ARMSTRONG V. STEARNS-ROGER ELEC. CONTRACTORS, 1982-NMCA-177, 99 N.M. 275, 657 P.2d 131 (Ct. App. 1982)

LENNIE M. ARMSTRONG, as surviving wife of HALLIE B. ARMSTRONG, deceased, Plaintiff-Appellant,
vs.
STEARNS-ROGER ELECTRICAL CONTRACTORS, INC., and FIREMAN'S FUND INSURANCE COMPANIES, Defendants-Appellees.

No. 5763

COURT OF APPEALS OF NEW MEXICO

1982-NMCA-177, 99 N.M. 275, 657 P.2d 131

November 18, 1982

Appeal from the District Court of San Juan County, Musgrove, Judge

Petition for Writ of Certiorari Denied January 7, 1983

COUNSEL

BRUCE P. MOORE, Moscow, Idaho, Attorney for Plaintiff-Appellant.

CARLOS G. MARTINEZ, JAMES H. JOHANSEN, SHAFFER, BUTT, THORNTON & BAEHR, P.C., Albuquerque, New Mexico, Attorneys for Defendants-Appellees.

JUDGES

Hendley, J., wrote the opinion. I CONCUR: RAMON LOPEZ, Judge, LEWIS R. SUTIN, Judge, (Specially Concurring) in Result

AUTHOR: HENDLEY

OPINION

HENDLEY, Judge.

{1} Plaintiff appeals an adverse judgment for workmen's compensation benefits. The issues on appeal concern compensation and attorney's fee.

{2} Mr. Armstrong was employed by Stearns-Roger as an electrician. He had been fitted with a pacemaker in 1976. On October 8, 1980, Mr. Armstrong left work complaining of a sore back. On that day he saw a chiropractor. The next day his wife made an

appointment for him to see Dr. Williams about his back. Dr. Williams had been the family doctor for several years. After diagnosing the back strain, Dr. Williams decided that treatment on a diathermy machine would be beneficial.

{3} Dr. Williams began diathermy treatment on Mr. Armstrong's back. A diathermy machine works by sending small electrical *{*276}* impulses through muscle tissue, increasing the healing rate. When the machine was turned on, decedent suffered cardiac arrest due to interference with his pacemaker by the machine. Mr. Armstrong never regained consciousness and subsequently died. There was an x-ray in Dr. Williams' file showing that Armstrong was fitted with a pacemaker. It was also obvious upon direct physical examination.

{4} Stearns-Roger maintained a first aid station staffed by a registered nurse. It was Stearns-Roger's policy that employees report all injuries to their immediate supervisor and the first aid station. There first aid would be provided or the employee would be referred to one of a list of physicians. Dr. Williams was not on the list. Decedent knew the company policy. He had been provided with a book on safe practices which outlined these procedures. He also had followed these procedures on three previous occasions.

{5} The trial court made the following findings:

3. The employer had actual notice of said accident.

4. At the time of the accident the employer had made provisions for adequate medical treatment of Hallie Armstrong.

5. Hallie Armstrong declined to use the medical treatment provided by the employer and obtained the services of a doctor of his own choice, Dr. Wetzel Williams.

6. On October 9, 1980, Dr. Williams put Hallie Armstrong on a diathermy machine. Mr. Armstrong immediately suffered cardiac arrest, lapsed into a coma and died on November 14, 1980.

7. Mr. Armstrong was equipped with a pace maker of which Dr. Williams was, or should have been, aware.

8. Dr. William's [sic] treatment did not worsen or aggravate Mr. Armstrong's back strain injury.

9. There was no medical causation between Mr. Armstrong's injury of October 8, 1980 and his death of November 14, 1980.

10. The accidental injury suffered by Mr. Armstrong on October 9, 1980 resulting from the treatment by Dr. Williams did not arise in the course of employment with Stearns-Roger.

{6} The trial court concluded:

1. Mr. Armstrong's death was not a direct and proximate result of any injury arising out of and in the course of his employment by Stearns-Roger.

2. The injury suffered by Mr. Armstrong on October 9, 1980 while being treated by Dr. Williams which resulted in Mr. Armstrong's death was an independent intervening cause.

3. The plaintiff is not entitled to any workmen's compensation benefits under the New Mexico Workmen's Compensation Act.

Judgment was subsequently entered dismissing the action.

{7} Section 52-1-49, N.M.S.A. 1978, states in part:

Medical and related benefits; artificial members.

A. After injury, and continuing as long as medical or surgical attention is reasonably necessary, the employer shall furnish all reasonable surgical, physical rehabilitation services, medical, osteopathic, chiropractic, dental, optometry and hospital services and medicine unless the workman refuses to allow them to be so furnished.

B. In case the employer has made provisions for, and has at the service of the workman at the time of the accident, adequate surgical, hospital and medical facilities and attention and offers to furnish these services during the period necessary, then the employer shall be under no obligation to furnish additional surgical, medical or hospital services or medicine than those so provided; provided, however, that the employer furnishing such surgical, medical and hospital services and medicines shall be liable to the workman for injuries resulting from neglect, lack of skill or care on the part of any person, partnership, corporation or *{*277}* association employed by the employer to care for the workman. In the event, however, that any employer becomes so liable to the workman, it shall be optional with the workman injured in such a manner to accept the foregoing provisions and hold the employer liable for the injuries, or to reject these provisions and retain the right to sue the person, partnership, corporation or association employed by the employer who injures the workman through neglect, lack of skill or care. Election to accept or reject the provisions of this section shall be made by a notice in writing, signed and dated, given by the workman to his employer; and, if the workman elects to hold the employer liable for the injuries, the cause of action of the workman against the third person, partnership, corporation or association shall be assigned to the employer, who may institute proceedings thereon in any court having jurisdiction, in the workman's name.

{8} The question before us is one of first impression. Therefore, we recite the applicable litany regarding workmen's compensation cases.

{9} The Workmen's Compensation Act is **sui generis** and creates rights and remedies which are exclusive. **Hudson v. Herschbach Drilling Co.,** 46 N.M. 330, 128 P.2d 1044 (1942). The Act is remedial in nature and its language is to be liberally construed, but a strained construction is proscribed. **Anaya v. City of Santa Fe,** 80 N.M. 54, 451 P.2d 303 (1969). Those rights and remedies can only be received when specified by statute. **Pedrazza v. Sid Fleming Con., Inc.,** 94 N.M. 59, 607 P.2d 597 (1980).

{10} It is plaintiff's position that she is entitled to workmen's compensation death benefits as a matter of law. For this proposition she cites 1 Larson's Workmen's Compensation Law, §§ 13.20 and 13.21 and the cases cited therein and in the Cumulative Supplement. We do not find these cases to be of any aid. Unless we can find statutory support for the proposition, that an employer is liable when a claimant bypasses the employer's provisions for reasonably necessary medical care and seeks his own doctor and is injured, claimant cannot recover. **Hudson v. Herschbach Drilling Co., supra.** Any strained construction to cover this proposition is proscribed. **Anaya v. City of Santa Fe, supra.** Further, there is no claim that the medical attention, which would have been furnished by Stearns-Roger, was inadequate. Findings of fact numbers 4 and 5 and not challenged. **See** § 52-1-49(A).

{11} We do not agree with defendants that under the facts of this case § 52-1-49(B) is applicable. That section's applicability relates only to those situations where the employer has provided adequate medical attention.

{12} Plaintiff states:

In modern parlance the test for liability for workman's compensation benefits is a "but for" test. [Footnote omitted.] **Allstate Ins. Co. v. Industrial Commission,** [126 Ariz. 425, 616 P.2d 100 (Ariz. App. 1980)]. But for the injury suffered by Mr. Armstrong arising out of and in the course of his employment on October 8, 1979 he would not have been treated by Dr. Williams or killed by the docotr's [sic] [doctor's] malpractice.

{13} First, **Allstate Ins. Co., supra,** is distinguished on its facts. It involved medical treatment which was necessary before the treatment to the injury could be done. Second, the case did not involve the claimant bypassing the employer's provision for medical care and seeking his own medical treatment. **Allstate Ins. Co., supra,** is not authority for the proposition that plaintiff would not have been "killed" by the doctor's malpractice except for the injury suffered.

{14} Accordingly, we hold that the Workmen's Compensation Act does not provide for benefits to plaintiff under the facts of this case. **Pedrazza, supra.** Having so decided, we do not reach the issue of attorney's fees.

{15} Affirmed.

{16} IT IS SO ORDERED.

*{*278}* I CONCUR: LOPEZ, Judge.

SUTIN, Judge, specially concurs in result.

SPECIAL CONCURRENCE

SUTIN, Judge (Specially Concurring in Result).

{17} I concur in the result.

{18} Written opinions by district judges are invaluable in cases which involve difficult legal problems. Judge Musgrove, the trial judge, filed a written opinion, a copy of which is attached hereto as an appendix. The opinion succinctly and adequately answers the questions raised by plaintiff. I adopt the opinion of Judge Musgrove. In addition to Judge Musgrove's opinion, substantial evidence supports his findings, and the findings are sufficient to support the conclusions entered. The opinion could end here.

{19} Plaintiff raised two issues in this appeal:

(1) Section 52-1-49(B), N.M.S.A. 1978 has no pertinence to this case, and

(2) Plaintiff, as a matter of law, is entitled to workmen's compensation death benefits.

{20} The pertinence of § 52-1-49(B) is stated in **Security Insurance Co. of Hartford v. Chapman,** 88 N.M. 292, 540 P.2d 222 (1975). The court said:

Section... [52-1-49] (B), supra, nowhere requires the employer to furnish either **compensation** or medical or hospital care **for the employee as a result of the injuries he sustains by reason of this subsequent tortious act of the doctors or the hospital.** [Emphasis added.] [Id. 297.]

{21} If this means a workman cannot recover compensation for subsequent tortious conduct of a doctor, plaintiff's case also ends here. The Workmen's Compensation Act makes no reference to subsequent tortious conduct of a personal doctor selected by a workman, not by the employer. It makes no reference to the liability of an employer for injuries resulting to a workman from any negligence of a workman's family doctor. It is otherwise where the Act so provides. **Fitzpatrick v. Fidelity & Casualty Co. of New York,** 7 Cal.2d 230, 60 P.2d 276 (1936). It has been held that a workman cannot recover compensation from his employer for injuries resulting to him from any negligence of his physician, **Powell v. Galloway,** 229 Ky. 37, 16 S.W.2d 489 (1929), but he can recover for the negligence of the doctor selected by the employer. **McCorkle v. McCorkle,** 265 S.W.2d 779 (Ky. 1954).

{22} Under § 52-1-49(B) a workman has a choice of remedies. He can sue the employer for damages at common law for the negligence of a doctor or sue the doctor for medical malpractice. He cannot do both. This is an exception to the exclusivity

provisions of the Act. For a wide diversity of opinion see, RIGHT TO MAINTAIN MALPRACTICE SUIT AGAINST INJURED EMPLOYEE'S ATTENDING PHYSICIAN NOTWITHSTANDING RECEIPT OF WORKMEN'S COMPENSATION AWARD, 28 A.L.R.3d 1066 (1969).

{23} Plaintiff asserts that subsection (B) is not pertinent because Dr. Williams, the family doctor, was not employed by defendant. The Act does not deny a workman the right to select his own doctor, especially so when the employer does not furnish medical services. The medical services furnished by the employer can be refused. Subsection (A). Nevertheless, a doctor selected by a workman can become one "employed" by the employer. This is so if the employer accepts the services of the doctor and pays his medical expenses. If an employer has not made active efforts to provide a workman with medical care, the employer is liable for medical expenses incurred by the workman's doctor. **Trujillo v. Beaty Elec. Co., Inc.,** 91 N.M. 533, 577 P.2d 431 (Ct. App. 1978); **Garcia v. Genuine Parts Co.,** 90 N.M. 124, 560 P.2d 545 (Ct. App. 1977). It logically follows that if the employer is liable for the medical expenses of a workman's doctor, the doctor has been "employed" to furnish medical care to the workman. For the tortious act of this doctor, which results in the workman's death, the employer would be liable in damages.

{24} On the other hand, if the employer has provided medical care and the workman refuses such care and selects his own doctor, the employer is not liable for the medical expense incurred. **Tafoya v. S & S Plumbing Co.,** 97 N.M. 249, 638 P.2d 1094 (Ct. App. 1981); **Gregory v. Eastern New Mexico University,** 81 N.M. 236, 465 P.2d 515 (Ct. App. 1970). The doctor, then, has not been employed and the employer is not liable in damages for the death of the workman. Plaintiff did not challenge the court's finding that adequate medical treatment had been furnished Armstrong, and plaintiff admits Dr. Williams is not entitled to medical expenses incurred. These facts establish that plaintiff has no right to a direct action in tort against the employer.

{25} In the above respects, 52-1-49(B) has some pertinence to this case.

{26} Plaintiff claims she is entitled to compensation benefits as a matter of law because Dr. Williams treated Armstrong for an injury that arose out of and in the course of employment; that under a universal rule, the new injury or aggravation of the original injury caused by Dr. Williams' treatment relates back to the original back strain injury and becomes an accidental injury arising out of and in the course of employment.

{27} Plaintiff relies primarily on **Jenkins v. Sabourin,** 104 Wis.2d 309, 311 N.W.2d 600 (1981); **Hurchick v. Falls Township Board of Supervisors,** 203 Pa. Super. 1, 198 A.2d 356 (1964) and **McDaniel v. Sage,** 174 Ind. App. 71, 366 N.E.2d 202 (1977). These are not cases in which a workman seeks compensation benefits from an employer. Jenkins and McDaniel are direct action cases. Hurchick involved the modification or termination of a compensation agreement in which an impartial medical witness was appointed. In the course of each opinion, a broad rule was adopted that supports plaintiff's position. In McDaniel, the court said:

As a general rule, if an employee receives medical attention for an injury which arose out of and in the course of his employment, new injury or aggravation of the injury under treatment, as a result of that treatment, has been considered as arising out of and in the course of employment for workmen's compensation coverage. This general rule has been followed in Indiana even where the aggravation of a work related injury is caused by medical malpractice. [366 N.E.2d 204.]

{28} Cited as authority is Annot., Workmen's Compensation Act as affecting liability of or remedy against employer for injury due to medical or surgical treatment of employee after injury, 127 A.L.R. 1108 (1940). The McDaniel rule is effective, "if there is no intervening independent cause to break the chain of causation between the new injury or aggravation and the original injury...." [Id. 1109.] This factor is included in the Hurchick jurisdiction, **Vogel v. Jones** and **Laughlin Steel Corporation,** 221 Pa. Super. 157, 289 A.2d 158 (1972) and the McDaniel jurisdiction. **National Rolling Mill Co. v. Kish,** 80 Ind. App. 331, 139 N.E. 454 (1923).

{29} Black's Law Dictionary 956 (Rev. 4th ed. 1968) defines "Intervening Cause":

The "intervening cause," which will relieve of liability for an injury, is an independent cause which intervenes between the original wrongful act or omission and the injury, turns aside the natural sequence of events, and produces a result which would not otherwise have followed and which could not have been reasonably anticipated. [Citation omitted.] **An act of an independent agency which destroys the causal connection** between the negligent act of the defendant and the wrongful injury; the independent act being the immediate cause, in which case damages are not recoverable because the original wrongful act is not the proximate cause. [Citation omitted.] [Emphasis added.]

{30} The question whether death resulted from the back strain injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a new intervening act, so that the old cause goes and a new one is submitted for it, that is a new act which gives a fresh origin to the after consequences.

{31} The cause of the back strain injury was work-related. The cause of death was a diathermy machine used by Dr. Williams. The old cause left and the new one was submitted for it. The diathermy machine did not worsen or aggravate the back strain injury. It attacked a heart condition unrelated to the back strain. It was not proximate to the original hurt.

{32} Dr. Williams, selected by Armstrong, who put Armstrong on the diathermy machine which attacked Armstrong's heart, was an independent agency whose act destroyed the causal connection between the back strain injury and death.

{33} The court found (concluded) that Dr. Williams' treatment of Armstrong was an independent intervening cause. Plaintiff argues that in a case arising under workmen's compensation and the common law of torts, independent intervening cause has no

function. It does have a function when a workman's intentional conduct creates the independent intervening cause.

{34} 1 Larson's Workmen's Compensation Law, 13.00, p. 3-348 states the following rule:

When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct.

{35} One example given is that of a claimant who decides to consult a witch doctor and suffers total paralysis. The author stated:

It is unlikely that anyone would contend that such a result should be compensable. [Id. 3-363-3-364.]

Here is no mere negligence. Here is a deliberate act which was probably in violation of express medical orders, and undoubtedly in violation of an implied prohibition. [Id. 3-367.]

{36} The chain of causation is broken by intentional conduct, expressly or impliedly prohibited by the employer.

{37} A workman who refuses medical services furnished by an employer and decides to consult his family doctor for a back strain injury which results in death is an intentional act. The claimant's personal doctor is the independent agency whose act was an independent intervening cause which destroyed or broke the causal connection.

{38} This rule of law appears in a different fashion under § 52-1-28(B). It reads:

In all cases where the defendants deny that an alleged disability is a natural and direct result of the accident, the workman must establish that causal connection as a medical probability by expert medical testimony. No award of compensation shall be based on speculation or on expert testimony that as a medical possibility the causal connection exists.

{39} Plaintiff must establish that a "causal connection" existed between Armstrong's back strain injury and death where Dr. Williams' act intervened. Expert medical testimony is essential to prove, as a medical probability, that Dr. Williams' act did not break the causal connection. No such evidence was presented. Armstrong's death was not a natural and direct result of the back strain injury.

{40} Absent intervention, "causal connection" is "cause in the sense that the accident had its origin in the hazards to which the employment exposed the employee while doing his work." **Tapp v. Tapp,** 192 Tenn. 1, 236 S.W.2d 977, 979 (1951); **Schwartz v.**

City of Duluth, 264 Minn. 514, 119 N.W.2d 822 (1963). The general rule has been stated to be "that causal connection is established when it is shown that an employee has received a compensable injury which materially aggravates or accelerates a pre-existing latent disease which becomes the direct and immediate cause of death." **Justice v. Panther Coal Co.,** 173 Va. 1, 2 S.E.2d 333, 336 (1939). Perhaps, this definition might be gleaned from **Moorhead v. Gray Ranch Co.,** 90 N.M. 220, 561 P.2d 493 (Ct. App. 1977).

{41} Neither definition assists plaintiff. Armstrong's back strain had its origins in his work, not Dr. Williams' use of the diathermy machine, and Armstrong's heart condition was not a pre-existing latent disease.

{42} Finally, plaintiff states, but does not discuss a "but for" test --"but for" the back strain injury, Armstrong would not have been treated by Dr. Williams or killed by the doctor's malpractice. She tries to carve this theory out of **Allstate Ins. Co. v. Industrial Commission,** 126 Ariz. 425, 616 P.2d 100 (1980). The Allstate question was whether pre-surgery treatment necessary to place the injured workman in a condition to undergo surgery was related to an industry injury. The court decided that "these preexisting conditions would not have required treatment 'but for' the impending surgery." [Id. 102.] This "but for" result is far removed from that stated by plaintiff.

{43} The "but for" rule is applied in direct action against a doctor for malpractice. **Hooyman v. Reeve,** 168 Wis. 420, 170 N.W. 282 (1919). The court said:

The injury caused by the malpractice would not have occurred but for the original injury, and resulted because of such injury, and was a proximate result thereof. [Id. 283.]

{44} In a workmen's compensation case, the "but for" rule would be applicable if "but for" the back strain injury, Armstrong would have been treated or killed by the malpractice of Dr. Williams selected by Armstrong's employer, which conduct of Dr. Williams caused Armstrong's death. If Armstrong had not refused the medical services made available by the employer, and had not intentionally sought medical care of his personal family doctor, he would probably have lived. This litigation would have been avoided. The acts of a workman with full knowledge of duties required for medical care, who violates those duties, violates the spirit of the Workmen's Compensation Act. It would not be equitable or just to burden the employer with payment of compensation benefits and the costs and expense of vexatious litigation. Where diligence, honesty and faithful performance of duty are practiced, injustice to the workman and hardship to the employer would not occur.

APPENDIX

STATE OF NEW MEXICO COUNTY OF SAN JUAN

IN THE DISTRICT COURT

LENNIE M. ARMSTRONG, as surviving wife of HALLIE B. ARMSTRONG, Deceased, Plaintiff, vs. STEARNS-ROGER ELECTRICAL CONTRACTORS, INC., and FIREMAN'S FUND INSURANCE COMPANIES, Defendants.

No. 81-1110

OPINION

The plaintiff, as the surviving widow of Hallie B. Armstrong (workman) brought this action to recover workmen's compensation benefits against the defendants (employer and insurer).

On October 8, 1980 Mr. Armstrong strained his back while working. He went to a chiropractor later that day. The next morning his back was hurting and he made an appointment to see his family physician, Dr. Wetzel Williams. Mr. Armstrong had been equipped with a pacemaker for several years. Dr. Williams put Mr. Armstrong on a diathermy machine. As soon as it was turned on Mr. Armstrong went into cardiac arrest; lapsed into a coma and died on November 14, 1980. There was some evidence that from prior visits and X-rays the doctor was aware that Mr. Armstrong had a pacemaker.

The determinative issues are 1, causation and 2, notice.

The plaintiff's theory is that the treatment by the doctor which resulted in Mr. Armstrong's death was an aggravation of the original injury and she is entitled to death benefits as provided by the Workmen's Compensation Act. Plaintiff has cited Larson, Sec. 13-20 and cases cited therein for the general proposition that aggravation of the original injury by the treating physician is compensable. However, whether the workmen's compensation acts of the jurisdictions cited are similar or not to the New Mexico Act was not discussed.

Mr. Armstrong suffered two accidents. The first accident occurred when he strained his back while at work. The second accident occurred when the diathermy machine interrupted the pacemaker causing cardiac arrest.

From a medical standpoint there was no evidence that the treatment by Dr. Williams in any way worsened or aggravated the back strain. There was no medical causation between the back strain and the death.

In order to maintain her action, the plaintiff must prove a causal relationship between the two accidents. The criteria for a compensable claim is as follows:

Claim for workmen's compensation shall be allowed only:

1. When the workman has sustained an accidental injury arising out of and in the course of his employment.

2. When the accident was reasonably incident to his employment, and

3. When the disability is a natural and direct result of the accident, Section 52-1-28 N.M.S.A. 1978.

"Course of employment" refers to the time, place and circumstances under which the injury occurred. "While at work" is synonymous with "in the course of the employment." **Thigpen v. County of Valencia,** 89 N.M. 299.

Mr. Armstrong's second accident did not arise in the course of his employment. The disability, in this case death, was not a natural and direct result of the first accident. The second accident was an independent intervening cause.

The New Mexico Workmen's Compensation Act has a very unusual provision concerning the very situation presented in this case. Section 52-1-49B N.M.S.A. 1978 states:

"In case the employer has made provision for and has at the service of the workman at the time of the accident, adequate surgical, hospital and medical facilities and attention and offers to furnish these services during the period necessary, then the employer shall be under no obligation to furnish additional surgical, medical or hospital services or medicine than those so provided; provided, however, that the employer furnishing such surgical, medical and hospital services and medicines shall be liable to the workman for injuries resulting from neglect, lack of skill or care on the part of any person, partnership, corporation or association employed by the employer to care for the workman. In the event, however, that any employer becomes so liable to the workman, it shall be optional with the workman injured in such a manner to accept the foregoing provisions and hold the employer liable for the injuries or to reject these provisions and retain the right to sue the person, partnership, corporation or association employed by the employer who injures the workman through neglect, lack of skill or care. Election to accept or reject the provisions of this section shall be made by a notice in writing signed and dated, given by the workman to his employer; and if the workman elects to hold the employer liable for the injuries the cause of action of the workman against the third person, partnership, corporation or association shall be assigned to the employer, who may institute proceedings thereon in any court having jurisdiction in the workman's name."

The New Mexico Supreme Court interpreted this section of the Act in **Security Insurance Co. of Hartford v. Chapman,** 88 N.M. 292. At page 297 the Court stated:

"Normally, under the law of torts, absent a contractual or statutory obligation to furnish medical or hospital services, an employer is not liable for furnishing such services to employees. However, many cases, and we believe the better reasoned, place upon the employer in this situation the duty to use due care in selecting the doctor and hospital. Beyond this there is no liability of the employer for the tortious conduct of the doctor or hospital. (citation omitted) However, Section 59-10-19.1(B) (now Section 52-1-49(B)

NMSA 1978) Supra, extends this tort liability of the employer to cover the tortious conduct of the doctor and hospital, if the employer has made provisions for medical and hospital care of the employee at the time of the accident out of which arises the employee's rights to compensation and medical and hospital care under the Workmen's Compensation Act. **Section 59-10-19.1(B) Supra nowhere requires the employer to furnish either compensation or medical or hospital care for the employee as a result of the injuries he sustains by reason of this subsequent tortious act of the doctors or hospital"** Emphasis supplied.

The employee, or a surviving widow, may elect to hold the employer liable for the injuries he sustained as a result of the tortious act of the doctor, which could include any damages he could prove in an ordinary malpractice action or he may file his action directly against the doctor.

The election is not between seeking compensation benefits for the death and the tortious act of the doctor but going directly against the doctor or holding the employer liable for the tortious acts of the doctor.

Here the plaintiff has not elected to hold the employer liable for the tortious act of Dr. Williams, but is seeking compensation benefits for the death. This is contrary to the law stated in **Security Insurance Co. of Hartford v. Chapman, supra.** In this case the employer had provided a first aid station to which all employees had been instructed to report all on the job injuries. If the injury was such that required more attention than could be given at the first aid station, the employee would be referred to a doctor or hospital. Mr. Armstrong was familiar with the procedure. Prior to October 8, 1980 he had had some on the job injuries and had been treated at the first aid station. However, on October 8, 1980 when he injured his back, he did not report to the first aid station. Instead he first selected a a chiropractor and then his family doctor. Dr. Williams was not employed by the employer nor was he a doctor to whom the employer referred its employees.

Assuming, without deciding, that the procedure provided by the employer for furnishing medical attention was just a passive willingness to do so, Mr. Armstrong would have had the right to select his own doctor. **Trujillo v. Beaty Elec. Co.,** 91 N.M. 533; **Garcia v. Genuine Parts Co.,** 90 N.M. 124. In such case Section 52-1-49(B) NMSA 1978 would also apply since it would be treated as if the employer had furnished the medical care. Also, the same limitations as to compensation benefits for the subsequent injury caused by the doctor would apply.

If the employer has made provision for medical care and the workman refuses such care and selects his own doctor, the employer is not responsible for such medical expense. **Gregory v. Eastern New Mexico University,** 81 N.M. 236. Logically, it would follow that if the employer is not responsible for the expense he would not be responsible for the subsequent disability or death resulting from the tortious act of the doctor selected by the workman.

In the present case there was substantial evidence on which could be found that the employer had made provision for adequate medical care at the time of the on the job injury.

Since the case must fail on the causation issue, the issue of notice is academic.

The plaintiff is not entitled to any benefits under the Workmen's Compensation Act.

Counsel will file any requested findings of fact and conclusions of law by April 20, 1982. The original to be filed with the Clerk and a copy to the judge.

Counsel for defendants will submit a form of judgment to conform with this opinion.