to apportion the resulting liability: (1) The employer can assume responsibility for the entire resulting disability from blindness in both eyes; (2) the legislature, pursuant to an apportionment

permanent pre-existing physical impairment. *Id.* at 487, 650 P.2d at 9. The Fund also raised the following issues: 1) whether the Subsequent Injury Act applies only to pre-existing physical impairments arising from accidental injuries, thereby excluding congenital impairments; 2) whether (and if so, how) the limitations of the scheduled member section of the Workmen's Compensation Act apply to the Subsequent Injury Act; and 3) whether the trial court correctly apportioned liability between the employer and the Fund. *Fierro*, 104 N.M. at 402, 722 P.2d at 653. On remand, the court of appeals held that the Subsequent Injury Act is applicable to congenital defects; that the limitations in the scheduled member section of the Workmen's Compensation Act do not apply to the Subsequent Injury Act; and that the trial court correctly apportioned liability between the employer and the Fund. *Fierro* 104 N.M. at 413-15, 722 P.2d at 664-66.

23. *Id.* at 405, 722 P.2d at 656.

24. See *Vaughn supra* at footnote 22.

25. *Fierro*, 104 N.M. at 408, 722 P.2d at 659.

26. *Fierro*, 104 N.M. at 53, 716 P.2d at 244.

27. *Id.*

28. N.M. STAT. ANN. § 52-2-3 (1987 Repl. Pamp.) defines permanent physical impairment as: any permanent physical defect, due to a previous accident or disease or due to any congenital condition, which is capable of being expressed in percentage terms as determined by medically or scientifically demonstrable findings as 31 presented in the American medical association's guides to the evaluation of permanent impairment. . . .

29. 2 LARSON, WORKMEN'S COMPENSATION LAW, § 59.10 (1981).

statute, can impose liability on the employer only for the second injury (in this case, loss of the remaining good eye) and the employee would bear the cost of the remaining percentage of disability; or (3) compensation for the injury can be apportioned between the employer and a subsequent injury fund.³⁰ The third alternative insures that the employee receives disability benefits which would be payable under workmen's compensation for the resulting disability and relieves the employer from that portion of the liability attributable to the combination of the prior disability and the job-related injury.

Prior to 1959, under the New Mexico Workmen's Compensation Act,³¹ the employer assumed responsibility for the entire resulting disability caused by a prior disability and a job-related accident.³² In 1959, The New Mexico Legislature added an apportionment provision to the Workmen's Compensation Act.³³ This apportionment provision allocated the compensable loss between the employer and the employee.³⁴ The employer's liability was limited to the compensation payable for the single injury incurred following employment or the retention of an employee after a disabling injury.³⁵ The employee bore that portion of the loss attributable

30. *Id.* at 10-345-346.

31. N.M. STAT. ANN. §§ 59-10-1 to -138 (1953).

32. See generally *Workmen's Compensation in New Mexico: Pre-existing conditions and the Subsequent Injury Act*, 7 NAT. RESOURCES J. 632 (1967). The Subsequent Injury Act had not been construed by the courts when this comment was written. See also *Reynolds v. Ruidoso Racing Ass'n*, 69 N.M. 248, 365 P.2d 671 (1961).

33. N.M. STAT. ANN. § 59-10-37 (1959 Repl. Pamp.) states:

A. For the purpose of limiting the extent of an employer's liability to compensable disability incurred in employment, the employer may require a prospective employee as a condition of employment, or a present employee as a condition of continued employment, to certify the existence, the nature and the extent of any pre-existing disability.

B. Statements of pre-existing disability shall specify the degree of disability and describe specifically the type of disability. Every statement shall contain the signature of the employer, the prospective or present employee, and at least one physician licensed to practice within the state, and shall be acknowledged by each person signing the same so as to be eligible to be recorded in the county where the employment is initiated or where the employee works.

C. Thereafter, any employee who files a certification of pre-existing disability, and who sustains a compensable accident shall be limited in his recovery to the percentage of disability attributable to the current injury. The burden shall be upon the workman claiming any substantial diminution or the disappearance of the certified disability to prove that at the time the current disability was sustained, the prior certified disability was non-existent or to prove the degree of its diminution. In no case shall an award for current injury include liability for any portion of that percentage of disability agreed to exist at the date of initial employment, unless the finding is supported by substantial medical evidence that the certified disability was non-existent or had diminished at the time of the accident to the degree claimed.

34. *Id.*

35. *Id.*

to the disability pre-existing employment or retention in employment.³⁶ The employer's liability, however, was limited to the job-related injury only if the employee had executed and filed a certificate of pre-existing physical impairment prior to the second injury.³⁷ If the employer failed to have the employee execute and file a certificate prior to the second injury, the employer was liable for the entire resulting disability.³⁸

The New Mexico Subsequent Injury Act was enacted in 1961.³⁹ The Subsequent Injury Act applies when: (1) the employee has a permanent physical impairment pre-existing employment or retention in employment; (2) the employee sustains a subsequent disability compensable under the New Mexico Workmen's Compensation Act; (3) the subsequent disability is permanent; and (4) the subsequent disability is materially and substantially greater than that which would have resulted from the subsequent injury alone.⁴⁰ Generally, the Fund's contribution is the difference between the compensation which would be payable for the second injury alone and the compensation payable for the combined injury.⁴¹

Arguably, in some cases, if the prior impairment has been the subject of a compensation award by the same employer or a prior one, the amount of the prior award should be deducted from the current allowance.⁴² For example, a worker sustains a job-related back injury which results in a 30 percent permanent disability compensable under workmen's compensation. The worker is then hired by a different employer before being fully compensated for the first injury, and a second back injury occurs. If the second injury alone would result in a 25 percent disability, but the resulting permanent disability from the two injuries combined is 90 percent, the first employer would continue to pay the first 30 percent, the second employer would pay 25 percent for the second injury alone, and

36. *Id.*

37. *Id.*

38. *E.g. Reynolds*, 69 N.M. 248, 365 P.2d 671. The court allowed compensation for an injury which would not have occurred had there not been a pre-existing bone disease. *Id.* at 254, 365 P.2d at 675. The court made note of the fact that "[a]lthough 44 states have second injury funds as a means of answering the dilemma presented by dissatisfaction with rules of full responsibility and the rule of apportionment, New Mexico is one of the six that has never established such a fund." *Id.* at 257, 365 P.2d at 678.

Although the Act may not have been applicable to this case, the court failed to recognize that the 1961 Legislature had enacted the Subsequent Injury Act effective July 1, 1961. N.M. STAT. ANN. §§ 59-10-126 to -138 (1961 Repl. Pam.) *Reynolds* was decided in August of 1961. 69 N.M. 248, 365 P.2d 671.

39. N.M. STAT. ANN. §§ 59-10-126 to -138 (1961 Repl. Pam.).

40. *Ballard v. Southwest Potash Corp.*, 80 N.M. 10, 11-12, 450 P.2d 448, 449-50 (Ct. App. 1969). The second injury alone need not result in a permanent disability, if the second injury in combination with the pre-existing permanent physical impairment results in a permanent disability. *Smith*, 103 N.M. at 747, 713 P.2d at 563.

41. LARSON, *supra* at footnote 29, at § 59.34(a).

42. *Id.* at 10-539.

the Subsequent Injury Fund would pay the remaining 35 percent.⁴³ In most cases, however, the Fund is liable for the entire difference between the percentage attributable to the second injury alone and the percentage of the resulting disability.⁴⁴

The 1961 Subsequent Injury Act applied only if the employee executed and filed the certificate of pre-existing physical impairment with the superintendent of insurance prior to the injury causing the subsequent disability, or if a "true copy of a certificate duly executed prior to the date of the alleged cause of increased physical impairment" was attached to the pleading asserting liability of the fund.⁴⁵ The Legislature amended the Workmen's Compensation Act and the Subsequent Injury Act in 1975.⁴⁶ Those amendments included a repeal of the apportionment provision added to the Workmen's Compensation Act in 1959.⁴⁷ In addition, the provisions of the Subsequent Injury Act relating to the execution and filing of certificates of pre-existing physical impairment were simultaneously repealed and replaced.⁴⁸ The new section relating to certificates of pre-existing physical impairment provided:

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

D. In the event the certificate of pre-existing physical impairment certifies that the impairment was the result of an accidental injury, the Subsequent Injury Act [59-10-126 to 59-10-138] shall be applicable to any disability arising out of accident or occurrence taking place after the date a certificate is *executed*. (emphasis added).⁴⁹

This language was left unchanged when the Subsequent Injury Act was recodified in 1978.⁵⁰

43. The party seeking relief against the Fund, usually the worker, bears the burden of proof as to entitlement to recovery from the Fund. *Smith*, 103 N.M. at 742-43, 713 P.2d at 558-59. The employer bears the burden of proving apportionment between the employer and the Fund. *Id.*

Apportionment of liability creates difficult evidentiary problems, particularly in determination of how much is attributable to the second injury alone. *Id.* at 746, 713 P.2d at 562. If there is no compensable claim for the second injury, there is no recovery against the Fund. *Id.* Where the second injury is of such severity that it could have independently caused the permanent disability without combination with the first injury, the Fund would not be liable. *Id.* Conversely, in the appropriate case, the employer may be able to shift all of the liability for a compensable disability to the Fund. *Duran*, 105 N.M. at 288, 731 P.2d at 978.

44. *LARSON*, *supra* at footnote 29, at § 10-539. See also *Smith*, 103 N.M. at 746, 713 P.2d at 562.

45. N.M. STAT. ANN. § 59-10-133 (1961 Repl. Pamp.).

46. N.M. STAT. ANN. §§ 59-10-2 to -130.1 (1975 Repl. Pamp.).

47. *Id.* at § 59-10-37.

48. *Id.* at § 59-10-130.1.

49. *Id.*

50. N.M. STAT. ANN. §§ 52-2-1 to -13 (1978).

In 1982, the New Mexico Court of Appeals interpreted for the first time the 1975 amendment to the certification requirements of the Subsequent Injury Act in *Vaughn v. United Nuclear Corp.*⁵¹ The court of appeals created the "actual knowledge rule" when it construed Section 52-2-6(A) to allow the certificate of pre-existing physical impairment to be executed and filed after the subsequent job-related injury if the employer had "actual knowledge" of the employee's pre-existing disability.⁵² The court of appeals reversed *Vaughn* in *Fierro*⁵³. The supreme court subsequently reversed the court of appeals in *Fierro* and affirmed the *Vaughn* rationale for the actual knowledge rule.⁵⁴

IV. DISCUSSION AND ANALYSIS

In *Fierro*, the New Mexico Supreme Court characterized the Fund as a custodian or trustee of monies contributed to it by insurance companies and self-insured employers.⁵⁵ The court stated that the Fund's main purpose is to insure implementation of the intent of the Subsequent Injury Act to remove the obstacles to employment of the handicapped.⁵⁶ The supreme court then agreed with *Vaughn* that "where the employer, prior to the subsequent injury, had actual knowledge of the employee's pre-existing physical impairment, the certificate of pre-existing physical impairment can validly be filed after the subsequent injury."⁵⁷ The *Fierro* opinion is void of reasoning as to why actual knowledge as a means of complying with the Subsequent Injury Act is a more reasonable approach to the solution of employing the handicapped than requiring the employer to comply with the Act by having the certificate executed and preferably filed prior to a second injury.

The *Fierro* decision gives rise to two problems in application of the Subsequent Injury Act. First, by allowing a certificate that is executed and filed after a second injury to apply retroactively to that second injury, *Fierro* creates a system that is subject to arbitrary apportionment of liability. Thus, *Fierro* effectively nullifies the purpose of the certificate which is to provide documentation of the nature and extent of a pre-existing disability before a second injury occurs. Second, the supreme court failed to define the extent of actual knowledge required for compliance with the Subsequent Injury Act. Therefore, there is no judicially defined standard for application of the actual knowledge rule. Neither the

51. 98 N.M. 481, 650 P.2d 3.

52. *Id.* at 487, 650 P.2d at 9.

53. *Fierro*, 104 N.M. at 406, 722 P.2d at 657.

54. *Fierro*, 104 N.M. at 53, 716 P.2d at 244.

55. *Id.*

56. *Id.*

57. *Id.*

interpretation of the certification requirements nor the rationale for the actual knowledge rule adopted by the *Fierro* court finds support in the Subsequent Injury Act.

A. The Certification Requirement

The court of appeals' rationale in *Vaughn* for the actual knowledge rule and the supreme court's affirmation of that rule in *Fierro* are directly contrary to the statutory language of the Subsequent Injury Act.⁵⁸ The Subsequent Injury Act contains explicit language that makes a distinction between when the certificate of pre-existing physical impairment *must* be executed and when it *may* be filed.⁵⁹ Section 52-2-5(C) states that new employees must execute the certificate prior to beginning new employment in accordance with Section 52-2-6(D).⁶⁰ Section 52-2-6(D) requires the certificate to be executed before the second job-related injury.⁶¹ Section 52-2-6(A) states that the certificate may be filed at any time.⁶² The rule that the certificate may be executed after the second injury when the employer has actual knowledge of the employee's prior disability is neither expressed nor implied in any provision of the Subsequent Injury Act.

The *Vaughn* rationale for the actual knowledge rule is based on what was considered by the court of appeals to be the material changes made by the 1975 amendment to the filing requirements of the Subsequent Injury Act.⁶³ The court of appeals concluded that because the amendment made the filing provisions of the Subsequent Injury Act ambiguous, the provisions were subject to statutory construction and interpretation.⁶⁴ The deficiency in the court's analysis and interpretation of the 1975 amendment lies in the court's failure to recognize the distinction made in the Act between the execution and filing of the certificate.

The 1975 amendment repealed Section 8 of the 1961 law relating to certificates of pre-existing physical impairment⁶⁵ and replaced it with what is now Section 52-2-6.⁶⁶ The language of Section 8 limiting application of the Subsequent Injury Act⁶⁷ was essentially rewritten in Section 52-

58. Eastburn, *The Subsequent Injury Act: Some Thoughts on Fierro*, 14 THE NEW MEXICO TRIAL LAWYER 131, 144 (1986).

59. See *supra* footnote 9.

60. N.M. STAT. ANN. § 52-2-5(C) (1978) makes reference to "section 8", which is now Section 52-2-6(D).

61. N.M. STAT. ANN. § 52-2-6(D) (1978).

62. *Id.* at § 52-2-6(A).

63. 98 N.M. at 487, 650 P.2d at 9.

64. *Id.* at 485, 650 P.2d at 7.

65. N.M. STAT. ANN. § 59-10-133 (1961 Repl. Pam.).

66. N.M. STAT. ANN. § 52-2-6 (1978).

67. The 1961 Subsequent Injury Act was limited to cases where the certificate had been executed and filed "prior to the injury or occurrence causing the subsequent disability" or where a "true copy of a certificate duly executed prior to the date of the alleged cause of increased physical impairment" was attached to the pleading. *Id.*

2-6. The only material change from the old Section 8 is that under Section 52-2-6(A), the employee may file the certificate at any time with the superintendent of insurance rather than prior to the job related injury.⁶⁸ The requirement that the certificate must be "duly executed" prior to the job-related injury was rewritten under Section 52-2-6(D).⁶⁹ The court of appeals in *Vaughn* interpreted these changes to evince a legislative intent to make the provisions of Section 52-2-6(A) permissive thereby allowing the certificate to be filed even after the occurrence of a second injury.⁷⁰

The court of appeals analysis in *Vaughn* creating the actual knowledge rule is convoluted and confusing. The court held that Section 52-2-6 implicitly repealed Section 52-2-5(C).⁷¹ The court concluded that the 1975 amendment creating Section 52-2-6 failed to amend provisions in Section 52-2-5(C) which make it mandatory for a new employee to execute a certificate prior to beginning employment in accordance with Section 8, the predecessor to Section 52-2-6(D).⁷² The court reasoned that repeal of the mandatory filing requirements of Section 8 and enactment of the permissive filing provisions of Section 52-2-6(A) was a clear expression of intent by the legislature to abrogate the mandatory and conflicting "filing" provisions of Section 52-2-5(C).⁷³

The *Vaughn* court failed to recognize that Section 52-2-5(C) has nothing to do with the filing of a certificate and that Sections 52-2-5(C) and 52-2-6(D) reinforce rather than conflict with each other.⁷⁴ Section 52-2-5 relates to the authorization of payments from the Fund.⁷⁵ Section 52-2-5(C) applies to persons who have begun new employment after January 1, 1962.⁷⁶ It states that a judgment authorizing disbursement from the Fund will not be entered unless that employee "has given written notice to the employer of the nature and extent of prior physical impairment prior to beginning his employment by his *execution* of the certificate required by Section 8 of the Subsequent Injury Act." (emphasis added).⁷⁷ Section 52-2-5 was not substantively changed by the 1975 amendment. The only change necessary in Section 52-2-5(C) to make it consistent with Section 52-2-6 is to substitute the words "Section 52-2-6(D)" for "Section 8".

68. N.M. STAT. ANN. § 56-2-6(A) (1978).

69. *Id.* at § 56-2-6(D).

70. *Vaughn*, 98 N.M. at 487, 650 P.2d at 9.

71. *Id.* at 486, 650 P.2d at 8.

72. *Id.*

73. *Id.*

74. Eastburn, *supra* at footnote 58, at 145.

75. N.M. STAT. ANN. § 52-2-5(C) (1978).

76. *Id.* See *supra* footnote 9.

77. *Id.*

In *Vaughn*, the court of appeals recognized that the purpose of the certificate is to provide notice to an employer of any pre-existing disability and to document the nature and extent of the disability.⁷⁸ The *Vaughn* court's holding, however, implies that the statutory purpose of the certificate is somehow diminished when the employer has actual knowledge of an employee's prior disability. The court held that the provision in Section 52-2-6(D) requiring the certificate to be executed prior to the second injury was not intended to foreclose application of the Subsequent Injury Act in cases where the employer had prior actual knowledge of the employee's pre-existing disability and the certificate was executed and filed after the second injury.⁷⁹ The court simply concluded that to require the statutory procedure when the employer had actual knowledge of a prior disability would elevate form over substance, and thereby frustrate the remedial purpose of the Subsequent Injury Act.⁸⁰

In *Fierro*, the court of appeals did not make a distinction between execution and filing of a certificate when it reversed its previous analysis in *Vaughn* of the certification requirements.⁸¹ The court reversed its holding in *Vaughn* by stating that *Vaughn* was "incorrect to the extent it held the filing requirements of Section 52-2-6(A) permissive."⁸² The court of appeals concluded that although Section 52-2-6(A) states that "'any worker may at any time file . . . a certificate of pre-existing impairment' sub-sections C and D leave little doubt that 'any time' must mean 'any time' before the second injury."⁸³

The court of appeals reasoned in *Fierro* that because the purpose of the Subsequent Injury Act is to remove obstacles to employment of the handicapped, documentation of a disability is a reasonable way to insure that the Fund is utilized where the disability was a consideration in employment.⁸⁴ The court recognized that permissive filing after the second injury not only renders the certification provisions "meaningless", but also undermines the certificate's purpose of insuring that the Fund is utilized only where a disability was a factor in the initial hiring or retention of an employee.⁸⁵ The court also noted that the Legislature would not

78. *Vaughn*, 98 N.M. at 487, 650 P.2d at 9.

79. *Id.*

80. *Id.*

81. 104 N.M. 401, 722 P.2d 652. Judge Wood, in a special concurrence recognized that the pertinent issue in this case was when the certificate was executed as required by Section 52-2-6(D). *Id.* at 411, 722 P.2d at 667.

82. *Id.* at 406, 722 P.2d at 657.

83. *Id.* at 407, 722 P.2d at 658. Section 52-2-6(A) can be read to allow filing after the second injury if the certificate is executed before the injury pursuant to Section 52-2-6(D). *Supra* at footnote 9.

84. *Fierro*, 104 N.M. at 408, 722 P.2d at 658.

85. *Id.* at 407, 722 P.2d at 658.

have included the certification requirements in the Subsequent Injury Act if it had not intended that employers comply with them.⁸⁶

The court of appeals did not address in *Fierro* the impact that permissive filing has on the management and administration of claims against the Fund. The certificate gives the employer written notice of an employee's pre-existing disability and provides the superintendent of insurance with documentation of the nature and extent of the pre-existing disability. The certificate ultimately aids the administrative hearing officer or the court in the apportionment of liability between the employer and the Fund. Documentation of a pre-existing disability prior to a second injury is important to the process because it eliminates speculation about the permanence and the percentage of disability existing prior to the second job-related injury.

Processing claims against the Fund is relatively simple when the certificate is filed prior to the second injury because the superintendent has a record of the percentage attributable to the pre-existing permanent physical impairment when claims are submitted.⁸⁷ Under *Fierro*, the superintendent of insurance must satisfy claims based on percentages of pre-existing disability arbitrarily documented after the pre-existing disability has been combined with a second job-related injury. The difficulty inherent in proving the percentage of the prior impairment after the second injury has been demonstrated in at least one case reported since the *Fierro* decision.⁸⁸ The *Fierro* decision has thus prejudiced the Fund by creating a system of arbitrary apportionment of liability.

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

87. Ted Knight, Director of Policy and Rates, State Corporation Commission, stated in a telephone conversation with the author on June 10, 1987, that processing of claims when the certificate has been executed and filed prior to the second injury is a simple task. The certificates are kept in an index file and are on hand when claims are submitted. The problems arise when the Fund is joined in a suit as an afterthought and the pre-existing permanent physical impairment has not been documented.

88. *Duran*, 105 N.M. 277, 731 P.2d 973. The worker suffered a work-related low-back injury in 1983 precipitating a claim against Xerox, the employer, and the Fund. *Id.* at 278, 731 P.2d at 974. The worker had suffered two previous back injuries and surgeries prior to the 1983 injury, the first in 1974 and the second in 1981. *Id.*

The worker filed his claim against Xerox in April, 1984, and amended his complaint on January 11, 1985, naming the Fund as a defendant. *Id.* at 279, 731 P.2d at 975. Following the filing of a stipulation of settlement between Xerox and *Duran* on January 22, 1985, Xerox filed a third party complaint against the Fund. *Id.* At a deposition taken in June of 1985, a physician testified that the worker was "in the category of the failed back syndrome . . . is unable to return to gainful employment . . . and has a permanent disability." *Id.* at 278-79, 731 P.2d at 974-75. The same physician signed the certificate of pre-existing physical impairment on December 12, 1985. *Id.* at 279, 731 P.2d at 975.

A judgment was entered in favor of the worker and in favor of Xerox, apportioning liability 80 percent to the Fund and 20 percent to Xerox. *Id.* On appeal, the Fund asked the court of appeals

The Fund is usually not brought into a case until late in the claims process.⁸⁹ By executing and filing the certificate after the second injury, insurance carriers and employers can attempt to have the hearing officer or the court unfairly apportion a major portion of their liability to the Fund. Attorneys defending the Fund must engage in discovery, independent of the discovery done before the Fund has been joined, to determine the validity and legitimate extent of claims against the Fund.⁹⁰ This additional time and expense necessary to determine the validity of claims could be substantially eliminated if employers were required to have the certificate executed prior to a second injury.

The 1986 Legislature's handling of the certification requirements after the court of appeals opinion in *Fierro* and before the supreme court *Fierro* opinion suggests that the legislative intent is that the certificate must be executed before the second injury.⁹¹ The 1986 Legislature amended Section 52-2-6 to clarify the types of pre-existing impairments covered by the Act which was an issue raised in *Fierro*.⁹² The language in Section 52-2-6(D) requiring execution of the certificate prior to the second injury was left unchanged.⁹³ If the Legislature intended that the certificate could be executed after a second injury when an employer had actual knowledge of a prior disability, contrary to the court of appeals *Fierro* opinion, it

to make a distinction between certificates executed after, as well as filed after, the second injury and certificates executed before, but filed after, the second injury. *Id.* The court of appeals, however, was bound by the *Fierro* decision and was not permitted to make the distinction urged by the Fund. *Id.*

The Fund also argued that the claims were time-barred because Duran's amended complaint and Xerox's third party complaint were filed more than a year after the injury. *Id.* The Fund contended that a one year statute of limitations was necessary to avoid difficulties of proof. *Id.* at 281, 713 P.2d at 977. The court acknowledged that the Fund's policy arguments in this context "actually raise anew the problem posed for the Fund by a certificate executed and filed after the subsequent injury." *Id.* The court stated, however, that it could not solve those problems that were the prerogative of the legislature. *Id.* The court did point out that the Subsequent Injury Act contains a number of "unfortunate ambiguities" that are in need of "legislative therapy." *Id.*

89. Robinson, *Injury Fund's Attorney Fees Prompt Bitter Debate*, Alb. J. Bus. O., April 13, 1987 at 4, col. 1.

90. *Id.*

91. Eastburn, *supra* at footnote 58, at 145.

92. N.M. STAT. ANN. § 52-2-6(B)(1986 Cum. Supp.) states: "The certificate shall set forth the nature of the permanent physical impairment, expressed both as a description of the impairment and as a percentage of the permanent physical impairment of the body as a whole. . . ." Section 52-2-6(D) states: "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 executed." See *supra* at footnote 9 for comparison. These changes were made in conjunction with the inclusion of congenital conditions under the definition of "permanent physical impairment". N.M. STAT. ANN. § 52-2-3(A) (1986 Cum. Supp.).

93. N.M. STAT. ANN. § 52-2-6(D) (1986 Cum. Supp.).

could have made its intent explicit in the 1986 amendment.⁹⁴ The Legislature's failure to do so indicates that the supreme court *Fierro* decision was incorrect.

The Subsequent Injury Act protects employers because contributions made to the Fund allow employers to spread the risk of hiring handicapped employees.⁹⁵ In *Fierro*, the supreme court characterized the Fund as a "custodian or trustee" of the contributions made to the Fund.⁹⁶ Yet, the *Fierro* court has made management of the Fund more difficult by allowing employers to file a certificate executed after a second injury. Employers and insurance carriers making contributions to the Fund have the right to expect that the Fund will be applied toward its intended purpose.⁹⁷ Particularly since employers and insurance carriers are the ones who will ultimately bear the cost as claims against the Fund increase.⁹⁸ The best way to insure that the Fund satisfies only legitimate claims is to require employers to comply with the Act by having the certificate executed and (preferably) filed prior to a second injury.

B. The Actual Knowledge Rule

Judicial creation of the actual knowledge rule has generated a new set

94. The 1987 Legislature has further complicated application of the Subsequent Injury Act. N.M. STAT. ANN. § 52-2-6(E) (1987 Repl. Pamph.) was added and states:

If a worker has a pre-existing permanent physical impairment and fails to fully and accurately disclose it to the employer in a pre-employment statement required by the employer and as a result of the failure to disclose, no certificate of pre-existing permanent physical impairment is filed, then the Subsequent Injury Act shall apply to any disability arising out of an accident or occurrence taking place after the date of employment of the worker.

Subsection E essentially means that the employer does not even need actual knowledge when a new employee fails to disclose a permanent physical impairment on an employment application. Subsection E seems to deviate from the express purpose of the Act. See *supra* at footnote 2. An employer cannot discriminate based upon something it does not know. *Padilla v. Chavez*, 105 N.M. 349, 732 P.2d 876 (Ct. App. 1987). It is doubtful that subsection E is the type of "legislative therapy" the court of appeals had in mind in the *Duran* decision. See *supra* at footnote 88.

It is interesting to note that the court of appeals refused to extend the *Vaughn* rationale to the situation described in subsection E in January, 1987. *Padilla*, 105 N.M. 349, 732 P.2d 876. The employer argued that the Fund should be liable where the employer has no actual knowledge, but where "diligent" efforts are made to ascertain the existence of a pre-existing impairment. *Id.* at 350, 732 P.2d at 877. The diligent efforts were questions asked on an employment application and during an interview. *Id.* The court stated that "[t]o permit an employer's efforts in ascertaining knowledge to substitute for actual knowledge when the certificate is filed after the subsequent injury would effectively nullify the certificate requirements of Section 52-2-6 (Cum. Supp. 1986)." *Id.* at 351, 732 P.2d at 878. The court also noted that an employer, given false information at time of hiring, may have a defense to a claim for compensation and thus, does not need this protection from the Fund. *Id.*

95. *Fierro*, 104 N.M. at 406, 722 P.2d at 657.

96. *Fierro*, 104 N.M. at 53, 716 P.2d at 244.

97. Eastburn, *supra* at footnote 58, at 145.

98. McClellan, *Workers' Claims Overburden State's 'Second Injury Fund'* Alb. J., Oct. 4, 1987, at C4, col. 4. Maureen Reed, general counsel for the State Corporation Commission, stated that the state will have to increase assessments against insurance companies [and self-insured employers] because of the unprecedented number of claims that have been made against the Fund as a result of recent New Mexico Court of Appeals opinions. *Id.* at col. 1.

of issues in the application of the Subsequent Injury Act. Precisely what constitutes "actual knowledge" is undefined by the courts. Thus, there is no judicially defined standard to apply in cases when the employer's actual knowledge is an issue. Moreover, the employer's actual knowledge of an employee's prior disability is inherently difficult to prove. The courts may also have to determine whose knowledge will satisfy the rule.

The supreme court reversed the court of appeals in *Fierro* without addressing the question of how much an employer must know about a prior disability or how the employer must acquire such knowledge. Arguably, the nature and extent of Stanley's awareness of Fierro's "problem" with his right eye fell short of the kind of knowledge needed to make an informed decision as to retaining Fierro as an employee.⁹⁹ However, *Fierro* indicates that a casual awareness of "some sort of problem", acquired indirectly, will suffice as "actual knowledge".¹⁰⁰

In the absence of an undefined standard of what constitutes sufficient actual knowledge, application of the Subsequent Injury Act may be troublesome. The court of appeals abrogated the actual knowledge rule in *Fierro* out of a concern that the rule would lead to uncertainty in applying the Subsequent Injury Act.¹⁰¹ The court of appeals thought that the *Fierro* case foreshadowed a "tedious decisional journey" for the court in its effort to determine in each case what is or is not adequate actual knowledge.¹⁰² The court also feared that the possibility of extensive litigation to determine the actual knowledge of the employer might in itself discourage the hiring and retention of a handicapped employee.¹⁰³

Application of the actual knowledge rule in jurisdictions which follow the rule¹⁰⁴ illustrates exactly the "tedious decisional journey" which the court of appeals foreshadowed in *Fierro*. The various judicial distinctions made as to what is or is not sufficient actual knowledge can lead to

99. The reasoning underlying the "actual knowledge rule" is that the employer cannot discriminate based on something of which he is not aware. *Fierro*, 104 N.M. at 405, 722 P.2d at 656. Conversely, if the employer has knowledge of a permanent disability and hires or retains the employee in spite of such knowledge, the employer's liability for a second injury should be limited by the Subsequent Injury Act. *Vaughn*, 98 N.M. at 487, 650 P.2d at 9. See also *Zyla v. A.D. Juilliard & Co.*, 102 N.Y.S.2d 255, 257 (N.Y. App. Div. 1951) (employer had knowledge of employee's diabetes but did not know that the nature of the diabetes and other conditions constituted a permanent impairment. *Id.* at 258. A subsequent injury resulted in amputation of a leg. *Id.* at 256. The court held that the actual knowledge rule was implicit in the New York workmen's compensation law, but the fund was not liable because there was no proof that the employer knew or retained the employee with knowledge that the diabetes was a permanent impairment of the type to be an obstacle to employment. *Id.* at 257.).

100. 104 N.M. 50, 716 P.2d 241.

101. 104 N.M. at 406, 722 P.2d at 657.

102. *Id.*

103. *Id.*

104. Three other states have adopted the actual knowledge rule. Florida, FLA. STAT. ANN. § 440.49(2)(f) (West 1984); Kansas, KAN. STAT. ANN. § 44-567(b) (1986); New York by judicial creation. See *Zyla*, 102 N.Y.S.2d. at 255.

incongruous results.¹⁰⁵ Examination of the rule's application reveals how troublesome the issues become,¹⁰⁶ and that the rule does not always enhance the policies of subsequent injury legislation.¹⁰⁷

The special disability funds in New York and Florida are liable only if the employer knew the pre-existing condition was permanent and likely to be an obstacle to employment.¹⁰⁸ In New York, if the employer has knowledge of a condition but has not formed an opinion as to its permanency, the New York Special Disability Fund is not liable.¹⁰⁹ The rationale is that assistance from a fund established to encourage employment of the handicapped is not needed in the absence of a belief that a permanent disability exists.¹¹⁰ Kansas requires employers to prove knowledge that gave rise to a reservation in the mind of the employer in deciding to hire or retain the employee.¹¹¹ The actual knowledge rule under *Fierro* does not require proof of any specific criteria other than knowledge of "some sort of problem".¹¹²

The defendant in *Fierro* argued that "no requirement that the employer show knowledge of the permanency of plaintiff's pre-existing condition" could be implied from the Act.¹¹³ The court of appeals agreed, particularly since the actual knowledge rule was "judicially created, and does not appear in the SIA."¹¹⁴ The court reasoned that something more than knowledge of "some sort of problem" was needed for an employer to make an informed decision about hiring or retaining an employee.¹¹⁵ This

105. Compare *Hines v. Tico Taco*, 683 P.2d 1295 (Kan. Ct. App. 1984)(employee believed a back injury had been cured by spinal fusion and told employer that she had not had problems since surgery. *Id.* at 1296. The fund was not liable when she reinjured her back at work because neither the employer nor employee had knowledge of the impairment.) and *Ramirez v. Rockwell Intern.*, 701 P.2d 366 (Kan. Ct. App. 1985)(distinguishes *Hines* and reaches the opposite result in similar case.).

106. *Matter of Bellucci v. Tip Top Farms*, 301 N.Y.S.2d 14, 248 N.E.2d 864 (1969).

107. E.g. *Johnson v. State*, 727 P.2d 912 (Kan. 1986) (claimant had worked for the same employer for 23 years and had settled a claim for a permanent disability seven years before the second injury. *Id.* at 914. The fund was not liable because the employer failed to prove that the employer had a reservation when it retained the employee. *Id.* at 917. See generally *Larson*, *supra* footnote 29, at § 59.33(b)).

108. *Zyla*, 102 N.Y.S.2d at 257; FLA. STAT. ANN. § 440.49(2)(f) (West 1984).

109. *Ciliberti v. Certified Creations, Inc.*, 435 N.Y.S.2d 82 (N.Y. App. Div. 1980) (fund not liable because the employer was only aware of some kind of hearing problem and the employee's hearing problem did not interfere with his work.). Cf. *Special Disability Trust v. Lakeland Const.*, 478 So.2d 391 (Fla. Dist. Ct. App. 1985) (fund liable for employer's Korsakoff's Syndrome (caused by chronic alcohol abuse) because employer knew of employee's alcoholism. The court reasoned that the alcoholism was a hindrance to his work and an obstacle to his employment.).

110. *MacWilliams v. Conap*, 392 N.Y.S.2d 506, 507 (N.Y. App. Div. 1977).

111. *Johnson*, 727 P.2d at 917.

112. 104 N.M. at 51, 716 P.2d at 242.

113. 104 N.M. at 405, 722 P.2d at 656.

114. *Id.*

115. *Id.* Stanley's argued that the permanency of the condition could be inferred since "problems with one's sight do not spontaneously resolve themselves." *Id.* The court of appeals rejected this argument and pointed out that one could have a temporary eye problem which would not be an obstacle to employment. *Id.*

reasoning, however, did not convince the supreme court.¹¹⁶ The standard for actual knowledge of a pre-existing disability as it exists under *Fierro* will make it easy for employers and insurance carriers to shift their compensation liability to the Fund.

The New Mexico Subsequent Injury Act requires that the employee's prior disability be permanent.¹¹⁷ The certificate of pre-existing physical impairment provides documentation of the permanency and percentage of the prior disability¹¹⁸ and gives the employer notice of that disability.¹¹⁹ When the certificate is not executed until after the second injury, the permanency and percentage of the prior disability and the employer's actual knowledge are facts that must be proved. These questions of fact can raise questions of credibility,¹²⁰ and the nuances which accompany each fact situation require that a determination of actual knowledge must be made on a case-by-case basis.¹²¹ These case-by-case determinations would not be necessary if employers were required to have the certificate executed and filed prior to the second injury.

The New Mexico courts will also have to determine whose actual knowledge will satisfy the rule. In *Fierro*, the manager of Stanley's who hired Fierro was the person who learned indirectly that Fierro had "some sort of problem".¹²² The knowledge of an agent who hires for another can satisfy the employer's knowledge requirement in other jurisdictions that follow the actual knowledge rule.¹²³ Will the actual knowledge of an officer of a corporation be imputed to a corporation when the manager who makes decisions as to hiring has no actual knowledge?¹²⁴ Can a previous business owner-employer's knowledge satisfy the requirement when the new owner-employer has no actual knowledge?¹²⁵ Will an insurance agent or manager's knowledge fail the test because he has no authority to hire or fire?¹²⁶ These are just some of the issues the courts will need to address as the actual knowledge rule develops in New Mexico.

The New York courts have rigorously applied the actual knowledge rule, making liability of the New York Special Disability Fund far from

116. *Fierro*, 104 N.M. at 53, 716 P.2d at 241.

117. N.M. STAT. ANN. § 52-2-9 (1987 Repl. Pam.).

118. *Id.* at § 52-2-6(B).

119. *Vaughn*, 98 N.M. at 487, 650 P.2d at 9.

120. *See Wall v. Premium Transport Serv.*, 412 N.Y.S.2d 440 (N.Y. App. Div. 1979).

121. *See Oates v. Post & Danley Truck Lines*, 594 P.2d 684 (Kan. Ct. App. 1979).

122. 104 N.M. at 404, 722 P.2d at 655.

123. *Special Disability Fund v. Wheeler*, 440 So.2d 460 (Fla. Dist. Ct. App. 1983).

124. *See Grounds v. Triple J. Construction*, 606 P.2d 484 (Kan. Ct. App. 1980) (corporation president's knowledge was imputed to corporation.) and *Baron v. Nobar Realty Corp.*, 120 N.Y.S.2d 712 (N.Y. App. Div. 1953) (corporation officer's knowledge imputed to the corporation.).

125. *See Special Disability Fund v. Siesta Lago Mobile Homes*, 473 So.2d 8 (Fl. Ct. App. 1985) (former owner's knowledge not imputed to new owner.).

126. *See Buckl v. News Syndicate*, 316 N.Y.S.2d 574 (1970) (insurance agent's knowledge not imputed to employer.).

guaranteed.¹²⁷ Most jurisdictions reject the rule because actual knowledge is difficult to prove.¹²⁸ Professor Larson criticizes the rule because "it involves one of those distinctions that consume far more litigation time and cost than the policy at stake is worth."¹²⁹ The *Fierro* decision thus places New Mexico in the minority of states that must needlessly grapple with application of the actual knowledge rule based upon documentation acquired after the occurrence causing the subsequent disability.

V. CONCLUSION

The Subsequent Injury Fund has the potential to play a substantial role in the compensation of injured workers in New Mexico. The Subsequent Injury Act allows the employer to limit its liability for a disability arising from a second injury and thereby encourages the employment of handicapped persons. Claims against the Fund have increased dramatically in recent years as more employers and attorneys have become aware of the Fund's existence.¹³⁰

Due to the recent changes in the Workmen's Compensation Act, an administrative agency has assumed responsibility for the apportionment of liability between the employer and the Fund.¹³¹ The certificate of pre-existing physical impairment should serve to aid the agency with this task. The *Fierro* decision, however, has diminished the certificate's role in the processing of claims, prejudicing the Fund's ability to administer and defend claims against the Fund. The decision effectively preempts the certification requirement with a requirement which will potentially impede the efficient administration and accurate apportionment of claims against the Subsequent Injury Fund.

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127. LARSON, *supra* at footnote 29, at § 59.33(e).

128. See, e.g., *Atlantic & Gulf Stevedores v. Director of Worker's Compensation Programs*, 542 F.2d 602 (3rd Cir. 1976) (the test for determination of whether an employer will receive the benefit of the second-injury special fund under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 908(f)(1972), is an objective "latent-manifest" test because an employer's subjective actual knowledge is difficult to prove. *Id.* at 609. "Conditions that are latent rather than manifest to a prospective employer do not qualify as § 8(f) disabilities." *Id.*

129. LARSON, *supra* at footnote 29, at § 59.33(e).

130. As late as 1982, the Fund did not have three cases a year. In 1985, The Fund had approximately 50 cases and today it has about 100. Robinson, *Special Worker Fund Pays Big Portion to Lawyers*, Alb. J. Bus. O., March 23, 1987 at 1, col. 1. This may explain why the 1986 Legislature increased the quarterly contribution into the Fund from 1% to 3% of sums paid as compensation benefits. N.M. STAT. ANN. § 52-2-4(B) (1986 Cum. Supp.). See also McClellan at footnote 98.

131. N.M. STAT. ANN. §§ 52-5-1 to -18 (1987 Repl. Pamp.).