Chapter 52

Workers' Compensation

Article 1

Workers' Compensation

§ 52-1-1. Short title.

Chapter 52, Article 1 NMSA 1978 shall be known and may be cited as the "Workers' Compensation Act."

History: Laws 1929, ch. 113, § 1; C.S. 1929, § 156-101; 1941 Comp., § 57-901; 1953 Comp., § 59-10-1; Laws 1959, ch. 67, § 1; 1986, ch. 22, § 1; 1987, ch. 235, § 1.

I. General Consideration.
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I. General Consideration.

Cross-references. - As to Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 et seq. As to no compensation payable under Workmen's Compensation Act for occupational disease, see 52-3-46 NMSA 1978. As to when members of New Mexico mounted patrol are covered by Workmen's Compensation Act, see 29-6-5 NMSA 1978. As to premiums for workmen's compensation insurance as material furnished in remedies against contractors performance bond, see 48-2-17 NMSA 1978. As to hospital liens upon personal injury damages recovered not including workmen's compensation, see 48-8-1 NMSA 1978. As to Occupational Health and Safety Act not to supersede or affect Workmen's Compensation Act, see 50-9-21 NMSA 1978. As to Workmen's Compensation Assigned Risk Pool Act, see 59A-33-1 NMSA 1978 et seq. As to motor vehicle liability policy not insuring liability under Workmen's Compensation Law, see 66-5-221 NMSA 1978. As to safety devices required by Mining Safety Act as also required by Workmen's Compensation Act, see 69-8-15 NMSA 1978.

The 1986 amendment substituted "Chapter 52, Article 1 NMSA 1978" for "This act, Sections 59-10-1 through 59-10-37, New Mexico Statutes Annotated, 1953 Compilation".

The 1987 amendment, effective June 19, 1987, substituted "and may be cited as the 'Workers' Compensation Act'." for "shall be known as the 'Workmen's Compensation Act'."

Effective dates. - Laws 1986, ch. 22, § 103 makes the amendment of this section effective on July 1, 1986.

Temporary provisions. - Laws 1986, ch. 22, § 104 provides for the creation of an interim legislative workmen's compensation committee to be composed of four members from the house of representatives, appointed by the speaker, and four members of the senate, appointed by the committees' committee or, if appointed in the interim, by the president pro tempore with the approval of a majority of the members of the committees' committee. The purpose of the committee is to study the entire personal injury and disease disablement area of the law and recommend any changes in law to the first session of the thirty-eighth legislature. Staff and funds for the committee are to be provided by the legislative counsel service.

Constitutionality upheld. - The court's former ruling in State ex rel. Hovey Concrete Prods. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957) is expressly overruled and the creation of a workmen's compensation administration and vesting in it the determination of controversies thereunder is held to be a valid constitutional exercise of legislative power. Wylie Corp. v. Mowrer, 104 N.M. 751, 726 P.2d 1381 (1986).

Workmen's compensation is not a fundamental right. Casillas v. S.W.I.G., 96 N.M. 84, 628 P.2d 329 (Ct. App.), appeal dismissed, 454 U.S. 934, 102 S. Ct. 467, 70 L. Ed. 2d 242 (1981).

Workmen's Compensation Act is neither arbitrary nor discriminatory; its provisions apply to all workers subject to it. Casillas v. S.W.I.G., 96 N.M. 84, 628 P.2d 329 (Ct. App.), appeal dismissed, 454 U.S. 934, 102 S. Ct. 467, 70 L. Ed. 2d 242 (1981).

Supreme court without jurisdiction to eliminate rights conferred by act. - Supreme court is without jurisdiction to eliminate rights that were conferred in the Workmen's Compensation Act by the legislature. Gonzales v. Sharp & Fellows Contracting Co., 51 N.M. 121, 179 P.2d 762 (1947).

Court not to alter clear legislative condition. - It is not the province of the court, but of the legislature, to make changes in the provisions of statute law. Where the law-making body has specified clearly who shall be entitled to compensation benefits and under what circumstances, the court should not alter the conditions required to obtain such benefits. Sanchez v. Bernalillo County, 57 N.M. 217, 257 P.2d 909 (1953).

Workmen's Compensation Act does not apply to employers in farm and ranch operations. McKinney v. Davis, 84 N.M. 352, 503 P.2d 332 (1972).

Workmen's Compensation Act is not exclusive remedy of the employee. An employee has a claim against a third party. Montanez v. Cass, 89 N.M. 32, 546 P.2d 1189 (Ct. App. 1975), rev'd in part on other grounds sub nom. New Mexico Elec. Serv. Co. v. Montanez, 89 N.M. 278, 551 P.2d 634 (1976).

Workmen's Compensation Act does not make employer an insurer of the employee against injury or death occurring during his hours of employment. Little v. J. Korber & Co., 71 N.M. 294, 378 P.2d 119 (1963).

The Workmen's Compensation Act does not make the employer an insurer of the employee against injury or death occurring during his hours of employment. The burden is always on a plaintiff to establish that the employee sustained an accidental injury in the course of his employment and arising out of it. Where there is a sequence of events in rapid order, such a brief hiatus of time between exertion, followed by the quenching of thirst with refrigerated water and, then, sudden death, the natural experience of mankind suggests there likely is a causal connection between the strain and exhaustion, on the one hand, and the consequent death on the other. The latter, of course, may not rest on mere suspicion, surmise or guess. But it may arise as a fair and legitimate inference from circumstances in evidence. Teal v. Potash Co. of Am., 60 N.M. 409, 292 P.2d 99 (1956).

Reduction in earning capacity has always been primary concern of workmen's compensation legislation. Webb v. Hamilton, 78 N.M. 647, 436 P.2d 507 (1968), overruled on other grounds American Tank & Steel Corp. v. Thompson, 90 N.M. 513, 565 P.2d 1030 (1977).

Vocational rehabilitation. - Under this chapter, an injured worker is entitled to such vocational rehabilitation services as are necesary to return her to suitable employment. While this requirement is mandatory in nature, the worker has the burden of presenting sufficient evidence so as to establish a need for rehabilitation benefits. Gutierrez v. Amity Leather Prods. Co., 107 N.M. 26, 751 P.2d 710 (Ct. App. 1988).

No express consent by state to be sued in act. - The language appearing in 21-7-4 NMSA 1978 relating to the powers of the board of regents of the university, "of suing and being sued, or contracting and being contracted with," are grants of power to sue and be sued only upon such matters as are within the scope of other corporate powers of such institutions, while on the other hand, the Workmen's Compensation Act is in derogation of the common law, sui generis and contains therein no express consent by the state to be sued. Zamora v. Regents of Univ. of N.M., 60 N.M. 41, 287 P.2d 237 (1955).

Negligence action against state under special law. - Laws 1947, ch. 162, allowing a particular person to sue the state for injuries resulting from its negligence is a special

law (no other person who might have a like claim could prosecute such a suit under the act); hence, since a general law could be enacted providing that the state shall be liable to persons injured or killed on account of the negligence of the state, its officers and employees, the act in question is void. Lucero v. New Mexico State Hwy. Dep't, 55 N.M. 157, 228 P.2d 945 (1951).

No statute forbidding benefits to workman receiving benefits under other statute. - There is no provision in the compensation statute forbidding benefits to an injured workman on the ground that he is receiving benefits under some other local or federal statute. Snead v. Adams Constr. Co., 72 N.M. 94, 380 P.2d 836 (1963).

A worker is not precluded from recovering benefits under both the Public Employees' Retirement Act and the Workers' Compensation Act. Montney v. State ex rel. State Hwy. Dep't, 108 N.M. 326, 772 P.2d 360 (Ct. App. 1989).

Award subject to diminution or termination due to change. - An award for total and permanent disability under this section, with the exception of certain amputations, is always subject to diminution or termination due to a change in disability. Hamilton v. Doty, 71 N.M. 422, 379 P.2d 69 (1962).

This section imposes upon board of regents no legal obligation to compensate financially for injuries sustained by their workmen in the course of their employment. Zamora v. Regents of Univ. of N.M., 60 N.M. 41, 287 P.2d 237 (1955).

Under this section it is not necessary that injury should result momentarily to be accidental. It may be the result of hours, even a day, or longer, depending upon the facts of the case. Salazar v. County of Bernalillo, 69 N.M. 464, 368 P.2d 141 (1962).

Measure of disability. - There is no presumption in the Workmen's Compensation Law that every workman is completely able-bodied when he enters his employment; the measure of disability under the statute is the relationship between the workman's ability to do work prior to the injury, and such ability following the injury. Snead v. Adams Constr. Co., 72 N.M. 94, 380 P.2d 836 (1963).

If a veterans administration payment is a pension, it cannot be considered to reduce the amount of workmen's compensation. Snead v. Adams Constr. Co., 72 N.M. 94, 380 P.2d 836 (1963).

Total and permanent disability not precluded by light work. - Fact that an employee could for a while after his injury engage in some light kinds of work, attended invariably by painful effects, does not preclude a finding of "total and permanent disability." Lipe v. Bradbury, 49 N.M. 4, 154 P.2d 1000 (1945).

Evidence of dependency upon decedent. - If there is substantial support in the evidence for the finding that plaintiffs were not dependent to any extent upon the decedent within the meaning, purpose and intent of the Workmen's Compensation Act, then plaintiffs

must fail on appeal. Lopez v. Schultz & Lindsay Constr. Co., 79 N.M. 485, 444 P.2d 996 (Ct. App.), cert. denied, 79 N.M. 448, 444 P.2d 775 (1968).

Compensation benefits not community assets. - Compensation benefits payable under the Workmen's Compensation Act, under this section, for injuries sustained during coverture, are not community assets. Richards v. Richards, 59 N.M. 308, 283 P.2d 881 (1955).

Preexisting disability not disabling under act. - Finding of the trial court that the 15% partial permanent disability, set forth in the certificate of preexisting disability was, in truth and in fact, not disabling so as to interfere with his ability to work in any particular, establishes that plaintiff did not have a preexisting disability under the Workmen's Compensation Act even when the doctor's answers to questions raised a conflict in the evidence concerning the application of the Subsequent Injury Act. Ballard v. Southwest Potash Corp., 80 N.M. 10, 450 P.2d 448 (Ct. App. 1969).

Condition for compensation where preexisting impairment present. - Assuming a certificate of preexisting impairment and assuming that procedural requirements are met, applicability of the act depends on four things: (a) a preexisting permanent physical impairment; (b) a subsequent disability compensable under the Workmen's Compensation Act; (c) the subsequent disability must be permanent and (d) the subsequent disability must be materially and substantially greater than that which would have resulted from the subsequent injury alone. Ballard v. Southwest Potash Corp., 80 N.M. 10, 450 P.2d 448 (Ct. App. 1969).

A stroke causally connected to work stress was compensable, even though the worker suffered from a preexisting condition, hypertension, which made the workman more susceptible to injury. Shadbolt v. Schneider, Inc., 103 N.M. 544, 710 P.2d 738 (Ct. App. 1985).

Traumatic neurosis compensable. - Traumatic neurosis, when directly caused by an accident within the purview of this act, was compensable. Jensen v. United Perlite Corp., 76 N.M. 384, 415 P.2d 356 (1966), overruled on other grounds, American Tank & Steel Corp. v. Thompson, 90 N.M. 513, 565 P.2d 1030 (1977).

Whether legislature intended fee collected from compensation cases. - Whether or not fee levied upon all civil actions filed was generally being collected could not influence decision as to whether legislature intended fee to be collected from those filing workmen's compensation claims. State ex rel. Sanchez v. Reese, 79 N.M. 624, 447 P.2d 504 (1968).

Supreme court addition fund fee not collected where other fees are not. - By making the supreme court addition fund fee collectible "in addition" to other fees it is certain that the legislature did not intend for it to be collected where the other fees were not. State ex rel. Sanchez v. Reese, 79 N.M. 624, 447 P.2d 504 (1968).

Review of determining fees in compensation case. - The ability, standing, skill, the amount in controversy, its importance and the benefits derived, go to the matter of determining fees in workmen's compensation cases. The court's award, though not supported by direct evidence, will not be disturbed upon review unless it plainly appears from the record that there has been an abuse of discretion. Shillinglaw v. Owen Shillinglaw Fuel Co., 70 N.M. 65, 370 P.2d 502 (1962).

Trial court shall award attorney's fees to successful claimant under certain conditions, but the award must be made to the claimant and not to his attorney. Lloyd v. Lloyd, 60 N.M. 441, 292 P.2d 121 (1956).

Amount of award of attorneys' fees in workmen's compensation proceeding is discretionary with the trial court and will not be disturbed except for abuse of discretion. Hedgecock v. Vandiver, 82 N.M. 140, 477 P.2d 316 (Ct. App. 1970).

Award of attorney's fees adequate. - Award of $150 as attorneys' fees where total award to claimant aggregated $644.97, exclusive of attorneys' fees, was adequate. Hedgecock v. Vandiver, 82 N.M. 140, 477 P.2d 316 (Ct. App. 1970).

Anyone as workman not excluded. - Nothing in the Workmen's Compensation Act is indicative of an intention to exclude from its benefits anyone who is in fact performing duties of a "workman." Shillinglaw v. Owen Shillinglaw Fuel Co., 70 N.M. 65, 370 P.2d 502 (1962).

The extent of an injured employee's compensation is not confined to loss under specific schedule in the Workmen's Compensation Act where the jury finds that employee suffered a total and permanent disability directly resulting from the injury. Lipe v. Bradbury, 49 N.M. 4, 154 P.2d 1000 (1945).

Refusal to find medical causation supported. - Where doctor who testified as to claimant's epilepsy stated that he could not say, with any certainty, that the epilepsy was caused by accident, trial court's refusal to find "medical causation" was supported. Torres v. Kansas City Structural Steel Co., 82 N.M. 511, 484 P.2d 353 (Ct. App. 1971).

Employer's liability not diminished because workman works while on compensation. - To hold that the employer's liability should be diminished because his injured workman has seen fit to suffer the discomforts of his infirmity and obtain employment, rather than to simply exist on the compensation the law allows him, seems inconsistent with the purpose and intent of the Workmen's Compensation Act. Evans v. Stearns-Roger Mfg. Co. 253 F.2d 383 (10th Cir. 1958).

Employer entitled to credit for monies paid under contractual benefits plan. - Trial court did not err in granting an employer credit against workers' compensation benefits for monies paid to its employee under the employer's accident and disability plans, where the benefit plan was in the nature of a contract and the employee's rights should be

equally governed by it. Carter v. Mountain Bell, 105 N.M. 17, 727 P.2d 956 (Ct. App. 1986).

Dependents entitled to payments after employee dies. - Where employee had been awarded compensation to be paid for 550 weeks but died from his injuries after receiving compensation for only 207 weeks, his dependents were entitled to the compensation payments for the remaining 343 weeks as such payments were not cut off by provisions of 59-10-18, 1953 Comp., (now repealed). Gonzales v. Sharp & Fellows Contracting Co., 51 N.M. 121, 179 P.2d 762 (1947).

Workman for conservancy district covered. - Workman engaged in general work of installing culverts in ditches, fixing water gates, repairing bridges, repairing dikes and filling sand bags for a conservancy district is covered under the Workmen's Compensation Act. Armijo v. Middle Rio Grande Conservancy Dist., 59 N.M. 231, 282 P.2d 712 (1955).

Reduction of compensation for failure to use safety equipment. - Compensation of worker in potash refinery was properly reduced by 50% because he failed to use safety equipment furnished by his employer which met requirements of the Mine Safety Act. Jones v. International Minerals & Chem. Corp., 53 N.M. 127, 202 P.2d 1080 (1949).

Repair of school building as extra-hazardous employment. - Carpenter engaged in repair of school building was engaged in "extra-hazardous employment" covered by the Workmen's Compensation Act even though when he was injured he was merely hanging venetian blinds. Scofield v. Lordsburg Mun. School Dist., 53 N.M. 249, 205 P.2d 834 (1949).

Disability en route to cafe compensable where employer gave consent. - Where workman employed as janitor, laborer and night watchman sustains disability while en route to nearby cafe where, with employer's knowledge and consent and no deduction in pay, workman ate lunch, disability is compensable. Sullivan v. Rainbo Baking Co., 71 N.M. 9, 375 P.2d 326 (1962).

Law reviews. - For note, "Workmen's Compensation in New Mexico: Pre-existing Conditions and the Subsequent Injury Act," see 7 Nat. Resources J. 632 (1967).

For comment on Johnson v. C & H Constr. Co., 78 N.M. 423, 432 P.2d 267 (Ct. App. 1967), see 8 Nat. Resources J. 522 (1968).

For survey, "Workmen's Compensation," see 6 N.M. L. Rev. 413 (1976).

For note, "Medical Benefits Awarded to an Illegal Alien: Perez v. Health and Social Services," see 9 N.M. L. Rev. 89 (1978-79).

For article, "Survey of New Mexico Law, 1979-80: Torts," see 11 N.M.L. Rev. 217 (1981).

For article, "Survey of New Mexico Law, 1979-80: Workmen's Compensation," see 11 N.M.L. Rev. 235 (1981).

For note, "Harmon v. Atlantic Richfield Co.: The Duty of an Employer to Provide a Safe Place to Work for the Employee of an Independent Contractor," see 12 N.M.L. Rev. 559 (1982).

For article, "Survey on New Mexico Law, 1982-83: Workmen's Compensation," see 14 N.M.L. Rev. 211 (1984).

For comment, "Comparative Fault Principles Do Not Affect Negligent Employer's Right to Full Reimbursement of Compensation Benefits Out of Worker's Partial Third-Party Recovery - Taylor v. Delgarno Transp., Inc.," see 14 N.M.L. Rev. 437 (1984).

For article, "The Role of the Vocational Expert in Worker's Compensation Cases," see 14 N.M.L. Rev. 483 (1984).

For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

For case note, "WORKERS' COMPENSATION LAW: A Clinical Psychologist is Qualified to Give Expert Medical Testimony Regarding Causation: Madrid v. University of California, d/b/a Los Alamos National Laboratory," see 18 N.M.L. Rev. 637 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation § 1.
Workmen's compensation as insurance, 119 A.L.R. 1245.
Application for, or award, denial or acceptance of, compensation under State Workmen's Compensation Act as precluding action under Federal Employers Liability Act by one engaged in interstate commerce within that act, 6 A.L.R.2d 581.
Workmen's compensation benefits, voluntarily paid under statute of one state, as bar to claim or ground for reduction of claim of compensation under statute of another state, 8 A.L.R.2d 628.
Workmen's Compensation Act as furnishing exclusive remedy for master's failure to inform servant of disease or physical condition disclosed by medical examination, 69 A.L.R.2d 1218.
Right of employee to maintain common-law action for negligence against workmen's compensation insurance carrier, 93 A.L.R.2d 598.
Unemployment compensation benefits applied for or received as affecting claim for workmen's compensation, 96 A.L.R.2d 941.
Validity and effect of policy provision purporting to reduce coverage by amount paid under Workmen's Compensation Law, 24 A.L.R.3d 1369.
Right to maintain malpractice suit against injured employee's attending physician notwithstanding receipt of workmen's compensation award, 28 A.L.R.3d 1066.
Insured's receipt of or right to workmen's compensation benefits as affecting recovery

under accident, hospital or medical expense policy, 40 A.L.R.3d 1012.
Homeowners' or personal liability insurance as providing coverage for liability under Workmen's Compensation Laws, 41 A.L.R.3d 1306.
Automobile insurance, exclusion of employees of insured covered by workmen's compensation, 45 A.L.R.3d 288.
Modern status of effect of Workmen's Compensation Act on right of third person tortfeasor to recover contribution from employer of injured or killed workman, 100 A.L.R.3d 350.
Recovery for discharge from employment in retaliation for filing workers' compensation claim, 32 A.L.R.4th 1221.
Workers' compensation: liability of successive employers for disease or condition allegedly attributable to successive employments, 34 A.L.R.4th 958.
Third-party tortfeasor's right to have damages recovered by employee reduced by amount of employee's workers' compensation benefits, 43 A.L.R.4th 849.
Willful, wanton, or reckless conduct of coemployee as ground of liability despite bar of workers' compensation law, 57 A.L.R.4th 888.
99 C.J.S. Workmen's Compensation § 1.

II. Construction Of Act.

This act is remedial legislation and must be liberally construed to effect its purpose. Lipe v. Bradbury, 49 N.M. 4, 154 P.2d 1000 (1945); Stevenson v. Lee Moor Contracting Co., 45 N.M. 354, 115 P.2d 342 (1941); Malone v. Swift Fresh Meats Co., 91 N.M. 359, 574 P.2d 283 (1978); Security Trust v. Smith, 93 N.M. 35, 596 P.2d 248 (1979).

Workmen's Compensation Act is to be construed liberally. Corzine v. Sears, Roebuck & Co., 80 N.M. 418, 456 P.2d 892 (Ct. App.), cert. denied, 80 N.M. 388, 456 P.2d 221 (1969); Wilson v. Mason, 78 N.M. 27, 426 P.2d 789 (Ct. App. 1967).

As is true in all humanitarian statutes, remedial in nature, the Workmen's Compensation Act has received a liberal interpretation from both trial judges and appellate courts in New Mexico. Valencia v. Stearns Roger Mfg. Co. 124 F. Supp. 670 (D.N.M. 1954).

It is the duty of supreme court to construe the compensation act liberally to give effect to its benevolent purpose and to construe the findings of the court liberally so as to support the judgment. Casados v. Montgomery Ward & Co., 78 N.M. 392, 432 P.2d 103 (1967).

The court is committed to liberal construction of the Workmen's Compensation Act in favor of the workman, and the injury need not result momentarily in order to be accidental; yet, some relationship between the accident relied upon and the injury suffered must be established. It cannot rest upon mere speculation. Lemon v. Morrison-Knudsen Co., 58 N.M. 830, 277 P.2d 542 (1954); Henderson v. Texas-New Mexico Pipe Line Co., 46 N.M. 458, 131 P.2d 269 (1942).

And reasonable doubts resolved in favor of employees. - The Workmen's Compensation Act must be liberally construed, and reasonable doubts resolved in favor of employees. Wilson v. Rowan Drilling Co., 55 N.M. 81, 227 P.2d 365 (1950); Sena v. Continental Cas. Co., 97 N.M. 753, 643 P.2d 622 (Ct. App. 1982).

Workmen's compensation statutes should be liberally and fairly construed in the workman's favor to insure the full measure of his exclusive statutory remedy. Evans v. Stearns-Roger Mfg. Co. 253 F.2d 383 (10th Cir. 1958).

The Workmen's Compensation Act is to be liberally construed in favor of the employee. Briscoe v. Hydro Conduit Corp., 88 N.M. 568, 544 P.2d 283 (Ct. App. 1975); Briggs v. Zia Co., 63 N.M. 148, 315 P.2d 217 (1957); Schiller v. Southwest Air Rangers, Inc., 87 N.M. 476, 535 P.2d 1327 (1975); Anaya v. New Mexico Steel Erectors, Inc., 94 N.M. 370, 610 P.2d 1199 (Ct. App. 1982).

The Workmen's Compensation Act is to be given a liberal construction in favor of claimants. Shillinglaw v. Owen Shillinglaw Fuel Co., 70 N.M. 65, 370 P.2d 502 (1962); Mann v. Board of County Comm'rs, 58 N.M. 626, 274 P.2d 145 (1954).

The Workmen's Compensation Act is to be liberally construed in favor of the claimant. Yardman v. Cooper, 65 N.M. 450, 339 P.2d 473 (1959), overruled on other grounds, Montell v. Orndorff, 67 N.M. 156, 353 P.2d 680 (1960).

But liberal construction does not mean total disregard for statute. - This section is to be liberally construed in favor of claimant, but liberal construction does not mean total disregard for the statute, or repeal of it under the guise of construction. Copeland v. Black, 65 N.M. 214, 334 P.2d 1116 (1959), overruled on other grounds, Montell v. Orndorff, 67 N.M. 156, 353 P.2d 680 (1960); Anaya v. New Mexico Steel Erectors, Inc., 94 N.M. 370, 610 P.2d 1199 (1980).

The court has frequently held that the Workmen's Compensation Act is to be liberally construed in favor of the claimant; however, liberal construction does not mean a total disregard for the statute, or repeal of it under the guise of construction. Ross v. Marberry & Co., 66 N.M. 404, 349 P.2d 123 (1960).

Liberal construction does not mean total disregard for the statute. Yardman v. Cooper, 65 N.M. 450, 339 P.2d 473 (1959), overruled on other grounds, Montell v. Orndorff, 67 N.M. 156, 353 P.2d 680 (1960); Varela v. Mounho, 92 N.M. 147, 584 P.2d 194 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Nor does it mean enlarging apparent legislative intent. - The statute must be liberally construed in favor of the workman, but this does not mean enlarging on the apparent legislative intent or giving words meaning beyond their ordinary scope. Hicks v. Artesia Alfalfa Growers' Ass'n, 66 N.M. 165, 344 P.2d 475 (1959).

And not to be construed so as to nullify its provisions. - The Workmen's Compensation Act is remedial and should be liberally interpreted so as to accomplish its purposes, while at the same time a reasonable construction must be accorded it, and it shall not be construed in such a way as to nullify certain of its provisions. Geeslin v. Goodno, Inc., 75 N.M. 174, 402 P.2d 156 (1965); Security Trust v. Smith, 93 N.M. 35, 596 P.2d 248 (1979); Transamerica Ins. Co. v. Sydow, 97 N.M. 51, 636 P.2d 322 (Ct. App. 1981).

But still court must construe act in reasonable manner. - The supreme court gives to the Workmen's Compensation Act a liberal construction in favor of the laborer, but still the court must construe the act in a reasonable manner, and not in such a way as would abrogate certain portions of the statute to the preference of other portions thereof. Boggs v. D & L Constr. Co., 71 N.M. 502, 379 P.2d 788 (1963).

So beneficent purpose not thwarted by technical refinement. - The Workmen's Compensation Act is remedial in nature; is given a liberal interpretation by both the trial and reviewing courts; reasonable doubts must be resolved in favor of the employee; its beneficent purposes may not be thwarted by technical refinement or interpretation. Lucero v. C.R. Davis Contracting Co., 71 N.M. 11, 375 P.2d 327 (1962), overruled on other grounds, Mascarenas v. Kennedy, 74 N.M. 665, 397 P.2d 312 (1964).

Technical precision in pleading not required. - Claims for workmen's compensation are to be liberally construed and technical precision in pleading is not generally required. Gonzales v. Gackle Drilling Co., 70 N.M. 131, 371 P.2d 605 (1962).

Rule of liberal construction applies to Workmen's Compensation Law, not to evidence offered in support of a claim under that law. Guidry v. Petty Concrete Co., 77 N.M. 531, 424 P.2d 806 (1967).

And no application to consideration to be given by trier of fact. - The rule of liberal construction of the Workmen's Compensation Act has no application to the consideration, weight and credibility to be given the evidence by the trier of the facts. Young v. Signal Oilfield Serv., Inc., 81 N.M. 67, 463 P.2d 43 (Ct. App. 1969).

Although the Workmen's Compensation Act must be liberally construed to effect its purpose, this view of liberal construction applies only to the law and not to the facts. Lopez v. Schultz & Lindsay Constr. Co., 79 N.M. 485, 444 P.2d 996 (Ct. App.), cert. denied, 79 N.M. 448, 444 P.2d 775 (1968); Brown v. General Ins. Co. of Am., 70 N.M. 46, 369 P.2d 968 (1962).

And claimant not relieved of burden. - The liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered in support of a claim under the law. The rule of liberal construction does not relieve a claimant of the burden of establishing his right to compensation by a preponderance of the evidence, nor does it permit a court to award compensation where the requisite proof is absent. Mascarenas v. Kennedy, 74 N.M. 665, 397 P.2d 312 (1964).

Statute as sui generis. - The Workmen's Compensation Act is sui generis and creates exclusive rights, remedies and procedure uncontrolled by codes of procedure in actions at law or equity. Lipe v. Bradbury, 49 N.M. 4, 154 P.2d 1000 (1945).

Workmen's compensation statutes are sui generis and create rights, remedies and procedures which are exclusive. They are in derogation of the common law and are not controlled or affected by the code of procedure in suits at law or actions in equity except as provided therein. Garza v. W.A. Jourdan, Inc., 91 N.M. 268, 572 P.2d 1276 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977).

And rights, remedies and procedure exclusive. - Workmen's compensation statutes are sui generis and create rights, remedies and procedures which are exclusive. Anaya v. City of Santa Fe, 80 N.M. 54, 451 P.2d 303 (1969); Day v. Penitentiary of N.M., 58 N.M. 391, 271 P.2d 831 (1954).

Except as specifically provided. - That workmen's compensation statutes are sui generis, and that the rules of procedure in civil actions are not applicable except as specifically provided therein, has been long recognized by this court. Holman v. Oriental Refinery, 75 N.M. 52, 400 P.2d 471 (1965).

The workmen's compensation statutes are sui generis and create rights and procedures which are exclusive and are in derogation of the common law and the code of procedure with certain exceptions as provided in the statutes. Magee v. Albuquerque Gravel Prods. Co., 65 N.M. 314, 336 P.2d 1066 (1959).

Legislative intent as to purpose of elective act. - The purpose under an elective act such as this is to cause the employer to obtain compensation protection. It is contrary to legislative intent that any technical delay which in no way prejudices a claimant would give rise to a common-law suit. Quintana v. Nolan Bros., 80 N.M. 589, 458 P.2d 841 (Ct. App. 1969).

Purpose of act. - This act was evidently intended to extend its protection to persons who are not employees at common law. Its purpose is to avoid uncertainty in litigation and to assure the injured workmen and their dependents prompt payment of compensation. Jones v. George F. Getty Oil Co. 92 F.2d 255 (10th Cir. 1937), cert. denied, 303 U.S. 644, 58 S. Ct. 644, 82 L. Ed. 1106 (1938).

The basic purpose of the Workmen's Compensation Act is to ensure that industry carry the burden of personal injuries suffered by workers in the course of their employment. Superintendent of Ins. v. Mountain States Mut. Cas. Co., 104 N.M. 605, 725 P.2d 581 (Ct. App. 1986).

The Workmen's Compensation Act expresses the intention and policy of this state that employees who suffer disablement as a result of injuries causally connected to their work shall not become dependent upon the welfare programs of the state, but shall receive some portion of the wages they would have earned had it not been for the

intervening disability. Casias v. Zia Co., 93 N.M. 78, 596 P.2d 521 (Ct. App.), cert. denied, 93 N.M. 8, 595 P.2d 1203 (1979).

The purpose of this act is to provide a humanitarian and economical system for compensating injured workmen, while being fair to the employer. Anaya v. New Mexico Steel Erectors, Inc., 94 N.M. 370, 610 P.2d 1199 (1980).

Primary purpose of Workmen's Compensation Act is to keep an injured workman and his family at least minimally secure financially; public policy demands it. Aranda v. Mississippi Chem. Corp., 93 N.M. 412, 600 P.2d 1202 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979); Casillas v. S.W.I.G., 96 N.M. 84, 628 P.2d 329 (Ct. App.), appeal dismissed, 454 U.S. 934, 102 S. Ct. 467, 70 L. Ed. 2d 242 (1981).

Purpose of Workmen's Compensation Act is to provide a form of recovery for workmen or his heirs. The employer is entitled to present whatever relevant evidence deemed necessary to establish its position, and it is the duty of the district court to see to the fulfillment of that statutory purpose within the framework of the facts and the law. Livingston v. Loffland Bros., 86 N.M. 375, 524 P.2d 991 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974).

To avoid uncertainty in litigation and to assure injured workmen prompt payment of compensation, the court has often said that the act should be liberally construed to accomplish the purposes for which it was enacted. Mirabal v. International Minerals & Chem. Corp., 77 N.M. 576, 425 P.2d 740 (1967).

Spirit of this act flows in direction of workman and his protection; the compensation carrier should not seek technical, circuitous routes to avoid its responsibilities. Perea v. Gorby, 94 N.M. 325, 610 P.2d 212 (Ct. App. 1980).

Purpose of depriving noncomplying employer of common-law defenses under an elective act such as this is to cause the employer to obtain compensation protection. It would seem contrary to legislative intent that any technical delay which in no way prejudices a claimant would give rise to a common-law suit. Mirabal v. International Minerals & Chem. Corp., 77 N.M. 576, 425 P.2d 740 (1967).

Purpose of industry carrying burden of injuries. - The basic purpose of the Workmen's Compensation Act is to ensure that industry carries the burden of personal injuries suffered by workmen in the course of their employment, and consequently, the relationship of the parties is not to be determined from the name attached to it by them, but from the consequences which the law imputes to their agreement to prevent evasion of the obligations which the act imposes upon employers. Yerbich v. Heald, 89 N.M. 67, 547 P.2d 72 (Ct. App. 1976).

Claims for compensation under Workmen's Compensation Act are judicial in nature, and constitute civil actions, and thus are actions subject to removal under the federal removal statute. Valencia v. Stearns Roger Mfg. Co. 124 F. Supp. 670 (D.N.M. 1954).

Idea of negligence foreign to recovery. - The idea of negligence as an essential to recovery is generally foreign to the theory of workmen's compensation. Cuellar v. American Employers' Ins. Co., 36 N.M. 141, 9 P.2d 685 (1932).

Interests of claimant and public paramount. - Within the policy considerations of the Workmen's Compensation Act the interests of the claimant and the public are paramount. Codling v. Aztec Well Servicing Co., 89 N.M. 213, 549 P.2d 628 (Ct. App. 1976); Ruiz v. City of Albuquerque, 91 N.M. 526, 577 P.2d 424 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

To prevent claimant from being on welfare rolls was part of legislative scheme of the Workmen's Compensation Act, and the legislative scheme was not meant to allow a recovery comparable to that in the normal tort recovery. Codling v. Aztec Well Servicing Co., 89 N.M. 213, 549 P.2d 628 (Ct. App. 1976).

Right to be sued must be found in act. - The rights and remedies provided by the Workmen's Compensation Act are in derogation of the common law and consent to be sued must be found in the act itself. Day v. Penitentiary of N.M., 58 N.M. 391, 271 P.2d 831 (1954).

Decisions of other states persuasive but not binding. - The Workmen's Compensation Act of New Mexico is sui generis and creates rights, remedies and procedures which are exclusive; therefore, the decisions of other states, if any, which have comparable statutory provisions are persuasive but not binding on the court. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975).

Performance of medical services within act's scope. - The fact that a person performed medical services, vel non, does not take her outside the scope of the Workmen's Compensation Act. McKenzie v. Daubenheyer, 465 F. Supp. 1 (D.N.M. 1977).

Act does not limit meaning of "accident" to sudden injuries, nor is its meaning limited by any time test. Salazar v. County of Bernalillo, 69 N.M. 464, 368 P.2d 141 (1962).

Engineering works as used in section enumerating hazardous occupations does not include operation of a truck on a highway and the owner of a milk truck, accordingly, was not engaged in an "extra-hazardous occupation" making the truck driver's death compensable under the act. Hernandez v. Border Truck Line, 49 N.M. 396, 165 P.2d 120 (1946).

III. Employer-Employee Relationship.

Workmen's Compensation Act is based upon employer-employee relationship. Maynerich v. Little Bear Enters., Inc., 82 N.M. 650, 485 P.2d 984 (Ct. App. 1971).

The employer-employee relationship, to which the act applies, is one created by contract between the parties; consequently, if the employer in this case seeks to avail itself of the Workmen's Compensation Act as a bar to a common-law action, then it must show a valid contract of employment between it and the minor employee, Maynerich v. Little Bear Enters., Inc., 82 N.M. 650, 485 P.2d 984 (Ct. App. 1971).

Supervision of results does not transform independent contractor to employee. - Supervision relating to results contracted to be accomplished does not transform the relationship of employer-independent contractor to that of employer-employee. Roybal v. Bates Lumber Co., 76 N.M. 127, 412 P.2d 555 (1966).

Length of time in work irrelevant. - Whether the injured person had been doing work for five or 50 minutes, and whether he would have continued in this work for a shorter or greater length of time is irrelevant in determining whether one is a special employee. Wuertz v. Howard, 77 N.M. 228, 421 P.2d 441 (1966).

Corporate officer is employee. - Corporate officer not in fact sole owner of the corporation and performing nonexecutive work ordinarily performed by employees is generally held to be an employee covered by the act, notwithstanding the corporate office held by him. Shillinglaw v. Owen Shillinglaw Fuel Co., 70 N.M. 65, 370 P.2d 502 (1962).

Particularly when injured performing duty of employees. - A corporate officer may be considered an employee under the Workmen's Compensation Act, particularly when he is injured while performing a duty which was ordinarily done by employees. Shillinglaw v. Owen Shillinglaw Fuel Co., 70 N.M. 65, 370 P.2d 502 (1962).

Special employee negligence action barred by act. - Where plaintiff employee of oil well driller was asked by employee of driller hired to supply cement for an oil well to help unclog hose and was injured, he was a special employee and his negligence action was barred under Workmen's Compensation Act. Wuertz v. Howard, 77 N.M. 228, 421 P.2d 441 (1966).

Basis for determining whether one is special employee so that negligence action is barred by Workmen's Compensation Act is: whose is the work being done? In answering this question, the power to control the work is of great importance. Wuertz v. Howard, 77 N.M. 228, 421 P.2d 441 (1966).

Status of special employment is not dependent on the accident happening on the premises of the special employer. Wuertz v. Howard, 77 N.M. 228, 421 P.2d 441 (1966).

Consent does not bar employee from becoming special employee of another. Wuertz v. Howard, 77 N.M. 228, 421 P.2d 441 (1966).

Military institute instructor not employee when piloting rented aircraft. - Evidence supported findings that army sergeant who had instructed in military institute's department of military science and tactics was not an employee of the institute with respect to his piloting of a rented aircraft in a tactical exercise which crashed resulting in his death. Lance v. New Mexico Military Inst., 70 N.M. 158, 371 P.2d 995 (1962).

Action against coemployee or person other than employer. - Prior to the 1971 amendment it was held that a coemployee was "a person other than the employer" against whom a negligence action for damages might be maintained. Hockett v. Chapman, 69 N.M. 324, 366 P.2d 850 (1961).

Public officers not entitled to benefits. - Prior to 1972, members of the New Mexico state labor and industrial commission, the state fair commission, the racing commission and the livestock board, were all public officers, not employees, and not entitled to benefits under this act. 1968 Op. Att'y Gen. No. 68-109.

IV. Course of Employment.

Injury compensable only if related to employment. - An injury is compensable only if it is shown to be both "arising out of" and "in the course of" employment. Romero v. S.S. Kresge Co., 95 N.M. 484, 623 P.2d 998 (Ct. App. 1981).

Burden on claimant to establish accident in course of employment. - Burden is on the claimant to establish by evidence that worker's death was proximately caused by an accident arising out of and in the course of his employment. Southwestern Portland Cement Co. v. Simpson, 135 F.2d 584 (10th Cir. 1943).

Burden of proof after claimant raised reasonable inference regarding course of employment. - After claimant has introduced proof of facts raising a natural and reasonable inference that accident arose out of and in the course of employee's employment and occurred when he was performing services arising out of and in the course of his employment, burden rested on the employer to show the contrary. Southwestern Portland Cement Co. v. Simpson, 135 F.2d 584 (10th Cir. 1943).

Inference by jury as to course of employment. - Where there is substantial evidence that death of employee resulted from accident and that accident occurred during his hours of work, at a place where his duties required him to be, or where he might properly have been in the performance of such duties, the triers of the issues of fact may reasonably conclude therefrom, as a natural inference, that the accident arose out of and in the course of the employment. Southwestern Portland Cement Co. v. Simpson, 135 F.2d 584 (10th Cir. 1943).

As presumption of fact. - Since burden is on claimant to prove that accident arose out of and in the course of employment, either by direct evidence or by evidence from which

these facts may be legitimately inferred, the presumption is not a legal presumption, but one of fact, that is, a natural inference drawn from proven facts. Southwestern Portland Cement Co. v. Simpson, 135 F.2d 584 (10th Cir. 1943).

Accident arises in course of employment when it occurs within the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto. Wilson v. Rowan Drilling Co., 55 N.M. 81, 227 P.2d 365 (1950).

Claimant not disqualified from disability due to preexisting condition where injury in course of employment. - That claimant was susceptible to an intervertebral disc problem, and there was no doubt but that it was because of this preexisting condition that injury occurred, did not disqualify him from disability benefits, where it was determined that the injury arose out of and in the course of his employment. Shannon v. Sandia Corp., 79 N.M. 634, 447 P.2d 514 (1968).

Aggravation by accident of preexisting condition as compensable. - That claimant in his early life suffered from tuberculosis resulting in a Ghon tubercle does not preclude claimant from compensation for dust induced hemorrhage on the job, even though one without such a condition would not have been so adversely affected from breathing a sudden heavy concentration of dust. The aggravation by accident of a preexisting condition, whether the result of a disease or a congenital weakness, is nevertheless compensable. Lucero v. C.R. Davis Contracting Co., 71 N.M. 11, 375 P.2d 327 (1962), overruled on other grounds, Mascarenas v. Kennedy, 74 N.M. 665, 397 P.2d 312 (1964).

Admission of company and insurer support finding of course of employment. - Admission of making of accident report by the foreman of defendant company and the payment of weekly compensation and medical benefits by the insurer, while not conclusive, was sufficient to support a finding that accident arose out of and in the course of plaintiff's employment by defendant company. Johnson v. J.S. & H. Constr. Co., 81 N.M. 42, 462 P.2d 627 (Ct. App. 1969).

Employer's admission that he had paid several thousand dollars worth of premiums to take care of a particular accident was competent evidence the workmen were injured in an accident arising out of and in the course of their employment, but it was not conclusive on the point. Feldhut v. Latham, 60 N.M. 87, 287 P.2d 615 (1955).

An employee is not in the course of employment while going to and returning from his work, but there are many exceptions to the rule. Wilson v. Rowan Drilling Co., 55 N.M. 81, 227 P.2d 365 (1950).

When employee is sent by his employer on a special mission away from his regular work; or by the terms of his contract of employment is burdened with a special duty incidental thereto, but aside from the labor upon which his wages are measured; while upon such mission, or in the performance of such duty, the employee is acting within

the course of his employment. Wilson v. Rowan Drilling Co., 55 N.M. 81, 227 P.2d 365 (1950).

Evidence to establish causal connection between work accident and disability. - Evidence, taken in consideration with the fact that all through a life of heavy work the claimant, though suffering from tuberculosis in infancy resulting in a scarred lung, had never before hemorrhaged, and for the first time did so while coughing as the result of suddenly breathing heavy dust on the job, provided an ample evidence to sustain a causal connection between work accident and claimant's disability. Lucero v. C.R. Davis Contracting Co., 71 N.M. 11, 375 P.2d 327 (1962), overruled on other grounds, Mascarenas v. Kennedy, 74 N.M. 665, 397 P.2d 312 (1964).

Evidence substantiates causal relationship between employment and heart attack. - Regardless of any claimed conflict in the testimony of the medical experts, where they were in agreement generally in their opinions that an emotional upset results in stress upon the heart as much as physical stress, and that anger may be a precipitating cause of heart attacks, either disabling or fatal, and that an employee who was suffering from advanced generalized arteriosclerosis of the coronary arterial system would be more affected by severe stress than one who had no arteriosclerosis, the evidence met the requirements of substantiation and the evidence established a causal relationship, and the employee, in the course of his employment, became emotionally upset, suffered a compensable accidental injury and as a result thereof died of a myocardial infarction due to arteriosclerotic heart disease. Little v. J. Korber & Co., 71 N.M. 294, 378 P.2d 119 (1963).

Within scope where helping foreman's stalled car. - Workmen on their way to work who were injured while pushing general foreman's stalled car at his request were held to be within the scope of their employment and entitled to compensation under the Workmen's Compensation Act. Feldhut v. Latham, 60 N.M. 87, 287 P.2d 615 (1955).

Prisoner working for city not in course of employment. - Absent legislative authority to release a prisoner from his sentence, the effect of a standing order by a municipal judge to allow prisoners to work for the city and thereby receive credit on their fines could be no more than an order directing that such prisoner perform work for the city. His status as a prisoner was not thereby changed. So long as his status was that of a prisoner, his injury did not arise out of and in the course of his employment with the city; hence, it is not compensable under the Workmen's Compensation Act. Scott v. City of Hobbs, 69 N.M. 330, 366 P.2d 854 (1961).

Stockholder injured within scope when working as manager. - Evidence showed that stockholder who was president and member of board of directors of corporation sustained an injury suffered in an accident arising out of and in the scope of his employment while working as manager for the defendant corporate employer and that he died as a result thereof. Shillinglaw v. Owen Shillinglaw Fuel Co., 70 N.M. 65, 370 P.2d 502 (1962).

Sudden breathing of dust as accident. - Where there is a sudden breathing by employee of heavy dust-laden air, caused by the nearby operation of a power broom sweeping the streets, which when taken into his lungs caused a coughing spell and a resulting sudden hemorrhage, it can be said to produce an "unintended," "unexpected" and "unlooked for" result, requiring the court to characterize the event as accidental and is sufficient to sustain a finding of accidental injury in the course of employment. Lucero v. C.R. Davis Contracting Co., 71 N.M. 11, 375 P.2d 327 (1962), overruled on other grounds, Mascarenas v. Kennedy, 74 N.M. 665, 397 P.2d 312 (1964).

Meaning of "date when the compensable injury manifests itself" or "date when the workman knows or should know he has suffered a compensable injury" is applicable to all of the portions of the Workmen's Compensation Act where the terms "time of accident," "time of injury," "date of disability," "date of accidental injury," or words of similar import are used, recognizing the reality of possible latent injuries and that payment of compensation is a partial substitute for wages formerly earned by the workman at the time when he can no longer earn the same wage. Casias v. Zia Co., 93 N.M. 78, 596 P.2d 521 (Ct. App.), cert. denied, 93 N.M. 8, 595 P.2d 1203 (1979).

V. Procedural Matters.

Lack of jurisdiction at any stage of proceeding is controlling consideration to be resolved before going further. Baker v. Shufflebarger & Assocs., 77 N.M. 50, 419 P.2d 250 (1966).

Federal court jurisdictional minimum met where right to all payments in issue. - A possibility that payments of workmen's compensation benefits will terminate before the total reaches the jurisdictional minimum necessary for the federal district court to entertain the case after removal is immaterial if the right to all the payments is in issue, since future payments under the act are not in any proper sense contingent, although they may be decreased or cut off altogether by the operation of conditions subsequent. Valencia v. Stearns Roger Mfg. Co. 124 F. Supp. 670 (D.N.M. 1954).

In the nature of civil complaints, workmen's compensation cases are not civil actions but are sui generis. State ex rel. Sanchez v. Reese, 79 N.M. 624, 447 P.2d 504 (1968).

Conventional methods of administration of justice employed. - The New Mexico Workmen's Compensation Act may be classified as one of the "judicial" acts, whereby the workmen's compensation claim in the first instance is filed in a court of record in a district court of the state, process issued by said court and a trial of the cause had, either before the district judge without a jury, or with a jury; there are certain differences in the procedure between a workmen's compensation case and the ordinary damage case. But at the same time, from an overall standpoint, the conventional methods of administration of justice are employed in workmen's compensation cases. Valencia v. Stearns Roger Mfg. Co. 124 F. Supp. 670 (D.N.M. 1954).

Disqualification of judge statute applicable to compensation claims. - Provision of statute for the disqualification of a judge by a party to any action or proceeding is applicable to claims prosecuted under the Workmen's Compensation Act. State ex rel. Pacific Employers Ins. Co. v. Arledge, 54 N.M. 267, 221 P.2d 562 (1950).

Nothing inconsistent in applying general rules covering jury trials to workmen's compensation cases. Bryant v. H.B. Lynn Drilling Corp., 65 N.M. 177, 334 P.2d 707 (1959).

Limitations under this act commence to run from time of employer's failure to pay compensation for a disability when the disability can be ascertained and duty to compensate arises rather than from the date of the accident. Anderson v. Contract Trucking Co., 48 N.M. 158, 146 P.2d 873 (1944).

Claim not too late where employer's doctor indicated injury minor. - Where at time of injury employee was led to believe by employer's doctor that injury was minor and attributed eye weakness to advancing age and natural causes, employee's claim for compensation filed within statutory time after discovery of seriousness of the injury more than two years after the accident was not too late. Anderson v. Contract Trucking Co., 48 N.M. 158, 146 P.2d 873 (1944).

Sufficient allegation of general bodily impairment. - Statement of the injury, together with the further statement that by reason thereof he was totally unable to perform any work in any general field of endeavor in which he could engage, and that his disability was total and permanent, we think, was a sufficient allegation of general bodily impairment resulting from the described injury. Gonzales v. Gackle Drilling Co., 70 N.M. 131, 371 P.2d 605 (1962).

Special interrogatory should cover both requisites to right to compensation set forth in 52-1-9 NMSA 1978: whether employee was performing services arising out of and in course of his employment at time of the accident, and whether the employee's death was proximately caused by an accident arising out of and in course of his employment. Southwestern Portland Cement Co. v. Simpson, 135 F.2d 584 (10th Cir. 1943).

No provision made for special interrogatories. - The Workmen's Compensation Act gives the right of trial by jury to either party but makes no provision for special interrogatories. However, to submit special interrogatories without a general verdict unless the latter is waived or consented to is reversible error. Saavedra v. City of Albuquerque, 65 N.M. 379, 338 P.2d 110 (1959).

A motion for dismissal is in order where claim shows that the defendant was not at time of employee's death engaged in an extra-hazardous business covered under the act. Hernandez v. Border Truck Line, 49 N.M. 396, 165 P.2d 120 (1946).

No summary judgment for claims filed prior to Laws 1959. - A workmen's compensation claim filed prior to the effective date of Laws 1959, ch. 67, may not be disposed of on summary judgment. Gonzales v. Gackle Drilling Co., 70 N.M. 131, 371 P.2d 605 (1962).

Motion for summary judgment erroneously granted where evidence showed not special employee. - Trial court erred in granting appellee's motion for summary judgment in personal injury suit on grounds that appellant, a welder sent to appellee's premises by his regular employer, was a special employee and thus was barred from further recovery by the Workmen's Compensation Act, where testimony of appellant disclosed that the work he was engaged in at the time of the accident was in the usual performance of his duties and that if any of appellee's agents had given him instructions contrary to those of his regular employer he would not have followed them. Such evidence, if not contradicted by other evidence to be offered in the trial thereafter ordered, would have required the conclusion that appellant was employed solely by his regular employer and was not prevented by the act from recovery from appellee. Davison v. Tom Brown Drilling Co., 76 N.M. 412, 415 P.2d 541 (1966).

Right to remove to federal court not waived by electing state compensation. - The claimant's argument that the employer elected to be governed by the laws of New Mexico, by having sought the protection afforded by the Workmen's Compensation Act and thus should not be able to remove a case thereunder to a federal forum was without merit since a state cannot constitutionally provide, by statute, an instrumentality whereby the right to remove a case to a federal tribunal can be waived. Valencia v. Stearns Roger Mfg. Co. 124 F. Supp. 670 (D.N.M. 1954).

In order to make out case calling for directed verdict for employer, one is compelled to weigh the evidence and draw inferences against the verdict, which should be resolved in favor of the verdict for the employee. Teal v. Potash Co. of Am., 60 N.M. 409, 292 P.2d 99 (1956).

In compensation case, evidence of pecuniary circumstances of parties is incompetent. Hamilton v. Doty, 65 N.M. 270, 335 P.2d 1067 (1958).

Where evidence before trial court conflicted as to causal connection between accident and death, it was for the trial court to resolve the disagreement. Mayfield v. Keeth Gas Co., 81 N.M. 313, 466 P.2d 879 (Ct. App. 1970).

Admission of evidence of strenuous training course. - Trial court did not abuse its discretion in admitting testimony relating to strenuousness of training course decedent was taking at the time of his death, offered by employee who had taken the course under sufficiently similar circumstances and conditions. Brown v. General Ins. Co. of Am., 70 N.M. 46, 369 P.2d 968 (1962).

Admission of self-serving declaration of deceased workman. - While recognizing the trend toward a greater admissibility of declarations of deceased persons where the same information cannot be obtained in a more purified or authentic form, the self-

serving declarations of a decedent in a workmen's compensation case will not be admitted on the ground of necessity alone even though it was the only available evidence bearing on the issue. Brown v. General Ins. Co. of Am., 70 N.M. 46, 369 P.2d 968 (1962).

Causal connection between false statement and injury. - There was substantial evidence to support the hearing officer's determination of a causal connection between the claimant's false representation on her employment application and her subsequent injury, in the form of the claimant's physical impairment rating and the respondent's expert testimony that the claimant was at an increased risk due to her prior undisclosed injury. Jaynes v. Wal-Mart Store No. 824, 107 N.M. 648, 763 P.2d 82 (Ct. App. 1988).

Jury to accept or reject expert's testimony. - Medical testimony, as other expert evidence, is intended to aid, but not to conclude, a court or jury. "The jury is entitled to rely upon rational inferences deductible from the evidence, whether arising from expert testimony or otherwise." It is within the province of the jury to accept or reject expert surgeon's testimony. Seay v. Lea County Sand & Gravel Co., 60 N.M. 399, 292 P.2d 93 (1956).

The jury is privileged to accept, reject or give such weight to the testimony of expert witnesses only, as it deemed the same entitled to have. Teal v. Potash Co. of Am., 60 N.M. 409, 292 P.2d 99 (1956).

Jury inference regarding heart attack proper. - Jury inference that an unusual strain on decedent's heart, helped along by difficulty in breathing caused by fumes from testing a new process, invoked a heart attack and death is proper. Teal v. Potash Co. of Am., 60 N.M. 409, 292 P.2d 99 (1956).

Extent of injury as question for jury. - Except when it may be stated as a matter of law that a claimant is not totally and permanently disabled within terms of this act, the extent of his disability becomes a jury question. Lipe v. Bradbury, 49 N.M. 4, 154 P.2d 1000 (1945).

Evidence supported giving issue to jury. - That claimant suffered an emotional upset at his office, related to his work, three hours before the stroke, coupled with medical testimony that fatigue and emotional upsets hasten the precipitation of a fatal incident in an individual with essential hypertension, and that there was "a strong probability of connection" between these factors and decedent's cerebral hemorrhage, refute a contention that "the jury should not have been permitted to speculate upon the issue." Salazar v. County of Bernalillo, 69 N.M. 464, 368 P.2d 141 (1962).

Jury question whether causal connection between accident and disability. - Even where no positive statement can be made as to the causal connection by medical witnesses, court was correct in sending the case to the jury on the basis of the medical testimony, such as it was, and the lay testimony as to the events surrounding the accident both before and after it happened, as it was for jury determination as to whether there was a

natural sequence of events which indicate a causal connection between work accident and disability sustained. Lucero v. C.R. Davis Contracting Co., 71 N.M. 11, 375 P.2d 327 (1962), overruled on other grounds, Mascarenas v. Kennedy, 74 N.M. 665, 397 P.2d 312 (1964).

Instruction for jury to make determination between two alternatives proper. - Where, under claim presented, jury had right to determine extent of the injury, whether it was confined to a fractured wrist injury which must be compensated under specific schedule, or whether the injury resulted in total permanent disability under residuary clause, an instruction which permitted jury to make a determination as between these two alternatives was proper. Lipe v. Bradbury, 49 N.M. 4, 154 P.2d 1000 (1945).

Refusal to give jury instruction on attorney's fees proper. - Refusal of trial court to give jury instruction that in compensation cases attorney's fees are paid by the employer and insurer and not by the claimant is proper. Seay v. Lea County Sand & Gravel Co., 60 N.M. 399, 292 P.2d 93 (1956).

Claimant has burden of proving compensable accident. Romero v. S.S. Kresge Co., 95 N.M. 484, 623 P.2d 998 (Ct. App. 1981).

Failure of court to find fact as finding against party with burden. - Even if omissions were made, it is the rule in this jurisdiction that a failure by the trial court to find a material fact must be regarded as a finding against the party having the burden of establishing such fact. Baker v. Shufflebarger & Assocs., 77 N.M. 50, 419 P.2d 250 (1966).

No attack on findings where no objection on requested findings. - Where workmen's compensation proceeding's findings were not objected to and no requested findings were timely made under Rule 52(b), N.M.R. Civ. P. (now see Paragraph B of Rule 1-052), the court's findings could not be attacked. Gillit v. Theatre Enters., Inc., 71 N.M. 31, 375 P.2d 580 (1962).

No denial of appeal right where accepted less compensation than entitled. - Under Workmen's Compensation Law, a workman cannot be denied the right of appeal by his acceptance of a compensation award in an amount less than that to which he is entitled. Evans v. Stearns-Roger Mfg. Co. 253 F.2d 383 (10th Cir. 1958).

After notice of appeal from judgment in workman's compensation case was filed, trial court lost jurisdiction of the cause and acted properly in refusing to set aside its judgment. Ledbetter v. Lanham Constr. Co., 76 N.M. 132, 412 P.2d 559 (1966).

Prejudgment interest. - Section 56-8-4D NMSA 1978 contains an express exemption for the state from awards of prejudgment interest in favor of an injured worker in a workers' compensation action. Montney v. State ex rel. State Hwy. Dep't, 108 N.M. 326, 772 P.2d 360 (Ct. App. 1989).

Only favorable evidence considered on appeal. - On appeal in compensation hearing only that evidence and the reasonable inferences to be drawn therefrom which support the findings will be considered. All evidence unfavorable to the findings will be disregarded. Lopez v. Schultz & Lindsay Constr. Co., 79 N.M. 485, 444 P.2d 996 (Ct. App.), cert. denied, 79 N.M. 448, 444 P.2d 775 (1968).

And not weigh conflicting evidence or credibility of witnesses. - In reviewing workmen's compensation cases, court of appeals considers only evidence and inferences that may be reasonably drawn therefrom in the light most favorable to support the findings, and will not weigh conflicting evidence or credibility of the witnesses. Lopez v. Phelps Dodge Corp., 83 N.M. 799, 498 P.2d 686 (Ct. App. 1972).

Voluntary payment of compensation benefits is merely competent evidence as to any issue in a workman's compensation suit and does not create any presumptions or shifts in the original burden. Romero v. S.S. Kresge Co., 95 N.M. 484, 623 P.2d 998 (Ct. App. 1981), overruled on other grounds, But see, Dupper v. Liberty Mut. Ins. Co., 105 N.M. 503, 734 P.2d 743 (1987); Perea v. Gorby, 94 N.M. 325, 610 P.2d 212 (Ct. App. 1980); Medrano v. Ray Willis Constr. Co., 96 N.M. 643, 633 P.2d 1241 (Ct. App. 1981).

Employer's voluntary payment of employee's benefits admission of accident. - By voluntarily paying an injured employee workmen's compensation benefits, the employer admits that the employee's disability was a natural and direct result of an accident arising out of and in the course of his employment and relieves plaintiffs of the burden of establishing any causal connection as a medical probability by expert medical testimony. Perea v. Gorby, 94 N.M. 325, 610 P.2d 212 (Ct. App. 1980). But see Romero v. S.S. Kresge Co., 95 N.M. 484, 623 P.2d 998 (Ct. App. 1981), overruled on other grounds, Dupper v. Liberty Mut. Ins. Co., 105 N.M. 503, 734 P.2d 743 (1987).

Claimant's testimony as only evidence supporting trial court's finding remains undisturbed on appeal. - Where claimant's testimony is the only evidence which has a bearing on the cause of the accident and if her statement will support the trial court's finding that her injury arose out of and in the course of her employment, the finding shall not be disturbed on appeal. Romero v. S.S. Kresge Co., 95 N.M. 484, 623 P.2d 998 (Ct. App. 1981).

Supreme court will not disturb findings where substantial evidence. - It is clear that in workmen's compensation cases, as in other appeals, where substantial evidence is present to support a finding, the supreme court will not disturb the same on appeal. Yates v. Matthews, 71 N.M. 451, 379 P.2d 441 (1963).

Judgment not reversed though rule erroneously applied where evidence substantial. - A workmen's compensation case which presented a question concerning traumatic neurosis required an extra-cautious view of the evidence, but when the trial court construed the evidence in a manner more favorable to the claimant, its judgment was not to be reversed even though an erroneous rule may have been applied to the weight to be given the evidence, because the evidence in that case substantially supported the

findings without applying the erroneous rule. Jensen v. United Perlite Corp., 76 N.M. 384, 415 P.2d 356 (1966).

§ 52-1-1.1. Definitions.

As used in Chapter 52, Articles 1 through 6 NMSA 1978:

A. "director" means the director of the workers' compensation division of the labor department;

B. "workers' compensation judge" means an individual appointed by the director to act as a workers' compensation judge in the administration of the Workers' Compensation Act [this article] or the New Mexico Occupational Disease Disablement Law;

C. "workman" or "workmen" means worker or workers;

D. "Workmen's Compensation Act" means Workers' Compensation Act; and

E. "workmen's compensation administration" means workers' compensation division of the labor department.

History: Laws 1986, ch. 22, § 26; 1987, ch. 235, § 2; 1989, ch. 263, § 2.

The 1987 amendment, effective June 19, 1987, in the opening clause substituted "Articles 1 through 6" for "Articles 1 through 3"; in Subsections A and B substituted "workers' " for "workmen's"; in Subsection A deleted "appointed" preceding "director"; added Subsections C, D and E; and made a minor word change in Subsection A.

The 1989 amendment, effective June 16, 1989, substituted "division of the labor department" for "administration" in Subsections A and E, and twice substituted "workers' compensation judge" for "hearing officer" in Subsection B.

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective on July 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

§ 52-1-2. Employers who come within act.

The state and each county, municipality, school district, drainage, irrigation or conservancy district, public institution and administrative board thereof employing workers, every charitable organization employing workers and every private person, firm or corporation engaged in carrying on for the purpose of business or trade within this

state, and which employs four or more workers, except as provided in Section 52-1-6 NMSA 1978, shall become liable to and shall pay to any such 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.

History: Laws 1929, ch. 113, § 2; C.S. 1929, § 156-102; Laws 1933, ch. 178, § 1; 1937, ch. 92, § 1; 1941 Comp., § 57-902; 1953 Comp., § 59-10-2; Laws 1971, ch. 261, § 1; 1973, ch. 240, § 1; 1975, ch. 284, § 1; 1987, ch. 235, § 3.

I. General Consideration.

Cross-references. - As to coverage by state agencies, see 52-1-3 NMSA 1978. As to exemption of educational institutions, see 52-1-63 NMSA 1978. As to board of bar commissioners and state board of bar examiners not state agency for purposes of workmen's compensation coverage, see 36-2-9.1 NMSA 1978.

The 1987 amendment, effective June 19, 1987, substituted "workers" for "workmen" throughout the section, substituted "52-1-6 NMSA 1978" for "59-10-4 NMSA 1953" in the middle, and inserted "authorized by the director or" following "to such person as may be" near the end.

Purpose of the workmen's compensation legislation is to provide a humanitarian and economical system of compensation for injured workmen, and such legislation should be given a liberal construction in favor of a claimant, but the provisions of the act may not be disregarded in the name of liberal construction. Graham v. Wheeler, 77 N.M. 455, 423 P.2d 980 (1967).

Workmen's compensation is a loss-distribution mechanism with two objectives. The first is to make the victim whole, and the second is to see, if possible, that the loss falls on the wrongdoer as a matter of simple ethics. Baca v. Gutierrez, 77 N.M. 428, 423 P.2d 617 (1967).

Aid to construction of act. - The maxim "expressio unius est exclusio alterius" is only an aid to construction and does not apply to provisions of Workmen's Compensation Act reading: "injuries sustained in extra-hazardous duties incident to the business," and "The right to the compensation provided for in this act, . . . for any personal injury

accidentally sustained or death resulting therefrom, shall obtain in all cases" when the conditions and circumstances stated and required by 52-1-9 NMSA 1978, are present. Wilson v. Rowan Drilling Co., 55 N.M. 81, 227 P.2d 365 (1950).

Liberal construction rule applies to law, not evidence. - The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim. Brown v. General Ins. Co. of Am., 70 N.M. 46, 369 P.2d 968 (1962).

New Mexico's workmen's compensation statute is based on extrahazardous occupations and pursuits. Hayes v. Ampex Corp., 85 N.M. 444, 512 P.2d 1280 (Ct. App. 1973), overruled on other grounds, Dupper v. Liberty Mut. Ins. Co., 105 N.M. 503, 734 P.2d 743 (1987).

It is not the purpose of Workmen's Compensation Act to permit suit against state without consent having been first obtained. There is no basis to assume that a school district can be sued without consent on the strength of its inclusion in this section and former 59-10-12, 1953 Comp. McWhorter v. Board of Educ., 63 N.M. 421, 320 P.2d 1025 (1958).

No express consent by state to be sued in workmen's compensation proceeding involving the state penitentiary and the consent is not to rest on implication. Day v. Penitentiary of N.M., 58 N.M. 391, 271 P.2d 831 (1954).

A suit may not be brought against a state institution under the Workmen's Compensation Act without the express consent of the state. McWhorter v. Board of Educ., 63 N.M. 421, 320 P.2d 1025 (1958).

School district is an institution or agency of the state, and as such is immune from suit without the state's consent. McWhorter v. Board of Educ., 63 N.M. 421, 320 P.2d 1025 (1958).

This act becomes operative without affirmative action by employer or employee as soon as the employment begins, unless rejected by written contract or notice. Jones v. George F. Getty Oil Co. 92 F.2d 255 (10th Cir. 1937), cert. denied, 303 U.S. 644, 58 S. Ct. 644, 82 L. Ed. 1106 (1938).

Where petition for damages brings action within act. - Although a petition for damages for injuries sustained during employment does not contain an affirmative allegation of how many workmen are employed by the employer, it brings the action within the compensation act where it alleges the injuries were received by a fall from a pole 30 feet from the ground. Jones v. George F. Getty Oil Co. 92 F.2d 255 (10th Cir. 1937), cert. denied, 303 U.S. 644, 58 S. Ct. 644, 82 L. Ed. 1106 (1938).

Dismissal on motion where only question of law. - Where the pleadings as well as documentary evidence indicated that the employer of an injured minor employee qualified under Workmen's Compensation Act and that the injured employee who had

not given notice of election not to become subject to the act had received compensation, the case could be dismissed on motion since only questions of law were presented. Benson v. Export Equip. Corp., 49 N.M. 356, 164 P.2d 380 (1945).

Acts of employer as evidence to predicate award. - Act of employer in making out an accident report and the payment of compensation to the decedent until shortly before his death constitutes sufficient evidence upon which to predicate award of compensation for injury, and for resulting death as well, when coupled with the evidence of medical witnesses in the case that the injury would aggravate subsequent illness and hasten death. Gilbert v. E.B. Law & Son, 60 N.M. 101, 287 P.2d 992 (1955).

Employer must show valid employment contract. - If an employer seeks to avail itself of the Workmen's Compensation Act as a bar to a common-law action, then it must show a valid contract of employment between it and the injured employee. Howie v. Stevens, 102 N.M. 300, 694 P.2d 1365 (Ct. App. 1984).

Self-serving declaration of deceased workman. - While recognizing the trend toward a greater admissibility of declarations of deceased persons where the same information cannot be obtained in a more purified or authentic form, the self-serving declarations of a decedent in a workmen's compensation case will not be admitted on the ground of necessity alone even though it was the only available evidence bearing on the issue. Brown v. General Ins. Co. of Am., 70 N.M. 46, 369 P.2d 968 (1962).

Evidence of strenuous training course admitted. - Trial court did not abuse its discretion in admitting testimony relating to strenuousness of training course decedent was taking at the time of his death, offered by employee who had taken the course under sufficiently similar circumstances and conditions. Brown v. General Ins. Co. of Am., 70 N.M. 46, 369 P.2d 968 (1962).

Question of compensable injury not affected by workman being more readily susceptible. - Although a workman may be more readily susceptible to injury than other workmen similarly employed, by reason of a preexisting physical condition, the question whether the injury is compensable is not affected thereby. Gilbert v. E. B. Law & Son, 60 N.M. 101, 287 P.2d 992 (1955).

Employee who has preexisting physical weakness or disease may suffer compensable injury if the employment contribution can be found either in placing the employee in a position which aggravates the danger due to the idiopathic condition, or where the condition is aggravated by strain or trauma due to the employment requirements. Berry v. J.C. Penney Co., 74 N.M. 484, 394 P.2d 996 (1964).

Violation of specific instruction bars recovery. - Where the trial found that the injury to the plaintiff did not arise out of his work, but did occur at a time when he was using a machine tool in violation of and contrary to instructions given him by his supervisor, benefits under this act were properly denied, because violation of specific instructions which limit the scope or sphere of work which an employee is authorized to do bars

recovery of workmen's compensation for an injury so sustained. Witt v. Marcum Drilling Co., 73 N.M. 466, 389 P.2d 403 (1964).

Insurer liable where agent accepted application after effective date. - Where employer applied for compensation insurance from "December 5, 1937 to December 5, 1938," and agent of insurer accepted application on December 8, as of December 5, 1937, and an employee was killed on December 6, 1937 and suit was filed for compensation by his dependents, and insurer denied liability because of employer's willful, intentional and fraudulent concealment of facts of death, the court held that such evidence was insufficient to warrant its finding that the insurer was not liable for compensation for death of said employee. Points v. Wills, 44 N.M. 31, 97 P.2d 374 (1939).

Availability of common-law defenses for employer. - Under the Workmen's Compensation Act, where an employer is subject to the act and has failed to comply therewith, an employee who sustains compensable injuries is afforded one of two remedies: (1) maintain a civil action against the employer for damages suffered or (2) in lieu of a common-law action, apply to the district court for compensation benefits under the act. In both instances, the employer is denied the common-law defenses of contributory negligence, assumption of risk and the fellow servant rule. However, the employer is not subject to the act, the act itself would not apply to the employer and an employer would be entitled to all common-law defenses in a common-law action for negligence brought by an employee. Arvas v. Feather's Jewelers, 92 N.M. 89, 582 P.2d 1302 (Ct. App. 1978).

Findings supported by substantial evidence. - If findings that plaintiff was not performing any service for employer at the time of the accident are supported by substantial evidence, then plaintiffs must fail in this appeal. By substantial evidence is meant that evidence which is acceptable to a reasonable mind as adequate support for a conclusion. Young v. Signal Oilfield Serv., Inc., 81 N.M. 67, 463 P.2d 43 (Ct. App. 1969).

Law reviews. - For note, "Harmon v. Atlantic Richfield Co.: The Duty of an Employer to Provide a Safe Place to Work for the Employee of an Independent Contractor," see 12 N.M.L. Rev. 559 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 95, 97 to 150, 162.
General or special employer's liability for compensation to injured employee, 3 A.L.R. 1181; 34 A.L.R. 768; 58 A.L.R. 1467; 152 A.L.R. 816.
Application to employees engaged in farming, 7 A.L.R. 1296; 13 A.L.R. 955; 35 A.L.R. 208; 43 A.L.R. 954; 107 A.L.R. 977; 140 A.L.R. 399.
Property-owner's liability for injury to workmen engaged in building or repairing structure under provisions as to casual employment, 15 A.L.R. 735; 33 A.L.R. 1460; 60 A.L.R. 1195; 107 A.L.R. 934.
Construction of provisions directed against noninsuring or self-insuring employers, 18 A.L.R. 267.

General discussion of the nature of the relationship of employer and independent contractor, 19 A.L.R. 226.
Circumstances under which existence of relationship of employer and independent contractor is predicable, 19 A.L.R. 1168.
Elements bearing directly upon the quality of a contract as affecting the character of one as independent contractor, 20 A.L.R. 684.
Window washer as casual employee, 28 A.L.R. 624.
Workmen's compensation: applicability to charitable institutions, 30 A.L.R. 600.
Concurrent or joint employment by several, 30 A.L.R. 1000; 58 A.L.R. 1395.
Effect of kinship or family relationship between parties, 33 A.L.R. 585.
Workmen's compensation: what is casual employment, 33 A.L.R. 1452; 60 A.L.R. 1195; 107 A.L.R. 934.
Teamster as independent contractor under Workmen's Compensation Act, 42 A.L.R. 607; 43 A.L.R. 1312; 120 A.L.R. 1031.
Independence of contract considered with relation to scope and construction of statutes, 43 A.L.R. 346.
Ownership of leased or rented property as constituting business, trade or occupation within Workmen's Compensation Act, 50 A.L.R. 1176.
Constitutionality of provisions applicable to public officers or employees, 53 A.L.R. 1290.
Municipal corporation as an employer, 54 A.L.R. 788.
One doing work under a cost plus contract as an independent contractor, or a servant or an agent, 55 A.L.R. 291.
One in general employment of contractee, but who at time of accident was assisting or cooperating with, an independent contractor, as employee of former or latter for the time, 55 A.L.R. 1263.
Whether character of work undertaken is part or process of principal's trade or business within Workmen's Compensation Act, 58 A.L.R. 882.
Nurse as independent contractor or servant, 60 A.L.R. 303.
Applicability of workmen's compensation to injuries sustained while flying, 62 A.L.R. 229.
Right as against vehicle owner, of one not in his general employment, injured while assisting in remedying conditions due to accident to automobile or truck in highway, 72 A.L.R. 1284.
One employed by servant in emergency as servant of the master, 76 A.L.R. 971.
Independent contractors and Workmen's Compensation Act, 78 A.L.R. 493.
Helper, assistant or substitute for an employee as himself an employee, 80 A.L.R. 522.
Continuity and duration of employment required by provision making applicability of act depend on number of persons employed, 81 A.L.R. 1232.
"Seasonal" employment within provisions of Workmen's Compensation Act, 93 A.L.R. 308.
Construction and application of term "business" as used in provision of Workmen's Compensation Acts, 106 A.L.R. 1502.
Evasion or avoidance of requirements of Workmen's Compensation Act, effect of intent as to, on status of independent contractor as distinguished from employee, 107 A.L.R. 855.

National bank or receiver thereof as within state Workmen's Compensation Act, 113 A.L.R. 1454.
Federal property within state, injury occurring on, or in connection with contracts in relation to, applicability of state Workmen's Compensation Act, 153 A.L.R. 1050.
Musicians or other entertainers as employees of hotel or restaurant in which they perform, within Workmen's Compensation Act, 158 A.L.R. 915; 172 A.L.R. 325.
Coverage of industrial or business employee when performing under orders, services for private benefit of employer or superior, or officer, representative or stockholder of corporate employer, 172 A.L.R. 378.
Constitutional or statutory provision referring to "employees" as including public officers, 5 A.L.R.2d 415.
Voluntary payment of compensation under statute of one state as bar to claim or ground for reduction of claim of compensation under statute of another state, 8 A.L.R.2d 628.
Status of gasoline and oil distributor or dealer, as agent, employee or independent contractor or dealer, 83 A.L.R.2d 1282.
Workers' compensation immunity as extending to one owning controlling interest in employer corporation, 30 A.L.R.4th 948.
99 C.J.S. Workmen's Compensation §§ 37 to 58.

II. Employment Covered.

Only injuries "arising out of and in course of" employment are compensable. Martinez v. Fidel, 61 N.M. 6, 293 P.2d 654 (1956).

Under the express language of this section it is not enough that an injury "arose in the course of employment," it must "arise out of" as well as "in the course of" the employment. Berry v. J.C. Penney Co., 74 N.M. 484, 394 P.2d 996 (1964).

Out of and in course of employment. - "Out of" course of employment points to the cause or source of the accident, while "in the course of" relates to time, place and circumstances. Martinez v. Fidel, 61 N.M. 6, 293 P.2d 654 (1956).

Injury is said to arise in course of employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while he is fulfilling his duties or engaged in doing something incidental thereto. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976).

Scope of employment is to be determined from directions of employer, and not from any agreement between the employer and her fellow employees; thus, the fact that an employer agreed with her fellow employees to form a car pool at a shopping center before proceeding to a required conference was of no consequence to the scope of her employment. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976).

Where facts undisputed, employment question of law. - Where the historical facts of the case are undisputed, the question whether the accident arose out of and in the course of the employment is a question of law. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976).

Injury not in course of employment where for personal benefit alone. - The injury received in altercation with guard at gate of job site may have arisen out of his employment but was not sustained in the course of his employment; since claimant's purpose in returning to the site to obtain a pay advance was for his personal benefit alone and not designed to further the employer's business. Fautheree v. Insulation & Specialties, Inc., 67 N.M. 230, 354 P.2d 526 (1960).

No sure test for determining whether employee or independent contractor. - There is no single or sure criterion affording a test of when the relationship is that of employee and when that of an independent contractor, and "a fact found controlling in one combination may have a minor importance in another." Nelson v. Eidal Trailer Co., 58 N.M. 314, 270 P.2d 720 (1954).

Manufacturer not responsible for compensation for death of independent contractor's employee. - Where contract between truck loader and manufacturing company left the time and manner of performance and the hiring and payment of extra help to the discretion of the loader, loader was an independent contractor, and manufacturer was not liable for workmen's compensation for death of loader's employee. Nelson v. Eidal Trailer Co., 58 N.M. 314, 270 P.2d 720 (1954).

Nor owner of gravel pit. - Where owner of gravel pit contracted with third party for drilling holes and placing dynamite and third party employed claimant, who was injured in operation and third party made his own arrangements with his employees and was paid flat daily rate under contract, third party was an independent contractor and claimant was not entitled to compensation from land owner. Gober v. Sanders, 64 N.M. 66, 323 P.2d 1104 (1958).

Worker, whose means and method of work not controlled, deemed independent contractor. - The trial court correctly determined that plaintiff was an independent contractor where defendant had the power to control the results of plaintiff's work, but did not have the right to control the means and methods of plaintiff's work, plaintiff was not required to work any specified hours, nor was there a requirement as to who was to perform specific tasks. Tafoya v. Casa Vieja, Inc., 104 N.M. 775, 727 P.2d 83 (Ct. App. 1986).

Independent truck contractor not within act. - A trucker engaged by a gin company for hauling seed to designated places and who hired and paid for any extra help he employed on his own was an independent contractor and did not fall within the scope of the Workmen's Compensation Act as an "employee." Bland v. Greenfield Gin Co., 48 N.M. 166, 146 P.2d 878 (1944).

Employee may be discharged at will. - Where a truck driver who is employed to haul logs to railroad transportation, at a price per thousand timber foot, may be discharged at will, he is an employee and not an independent contractor, although he has the control of size of load, time for working, and choice of routes. Burruss v. B.M.C. Logging Co., 38 N.M. 254, 31 P.2d 263 (1934).

Work need not be in New Mexico. - Claim that in order for employment relationship to exist in New Mexico the claimant must work for the employer in New Mexico before being assigned to work elsewhere is without merit. Franklin v. Geo. P. Livermore, Inc., 58 N.M. 349, 270 P.2d 983 (1954).

Contract with employees to operate independently. - All employers covered by Workmen's Compensation Act operate under it unless by contract with employees they show intention to operate independently of it. 1931-32 Op. Att'y Gen. 88.

Special errand rule applicable where supervisors requested car pool. - Where deceased employee who, along with three others, was ordered by the defendant-employer to attend a special two-day health and social services department meeting (all of whom had been requested by their respective supervisors to form a car pool and to return overnight to their home town between the two sessions in order to save fuel and reduce travel costs), picked up the three other employees at an agreed-on meeting place, a parking lot, and proceeded in her car to the meeting, and at the close of the first day's session, after discharging her three colleagues in the same parking lot, drove out of the parking lot and immediately thereafter was involved in the accident which resulted in her death, the supreme court held that the special errand rule was applicable in that deceased was on a special mission for her employer and was within the scope of her employment from the moment she left home until the moment she would have returned home at the end of the day, and therefore, her fatal injuries arose out of and in the course of her employment, and the "going and coming" rule was inapplicable. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976).

The special errand rule states that when an employee, having identifiable time and space limits on his employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976).

Contractor with less than four employees. - Except as provided in this section, a contractor is not subject to the Workmen's Compensation Act though engaged in extrahazardous activity unless he expressly elects to come under it, if he has less than four employees. 1945-46 Op. Att'y Gen. No. 3711.

Where an employer employs four or more persons in the business he was required to carry workmen's compensation insurance or to exempt himself from the Workmen's Compensation Act. Castillo v. Juarez, 80 N.M. 196, 453 P.2d 217 (Ct. App. 1969).

Employer covered where employees for all proprietorships totaled more than four. - Defendant who solely owned and operated three businesses as sole proprietorships, and who cumulatively employed a total of four or more employees in those three sole proprietorships, was an employer under this act, even though the business for which claimant worked did not employ four employees. Clark v. Electronic City, 90 N.M. 477, 565 P.2d 348 (Ct. App. 1977).

Certain governmental units may be subject to this act if engaged in extrahazardous occupations or pursuits and if the employer and employees have either expressly or impliedly accepted and agreed to be bound by the act. 1961-62 Op. Att'y Gen. No. 61-16.

State department is not subject to the Workmen's Compensation Act as to office employees and others in nonhazardous occupation and may not elect to come under the act or to such employees. 1951-52 Op. Att'y Gen. Nos. 5598, 5599.

Applies to state educational institutions. - The Workmen's Compensation Act applies to state educational institutions whether employees are working on a farm or ranch, custodians or teaching in classrooms where dangerous substances are used. 1931-32 Op. Att'y Gen. 114.

Municipal board of education is not liable under Workmen's Compensation Act. 1957-58 Op. Att'y Gen. No. 57-310.

Workmen's compensation insurance may be carried by board of education. 1957-58 Op. Att'y Gen. No. 57-310.

School and conservancy district are included in Workmen's Compensation Act when engaged in an extrahazardous occupation or pursuit. Armijo v. Middle Rio Grande Conservancy Dist., 59 N.M. 231, 282 P.2d 712 (1955).

But no authority to sue state. - Although a school district is subject to the provisions of the Workmen's Compensation Act, there is no authority to support the contention that a suit can be brought without the consent of the state. McWhorter v. Board of Educ., 63 N.M. 421, 320 P.2d 1025 (1958).

Mere fact that defendant is a "conservancy district," as the term is used in this section, does not subject it to the act, but liability only attaches when employers are engaged in "occupations or pursuits declared extrahazardous" by 59-10-10, 1953 Comp. (now repealed). Rumley v. Middle Rio Grande Conservancy Dist., 40 N.M. 183, 57 P.2d 283 (1936).

State and political subdivisions. - It was apparent legislative intention that the state and its political subdivisions should come within provisions of the Workmen's Compensation Act if it employs any workmen at all in dangerous pursuits when legislature deleted the words "As many as four" by amendment in 1933. 1943-44 Op. Att'y Gen. No. 4224.

Employees of state insane asylum, not engaged in "extrahazardous occupation," may be brought under the law by mutual agreement. 1931-32 Op. Att'y Gen. 90.

Employees of state highway department are entitled to benefits under this act. State ex rel. Maryland Cas. Co. v. State Hwy. Comm'n, 38 N.M. 482, 35 P.2d 308 (1934); Cuellar v. American Employers' Ins. Co., 36 N.M. 141, 9 P.2d 685 (1932).

Members of voluntary fire department without some contract of employment with city are not entitled to benefits of Workmen's Compensation Act. 1931-32 Op. Att'y Gen. 163.

Return to route after major deviation not necessarily return to scope of employment. - If in the course of a business trip an employee makes a major deviation, major because of its duration in time or because of its nature, or both, it can be said that as a matter of law he has abandoned his employment. Then, regardless if he returns to the route of the business trip, this does not in and of itself return him to the scope of employment, and an injury occurring after this does not arise out of or in the course of his employment. Carter v. Burn Constr. Co., 85 N.M. 27, 508 P.2d 1324 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973).

Where decedent spent the four and one-half hours drinking beer, playing pool and conversing with his friends at lounge, such excursion constitutes a major deviation and therefore injuries sustained upon returning to the route of the business trip were not compensable. Carter v. Burn Constr. Co., 85 N.M. 27, 508 P.2d 1324 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973).

However, minor deviations treated differently. - An employee, who while on a trip in the course of his employment makes a minor deviation for personal reasons, is outside the scope of his employment during the deviation. However, once he returns to the route of the business trip he reenters the scope of his employment and responsibility attaches; however, very minor deviations are disregarded or considered as part of the employment agreement. Carter v. Burn Constr. Co., 85 N.M. 27, 508 P.2d 1324 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973).

Injuries compensable where employer furnishes transportation to and from work. - Ordinarily injuries sustained by an employee while on his way to work or after leaving are not compensable; however, one exception to the rule is where the employer agrees to and does furnish transportation to and from work. Carter v. Burn Constr. Co., 85 N.M. 27, 508 P.2d 1324 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973).

Mounted patrol trooper not under color of employment agreement. - A trooper or officer of the New Mexico mounted patrol, in carrying out duties as provided, is without question engaging in extrahazardous activities. However, such extrahazardous duty is not being performed under any color of an employment agreement. 1957-58 Op. Att'y Gen. No. 57-41.

Except while under direct supervision of state police officer. - Workmen's compensation coverage includes New Mexico mounted patrol members should they become injured while working under the direct supervision of a state police officer. 1957-58 Op. Att'y Gen. No. 58-218.

Compensation for layman acting as posseman. - There can be no question that any citizen, whether he be a sheriff's posseman, layman or of any other status, who would be legally subject to an assistance call of posse comitatus and who was indeed duly and legally so called, and who in the course of such duties was injured, would be included in workmen's compensation. 1957-58 Op. Att'y Gen. No. 58-218.

Citizen employed by deputy sheriff not employee of county. - A deputy sheriff is without power to hire a citizen to direct traffic and where such citizen is killed by an automobile while so doing, no recovery may be had for his death under the Workmen's Compensation Act on the ground that he was an employee of the county. Eaton v. Bernalillo County, 46 N.M. 318, 128 P.2d 738 (1942).

Implied authority of foreman related to drilling duties only. - Where foreman lacked authority from the company to deliver the car back to Farmington and employee per request of foreman helped in return of car, that the foreman of the crew had implied authority to direct the crew to do those things which were required of them was held immaterial as this related to their duties in drilling the well, and had nothing to do with the disposition of the shuttle car; therefore, accident did not arise out of and in the course of claimant's employment but was incidental to assisting foreman in actions taken in an individual capacity. Covington v. Rutledge Drilling Co., 71 N.M. 120, 376 P.2d 180 (1962).

Injuries arising out of risks or conditions personal and not out of a risk peculiar to the employment, do not "arise out of" the employment unless the employment contributes to the risk or aggravates the injury, and those injuries within the category of risks personal to the claimant are universally held to be noncompensable. Berry v. J.C. Penney Co., 74 N.M. 484, 394 P.2d 996 (1964).

Accident when employee not doing anything for employer not compensable. - An accident occurring upon a public way, when the employee is not doing anything for the employer by reason of the employment, is not compensable "because not arising out of his employment," and not occurring in the "course of his employment," unless the negligence of the employer was the proximate cause. Martinez v. Fidel, 61 N.M. 6, 293 P.2d 654 (1956).

While interstate truckers need not carry workmen's compensation, the workmen and employer may elect to come under the law by voluntary agreement. 1937-38 Op. Att'y Gen. 43.

Truck driver who developed pneumonia as result of defective truck, which discharged excessive amount of smoke and gases, furnished by employer, was entitled to compensation under this act. Stevenson v. Lee Moor Contracting Co., 45 N.M. 354, 115 P.2d 342 (1941).

Test in determining when one is employed as farm laborer to be covered by this act is the general nature and purpose of his employment and not the particular items of work. Koger v. A.T. Woods, Inc., 38 N.M. 241, 31 P.2d 255 (1934).

Employment in timber cutting. - An accident to a workman employed in a forest, caused by a falling tree, and resulting in his death, arose out of his employment. Merrill v. Penasco Lumber Co., 27 N.M. 632, 204 P. 72 (1922) (decided under former law).

III. Injury By Accident.

Accidental injury to permit recovery. - This section requires that there must be an injury caused by accident, an "accidental injury," to permit recovery. Aranbula v. Banner Mining Co., 49 N.M. 253, 161 P.2d 867 (1945).

Nature of accidental injury. - Accidental injuries may arise without the usually attending factors of narrow limits of time for the beginning and completion of the injury, or without unusual, or extraordinary conditions of employment not common to others, but there must be an accident, as distinguished from common occupational, or industrial, sickness or disease. Aranbula v. Banner Mining Co., 49 N.M. 253, 161 P.2d 867 (1945).

Term "accidental injury" as used in Workmen's Compensation Act should be liberally construed in favor of the compensation claimant; "injury by accident" has been construed to mean nothing more than an accidental injury or an "accident" as the word is ordinarily used, and denotes an unlooked for mishap or some untoward event which is not expected or designed; the meaning of "accident" is not limited to sudden injuries, nor is its meaning limited by any time test; the unintended result of an intentional act of the person injured may be an "accident" within the meaning of our compensation act. Gilbert v. E.B. Law & Son, 60 N.M. 101, 287 P.2d 992 (1955).

In sense of this section, accidental injury or accident is an unlooked for mishap, or untoward event which is not expected or designed. Ortiz v. Ortiz & Torres Dri-Wall Co., 83 N.M. 452, 493 P.2d 418 (Ct. App. 1972).

It is unnecessary that workman be subjected to unusual or extraordinary condition or hazard not usual to his employment for an injury to be an accidental injury under the

compensation act. Ortiz v. Ortiz & Torres Dri-Wall Co., 83 N.M. 452, 493 P.2d 418 (Ct. App. 1972).

The term "injury by accident" as employed in this section means nothing more than an accidental injury, or an accident, as the word is ordinarily used; it denotes an unlooked for mishap, or an untoward event which is not expected or designed. Aranbula v. Banner Mining Co., 49 N.M. 253, 161 P.2d 867 (1945).

The "by accident" requirement is now deemed satisfied in most jurisdictions either if the cause was of an accidental character or if the effect was the unexpected result of routine performance of the claimant's duties. Accordingly, if the strain of claimant's usual exertions causes collapse from back weakness, the injury is held accidental. Ortiz v. Ortiz & Torres Dri-Wall Co., 83 N.M. 452, 493 P.2d 418 (Ct. App. 1972).

Accident must result from risk incident to employment. - Before an injury may be said to be compensable as "arising out of employment," the accident causing the injury must result from a risk reasonably incident to the employment; a risk common to the public generally and not increased in any way by the circumstances of the employment is not covered by the act; but it is not necessary that a workman be subjected to an unusual or extraordinary condition, not usual to his employment, for an injury sustained to be termed an accidental one under the law. Gilbert v. E.B. Law & Son, 60 N.M. 101, 287 P.2d 992 (1955).

Causal connection between employment and accident. - Under this section, there must not only have been a causal connection between the employment and the accident, but the accident must result from a risk incident to the work itself. Berry v. J.C. Penney Co., 74 N.M. 484, 394 P.2d 996 (1964).

Where fall not result of risk involved in employment. - Claimant's idiopathic fall on employer's concrete floor and injury were not the result of a risk involved in his employment or incident to it. Luvaul v. A. Ray Barker Motor Co., 72 N.M. 447, 384 P.2d 885 (1963).

Malfunction of body as accidental injury. - Based upon the reasoning of these cases, a malfunction of the body itself, such as a fracture of the disc or tearing a ligament or blood vessel, caused or accelerated by doing work required or expected in employment, is an accidental injury within the meaning and intent of the compensation act. Ortiz v. Ortiz & Torres Dri-Wall Co., 83 N.M. 452, 493 P.2d 418 (Ct. App. 1972).

Compensation denied where present condition natural progression of preexisting one. - Compensation denied as claimant did not suffer a myocardial infarction while working, as his present condition is the result of the natural progression of his preexisting heart condition. Thompson v. Banes Co., 71 N.M. 154, 376 P.2d 574 (1962).

Silicosis not accident. - While workmen's compensation acts are given a liberal interpretation in favor of the workman, silicosis does not fall within the purview of an injury by accident. Aranbula v. Banner Mining Co., 49 N.M. 253, 161 P.2d 867 (1945).

But occupational disease. - Silicosis acquired over a period of years and without the element of excessive exposure and sudden and unexpected occurrence of injury or illness is an occupational disease and not an injury by accident. Aranbula v. Banner Mining Co., 49 N.M. 253, 161 P.2d 867 (1945).

Injury may result from inhaling gases for days. - An injury, to be compensable under this act, need not result momentarily. It may be the result of inhaling gases for hours or days. Stevenson v. Lee Moor Contracting Co., 45 N.M. 354, 115 P.2d 342 (1941).

§ 52-1-3. Workers' compensation coverage; coverage by state agencies.

A. The risk management division of the general services department shall provide workers' compensation coverage for all public employees, as defined in the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978], of all state agencies regardless of the hazards of their employment.

B. The director of the risk management division shall ascertain the most economical means of providing such coverage and may secure a policy or policies of insurance to provide the coverage required. The director of the risk management division shall collect or transfer funds from each agency to cover the agency's respective share of the cost of the coverage.

C. The director of the risk management division shall determine the possibilities for including school districts under uniform coverage and the methods of administration therefor.

D. For purposes of this section, "state" or "state agency" means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions.

History: 1953 Comp., § 59-10-2.1, enacted by Laws 1977, ch. 385, § 15; 1978, ch. 166, § 15; 1979, ch. 199, § 1; 1987, ch. 235, § 4.

Repeals and reenactments. - Laws 1977, ch. 385, § 15, repealed former 59-10-2.1, 1953 Comp., relating to coverage by state agencies for workmen's compensation insurance, and enacted a new 59-10-2.1, 1953 Comp.

The 1987 amendment, effective June 19, 1987, inserted "of the general services department" following "risk management division" and substituted "workers' " for "workmen's" both places it appears in Subsection A and inserted "of the risk

management division" following "the director" at the beginning of Subsections B, C and D.

Risk management division. - The risk management division, referred to in Subsection A, was originally part of the department of finance and administration. Laws 1983, ch. 301, § 14, reorganizes the department, abolishing that particular division therein. Laws 1983, ch. 301, § 3, creates the department of general services, consisting of several divisions, including the risk management division. Laws 1983, ch. 301, § 7, provides that all references in law to the risk management division of the department of finance and administration shall be construed to be references to the same division within the general services department. See 9-6-3 and 9-17-3 NMSA 1978 and notes thereto.

School district is a political subdivision of the state created to aid in the administration of education, and subject to the immunities available to the state itself. McWhorter v. Board of Educ., 63 N.M. 421, 320 P.2d 1025 (1958).

And subject to act. - Although a school district is subject to the provisions of the Workmen's Compensation Act, there is no authority to support the contention that a suit can be brought without the consent of the state. McWhorter v. Board of Educ., 63 N.M. 421, 320 P.2d 1025 (1958).

School bus drivers in San Miguel county are employees of county so as to come within the provisions of the Workmen's Compensation Act. 1959-60 Op. Att'y Gen. No. 60-202.

Public officer not entitled to benefits. - Prior to 1972, members of the New Mexico state labor and industrial commission, the state fair commission, the racing commission and the livestock board, were all public officers, not employees, and not entitled to benefits under this act. 1968 Op. Att'y Gen. No. 68-109.

Volunteer fire department. - The village of Hatch need not pay premiums upon insurance for workmen's compensation coverage for personnel of the volunteer fire department. 1955-56 Op. Att'y Gen. No. 6505.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 659 to 661.
Constitutional or statutory provisions referring to "employees" as including public officers, 5 A.L.R.2d 415.
99 C.J.S. Workmen's Compensation §§ 27 to 37.

§ 52-1-3.1. Public employee.

As used in the Workers' Compensation Act [this article], unless otherwise provided, "public employee" means any person receiving a salary from, and acting in the service of, the state or any county, municipality, school district, drainage, irrigation or conservancy district, public institution or administrative board, including elected or

appointed public officers. The term "public employee" does not include an independent contractor.

History: 1978 Comp., § 52-1-3.1, enacted by Laws 1979, ch. 199, § 2; 1989, ch. 263, § 3.

The 1989 amendment, effective June 16, 1989, made a minor stylistic change in the first sentence.

§ 52-1-4. Filing certificate of insurance coverage or other evidence of coverage with workers' compensation division; exemptions from requirement.

A. Every employer subject to the Workers' Compensation Act [this article] shall direct his insurance carrier to file and the insurance carrier shall file in the office of the director evidence of workers' compensation insurance coverage in the form of a certificate containing that information required by regulation of the director. In case any employer is able to show to the satisfaction of the director that he is financially solvent and that providing insurance coverage is unnecessary, the director shall issue him a certificate to that effect, which shall be filed in lieu of the certificate of insurance. The director shall provide by regulations the procedures for reviewing, renewing and revoking any certificate excusing an employer from filing a certificate of insurance, including provisions permitting the director to condition the issuance of the certificate upon the employer's proving adequate security.

B. Any certificate of the director filed under the provisions of this section shall show the post office address of such employer.

C. Every contract or policy insuring against liability for workers' compensation benefits or certificate for which is filed under the provisions of this section shall provide that the insurance carrier or the employer shall be directly and primarily liable to the worker and, in event of his death, his dependents, to pay the compensation and other worker's compensation benefits for which the employer is liable.

D. The state, counties, municipalities, school districts, drainage, irrigation or conservancy districts, institutions and administrative boards thereof shall not be required to file a certificate under the provisions of this section.

E. In the event of an insurance policy cancellation, the workers' compensation insurance carrier shall file notice to the director within ten days of such cancellation on a form approved by the director.

History: 1978 Comp., § 52-1-4, enacted by Laws 1987, ch. 235, § 5; 1989, ch. 263, § 4.

Cross-references. - As to employers of private domestic servants or of farm and ranch laborers exempt from act, see 52-1-6 NMSA 1978.

Repeals and reenactments. - Laws 1987, ch. 235, § 5 repealed former 52-1-4 NMSA 1978 as amended by Laws 1986, ch. 22, § 2, and enacted a new 52-1-4 NMSA 1978.

The 1989 amendment, effective June 16, 1989, substituted "division" for "administration" in the catchline, inserted "direct his insurance carrier to file and the insurance carrier shall" in the first sentence of Subsection A, and added Subsection E.

Workmen's Compensation Act is compulsory, not elective, and compliance may be accomplished by filing an undertaking in the nature of insurance, by filing a certificate in evidence thereof, or by qualifying as a self-insurer; the failure of an employer to comply in any way constitutes a violation of the act and subjects him to a claim in tort for negligence by an employee. Montano v. Williams, 89 N.M. 86, 547 P.2d 569 (Ct. App.), aff'd, 89 N.M. 252, 550 P.2d 264 (1976).

Purpose under elective act such as this is to cause the employer to obtain compensation protection. It is contrary to legislative intent that any technical delay which in no way prejudices a claimant would give rise to a common-law suit. Quintana v. Nolan Bros., 80 N.M. 589, 458 P.2d 841 (Ct. App. 1969).

Purpose of mandatory filing requirement is to notify a workman that the employer has complied with the insurance requirements of the act; that the employer is subject to the provisions thereof and that the workman is conclusively presumed to have accepted its provisions. Shope v. Don Coe Constr. Co., 92 N.M. 508, 590 P.2d 656 (Ct. App. 1979).

Frustration of legislative intent. - There is a point beyond which the mandatory provisions of the Workmen's Compensation Act cannot be ignored. If the mandatory provisions are disregarded altogether it is clear that the intention of the legislature would be totally frustrated. Security Trust v. Smith, 93 N.M. 35, 596 P.2d 248 (1979).

Employee's remedies where employer fails to file. - If the employer utterly fails to comply with the provisions of the Workers' Compensation Act (this article), such as by failing to obtain insurance or to properly file a certificate of insurance, the employee has two options: she may either file a workers' compensation action or file an action for common law remedies, to which she may attach a contract claim for wrongful discharge. Failure to comply with the act does not allow the employee to file both a workers' compensation action and a wrongful discharge action. Shores v. Charter Servs., Inc., 106 N.M. 569, 746 P.2d 1101 (1987).

Workman's right to common-law action conclusive. - Where the employer has actually failed to obtain insurance coverage and no insurance coverage exists at the time the common-law action is filed, the workman's right to the common-law action is conclusive. Shope v. Don Coe Constr. Co., 92 N.M. 508, 590 P.2d 656 (Ct. App. 1979).

Purpose of depriving noncomplying employer of common-law defenses under an elective act such as this is to cause the employer to obtain compensation protection. It would seem contrary to legislative intent that any technical delay which in no way prejudices a claimant would give rise to a common-law suit. Mirabal v. International Minerals & Chem. Corp., 77 N.M. 576, 425 P.2d 740 (1967).

Standard in state for foreclosure of employee's common-law remedies is whether the employer has substantially complied with the Workmen's Compensation Act; strict compliance is not necessary. Security Trust v. Smith, 93 N.M. 35, 596 P.2d 248 (1979).

Employer's late filing of insurance policy not substantial compliance. - Employer's late filing of a policy of insurance or a certificate of proof thereof with the clerk of the district court, (now superintendent of insurance), as required by this section, does not constitute substantial compliance with the Workmen's Compensation Act, where such filing occurred after the date of plaintiffs' injuries and also after the date of the commencement in the federal court of plaintiffs' actions seeking common-law and statutory remedies other than those provided for by the Workmen's Compensation Act. Security Trust v. Smith, 93 N.M. 35, 596 P.2d 248 (1979).

But late filing after plaintiff has commenced suit may constitute substantial compliance with the mandatory filing requirements of this section, so as to force plaintiff to seek the exclusive remedies of the act, when plaintiff received actual notice of the policy's existence before his filing. Baldwin v. Worley Mills, Inc., 95 N.M. 398, 622 P.2d 706 (Ct. App. 1980).

The "shall file" provision in this section is mandatory. Montano v. Williams, 89 N.M. 86, 547 P.2d 569 (Ct. App.), aff'd, 89 N.M. 252, 550 P.2d 264 (1976); Quintana v. Nolan Bros., 80 N.M. 589, 458 P.2d 841 (Ct. App. 1969) (decided prior to the 1989 amendment).

This section places duty of filing upon employer, not the insurer and if the employer pursued a course indicating there was no compensation insurance, it might be estopped to show there was coverage in fact, and might therefore subject itself to the liability resulting from the failure to provide insurance. Quintana v. Nolan Bros., 80 N.M. 589, 458 P.2d 841 (Ct. App. 1969) (decided prior to the 1989 amendment).

Failure to file would not deprive court of jurisdiction. - If an insurer, named as a defendant in a workmen's compensation suit, was served pursuant to former 52-1-32 NMSA 1978 (now see 52-5-5 et seq.) a failure to file the policy pursuant to this section would not deprive the court of jurisdiction over that insurer. Quintana v. Nolan Bros., 80 N.M. 589, 458 P.2d 841 (Ct. App. 1969) (decided prior to the 1989 amendment).

Delay in filing does not remove limitation on employer's liability. - A delay in filing pursuant to this section does not remove the limitation on the employer's liability because the statutory purpose is met when the employer obtains compensation protection for his workmen. Quintana v. Nolan Bros., 80 N.M. 589, 458 P.2d 841 (Ct.

App. 1969) (decided prior to the 1989 amendment).

A delay in filing, pursuant to this section does not necessarily remove the limitations on the employer's liability found in 52-1-6, 52-1-8 and 52-1-9 NMSA 1978. Quintana v. Nolan Bros., 80 N.M. 589, 458 P.2d 841 (Ct. App. 1969) (decided prior to the 1989 amendment).

Judicial approval is not necessary where employer files insurance policy or a certificate in evidence thereof. Montano v. Williams, 89 N.M. 86, 547 P.2d 569 (Ct. App.), aff'd, 89 N.M. 252, 500 P.2d 264 (1976).

No presumption that employee bound until employer complies with requirements. - The employee could not be conclusively presumed to have accepted the provisions of the Workmen's Compensation Act since the employer had not complied with its requirements, including insurance. Until there is a compliance with the requirements of the act relating to insurance by the employer, then, no presumption arises that the employee is bound by the act. Addison v. Tessier, 62 N.M. 120, 305 P.2d 1067 (1957).

And action at law lies in favor of employee against employer. - Where an employer did not carry workmen's compensation insurance, nor had he relieved himself of such requirement as required by this section, the employer was not operating under the provisions of the act, and his employee, under such circumstances, could not have been conclusively presumed to have accepted the provisions thereof. Consequently, action at law lies in favor of the employee and against the employer, and the defenses enumerated in 52-1-8 NMSA 1978 were not available to employer. Addison v. Tessier, 62 N.M. 120, 305 P.2d 1067 (1957).

When employer does not file insurance policy, the workman has a right to rely upon this conduct of the employer, and to choose which road to take for relief, that is, to follow either common law or the statute. Montano v. Williams, 89 N.M. 86, 547 P.2d 569 (Ct. App.), aff'd, 89 N.M. 252, 550 P.2d 264 (1976) (decided prior to the 1989 amendment).

Insurance coverage created though policy not filed until after accident. - Where the actual policy purporting to provide the required coverage under this section for the period during which workmen's accident took place was not filed with the district court until 40 days after the accident, but where the employer had had continuous coverage under an identical policy and also had a letter of intent to renew the policy which was dated before the accident, a binding contract of insurance coverage had been created for the period during which the accident took place, and the workmen was precluded from bringing a suit for common-law negligence against employer. Mirabal v. International Minerals & Chem. Corp., 77 N.M. 576, 425 P.2d 740 (1967).

If common-law action is not filed prior to filing of insurance coverage, even if filed late, the workman does not escape the provisions of the act. Shope v. Don Coe Constr. Co., 92 N.M. 508, 590 P.2d 656 (Ct. App. 1979).

Filing of insurance policy after injury as substantial compliance. - A technical delay in the filing of an insurance policy after an employee suffers an injury, but prior to a common-law action by the employee, does not prejudice the plaintiff because it is substantial compliance with the insurance requirements of the Workmen's Compensation Act, and the workman has not been harmed or injured or placed in a disadvantaged position. Montano v. Williams, 89 N.M. 86, 547 P.2d 569 (Ct. App.), aff'd, 89 N.M. 252, 550 P.2d 264 (1976).

A technical delay in filing a workmen's compensation policy after an employee suffered an injury, but prior to the time the employee filed his common law action, was substantial compliance with the insurance requirements of the Workmen's Compensation Act. Shope v. Don Coe Constr. Co., 92 N.M. 508, 590 P.2d 656 (Ct. App. 1979).

When act no bar to tort action. - Allowing the Workmen's Compensation Act to stand as a bar to a tort action when the employer failed to file anything, or otherwise to comply with this section until after commencement of the tort action would abrogate this section. Security Trust v. Smith, 93 N.M. 35, 596 P.2d 248 (1979).

Employer not invoke estoppel to bar employee where knowingly carried no insurance. - Employer at all times knew that he did not carry workmen's compensation insurance and had not relieved himself of so doing as provided by the act; therefore, he is not in a position to invoke the doctrine of estoppel as a bar to employee's cause of action. Addison v. Tessier, 62 N.M. 120, 305 P.2d 1067 (1957).

Workman is statutory beneficiary of workmen's compensation insurance rather than insured. Herrera v. Springer Corp., 85 N.M. 6, 508 P.2d 1303 (Ct. App.), modified on other grounds, 85 N.M. 201, 510 P.2d 1072 (1973).

Complete coverage under same general policy for contractor and subcontractor. - Where both a public works contractor and a subcontractor elect to come within the provisions of the act, an arrangement may be worked out as a matter of contract wherein complete coverage may be had under the same general policy, provided that both the principal contractor and the independent contractor are parties to the insurance contract and are parties insured therein. Employees of the subcontractor would not be fully protected in a contract of insurance entered into merely between the insurer and the original contractor as the insured, notwithstanding the attachment of a rider to the original policy purporting to cover the employees of the subcontractor, unless the subcontractor is actually made a party to the insurance contract. 1939-40 Op. Att'y Gen. 105.

Filing requirement applies to public works. - A reading of the fact would seem to disclose an unequivocal legislative intent requiring those employers who elect to come under its provisions to file with the proper clerk of the district court "good and sufficient undertaking in the nature of insurance or security" for the payment of claims that might arise against the employer under the act, unless this requirement is dispensed with by

certificate of the proper district judge. This requirement would apply to public works. Construction of the work involved is such as to be classified as extrahazardous within the meaning of 59-10-10, 59-10-12, 1953 Comp. (now repealed). 1939-40 Op. Att'y Gen. 105.

School districts need not carry insurance on all their employees but may also carry multiple insurance on such employees as it chooses. 1943-44 Op. Att'y Gen. No. 4429.

It is not necessary that injury should result momentarily to be accidental. It may be the result of hours, even a day or longer, of breathing or inhaling gases, depending upon the facts of the case. Hathaway v. New Mexico State Police, 57 N.M. 747, 263 P.2d 690 (1953); Stevenson v. Lee Moor Constructing Co., 45 N.M. 354, 115 P.2d 342 (1941).

Strain caused by unusual exertion as accident. - Death in the ordinary course of employment, resulting from strain upon the heart caused by unusual exertion, is an accident within the meaning of the workmen's compensation statutes. On the other hand, death occurring while in the discharge of usual duties, in a normal manner without exceptional effort, is insufficient to establish a "mishap" or "fortuitous happening." Hathaway v. New Mexico State Police, 57 N.M. 747, 263 P.2d 690 (1953).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 30, 44, 115, 179 to 185.
Insolvency of insurer or employer as affecting liability for compensation, 8 A.L.R. 1346.
Power of commission to make award against self-insurer, 13 A.L.R. 1385.
Subrogation of insurance carrier to rights of injured employee against third person causing injury, 19 A.L.R. 782; 27 A.L.R. 493; 37 A.L.R. 838; 67 A.L.R. 249; 88 A.L.R. 665; 106 A.L.R. 1040.
Civil and criminal consequences of failure to insure or otherwise secure compensation, 21 A.L.R. 1428.
Right of insurer under Workmen's Compensation Act to recover from employer, who has breached warranty, the amount it has been obliged to pay employee, 22 A.L.R. 1481.
Findings upon claim for compensation as binding upon insurance carrier, 28 A.L.R. 882.
Insurance under Workmen's Compensation Act as coextensive with insured's liability under act, 45 A.L.R. 1329; 108 A.L.R. 812.
Provisions in relation to insurance in Workmen's Compensation Act, 58 A.L.R. 890; 105 A.L.R. 58; 180 A.L.R. 1214; 151 A.L.R. 1359.
Independent contractors or subcontractors, specific provisions of compensation acts in relation to insurance to protect employees, 105 A.L.R. 593.
Third person's negligence causing injury, right of insurance carrier as against employee or his dependents, 106 A.L.R. 1059.
Right of insurance company as to rejection of application for insurance in view of its public interest, 107 A.L.R. 1421; 123 A.L.R. 139.
Cancellation or attempt at cancellation of insurance, 107 A.L.R. 1514.
Policy of compensation insurance issued to individual as covering employees of partnership of which he is a member, 114 A.L.R. 724.
Right as between insurer of employer primarily responsible under compensation act and

insurer of employer secondarily liable under that act where injury was due to latter's negligence, 117 A.L.R. 571.
Provision of workmen's compensation insurance policy with respect to notice of accident or claim, 123 A.L.R. 950; 18 A.L.R.2d 443.
Reinsurance of self-insurer, 153 A.L.R. 967.
Insurance carrier's liability for part of employer's liability attributable to violation of law or other misconduct on his part, 1 A.L.R.2d 407.
Insurer's denial of renewal of policy, waiver and estoppel, 85 A.L.R.2d 1410.
99 C.J.S. Workmen's Compensation §§ 25, 37, 115 to 119; 100 C.J.S. Workmen's Compensation §§ 353 to 377.

§ 52-1-4.1. Filing insurance policy in office of director; fee.

Every employer subject to the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978], who files in the office of the director any certificate pursuant to the provisions of Section 52-1-4 NMSA 1978, shall pay to the director, upon the initial filing or any amendment thereto, a filing fee of five dollars ($5.00).

History: 1978 Comp., § 52-1-4.1, enacted by Laws 1979, ch. 368, § 2; 1987, ch. 235, § 6.

The 1987 amendment, effective June 19, 1987, substituted "Workers' " for "Workmen's", "director" for "superintendent of insurance" both places it appears, "any certificate" for "any insurance policy or certificate thereof, bond or undertaking", and "five dollars ($5.00)" for "one dollar and twenty-five cents ($1.25)".

§ 52-1-5. Destruction of policies, bonds and undertakings.

From and after the expiration of three years following the date of filing of any insurance policy or certificate thereof, bond or undertaking, pursuant to the provisions of Section 52-1-4 NMSA 1978, the director may, in his discretion, authorize the destruction of such insurance policies, certificates, bonds and undertakings.

History: 1953 Comp., § 59-10-3.1, enacted by Laws 1955, ch. 137, § 1; 1965, ch. 255, § 2; 1979, ch. 368, § 3; 1987, ch. 235, § 7.

The 1987 amendment, effective June 19, 1987, substituted "director" for "superintendent of insurance".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation § 44; 82 Am. Jur. 2d Workmen's Compensation §§ 650, 662.

§ 52-1-6. Application of provisions of act.

A. Every employer of four or more workers shall be subject to the provisions of the Workers' Compensation Act [this article]. The Workers' Compensation Act shall not apply to employers of private domestic servants or to employers of farm and ranch laborers. Provided, however, that effective January 1, 1978, the provisions of the Workers' Compensation Act shall apply to employers of three or more workers, except to employers of private domestic servants and farm and ranch laborers and that effective January 1, 1990, the provisions of the Workers' Compensation Act shall apply to employers of three or more workers, except to employers of private domestic servants and farm and ranch laborers.

B. An election to be subject to the Workers' Compensation Act by employers of private domestic servants, farm and ranch laborers, or by persons for whom the services of qualified real estate salespersons are performed or by a partner or self-employed person may be made by filing, in the office of the director of the workers' compensation division, either a sworn statement to the effect that the employer accepts the provisions of the Workers' Compensation Act or an insurance or security undertaking as required by Section 52-1-4 NMSA 1978.

C. Every employee shall be conclusively presumed to have accepted the provisions of the Workers' Compensation Act if his employer is subject to the provisions thereof and has complied with its requirements, including insurance.

D. 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 of their rights 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 what ever 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 of 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 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 or another employee of his employer, including a management or supervisory employee, or the insurer, guarantor or surety of his employer.

History: Laws 1937, ch. 92, § 2; 1941 Comp., § 57-904; Laws 1953, ch. 87, § 1; 1953 Comp., § 59-10-4; Laws 1959, ch. 67, § 2; 1971, ch. 253, § 1; 1971, ch. 261, § 2; 1973, ch. 240, § 2; 1975, ch. 284, § 3; 1979, ch. 368, § 4; 1987, ch. 260, § 1; 1989, ch. 263, § 5.

Cross-references. - As to employees who come within act, see 52-1-2 NMSA 1978. As to coverage by state agencies, see 52-1-3 NMSA 1978. As to application of provisions

of act to certain corporations' employees, see 52-1-7 NMSA 1978. As to right to compensation as exclusive, see 52-1-9 NMSA 1978.

The 1987 amendment, effective June 19, 1987, in Subsection B, substituted "or by employers" for "or of employers" and inserted "or by persons for whom the services of qualified real estate salespersons are performed".

The 1989 amendment, effective June 16, 1989, in Subsection A added all of the language of the last sentence beginning with "and that effective January 1, 1990"; in Subsection B deleted "or by employers of less than four workmen, and effective January 1, 1978, less than three employees" following "laborers", and substituted "director of the workers' compensation division" for "superintendent of insurance" and "sworn statement" for "written statement"; and made minor stylistic changes throughout the section.

Section constitutionally enacted. - The claim that this section was enacted in violation of N.M. Const., art. IV, § 16 is without merit. Varela v. Mounho, 92 N.M. 147, 584 P.2d 194 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Workmen's Compensation Act is compulsory, not elective, and compliance may be accomplished by filing an undertaking in the nature of insurance, by filing a certificate in evidence thereof, or by qualifying as a self-insurer; the failure of an employer to comply in any way constitutes a violation of the act and subjects him to a claim in tort for negligence by an employee. Montano v. Williams, 89 N.M. 86, 547 P.2d 569 (Ct. App.), aff'd, 89 N.M. 252, 550 P.2d 264 (1976).

The purpose of the statute is to afford the employer a means of electing whether or not he shall come under the act. Those engaged in extra-hazardous occupations come within the act automatically unless affirmative action is taken to exempt themselves from the act. 1955-56 Op. Att'y Gen. No. 6289 (opinion rendered under former law).

Act's remedy exclusive. - Once the Workmen's Compensation Act provides a remedy, that act is exclusive and the claimant has no right to bring an action in common-law negligence against his employer. Galles Chevrolet Co. v. Chaney, 92 N.M. 618, 593 P.2d 59 (1979); Segura v. Molycorp, Inc., 97 N.M. 13, 636 P.2d 284 (1981).

The New Mexico Workmen's Compensation Act expressly makes the remedies provided by the act the sole and exclusive remedies available to an employee for claims against his employer or insurer. Dickson v. Mountain States Mut. Cas. Co., 98 N.M. 479, 650 P.2d 1 (1982).

Presumed acceptance of act. - In view of the conclusive presumption provided for by Laws 1929, ch. 113, § 4 (now repealed), an employee could assume that unless

employer filed a rejection of the act with the county clerk, it was accepted according to its terms. Points v. Wills, 44 N.M. 31, 97 P.2d 374 (1939).

Employer conclusively presumed to accept act where not exempted. - Where an employer had not exempted himself from the operation of the Workmen's Compensation Act, he is conclusively presumed to have accepted its provisions. Addison v. Tessier, 62 N.M. 120, 305 P.2d 1067 (1957) (decided under former law).

Employee presumed to accept act where employer followed act requirements. - If an employer had been carrying insurance, or had relieved himself from so doing, as required by the act, it would have been conclusively presumed that the employee had himself accepted the provisions of the act, and an action at law could not have been maintained because in that case the remedy under said act is exclusive. Addison v. Tessier, 62 N.M. 120, 305 P.2d 1067 (1957).

But where not followed, no presumption and action at law lies. - Where an employer did not carry workmen's compensation insurance, nor had he relieved himself of such requirement as required by 52-1-4 NMSA 1978, the employer was not operating under the provisions of the act, and his employee, under such circumstances, could not have been conclusively presumed to have accepted the provisions thereof. Consequently, action at law lies in favor of the employee and against the employer, and the defenses enumerated in 52-1-8 NMSA 1978 were not available to employer. Addison v. Tessier, 62 N.M. 120, 305 P.2d 1067 (1957) (decided under former law).

The employee could not be conclusively presumed to have accepted the provisions of the Workmen's Compensation Act since the employer had not complied with its requirements, including insurance. Until there is a compliance with the requirements of the act relating to insurance by the employer, then, no presumption arises that the employee is bound by the act. Addison v. Tessier, 62 N.M. 120, 305 P.2d 1067 (1957).

And employer cannot invoke estoppel to bar employee's action. - Employer at all times knew that he did not carry workmen's compensation insurance and had not relieved himself of so doing as provided by the act; therefore, he is not in a position to invoke the doctrine of estoppel as a bar to employee's cause of action. Addison v. Tessier, 62 N.M. 120, 305 P.2d 1067 (1957).

Act became operative unless contract provided otherwise. - As soon as a person entered another's employ the act became operative, unless the contract of employment provided the act should not apply or written notice was given to that effect. Jones v. George F. Getty Oil Co. 92 F.2d 255 (10th Cir.), cert. denied, 303 U.S. 644, 58 S. Ct. 644, 82 L. Ed. 1106 (1937).

Illegally employed minor has common-law action for injury. - The employment contract of illegally employed minor is voidable, giving that minor employee the right to pursue a common-law action against the employer if the minor is injured in the employment. Howie v. Stevens, 102 N.M. 300, 694 P.2d 1365 (Ct. App. 1984).

Tort action against insurer. - The legislature, in enacting 59A-16-1 to 59A-16-30 NMSA 1978 (trade practices and frauds), intended to broaden the Workers' Compensation Act (this article) so as to provide for a separate tort action by an injured worker against an insurer who in bad faith refuses to pay compensation benefits. The private right of action specifically created by 59A-16-30 NMSA 1978, however, applies only to an intentional, willful refusal to pay compensation benefits, and not to an insurer's negligent or dilatory failure to pay benefits, since the latter situation is already covered by the Workers' Compensation Act. Russell v. Protective Ins. Co., 107 N.M. 9, 751 P.2d 693 (1988).

No cause of action against insurer for refusal to pay medical claims. - An injured employee who is receiving workmen's compensation benefits and medical expenses from his employer or his insurer does not have a cause of action against the employer's insurer for a refusal of the insurer to pay some of the medical expenses which the employee claims are owing. Dickson v. Mountain States Mut. Cas. Co., 98 N.M. 479, 650 P.2d 1 (1982).

But exclusivity provision does not preclude action against third party. - The exclusivity provision of the Workmen's Compensation Act does not preclude an employee or his estate from seeking damages against a third party who is not an employer, coemployee, or insurer or guarantor of his employer. Matkins v. Zero Refrigerated Lines, 93 N.M. 511, 602 P.2d 195 (Ct. App. 1979).

Scope of act's immunity. - The immunity of an employee for an injury done to a fellow employee is not limited to negligent injury; rather, the provisions of the Workmen's Compensation Act accord immunity for all causes of action, all common-law rights and remedies, for negligence or wrong including intentional torts. Gallegos v. Chastain, 95 N.M. 551, 624 P.2d 60 (Ct. App. 1981).

Employee not liable for injury or death of coemployee. - Under the Workmen's Compensation Act, an employee of an employer who has complied with the requirements of the act is not subject to liability under the common law for the injury or death of a coemployee. Matkins v. Zero Refrigerated Lines, 93 N.M. 511, 602 P.2d 195 (Ct. App. 1979).

Where decedent did not affirmatively elect not to accept provisions of act, nor was such election denied, decedent accepted the provisions of the Workmen's Compensation Act and plaintiff is bound thereby. Shope v. Don Coe Constr. Co., 92 N.M. 508, 590 P.2d 656 (Ct. App. 1979).

Contract for additional benefits permitted. - An employee may privately contract with his employer for disability benefits in addition to those provided by the Workmen's Compensation Act. Segura v. Molycorp, Inc., 97 N.M. 13, 636 P.2d 284 (1981).

Exemption only applicable to farm and ranch laborers. - In subsection A, the legislature did not intend to permit employers to exempt their entire work force from the Workmen's

Compensation Act by employing a few farm and ranch laborers: this exemption applies only with respect to farm and ranch laborers. Cueto v. Stahmann Farms, Inc., 94 N.M. 223, 608 P.2d 535 (Ct. App. 1980).

And exempt status of farm employee should be judged from general character of work rather than his activity on any particular day. Cueto v. Stahmann Farms, Inc., 94 N.M. 223, 608 P.2d 535 (Ct. App. 1980).

Employer operating commercial dairy is excluded from the Workmen's Compensation Act, by Subsection A of this section, to the extent of employment of farm labor. Varela v. Mounho, 92 N.M. 147, 584 P.2d 194 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Contract substituting less compensation scheme for act invalid. - A contract between an employer and employee providing that the Workmen's Compensation Act should not apply to their relationship, which substituted a scheme for less compensation for injury or death, was invalid as against public policy, and the contract could not be introduced in evidence in a suit to recover compensation. Christensen v. Dysart, 42 N.M. 107, 76 P.2d 1 (1938).

There is no express consent by state to be sued in a Workmen's Compensation proceeding involving the state penitentiary and the consent is not to rest on implication. Day v. Penitentiary of N.M., 58 N.M. 391, 271 P.2d 831 (1954).

Right of removal to federal court not waived by election of act. - The claimant's argument that the employer elected to be governed by the laws of New Mexico, by having sought the protection afforded by the Workmen's Compensation Act and thus should not be able to remove a case thereunder to a federal forum was without merit since a state cannot constitutionally provide, by statute, an instrumentality whereby the right to remove a case to a federal tribunal can be waived. Valencia v. Stearns Roger Mfg. Co. 124 F. Supp. 670 (D.N.M. 1954) (decided under former law).

Failure to file did not waive venue or removal rights. - Failure to file an election not to accept the provisions of this article did not constitute an acceptance of the provision fixing venue of actions in the state court for recovery of benefits and did not waive any right to remove the cause to the federal court. Fresquez v. Farnsworth & Chambers Co. 238 F.2d 709 (10th Cir. 1956) (decided under former law).

Delay in filing does not remove limitation on liability. - A delay in filing pursuant to 52-1-4 NMSA 1978 does not remove the limitation on the employer's liability because the statutory purpose is met when the employer obtains compensation protection for his workmen. Quintana v. Nolan Bros., 80 N.M. 589, 458 P.2d 841 (Ct. App. 1969).

A delay in filing, pursuant to 52-1-4 NMSA 1978 does not necessarily remove the limitations on the employer's liability found in this section, 52-1-8 and 52-1-9 NMSA 1978. Quintana v. Nolan Bros., 80 N.M. 589, 458 P.2d 841 (Ct. App. 1969).

Coemployee was "a person other than the employer" against whom a negligence action for damages might be maintained. Hockett v. Chapman, 69 N.M. 324, 366 P.2d 850 (1961) (decided under former law).

What constitutes sufficient election by employer to be bound by act. - The decision in Eaves v. Contract Trucking Co., 55 N.M. 463, 235 P.2d 530 (1951), where the supreme court held the failure of the employer to file a written election to be subject to the act in the office of the clerk of the district court rendered the employer and his insurer immune to action under the act, although the bond was actually filed, was too strict, but the legislature has cured the error in the Eaves v. Contract Trucking Co., supra, case by providing that the filing by the employer of a statement he elected to be bound by the Workmen's Compensation Act or the filing of a bond is a sufficient election by the employer to be bound by the act. Garrison v. Bonfield, 57 N.M. 533, 260 P.2d 718 (1953) (decided under former law).

Extending coverage. - A county or other employer may extend coverage of the Workmen's Compensation Act to employees not listed specifically as engaged in extra-hazardous employment by filing an election to that effect with the clerk of the district court and taking out a policy of workmen's compensation insurance. 1949-50 Op. Att'y Gen. No. 5194 (opinion rendered under former law).

Where more than four employees when all three proprietorships considered. - Defendant who solely owned and operated three businesses as sole proprietorships, and who cumulatively employed a total of four or more employees in those three sole proprietorships, was an employer under this act, even though the business for which claimant worked did not employ four employees. Clark v. Electronic City, 90 N.M. 477, 565 P.2d 348 (Ct. App. 1977).

Employer's loss of immunity to tort action. - An employer becomes vulnerable to a tort action by an employee and loses the immunity of Subsection D if the employer possesses a second persona sufficiently independent from and unrelated to the status of employer. Salswedel v. Enerpharm, Ltd, 107 N.M. 728, 764 P.2d 499 (Ct. App. 1988).

Tort law governs acts of hospital in treating employee for accident. - Section 52-1-49 NMSA 1978 coupled with this section and 52-1-56 NMSA 1978 clearly demonstrate a legislative intent that ordinary tort law, except as modified by said 52-1-49 and 52-1-56 NMSA 1978, shall govern the tortious acts of medical personnel and hospitals charged with the care and treatment of an employee for a compensable accident. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975).

Third party under Subsection D. - A partnership in which the employer participates can be considered a third party for purposes of Subsection D. Salswedel v. Enerpharm, Ltd, 107 N.M. 728, 764 P.2d 499 (Ct. App. 1988).

Shot while at work as in course of employment. - Where the mentally disturbed husband was aroused by an act of decedent while he was at work, and the husband then went to

the employer's premises while decedent was there at work, and shot him, the risk was connected with the employment and the injury arose out of the employment. Hence, the exclusionary provision of the insurance policy precludes recovery where policy excludes "injury arising out of, or in the course of, any employment," and plaintiff is seeking to recover the remaining balance unpaid after recovery under the workmen's compensation law. Roskell v. Prudential Ins. Co. of Am. 529 F.2d 1 (10th Cir. 1976).

Private employers of farm and ranch laborers are expressly exempted from application of the Workmen's Compensation Act. Williams v. Cooper, 57 N.M. 373, 258 P.2d 1139 (1953).

Juror who suffers accidental injury while in performance of his duties is not entitled to an award of compensation for his injury. Seward v. County of Bernalillo, 61 N.M. 52, 294 P.2d 625 (1956).

Peace officer covered for injury received while in private employment. - A peace officer may, by accepting private employment, receive compensation benefits as any other private employee, if his employer is covered by the act, or has elected to be bound thereby, and his injury is one received incident to his duties as a private employee. Chapman v. Anison, 65 N.M. 283, 336 P.2d 323 (1959).

Ensilage cutting does not fall within occupation of milling. - Ensilage cutting does not fall within the statutorily designated extra-hazardous occupation of milling, and workman injured by ensilage cutting machine was not entitled to workmen's compensation. Graham v. Wheeler, 77 N.M. 455, 423 P.2d 980 (1967).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Torts," see 11 N.M.L. Rev. 217 (1981).

For comment, "Comparative Fault Principles Do Not Affect Negligent Employer's Right to Full Reimbursement of Compensation Benefits Out of Worker's Partial Third-Party Recovery - Taylor v. Delgarno Transp., Inc.," see 14 N.M.L. Rev. 437 (1984).

For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 67, 119, 121 to 127.
Employer's taking out insurance covering employees not otherwise within Workmen's Compensation Act as election to accept act, 103 A.L.R. 1523.
What conduct is willful, intentional, or deliberate within Workmen's Compensation Act provision authorizing tort action for such conduct, 96 A.L.R.3d 1064.
Modern status of effect of state Workmen's Compensation Act on right of third-person tortfeasor to contribution or indemnity from employer of injured or killed workman, 100 A.L.R.3d 350.
Willful, wanton, or reckless conduct of coemployee as ground of liability despite bar of

workers' compensation law, 57 A.L.R.4th 888.
99 C.J.S. Workmen's Compensation §§ 37 to 58, 89, 120 to 129.

§ 52-1-6.1. Worker's compensation; definition.

For the purposes of Section 52-1-6 NMSA 1978 "farm and ranch laborers" shall include those persons providing care for animals in training for the purpose of competition or competitive exhibition. Employees of a veterinarian and laborers at a treating facility or a facility used solely for the boarding of animals, which is not an intrinsic part of a farm or ranch operation, are not covered by this provision.

History: Laws 1984, ch. 127, § 988.3.

Effective dates. - Laws 1984, ch. 127, § 999 makes the act effective January 1, 1985.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 121 to 123.

§ 52-1-6.2. Safety program; bonus to worker.

Any employer that is subject to the provisions of the Workers' Compensation Act [this article] may implement a safety program, as approved by the superintendent of insurance, that provides for bonuses of up to ten percent of a worker's wage to be paid to a worker that fulfills criteria established by the employer for eligibility for the bonus. The criteria shall incorporate the concept of bonuses based upon a stated number of accident-free work days completed by the worker. Any bonus paid under a program authorized by this section shall not be included in computing a worker's average wage for establishing workers' compensation insurance premiums.

History: Laws 1989, ch. 263, § 92.

Effective dates. - Laws 1989, ch. 263 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

§ 52-1-7. Application of provisions of act to certain corporations' employees.

A. Notwithstanding any provisions to the contrary in the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978], an employee, as defined in Subsection F of this section, of a professional or business corporation, employed by the professional or business corporation as a worker as defined in the Workers' Compensation Act, may affirmatively elect not to accept the provisions of the Workers' Compensation Act.

B. Each employee desiring to affirmatively elect not to accept the provisions of the Workers' Compensation Act may do so by filing an election in the office of the director.

C. Each employee desiring to revoke his affirmative election not to accept the provisions of the Workers' Compensation Act may do so by filing a revocation of the affirmative election with the workers' compensation insurer and in the office of the director. The revocation shall become effective thirty days after filing. The employee shall cause a copy of the revocation to be mailed to the board of directors of the professional or business corporation.

D. The filing of an affirmative election not to accept the provisions of the Workers' Compensation Act shall create a conclusive presumption that such employee is not covered by the Workers' Compensation Act until the effective date of a revocation filed pursuant to this section. The filing of an affirmative election not to accept the provisions of the Workers' Compensation Act shall apply to all corporations in which the employee has a financial interest.

E. In determining the number of workers of an employer to determine who comes within the act [Chapter 52, Article 1 NMSA 1978], an employee who has filed an affirmative election not to be subject to the Workers' Compensation Act shall be counted for determining the number of workers employed by such employer.

F. For purposes of this section:

(1) "executive officer" means the chairman of the board, president, vice president, secretary or treasurer; and

(2) "employee" means an executive officer owning ten percent or more of the outstanding stock of a professional or business corporation.

History: 1953 Comp., § 59-10-4.1, enacted by Laws 1975, ch. 284, § 4; 1979, ch. 368, § 5; 1987, ch. 235, § 8.

Cross-references. - As to employers who come within act, see 52-1-2 NMSA 1978. As to coverage by state agencies, see 52-1-3 NMSA 1978. As to application of provisions of act, see 52-1-6 NMSA 1978. As to definition of workman, see 52-1-16 NMSA 1978.

The 1987 amendment, effective June 19, 1987, substituted "workers' " for "workmen's" and "director" for "superintendent of insurance" throughout the section and in Subsection F(2) made a minor language change.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation § 177.
99 C.J.S. Workmen's Compensation § 82.

§ 52-1-8. Defenses to action by employee.

In an action to recover damages for a personal injury sustained by an employee while engaged in the line of his duty as such or for death resulting from personal injuries so sustained in which recovery is sought upon the ground of want of ordinary care of the employer, or of the officer, agent or servant of the employer, it shall not be a defense:

A. that the employee, either expressly or impliedly, assumed the risk of the hazard complained of as due to the employer's negligence;

B. that the injury or death was caused, in whole or in part, by the want of ordinary care of a fellow servant; and

C. that the injury of [or] death was caused, in whole or in part by the want of ordinary care of the injured employee where such want of care was not willful.

Any employer who has complied with the provisions of the Workers' Compensation Act [this article] relating to insurance or any of the employees of the employer, including management and supervisory employees, shall not be subject to any other liability whatsoever for the death of or personal injury to any employee, except as provided in the Workers' Compensation Act, and all causes of action, actions at law, suits in equity, and proceedings whatever, and all statutory and common-law rights and remedies for and on account of such death of, or personal injury to, any such employee and accruing to any and all persons whomsoever, are hereby abolished except as provided in the Workers' Compensation Act.

History: Laws 1937, ch. 92, § 3; 1941 Comp., § 57-905; 1953 Comp., § 59-10-5; Laws 1971, ch. 253, § 2; 1973, ch. 240, § 3; 1989, ch. 263, § 6.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes in the last undesignated paragraph.

Compiler's notes. - The New Mexico Rules of Civil Procedure for the district courts now provide for only one form of action, known as "civil action." See Rule 1-002.

Act not invalid class legislation. - Contention that insofar as negligent employers are relieved from the burden of contribution the Workmen's Compensation Act is exemplary of invalid class legislation is devoid of merit. Beal v. Southern Union Gas Co., 62 N.M. 38, 304 P.2d 566 (1956).

Limitation on employer liability not violative of equal protection. - The fact that wrongful death actions against employers by survivors of employees killed in the scope of their employment are not allowed, while wrongful death actions are allowed if the employee was killed outside the scope of his employment, does not render the section violative of

equal protection. Sanchez v. M.M. Sundt Constr. Co., 103 N.M. 294, 706 P.2d 158 (Ct. App. 1985).

Proceedings under Workmen's Compensation Act are exclusive, completely preempting any other action than is set out in the act. Sanchez v. Hill Lines, 123 F. Supp. 42 (D.N.M. 1954).

Act's remedy exclusive. - Once the Workmen's Compensation Act provides a remedy, that act is exclusive and the claimant has no right to bring an action in common-law negligence against his employer. Galles Chevrolet Co. v. Chaney, 92 N.M. 618, 593 P.2d 59 (1979).

Election of remedies. - Worker's compensation and tort claims are inconsistent remedies. Whether the doctrine of election of remedies applies depends upon whether plaintiff has made a choice of one of these remedies. Romero v. J.W. Jones Constr. Co., 98 N.M. 658, 651 P.2d 1302 (Ct. App. 1982).

The acceptance of compensation and medical benefits cannot be held to be an election to pursue a remedy under the worker's compensation statute if the plaintiff is unaware that he is receiving benefits under the compensation statute. Romero v. J.W. Jones Constr. Co., 98 N.M. 658, 651 P.2d 1302 (Ct. App. 1982).

Workmen's Compensation Act does not look to fault of employer; instead, the employer is liable to the employee for compensation if the conditions of 52-1-9 NMSA 1978 are met. Taylor v. Delgarno Transp., Inc., 100 N.M. 138, 667 P.2d 445 (1983).

Workmen's Compensation Act is compulsory, not elective, and compliance may be accomplished by filing an undertaking in the nature of insurance, by filing a certificate in evidence thereof, or by qualifying as a self-insurer; the failure of an employer to comply in any way constitutes a violation of the act and subjects him to a claim in tort for negligence by an employee. Montano v. Williams, 89 N.M. 86, 547 P.2d 569 (Ct. App.), aff'd, 89 N.M. 252, 550 P.2d 264 (1976).

Workmen's Compensation Act abrogates or modifies the Tort-feasor's Act to the extent that it has application to the liability of an employer to an employee. If the basis for employer's liability is the injuries to its employee, it is limited by the Workmen's Compensation Act, and there can be no contribution. Beal v. Southern Union Gas Co., 62 N.M. 38, 304 P.2d 566 (1956).

The New Mexico Workmen's Compensation Act abrogates the New Mexico Joint Tort-feasor's Contribution Act. Hill Lines v. Pittsburg Plate Glass Co. 222 F.2d 854 (10th Cir. 1955).

Purpose of workmen's compensation laws is to provide not only for employees a remedy which is both expeditious and independent of proof of fault, but also for

employers a liability which is limited and determinate. Sanchez v. Hill Lines, 123 F. Supp. 42 (D.N.M. 1954).

For an injury to be compensable, it must arise out of and in the course of employment and not willfully suffered or intentionally inflicted. Gough v. Famariss Oil & Ref. Co., 83 N.M. 710, 496 P.2d 1106 (Ct. App.), cert. denied, 83 N.M. 698, 496 P.2d 1094 (1972).

Must be accidental injury to permit recovery. - Statutes require that there must be an injury caused by accident, an "accidental injury" to permit recovery. Aranbula v. Banner Mining Co., 49 N.M. 253, 161 P.2d 867 (1945).

Accidental injuries may arise without the usually attending factors of narrow limits of time for the beginning and completion of the injury, or without unusual, or extraordinary conditions of employment not common to others, but there must be an accident, as distinguished from common occupational, or industrial, sickness or disease. Aranbula v. Banner Mining Co., 49 N.M. 253, 161 P.2d 867 (1945).

The term "injury by accident" as employed in the section means nothing more than an accidental injury, or an accident, as the word is ordinarily used; it denotes an unlooked for mishap, or an untoward event which is not expected or designed. Aranbula v. Banner Mining Co., 49 N.M. 253, 161 P.2d 867 (1945).

Want of ordinary care means negligent conduct on the part of employee. Gough v. Famariss Oil & Ref. Co., 83 N.M. 710, 496 P.2d 1106 (Ct. App.), cert. denied, 83 N.M. 698, 496 P.2d 1094 (1972).

"Willful" means the intentioned doing of a harmful act without just cause or excuse or an intentional act done in utter disregard for the consequences. Gough v. Famariss Oil & Ref. Co., 83 N.M. 710, 496 P.2d 1106 (Ct. App.), cert. denied, 83 N.M. 698, 496 P.2d 1094 (1972).

Negligent conduct not defense, but willful misconduct is. - The legislature intended this section to mean that negligent conduct of an employee which causes an injury is not a defense to a claim for workmen's compensation, but willful misconduct is a defense. Gough v. Famariss Oil & Ref. Co., 83 N.M. 710, 496 P.2d 1106 (Ct. App.), cert. denied, 83 N.M. 698, 496 P.2d 1094 (1972).

Availability of common-law defenses for employer. - Under the Workmen's Compensation Act, where an employer is subject to the act and has failed to comply therewith, an employee who sustains compensable injuries is afforded one of two remedies: (1) maintain a civil action against the employer for damages suffered or (2) in lieu of a common-law action, apply to the district court for compensation benefits under the act. In both instances, the employer is denied the common-law defenses of contributory negligence, assumption of risk and the fellow servant rule. However, the employer is not subject to the act, the act itself would not apply to the employer and an employer would be entitled to all common-law defenses in a common-law action for

negligence brought by an employee. Arvas v. Feather's Jewelers, 92 N.M. 89, 582 P.2d 1302 (Ct. App. 1978).

Assumption of risk not available as affirmative defense. - Assumption of risk is no longer recognized as an affirmative defense. What has heretofore been called "assumption of risk" can be covered entirely by the reasonable man standard of contributory negligence. If pleaded and warranted by the evidence, the ground formerly occupied by the doctrine of assumption of risk will be covered by the law pertaining to negligence and contributory negligence. Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971).

Employer's avoidance of liability under act. - See Matkins v. Zero Refrigerated Lines, 93 N.M. 511, 602 P.2d 195 (Ct. App. 1979).

To escape liability an employer must show that when the wrongful act was committed, the employee had abandoned his employment and was acting for a purpose of his own which was not incident to his employment. Nichols v. United States, 796 F.2d 361 (10th Cir. 1986).

Employer may voluntarily relinquish statutory protection of limited liability. - Although the workmen's compensation statute affords an employer release from unlimited liability in exchange for a limited amount of compensation for the injured employee, if the employer desires to voluntarily relinquish his statutory protection, he may do so. City of Artesia v. Carter, 94 N.M. 311, 610 P.2d 198 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

In order to create estoppel by acceptance of workmen's compensation benefits it is essential that the person against whom estoppel is claimed, should have acted with full knowledge of the facts and of his rights. Maynerich v. Little Bear Enters., Inc., 82 N.M. 650, 485 P.2d 984 (Ct. App. 1971).

Legislature intended to declare void any contract provisions which seek to impose additional liability on an employer. Gulf Oil Corp. v. Rota-Cone Field Operating Co., 84 N.M. 483, 505 P.2d 78 (Ct. App. 1972), writ quashed, 85 N.M. 636, 515 P.2d 640 (1973).

Limitation of employer's liability for injuries sustained by employee covered by the Workmen's Compensation Act covers all instances where that injury is sought to be made the basis for further and additional liability by the employee or others in his behalf, and indirect liability for such injury is also foreclosed both by the terms of the act and because the employer's liability for such injury is not in tort. Beal v. Southern Union Gas Co., 62 N.M. 38, 304 P.2d 566 (1956).

Employer is not subject to liability in addition to Workmen's Compensation Act even where the employer voluntarily enters into a contract which also seeks indemnity. Gulf Oil Corp. v. Rota-Cone Field Operating Co., 84 N.M. 483, 505 P.2d 78 (Ct. App. 1972), writ quashed, 85 N.M. 636, 515 P.2d 640 (1973).

Standard in New Mexico for foreclosure of employee's common-law tort remedies is whether the employer has substantially complied with the Workmen's Compensation Act. Strict compliance is not necessary, but failure of an employer to substantially comply with the act constitutes a violation of the act and subjects him to a claim for negligence by an employee. Williams v. Montano, 89 N.M. 252, 550 P.2d 264 (1976).

Equitable considerations apply to workmen's compensation claims and defenses. Anaya v. City of Santa Fe, 80 N.M. 54, 451 P.2d 303 (1969).

Even though the Workmen's Compensation Act does not specifically provide for equitable defenses, this court has considered equitable claims and defenses in workmen's compensation proceedings: fraud or mutual mistake, incapacity to contract, estoppel, misconduct, undue influence, misrepresentation or coercion. Anaya v. City of Santa Fe, 80 N.M. 54, 451 P.2d 303 (1969).

Employee not liable for injury or death of coemployee. - Under the act, an employee of an employer who has complied with the requirements of the act is not subject to liability under the common law for the injury or death of a coemployee. Matkins v. Zero Refrigerated Lines, 93 N.M. 511, 602 P.2d 195 (Ct. App. 1979).

Employee's immunity extends to all causes of action. - The immunity of an employee for an injury done to a fellow employee is not limited to negligent injury; rather, the provisions of the Workmen's Compensation Act accord immunity for all causes of action, all common-law rights and remedies, for negligence or wrong, including intentional torts. Gallegos v. Chastain, 95 N.M. 551, 624 P.2d 60 (Ct. App. 1981).

Unreasonable delay in filing claim. - Where claimant delayed six years and nine months before filing claim, the trial court correctly held that the cause was barred by unreasonable delay and laches. Anaya v. City of Santa Fe, 80 N.M. 54, 451 P.2d 303 (1969).

The question of whether a workmen's compensation claim is barred by laches must be determined by the facts and circumstances in each case and according to right and justice. Anaya v. City of Santa Fe, 80 N.M. 54, 451 P.2d 303 (1969).

Delay in filing does not remove limitation on employer's liability. - A delay in filing pursuant to 52-1-4 NMSA 1978 does not remove the limitation on the employer's liability because the statutory purpose is met when the employer obtains compensation protection for his workmen. Quintana v. Nolan Bros., 80 N.M. 589, 458 P.2d 841 (Ct. App. 1969).

A delay in filing, pursuant to 52-1-4 NMSA 1978 does not necessarily remove the limitations on the employer's liability found in 52-1-6, 52-1-8 NMSA 1978, and this section. Quintana v. Nolan Bros., 80 N.M. 589, 458 P.2d 841 (Ct. App. 1969).

Defenses not available where employer not operating under provisions. - Where an employer did not carry workmen's compensation insurance, nor had he relieved himself of such requirement as required by 52-1-4 NMSA 1978, the employer was not operating under the provisions of the act, and his employee, under such circumstances, could not have been conclusively presumed to have accepted the provisions thereof. Consequently, action at law lies in favor of the employee and against the employer, and the defenses enumerated in this section were not available to employer. Addison v. Tessier, 62 N.M. 120, 305 P.2d 1067 (1957) (decided under former law).

Nor invoke estoppel as bar to employee's action. - Employer at all times knew that he did not carry workmen's compensation insurance and had not relieved himself of so doing as provided by the act; therefore, he is not in a position to invoke the doctrine of estoppel as a bar to employee's cause of action. Addison v. Tessier, 62 N.M. 120, 305 P.2d 1067 (1957).

Section has no application to occupation excepted from act. - Defendant-employers in negligence action by farm laborer are not barred by this section of the Workmen's Compensation Act from relying on the common-law defenses of contributory negligence and assumed risk, because this section can have no application to an occupation that is excepted from the act, and supreme court has held it does not apply to employers of farm and ranch labor. Thompson v. Dale, 59 N.M. 290, 283 P.2d 623 (1955).

Violation of specific instruction bars recovery. - Violation of specific instructions which limit the scope or sphere of work which an employee is authorized to do bars recovery of workmen's compensation for an injury so sustained. Gough v. Famariss Oil & Ref. Co., 83 N.M. 710, 496 P.2d 1106 (Ct. App.), cert. denied, 83 N.M. 698, 496 P.2d 1094 (1972).

Section preempts any third-party action for indemnity or contribution against employer for liability to his employee as an alleged joint tort-feasor. Hill Lines v. Pittsburg Plate Glass Co. 222 F.2d 854 (10th Cir. 1955).

Exclusive remedy prohibits recovery by third party based on negligence. - Where a third party plaintiff filed its complaint against third party defendant, alleging that the accident was caused by his negligence and was therefore a breach of contract, recovery of any judgment obtained against it over and from third party defendant, and, by a second count, sought similar recovery on the theory of an implied agreement for indemnity in the event of negligence, each of the actions was held prohibited by the exclusive remedy section of 52-1-9 NMSA 1978. Royal Indem. Co. v. Southern Cal. Petroleum Corp., 67 N.M. 137, 353 P.2d 358 (1960).

Employee of contractor though provided by another company. - An employee who was employed by another company which provided manpower to a contractor on a project and was subject to orders on the job from the contractor's supervisory personnel was an employee of the contractor and entitled to workmen's compensation for injuries on the job and may not sue the contractors in tort on negligence. Shipman v. Macco Corp., 74 N.M. 174, 392 P.2d 9 (1964).

Facts constitute willful misconduct on part of employee. - Facts that an employee in the absence of an emergency (1) intentionally violated the instructions of employer by permitting someone else to drive, (2) knowing this person had engaged in drinking intoxicating beverages, (3) and intentionally permitted this person to drive a truck carrying gasoline down a mountain road with numerous hair-pin curves under very hazardous weather conditions without experience in driving this particular truck were sufficient to meet definition of willful misconduct. Gough v. Famariss Oil & Ref. Co., 83 N.M. 710, 496 P.2d 1106 (Ct. App.), cert. denied, 83 N.M. 698, 496 P.2d 1094 (1972).

Amnesty to employer where no express indemnity contract. - The exclusive remedy provision of the Workmen's Compensation Act grants amnesty to an employer for all causes of action relating to employees' injuries, regardless of the question of independent breach of duty, where there is no express contract of indemnity. Royal Indem. Co. v. Southern Cal. Petroleum Corp., 67 N.M. 137, 353 P.2d 358 (1960).

Stranger has no contribution right against employer. - Under New Mexico's Workmen's Compensation Act, a stranger to the employer-employee relationship who is liable to the employee for injuries received by the employee in the course of his employment does not have a right of contribution against the employer, even if the employer was also at fault. Sanchez v. Hill Lines, 123 F. Supp. 42 (D.N.M. 1954).

Company not entitled to contribution from contractor where latter came under act. - Where contractor's employees were injured in the course of employment by a gas explosion and filed separate actions against the gas company, the gas company would not be entitled to indemnity on a contribution from the contractor since the contractor came within the Workmen's Compensation Act and had paid or was paying all obligations thereunder to employees, and contractor's liability was limited to that under the act in absence of the contract of indemnity between the contractor and the gas company. Beal v. Southern Union Gas Co., 62 N.M. 38, 304 P.2d 566 (1956).

Third-party indemnity claim from employer not barred. - The public policy expressed in the workmen's compensation statute does not bar a claim for indemnity by the third party from the employer where that claim is based on an express contract of indemnity. City of Artesia v. Carter, 94 N.M. 311, 610 P.2d 198 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

No compensable disability for impairment unconnected with injury. - If a claimant, through voluntary conduct unconnected with his injury, takes himself out of the labor market or if he, after injury, resumes employment and is fired for misconduct, his

impairment playing no part in the discharge, there is no compensable disability. Aranda v. Mississippi Chem. Corp., 93 N.M. 412, 600 P.2d 1202 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

Claim of teacher injured by student not barred because not in course of employment. - Because a teacher, injured when struck by a pipe being hauled in a truck driven by a student who was not employed by the school, was not in the course of employment when the accident occurred, the exclusive remedy provision of this section should not bar the teacher from legal recourse to press his negligence claim against the student. Trembath v. Riggs, 100 N.M. 615, 673 P.2d 1348 (Ct. App. 1983).

Proof of special employee. - In cases where a third person having sued the general employer for injuries arising from the negligence of his employee, such general employer defending on the ground that such negligent employee was, at the time, in the special employ of another person, in order for the defense to prevail, the general employer must not only show that the workman was in the special employ of another, but also that such workman's status as a general employee of the defendant had temporarily ceased and negative the fact that the employee was the servant of both employers at the time of the accident. Jones v. George F. Getty Oil Co. 92 F.2d 255 (10th Cir.), cert. denied, 303 U.S. 644, 58 S. Ct. 644, 82 L. Ed. 1106 (1937).

No evidence connecting disability with old injury. - Where defendant alleged that plaintiff's condition was caused by disability resulting from old injury, instead of injury received while working for defendant, evidence produced by defendant that two injuries were not in the same location and that plaintiff could not have performed heavy physical labor, in which he was engaged prior to second injury, if he had not fully recovered from old injury, did not sustain such allegations, where there was no substantial evidence connecting the disability, for which plaintiff claimed compensation, with the first injury. Robinson v. Mittry Bros., 43 N.M. 357, 94 P.2d 99 (1939).

Silicosis not injury by accident. - Silicosis acquired over a period of years and without the element of excessive exposure and sudden and unexpected occurrence of injury or illness is an occupational disease and not an injury by accident. Aranbula v. Banner Mining Co., 49 N.M. 253, 161 P.2d 867 (1945).

While workmen's compensation acts are given a liberal interpretation in favor of the workman, silicosis does not fall within the purview of an injury by accident. Aranbula v. Banner Mining Co., 49 N.M. 253, 161 P.2d 867 (1945).

Consortium action by spouse of injured employee barred. - The spouse of an injured employee is barred by the limitations of this section from maintaining an independent action for loss of consortium against the employer arising out of the injury to the employee. Roseberry v. Phillips Petroleum Co., 70 N.M. 19, 369 P.2d 403 (1962).

Evidence insufficient to establish negligence. - In compensation proceeding, where the evidence showed that deceased employee was driving his own car along a piece of

road under construction by employer, and closed to other traffic, behind a truck loaded with stone traveling 25 miles an hour and raising a cloud of dust, and attempted to pass such truck and found himself facing an empty truck coasting down a hill out of gear with which he collided, and that the driver of the empty truck did not see the automobile until within 15 feet of the loaded truck, it was insufficient to establish truck driver's negligence. Caviness v. Driscoll Constr. Co., 39 N.M. 441, 49 P.2d 251 (1935).

In action for death of an employee driving his own car home to dinner over a piece of road under construction by employer, as was his usual custom, by reason of collision with employer's trucks, recovery could not be made without showing of negligence of employer even assuming that the defense of contributory negligence was not available to him. Caviness v. Driscoll Constr. Co., 39 N.M. 441, 49 P.2d 251 (1935).

Law reviews. - For note, "Comparative v. Contributory Negligence: The Effect of Plaintiff's Fault," see 6 N.M. L. Rev. 171 (1975).

For article, "Survey of New Mexico Law, 1979-80: Torts," see 11 N.M.L. Rev. 217 (1981).

For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation § 39.
Action at law to recover for injury as affected by decision or finding made in workmen's compensation proceeding concerning same injury, 84 A.L.R.2d 1036.
Common-law action for negligence against workmen's compensation insurance carrier, right of employee to maintain, 93 A.L.R.2d 598.
Right to maintain action against fellow employee for injury or death covered by workmen's compensation, 21 A.L.R.3d 845.
Employee's action against employer for fraud, false imprisonment, defamation or the like, workmen's compensation provision as precluding, 74 A.L.R.3d 838.
Modern status: "dual capacity doctrine" as basis for employee's recovery from employer in tort, 23 A.L.R.4th 1151.
"Dual capacity doctrine" as basis for employee's recovery for medical malpractice from company medical personnel, 73 A.L.R.4th 115.
Workers' compensation: effect of allegation that injury was caused by, or occurred during course of, worker's illegal conduct, 73 A.L.R.4th 270.
100 C.J.S. Workmen's Compensation §§ 557 to 563; 101 C.J.S. Workmen's Compensation §§ 917 to 1045.

§ 52-1-9. Right to compensation; exclusive.

The right to the compensation provided for in this act [Chapter 52, Article 1 NMSA 1978], in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur:

A. at the time of the accident, the employer has complied with the provisions thereof regarding insurance;

B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and

C. the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted.

History: Laws 1937, ch. 92, § 4; 1941 Comp., § 57-906; 1953 Comp., § 59-10-6; Laws 1973, ch. 240, § 4.

I. General Consideration.

Cross-references. - As to affect of application of provision of act, see 52-1-6 NMSA 1978. As to meaning of "injury by accident arising out of and in the course of employment," see 52-1-19 NMSA 1978.

Act not invalid class legislation. - Contention that insofar as negligent employers are relieved from the burden of contribution the Workmen's Compensation Act is exemplary of invalid class legislation is devoid of merit. Beal v. Southern Union Gas Co., 62 N.M. 38, 304 P.2d 566 (1956).

Workmen's Compensation Act abrogates or modifies the Tort-feasor's Act to the extent that it has application to the liability of an employer to an employee. If the basis for employer's liability is the injuries to its employee, it is limited by the Workmen's Compensation Act, and there can be no contribution. Beal v. Southern Union Gas Co., 62 N.M. 38, 304 P.2d 566 (1956).

Purpose of workmen's compensation laws is to provide not only for employees a remedy which is both expeditious and independent of proof of fault, but also for

employers a liability which is limited and determinate. Sanchez v. Hill Lines, 123 F. Supp. 42 (D.N.M. 1954).

Primary purpose of Workmen's Compensation Act is to keep an injured workman and his family at least minimally secure financially; public policy demands it. Aranda v. Mississippi Chem. Corp., 93 N.M. 412, 600 P.2d 1202 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979); Casillas v. S.W.I.G., 96 N.M. 84, 628 P.2d 329 (Ct. App.), appeal dismissed, 454 U.S. 934, 102 S. Ct. 467, 70 L. Ed. 2d 242 (1981).

Workmen's Compensation Act expresses intention and policy of state that employees who suffer disablement as a result of injuries causally connected to their work shall not become dependent upon the welfare programs of the state, but shall receive some portion of the wages they would have earned, had it not been for the intervening disability. Casias v. Zia Co., 93 N.M. 78, 596 P.2d 521 (Ct. App.), cert. denied, 93 N.M. 8, 595 P.2d 1203 (1979).

And does not create presumption of employer's liability. - Voluntary payment of workmen's compensation benefits does not, by itself, create a presumption that the employer is liable. Wilson v. Richardson Ford Sales, Inc., 97 N.M. 226, 638 P.2d 1071 (1981).

Workmen's Compensation Act does not look to fault of employer; instead, the employer is liable to the employee for compensation if the conditions of this section are met. Taylor v. Delgarno Transp., Inc., 100 N.M. 138, 667 P.2d 445 (1983).

Remedy under the New Mexico Workmen's Compensation Act is exclusive. Chavez v. Kennecott Copper Corp. 547 F.2d 541 (10th Cir. 1977); Sanford v. Presto Mfg. Co., 92 N.M. 746, 594 P.2d 1202 (Ct. App. 1979).

The New Mexico Workmen's Compensation Act expressly makes the remedies provided by the act the sole and exclusive remedies available to an employee for claims against this employer or insurer. Dickson v. Mountain States Mut. Cas. Co., 98 N.M. 479, 650 P.2d 1 (1982).

The Workmen's Compensation Act is legislation in derogation of the common law and creates exclusive rights, remedies and procedures. Williams v. Amax Chem. Corp., 104 N.M. 93, 720 P.2d 1234 (1986).

Act affords exclusive remedy. - Once the Workmen's Compensation Act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the employee or his dependents against the employer and insurance carrier. Mountain States Tel. & Tel. Co. v. Montoya, 91 N.M. 788, 581 P.2d 1283 (1978).

The plaintiff's sole remedy is provided by the Workmen's Compensation Act. It is not the want of a possible cause of action that precludes the plaintiff from obtaining independent relief; it is the exclusivity provisions of the act. Gonzales v. United States

Fid. & Guar. Co., 99 N.M. 432, 659 P.2d 318 (Ct. App. 1983).

Once the Workmen's Compensation Act provides a remedy, that act is exclusive and the claimant has no right to bring an action in common-law negligence against his employer. Galles Chevrolet Co. v. Chaney, 92 N.M. 618, 593 P.2d 59 (1979).

Proceedings under Workmen's Compensation Act are exclusive, completely preempting any other action than is set out in the act. Sanchez v. Hill Lines, 123 F. Supp. 42 (D.N.M. 1954).

Aid in construction of act. - The maxim "expressio unius est exclusio alterius," is only an aid to construction and does not apply to provisions of Workmen's Compensation Act, "injuries sustained in extra-hazardous duties incident to the business," and "The right to the compensation provided for in this act, . . . for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases" when the conditions and circumstances stated and required by this section are present. Wilson v. Rowan Drilling Co., 55 N.M. 81, 227 P.2d 365 (1950).

Employer is not subject to liability in addition to Workmen's Compensation Act even where the employer voluntarily enters into a contract which also seeks indemnity. Gulf Oil Corp. v. Rota-Cone Field Operating Co., 84 N.M. 483, 505 P.2d 78 (Ct. App. 1972), writ quashed, 85 N.M. 636, 515 P.2d 640 (1973).

Legislature intended to declare void any contract provisions which seek to impose additional liability on an employer. Gulf Oil Corp. v. Rota-Cone Field Operating Co., 84 N.M. 483, 505 P.2d 78 (Ct. App. 1972), writ quashed, 85 N.M. 636, 515 P.2d 640 (1973).

Limitation of employer's liability for injuries sustained by an employee covered by the Workmen's Compensation Act covers all instances where that injury is sought to be made the basis for further and additional liability by the employee or others in his behalf, and indirect liability for such injury is also foreclosed both by the terms of the act and because the employer's liability for such injury is not in tort. Beal v. Southern Union Gas Co., 62 N.M. 38, 304 P.2d 566 (1956).

Grants amnesty to employer where no indemnity contract. - The exclusive remedy provision of the Workmen's Compensation Act grants amnesty to an employer for all causes of action relating to employees' injuries, regardless of the question of independent breach of duty, where there is no express contract of indemnity. Royal Indem. Co. v. Southern Cal. Petroleum Corp., 67 N.M. 137, 353 P.2d 358 (1960).

The words "accident" or "accidental injury" should be liberally construed. Stevenson v. Lee Moor Contracting Co., 45 N.M. 354, 115 P.2d 342 (1941).

Claimant has burden of proving compensable accident. Romero v. S.S. Kresge Co., 95 N.M. 484, 623 P.2d 998 (Ct. App. 1981).

Payment of compensation benefits by employer does not relieve claimant's burden of proving a compensable accident. Romero v. S.S. Kresge Co., 95 N.M. 484, 623 P.2d 998 (Ct. App. 1981). But see Perea v. Gorby, 94 N.M. 325, 610 P.2d 212 (Ct. App. 1980); Medrano v. Ray Willis Constr. Co., 96 N.M. 643, 633 P.2d 1241 (Ct. App. 1981).

No due process right to greater disability benefits. - An injured worker does not have a due process property right to disability benefits greater than those conferred by the legislature. Casillas v. S.W.I.G., 96 N.M. 84, 628 P.2d 329 (Ct. App.), appeal dismissed, 454 U.S. 934, 102 S. Ct. 467, 70 L. Ed. 2d 242 (1981).

Employer may voluntarily relinquish statutory protection of limited liability. - Although the workmen's compensation statute affords an employer release from unlimited liability in exchange for a limited amount of compensation for the injured employee, if the employer desires to voluntarily relinquish his statutory protection, he may do so. City of Artesia v. Carter, 94 N.M. 311, 610 P.2d 198 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Employee's termination of employment due to disability deemed involuntary. - Where an employee's disability or inability to perform his former job on production causes him to quit the job, for purposes of determining his rights to compensation benefits, the employee did not voluntarily leave his employment. Aranda v. Mississippi Chem. Corp., 93 N.M. 412, 600 P.2d 1202 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

No recovery solely upon claim of payments during investigation period. - A claimant cannot base her recovery solely on the fact that the employer paid benefits during a period when the accident was under investigation. Romero v. S.S. Kresge Co., 95 N.M. 484, 623 P.2d 998 (Ct. App. 1981).

Injured employee may sue third party, other than the employer or an employee of the employer, for negligence in causing the injured employee's accident. Taylor v. Delgarno Transp., Inc., 100 N.M. 138, 667 P.2d 445 (1983).

Third-party indemnity claim from employer not barred. - The public policy expressed in the workmen's compensation statute does not bar a claim for indemnity by the third party from the employer where that claim is based on an express contract of indemnity. City of Artesia v. Carter, 94 N.M. 311, 610 P.2d 198 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Accidental injury while employed, expenses due to problems exacerbated by injury, fulfills prerequisites. - Findings that plaintiff: (1) suffered an accidental injury while in the course and scope of his employment while inventorying and numbering air conditioners; and (2) incurred medical expenses due to symptomatic problems with his lower back exacerbated by the injury, included the necessary prerequisites for coverage under the Workmen's Compensation Act. Diatteo v. County of Dona Ana, 104 N.M. 599, 725 P.2d 575 (Ct. App. 1986).

Cause of action for alleged bad faith not separate from claim. - Where plaintiff asserts that the defendant's alleged bad faith denial of plaintiff's claim for compensation was tortious conduct which delayed payment of compensation, and constitutes a basis for a cause of action by plaintiff against the defendant for deceit, bad faith and intentional infliction of emotional distress, the court held that these claims are not separate and distinct from the plaintiff's claim for workmen's compensation benefits, and consequently, the award by the state court of compensation benefits to the plaintiff is a bar to the federal court action. Chavez v. Kennecott Copper Corp. 547 F.2d 541 (10th Cir. 1977).

Satisfaction executed with compromise bars action. - Where the plaintiff attempts to bring this federal court action two years later for a claim of bad faith delay arising out of the very dispute which was compromised and settled and the proceeds of which have been retained by the plaintiff, since the receipt and satisfaction of judgment in the prior case stipulated that it was in satisfaction of any other claims against defendant, while the only action which had been pending was the workmen's compensation action, this broad satisfaction executed as a part of a compromise settlement arises to an accord and satisfaction and bars the present action by the plaintiff. Chavez v. Kennecott Copper Corp. 547 F.2d 541 (10th Cir. 1977).

Full knowledge essential for estoppel by acceptance of benefits. - In order to create estoppel by acceptance of workmen's compensation benefits it is essential that the person against whom estoppel is claimed, should have acted with full knowledge of the facts and of his rights. Maynerich v. Little Bear Enters., Inc., 82 N.M. 650, 485 P.2d 984 (Ct. App. 1971).

Reviewable conclusion of law. - Where conclusion that one has suffered an accident is based upon undisputed facts found by the court and incorporated in his decision, the conclusion is one of law, reviewable by the supreme court. Webb v. New Mexico Publishing Co., 47 N.M. 279, 141 P.2d 333 (1943).

Remedy in state court where employer ceases making payments. - Where plaintiff's employer ceases making payments under this act, and enters into a stipulation, approved by the state court, which contains a release of any and all liability whatsoever, where employer again ceases payment, the plaintiff's remedy is in the state court under the act and not in a federal court and is not separate and apart from the claims under the act, which is the exclusive remedy for the denial of a claim for compensation. Escobedo v. American Employers Ins. Co. 547 F.2d 544 (10th Cir. 1977).

Even where bad faith settlement alleged. - Plaintiff was injured in the course of his employment, and defendant commenced payment of compensation benefits, but after seven months, failed and refused to make further payments; whereupon, the plaintiff filed his claim in the state district court. A settlement was reached and upon a stipulation and joint motion, a judgment was entered by the state court in favor of the plaintiff. The stipulation for judgment contained a release of plaintiff's compensation claims and a release "of any and all other liability whatsoever kind and nature which has either been

or could be made as involving or arising out of this proceeding, with the contemplation that any and all claims and proceedings be foreclosed and considered completely resolved and finalized . . . ." Judgment was entered January 15, 1975, and the new complaint was filed August 4, 1975, based on theory that the alleged bad faith of defendant in terminating the payments created a cause of action separate and apart from the claim for compensation which was settled in the state court proceeding and that the state court's disposition of plaintiff's claim is not a bar to this action. The trial court granted motion for summary judgment of dismissal on the grounds that the act clearly contemplates that an employer may deny a workman's claim, but if he does, it provides the workman with a remedy. The remedy is the same whether the denial is made in good faith or bad faith. The act gives the workman the right to file his claim with the state district court and have the court adjudicate it, and this is the exclusive remedy for the denial of a claim for compensation. Escobedo v. American Employers Ins. Co. 547 F.2d 544 (10th Cir. 1977).

Action by third party for negligence prohibited. - Where a third party plaintiff filed its complaint against third party defendant, alleging that the accident was caused by his negligence and was therefore a breach of contract, recovery of any judgment obtained against it over and from third party defendant, and, by a second count, sought similar recovery on the theory of an implied agreement for indemnity in the event of negligence, each of the actions was held prohibited by the exclusive remedy of this section. Royal Indem. Co. v. Southern Cal. Petroleum Corp., 67 N.M. 137, 353 P.2d 358 (1960).

Illegally employed minor not covered and may sue. - A contract, the performance of which violates a penal statute, is illegal and at least voidable, and will not provide a basis for the assertion of rights under such contract, particularly by the party upon whom the statute imposes the penalty; therefore, an illegally employed minor is not covered by the act and therefore may pursue a common-law action. Maynerich v. Little Bear Enters., Inc., 82 N.M. 650, 485 P.2d 984 (Ct. App. 1971).

Stranger does not have contribution against employer where liable to employee. - Under New Mexico's Workmen's Compensation Act, a stranger to the employer-employee relationship who is liable to the employee for injuries received by the employee in the course of his employment does not have a right of contribution against the employer, even if the employer was also at fault. Sanchez v. Hill Lines, 123 F. Supp. 42 (D.N.M. 1954).

Company not entitled to contribution from contractor paying under act. - Where contractor's employees were injured in the course of employment by a gas explosion and filed separate actions against the gas company, the gas company would not be entitled to indemnity on a contribution from the contractor since the contractor came within the Workmen's Compensation Act and had paid or was paying all obligations thereunder to employees, and contractor's liability was limited to that under the act in absence of the contract of indemnity between the contractor and the gas company. Beal v. Southern Union Gas Co., 62 N.M. 38, 304 P.2d 566 (1956).

Question of safety control and special employee for jury. - Where certain showings raised material issues of fact as to whether the safe operation of the crane which killed plaintiff's decedent was its lessor's work and as to whether the lessor had a right to control safety matters, summary judgment on these matters was improper, and whether crane operator was or was not a special employee of lessee in connection with safety matters in the operation of the crane was a factual question for the jury. Fresquez v. Southwestern Indus. Contractors & Riggers, 89 N.M. 525, 554 P.2d 986 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

Special employee within scope of act. - In action to recover damages for personal injury, plaintiff as a special employee of defendant was within the scope of Workmen's Compensation Act, whose remedies were exclusive and which extended its protection to persons who were not employees at common law. Jones v. George F. Getty Oil Co. 92 F.2d 255 (10th Cir.), cert. denied, 303 U.S. 644, 58 S. Ct. 644, 82 L. Ed. 1106 (1937).

Not independent contractor. - Where under a contract of employment an employee was to load concentrates onto freight cars, at a price per ton, and hire his own helpers, but employer had right to discharge employee with or without cause to coerce employee in doing the work suitable to the employer, the employee was not an independent contractor, and was entitled to compensation for injuries. American Employers' Ins. Co. v. Grabert, 39 N.M. 173, 42 P.2d 1116 (1935).

Compensation not affected because workman more susceptible. - That a workman may have been rendered more susceptible to injury than other workmen because of his physical condition cannot affect the compensability of the injury. Webb v. New Mexico Publishing Co., 47 N.M. 279, 141 P.2d 333 (1943).

Allowance of attorney fee. - Where insurance carrier had offered to pay the regular compensation but refused to pay the 50% additional compensation and employment of counsel became necessary to collect the additional amount, allowance of the attorney fee to the employee was proper. Janney v. Fullroe, Inc., 47 N.M. 423, 144 P.2d 145 (1943).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Torts," see 11 N.M.L. Rev. 217 (1981).

For annual survey of New Mexico law relating to workmen's compensation, see 13 N.M.L. Rev. 495 (1983).

For article, "Survey on New Mexico Law, 1982-83: Workmen's Compensation," see 14 N.M.L. Rev. 211 (1984).

For comment, "Comparative Fault Principles Do Not Affect Negligent Employer's Right to Full Reimbursement of Compensation Benefits Out of Worker's Partial Third-Party Recovery - Taylor v. Delgarno Transp., Inc.," see 14 N.M.L. Rev. 437 (1984).

For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 34, 35, 49.
Constitutionality of Workmen's Compensation Act giving choice of remedies exclusively to either employer or employee, 6 A.L.R. 1562.
Federal Employers' Liability Law, bringing action under, as bar to subsequent action under state act, and vice versa, 12 A.L.R. 709; 36 A.L.R. 917; 89 A.L.R. 693.
Serious and willful misconduct of employer warranting increased compensation, or action at law, 16 A.L.R. 620; 58 A.L.R. 1379; 68 A.L.R. 301.
Rights and remedies where employee was injured by third person's negligence, 19 A.L.R. 766; 27 A.L.R. 493; 37 A.L.R. 838; 67 A.L.R. 249; 88 A.L.R. 665; 106 A.L.R. 1040.
Submission of rejected claim under Workmen's Compensation Act as affecting independent action for death or injury, 36 A.L.R. 1293.
Applicability and effect of workmen's compensation acts in case of injuries to minors, 49 A.L.R. 1435; 60 A.L.R. 847; 83 A.L.R. 416; 142 A.L.R. 1018.
Application for and acceptance of benefits under Workmen's Compensation Act as affecting right of action against employer independently of that act, 50 A.L.R. 223.
Common-law remedies, effect of provisions of Workmen's Compensation Act in relation to employees of independent contractors or subcontractors, 58 A.L.R. 894; 105 A.L.R. 580; 151 A.L.R. 1354; 180 A.L.R. 1214.
Workmen's Compensation Act, as providing exclusive remedy for injury by assault, 72 A.L.R. 110; 112 A.L.R. 1258.
Bringing action against employer as an election or estoppel precluding claim under Workmen's Compensation Act, 94 A.L.R. 1430.
Statutory provisions regarding action against employer who does not assent to compensation act as affirmative support, by employee, for right of action not otherwise existing, 97 A.L.R. 1297.
Third party, claim or action against one as, as precluding action or claim against him as employer or vice versa, 98 A.L.R. 416.
Federal Safety Appliance Act, state Workmen's Compensation Act as precluding action based on noncompliance with, to recover for death or injury to railroad employee while engaged in intrastate commerce, 98 A.L.R. 511; 104 A.L.R. 839.
Workmen's Compensation Act as exclusive of remedy by action against employer for injury or disease not compensable under act, 100 A.L.R. 519; 121 A.L.R. 1143.
Compensation act as precluding common-law action by husband or wife of injured employee, 104 A.L.R. 346.
Employee's right of election after injury or disability as between benefits of compensation act and action at law against employer, 117 A.L.R. 515.
Right as between employer primarily responsible under Workmen's Compensation Act and employer secondarily liable under that act where injury was due to latter's negligence, 117 A.L.R. 571.
Common-law remedy against general employer by employee of independent contractor

or against independent contractor by employee of subcontractor, as affected by specific provisions of Workmen's Compensation Act relating to such employees, 151 A.L.R. 1359; 166 A.L.R. 813.
Malpractice action against physician, right of employee who does not receive award under Workmen's Compensation Act to maintain, 154 A.L.R. 315.
Remedy as between subcontractor and principal contractor in respect to workmen's compensation paid by one to employee injured through other's negligence where injured employee had no remedy apart from the act, 166 A.L.R. 1221.
Application for, or award, denial or acceptance of compensation under state Workmen's Compensation Act as precluding action under Federal Employer's Liability Act by one engaged in interstate commerce within that act, 6 A.L.R.2d 581.
Injury while crossing or walking along railroad or street railway tracks, going to or from work, as arising out of and in the course of employment, 50 A.L.R.2d 363.
Workmen's compensation for injury or death on or near golf course, 82 A.L.R.2d 1195.
Suicide as compensable under Workmen's Compensation Act, 15 A.L.R.3d 616.
Malpractice suit against injured employee's attending physician, right to maintain notwithstanding receipt of workmen's compensation award, 28 A.L.R.3d 1066.
Workmen's compensation: injury or death due to storms, 42 A.L.R.3d 385.
Injury sustained while attending employer-sponsored social affair as arising out of and in the course of employment, 47 A.L.R.3d 566.
Employer's liability for injury caused by food or drink purchased by employee in plant facilities, 50 A.L.R.3d 505.
Receipt of public relief or gratuity as affecting recovery in personal injury action, 77 A.L.R.3d 366.
What conduct is willful, intentional, or deliberate within Workmen's Compensation Act provision authorizing tort action for such conduct, 96 A.L.R.3d 1064.
Modern status of effect of state Workmen's Compensation Act on right of third-person tortfeasor to contribution or indemnity from employer of injured or killed workman, 100 A.L.R.3d 350.
Employer's tort liability to worker for concealing workplace hazard or nature or extent of injury, 9 A.L.R.4th 778.
Workmen's Compensation Act as furnishing exclusive remedy for employee injured by product manufactured, sold, or distributed by employer, 9 A.L.R.4th 873.
Cancer as compensable under workers' compensation acts, 19 A.L.R.4th 639.
Workers' Compensation Act as precluding tort action for injury to or death of employee's unborn child, 55 A.L.R.4th 792.
Willful, wanton, or reckless conduct of coemployee as ground of liability despite bar of Workers' Compensation Law, 57 A.L.R.4th 888.
"Dual capacity doctrine" as basis for employee's recovery for medical malpractice from company medical personnel, 73 A.L.R.4th 115.
99 C.J.S. Workmen's Compensation §§ 130 to 265; 101 C.J.S. Workmen's Compensation §§ 917 to 1045.

II. Employer Compliance.

Employee's remedies where employer fails to comply. - If the employer utterly fails to comply with the provisions of the Workers' Compensation Act (this article), such as by failing to obtain insurance or to properly file a certificate of insurance, the employee has two options: she may either file a workers' compensation action or file an action for common law remedies, to which she may attach a contract claim for wrongful discharge. Failure to comply with the act does not allow the employee to file both a workers' compensation action and a wrongful discharge action. Shores v. Charter Servs., Inc., 106 N.M. 569, 746 P.2d 1101 (1987).

Delay in filing does not remove limitation on employer's liability. - A delay in filing, pursuant to 52-1-4 NMSA 1978 does not necessarily remove the limitations on the employer's liability found in 52-1-6, 52-1-8 and this section. Quintana v. Nolan Bros., 80 N.M. 589, 458 P.2d 841 (Ct. App. 1969).

A delay in filing pursuant to 52-1-4 NMSA 1978 does not remove the limitation on the employer's liability because the statutory purpose is met when the employer obtains compensation protection for his workmen. Quintana v. Nolan Bros., 80 N.M. 589, 458 P.2d 841 (Ct. App. 1969).

Employer interpretation permitting action against coemployees. - The highway commission insurance requirements evidence a desire to provide compensation for bodily injury and property damage; the contractor's employees are compensated by workmen's compensation, members of the public in general are compensated by the public liability insurance, but the policy of the commission is only to provide this compensation and not to indemnify employees under Hockett v. Chapman, 69 N.M. 324, 366 P.2d 850 (1961), interpretation of the Workmen's Compensation Law permitting actions against coemployees. Chavez v. Pino, 86 N.M. 464, 525 P.2d 391 (Ct. App. 1974).

Temporary helpers' coverage purchased at employer's expense. - Employer's indirect payments to a temporary help service were sufficient to invoke the protections of the exclusive remedy provisions against a temporary worker who sued the employer, where insurance coverage had been purchased by the service for the worker at the employer's expense. Garcia v. Smith Pipe & Steel Co., 107 N.M. 808, 765 P.2d 1176 (Ct. App. 1988).

III. Service in Course of Employment.

Burden is on the claimant to establish by evidence that worker's death was proximately caused by an accident arising out of and in the course of his employment. Southwestern Portland Cement Co. v. Simpson, 135 F.2d 584 (10th Cir. 1943).

Burden of proof that claimant is employee. - To obtain benefits under the Workmen's Compensation Act, the claimant has the burden of establishing that he is an employee. Dibble v. Garcia, 98 N.M. 21, 644 P.2d 535 (Ct. App. 1982).

Burden after claimant raises inference of course of employment. - After claimant has introduced proof of facts raising a natural and reasonable inference that accident arose out of and in the course of employee's employment and occurred when he was performing services arising out of and in the course of his employment, burden rested on the employer, it having denied those facts, to show the contrary. Southwestern Portland Cement Co. v. Simpson, 135 F.2d 584 (10th Cir. 1943).

Inference by jury as to course of employment. - Where there is substantial evidence that death of employee resulted from accident and that accident occurred during his hours of work, at a place where his duties required him to be, or where he might properly have been in the performance of such duties, the triers of the issues of fact may reasonably conclude therefrom, as a natural inference, that the accident arose out of and in the course of the employment. Southwestern Portland Cement Co. v. Simpson, 135 F.2d 584 (10th Cir. 1943).

Presumption of fact as to accident in employment. - Since burden is on claimant to prove that accident arose out of and in the course of employment, either by direct evidence or by evidence from which these facts may be legitimately inferred, the presumption is not a legal presumption, but one of fact, that is, a natural inference drawn from proven facts. Southwestern Portland Cement Co. v. Simpson, 135 F.2d 584 (10th Cir. 1943).

"Arising out of" construed. - For an injury to "arise out of" the employment, there must be showing that the injury was caused by a risk to which the worker was subjected by his employment; the employment must contribute something to the hazard of the injury. Schober v. Mountain Bell Tel., 96 N.M. 376, 630 P.2d 1231 (Ct. App. 1980); Velkovitz v. Penasco Indep. School Dist., 96 N.M. 577, 633 P.2d 685 (1981); Losinski v. Drs. Corcoran, Barkoff & Stagnone, 97 N.M. 79, 636 P.2d 898 (Ct. App. 1981).

An injury arises out of the employment when it is caused by a risk to which the worker is subjected in the employment. Sena v. Continental Cas. Co., 97 N.M. 753, 643 P.2d 622 (Ct. App. 1982).

The principles "arising out of" and "in the course of employment" within the meaning of the Workmen's Compensation Act must coexist at the time of the injury in order that an award be sustained. These terms are not synonymous: the former relates to the cause of the injury and the latter refers to the time, place and circumstances under which the injury occurred. The injury must be reasonably incident to the employment or one flowing therefrom as a natural consequence. Walker v. Woldridge, 58 N.M. 183, 268 P.2d 579 (1954); Wilson v. Richardson Ford Sales, Inc., 97 N.M. 226, 638 P.2d 1071 (1981).

It is not enough that the injury arose in the course of employment. For an injury to be compensable within the Workmen's Compensation Act it must "arise out of" and in the course of employment and not be willfully suffered or intentionally inflicted. Walker v. Woldridge, 58 N.M. 183, 268 P.2d 579 (1954).

Whether an injury occurs in the course of employment relates to the time, place and circumstances under which the accident takes place. Sena v. Continental Cas. Co., 97 N.M. 753, 643 P.2d 622 (Ct. App. 1982).

Service performed as material, not primary purpose of trip. - Where claimants were members of a drilling crew, and, at the request of the tool pusher, were cooperating in pushing the tool pusher's car down the road, an accident occurred, injuring some of the employees and it was held that certain of the employees were "literally in the course of their employment," it is the service to be performed for the employer that is material, not what may be the dominant or primary purpose of the trip. Brown v. Arapahoe Drilling Co., 70 N.M. 99, 370 P.2d 816 (1962).

Going to and from work not in course of employment. - A case of injury arising out of and in the course of employment was not established by the facts present in this case, where the plaintiff in going to and from work was not in the performance of service arising out of or in the course of his employment, his duties in behalf of the employer had terminated for the day, he was not being compensated for his time spent en route between the place of work and his home, the accident did not occur on the employer's premises, nor did plaintiff's duties require his presence at the place where the accident occurred, and the risk which caused the accident was one common to the traveling public and was not created by his employment. Rinehart v. Mossman-Gladden, Inc., 77 N.M. 470, 423 P.2d 991 (1967).

Compensation is not allowed if an injury occurs while the workman is on his way to assume the duties of his employment or after leaving such duties. Romero v. S.S. Kresge Co., 95 N.M. 484, 623 P.2d 998 (Ct. App. 1981).

Although courts have consistently resolved reasonable doubts in favor of the employee in many borderline areas, they have not extended this liberal treatment to the on-premises injury occurring before the work-day commences or as it ends. Gonzales v. New Mexico State Hwy. Dep't, 97 N.M. 98, 637 P.2d 48 (Ct. App. 1981).

And not compensable. - As a general rule injuries sustained by an employee while on the way to assume the duties of employment or after leaving such duties are not compensable. Rinehart v. Mossman-Gladden, Inc., 77 N.M. 470, 423 P.2d 991 (1967).

The basic principle or premise underlying "exceptions" to going and coming rule and the clue to their proper limits is found in the principle that the injury is compensable only where the journey is an inherent part of the service for which the employee is compensated or where the travel itself is a substantial part of the service performed. Rinehart v. Mossman-Gladden, Inc., 77 N.M. 470, 423 P.2d 991 (1967).

As to advisability of overturning the "going and coming" rule, see Gonzales v. New Mexico State Hwy. Dep't, 97 N.M. 98, 637 P.2d 48 (Ct. App. 1981).

Exception to "going and coming" rule upon proof of employer's negligence. - An exception to the "going and coming" rule arises when the injury occurs on the employer's premises and there is proof of the employer's negligence. Romero v. S.S. Kresge Co., 95 N.M. 484, 623 P.2d 998 (Ct. App. 1981).

When assault on employee deemed in course of employment. - Where plaintiff, although not required to live on the employer's premises, had no reasonable alternative and was required while living there to help fight fires and participate in search and rescue, plaintiff's injuries resulting from an assault and rape in her residence by one of the mentally retarded students at the employer's facility arose out of and in the course of her employment. Arnold v. State, 94 N.M. 278, 609 P.2d 725 (Ct. App. 1980).

Question of law where facts not disputed. - Where the facts are not in dispute, it is a question of law whether an accident arises out of and in the course of employment. Losinski v. Drs. Corcoran, Barkoff & Stagnone, 97 N.M. 79, 636 P.2d 898 (Ct. App. 1981).

Review of conclusion that accident arose out of employment. - The conclusion of law that the accident arose out of the course of employment is freely reviewable. Losinski v. Drs. Corcoran, Barkoff & Stagnone, 97 N.M. 79, 636 P.2d 898 (Ct. App. 1981).

Claimant's testimony as only evidence supporting trial court's finding remains undisturbed on appeal. - Where claimant's testimony is the only evidence which has a bearing on the cause of the accident and if her statement will support the trial court's finding that her injury arose out of and in the course of her employment, the finding shall not be disturbed on appeal. Romero v. S.S. Kresge Co., 95 N.M. 484, 623 P.2d 998 (Ct. App. 1981).

Reasonable inference that employee met accident on the job permissible. - If there are any facts and circumstances sufficient to raise a reasonable inference that the employee met an accident on the job, the failure to find positive evidence is not fatal to the claim. Sena v. Continental Cas Co., 97 N.M. 753, 643 P.2d 622 (Ct. App. 1982).

Violation of order forecloses compensability. - If an order or warning is one limiting the scope or sphere of work which claimant is authorized to do, then a violation forecloses compensability for the injury so sustained. Walker v. Woldridge, 58 N.M. 183, 268 P.2d 579 (1954).

Business or personal trip. - It is not necessary that, on failure of the personal motive, the business trip would have been taken by this particular employee at this particular time. It is enough that someone sometime would have had to take the trip to carry out the business mission. Perhaps another employee would have done it; perhaps another time would have been chosen; but if the trip would ultimately have had to be made, and if the

employer got this necessary item of travel accomplished by combining it with this employee's personal trip, it is accurate to say that it was a concurrent cause of the trip, rather than an incidental appendage or afterthought. Brown v. Arapahoe Drilling Co., 70 N.M. 99, 370 P.2d 816 (1962).

Accident held to arise out of course of employment. - Where a teacher is injured while skiing during a break in her supervision of students on a school-sponsored ski trip and the school authorities knew of and assented to the practice of sponsors skiing for their personal enjoyment on school ski trips, the injuries were caused by an accident which arose out of and in the course of her employment. Turley v. State, 96 N.M. 579, 633 P.2d 687 (1981).

Salesman on plane trip awarded for sales achievement was not in course of employment where he was engaged in a noncompulsory social activity and was not fulfilling any duties of his employment and was not engaged in something incidental to his duties during the flight. Beckham v. Estate of Brown, 100 N.M. 1, 664 P.2d 1014 (Ct. App. 1983).

Employee on loan to another as special employee. - At the time of his injury employee was engaged on work for the benefit and advantage of another corporation and was on loan from his employer to the other corporation as a "special" employee. Hence, his injury did not arise out of, or in the course of, his employment by his employer, and he was not when he was injured working for the purpose of his employer's trade or business. Barber v. Los Alamos Beverage Corp., 65 N.M. 323, 337 P.2d 394 (1959).

Employee of contractor though provided by another company. - An employee who was employed by another company which provided manpower to a contractor on a project and was subject to orders on the job from the contractor's supervisory personnel was an employee of the contractor and entitled to workmen's compensation for injuries on the job and may not sue the contractors in tort on negligence. Shipman v. Macco Corp., 74 N.M. 174, 392 P.2d 9 (1964).

Mental breakdown resulting from termination not compensable. - Employee who suffered a mental breakdown from being terminated from defendant's employ may not recover workmen's compensation benefits because claimant did not suffer an accidental injury arising out of his employment since the risk that the employment might be terminated was not a risk incident to the performance of claimant's work, and was not peculiar to claimant's employment. Kern v. Ideal Basic Indus., 101 N.M. 801, 689 P.2d 1272 (Ct. App. 1984).

Act of reaching employee at home by telephone is not a "circumstance" of employment. Hernandez v. Home Educ. Livelihood Program, Inc., 98 N.M. 125, 645 P.2d 1381 (Ct. App. 1982).

IV. Accident Proximate Cause of Injury.

There must still be causal relationship between accident and injury complained of. But such relationship need not be shown by uncontradicted, indisputable medical evidence., overruled on other grounds, White v. Valley Land Co., 64 N.M. 9, 322 P.2d 707 (1957); Mascarenas v. Kennedy, 74 N.M. 665, 397 P.2d 312 (1964).

Relationship must be shown between accident relied on and injury suffered to justify an award of workmen's compensation, as the award cannot rest on mere speculation. Henderson v. Texas-New Mexico Pipe Line Co., 46 N.M. 458, 131 P.2d 269 (1942).

It is not necessary that injury should result momentarily, to be accidental; it may be the result of hours, even a day or longer, depending upon the facts of the case. Marez v. Kerr-McGee Nuclear Corp., 93 N.M. 9, 595 P.2d 1204 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

Disabling event may occur months or years after work-related accident, and then become compensable; or it may be the product of a new "accident" resulting from the bodily malfunction ultimately induced by the original injury. Casias v. Zia Co., 93 N.M. 78, 596 P.2d 521 (Ct. App.), cert. denied, 93 N.M. 8, 595 P.2d 1203 (1979).

Where act has no reasonable relation to employment. - An employee must be held to stand the risk of injury received by him which proximately results from an act of his own which has no reasonable relation to the employment. Walker v. Woldridge, 58 N.M. 183, 268 P.2d 579 (1954).

Not within province to assume causal connection. - Where more than three months elapse between claimant's second heart attack and his demise, and no medical testimony exists as to a causal connection between the heart attack and the death, it is not within the province of the court to assume such a causal connection, nor may the court permit the jury so to do. Alspaugh v. Mountain States Mut. Cas. Co., 66 N.M. 126, 343 P.2d 697 (1959).

Burden on claimant to show causal connection. - When death occurs some three months after the second heart attack of the decedent, the burden of proof is on the claimant to show that death resulted from the accidental injury, and it is not unreasonable to require the claimant to produce proof of the causal connection, if such connection existed. Alspaugh v. Mountain States Mut. Cas. Co., 66 N.M. 126, 343 P.2d 697 (1959).

And error for case to go to jury where burden fails. - Error exists on the part of the trial judge in allowing a case to go to the jury, when death occurs some three months after the second heart attack of decedent, and claimant fails to sustain the burden of proving that the evidence reasonably gives rise to a circumstantial inference of the requisite causal relation. Alspaugh v. Mountain States Mut. Cas. Co., 66 N.M. 126, 343 P.2d 697 (1959).

Jury determination whether causal relation exists. - When the evidence indicates that there is an injury and shortly thereafter the injured person dies of an apparently related cause, such evidence is permitted to go to the jury for a determination by it as to whether the required causal relation exists. This is true in spite of the lack of medical evidence, convincing of and in itself, that the connection exists., overruled on other grounds, White v. Valley Land Co., 64 N.M. 9, 322 P.2d 707 (1957); Mascarenas v. Kennedy, 74 N.M. 665, 397 P.2d 312 (1964).

Where no positive statement could be made as to the causal connection by the medical witnesses, the court was correct in sending the case to the jury on the basis of the medical testimony, such as it was, and the lay testimony as to the events surrounding the accident both before and after it happened. It was for jury determination as to whether there was a natural sequence of events which indicates a causal connection. Whether there is enough evidence to have the jury make this determination in the first instance is a question for the court to determine in the face of a motion to dismiss. Where it appears that there was such evidence the supreme court must sustain the lower court in leaving the determination of fact to the jury., overruled on other grounds, White v. Valley Land Co., 64 N.M. 9, 322 P.2d 707 (1957); Mascarenas v. Kennedy, 74 N.M. 665, 397 P.2d 312 (1964).

Accidental injury or accident is an unlooked for mishap, or untoward event which is not expected or designed. Ortiz v. Ortiz & Torres Dri-Wall Co., 83 N.M. 452, 493 P.2d 418 (Ct. App. 1972).

Unnecessary that workman be subjected to unusual or extraordinary condition or hazard not usual to his employment for an injury to be an accidental injury under the compensation act. Ortiz v. Ortiz & Torres Dri-Wall Co., 83 N.M. 452, 493 P.2d 418 (Ct. App. 1972).

It is not essential that injury occur momentarily to be "accidental" within meaning of the Workmen's Compensation Act and an unintentional result of an intended act by the person injured comes within the definition of an accident. Henderson v. Texas-New Mexico Pipe Line Co., 46 N.M. 458, 131 P.2d 269 (1942).

Cause of and evidence of accident need not be simultaneous. - While there must be a time when it can be said with certainty that a compensable accidental injury has been inflicted, the cause and the coming into existence of the evidence characterizing it as a compensable one need not be simultaneous events. Webb v. New Mexico Publishing Co., 47 N.M. 279, 141 P.2d 333 (1943).

An accidental injury may be produced gradually and progressively and where a printer used a soap furnished by his employer to which he was unknowingly allergic, completely disabling him from performing any work, the resulting injury was a compensable accident. Webb v. New Mexico Publishing Co., 47 N.M. 279, 141 P.2d 333 (1943).

Disease by accident. - Findings of the trial court that "there was no accident on that date" and "any disability suffered by the plaintiff was due to a disease caused by specific germs, not an industrial accident," were conclusions of law and call for the construction of the meaning of the word "accident" as used in the Workmen's Compensation Act; although pneumonia is a germ disease and any disability plaintiff suffered was due to such disease, it does not follow that his injury was not "by accident," if the proximate cause of the disease was an accident. Stevenson v. Lee Moor Contracting Co., 45 N.M. 354, 115 P.2d 342 (1941).

Uncertainty as to time when injury occurs. - While usually the event and circumstances of an accidental injury can be definitely ascertained, there are exceptional cases in which injuries are unquestionably accidental although the precise time of their beginning is uncertain; if from the evidence, though the time is not definitely fixed, it can be consistently said that there has been an accidental injury according to the common usage of that phrase, it is sufficient. Webb v. New Mexico Publishing Co., 47 N.M. 279, 141 P.2d 333 (1943).

The "by accident" requirement is now deemed satisfied in most jurisdictions either if the cause was of an accidental character or if the effect was the unexpected result of routine performance of the claimant's duties. Accordingly, if the strain of claimant's usual exertions causes collapse from back weakness, the injury is held accidental. Ortiz v. Ortiz & Torres Dri-Wall Co., 83 N.M. 452, 493 P.2d 418 (Ct. App. 1972).

Employer's liability arose at time of accident, not injury. - In case where accident occurred under one insurance company, and injury occurred three years later under another, the employer's liability arose at the time of the accident and not the injury. The second insurance company was thus dismissed from the suit over a strong dissent. Ponce v. Hanes L'eggs Prods., Inc., 91 N.M. 112, 570 P.2d 943 (Ct. App. 1977).

And, no causal connection with insurance company at time of injury. - Where the accident was under one insurance company and the injury was three years later under a second insurance company, to hold the second company liable it was necessary to show a causal connection between the work done during the period of the new policy and the injury or disability, which in this case was not done. Ponce v. Hanes L'eggs Prods., Inc., 91 N.M. 112, 570 P.2d 943 (Ct. App. 1977).

False representation as causal connection with injury. - Where plaintiff knowingly and willfully made false representations as to his physical condition and his employer relied upon the false representations, a substantial factor in hiring plaintiff and a causal connection existed between the false representations and the injury claimed, plaintiff was not entitled to workmen's compensation benefits and the complaint should be dismissed with prejudice. Martinez v. Driver Mechenbier, Inc., 90 N.M. 282, 562 P.2d 843 (Ct. App. 1977).

Sufficient basis for conclusion that disability resulted from accident. - Despite conflicts between the experts, the testimony of claimant's doctor revealed a sufficient basis for

the conclusion that claimant's disability resulted from the accident, and that surgery was necessary, where he testified that he received from the claimant a history of the accident and a history of pain since the accident, that the conservative therapy employed by other physicians for over one year had not improved the claimant's condition, that in surgery abnormal intervertebral disc tissue was removed from the claimant and that after surgery the claimant's prognosis had improved considerably. Provencio v. New Jersey Zinc Co., 86 N.M. 538, 525 P.2d 898 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Aggravation of cancer or other disease may be inferable despite lack of medical evidence establishing indisputable causal connection between trauma and spread of preexisting cancer whenever the sequence of events is so strong as to establish a causal connection., overruled on other grounds, White v. Valley Land Co., 64 N.M. 9, 322 P.2d 707 (1957); Mascarenas v. Kennedy, 74 N.M. 665, 397 P.2d 312 (1964).

Where no disability and ulcer not caused by accident, no compensable claim. - Finding by the trial court that the cut suffered to claimant's hand did not result in a disability and that his perforated ulcer was not caused by an accidental injury sustained by claimant, arising out of and in the course of his employment precluded a compensable claim under the act. Dodson v. Eidal Mfg. Co., 72 N.M. 6, 380 P.2d 16 (1963).

Strain or exertion in employment causing heart attack compensable. - Even though the decedent may have been suffering from a heart condition which might have eventually caused his death, the claimant could nevertheless recover where the physical strain or exertion in the course of his employment was the proximate and immediate cause of the decedent's death; where the duties of the employment called for a quality and quantity of exertion which actually is the immediate precipitating factor in the death of a workman, by a heart attack, it is compensable. Hall-Stewart Drilling Co. v. Tomlin, 248 F.2d 953 (10th Cir. 1957).

A heart attack which results from exertion expended by a workman in performing his usual and ordinary duties, under usual and ordinary circumstances of his work, may be made the subject of a workmen's compensation award. Sanchez v. Board of County Comm'rs, 63 N.M. 85, 313 P.2d 1055 (1957).

Malfunction of body as accidental injury. - Based upon the reasoning of these cases, a malfunction of the body itself, such as a fracture of the disc or tearing a ligament or blood vessel, caused or accelerated by doing work required or expected in employment, is an accidental injury within the meaning and intent of the compensation act. Ortiz v. Ortiz & Torres Dri-Wall Co., 83 N.M. 452, 493 P.2d 418 (Ct. App. 1972); Herndon v. Albuquerque Pub. Schools, 92 N.M. 635, 593 P.2d 470 (Ct. App. 1978); Marez v. Kerr-McGee Nuclear Corp., 93 N.M. 9, 595 P.2d 1204 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

Purely psychological condition compensable. - Even a purely psychological condition, if it results from a work injury, is compensable under the Act. Schober v. Mountain Bell

Tel., 96 N.M. 376, 630 P.2d 1231 (Ct. App. 1980).

There need be no permanent physical alteration of body tissues in order to qualify for permanent disability. Schober v. Mountain Bell Tel., 96 N.M. 376, 630 P.2d 1231 (Ct. App. 1980).

Psychological disability caused by stress arising out of and in the course of employment is compensable, assuming the existence of an actual job condition which causes actual, not imagined stress. Candelaria v. General Elec. Co., 105 N.M. 167, 730 P.2d 470 (Ct. App. 1986); Lopez v. Smith's Mgt. Corp., 106 N.M. 416, 744 P.2d 544 (Ct. App. 1986).

Psychogenic pain disorder compensable. - Psychogenic pain disorder, insofar as it is a psychological disability, is compensable so long as it is proximately caused by an accident arising out of and in the course of employment. Gutierrez v. Amity Leather Prods. Co., 107 N.M. 26, 751 P.2d 710 (Ct. App. 1988).

Recovery not barred where suicide resulted from mental disability produced by compensable injury. - The statutory restrictions barring recovery where an injury is self-inflicted do not preclude recovery were the original work-related injury sustained by the workman was accidental and otherwise compensable, and the injury produced a mental disability which rendered the subsequent act of suicide of the workman non-purposeful. Schell v. Buell ECD Co., 102 N.M. 44, 690 P.2d 1038 (Ct. App. 1983), cert. denied, 102 N.M. 7, 690 P.2d 450 (1984).

Allergies as compensable injury. - If a constant exposure to cigarette smoke in a work environment triggers allergies which in turn cause an employee to collapse, this is a compensable accidental injury under the Act. Schober v. Mountain Bell Tel., 93 N.M. 337, 600 P.2d 283 (Ct. App. 1978), cert. denied, 92 N.M. 621, 593 P.2d 62 (1979); Schober v. Mountain Bell Tel., 96 N.M. 376, 630 P.2d 1231 (Ct. App. 1980).

Stress of labor aggravating preexisting infirmity compensable. - If the stress of labor aggravates or accelerates the development of a preexisting infirmity causing an internal breakdown of that part of the structure, a personal injury by accident does occur. Herndon v. Albuquerque Pub. Schools, 92 N.M. 635, 593 P.2d 470 (Ct. App. 1978); Powers v. Riccobene Masonry Constr., Inc., 97 N.M. 20, 636 P.2d 291 (Ct. App. 1980).

An employee who has a preexisting physical weakness or disease may suffer a compensable injury if the employment contribution can be found either in placing the employee in a position which aggravates the danger due to the idiopathic condition, or where the condition is aggravated by strain or trauma due to the employment requirements. Schober v. Mountain Bell Tel., 96 N.M. 376, 630 P.2d 1231 (Ct. App. 1980).

Injuries resulting from employer's tolerance of dangerous condition compensable. - Where the alleged conduct of the employer is that defendant intentionally permitted a hazardous work condition to exist or that defendant intentionally tolerated a dangerous

condition, injuries suffered by plaintiff as a result of that condition are accidental injuries within the meaning of the Workmen's Compensation Law and are not intentional injuries of the sort on which a common-law action for damages may be based. Sanford v. Presto Mfg. Co., 92 N.M. 746, 594 P.2d 1202 (Ct. App. 1979).

Hernia as compensable injury. - A workman's right to compensation for hernia was dependent upon showing that it did not exist prior to the injury. Martin v. White Pine Lumber Co., 34 N.M. 483, 284 P. 115 (1930).

Pneumonia as compensable. - Truck driver was entitled to compensation under this act where employer supplied him with a defective truck which discharged an excessive amount of smoke and gases, and he developed pneumonia as the result of such obnoxious fumes. Stevenson v. Lee Moor Contracting Co., 45 N.M. 354, 115 P.2d 342 (1941).

Employer liable where fall due to preexisting condition. - Where a workman, in the ordinary course of his work, slumps or faints from a heart weakness, while on a platform, and falls therefrom sustaining injuries resulting in death, the majority of courts, American and English, hold the employer liable if the injury was due to the fall, even though the fall was caused by a preexisting idiopathic condition. Christensen v. Dysart, 42 N.M. 107, 76 P.2d 1 (1938).

§ 52-1-10. Increase or reduction in compensation based on failure of employer to provide or failure of employee to use safety devices.

A. 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 Workers' Compensation Act [this article] shall be reduced ten percent.

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

C. In case the death of a worker results from the failure of an employer to provide safety devices required by law or, in any industry in which safety devices are not prescribed by statute, if the death of a worker results from the negligence of the employer in failing to supply reasonable safety devices in general use for the use or protection of the worker, and the deceased worker leaves no eligible dependents under the Workers' Compensation Act, in addition to the benefits provided for in Subsection A of Section 52-1-46 NMSA 1978, compensation in the amount of five thousand dollars ($5,000) shall be paid to the surviving father and mother of the deceased or, if either of them be

deceased, to the survivor of them. The surviving father and mother, or either of them, may file a claim for the five thousand dollars ($5,000) compensation, provided the father or mother has given notice in the manner and within the time required by Section 52-1-29 NMSA 1978 and the claim is filed within one year from the date of the worker's death. If there be no surviving father or mother, then the five thousand dollars ($5,000) compensation provided for in this subsection shall not be payable.

D. Any increased liability resulting from negligence on the part of the employer shall be recoverable from the employer only and not from the insurer, guarantor or surety of the employer under the Workers' Compensation Act, except that this provision shall not be construed to prohibit an employer from insuring against such increased liability.

E. No employee shall file a claim for increased compensation under the Workers' Compensation Act on the basis of an injury suffered because of the lack of a safety device nor shall a dependent of a deceased employee or the father or mother as provided in Subsection C of this section file a claim on the basis of the death of a worker suffered because of the lack of a safety device, unless the claim identifies the specific safety device which it is claimed was not furnished by the employer. The employer is under a like duty to allege the specific safety device which it is claimed an employee failed to use before the employer may claim a reduction of compensation as herein provided.

History: Laws 1929, ch. 113, § 7; C.S. 1929, § 156-107; Laws 1937, ch. 92, § 5; 1941 Comp., § 57-907; Laws 1953, ch. 96, § 1; 1953 Comp., § 59-10-7; Laws 1955, ch. 29, § 1; 1959, ch. 67, § 3; 1967, ch. 148, § 1; 1989, ch. 263, § 7.

I. General Consideration.

Cross-references. - As to Mining Safety Act, see 69-8-1 NMSA 1978 et seq. As to devices required by mining safety rules and regulations as "safety devices required by law," see 69-8-15 NMSA 1978.

The 1989 amendment, effective June 16, 1989, in Subsection C substituted "Section 52-1-46 NMSA 1978" for "Section 59-10-18.7 New Mexico Statutes Annotated, 1953 Compilation" in the first sentence, and "Section 52-1-29 NMSA 1978" for "Section 59-10-13.4 New Mexico Statutes Annotated, 1953 Compilation" in the second sentence; and made minor stylistic changes throughout the section.

Effect of Laws 1953, ch. 96. - See Clary v. Denman Drilling Co., 58 N.M. 723, 276 P.2d 499 (1954).

This section must be liberally construed in favor of workman, but this does not mean enlarging on the apparent legislative intent or giving words meaning beyond their ordinary scope. Hicks v. Artesia Alfalfa Growers' Ass'n, 66 N.M. 165, 344 P.2d 475 (1959).

Modification of benefits using OSHA regulations precluded. - The use of OSHA regulations to modify an employee's workers' compensation benefits is clearly precluded under 50-9-21A NMSA 1978. Bateman v. Springer Bldg. Materials Corp., 108 N.M. 655, 777 P.2d 383 (Ct. App. 1989).

Purpose of penalty system. - The percentage penalty system of this section is a recognition of and an attempt to correct the disproportion which might exist between the misconduct and the penalty. It attempts to accomplish both objectives of a compensation system; first, by providing enough compensation protection to avoid reducing the claimant to destitution; and second, by allowing a part of the loss, in the form of a fine, to fall on the wrongdoer. Baca v. Gutierrez, 77 N.M. 428, 423 P.2d 617 (1967).

Safety device statute was passed to compel employers to supply reasonable safety devices in general use for the protection of the workmen where safety devices are not specified by law. Only by observing it may employers avoid liability under it for compensable injuries to their employees. It is negligence to fail to do so if the facts render the act applicable. Apodaca v. Allison & Haney, 57 N.M. 315, 258 P.2d 711 (1953).

This section is not affected by provision limiting defenses of contributory negligence and assumed risk. Pino v. Ozark Smelting & Mining Co., 35 N.M. 87, 290 P. 409 (1930).

Not applicable to employers in mining industry. - The penalty provision of the Workmen's Compensation Act was not applicable to employers in the mining industry where specific safety regulations were prescribed by the Mine Safety Act. Jones v. International Minerals & Chem. Corp., 53 N.M. 127, 202 P.2d 1080 (1949) (decided under former law).

The term "industry" is not defined by specific examples of uses, thus the industry involved here is not work near a high voltage line and is not work on a high voltage line, but work exposing the decedent to the dangers of high voltage lines. Quintana v. East Las Vegas Mun. School Dist., 82 N.M. 462, 483 P.2d 936 (Ct. App. 1971).

Compensable character of the injury is question preceding and independent of the other question, "who shall receive it?" Sanchez v. Bernalillo County, 57 N.M. 217, 257 P.2d 909 (1953).

Special interrogatory should cover both requisites to right to compensation set forth in 52-1-9 NMSA 1978: whether employee was performing services arising out of and in course of his employment at time of the accident and whether the employee's death was proximately caused by an accident arising out of and in course of his employment. Southwestern Portland Cement Co. v. Simpson, 135 F.2d 584 (10th Cir. 1943).

Recovery from employer and insurer. - Provision in Workmen's Compensation Act (prior to 1959 amendment) authorizing additional percentage of compensation if employee's injury flowed from employer's failure to furnish safety devices authorized recovery from both employer and insurer in industries where safety devices were required by law, and authorized recovery from the employer only in industries wherein safety devices were not required by law. Janney v. Fullroe, Inc., 47 N.M. 423, 144 P.2d 145 (1943).

Timeliness of claim where disability paid. - Claim for workmen's compensation plus penalty for employer's failure to supply safety devices was not prematurely filed though regular disability compensation had been paid until time claim was filed. Wright v. Schultz, 55 N.M. 261, 231 P.2d 937 (1951).

Safety device contemplated by this section is something tangible and concrete, which can be seen, touched and described. Montoya v. Kennecott Copper Corp., 61 N.M. 268, 299 P.2d 84 (1956).

Not all things which promote safety can be considered as safety devices, and even those things which might be safety devices for one purpose may not be so for another purpose. Hicks v. Artesia Alfalfa Growers' Ass'n, 66 N.M. 165, 344 P.2d 475 (1959).

Requirement of "safe place to work" is not "safety device" within the meaning of this section. Montoya v. Kennecott Copper Corp., 61 N.M. 268, 299 P.2d 84 (1956).

Causal relation between injury and lack of safety device. - This section does not go to the causal relationship between the death and the accident. It goes to the causal relation between the death and the failure to supply reasonable safety devices; therefore, this section does not require the causal relation between the death and the lack of safety devices to be proved to a medical probability. Quintana v. East Las Vegas Mun. School Dist., 82 N.M. 462, 483 P.2d 936 (Ct. App. 1971).

This section requires that the injury or death of the workman must result from the employer's failure to provide a safety device before the 10% penalty can apply. In the absence of a showing of causation, no issue of entitlement to the penalty is raised. Boughton v. Western Nuclear, Inc., 99 N.M. 723, 663 P.2d 382 (Ct. App. 1983).

"Specific safety practice enjoined by law" not followed. - See Montoya v. Kennecott Copper Corp., 61 N.M. 268, 299 P.2d 84 (1956).

Prescribing required safety devices. - The labor and industrial commission is authorized to prescribe required safety devices for each industry by proper rules and regulations

and to cause the same to be filed with the librarian at the supreme court library as a public record. 1953-54 Op. Att'y Gen. No. 5796.

Question of safety device on appeal. - Question that if safety device was required it was duty of general contractor and not the subcontractor to supply it not having been raised in lower court, it could not be presented on appeal for the first time. Wright v. Schultz, 55 N.M. 261, 231 P.2d 937 (1951).

Supreme court review where judgment inherently defective. - Supreme court could review question of whether employee's widow was entitled to receive additional compensation by reason of the employer's failure to supply the safety devices required by law even though the assignment of error had been abandoned by the widow, as the supreme court may in its discretion review on its own motion where judgment of the trial court is inherently and fatally defective. Thwaits v. Kennecott Copper Corp., 52 N.M. 107, 192 P.2d 553 (1948).

Penalty for frivolous appeal. - The 10% penalty for a frivolous appeal was not applicable to an employer's and insurer's appeal from judgment in workmen's compensation case awarding employee disability compensation plus 50% additional compensation for employer's failure to supply reasonable safety devices. (Prior to 1959 amendment.); Wright v. Schultz, 55 N.M. 261, 231 P.2d 937 (1951).

Before safety measures can be considered as safety devices, there must be some proof that the same are in general use in that industry. Hicks v. Artesia Alfalfa Growers' Ass'n, 66 N.M. 165, 344 P.2d 475 (1959).

Device must be generally used in particular industry. - For the employer to avoid liability under the act, the safety device provided must be one generally used in the particular industry, and a device less than the safety device used generally in the particular industry may not be substituted therefor. Dickerson v. Farmer's Elec. Coop., 67 N.M. 23, 350 P.2d 1037 (1960).

Establishing general use. - Where one mining company used a safety electrical switch while two other companies in the same industry did not, a general use had not been established. Jones v. International Minerals & Chem. Corp., 53 N.M. 127, 202 P.2d 1080 (1949).

General use may be established by use of few. - The fact that there were but few engaged in the construction of sewer lines in streets carrying gas mains along which service lines were constantly encountered that had to be disconnected and reinstalled, thus creating hazard, would not preclude proof that there was a reasonable safety device employed by enough of the few so engaged to establish a general use. Apodaca v. Allison & Haney, 57 N.M. 315, 258 P.2d 711 (1953).

Witnesses qualified to do so may testify directly as to general use of safety devices in an industry and are not restricted to giving particular examples thereof. Briggs v. Zia Co., 63 N.M. 148, 315 P.2d 217 (1957).

Territorial limitation on proof of "use". - This section reads "reasonable safety devices in general use" and does not place a territorial limitation on the proof of that "use." It would seem logical that a practice in "general use" not only locally but universally would have greater weight in showing the employer's knowledge thereof. On the other hand, a "general use" locally only would be sufficient to make an employer liable under the act if the other requirements are met. Briggs v. Zia Co., 63 N.M. 148, 315 P.2d 217 (1957).

Local general use over universal where different. - Where the universal "general use" differs from the local "general use" then it would be necessary to offer proof of a reasonable safety device in "general use"locally. Briggs v. Zia Co., 63 N.M. 148, 315 P.2d 217 (1957).

Custom or usage is matter of fact and not of opinion but proof of the fact may be established either by testimony of specific uses, or by evidence of general practice of contractors. Romero v. H.A. Lott, Inc., 70 N.M. 40, 369 P.2d 777 (1962).

"General use" of safety device is established where it is shown that the use of a handrail was "prevalent," "usual," "extensive though not universal" and "widespread" by those engaged in the building industry. Romero v. H.A. Lott, Inc., 70 N.M. 40, 369 P.2d 777 (1962).

Finding of total permanent disability. - Where there is evidence of a substantial nature that employee not only suffered an injury to his knee but there is shown a general body impairment resulting therefrom of permanent damage to the quadriceps muscle; a permanent limp which produces a pelvic tilt, resulting in back pains; when he drives a truck or climbs, his leg swells and pains him, the pain extending to his back, a finding of total permanent disability is proper. Hamilton v. Doty, 65 N.M. 270, 335 P.2d 1067 (1958).

Claim withdrawn where employer complied with safety act. - Consideration of claim by employee for percentage penalty on ground that potash company, as employer, failed to guard a bucket elevator adequately was properly withdrawn from jury where it was shown that the employer had met requirements of the Mine Safety Act. Jones v. International Minerals & Chem. Corp., 53 N.M. 127, 202 P.2d 1080 (1949).

Rearview mirror on particular construction vehicle found to be reasonable safety device. Martinez v. Zia Co., 100 N.M. 8, 664 P.2d 1021 (Ct. App. 1983).

Evidence that insulated gloves were safety device for workmen who are working around such electrical lines and that they are in general use for working on such lines held sufficient. Quintana v. East Las Vegas Mun. School Dist., 82 N.M. 462, 483 P.2d 936 (Ct. App. 1971).

Guardrails on ore train used about mines constitute "safety devices" required by law within compensation act and an increase in the award by statutory percentage is justified where the employer fails to provide such safety device. Thwaits v. Kennecott Copper Corp., 52 N.M. 107, 192 P.2d 553 (1948).

Portable motor. - A motor attached to movable concrete mixer was only a part thereof and not a "portable motor" within the meaning of the exception mentioned in the section requiring electrical apparatus other than portable motors to be grounded so that additional percentage of compensation could be recovered for employee's death. Neeley v. Union Potash & Chem. Co., 47 N.M. 100, 137 P.2d 312 (1943).

Barricades to elevator shafts. - Statute denounces failure to furnish such safety devices as barricades or doors to elevator shafts as negligence and if employer fails to provide them or other reasonable safety devices in general use, the employer must suffer the statutory penalty. Wright v. Schultz, 55 N.M. 261, 231 P.2d 937 (1951).

Law reviews. - For comment, "Witnesses - Privileged Communications - Physician-Patient Privilege in Workmen's Compensation Cases," see 7 Nat. Resources J. 442 (1967).

For annual survey of New Mexico law relating to workmen's compensation, see 13 N.M.L. Rev. 495 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation § 233; 82 Am. Jur. 2d Workmen's Compensation § 359.
Failure to use safety appliances as serious and willful misconduct, 4 A.L.R. 121; 9 A.L.R. 1377; 23 A.L.R. 1161; 23 A.L.R. 1172; 26 A.L.R. 166; 58 A.L.R. 198; 83 A.L.R. 1211; 119 A.L.R. 1409.
Provision denying compensation for injury through willful failure to use guard or safety appliance, 9 A.L.R. 1377.
Constitutionality of statute which makes the application of regulations affecting place or conditions of work dependent upon demand of employees, 27 A.L.R. 927.
Federal Safety Appliance Act, state's power to substitute workmen's compensation for action, based on noncompliance, to recover for death of or injury to railroad employee while engaged in intrastate commerce, 104 A.L.R. 839.
Additional compensation because of misconduct or violation of law by employer, insurer's liability for, 1 A.L.R.2d 407.
What conduct is willful, intentional, or deliberate within Workmen's Compensation Act provision authorizing tort action for such conduct, 96 A.L.R.3d 1064.
99 C.J.S. Workmen's Compensation §§ 262, 333, 336; 100 C.J.S. Workmen's Compensation §§ 574, 612, 629; 101 C.J.S. Workmen's Compensation §§ 848, 860, 923, 944.

II. Employee Failure.

Failure to use safety device. - Failure to use a device provided by employer, reasonably calculated to promote safety, though not required by law, whereby injury resulted, required percentage reduction of compensation. Pino v. Ozark Smelting & Mining Co., 35 N.M. 87, 290 P. 409 (1930).

Where there is evidence at trial to show that the deceased was aware that the area in which he was killed was unsafe and that he was not allowed there, and where there is substantial evidence to support the court's finding that the deceased was in an unsafe area, despite warnings and safety training, when a slab fell on him and killed him, the court's reduction of the available benefits is proper. Aragon v. Anaconda Mining Co., 98 N.M. 65, 644 P.2d 1054 (Ct. App. 1982).

Pursuant to Rule 12(b), N.M.R. Civ. P. (now see Rule 1-012B), when an employer raises the defense that the employee failed to use a provided safety device, the defense must be asserted in a responsive pleading or the defense is not at issue. Salazar v. City of Santa Fe, 102 N.M. 172, 692 P.2d 1321 (Ct. App. 1983).

Where employee negligent and not failure to use safety device. - Provision for reduction of compensation for failure to use safety device provided by employer was not applicable where proximate cause of employee's death in fire which started when employee attempted to load tank truck with gasoline was employee's negligent act of pulling electric switch which started pump while he still held loading hose unconnected with the tank truck, and not his failure to use the safety valve provided. Sallee v. Calhoun, 46 N.M. 468, 131 P.2d 276 (1942).

No contributory negligence in act except failure of workman to use device. - Contributory negligence has no place in the Workmen's Compensation Act unless it be in failure of workman to observe statutory safety regulation or to use a safety device furnished by employer, which results in a percentage reduction in compensation he would otherwise receive. Wright v. Schultz, 55 N.M. 261, 231 P.2d 937 (1951).

Issue not raised in pleadings but tried by consent. - In a hearing as to an employee's work-related hearing loss, the employer introduced evidence on the availability of particular safety devices for hearing protection. The claimant did not object; in fact, he cross-examined the witness on whether use of the devices was mandatory and the method of enforcement. Under these circumstances, this issue was tried by consent and the claimant's contention that the employer was not entitled to benefit from the defense, because it was not raised in the pleadings, was without merit. Cisneros v. Molycorp, Inc., 107 N.M. 788, 765 P.2d 761 (Ct. App. 1988).

Question of employee failure submitted to jury. - Question whether employee failed to make use of safety electrical switches and whether such failure caused his injury while repairing an ore bucket elevator was properly submitted to jury in action under Workmen's Compensation Act. Jones v. International Minerals & Chem. Corp., 53 N.M. 127, 202 P.2d 1080 (1949).

Defense of employee intoxication. - Where intoxication is used as a defense by insurance carrier it has burden of proving the employee's intoxication and that the intoxication was cause of the accident which resulted in employee's injury. Parr v. New Mexico State Hwy. Dep't, 54 N.M. 126, 215 P.2d 602 (1950).

Failure to use vehicle seat belt. - Where the trial court found that the vehicle which was being driven by the plaintiff was equipped with a seat belt, which is a safety device, but that plaintiff did not have his seat belt on, the trial court accordingly reduced plaintiff's compensation by 10% for failure to use a safety device. Roybal v. County of Santa Fe, 79 N.M. 99, 440 P.2d 291 (1968).

Use of improper size wrench. - Where appropriate sizes of wrenches were available and foreman was present whose duty among other things was to furnish proper wrenches upon request, claimant being aware of danger attending use of improper size wrench, the penalty provision was not applicable. Rowland v. Reynolds Elec. Eng'r Co., 55 N.M. 287, 232 P.2d 689 (1951).

III. Employer Failure.

Employer is liable for penalty for failure to provide safety device in general use in an industry despite the fact that no single generally accepted method existed concerning installation of that safety device where there is a difference in the manner in which the devices used are built and installed but they are practically identical when installed and accomplish the same end result. Abeyta v. Pavletich, 57 N.M. 454, 260 P.2d 366 (1953).

Duty on employer to furnish adequate safety device. - The legislature enacted this section as a penalty system, placing the duty on the employer to furnish adequate safety devices in general use for the use or protection of the workman, and in the event of his failure to do so, making him liable to be found guilty of negligence and subject to the penalty provided. Baca v. Gutierrez, 77 N.M. 428, 423 P.2d 617 (1967).

The legislature enacted this section as a penalty system, placing the duty on the employer to furnish adequate safety devices in general use for the use or protection of the workman. Garza v. W.A. Jourdan, Inc., 91 N.M. 268, 572 P.2d 1276 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977).

Although employer is generally in another type of business, the particular activity at the time of the accident controls and employer has the duty of supplying reasonable safety devices for the work involved. Hicks v. Artesia Alfalfa Growers' Ass'n, 66 N.M. 165, 344 P.2d 475 (1959).

Even where employer engaged in more than one industry. - Under this section, it is the duty of the employer to supply reasonable safety devices in general use in the industry

of the employer. It follows that if the employer is engaged in more than one industry, he is charged with supplying the safety devices in general use in each of such industries. Hicks v. Artesia Alfalfa Growers' Ass'n, 66 N.M. 165, 344 P.2d 475 (1959).

Where court instructed that failure of employer must be "negligent" failure, that the safety device not supplied must be a reasonable one in general use, that the resulting accident must have been the proximate cause of the employer's failure, and that the employer must have known or reasonably should have known of the safety device at the time of the accident, the court specifically spelled out negligence and its refusal to define negligence further may not be urged as error. Briggs v. Zia Co., 63 N.M. 148, 315 P.2d 217 (1957).

Negligence proscribed in this section is the failure to supply safety device, not the negligent disregard for the safety of employees. Baca v. Gutierrez, 77 N.M. 428, 423 P.2d 617 (1967).

Statute of limitations not applicable. - Although the statute of limitations, 52-1-31 NMSA 1978, is jurisdictional and need not be raised as an affirmative defense, it nevertheless does not apply to this statutory penalty section relating to increase or reduction in compensation for failure to supply safety devices. Garza v. W.A. Jourdan, Inc., 91 N.M. 268, 572 P.2d 1276 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977).

No penalty liability where coemployees negligently used safety device. - Where the employer has provided the safety device required by law and an employee is injured through the negligence of his coemployees in using the safety device, the injured employee is not entitled to a penalty increase in benefits. Jaramillo v. Anaconda Co., 95 N.M. 728, 625 P.2d 1245 (Ct. App. 1981).

Devices required by Occupational Health and Safety Act regulations. - Regulations adopted under the authority of the state Occupational Health and Safety Act do not affect an employer's liability under the Workmen's Compensation Act, and safety devices required by such regulations are not required by law for the purposes of Subsection B. Casillas v. S.W.I.G., 96 N.M. 84, 628 P.2d 329 (Ct. App.), appeal dismissed, 454 U.S. 934, 102 S. Ct. 467, 70 L. Ed. 2d 242 (1981).

Evidence to support knowledge of employer of existing safety devices. - Where plaintiff proves that an explosion occurred in sewer pipe, killing decedent, and that previously gas leaks were discovered along the gas service lines close to the sewer pipe, and that gas was found inside the sewer pipe a few hours after explosion, the evidence is ample to entitle the jury to find that there was in common use, known to the defendants, or which in the exercise of ordinary care should have been known to them, safety devices for detecting and eliminating gases which might have accumulated in their sewer conduit in dangerous quantities, without depending solely on the sense of smell. Apodaca v. Allison & Haney, 57 N.M. 315, 258 P.2d 711 (1953).

Employer must have foreseen catastrophe if precautionary measures omitted. - Summary judgment is improper where there is an issue of fact as to whether the employer should have reasonably foreseen the danger and subsequent injury to the employee when particular safety devices were not used. DeArman v. Popps, 75 N.M. 39, 400 P.2d 215 (1965).

Also increases compensation of dependents. - It is not intended that there should be compensation to dependents who are not able to make out a case which would have entitled the workman to compensation if death had not ensued. On the other hand, the failure of the employer to provide safety devices will increase the compensation of dependents as well as of the workman. Sanchez v. Bernalillo County, 57 N.M. 217, 257 P.2d 909 (1953).

Where workman killed while installing safety device. - Since there was evidence that the general practice of the construction industry with respect to work in highly dangerous ditches is to build cribbing as the work progresses, employer was liable for penalty for failure to provide safety device where decedent workman was actually engaged in installation of such safety device at the time he was killed but the installation of cribbing had merely been started. Abeyta v. Pavletich, 57 N.M. 454, 260 P.2d 366 (1953).

Failure to supply reasonable safety device in general use in electrical industry is proscribed as negligence, and this section fixes the penalty therefor. Dickerson v. Farmer's Elec. Coop., 67 N.M. 23, 350 P.2d 1037 (1960).

The safety device in general use in the electrical industry for the protection of its linemen was a pair of rubber insulated gloves, which meet the industry's specifications, and plaintiff's gloves, falling short of such specifications could not be classified as a safety device in "general use" in the electrical industry. Dickerson v. Farmer's Elec. Coop., 67 N.M. 23, 350 P.2d 1037 (1960).

Metal or plastic helmet is reasonable safety device generally provided by employers for the protection of workmen who work near overhead swinging cables, hooks or machinery such as in the present case, and the employer failed to provide such safety device; therefore, such failure requires a compensation award to be increased by 10%. Mascarenas v. Kennedy, 74 N.M. 665, 397 P.2d 312 (1964).

Device for well driller's helper. - Addition of statutory penalty to compensation for total and permanent disability from accidental injury was proper where evidence warranted the finding that employer failed negligently to supply reasonable safety devices which were in general use for the protection of a well driller's helper. Flippo v. Martin, 52 N.M. 402, 200 P.2d 366 (1948).

Compliance with mining safety practices. - Delinquency of the employer with respect to specific safety practices required by mine safety statutes did not subject an employer to imposition of the penalty award under the safety statute, this section, where a workman had been injured or killed simply because the safety statute did not so provide. Montoya

v. Kennecott Copper Corp., 61 N.M. 268, 299 P.2d 84 (1956) (decided under former law).

§ 52-1-10.1. Allocation of fault; reimbursement.

Notwithstanding anything in the worker's compensation law to the contrary, if the fault of the worker's employer or those for whom the employer is legally responsible, other than the injured worker, is found to have proximately caused the worker's injury, the employer's right to reimbursement from the proceeds of the worker's recovery in any action against any wrongdoer shall be diminished by the percentage of fault, if any, attributed to the employer or those for whom the employer is responsible, other than the injured worker.

History: Laws 1987, ch. 141, § 4.

Effective dates. - Laws 1987, ch. 141 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 19, 1987.

Applicability. - Laws 1987, ch. 141, § 5 provides that the act shall apply to all civil actions initially filed on and after July 1, 1987.

Law reviews. - For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation § 431.
Workmen's Compensation § 1010.

§ 52-1-11. Injuries due to intoxication, willfulness or intention of worker are noncompensable.

No compensation shall become due or payable from any employer under the terms of the Workers' Compensation Act [this article] in event such injury was occasioned by the intoxication of such worker or willfully suffered by him or intentionally inflicted by himself.

History: Laws 1929, ch. 113, § 8; C.S. 1929, § 156-108; 1941 Comp., § 57-908; 1953 Comp., § 59-10-8; Laws 1989, ch. 263, § 8.

Cross-references. - As to compensation prohibited when workman under influence of certain drugs, see 52-1-12 NMSA 1978.

The 1989 amendment, effective June 16, 1989, added the catchline, and made minor stylistic changes.

Burden of proof on insurance carrier where intoxication used as defense to claim. - See Parr v. State Hwy. Dep't, 54 N.M. 126, 215 P.2d 602 (1950).

Employer has burden of proving that claimant was intoxicated at time of injury and that the intoxication was the proximate cause of the accident. Salazar v. City of Santa Fe, 102 N.M. 172, 692 P.2d 1321 (Ct. App. 1983).

Violation of order forecloses compensability. - If an order or warning is one limiting the scope or sphere of work which claimant is authorized to do, then a violation forecloses compensability for the injury so sustained. Walker v. Woldridge, 58 N.M. 183, 268 P.2d 579 (1954).

Act of employee without relation to employment. - An employee must be held to stand the risk of injury received by him which proximately results from an act of his own which has no reasonable relation to the employment. Walker v. Woldridge, 58 N.M. 183, 268 P.2d 579 (1954).

A plea of guilty to reckless driving is not conclusive evidence of willful conduct, but is rather an admission subject to explanation, and if explained becomes an issue of fact. The trial court's finding that the plaintiff did what he thought was best in his judgment and that at the time of the accident wherein the said plaintiff was injured he was within the scope of his employment and was acting in apparent emergency, and without deserting his employment, for the purpose of advancing the interest of his employer, was supported by substantial evidence. Martinez v. Earth Resources Co., 87 N.M. 278, 532 P.2d 207 (Ct. App. 1975).

Refusing to heed advice of physician not willful misconduct. - Where a workman had refused to heed the advice of his physician to remain in bed, but continued his work, such refusal did not constitute "willful misconduct" barring recovery of compensation for his death, from a fall or from a heart attack, when he did not know he had heart disease. Christensen v. Dysart, 42 N.M. 107, 76 P.2d 1 (1938).

Where worker ignored physician's advice to avoid heavy work because of his congenital vertebrae abnormality, and subsequently suffered from a work-related disc protrusion distinct from the congenital defect, worker's conduct did not bar compensation as worker was unaware of risk of development of distinct back problem which could aggravate the congenital defect. Tallman v. Arkansas Best Freight, 108 N.M. 124, 767 P.2d 363 (Ct. App. 1988).

Law reviews. - For comment, "Witnesses - Privileged Communications - Physician-Patient Privilege in Workmen's Compensation Cases," see 7 Nat. Resources J. 442 (1967).

For note, "Workmen's Compensation in New Mexico: Preexisting Conditions and the Subsequent Injury Act," see 7 Nat. Resources J. 632 (1967).

For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 207, 234, 235, 239.
Failure to use safety appliances as serious and willful misconduct, 4 A.L.R. 121; 23 A.L.R. 1172; 23 A.L.R. 1161; 26 A.L.R. 166; 58 A.L.R. 198; 83 A.L.R. 1211; 119 A.L.R. 1409.
Insanity as affecting right of employee to compensation, 6 A.L.R. 570.
Recovery of compensation for injury or death to which delirium tremens contributes, 19 A.L.R. 106; 28 A.L.R. 204; 60 A.L.R. 1299.
Necessity and sufficiency of evidence that delirium tremens suffered by applicant for compensation is attributable to his employment, 20 A.L.R. 26; 73 A.L.R. 488.
Workmen's compensation: effect of employee's intoxication, 43 A.L.R. 421.
Workmen's compensation: injury from assault, 72 A.L.R. 116; 112 A.L.R. 1258.
Suicide as compensable under Workmen's Compensation Act, 15 A.L.R.3d 616.
Workers' compensation: effect of allegation that injury was caused by, or occurred during course of, worker's illegal conduct, 73 A.L.R.4th 270.
99 C.J.S. Workmen's Compensation §§ 206, 258 to 265, 320; 100 C.J.S. Workmen's Compensation §§ 563, 564, 612, 636, 768.

§ 52-1-12. Compensation prohibited when worker under influence of certain drugs.

No compensation is payable from any employer under the provisions of the Workers' Compensation Act [this article] if the injury to the person claiming compensation was occasioned solely by the person being under the influence of a depressant, stimulant or hallucinogenic drug as defined in the New Mexico Drug, Device and Cosmetic Act [Chapter 26, Article 1 NMSA 1978] or under the influence of a narcotic drug as defined in the Controlled Substances Act unless the drug was dispensed to the person upon the prescription of a practitioner licensed by law to prescribe the drug or administered to the person by any person authorized by a licensed practitioner to administer the drug.

History: 1953 Comp., § 59-10-8.1, enacted by Laws 1971, ch. 55, § 1; 1989, ch. 263, § 9.

Cross-references. - As to injuries due to intoxication, willfulness or intention of workmen as noncompensable, see 52-1-11 NMSA 1978.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes in the catchline and near the beginning of the section, and substituted "New Mexico Drug, Device and Cosmetic Act" for "New Mexico Drug and Cosmetic Act" and "Controlled Substances Act" for "Uniform Narcotic Drug Act" near the middle of the section.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

§ 52-1-13. Termination of agreements.

Any agreement made between such employer and any such worker to be bound by the provisions of the Workers' Compensation Act [this article] may be terminated by either party upon giving thirty days notice to the other in writing, prior to any accidental injury suffered by such worker.

History: Laws 1929, ch. 113, § 9; C.S. 1929, § 156-109; 1941 Comp., § 57-909; 1953 Comp., § 59-10-9; Laws 1989, ch. 263, § 10.

The 1989 amendment, effective June 16, 1989, added the catchline, and made minor stylistic changes.

Termination notice. - This section requires an employer covered under this chapter through its elective rather than its mandatory provision, who wishes to terminate workers' compensation insurance coverage, to give 30 days prior written notice of intent to discontinue coverage to both its employees and the superintendent of insurance. The mere lapse of the insurance policy and oral notice of termination are insufficient to terminate an employer's liability for elective coverage. Castillo v. Weatherly, 107 N.M. 135, 753 P.2d 1323 (Ct. App. 1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 6, 15, 18.
99 C.J.S. Workmen's Compensation §§ 128, 129.

§ 52-1-14. [Interstate commerce not subject to state legislation exempted.]

This act [52-1-1 to 52-1-69 NMSA 1978] shall not be construed to apply to business or pursuits or employments which according to law are so engaged in interstate commerce as to be not subject to the legislative power of the state, nor to persons injured while they are so engaged.

History: Laws 1929, ch. 113, § 11; C.S. 1929, § 156-111; 1941 Comp., § 57-911; 1953 Comp., § 59-10-11.

No compensation where applied for and paid in Texas. - Where both employer and employee were residents of Texas, and contract of employment was entered into in Texas to be performed in New Mexico, no recovery could be had for injury occurring in New Mexico where compensation for such injury had been applied for and paid in Texas. Hughey v. Ware, 34 N.M. 29, 276 P. 27 (1929).

Intrastate and interstate employees of bus lines. - Any of employees of Greyhound Lines engaged in strictly intrastate business should come under the Workmen's

Compensation Act, and their interstate employees might well be affected by the law if there is no federal legislation including them. 1935-36 Op. Att'y Gen. 47.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 15, 88, 92 to 94.
Application of state act to actions under Federal Employers' Liability Law, 12 A.L.R. 697; 36 A.L.R. 917; 89 A.L.R. 693.
What employees are engaged in interstate commerce with Federal Employers' Liability Law, 77 A.L.R. 1374; 90 A.L.R. 846.
Applicability of state act where employer is engaged in both interstate and intrastate commerce, 80 A.L.R. 1418.
Application for, or award, denial or acceptance of, compensation under state Workmen's Compensation Act as precluding action under Federal Employers' Liability Act by one engaged in interstate commerce within that act, 6 A.L.R.2d 581.
15 C.J.S. Commerce § 138; 99 C.J.S. Workmen's Compensation §§ 22 to 26, 138; 100 C.J.S. Workmen's Compensation §§ 518, 548.

§ 52-1-15. Employer.

As used in the Workers' Compensation Act [this article], unless the context otherwise requires, "employer" includes any person or body of persons, corporate or incorporate, and the legal representative of a deceased employer or the receiver or trustee of a person, corporation, association or partnership engaged in or carrying on for the purpose of business or trade, charitable organizations, except as provided in Section 52-1-6 NMSA 1978, and also includes the state and each county, municipality, school district, drainage, irrigation or conservancy district and public institution and administrative board thereof employing workers under the terms of the Workers' Compensation Act.

History: 1953 Comp., § 59-10-12.8, enacted by Laws 1965, ch. 295, § 8; 1975, ch. 284, § 5; 1989, ch. 263, § 11.

Cross-references. - As to employers who come within act, see 52-1-2 NMSA 1978. As to coverage by state agencies, see 52-1-3 NMSA 1978.

The 1989 amendment, effective June 16, 1989, substituted "Section 52-1-6 NMSA 1978" for "Section 59-10-4 NMSA 1953" and "municipality" for "city, town", and made minor stylistic changes.

Test of act's applicability. - It is the business or undertaking of the employer, not the particular duty or task of the employee at the time, which furnishes the test on whether the act is applicable. Rumley v. Middle Rio Grande Conservancy Dist., 40 N.M. 183, 57 P.2d 283 (1936) (decided under former law).

It is not purpose of Workmen's Compensation Act to permit suit against state without consent having been first obtained. There is no basis to assume that a school district can be sued without consent on the strength of its inclusion in 52-1-2 NMSA 1978 and former 59-10-12, 1953 Comp. McWhorter v. Board of Educ., 63 N.M. 421, 320 P.2d 1025 (1958) (decided under former law).

There is no express consent by state to be sued in workmen's compensation proceeding involving the state penitentiary and the consent is not to rest on implication. Day v. Penitentiary of N.M., 58 N.M. 391, 271 P.2d 831 (1954) (decided under former law).

State agencies within act though state immune from suit. - The fact that the state is immune from suit does not mean that the state agencies such as the New Mexico A & M College are at liberty to disobey the law. They are clearly within the terms of the Workmen's Compensation Act and must comply therewith. 1957-58 Op. Att'y Gen. No. 57-19 (opinion rendered under former law).

A college is under the provisions of the workmen's compensation law. 1957-58 Op. Att'y Gen. No. 57-19 (opinion rendered under former law).

Sixth judicial district may not be classified as an employer within the meaning of this act. 1967 Op. Att'y Gen. No. 67-131.

Compensation benefits are not based on physical injury itself but on the disability produced by the injury. Lozano v. Archer, 71 N.M. 175, 376 P.2d 963 (1962) (decided under former law).

Free from total disability. - Evidence of 15 to 20% medical impairment, standing alone, is not substantial evidence as to what was the disability of the workman. In order to be free from total disability, a workman must be physically able to do the work required of him in his regular employment. Lucero v. Koontz, 69 N.M. 417, 367 P.2d 916 (1962) (decided under former law).

Wage earning ability in competitive market. - Where claimant was not able to do much of anything and could not pursue a regular job of labor without special consideration and even with successful surgery he would never be able to do heavy work, would be more vulnerable to new injury, would constitute a hazard to any employer or carrier and that the claimant is able to assist his wife in running a small grocery store by keeping books and giving advice is not indicative of wage earning ability in a competitive market. Lozano v. Archer, 71 N.M. 175, 376 P.2d 963 (1962) (decided under former law).

Not reflected by employer willing to retain in limited capacity. - The willingness of the employer, through special consideration because of long service, to continue to employ claimant in a capacity limited in quality, dependability or quantity, by no means reflects claimant's wage earning ability. Lozano v. Archer, 71 N.M. 175, 376 P.2d 963 (1962) (decided under former law).

Meaning of entire loss of wage earning ability. - To suffer an entire loss of wage earning ability does not mean that a workman must be in a state of absolute helplessness, or unable to do work of any kind. It means the disablement of the workman to earn wages in the same kind of work, or work of a similar nature for which he is trained, or is accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. Lozano v. Archer, 71 N.M. 175, 376 P.2d 963 (1962) (decided under former law).

Measure of loss of wage earning ability. - Whether the question involved is one of total disability or of partial disability, under the act, is to be determined by what the workman earns or is able to earn. The loss of wage earning ability is in theory a comparison of what the employee would have earned had he not been injured and what he is able to earn in his injured condition. Lozano v. Archer, 71 N.M. 175, 376 P.2d 963 (1962) (decided under former law).

May determine total disability. - An employee who is so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist may well be classified as totally disabled. Lozano v. Archer, 71 N.M. 175, 376 P.2d 963 (1962) (decided under former law).

When total disability exists. - Where employee sued under Workmen's Compensation Act for total, permanent disability from a back injury, jury instruction that total disability is presumed when both hands, both arms, both feet or both legs or any two thereof are lost was erroneous. Total disability exists where there is complete disability and must be determined from the facts in each case. Gerrard v. Harvey & Newman Drilling Co., 59 N.M. 262, 282 P.2d 1105 (1955) (decided under former law).

Use or handling of explosives by employees of department of game and fish in no way imperils the protection provided such employees by the Workmen's Compensation Act. 1957-58 Op. Att'y Gen. No. 57-42 (opinion rendered under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 96, 97, 114 to 117.
Workers' compensation: liability of successive employers for disease or condition allegedly attributable to successive employments, 34 A.L.R.4th 958.
99 C.J.S. Workmen's Compensation §§ 37 to 58.

§ 52-1-16. Worker; real estate salesperson excepted.

A. As used in the Workers' Compensation Act [this article], unless the context otherwise requires, "worker" means any person who has entered into the employment of or works under contract of service or apprenticeship with an employer, except a person whose employment is purely casual and not for the purpose of the employer's trade or business. The term "worker" shall include "employee" and shall include the singular and

plural of both sexes. "Worker" includes public employee, as defined in the Workers' Compensation Act, including salaried public officers.

B. For the purposes of the Workers' Compensation Act, an individual who performs services as a qualified real estate salesperson shall not be treated as an employee and the person for whom the services are performed shall not be treated as an employer.

C. For the purpose of Subsection B of this section, a "qualified real estate salesperson" means an individual who:

(1) is a licensed real estate salesperson, associate broker or broker under contract with a real estate firm;

(2) receives substantially all of his remuneration, whether or not paid in cash, for the services performed as a real estate salesperson, associate broker or broker under contract with a real estate firm in direct relation to sales or other output, including the performance of services, rather than to the number of hours worked; and

(3) performs services pursuant to a written contract between himself and the person for whom the services are performed, and the contract provides that the individual will not be treated as an employee with respect to such services.

History: 1953 Comp., § 59-10-12.9, enacted by Laws 1965, ch. 295, § 9; 1979, ch. 199, § 3; 1986, ch. 17, § 1; 1989, ch. 263, § 12.

Cross-references. - As to work not casual employment, see 52-1-22 NMSA 1978.

The 1986 amendment added "real estate salesperson excepted" in the catchline, designated the existing provisions of this section as Subsection A, and added Subsections B and C.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes in the catchline, and in Subsections A and B.

Effective dates. - Laws 1986, ch. 17 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 21, 1986.

Basic purpose of the Workmen's Compensation Act is to ensure that industry carries the burden of personal injuries suffered by workmen in the course of their employment, and consequently, the relationship of the parties is not to be determined from the name attached to it by them, but from the consequences which the law imputes to their agreement to prevent evasion of the obligations which the act imposes upon employers. Yerbich v. Heald, 89 N.M. 67, 547 P.2d 72 (Ct. App. 1976).

What is reasonably incident to the employment depends upon the practices permitted in the particular employment and on the customs of the employment environment

generally. Whitehurst v. Rainbo Baking Co., 70 N.M. 468, 374 P.2d 849 (1962) (decided under former law).

Meaning of "work" under this act differs from meaning under Minimum Wage Act. - In arguing the meaning of "work" in the context of the Minimum Wage Act, workmen's compensation cases should not be considered because they deal with statutory definitions which differ from the definitions in the Minimum Wage Act. Garcia v. American Furn. Co., 101 N.M. 785, 689 P.2d 934 (Ct. App. 1984).

Definition of "workman" must be satisfied for Act to apply. - Although a school admitted that a student was acting as its agent or employee when an accident occurred, this admission does not by itself invoke the Workmen's Compensation Act if the Act's statutory definition of a "workman" is not otherwise satisfied. Trembath v. Riggs, 100 N.M. 615, 673 P.2d 1348 (Ct. App. 1983).

The words "employer and employee" as used in the New Mexico Workmen's Compensation Act are used in their natural sense and intended to describe the conventional relation between the employer who pays wages to an employee for his labor. Perea v. Board of Torrance County Comm'rs, 77 N.M. 543, 425 P.2d 308 (1967); Dibble v. Garcia, 98 N.M. 21, 644 P.2d 535 (Ct. App. 1982).

Statutory definition of workman does not include public officer or official, and election judge who was injured delivering ballot boxes was ruled a public officer and barred from collecting workmen's compensation. Candelaria v. Board of County Comm'rs, 77 N.M. 458, 423 P.2d 982 (1967).

Volunteer is not entitled to benefits of workmen's compensation laws. Jelso v. World Balloon Corp., 97 N.M. 164, 637 P.2d 846 (Ct. App. 1981).

Appellant must be employed by county in order to sue county under the Workmen's Compensation Act. Perea v. Board of Torrance County Comm'rs, 77 N.M. 543, 425 P.2d 308 (1967).

Question of fact distinguished from conclusion of law. - The question of whether the claimant worked for one or the other of the corporations is one of fact, as distinguished from the question of whether the relationship of master and servant or that of an independent contractor existed, which is a conclusion of law. Creley v. Western Constructors, Inc., 79 N.M. 727, 449 P.2d 329 (1969).

It is for trier of facts to determine weight to be given to evidence and the credibility of witnesses. Creley v. Western Constructors, Inc., 79 N.M. 727, 449 P.2d 329 (1969).

Workmen's Compensation Act is based upon employer-employee relationship. Perea v. Board of Torrance County Comm'rs, 77 N.M. 543, 425 P.2d 308 (1967).

Employer-employee relationship, to which the act applies, is one created by contract between the parties; consequently, if the employer in this case seeks to avail itself of the Workmen's Compensation Act as a bar to a common-law action, then it must show a valid contract of employment between it and the minor employee. Maynerich v. Little Bear Enters., Inc., 82 N.M. 650, 485 P.2d 984 (Ct. App. 1971).

Primary test to determine employment status is the right to control the details of the work. Barger v. Ford Sales Co., 89 N.M. 25, 546 P.2d 873 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

The principal test for determining whether an employer-employee relationship exists, as opposed to an independent contractor relationship, is whether the employer has the right to control the details of the work. Jelso v. World Balloon Corp., 97 N.M. 164, 637 P.2d 846 (Ct. App. 1981).

The right to control is a test for determining an employer-employee relationship. Dibble v. Garcia, 98 N.M. 21, 644 P.2d 535 (Ct. App. 1982).

One of the tests of relation of employer and employee is that the employer retains the right to direct the manner in which his business shall be done and the result to be accomplished. Perea v. Board of Torrance County Comm'rs, 77 N.M. 543, 425 P.2d 308 (1967).

Factors considered in determining right to control. - Factors to be considered in determining whether the right to control exists are: (1) the right or exercise of control of the details of the work; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire. Dibble v. Garcia, 98 N.M. 21, 644 P.2d 535 (Ct. App. 1982).

Power of discharge is only one item to be considered in determining whether an individual is an employee and whether that item is of primary importance depends on the circumstances of the case. Yerbich v. Heald, 89 N.M. 67, 547 P.2d 72 (Ct. App. 1976).

Method of payment is merely one of the subordinate factors considered in the right to control test. This factor can be outweighed by other factors. The mere payment of wages is not sufficient to establish the employer and employee relationship. Perea v. Board of Torrance County Comm'rs, 77 N.M. 543, 425 P.2d 308 (1967).

Length of time in work does not change test. - Whether the injured person had been doing this work for five or 50 minutes, and whether he would have continued in this work for a shorter or greater length of time in no way changes the test. The test is: whose work was being done at the time of the accident? Barger v. Ford Sales Co., 89 N.M. 25, 546 P.2d 873 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Limited control usually creates independent contractor relationship. - Where control is limited to the ultimate results to be achieved under a contract, the relationship is usually

that of an independent contractor. Dibble v. Garcia, 98 N.M. 21, 644 P.2d 535 (Ct. App. 1982).

Mutuality of obligations and agreement required. - To establish the relationship of employer-employee, there must exist a mutuality of obligations and agreement. There must be present both a duty of employee to perform services subject to an employer's right to control the details of performance, and the worker's right to receive compensation. Jelso v. World Balloon Corp., 97 N.M. 164, 637 P.2d 846 (Ct. App. 1981).

Mutual assent required. - Existence of the relationship of employer and employee depends upon a contract of employment and cannot exist without mutual assent, express or implied. Jelso v. World Balloon Corp., 97 N.M. 164, 637 P.2d 846 (Ct. App. 1981).

"Relative nature of the work" test is another method for determining an employer-employee relationship. Dibble v. Garcia, 98 N.M. 21, 644 P.2d 535 (Ct. App. 1982).

As to the factors which make up the "relative nature of the work" test, see Dibble v. Garcia, 98 N.M. 21, 644 P.2d 535 (Ct. App. 1982).

Hope of future employment alone is insufficient evidence to show a contract for hire. Jelso v. World Balloon Corp., 97 N.M. 164, 637 P.2d 846 (Ct. App. 1981).

Findings to support conclusion of employee. - The trial court's findings that deceased was paid by the hour, had taxes withheld from his pay, had entered into a contract of hire and could be discharged any time defendant felt his work was unsatisfactory, support the conclusion that deceased was defendant's employee and therefore covered under the Workmen's Compensation Act. Abbott v. Donathon, 86 N.M. 477, 525 P.2d 404 (Ct. App. 1974).

There is no single or sure criterion affording test of when relationship is that of employee and when that of an independent contractor, and "a fact found controlling in one combination may have a minor importance in another." Nelson v. Eidal Trailer Co., 58 N.M. 314, 270 P.2d 720 (1954) (decided under former law).

Principal factor to be considered in determining whether individual is employee or an independent contractor in workmen's compensation is the power on the part of the employer to control, which may be inferred from: (1) control of the manner and means of performance, (2) the right to discharge at will and (3) the method of payment (i.e., lump-sum, piece-rate, periodic wages), among other things. A second factor to be considered is whose work is being done; that is, is it a separate piece of work or an integral part of the employer's business. Consequently, summary judgment in favor of defendant, owner of a lumber business, was reversed so the relationship between him and the owner of a log-hauling truck driven by deceased could be determined at trial, so as to

determine whether plaintiff's deceased was an employee of the lumber business. Yerbich v. Heald, 89 N.M. 67, 547 P.2d 72 (Ct. App. 1976).

Chief consideration which determines one to be independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for. Shipman v. Macco Corp., 74 N.M. 174, 392 P.2d 9 (1964) (decided under former law).

Company not liable for death of independent contractor's helper. - Where contract between truck loader and manufacturing company left the time and manner of performance and the hiring and payment of extra help to the discretion of the loader, loader was an independent contractor, and manufacturer was not liable for workmen's compensation for death of loader's employee. Nelson v. Eidal Trailer Co., 58 N.M. 314, 270 P.2d 720 (1954) (decided under former law).

Messenger who delivered ballot boxes to county clerk was independent contractor, and the statutory definition of workman does not include an independent contractor. Messenger, therefore, was not an employee, and not entitled to workmen's compensation. Candelaria v. Board of County Comm'rs, 77 N.M. 458, 423 P.2d 982 (1967).

Controlling factor whether servant of employer can be special servant of another. - In the case of Weese v. Stoddard, 63 N.M. 20, 312 P.2d 545 (1957), in considering the test for determining whether a general servant of one employer can become the special or particular servant of another, the court said: "The controlling factor in determining this question is: Whose work is being performed and who controlled and directed the agent in his work?" Brown v. Pot Creek Logging & Lumber Co., 73 N.M. 178, 386 P.2d 602 (1963) (decided under former law).

Special employee of one though employed by another. - Where plaintiff performed the duties of defendant, although employed by another company, for compensation, and injured himself, and was under the control and supervision of defendant, he is a workman under this section and became a special employee of defendant. Length of time of employment is not the test: the test is whose work is being done at the time of the accident, and who has the right to control the details of the work. Because plaintiff performed defendant's activities and duties, it was not a casual employment and was not an exception to this rule. Barger v. Ford Sales Co., 89 N.M. 25, 546 P.2d 873 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Special temporary employees could recover. - Where a buyer of water from another state loaned his employees to the seller in this state to repair a well, the employees became special temporary employees of seller and could recover for injuries sustained during the repair work under the compensation law only. The act extended to persons not employees at common law. Jones v. George F. Getty Oil Co. 92 F.2d 255 (10th Cir. 1937), cert. denied, 303 U.S. 644, 58 S. Ct. 644, 82 L. Ed. 1106 (1938) (decided under former law).

Employee injured during off-duty hours while working for another. - Where claimant was regularly employed by the defendant corporation, but the particular work or employment giving rise to injury was undertaken on off-duty hours from the regular job, he was doing work for another corporation away from the premises of his regular employer and was so engaged when his injury occurred, then claimant was a special employee of the other corporation. Brown v. Pot Creek Logging & Lumber Co., 73 N.M. 178, 386 P.2d 602 (1963) (decided under former law).

Liability of partnership's insurer for injuries to working partner. - Under the terms of the New Mexico Compensation Act, if a partnership, as employer, was not liable for injuries to a working partner then its insurer was not liable under the act through a contractual relationship between the insurance agent, the insurance company and the partnership. Jernigan v. Clark & Day Exploration Co., 65 N.M. 355, 337 P.2d 614 (1959) (decided under former law).

As working partner and, hence, occupying status of employer, plaintiff was not covered by the Workmen's Compensation Act of New Mexico. Jernigan v. Clark & Day Exploration Co., 65 N.M. 335, 337 P.2d 614 (1959) (decided under former law).

Casual employment not for purpose of employer's business. - Where plaintiff was hired as an extra man for a specific day, did not know for which corporation he was employed and was injured while performing work for the benefit of a corporation other than that by which he was hired, plaintiff was a person whose employment was "purely casual" and not for the purpose of the employer's trade or business. Barber v. Los Alamos Beverage Corp., 65 N.M. 323, 337 P.2d 394 (1959) (decided under former law).

Not casual employment where necessary part of process. - Where the decedent was hauling away dirt obtained from the excavation of a pond by defendant, and the hauling of dirt was a necessary part of the process of excavation, the decedent was not a casual employee. This work, which was not casual employment under 52-1-22 NMSA 1978, was also not casual employment under this section. Abbott v. Donathon, 86 N.M. 477, 525 P.2d 404 (Ct. App. 1974).

Principal factors when performing duties for state court, in determining the status of an employee, are the power of appointment and removal and the fixing of salaries, not the fact that the employee may be paid from the fund of a lesser political entity. Perea v. Board of Torrance County Comm'rs, 77 N.M. 543, 425 P.2d 308 (1967).

Deputy district court clerk not county employee. - In workmen's compensation suit, plaintiff, a deputy district court clerk and juvenile probation officer who was appointed by the district court judge and was under the supervision and control of the district judge and district court clerk, was not considered a county employee under the Workmen's Compensation Act where county commissioners neither appointed him nor exercised any supervision or control of his duties, notwithstanding the argument that the district court fund was a county fund. Perea v. Board of Torrance County Comm'rs, 77 N.M. 543, 425 P.2d 308 (1967).

Public officers not entitled to benefits. - Prior to 1972, members of the New Mexico state labor and industrial commission, the state fair commission, the racing commission and the livestock board, were all public officers, not employees, and not entitled to benefits under this act. 1968 Op. Att'y Gen. No. 68-109.

Illegally employed minor not covered and may sue. - A contract, the performance of which violates a penal statute, is illegal and at least voidable, and will not provide a basis for the assertion of rights under such contract, particularly by the party upon whom the statute imposes the penalty; therefore, an illegally employed minor is not covered by the act and therefore may pursue a common-law action. Maynerich v. Little Bear Enters., Inc., 82 N.M. 650, 485 P.2d 984 (Ct. App. 1971).

Citizen aiding peace officers entitled to benefits. - Aiding peace officers in quelling riots and coping with unlawful assemblies and other dangerous situations where citizen has been impressed into service entitles the citizen to compensation benefits if he is injured in the course of rendering such assistance. Eaton v. Bernalillo County, 46 N.M. 318, 128 P.2d 738 (1942).

Mounted patrol members eligible. - Members of the mounted patrol who have been duly called out by members of the state police are eligible for workmen's compensation coverage. Whether they are in fact covered by the workmen's compensation policy now in effect for the state police is a question that can only be answered by reference to the policy. If the policy covers only regularly appointed, active members of the state police, it probably does not cover persons who are deputized to assist the state police. On the other hand, if it includes all persons who may be called out to assist the state police, such as members of the mounted patrol or members of the state police reserve, then such persons are covered. 1959-60 Op. Att'y Gen. No. 60-239 (opinion rendered under former law).

Coffee breaks consented to by employer. - Coffee breaks for the personal comfort of employees during working hours are consented to by the employer. Whitehurst v. Rainbo Baking Co., 70 N.M. 468, 374 P.2d 849 (1962) (decided under former law).

Law reviews. - For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 96 to 185.
Employees within provisions applicable to operation of railroads, 7 A.L.R. 1160.
Compensation for death of or injury to peace officer employed in private plant, 8 A.L.R. 190.
Constitutionality of provisions of Workmen's Compensation Act applicable to public officers or employees, 53 A.L.R. 1290.
Compensation for injuries received in connection with air navigation, 83 A.L.R. 403; 99 A.L.R. 173; 155 A.L.R. 1026.
Needy persons put to work by municipality or other public body as means of extending

aid to them as within protection of compensation act, 96 A.L.R. 1154; 127 A.L.R. 1483.
Musicians and other entertainers as employees of hotel or restaurant in which they perform, within Workmen's Compensation Act, 158 A.L.R. 915; 172 A.L.R. 325.
Constitutional or statutory provision referring to "employees" as including public officers, 5 A.L.R.2d 415.
Workers' compensation: student athlete as "employee" of college or university providing scholarship or similar financial assistance, 58 A.L.R.4th 1259.
Workers' compensation: injuries incurred during labor activity, 61 A.L.R.4th 196.
99 C.J.S. Workmen's Compensation §§ 59 to 119.

§ 52-1-17. Dependents.

As used in the Workers' Compensation Act [this article], unless the context otherwise requires, the following persons, and they only, shall be deemed dependents and entitled to compensation under the provisions of the Workers' Compensation Act:

A. a child under eighteen years of age or incapable of self-support and unmarried or under twenty-three years of age if enrolled as full-time student in any accredited educational institution;

B. the widow or widower, only if living with the deceased at the time of his death or legally entitled to be supported by him, including a divorced spouse entitled to alimony;

C. a parent or grandparent only if actually dependent, wholly or partially, upon the deceased; and

D. a grandchild, brother or sister only if under eighteen years of age or incapable of self-support, and wholly dependent upon the deceased.

The relation of dependency must exist at the time of the injury.

E. Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the injury, and their right to any death benefit shall cease upon the happening of any one of the following contigencies [contingencies]:

(1) upon the marriage of the widow or widower;

(2) upon a child, grandchild, brother or sister reaching the age of eighteen years, unless the child, grandchild, brother or sister at such time is physically or mentally incapacitated from earnings, or upon a dependent child, grandchild, brother or sister becoming self-supporting prior to attaining that age or if a child, grandchild, brother or sister over eighteen years of age who is enrolled as a full-time student in any accredited educational institution ceases to be so enrolled or reaches the age of twenty-three. A child, grandchild, brother or sister who originally qualified as a dependent by virtue of being less than eighteen years of age may, upon reaching age eighteen, continue to

qualify if physically or mentally incapable of self-support, actually dependent or enrolled in an educational institution; or

(3) upon the death of any dependent.

History: 1953 Comp., § 59-10-12.10, enacted by Laws 1965, ch. 295, § 10; 1973, ch. 47, § 1; 1977, ch. 275, § 1; 1989, ch. 263, § 13.

Cross-references. - As to definition of child, see 52-1-18 NMSA 1978.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes throughout the section.

Constitutionality of Subsections A and B. - See Shahan v. Beasley Hot Shot Serv., Inc., 91 N.M. 462, 575 P.2d 1347 (1978).

Legislative intent of this section and 52-1-46 NMSA 1978, is to give benefits only to those who are "eligible dependents" and not "heirs" as in the case of descent and distribution. Clauss v. Electronic City, 93 N.M. 75, 596 P.2d 518 (Ct. App. 1979).

Relation of dependency simply means the character of the relationship that the family has to the deceased. Shahan v. Beasley Hot Shot Serv., Inc., 91 N.M. 462, 575 P.2d 1347 (1978).

"Legally entitled to support" means entitled to support according to law. Kau v. Bennett, 91 N.M. 162, 571 P.2d 819 (Ct. App. 1977).

After several years of marriage, plaintiff's husband disappeared. They were not divorced; she never abandoned him or remarried during his absence. Months passed and she was notified of his death. These circumstances did not defeat her being legally entitled to be supported by her deceased husband, at the time of his death. Kau v. Bennett, 91 N.M. 162, 571 P.2d 819 (Ct. App. 1977).

Rights, remedies of worker are separate and distinct from dependent's; a dependent's claim is not derivative of the worker, but is given him by statute independent of the worker. Pedrazza v. Sid Fleming Contractor, 94 N.M. 59, 607 P.2d 597 (1980).

Test for dependency is whether the deceased employee had actually contributed to claimant's support, and whether they relied upon such earnings in whole or in part for their livelihood. Employers Mut. Liab. Ins. Co. v. Jarde, 73 N.M. 371, 388 P.2d 382 (1963) (decided under former law).

Dependency depends upon employee contributing and claimant relying on support. - "Dependency" under the act did not necessarily depend upon whether claimants could support themselves without earnings of the deceased, but rather it depended upon whether the deceased employee had actually contributed to claimants' support and

whether they relied upon such earnings in whole or in part for their livelihood. Barney Cockburn & Sons v. Lane, 45 N.M. 542, 119 P.2d 104 (1941) (decided under former law).

While legal liability to support does not of itself prove dependency, the failure of a husband to support his wife and children for a considerable time prior to an accident does not of itself disprove their actual dependency. These are but circumstances to be taken into consideration in determining dependency. Actual dependency is a question of fact to be determined by all the facts and circumstances of each case. Houston v. Lovington Storage Co., 75 N.M. 60, 400 P.2d 476 (1965).

Legal liability to support did not of itself prove dependency. Merrill v. Penasco Lumber Co., 27 N.M. 632, 204 P. 72 (1922) (decided under former law).

Heirship without defined dependency would not authorize compensation, but dependency without heirship in certain cases would do so. Rumley v. Middle Rio Grande Conservancy Dist., 40 N.M. 183, 57 P.2d 283 (1936) (decided under former law).

Dependency under statute is a question of fact. It depends upon whether the deceased employee had actually contributed to claimant's support and whether claimant relied upon such contributions in whole or in part for his livelihood. Wilson v. Mason, 78 N.M. 27, 426 P.2d 789 (Ct. App. 1967).

Existence of actual partial dependency is question of fact to be proved by the evidence. Ferris v. Thomas Drilling Co., 62 N.M. 283, 309 P.2d 225 (1957) (decided under former law).

Actual partial dependency may exist even if the evidence shows that the claimant could have existed without the contributions of the deceased employee. It depends upon whether the deceased employee had actually contributed to claimant's support and whether he relied upon such earnings in whole or in part for his livelihood. Ferris v. Thomas Drilling Co., 62 N.M. 283, 309 P.2d 225 (1957) (decided under former law).

Dependency and its extent are to be determined as of date of injury, and upon the happening of certain contingencies the right to any death benefits shall cease, i.e., upon the marriage of the widow or widower, upon the child reaching the age of 18 or becoming self-supporting or upon the death of any dependent. Employers Mut. Liab. Ins. Co. v. Jarde, 73 N.M. 371, 388 P.2d 382 (1963) (decided under former law).

"Relative nature of the work" test is a better test than "right to control" test in determining whether workmen's compensation claimant was an employee or independent contractor. "Relative nature of work" test examines, first, the character of plaintiff's work or business, and second, the relationship of claimant's work to the purported employer's business. Therefore, claimant hired by insurance company as "storm trooper" or "catastrophe adjuster" was an independent contractor not eligible for

workmen's compensation funds, even though insurance company had right to fire him at anytime, where claimant received a fee rather than wages, paid his own personal expenses, set his own hours, used his own equipment, was not subject to deduction for withholding tax or social security, set his own methods of investigation and could refuse to take claims. Burton v. Crawford & Co., 89 N.M. 436, 553 P.2d 716 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Presumption of marriage. - In proceeding under Workmen's Compensation Act by second wife to recover compensation for death of husband, presumption of validity arising from second marriage was a superior presumption to the presumption of the continuance of the former marriage relation, and, in absence of countervailing proof, was sufficient to overcome the latter. De Vigil v. Albuquerque & Cerrillos Coal Co., 33 N.M. 479, 270 P. 791 (1928) (decided under former law).

Where the validity of a subsequent marriage is attacked on the basis of the continuing existence of a prior marriage at the time the second was contracted, a presumption of validity attaches to the last marriage. Schall v. Schall, 97 N.M. 665, 642 P.2d 1124 (Ct. App. 1982).

Impermissible discrimination does not exist where natural children and stepchildren share equally in workmen's compensation benefits. Shahan v. Beasley Hot Shot Serv., Inc., 91 N.M. 462, 575 P.2d 1347 (1978).

Wife denied benefits where separated and supported by another. - A first wife not claiming compensation benefits as a widow, but on the basis that she was legally entitled to be supported by the deceased, was denied benefits where she and the deceased had been separated and she began living with, and was supported by, another man for approximately 10 years. Lauderdale v. Hydro Conduit Corp., 89 N.M. 579, 555 P.2d 700 (Ct. App. 1976).

And widow denied because deceased not divorced from first wife. - A surviving widow was denied benefits when her husband was killed in a compensable accident because of clear and convincing evidence that the deceased and his first wife had never obtained a divorce. Lauderdale v. Hydro Conduit Corp., 89 N.M. 579, 555 P.2d 700 (Ct. App. 1976).

Failure to support before accident. - Failure of a husband to support his wife and children for a considerable time prior to the accident which caused his death did not of itself prove that they were not actual dependents. Merrill v. Penasco Lumber Co., 27 N.M. 632, 204 P. 72 (1922) (decided under former law).

Failure of husband to support wife was only one of several factors to be considered in determining dependency, and the existence of the marriage relation alone would not prove it. Husband's failure to support wife did not alone negative it. In re Tocci, 45 N.M. 133, 112 P.2d 515 (1941) (decided under former law).

Widow's right to benefits ceases upon her remarriage under the Workmen's Compensation Act. Sanchez v. Bernalillo County, 57 N.M. 217, 257 P.2d 909 (1953) (decided under former law).

Child of deceased workman under age of 18 years is actual dependent as a matter of law. Proof that the deceased workman left surviving a child under the age of 18 years sufficiently establishes its dependency; but the presumption of dependency is rebuttable. Snarr v. Carroll, 63 N.M. 380, 320 P.2d 736 (1958) (decided under former law).

Dependency of older child. - After establishing that dependents were entitled to compensation, proof that deceased workman had a child under 18 was enough to establish dependency unless it appeared further that the child was self-supporting, but before a married child over 18 could be claimed as a dependent it would have to be shown that the child was incapable of self-support and was actually dependent upon the father. Hamilton v. Prestridge, 47 N.M. 440, 144 P.2d 156 (1943) (decided under former law).

Subsection A does not require a showing of actual dependency in the case of children under the age of 23 and enrolled as full-time students. Garrison v. Safeway Stores, 102 N.M. 179, 692 P.2d 1328 (Ct. App. 1984).

Contributions of child to his own education fund does not establish parents' dependency because the contribution was not for the support of his parents. Wilson v. Mason, 78 N.M. 27, 426 P.2d 789 (Ct. App. 1967).

Dependent parents. - The father and mother of an unmarried son without children were dependents, where neither were employed and the son was their sole support. Gonzales v. Chino Copper Co., 29 N.M. 228, 222 P. 903 (1924) (decided under former law).

Parents recover where dependency of child not shown. - Where there was a failure of proof of actual dependency of the child, partially dependent parents were entitled to recover. Snarr v. Carroll, 63 N.M. 380, 320 P.2d 736 (1958) (decided under former law).

And benefits never asked for child. - Where the child of the workman had lived with its mother and stepfather since its birth, and had been supported exclusively by them, and they had never asked for death benefits for the child as a result of the death of its father, it follows that parents of the workman are entitled to compensation if actually dependent upon the workman. Snarr v. Carroll, 63 N.M. 380, 320 P.2d 736 (1958) (decided under former law).

Parent earning more than costs not conclusive as to dependency. - That a parent, having no dependents, earned in excess of necessary cost of food, housing and clothes was not conclusive against claim of dependency. Dimas v. Albuquerque & Cerrillos Coal Co., 35 N.M. 591, 3 P.2d 1068 (1931) (decided under former law).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Workmen's Compensation," see 11 N.M.L. Rev. 235 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation § 47; 82 Am. Jur. 2d Workmen's Compensation §§ 535, 545 to 547, 575, 656.
Children of one with whom deceased workman was living in illicit relations as dependents, 154 A.L.R. 698.
Posthumous children and children born after accident as dependents, 18 A.L.R.3d 900.
99 C.J.S. Workmen's Compensation §§ 19, 62, 130, 132 to 149; 100 C.J.S. Workmen's Compensation § 520.

§ 52-1-18. Child.

As used in the Workers' Compensation Act [this article], unless the context otherwise requires, "child" includes stepchildren, adopted children, posthumous children and acknowledged illegitimate children but does not include married children unless dependent. The words "adopted" or "adoption" as used in the Workers' Compensation Act shall include cases where persons are treated as adopted as well as those of legal adoption.

History: 1953 Comp., § 59-10-12.11, enacted by Laws 1965, ch. 295, § 11; 1989, ch. 263, § 14.

Cross-references. - As to meaning of dependents, see 52-1-17 NMSA 1978.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes.

Amount of compensation for child. - A child was not entitled to compensation in an amount equal to 25% of the earnings of the deceased where the deceased left a widow, no specific amount being provided as compensation to the child under such circumstances, and where deceased employee was survived by widow and child under 18 years by a prior marriage, compensation for both was limited to 45% of the workman's wages not to exceed $18.00 per week. Wilson v. Rowan Drilling Co., 55 N.M. 81, 227 P.2d 365 (1950) (decided under former law).

Allowance for unborn child. - Allowance was to be made in compensation proceeding for a child en ventre su mere for the period from the employee's death and child's birth, with proviso that compensation could be reduced if the child should be born dead or should die. Neeley v. Union Potash & Chem. Co., 47 N.M. 100, 137 P.2d 312 (1943) (decided under former law).

Treatment of adopted children. - Former statute indicated a legislative thought that an adopted child should be treated "in all respects" as a natural child in applying the Workmen's Compensation Act. Hahn v. Sorgen, 50 N.M. 83, 171 P.2d 308 (1946) (decided under former law).

Stepchildren and natural children treated equally. - See Schall v. Schall, 97 N.M. 665, 642 P.2d 1124 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 191, 195, 202; 82 Am. Jur. 2d Workmen's Compensation §§ 402, 656.
99 C.J.S. Workmen's Compensation §§ 112 to 114, 146, 147; 100 C.J.S. Workmen's Compensation § 552.

§ 52-1-19. Injury by accident; course of employment.

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

History: 1953 Comp., § 59-10-12.12, enacted by Laws 1975, ch. 284, § 6; 1986, ch. 22, § 3; 1987, ch. 235, § 9.

Repeals and reenactments. - Laws 1975, ch. 284, § 6, repealed former 59-10-12.12, 1953 Comp., relating to injuries sustained in extra-hazardous occupations or pursuit, and enacted a new 59-10-12.12, 1953 Comp.

The 1986 amendment added the last sentence.

The 1987 amendment, effective June 19, 1987, substituted "workers' " for "workmen's" near the beginning and deleted the former last sentence which read "As used in this section, 'accident' means any unlooked for mishap or untoward event which is not expected or designed".

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section is effective on May 21, 1986.

Compiler's notes. - Laws 1987, ch. 235, § 54A, effective June 19, 1987, repealed Laws 1986, ch. 22, § 105 which had formerly repealed this section effective July 1, 1987.

Aid to construction. - The maxim "expressio unius est exclusio alterius," was only an aid to construction and did not apply to provision of Workmen's Compensation Act reading: "injuries sustained in extra-hazardous duties incident to the business," and "The right to the compensation provided for in this act, . . . for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases" when the conditions

and circumstances stated and required by 52-1-9 NMSA 1978 were present. Wilson v. Rowan Drilling Co., 55 N.M. 81, 227 P.2d 365 (1951) (decided under former law).

Question of law where facts undisputed. - Where the historical facts of the case are undisputed, the question whether the accident arose out of and in the course of the employment is a question of law. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976).

Coverage of this section applies only to "work." Hayes v. Ampex Corp., 85 N.M. 444, 512 P.2d 1280 (Ct. App. 1973) (decided under former law).

This section provides workmen's compensation coverage for injuries "while at work" and excludes from coverage nonnegligent injuries occurring after leaving the duties of employment. Hayes v. Ampex Corp., 85 N.M. 444, 512 P.2d 1280 (Ct. App. 1973) (decided under former law).

"While at work". - Under this section, for an injury to have been sustained in an extra-hazardous occupation or pursuit, it must have been sustained "while at work" either in or about the premises of the employer or at any place where the employer's business requires the presence of the employee. "While at work" is synonymous with "in the course of the employment." Hayes v. Ampex Corp., 85 N.M. 444, 512 P.2d 1280 (Ct. App. 1973) (decided under former law).

The "duties of employment" referred to in the last phrase of this section is synonymous with "while at work," which in turn is synonymous with "in the course of the employment." Hayes v. Ampex Corp., 85 N.M. 444, 512 P.2d 1280 (Ct. App. 1973) (decided under former law).

Injury is said to arise in course of employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while he is fulfilling his duties or engaged in doing something incidental thereto. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976).

An employee's injury arose in the course of employment if it happened within the period of employment at some place where the employee might reasonably be and while he was reasonably fulfilling duties of his employment or was doing something incidental thereto. McKinney v. Dorlac, 48 N.M. 149, 146 P.2d 867 (1944) (decided under former law).

Heart attack caused by employment is accidental injury within this article. Segura v. Kaiser Steel Corp., 102 N.M. 535, 697 P.2d 954 (Ct. App. 1984).

Stroke arising out of employment. - A worker's injury, a stroke which was a result of on the job stress resulting from a safety-related incident, "arose out of" his employment. Shadbolt v. Schneider, Inc., 103 N.M. 544, 710 P.2d 738 (Ct. App. 1985).

Liability under dual-purpose doctrine. - The dual-purpose doctrine provides that when a worker is on a trip which serves both a business and a personal purpose, and the business purpose would have necessitated the trip by someone even if it had not coincided with the personal purpose, then injury occurring on the trip is within the course of the worker's employment. Clemmer v. Carpenter, 98 N.M. 302, 648 P.2d 341 (Ct. App. 1982).

Scope of employment is to be determined from directions of employer, and not from any agreement between the employee and her fellow employees; thus, the fact that an employee agreed with her fellow employees to form a car pool at a shopping center before proceeding to a required conference was of no consequence to the scope of her employment. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976).

Ingress and egress from employer's premises. - When an employee is going to or coming from his place of work and is on the employer's premises, he is within the protective ambit of the Workers' Compensation Act (this article), at least when using the customary means of ingress and egress or route of employee's travel or is otherwise injured in a place he may reasonably be expected to be. Dupper v. Liberty Mut. Ins. Co., 105 N.M. 503, 734 P.2d 743 (1987).

Going to and returning from work not in course of employment. - It is a general rule, and so provided by statute in this state, that an employee is not in the course of his employment while going to and returning from his work. Hayes v. Ampex Corp., 85 N.M. 444, 512 P.2d 1280 (Ct. App. 1973) (decided under former law).

Although courts have consistently resolved reasonable doubts in favor of the employee in many borderline areas, they have not extended this liberal treatment to the on-premises injury occurring before the work-day commences or as it ends. Gonzales v. New Mexico State Hwy. Dep't, 97 N.M. 98, 637 P.2d 48 (Ct. App. 1981).

But there are exceptions. - Ordinarily "injuries" sustained by employees while on their way to assume the duties of their employment or after leaving such duties are not compensable. But there are exceptions to the rule; among them, where the employment requires the employee to travel on the highways and where the employer contracts to and does furnish transportation to and from work. Martinez v. Fidel, 61 N.M. 6, 293 P.2d 654 (1956) (decided under former law).

Such as where employer agreed to furnish transportation. - While employee ordinarily was not in course of employment when injured while traveling to or from work, where employer agreed to furnish transportation, and employee was paid by his employer to transport himself and other employees, and was injured fatally during such a journey, his death arose out of and in course of employment, and was compensable. Barrington v. Johnn Drilling Co., 51 N.M. 172, 181 P.2d 166 (1947) (decided under former law).

Where employer in employment contract agreed to transport employees to and from

work, an employee who was injured while being transported suffered his injury in the course of employment. Barrington v. Johnn Drilling Co., 51 N.M. 172, 181 P.2d 166 (1947) (decided under former law).

Employee required to drive city vehicle to and from work and remain on call at all times at home was within his "course of employment" when driving home, even though he spent two and one-half hours after work, and before his drive, socializing and drinking in a bar. Salazar v. City of Santa Fe, 102 N.M. 172, 692 P.2d 1321 (Ct. App. 1983).

As to advisability of overturning the "going and coming" rule, see Gonzales v. New Mexico State Hwy. Dep't, 97 N.M. 98, 637 P.2d 48 (Ct. App. 1981).

Traveling between job sites does not fall within the "going and coming" rule, and an employee who is injured while going from job site to job site will not be excluded from receiving benefits. Garcia v. Phil Garcia's Elec. Contractor, 99 N.M. 374, 658 P.2d 449 (Ct. App. 1982).

Off-premise activity during lunch or meal period. - Where the employee is engaged in an off-premise activity during the lunch or meal period in furtherance of his employer's interests, and at the direction of or with the consent of his employer, an injury sustained by the employee may be compensable under the Workers' Compensation Act. Smith v. City of Albuquerque, 105 N.M. 125, 729 P.2d 1379 (Ct. App. 1986).

A back injury sustained when claimant, a city risk management coordinator, tripped and fell in a restaurant after having lunch with a city attorney was compensable, where the primary purpose of the lunch was to discuss cases on which they had been working, and 75% of the lunch meeting was devoted to the discussion of city business. Smith v. City of Albuquerque, 105 N.M. 125, 729 P.2d 1379 (Ct. App. 1986).

Teacher leaving school premises for lunch. - A teacher injured as he was leaving school premises for lunch, when he was struck by a pipe being hauled in a truck driven by a student as a favor to another teacher, is not in the course of employment when the accident occurred, so recovery under the Workmen's Compensation Act is barred. Trembath v. Riggs, 100 N.M. 615, 673 P.2d 1348 (Ct. App. 1983).

Worker's claim was not barred by the going and coming rule simply because the accident occurred after claimant had left the employer's designated parking lot at a shopping mall but before she had arrived at her employer's shop in the mall, where she had met a coworker with whom she had coffee in a mall restaurant before slipping on a heavily waxed floor. Lovato v. Maxim's Beauty Salon, Inc., N.M. , 782 P.2d 391 (Ct. App. 1989).

Liability in dual-employment situation. - In the dual-employment situation, if the accident occurs when the worker is clearly performing services for only one employer, then that employer is liable for any workmen's compensation benefits. If, however, the services being performed at the time of the accident cannot be attributed to a specific employer,

but are services performed for both employers, then both employers are liable. In the latter case, the benefits are apportioned between the employers on the basis of the percentage of the worker's total wages paid by each employer. Clemmer v. Carpenter, 98 N.M. 302, 648 P.2d 341 (Ct. App. 1982).

Requirement or custom established by employer. - An employee who comes upon the premises on an off day to receive a paycheck, which is a requirement or custom established by the employer, and is injured while on the premises for that purpose, sustains the injury while in the course of employment. Martinez v. Stoller, 96 N.M. 571, 632 P.2d 1209 (Ct. App. 1981).

Proof of negligence of employer is required under "going and coming" provision when work for the employer has ceased, even though the injury may occur while the employee is still upon the employer's premises. Hayes v. Ampex Corp., 85 N.M. 444, 512 P.2d 1280 (Ct. App. 1973) (decided under former law).

Being on employer's premises and subject to rules not covered. - Plaintiff was not covered under this section where she claimed that she had not left the duties of her employment because so long as she was on the employer's premises she was subject to various rules and regulations of the employer, the breach of which could result in disciplinary action against her. Hayes v. Ampex Corp., 85 N.M. 444, 512 P.2d 1280 (Ct. App. 1973) (decided under former law).

Except for proof of employer negligence. - Proof of negligence of the employer is required under the "going and coming" provision of the New Mexico Workmen's Compensation Act, when work for the employer has ceased, even though the injury may occur while the employee is still upon the employer's premises. McDonald v. Artesia Gen. Hosp., 73 N.M. 188, 386 P.2d 708 (1963) (decided under former law).

In action for compensation for death of employee killed in automobile collision after leaving work over most practical and usual route traveled by him and other employees on premises of employer, claimant could not recover without proof of employer's negligence. Caviness v. Driscoll Constr. Co., 39 N.M. 441, 49 P.2d 251 (1935); Cuellar v. American Employers' Ins. Co., 36 N.M. 141, 9 P.2d 685 (1932) (decided under former law).

Under the provisions of this section, an employee ordinarily has no compensable claim if injured while on his way to assuming the duties of his employment or after leaving such duties. On the other hand, an employee does have a compensable claim if injured while on his way to assuming his duties or leaving his duties if the employer's negligence was the proximate cause of that injury. Galles Chevrolet Co. v. Chaney, 92 N.M. 618, 593 P.2d 59 (1979).

And where employer negligent dependents recover compensation. - Where a workman leaving his work in road-building, while on his way to his home by a reasonable and not prohibited route, in the area then being used by his employer, was killed by negligence

in the road-building, attributable to his employer, compensation was recoverable by his dependents. Cuellar v. American Employers' Ins. Co., 36 N.M. 141, 9 P.2d 685 (1932) (decided under former law).

On trip at employer's direction. - Where employee was fatally injured on trip from Albuquerque to Roswell, the trip being made at employer's direction and on time paid for by his employer, the injuries were sustained in course of employment within provisions of the Workmen's Compensation Act. McKinney v. Dorlac, 48 N.M. 149, 146 P.2d 867 (1944) (decided under former law).

Stop did not deny trip character. - Mere fact that while en route to a construction job over which project engineer had supervision he called on his desperately ill father did not deny the trip character as in the course of his employment, where he had resumed travel on the journey which occasioned the trip, and recovery of compensation for his death resulting from accidental injury was not thereby precluded. Parr v. New Mexico State Hwy. Dep't, 54 N.M. 126, 215 P.2d 602 (1950) (decided under former law).

Deviation en route did not bar recovery. - Where employee was traveling from Albuquerque to Roswell on employer's business, fact that he had stopped for an hour or more en route at a bar and cafe, did not bar a recovery for his death under the Workmen's Compensation Act where the fatal injury in automobile accident took place after he resumed his journey. McKinney v. Dorlac, 48 N.M. 149, 146 P.2d 867 (1944) (decided under former law).

Special errand rule applicable where employee on special mission. - Where deceased employee who, along with three others, was ordered by the defendant-employer to attend a special two-day health and social services department meeting (all of whom had been requested by their respective supervisors to form a car pool and to return overnight to their home town between the two sessions in order to save fuel and reduce travel costs), picked up the three other employees at an agreed on meeting place, a parking lot, and proceeded in her car to the meeting, and at the close of the first day's session, after discharging her three colleagues in the same parking lot, drove out of the parking lot and immediately thereafter was involved in the accident which resulted in her death, the supreme court held that the special errand rule was applicable in that deceased was on a special mission for her employer and was within the scope of her employment from the moment she left home until the moment she would have returned home at the end of the day, and therefore, her fatal injuries arose out of and in the course of her employment, and the "going and coming" rule was inapplicable. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976).

The special errand rule states that when an employee, having identifiable time and space limits on his employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the

service itself. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976).

Assault upon employee. - A workman cannot file an independent common-law tort claim against an employer and is restricted to an action under the Workmen's Compensation Act when an assault upon him was work-related and arose out of employment. But, where an employee had completed his work and was on his way out of the building when an assault occurred, it was not committed in the course of his employment. Mountain States Tel. & Tel. Co. v. Montoya, 91 N.M. 788, 581 P.2d 1283 (1978).

Leaving for work at earlier time is not sufficient to constitute "special mission" and to avoid the pronouncement of the "going and coming" rule as embodied in this section. Ross v. Marberry & Co., 66 N.M. 404, 349 P.2d 123 (1960) (decided under former law).

Where accident occurred after plaintiff's hours of work had ended and when she was going home, she was not at work when the accident occurred. Hayes v. Ampex Corp., 85 N.M. 444, 512 P.2d 1280 (Ct. App. 1973) (decided under former law).

General employment as extra-hazardous. - The mere fact that, at the moment of injury, claimant may have been engaged in extra-hazardous work does not bring him within the act where his general employment is not classed as extra-hazardous. Thomas v. Gardner, 75 N.M. 371, 404 P.2d 853 (1965) (decided under former law).

Slipping on ice not danger peculiar to employment. - As the hazard of slipping on the ice in the alley was not a causative danger peculiar to the claimant's employment, the injury received could not properly be found to have arisen out of the employment. Martinez v. Fidel, 61 N.M. 6, 293 P.2d 654 (1956) (decided under former law).

Where workman sustained injuries while taking fellow employee to work when his truck collided at night with an unlighted road roller of the employer some distance from where employee's work required him to set out and check flares, the injury was not compensable under Workmen's Compensation Act and did not preclude a common-law action based on employer's negligence. Olguin v. Thygesen, 47 N.M. 377, 143 P.2d 585 (1943) (decided under former law).

Carpenter repairing school building. - Carpenter who had been employed to repair school building by replacing and puttying broken windows, mending and painting window screens and hanging venetian blinds and who was injured while hanging blinds was engaged in a single employment of an extra-hazardous nature and was entitled to compensation on that basis without regard to whether hanging of blinds, standing alone, was "decoration, alteration or repair" within phrase "building work" as used in former statute. Scofield v. Lordsburg Mun. School Dist., 53 N.M. 249, 205 P.2d 834 (1949) (decided under former law).

Making bank deposit for employer after hours covered. - Plaintiff who was required to deposit her employer's funds in a bank after normal working hours each working day,

and who was injured while returning from the bank to the point where her normal route home continued, was at work at the place where her employer's business required her to be as well as being within the "special errand" rule, and therefore was entitled to compensation. Avila v. Pleasuretime Soda, Inc., 90 N.M. 707, 568 P.2d 233 (Ct. App. 1977).

Returning to job site to draw advance pay. - Assuming that returning to the job site for the purpose of drawing advance pay was a "normal incident of the employment relation," injury resulting from altercation with gate guard occurred "while he was on his way to assume" the duty of his employment and hence the claim for compensation is barred by this section. Fautheree v. Insulation & Specialties, Inc., 67 N.M. 230, 354 P.2d 526 (1960) (decided under former law).

Injury in repairing employee's truck. - Under findings of trial court that employee was required to keep his truck in repair, that injury was received 22 miles from the place of work in repair shop with which the employer had no connection, and where employer's business did not require the presence of the employee, the employee's injury did not arise out of and in the course of his employment. McDonald v. Denison, 51 N.M. 386, 185 P.2d 508 (1946) (decided under former law).

Law reviews. - For note, "Workmen's Compensation in New Mexico: Preexisting Conditions and the Subsequent Injury Act," see 7 Nat. Resources J. 632 (1967).

For article, "Survey of New Mexico Law, 1979-80: Workmen's Compensation," see 11 N.M.L. Rev. 235 (1981).

For annual survey of New Mexico law relating to workmen's compensation, see 13 N.M.L. Rev. 495 (1983).

For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 227, 228; 82 Am. Jur. 2d Workmen's Compensation §§ 240 to 288.
Injury to employee crossing or walking along railroad tracks going to or from work, 50 A.L.R.2d 391.
Workers' compensation: sexual assaults as compensable, 52 A.L.R.4th 731.
Workers' compensation: injuries incurred during labor activity, 61 A.L.R.4th 196.
Workers' compensation: injuries incurred while traveling to or from work with employer's receipts, 63 A.L.R.4th 253.
99 C.J.S. Workmen's Compensation §§ 153 to 160, 220 to 257(3); 100 C.J.S. Workmen's Compensation § 611.

§ 52-1-20. Determination of average weekly wage.

As used in the Workers' Compensation Act [this article], unless the context otherwise requires, the average weekly wage of an injured employee shall be taken as the basis upon which to compute compensation payments and shall be determined as follows:

A. whenever the term "wages" is used, it shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the accident, either express or implied, and shall not include gratuities received from employers or others nor shall it include the amounts deducted by the employer under the contract of hire for materials, supplies, tools and other things furnished and paid for by the employer and necessary for the performance of such contract by the employee, but the term "wages" shall include the reasonable value of board, rent, housing, lodging or any other similar advantages received from the employer, the reasonable value of which shall be fixed and determined from the facts in each particular case;

B. average weekly wages for the purpose of computing benefits provided in the Workers' Compensation Act shall, except as hereinafter provided, be calculated upon the monthly, weekly, daily, hourly or other remuneration which the injured or killed employee was receiving at the time of the injury in the following manner:

(1) where the employee is being paid by the month for his services under a contract of hire, the weekly wage shall be determined by multiplying the monthly wage or salary at the time of the accident by twelve and dividing by fifty-two;

(2) where the employee is being paid by the week for his services under a contract of hire, the weekly remuneration at the time of the accident shall be deemed to be the weekly wage for the purposes of the Workers' Compensation Act;

(3) where the employee is rendering service on a per diem basis, the weekly wage shall be determined by multiplying the daily wage by the number of days and fractions of days in the week during which the employee under a contract of hire was working at the time of the accident or would have worked if the accident had not intervened; provided, however, that in no case shall the daily wage be multiplied by less than three for the purpose of determining the weekly wage;

(4) where the employee is being paid by the hour, the weekly wage shall be determined by multiplying the hourly rate by the number of hours in a day during which the employee was working at the time of the accident or would have worked if the accident had not intervened to determine the daily wage; then the weekly wage shall be determined from the daily wage in the manner set forth in Paragraph (3) of this subsection; provided, that in no case shall the hourly rate be multiplied by less than seven; and

(5) where the employee is paid on a piecework, tonnage, commission or any other basis except upon a monthly, weekly, daily or hourly wage and where the employment is but

casual and in the usual course of the trade, business, profession or occupation of his employer, the total amount earned by the injured or killed employee in the twelve months preceding the accident shall be computed, which sum shall be divided by the number of days the injured person was employed during the twelve months immediately preceding the accident, and the result thus ascertained shall be considered the average daily wage of the employee; then the weekly wage shall be determined from the daily wage in the manner set forth in Paragraph (3) of this subsection;

C. provided, further, however, that in any case where the foregoing methods of computing the average weekly wage of the employee by reason of the nature of the employment or the fact that the injured employee has not worked a sufficient length of time to enable his earnings to be fairly computed thereunder or has been ill or in business for himself or where for any other reason the methods will not fairly compute the average weekly wage, in each particular case, computation of the average weekly wage of the employee [shall be made] in such other manner and by such other method as will be based upon the facts presented [to] fairly determine such employee's average weekly wage; and

D. provided, that in case such earnings have been unusually large on account of the employer's necessity temporarily requiring him to pay extraordinary high wages, such average weekly earnings shall be based upon the usual earnings in the same community for labor of the kind of [the] worker was performing at the time of the injury. In any event, the weekly compensation allowed shall not exceed the maximum nor be less than the minimum provided by law.

History: 1953 Comp., § 59-10-12.13, enacted by Laws 1965, ch. 295, § 13; 1989, ch. 263, § 15.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes throughout the section.

Compiler's notes. - The bracketed words [shall be made] and [to] near the end of Subsection C were inserted by the compiler.

Methods not exclusive or mandatory. - While this section defines the method for determining average weekly earnings under varying circumstances of employment, the methods so set forth are not exclusive nor are they under all circumstances mandatory requirements or binding on the trial court. Kendrick v. Gackle Drilling Co., 71 N.M. 113, 376 P.2d 176 (1962) (decided under former law).

The phrase "in any event" in this statute means "no matter what else may be" or "whatever may happen" and is a prohibition. No event and no circumstance can excuse compliance with the conditions stated. Trujillo v. Tanuz, 85 N.M. 35, 508 P.2d 1332 (Ct. App. 1973).

"Average weekly wage" means the money rate at which services are recompensed at the time of the accident. Gilliland v. Hanging Tree, Inc., 92 N.M. 23, 582 P.2d 400 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

The average weekly wage is based on the salary which the injured employee is receiving at the time of the injury pursuant to his or her contract for hire. Where an educational aide was paid 52 weeks a year based on a 40 week work year, this requires that her compensation be based on a 52 week work year. Duran v. Albuquerque Pub. Schools, 105 N.M. 297, 731 P.2d 1341 (Ct. App. 1986).

Employee must have earned money immediately prior to injury. - To entitle an employee to compensation under former statute, he must have been earning money at or immediately prior to the time of his injury, from an employer defined in the statute. In computing the compensation, the relationship must have continuously existed, although the work could have been intermittent. Mendoza v. Gallup S.W. Coal Co., 41 N.M. 161, 66 P.2d 426 (1937) (decided under former law).

Determining preinjury average weekly wage. - Subsection C permits the trial court to determine the preinjury average weekly wages of an injured workman by any method supported by the evidence in the particular case which fairly represents his average weekly wage if they cannot be fairly determined by one of the formulae set out in Subsection B. Kendrick v. Gackle Drilling Co., 71 N.M. 113, 376 P.2d 176 (1962) (decided under former law).

Since an injury occurring on a worker's part-time job disabled her from working at 100% capacity at either her full or part-time job, her capacity as a wage earner patently was impaired beyond the limits of the part-time job. Compensation benefits, therefore, were logically based on her combined wages and correctly reflected her reduced earning capacity in both employments. Justiz v. Walgreen's & Travelers Ins. Co., 106 N.M. 346, 742 P.2d 1051 (1987).

Benefits based on weekly wage at time of accident, not at time of earlier position. - Where a worker had opted to take a new position with an employer at a reduced rate of pay and had worked at that position for approximately seven weeks prior to his injury, compensation benefits should have been computed based on the average weekly wage that the worker was earning at the time of his accident, not on the average weekly wage which he was earning in earlier, higher paying position. Eberline Instrument Corp. v. Felix, 103 N.M. 422, 708 P.2d 334 (1985).

Gain from operating below production estimates. - Additional economic gain realized by an independent school bus contractor by virtue of operating and maintaining her bus below production worksheet estimates constituted an implied compensation within the meaning of Subsection A. Gonzales v. Mountain States Mut. Cas. Co., 105 N.M. 100, 728 P.2d 1369 (Ct. App. 1986).

Unfair to apply hourly wage as measure. - Where claimant had worked for various drilling companies during 28 of the preceding 30 weeks in 1960 at an average weekly wage of $133.75, it would be manifestly unfair to apply the hourly wage being received by claimant at the time of his injury as a measure of his average weekly wages prior to the accident. Kendrick v. Gackle Drilling Co., 71 N.M. 113, 376 P.2d 176 (1962) (decided under former law).

Prior earnings not sole basis of determining average weekly wage. - Kendrick v. Gackle Drilling Co., 71 N.M. 113, 376 P.2d 176 (1962), does not, as claimed by appellants, require the employee's prior earnings as disclosed by income tax returns to be used as the sole basis of determining average preinjury weekly wage as the workmen's compensation statute provides that compensation payments shall be determined by arriving at the difference between the employee's earning ability before and after the injury, not upon a loss of earnings or income caused by the accident. Mascarenas v. Kennedy, 74 N.M. 665, 397 P.2d 312 (1964) (decided under former law).

Tips regarded as wages. - When it is within the contemplation of the parties that tips are to be retained by an employee as part of his compensation, they are to be regarded as wages for compensation purposes. Hopkins v. Fred Harvey, Inc., 92 N.M. 132, 584 P.2d 179 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Speculative future payments for prior services not "wage". - Where it is undisputed that at the time of the accident decedent had no wage and thus had no basis for computing an average weekly wage, the speculative possibility that some time in the future decedent might be paid for services performed prior to his death was not a "wage" within the statutory meaning. Gilliland v. Hanging Tree, Inc., 92 N.M. 23, 582 P.2d 400 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

The phrase "number of days . . . employed" in Subsection B(5) means the actual number of days claimant worked for employer before the accident rather than the number of days elapsed between the date of hiring and the accident. Fahr v. Aaron McGruder Trucking, 107 N.M. 241, 755 P.2d 85 (Ct. App. 1988).

Findings of fact to justify use of another method of determination. - Where a trial court, if it considered the methods prescribed under Subsection B for computing average weekly earnings unfair under the facts as disclosed by the evidence, it should have made findings of fact which would justify the use of another method as provided by Subsection C, and this court may properly remand the cause for such findings. Kendrick v. Gackle Drilling Co., 71 N.M. 113, 376 P.2d 176 (1962) (decided under former law).

A determination of an employee's average weekly wages by some method other than the formulae was said in Kendrick v. Gackle Drilling Co., 71 N.M. 113, 376 P.2d 176 (1962) to be permitted under Subsection C of this section only when the trial court found as a fact, based upon substantial evidence sufficient to justify resort to that provision, that his average weekly wage could not fairly be determined by one of the formulae set

out in Subsection B of this section. Mascarenas v. Kennedy, 74 N.M. 665, 397 P.2d 312 (1964) (decided under former law).

The loss of wage earning ability is in theory a comparison of what the employee would have earned had he not been injured and what he is able to earn in his injured condition. Kendrick v. Gackle Drilling Co., 71 N.M. 113, 376 P.2d 176 (1962) (decided under former law).

Determining compensation where employee worked only one week. - Former statute merely fixed four-week limit for injury, and where the employee had worked but a week at his employment before receiving his fatal injury, the average weekly earnings of other workmen in like employment could be considered. Burruss v. B.M.C. Logging Co., 38 N.M. 254, 31 P.2d 263 (1934) (decided under former law).

Fairness of award where no findings of unusual conditions. - Where there were no findings, and none were requested, to indicate any unusual condition of employment from which unfairness of award, if any, could be inferred, where employee earned an average of $4.36 a week, a compensation award of $8.40 a week for permanent total disability was not as a matter of law unfair to the employer. La Rue v. Johnson, 47 N.M. 260, 141 P.2d 321 (1943) (decided under former law).

Weekly compensation not to be less than minimum hourly rate. - Regardless of what event occurs, the weekly compensation allowed by the court, based on an hourly rate, shall not be an hourly rate less than the minimum provided by the Minimum Wage Act whether there is a state and federal minimum wage law. Trujillo v. Tanuz, 85 N.M. 35, 508 P.2d 1332 (Ct. App. 1973).

Application of Subsection D. - Exception in Subsection D to the "wage earned at the time of the accident" rule was meant to cover exigent circumstances, for example, payment of necessary overtime to meet a deadline, and was not meant to apply to federally regulated wages foreseen at the time the contract was negotiated and provided for initially during the calculation of the construction bid. Salcido v. Transamerica Ins. Group, Inc., 102 N.M. 217, 693 P.2d 583 (1985).

"Same community," within context of Subsection D, was not restricted to an area where plaintiff's employer was of necessity paying extraordinarily high wages for temporary work, but it meant a broader area - the area in which plaintiff normally worked. Salcido v. Transamerica Ins. Group, Inc., 102 N.M. 344, 695 P.2d 494 (Ct. App. 1983), rev'd on other grounds, 102 N.M. 217, 693 P.2d 583 (1985).

Earnings of casual employee. - When a casual employee received a compensable injury, earnings from his regular employment from the preceding 12 months are properly considered as the bases for determining the right to compensation. Bailey v. Farr, 66 N.M. 162, 344 P.2d 173 (1959) (decided under former law).

Judge's unconcurred opinion on escalating benefits not court of appeal's decision. - Where a judge's opinion concerning escalating benefits under the Workmen's Compensation Act is not concurred in by another judge, her view concerning escalating benefits is not a decision of the court of appeals and a judgment on remand which does not provide for escalating benefits complies with the mandate and opinion of the court of appeals. Casias v. Zia Co., 94 N.M. 723, 616 P.2d 436 (Ct. App. 1980).

Law reviews. - For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 368, 369.
99 C.J.S. Workmen's Compensation §§ 292 to 294; 100 C.J.S. Workmen's Compensation § 568.

§ 52-1-21. Repealed.

Repeals. - Laws 1987, ch. 235, § 54B repeals 52-1-21 NMSA 1978 as enacted by Laws 1965, ch. 295, § 14, relating to the use of the terms "judge" and "court" in the Workmen's Compensation Act, effective June 19, 1987. For provisions of former section, see 1978 Original Pamphlet.

§ 52-1-22. Work not casual employment.

As used in the Workers' Compensation Act [this article], unless the context otherwise requires, where any employer procures any work to be done wholly or in part for him by a contractor other than an independent contractor and the work so procured to be done is a part or process in the trade or business or undertaking of such employer, then such employer shall be liable to pay all compensation under the Workers' Compensation Act to the same extent as if the work were done without the intervention of such contractor. The work so procured to be done shall not be construed to be "casual employment".

History: 1953 Comp., § 59-10-12.15, enacted by Laws 1965, ch. 295, § 15; 1989, ch. 263, § 16.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes.

Employer-employee relationship, to which the act applies, is one created by contract between the parties; consequently, if the employer in this case seeks to avail itself of the Workmen's Compensation Act as a bar to a common-law action, then it must show a valid contract of employment between it and the minor employee. Maynerich v. Little Bear Enters., Inc., 82 N.M. 650, 485 P.2d 984 (Ct. App. 1971).

The word "undertaking" is defined as something undertaken: a business, work or project which one engages in or attempts; the deepening of an irrigation pond was an undertaking within the ordinary meaning of that term. Abbott v. Donathon, 86 N.M. 477, 525 P.2d 404 (Ct. App. 1974).

"Relative nature of work" test is a better test than "right to control" test in determining whether workmen's compensation claimant was an employee or independent contractor. "Relative nature of work" test examines, first, the character of plaintiff's work or business, and second, the relationship of claimant's work to the purported employer's business. Therefore, claimant hired by insurance company as "storm trooper" or "catastrophe adjuster" was an independent contractor not eligible for workmen's compensation funds, even though insurance company had right to fire him at any time, where claimant received a fee rather than wages, paid his own personal expenses, set his own hours, used his own equipment, was not subject to deduction for withholding tax or social security, set his own methods of investigation and could refuse to take claims. Burton v. Crawford & Co., 89 N.M. 436, 553 P.2d 716 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Whether employment is in usual course of employer's business is decisive question. Where the business is ranching, water is a prime necessity and here it is to be produced by means of windmills. It follows that a windmill repairman's employment is covered by the act. Bailey v. Farr, 66 N.M. 162, 344 P.2d 173 (1959) (decided under former law).

Trade or business not separate concepts. - In considering whether a workman was or was not an independent contractor, where the work to be done was an "undertaking," the court is not concerned with trade or business as separate concepts. Abbott v. Donathon, 86 N.M. 477, 525 P.2d 404 (Ct. App. 1974).

Not casual employment where necessary part of process. - Where the decedent was hauling away dirt obtained from the excavation of a pond by defendant, and the hauling of dirt was a necessary part of the process of excavation, the decedent was not a casual employee. This work, which was not casual employment under this section, was also not casual employment under 52-1-16 NMSA 1978. Abbott v. Donathon, 86 N.M. 477, 525 P.2d 404 (Ct. App. 1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 109 to 113, 129, 202.
99 C.J.S. Workmen's Compensation §§ 69, 70, 90 to 111, 294.

§ 52-1-23. Contractor becoming employer in casual employment.

For purposes of the Workers' Compensation Act [this article], where any employer procures any work to be done wholly or in part for him by a contractor where the work so procured to be done is casual employment as to such employer, then such contractor shall become the employer.

History: 1953 Comp., § 59-10-12.16, enacted by Laws 1965, ch. 295, § 16; 1989, ch. 263, § 17.

The 1989 amendment, effective June 16, 1989, made a minor stylistic change.

In determining workman's status, the right of control is the test. If he has the right to control the work, he is an independent contractor; if not, he is an employee. Bailey v. Farr, 66 N.M. 162, 344 P.2d 173 (1959) (decided under former law).

Chief consideration which determines one to be independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for. Shipman v. Macco Corp., 74 N.M. 174, 392 P.2d 9 (1964) (decided under former law).

Liability of general contractor to employees of subcontractors performing construction or other work on the premises is founded in part on the assumption that the owner has placed the general contractor in physical control of the job site; by virtue of this control, the general contractor is burdened with a duty similar to that owed by the landowner to business invitees, to exercise reasonable care to maintain the premises in a reasonably safe condition. DeArman v. Popps, 75 N.M. 39, 400 P.2d 215 (1965).

General contractor not liable absent control over location. - Absent control over the job location or direction of the manner in which the delegated tasks are carried out, the general contractor is not liable for injuries to employees of the subcontractor resulting from either the condition of the premises or the manner in which the work is performed. DeArman v. Popps, 75 N.M. 39, 400 P.2d 215 (1965).

Claimant as employee of contractor not contractee. - Where claimant at all times was paid, employed and subject to discharge by defendant, defendant was hired to do one specific job, and defendant had its own independence of means and methods, subject only to general supervision of the desired results, there can be no question that plaintiff was an employee of defendant and not of contractee. DeArman v. Popps, 75 N.M. 39, 400 P.2d 215 (1965).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 59, 109 to 113, 129, 168, 202; 82 Am. Jur. 2d Workmen's Compensation § 444. 99 C.J.S. Workmen's Compensation §§ 69, 70, 90 to 111.

§ 52-1-24. Impairment; definition.

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

A. "impairment" includes physical impairment, primary mental impairment and secondary mental impairment;

B. "primary mental impairment" means a mental illness arising from an accidental injury

arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances, but is not an event in connection with disciplinary, corrective or job evaluation action or cessation of the worker's employment; and

C. "secondary mental impairment" means a mental illness resulting from a physical impairment caused by an accidental injury arising out of and in the course of employment.

History: 1978 Comp., § 52-1-24, enacted by Laws 1987, ch. 235, § 10.

Repeals and reenactments. - Laws 1987, ch. 235, § 10 repeals former 52-1-24 NMSA 1978 as reenacted by Laws 1986, ch. 22, § 4, relating to permanent total disability, and enacts the above section, effective June 19, 1987. For provisions of former section, see 1986 Cumulative Supplement to this pamphlet. For present comparable provisions, see 52-1-25 NMSA 1978.

Compiler's notes. - Laws 1987, ch. 235, § 54A, effective June 19, 1987, repealed Laws 1986, ch. 22, § 105 which had formerly repealed this section effective July 1, 1987.

Law reviews. - For case note, "WORKERS' COMPENSATION LAW: A Clinical Psychologist Is Qualified to Give Expert Medical Testimony Regarding Causation: Madrid v. University of California, d/b/a Los Alamos National Laboratory," see 18 N.M.L. Rev. 637 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Workmen's Compensation §§ 301, 302. 99 C.J.S. Workmen's Compensation § 201.

§ 52-1-25. Total disability.

A. As used in the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978], "total disability" means an impairment to a worker resulting by reason of an accidental injury arising out of and in the course of employment which prevents the worker from engaging, for remuneration or profit, in any occupation for which he is or becomes fitted by age, training or experience.

B. It shall be conclusively presumed that the loss or permanent loss of use of both hands or both arms or both feet or both legs or both eyes or any two of them constitutes total disability.

History: 1978 Comp., § 52-1-25, enacted by Laws 1987, ch. 235, § 11.

I. General Consideration.
II. Procedural Matters.
III. Illustrative Cases.

I. General Consideration.

Repeals and reenactments. - Laws 1987, ch. 235, § 11 repeals former 52-1-25 NMSA 1978, as reenacted by Laws 1986, ch. 22, § 5, relating to partial disability, and enacts the above section, effective June 19, 1987. For provisions of former section, see 1986 Cumulative Supplement to this pamphlet. For present comparable provisions, see 52-1-26 NMSA 1978.

Compiler's notes. - Laws 1987, ch. 235, § 54A, effective June 19, 1987, repealed Laws 1986, ch. 22, § 105 which had formerly repealed this section effective July 1, 1987.

Employer and workman must comply with spirit of act, i.e., a common-sense concept of fairness in the view of a subjective eye that reviews the facts. Purcella v. Navajo Freight Lines, 95 N.M. 306, 621 P.2d 523 (Ct. App. 1980).

Compensation benefits are not based on physical injury itself but on disability produced by the injury and a claim for workmen's compensation is properly denied where there is a failure to establish that the claimant's wage-earning ability had been decreased as a result of the alleged accidental injury. Gallegos v. Kennedy, 79 N.M. 590, 446 P.2d 642 (1968); Anaya v. New Mexico Steel Erectors, Inc., 94 N.M. 370, 610 P.2d 1199 (1980); Cardenas v. United Nuclear Homestake Partners, 97 N.M. 46, 636 P.2d 317 (Ct. App. 1981).

"Any work" means a workman's ordinary employment, or such other employment, if any, approximating the same livelihood the workman might be expected to follow in view of his circumstances and capabilities. Aranda v. Mississippi Chem. Corp., 93 N.M. 412, 600 P.2d 1202 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979) (decided under prior law).

And "any work" must be available so that total disability will not be an inducement to malingering; a workman must make reasonable efforts to obtain work with the employer within work capabilities, and if not available, such reasonable efforts must be made elsewhere; thereby, the employer should also make reasonable efforts to retain the employee in such jobs that are comparable or similar to the workman's skills and training, and if not available, the employer should make reasonable efforts to assist the workman in obtaining comparable available employment elsewhere. Aranda v. Mississippi Chem. Corp., 93 N.M. 412, 600 P.2d 1202 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979) (decided under prior law).

Disability is defined in terms of inability to perform usual tasks of his employment or work for which the workman is fitted. Anaya v. Big Three Indus., Inc., 86 N.M. 168, 521 P.2d 130 (Ct. App. 1974).

Legally totally disabled. - Under this section if a worker can no longer do the work he was doing when injured, and cannot do the only work for which he is qualified, he is "legally" totally disabled. Roybal v. County of Santa Fe, 79 N.M. 99, 440 P.2d 291 (1968).

"Disability" means disablement resulting from an accidental injury; it is not synonymous with productivity. Medina v. Wicked Wick Candle Co., 91 N.M. 522, 577 P.2d 420 (Ct. App. 1977).

Primary test for disability is capacity to perform work. Medina v. Zia Co., 88 N.M. 615, 544 P.2d 1180 (Ct. App. 1975), cert. denied, 89 N.M. 6, 546 P.2d 71 (1976); Adams v. Loffland Bros. Drilling Co., 82 N.M. 72, 475 P.2d 466 (Ct. App. 1970); Lujan v. Circle K Corp., 94 N.M. 719, 616 P.2d 432 (Ct. App. 1980); Klindera v. Worley Mills, Inc., 96 N.M. 743, 634 P.2d 1295 (Ct. App. 1981); Salcido v. Transamerica Ins. Group, Inc., 102 N.M. 217, 693 P.2d 583 (1985).

In order to be entitled to an award of compensation benefits a workman must not only suffer a physical impairment, but also be unable to perform work. Cardenas v. United Nuclear Homestake Partners, 97 N.M. 46, 636 P.2d 317 (Ct. App. 1981).

Two tests in definition of total or partial disability. - The definition of total and partial disability under this section and 52-1-26 NMSA 1978 contain two tests: (1) the workman must be totally or partially unable to perform the work he was doing at the time of the injury, and (2) he must be wholly or partially unable to perform any work for which he is fitted. Medina v. Zia Co., 88 N.M. 615, 544 P.2d 1180 (Ct. App. 1975), cert. denied, 89 N.M. 6, 546 P.2d 71 (1976); Marez v. Kerr-McGee Nuclear Corp., 93 N.M. 9, 595 P.2d 1204 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979); Aranda v. Mississippi Chem. Corp., 93 N.M. 412, 600 P.2d 1202 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979); Schober v. Mountain Bell Tel., 96 N.M. 376, 630 P.2d 1231 (Ct. App. 1980); Smith v. City of Albuquerque, 105 N.M. 125, 729 P.2d 1379 (Ct. App. 1986).

The definition of "total disability" provides for a two-pronged test, both of which must be proved by plaintiff at the time of trial: (1) plaintiff must prove that he was totally unable to perform the work he was doing at the time of the injury; and (2) he must prove that he was totally unable to perform any work for which he was fitted by age, education, training, general physical and mental capacity and previous work experience. Medina v. Wicked Wick Candle Co., 91 N.M. 522, 577 P.2d 420 (Ct. App. 1977).

The statutory definition of total disability provides for a two-pronged test, both parts of which must be proved by the plaintiff at trial: (1) complete inability to perform the usual tasks in the work he was performing at the time of the injury; and (2) absolute inability to

perform any work for which he is fitted by age, education, training, general physical and mental capacity, and previous work experience. Sanchez v. Homestake Mining Co., 102 N.M. 473, 697 P.2d 156 (Ct. App. 1985).

For total disability, the worker must be wholly unable to perform the work being performed at the time of injury and wholly unable to perform any work for which he is fitted. Dodrill v. Albuquerque Utils. Corp., 103 N.M. 737, 713 P.2d 7 (Ct. App. 1985).

Impairment, not unavailability of work, is key. - The inability to earn comparable wages must result from physical impairment, and may not be due merely to the unavailability of work. Strickland v. Coca-Cola Bottling Co., 107 N.M. 500, 760 P.2d 793 (Ct. App. 1988) (decided under prior law).

Disabled worker to seek work within capabilities. - A disabled workman, with knowledge that his employer hires handicapped employees, should seek work with his former employer or make reasonable efforts to obtain work within work capabilities. If total disability fades, compensation therefor must not be an inducement to malingering. Ulibarri v. Homestake Mining Co., 97 N.M. 734, 643 P.2d 298 (Ct. App. 1982).

Worker not disabled until unable to work. - Where a worker is able to, and does, perform the work she was doing at the time of an injury, albeit with constant pain, as well as work for which she is fitted by her training and experience, and files her claim for compensation well within the time limitation after she knows or has reason to know she has suffered a compensable injury when so advised by her own doctor, she is not disabled, under the clear language of this section and 52-1-26 NMSA 1978, until she is unable to work. Sedillo v. Levi-Strauss Corp., 98 N.M. 52, 644 P.2d 1041 (Ct. App. 1982).

Evidence of termination of employment is strong evidence that the claimant was totally incapacitated, but it may be overcome by considerations of claimant's other training, experience, his educational background and the fact that his injury was not so serious as to prevent his satisfactorily performing his job for approximately a year and a half after the jury's verdict. Churchill v. City of Albuquerque, 66 N.M. 325, 347 P.2d 752 (1959) (decided under former law).

Where disability causes employee to quit job. - Where an employee's disability or inability to perform his former job on production causes him to quit the job, for purposes of determining his rights to compensation benefits, the employee did not voluntarily leave his employment. Aranda v. Mississippi Chem. Corp., 93 N.M. 412, 600 P.2d 1202 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

Any post-injury employment not necessarily disqualifying work. - Contention that any post-injury employment is necessarily work for which a claimant is fitted, and therefore, the post-injury employment would disqualify the claimant from receiving total disability, was erroneous as the reemployment efforts of a claimant should not penalize him. Maes v. John C. Cornell, Inc., 86 N.M. 393, 524 P.2d 1009 (Ct. App. 1974).

Post-injury employment does not preclude, as a matter of law, a finding of total temporary disability. Whether evidence of post-injury employment is indicative that the injured workman is only partially rather than totally disabled depends upon the particular facts of each individual case. Amos v. Gilbert W. Corp., 103 N.M. 631, 711 P.2d 908 (Ct. App. 1985).

Ability to perform work established by worker's testimony. - Disability is measured by the ability to perform work. Medical testimony on this issue is not necessary and sometimes is not even helpful. Ability to perform work may be established by plaintiff's testimony. Grudzina v. New Mexico Youth Diagnostic & Dev. Center, 104 N.M. 576, 725 P.2d 255 (Ct. App.), cert. denied, 104 N.M. 460, 722 P.2d 1182 (1986).

Injured employee is "totally disabled" if he is unable to pursue any gainful employment without experiencing substantial pain. Marez v. Kerr-McGee Nuclear Corp., 93 N.M. 9, 597 P.2d 1178 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

Considering pain in determining effect of post-injury employment. - The trial court is justified in considering the pain claimant suffered in performing various tasks when determining the effect of post-injury employment on a claim for total disability. Maes v. John C. Cornell, Inc., 86 N.M. 393, 524 P.2d 1009 (Ct. App. 1974).

Total disability where unable to obtain only work ever known. - If a workman, even though only partially disabled, is unable to obtain the only kind of work he has ever known, he is entitled to total disability. Churchill v. City of Albuquerque, 66 N.M. 325, 347 P.2d 752 (1959) (decided under former law).

Total disability does not mean that a workman must be a helpless invalid. Aranda v. Mississippi Chem. Corp., 93 N.M. 412, 600 P.2d 1202 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

Loss in earning capacity. - A finding that plaintiff did not suffer a loss in earning capacity is not determinative on the issue of disability. Chavira v. Gaylord Broadcasting Co., 95 N.M. 267, 620 P.2d 1292 (Ct. App.), cert. denied, 95 N.M. 299, 621 P.2d 516 (1980).

"Training" is included in second test of total disability. The reason for including the element of "training" is to encourage a workman to seek other employment and to work despite disability that results from an accidental injury. Medina v. Wicked Wick Candle Co., 91 N.M. 522, 577 P.2d 420 (Ct. App. 1977); Aranda v. Mississippi Chem. Corp., 93 N.M. 412, 600 P.2d 1202 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

Change in primary test of disability. - The 1963 amendment of the 1959 definition changed the primary test of disability from wage-earning ability to capacity to perform work as delineated in this section. Medina v. Zia Co., 88 N.M. 615, 544 P.2d 1180 (Ct. App. 1975), cert. denied, 89 N.M. 6, 546 P.2d 71 (1976), (decided under prior law), Smith v. Trailways Bus Sys., 96 N.M. 79, 628 P.2d 324 (Ct. App. 1981).

"Odd-lot" doctrine of total disability. - Under the "odd-lot" doctrine, a worker may be found to be totally disabled where, while he is not altogether incapacitated for work, he is so handicapped that he is not subject to regular employment in any well-recognized branch of the labor market. The doctrine is concerned with irregular and unpredictable employment because of injury and the worker's ability to command regular income as the result of personal labor. Dodrill v. Albuquerque Utils. Corp., 103 N.M. 737, 713 P.2d 7 (Ct. App. 1985).

Partial and total two segments of disability continuum. - This section and 52-1-26 NMSA 1978 established a continuum from zero to total disability through all percentages of partial disability; partial and total disability are therefore not two separate concepts or issues but two segments of one disability continuum. Maes v. John C. Cornell, Inc., 86 N.M. 393, 524 P.2d 1009 (Ct. App. 1974).

Total disability, within the Act, may be said to exist when, considering the age, education, training, general physical and mental capacity and adaptability of the workman, he is unable by reason of his accidental injury to obtain and retain gainful employment. Rhodes v. Cottle Constr. Co., 68 N.M. 18, 357 P.2d 672 (1960) (decided under former law).

Award is based upon permanent injuries, not the outward manifestation, or lack thereof, of the symptoms resulting from the injuries. Having found total disability, it was not necessary for the trial court to make a negative finding with respect to the symptoms alone. Roybal v. County of Santa Fe, 79 N.M. 99, 440 P.2d 291 (1968).

A certain percentage of functional disability is not necessarily the same percentage of disability attributable to an injury under the Workmen's Compensation Act. Hales v. Van Cleave, 78 N.M. 181, 429 P.2d 379 (Ct. App.), cert. denied, 78 N.M. 198, 429 P.2d 657 (1967).

Entitled to disability where specific scheduled body member injured. - Workman was entitled to compensation benefits for total permanent disability under this section where his disability arose solely from injuries to a specific body member scheduled in 52-1-43 NMSA 1978, since that scheduled injury section was not exclusive. American Tank & Steel Corp. v. Thompson, 90 N.M. 513, 565 P.2d 1030 (1977).

Where injury is limited to scheduled member, the compensation is limited to temporary total disability during the healing period in which the workman is total disabled and thereafter to the percentage of disability to the scheduled member as provided by the statute. Rhodes v. Cottle Constr. Co., 68 N.M. 18, 357 P.2d 672 (1960) (decided under former law).

Benefits are allowed for total disability when the total disability results from the loss of or injury to a scheduled member. Mendez v. Southwest Community Health Servs., 104 N.M. 608, 725 P.2d 584 (Ct. App. 1986).

Court cannot conclude both total disability and scheduled injury. - Where the court both found and concluded that plaintiff was totally disabled but it also concluded and entered judgment for a scheduled injury, the judgment was reversed and remanded for a new judgment which conformed to the finding of total disability. Mendez v. Southwest Community Health Servs., 104 N.M. 608, 725 P.2d 584 (Ct. App. 1986).

Reduction of disability held not "wrongful". - Where disability is not reduced in a heedless, unjust, reckless or unfair manner, it is not "wrongful." Ulibarri v. Homestake Mining Co., 97 N.M. 734, 643 P.2d 298 (Ct. App. 1982).

And reduction of disability held without rational basis. - No rational basis was found to exist for reducing plaintiff's total permanent disability to 25 percent temporary partial disability. Martinez v. Zia Co., 99 N.M. 80, 653 P.2d 1226 (Ct. App. 1982).

Finding that worker is no longer disabled means that she has the capacity to perform work in the sense that she is wholly able to perform the usual tasks in the work she was performing at the time of her injury, and is wholly able to perform any work for which she is fitted by age, education, training, general physical and mental capacity and previous work experience. Klindera v. Worley Mills, Inc., 96 N.M. 743, 634 P.2d 1295 (Ct. App. 1981).

Temporary total disability means that which lasts for a limited time only while the workman is undergoing treatment. Sena v. Gardner Bridge Co., 93 N.M. 358, 600 P.2d 304 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Temporary disability is that which lasts for a limited time only while the workman is undergoing treatment, anticipating that eventually there will be either complete recovery or an impaired bodily condition which is static. Smith v. Trailways Bus Sys., 96 N.M. 79, 628 P.2d 324 (Ct. App. 1981).

Payment of total disability benefits during indefinite temporary disability. Where the evidence supports a finding of temporary disability, which continues indefinitely until some future change occurs, the trial court may direct payment of workmen's compensation total disability benefits pending a showing that the disability has diminished or no longer exists. Amos v. Gilbert W. Corp., 103 N.M. 631, 711 P.2d 908 (Ct. App. 1985).

Law reviews. - For annual survey of New Mexico law relating to workmen's compensation, see 13 N.M.L. Rev. 495 (1983).

For article, "The Role of the Vocational Expert in Worker's Compensation Cases," see 14 N.M.L. Rev. 483 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 240 to 288, 340.
Admissibility of opinion evidence as to employability on issue of disability in health and

accident insurance and workers' compensation cases, 89 A.L.R.3d 783.
99 C.J.S. Workmen's Compensation §§ 299 to 301, 320.

II. Procedural Matters.

Hearing required to determine whether worker precluded from receiving disability. - To determine whether a worker was precluded as a matter of law from receiving disability benefits during the time he earned wages, there must be a hearing on the worker's capacity to perform work and the availability of work on the job site. Salcido v. Transamerica Ins. Group, Inc., 102 N.M. 217, 693 P.2d 583 (1985).

Rate of compensation in effect on date of disability applies, not the date of the accident. Purcella v. Navajo Freight Lines, 95 N.M. 306, 621 P.2d 523 (Ct. App. 1980).

Date of disability where employer voluntarily pays, then reduces, benefits. - Where a workman suffers disability as a result of an accidental injury and the employer voluntarily pays compensation benefits and then wrongfully reduces payment thereof, causing the workman to seek relief in the courts, the date that disability is determined in the court proceedings is the date that the applicable rate of compensation applies, not the date of the accidental injury. Ulibarri v. Homestake Mining Co., 97 N.M. 734, 643 P.2d 298 (Ct. App. 1982).

Burden of proof of employability. - The claimant has the duty of showing that he was disabled from doing any work for which he was fitted by age, education, training and previous experience; however, after plaintiff has introduced evidence as to his age, education, training and general physical and mental capacity, the burden of coming forward is on the defendant as it is much easier for the defendant to prove the employability of the plaintiff for a particular job than for plaintiff to try to prove the universal negative of not being employable at any work. Brown v. Safeway Stores, Inc., 82 N.M. 424, 483 P.2d 305 (Ct. App. 1970).

Plaintiff must establish that he was totally or partially unable to perform work he was doing at the time of the injury, and in addition thereto, he must establish that he was totally or partially unable to perform any work for which he was fitted. Medina v. Zia Co., 88 N.M. 615, 544 P.2d 1180 (Ct. App. 1975), cert. denied, 89 N.M. 6, 546 P.2d 71 (1976).

Physician's testimony not conclusive. - Where medical evidence is conflicting, the testimony of a physician is not conclusive and the trier of facts may accept, reject or give such weight only as it deems the evidence warrants. Cardenas v. United Nuclear Homestake Partners, 97 N.M. 46, 636 P.2d 317 (Ct. App. 1981).

Opinion testimony of medical expert may be considered as substantial evidence upon which a finding of disability may be made. Marez v. Kerr-McGee Nuclear Corp., 93 N.M. 9, 595 P.2d 1204 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

Opinion as to medical disability does not resolve question of disability under Workmen's Compensation Law. Disability, at the time of plaintiff's accidental injury, was defined in terms of being able to perform the usual tasks of plaintiff's work or of being able to perform any work for which he was fitted by age, education, training, physical and mental capacity and experience. Goolsby v. Pucci Distrib. Co., 80 N.M. 59, 451 P.2d 308 (Ct. App. 1969).

Duty of employer to totally disabled. - The employer has a duty to prove not only that the jobs available to totally disabled employees might be, but more importantly, that such jobs be comparable or similar to the workman's skills and training and that these jobs are reasonably available to a person in the workman's position. Marez v. Kerr-McGee Nuclear Corp., 93 N.M. 9, 597 P.2d 1178 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

Payments not proof of disability. - Proof of the voluntary payment of total disability benefits did not constitute sufficient evidence that a worker was disabled. Strickland v. Coca-Cola Bottling Co., 107 N.M. 500, 760 P.2d 793 (Ct. App. 1988).

No differing measure of proof between total and partial disability. - Because the legislature saw fit to define total disability and partial disability in separate sections (this section and 52-1-26 NMSA 1978) does not justify a differing measure of proof. Roybal v. County of Santa Fe, 79 N.M. 99, 440 P.2d 291 (1968).

Determination of degree of disability is a question of fact for the fact finder and if there is substantial evidence in the record to support a finding, the appellate court is bound thereby. Adams v. Loffland Bros. Drilling Co., 82 N.M. 72, 475 P.2d 466 (Ct. App. 1970).

Determination of degree of disability in workmen's compensation cases is generally a matter for the trial court, and absent misapplication of the law or a lack of substantial evidence, an appellate court should not substitute its judgment for that of the trial court. Marez v. Kerr-McGee Nuclear Corp., 93 N.M. 9, 595 P.2d 1204 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

Question of disability properly submitted to jury. - Unless the trial court can say that claimant is not totally and permanently disabled as a matter of law, the question is properly submitted to the jury. Ruiz v. Hedges, 69 N.M. 75, 364 P.2d 136 (1961) (decided under former law).

Error to instruct on total disability where no evidence. - If there is no substantial evidence to support a finding of total and permanent disability, to instruct thereon would inject a false issue into the case and be error. Ruiz v. Hedges, 69 N.M. 75, 364 P.2d 136 (1961) (decided under former law).

Standard of review on appeal. - It is not a prerogative of the appellate court to weigh the testimony of medical experts, but rather to ascertain whether there is substantial evidence to support the trial court's evaluation of the evidence and determination of where the truth lies. Cardenas v. United Nuclear Homestake Partners, 97 N.M. 46, 636 P.2d 317 (Ct. App. 1981).

When attorney's fees unavailable. - If there are no benefits available to a deceased employee's estate, there can be no separate fee recovery available to his attorney. Brazfield v. Mountain States Mut. Cas. Co., 93 N.M. 417, 600 P.2d 1207 (Ct. App.), cert. denied, 93 N.M. 205, 598 P.2d 1165 (1979).

III. Illustrative Cases.

Disability based on allergy. - The condition of being physically affected by the presence of a certain substance is a permanent condition, if the susceptibility is permanent. Schober v. Mountain Bell Tel., 96 N.M. 376, 630 P.2d 1231 (Ct. App. 1980).

Unable to perform work because of anxiety reaction. - That the outward manifestations of the anxiety reaction could be controlled by medication does not alter the fact that plaintiff still was unable to perform any type of work such as he had formerly been able to do, or which, by reason of his age, mental condition, training and experience, he would have been able to do. Roybal v. County of Santa Fe, 79 N.M. 99, 440 P.2d 291 (1968).

Evidence supported trial court's finding that claimant was totally disabled where his injury caused a chronic lumbo-sacral strain, permanent in duration, from which no improvement could be expected, which occasioned flare-ups from time to time, one of such episodes resulting in hospitalization; where claimant bent down to pick something up or sat down and could not thereafter straighten up; and plaintiff, by experience and training, had done heavy, physical labor and had a seventh grade education. Gallegos v. Duke City Lumber Co., 87 N.M. 404, 534 P.2d 1116 (Ct. App. 1975).

Evidence that wholly unfit for proposed position. - Evidence that the job of night-watchman for claimant's former employer would mainly involve riding in a pickup truck over rough roads and that it would be possible, should plaintiff become disabled while working, that there would be no one at the plant to help him get back into town or call a doctor, taken together with evidence that claimant's condition would flare up from merely reaching to the ground for an object or getting up from a sitting position showed that plaintiff was wholly unfit for the proposed position, and supported the finding that plaintiff was '"totally disabled." Gallegos v. Duke City Lumber Co., 87 N.M. 404, 534 P.2d 1116 (Ct. App. 1975).

Evidence not supporting temporary total disability. - Where appellant testified that he had sought and was refused employment in the carpenter trade when his prospective

employer became aware of his disabled condition; two witnesses who were, or had been, foreman or superintendents in building construction testified that in their opinion appellant could not secure employment as a carpenter because of his physical condition resulting from the accidental injury; one of two doctors testified he did not believe appellant could obtain employment as a carpenter; both doctors expressed the opinion that at the time of their last examination appellant could perform certain of the duties of a carpenter which could be done without climbing or the use of other than wide trestles; both doctors testified that appellant's injury had not reached maximum recovery; one doctor testified that the disability to the injured member at the time of the last examination was 50%, the other that it was 60% to the right leg from the hip down; they both testified that they had expected maximum recovery within a period of 18 months, and that the ultimate partial permanent disability to the scheduled member was expected to be 25%, does not support the finding that appellant was temporarily totally disabled for only 18 months. Rhodes v. Cottle Constr. Co., 68 N.M. 18, 357 P.2d 672 (1960) (decided under former law).

If a workman is partially unable to perform the work he was doing at the time of injury because of weight lifting limitations, but is totally able to perform work for which he is fitted and does not return to work, the workman is not entitled to compensation. Medina v. Zia Co., 88 N.M. 615, 544 P.2d 1180 (Ct. App. 1975), cert. denied, 89 N.M. 6, 546 P.2d 71 (1976).

Injury justifying award. - A code welder who sustained an accidental injury to his right thumb, right index finger and the webbing between the thumb and finger, without further impairment to his body, as a natural and direct result of an accident, with the ability to use some, but not all, of the tools necessary to perform the usual tasks of a welder, was equally justified to an award of total and permanent disability under this section or an award for a scheduled injury under 52-1-43 NMSA 1978. American Tank & Steel Corp. v. Thompson, 90 N.M. 513, 565 P.2d 1030 (1977).

§ 52-1-26. Partial disability.

A. As a guide to the interpretation and application of this section, the policy and intent of this legislature is declared to be that every person who suffers a compensable injury with resulting partial disability should be provided with the opportunity to return to gainful employment as soon as possible with minimal dependence on compensation awards.

B. As used in the Workers' Compensation Act [this article], "partial disability" means a condition whereby a worker, by reason of injury arising out of and in the course of employment, suffers an impairment and is unable to some percentage extent to perform any work for which he is fitted by age, education and training.

C. The workers' compensation judge shall determine the percentage of disability by considering the work the worker is capable of performing or the work the worker would

be able to perform if vocational rehabilitation is required pursuant to Section 52-1-50 NMSA 1978.

History: 1978 Comp., § 52-1-26, enacted by Laws 1987, ch. 235, § 12; 1989, ch. 263, § 18.

I. General Consideration.
II. Procedural Matters.
III. Illustrative Cases.

I. General Consideration.

Repeals and reenactments. - Laws 1987, ch. 235, § 12 repealed the former 52-1-26 NMSA 1978, relating to temporary total disability and enacted a new 52-1-26 NMSA, effective June 19, 1987. For provisions of former section see 1986 Cumulative Supplement. For present comparable provisions, see 52-1-25 NMSA 1978.

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judge" for "hearing officer" in Subsection C.

Compiler's notes. - Laws 1987, ch. 235, § 54A, effective June 19, 1987, repealed Laws 1986, ch. 22, § 105 which had formerly repealed this section effective July 1, 1987.

Employer and workman must comply with spirit of this act, i.e., a common sense concept of fairness in the view of a subjective eye that reviews the facts. Purcella v. Navajo Freight Lines, 95 N.M. 306, 621 P.2d 523 (Ct. App. 1980).

Compensation benefits are not based on physical injury itself but on disability produced by the injury and a claim for workmen's compensation is properly denied where there is a failure to establish that the claimant's wage-earning ability had been decreased as a result of the alleged accidental injury. Gallegos v. Kennedy, 79 N.M. 590, 446 P.2d 642 (1968); Anaya v. New Mexico Steel Erectors, Inc., 94 N.M. 370, 610 P.2d 1199 (1980); Cardenas v. United Nuclear Homestake Partners, 97 N.M. 46, 636 P.2d 317 (Ct. App. 1981).

Disability necessary for compensation. - To entitle an injured workman to compensation, impairment is not enough; there must be disability. Pacheco v. Springer Corp., 83 N.M. 622, 495 P.2d 800 (Ct. App. 1972).

In order to be entitled to an award of compensation benefits a workman must not only suffer a physical impairment, but also be unable to perform work. Cardenas v. United Nuclear Homestake Partners, 97 N.M. 46, 636 P.2d 317 (Ct. App. 1981).

Disability is defined in terms of inability to perform usual tasks of his employment or work for which the workman is fitted. Anaya v. Big Three Indus., Inc., 86 N.M. 168, 521 P.2d 130 (Ct. App. 1974).

The primary test for disability is the capacity to perform work. Medina v. Zia Co., 88 N.M. 615, 544 P.2d 1180 (Ct. App. 1975), cert. denied, 89 N.M. 6, 546 P.2d 71 (1976); Klindera v. Worley Mills, Inc., 96 N.M. 743, 634 P.2d 1295 (Ct. App. 1981).

Change in primary test of disability. - The 1963 amendment of the 1959 definition changed the primary test of disability from wage-earning ability to capacity to perform work as delineated in the section. Medina v. Zia Co., 88 N.M. 615, 544 P.2d 1180 (Ct. App. 1975), cert. denied, 89 N.M. 6, 546 P.2d 71 (1976); Smith v. Trailways Bus Sys., 96 N.M. 79, 628 P.2d 324 (Ct. App. 1981).

Two tests in definition of disability. - The definition of total and partial disability under 52-1-24 (now see 52-1-25) NMSA 1978 and this section contain two tests: (1) the workman must be totally or partially unable to perform the work he was doing at the time of the injury, and (2) he must be wholly or partially unable to perform any work for which he is fitted. Medina v. Zia Co., 88 N.M. 615, 544 P.2d 1180 (Ct. App. 1975), cert. denied, 89 N.M. 6, 546 P.2d 71 (1976); Aranda v. Mississippi Chem. Corp., 93 N.M. 412, 600 P.2d 1202 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979); Schober v. Mountain Bell Tel., 96 N.M. 376, 630 P.2d 1231 (Ct. App. 1980); Smith v. City of Albuquerque, 105 N.M. 125, 729 P.2d 1379 (Ct. App. 1986).

Showing of two things necessary for partial disability. - To be partially disabled under this section plaintiff contends there must be a showing of two things: (1) an inability, to some percentage extent, to perform the usual work the workman was performing when injured and (2) an inability, to some percentage extent, to perform any work for which the workman is fitted. Cordova v. Union Baking Co., 80 N.M. 241, 453 P.2d 761 (Ct. App. 1969).

Worker not disabled until unable to work. - Where a worker is able to, and does, perform the work she was doing at the time of an injury, albeit with constant pain, as well as work for which she is fitted by her training and experience, and files her claim for compensation well within the time limitation after she knows or has reason to know she has suffered a compensable injury when so advised by her own doctor, she is not disabled until she is unable to work. Sedillo v. Levi-Strauss Corp., 98 N.M. 52, 644 P.2d 1041 (Ct. App. 1982).

Finding that worker is no longer disabled means that she has the capacity to perform work in the sense that she is wholly able to perform the usual tasks in the work she was performing at the time of her injury, and is wholly able to perform any work for which she is fitted by age, education, training, general physical and mental capacity and previous work experience. Klindera v. Worley Mills, Inc., 96 N.M. 743, 634 P.2d 1295 (Ct. App. 1981).

"Any work for which he is fitted" does not mean that a workman is not disabled if he can perform any work; rather, this phrase means that a workman is disabled if he cannot perform some or all the work for which he is fitted by reason of the various factors listed in this section. Anaya v. New Mexico Steel Erectors, Inc., 94 N.M. 370, 610 P.2d 1199 (1980); Schober v. Mountain Bell Tel., 96 N.M. 376, 630 P.2d 1231 (Ct. App. 1980).

Not entitled to compensation where totally able to perform fitted work. - If a workman is partially unable to perform the work he was doing at the time of injury because of weight lifting limitations, but is totally able to perform work for which he is fitted and does not return to work, the workman is not entitled to compensation. Medina v. Zia Co., 88 N.M. 615, 544 P.2d 1180 (Ct. App. 1975), cert. denied, 89 N.M. 6, 546 P.2d 71 (1976).

Where workman unable to obtain only kind of work ever known. - If a workman, even though only partially disabled, is unable to obtain the only kind of work he has ever known, he is therefore entitled to total disability. Churchill v. City of Albuquerque, 66 N.M. 325, 347 P.2d 752 (1959) (decided under former law).

Loss in earning capacity. - A finding that plaintiff did not suffer a loss in earning capacity is not determinative on the issue of disability. Chavira v. Gaylord Broadcasting Co., 95 N.M. 267, 620 P.2d 1292 (Ct. App.), cert. denied, 95 N.M. 299, 621 P.2d 516 (1980).

Where disability causes employee to quit job. - Where an employee's disability or inability to perform his former job on production causes him to quit the job, for purposes of determining his rights to compensation benefits, the employee did not voluntarily leave his employment. Aranda v. Mississippi Chem. Corp., 93 N.M. 412, 600 P.2d 1202 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

Evidence of termination of employment is strong evidence that the claimant was totally incapacitated, but it may be overcome by considerations of claimant's other training, experience, his educational background and the fact that his injury was not so serious as to prevent his satisfactorily performing his job for approximately a year and a half after the jury's verdict. Churchill v. City of Albuquerque, 66 N.M. 325, 347 P.2d 752 (1959) (decided under former law).

A claim for compensation for partial disability is properly denied where there is a failure to establish that the claimant has been to some percentage-extent disabled as defined by this section. Pacheco v. Springer Corp., 83 N.M. 622, 495 P.2d 800 (Ct. App. 1972).

Certain percentage of functional disability is not necessarily the same percentage of disability attributable to an injury under the Workmen's Compensation Act. Hales v. Van Cleave, 78 N.M. 181, 429 P.2d 379 (Ct. App.), cert. denied, 78 N.M. 198, 429 P.2d 657 (1967).

Impairment not necessarily disability. - Compensation, apart from the scheduled injury section, is based on disability to work, and a physical impairment is not necessarily a

"disability" under the section. Pacheco v. Springer Corp., 83 N.M. 622, 495 P.2d 800 (Ct. App. 1972).

Nondisabling pain does not constitute compensable injury under the New Mexico Workmen's Compensation Act. Gomez v. Hausman Corp., 83 N.M. 400, 492 P.2d 1263 (Ct. App. 1971), cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972).

Employee unable to "double over" consecutive shifts is partially disabled. - If a workman is assigned some overtime work occasionally and is unable to perform, he may not be partially disabled. But an employee assigned to "double over," that is, remain on the job for a second eight-hour shift whenever requested to do so by his employer, who is able to perform his regularly assigned work yet unable to "double over" is partially disabled to some percentage. Perez v. International Minerals & Chem. Corp., 95 N.M. 628, 624 P.2d 1025 (Ct. App. 1981).

Total and partial two segments of disability continuum. - Section 52-1-24 (now see 52-1-25) NMSA 1978 and this section establish a continuum from zero to total disability through all percentages of partial disability; partial and total disability are therefore not two separate concepts or issues but two segments of one disability continuum. Maes v. John C. Cornell, Inc., 86 N.M. 393, 524 P.2d 1009 (Ct. App. 1974).

No different measure of proof for total and partial disability. - Because the legislature saw fit to define total disability and partial disability in separate sections (52-1-25 NMSA 1978 and this section) does not justify a differing measure of proof. Roybal v. County of Santa Fe, 79 N.M. 99, 440 P.2d 291 (1968).

Effect of post-injury employment. - The existence of post-injury employment does not necessarily disqualify the workman from disability benefits. Schober v. Mountain Bell Tel., 96 N.M. 376, 630 P.2d 1231 (Ct. App. 1980); Bower v. Western Fleet Maintenance, 104 N.M. 731, 726 P.2d 885 (Ct. App. 1986).

Post-injury employment is evidence going to the question of whether a disability exists, but compensation for disability depends on the inability to peform some of the work for which the workman is fitted, not on whether or not the workman is employed. Schober v. Mountain Bell Tel., 96 N.M. 376, 630 P.2d 1231 (Ct. App. 1980).

Even though employee, injured while employed as a carpenter, had returned to fulltime employment as a police officer, the employee may be found to be permanently, partially disabled, as this section allows benefits where an employee is unable to perform some of the work for which he is fit. Jaramillo v. Kaufman Plumbing & Heating Co., 103 N.M. 400, 708 P.2d 312 (1985).

Post-injury unrelated illness. - This section does not provide authority for the trial court to consider a post-injury unrelated illness in awarding compensation. Clavery v. Zia Co., 104 N.M. 321, 720 P.2d 1262 (Ct. App. 1986).

Temporary disability is that which lasts for a limited time only while the workman is undergoing treatment, anticipating that eventually there will be either complete recovery or an impaired bodily condition which is static. Smith v. Trailways Bus Sys., 96 N.M. 79, 628 P.2d 324 (Ct. App. 1981).

Employer cannot have failed or refused to pay compensation until such time as the injured workman "is disabled 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." Gomez v. Hausman Corp., 83 N.M. 400, 492 P.2d 1263 (Ct. App. 1971), cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972).

Absent fraud, no credit for overpayment of minor amount. - Where defendants made absolutely no allegation that plaintiff defrauded them or was otherwise unjustly enriched, and where plaintiff has been overpaid by only approximately $42.00, this was not an appropriate case for credit for overpayments. Bower v. Western Fleet Maintenance, 104 N.M. 731, 726 P.2d 885 (Ct. App. 1986).

Law reviews. - For annual survey of New Mexico law relating to workmen's compensation, see 13 N.M.L. Rev. 495 (1983).

For article, "The Role of the Vocational Expert in Worker's Compensation Cases," see 14 N.M.L. Rev. 483 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 240 to 288, 340.
Admissibility of opinion evidence as to employability on issue of disability in health and accident insurance and workers' compensation cases, 89 A.L.R.3d 783.
99 C.J.S. Workmen's Compensation §§ 299, 302 to 304; 101 C.J.S. Workmen's Compensation §§ 850, 854, 860, 967.

II. Procedural Matters.

Rate of compensation in effect on date of disability applies, not the date of the accident. Purcella v. Navajo Freight Lines, 95 N.M. 306, 621 P.2d 523 (Ct. App. 1980).

Plaintiff must establish that he was totally or partially unable to perform the work he was doing at the time of the injury, and in addition thereto, he must establish that he was totally or partially unable to perform any work for which he was fitted. Medina v. Zia Co., 88 N.M. 615, 544 P.2d 1180 (Ct. App. 1975), cert. denied, 89 N.M. 6, 546 P.2d 71 (1976).

Doctor's opinion testimony was substantial evidence for a finding of 80% partial permanent disability. Roybal v. County of Santa Fe, 79 N.M. 99, 440 P.2d 291 (1968).

An opinion as to medical disability does not resolve question of disability under Workmen's Compensation Law. Disability, at the time of plaintiff's accidental injury, was defined in terms of being able to perform the usual tasks of plaintiff 's work or of being able to perform any work for which he was fitted by age, education, training, physical and mental capacity and experience. Goolsby v. Pucci Distrib. Co., 80 N.M. 59, 451 P.2d 308 (Ct. App. 1969).

Ability to perform established by worker's testimony. - Disability is measured by the ability to perform work. Medical testimony on this issue is not necessary and sometimes is not even helpful. Ability to perform work may be established by plaintiff's testimony. Grudzina v. New Mexico Youth Diagnostic & Dev. Center, 104 N.M. 576, 725 P.2d 255 (Ct. App.), cert. denied, 104 N.M. 460, 722 P.2d 1182 (1986).

Determination of degree of disability in workmen's compensation cases is generally a matter for the trial court, and absent misapplication of the law or a lack of substantial evidence, an appellate court should not substitute its judgment for that of the trial court. Marez v. Kerr-McGee Nuclear Corp., 93 N.M. 9, 595 P.2d 1204 (Ct. App. 1978), cert. denied, 92 N.M. 1532, 591 P.2d 286 (1979).

The determination of the degree of disability is a question of fact for the fact finder; if there is substantial evidence to support the finding, an appellate court is bound thereby. Gonzales v. Bates Lumber Co., 96 N.M. 422, 631 P.2d 328 (Ct. App. 1981).

Disability question properly submitted to jury. - Unless the trial court can say that claimant is not totally and permanently disabled as a matter of law, the question is properly submitted to the jury. Ruiz v. Hedges, 69 N.M. 75, 364 P.2d 136 (1961) (decided under former law).

III. Illustrative Cases.

Evidence establishing partial disability. - That plaintiff could not lift heavy items, he experienced continuous back pain even while wearing a back brace, his left leg was weak and ached, and he couldn't touch one or more of his toes on his left foot because of pain established that to some percentage extent he was unable to perform "any work" for which he was fitted and therefore partially disabled. Cordova v. Union Baking Co., 80 N.M. 241, 453 P.2d 761 (Ct. App. 1969).

There was substantial evidence to support the trial court's finding that plaintiff, paralyzed in a work-related accident, was totally unable to perform the work which he was doing at the time of the injury and 99 percent unable to perform any work for which he was fitted. Bower v. Western Fleet Maintenance, 104 N.M. 731, 726 P.2d 885 (Ct. App. 1986).

And partial permanent disability. - Where the doctor has testified that claimant is "medically" 100% disabled from driving a school bus and, further, that he is 80% incapacitated from doing any other work for which he is qualified, the evidence is substantial to support the finding of 80% partial permanent disability. Ortega v. New Mexico State Hwy. Dep't, 77 N.M. 185, 420 P.2d 771 (1966).

Evidence not supporting that claimant should have known of injury. - Where there was no evidence that plaintiff's pain prevented him, in any manner whatsoever, from performing all of the duties of his job until January 15, 1970, just as he had prior to the accident, there was no suggestion in the evidence that the plaintiff did not earn the wages paid him after the accident, it followed that there was no failure or refusal to pay compensation prior to January 15, 1970, and the trial court's finding that the plaintiff knew at all times, or by the exercise of reasonable diligence should have known, that he suffered a compensable injury on July 27, 1966, was not supported by substantial evidence and, therefore, was erroneous. Gomez v. Hausman Corp., 83 N.M. 400, 492 P.2d 1263 (Ct. App. 1971), cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972).

Finding of disability is not foreclosed by fact that appellee has been working driving a school bus, even though he should not be doing so because of injurious effects of such activity on him. Oretega v. New Mexico State Hwy. Dep't, 77 N.M. 185, 420 P.2d 771 (1966).

A finding of 40% disabled under this section is not erroneous where plaintiff, whose job involved lifting heavy objects, suffered a ruptured lumbar disc, would not be able to perform his old duties unless he had both discs fused, could only do sedentary work such as answering phones, and was generally disabled as to the first test of this section - the extent to which he was able to perform the usual tasks at the time of his injury - and also under the second test - the extent to which he was unable to perform any work to which he is fitted by training, etc. - the defendant was in pain, the chances of improvement were nil, and the plaintiff would be barred from jobs in his field when they came up. Barger v. Ford Sales Co., 89 N.M. 25, 546 P.2d 873 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Judgment awarding disability affirmed. See Aguilar v. Penasco Indep. School Dist. No. 6, 100 N.M. 625, 674 P.2d 515 (1984).

§ 52-1-27. Repealed.

Repeals. - Laws 1986, ch. 22, § 105 repealed 52-1-27 NMSA 1978, as enacted by Laws 1986, ch. 22, § 7, defining "date of maximum medical improvement", effective July 1 1987. That repeal, however, was repealed by Laws 1987, ch. 235, § 54A effective June 19, 1987.

Laws 1987, ch. 235, § 54B repeals 52-1-27 NMSA 1978, effective June 19, 1987. For provisions of former section, see 1986 Cumulative Supplement to this pamphlet.

§ 52-1-28. Compensable claims; proof.

A. 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 his employment;

(2) when the accident was reasonably incident to his employment; and

(3) when the disability is a natural and direct result of the accident.

B. In all cases where the 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.

History: 1953 Comp., § 59-10-13.3, enacted by Laws 1959, ch. 67, § 7; 1987, ch. 235, § 13.

I. General Consideration.

The 1987 amendment, effective June 19, 1987, substituted "workers' " for "workmen's" throughout the section; in Subsection B substituted "employer or his insurance carrier" for "defendants", substituted "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" for "as a medical probability by expert medical testimony", and deleted the former last sentence which read "No award of compensation shall be based on speculation or on expert testimony that as a medical possibility the causal connection exists".

For there to be workmen's compensation award, there must be disability and the compensation payable is measured in terms of disability. McCleskey v. N.C. Ribble Co., 80 N.M. 345, 455 P.2d 849 (Ct. App.), cert. denied, 80 N.M. 317, 454 P.2d 974 (1969).

Fundamental theory favors recovery rather than denial. - When the reason or cause for the accident is not explained, and it occurred during the time decedent was at work, the fundamental theory underlying the workmen's compensation law favors recovery rather than denial of compensation. Ensley v. Grace, 76 N.M. 691, 417 P.2d 885 (1966).

Burden is on plaintiff to establish existence of compensable claim and that, the evidence being in conflict, it was the necessary duty of the trial court to resolve the conflict. Tafoya v. Kermac Nuclear Fuels Corp., 71 N.M. 157, 376 P.2d 576 (1962).

Burden of proof of employability. - The claimant has the duty of showing that he was disabled from doing any work for which he was fitted by age, education, training and previous experience; however, after plaintiff has introduced evidence as to his age, education, training and general physical and mental capacity, the burden of coming forward is on the defendant as it is much easier for the defendant to prove the employability of the plaintiff for a particular job than for plaintiff to try to prove the universal negative of not being employable at any work. Brown v. Safeway Stores, Inc., 82 N.M. 424, 483 P.2d 305 (Ct. App. 1970).

Test for recovery under workmen's compensation statute relates to the workman's ability "to obtain and retain gainful employment," considering his age, education, training, general mental and physical capacity and his adaptability. Snead v. Adams Constr. Co., 72 N.M. 94, 380 P.2d 836 (1963).

Primary test for disability is capacity to perform work. Adams v. Loffland Bros. Drilling Co., 82 N.M. 72, 475 P.2d 466 (Ct. App. 1970); Bufalino v. Safeway Stores, Inc., 98 N.M. 560, 650 P.2d 844 (Ct. App. 1982).

Accidental injury while employed, expenses due to problems exacerbated by injury, fulfills prerequisites. - Findings that plaintiff: (1) suffered an accidental injury while in the course and scope of his employment while inventorying and numbering air conditioners; and (2) incurred medical expenses due to symptomatic problems with his lower back exacerbated by the injury included the necessary prerequisites for coverage under the workmen's compensation act. Diatteo v. County of Dona Ana, 104 N.M. 599, 725 P.2d 575 (Ct. App. 1986).

Determination of degree of disability is question of fact for the fact finder and if there is substantial evidence in the record to support a finding, the appellate court is bound thereby. Adams v. Loffland Bros. Drilling Co., 82 N.M. 72, 475 P.2d 466 (Ct. App. 1970).

Measure of disability under workmen's compensation statute is the relationship between the workman's ability to do work prior to the injury, and such ability following the injury. Gurule v. Albuquerque-Bernalillo County Economic Opportunity Bd., 84 N.M. 196, 500 P.2d 1319 (Ct. App.), cert. denied, 84 N.M. 180, 500 P.2d 1303 (1972).

Award is based upon permanent injuries, not the outward manifestation, or lack thereof, of the symptoms resulting from the injuries. Having found total disability, it was not

necessary for the trial court to make a negative finding with respect to the symptoms alone. Roybal v. County of Santa Fe, 79 N.M. 99, 440 P.2d 291 (1968).

"Permanent damage to the heart" is not a "disability" unless it adversely affects a workman's capacity to work. If it does, then a workman suffers a permanent disability, whether the damage is large or small. Bufalino v. Safeway Stores, Inc., 98 N.M. 560, 650 P.2d 844 (Ct. App. 1982).

Latent injuries are recognized under this section. Chaffins v. Jelco, Inc., 82 N.M. 666, 486 P.2d 75 (Ct. App.), cert. quashed, 83 N.M. 22, 487 P.2d 1092 (1971).

Payment of full wages not conclusive as to disability. - Payment of full wages, whether earned or not, is not conclusive on the question of "disability." Rayburn v. Boys Super Mkt., Inc., 74 N.M. 712, 397 P.2d 953 (1964).

If a veterans administration payment is a pension, it cannot be considered to reduce the amount of workmen's compensation. Snead v. Adams Constr. Co., 72 N.M. 94, 380 P.2d 836 (1963).

Lack of support not conclusive as to dependency. - In determining dependency of widow and children of deceased claimant, fact that claimant had not supported them in the years just previous to his death is not conclusive on question of dependency when there is some payment to dependents from his attached funds and deceased intended to begin supporting his dependents in full in near future. Houston v. Lovington Storage Co., 75 N.M. 60, 400 P.2d 476 (1965).

It is not necessary that essential facts to a recovery be proved by direct evidence; they may be established by reasonable inferences drawn from proven facts. Where there is substantial evidence that the death of an employee results from an accident and the accident occurs during his hours of work, at a place where his duties require him to be, or where he might properly have been in the performance of such duties, the trier of the facts may reasonably conclude therefrom, as a natural inference, that the accident arises out of and in the course of the employment, and that the injury was reasonably incident to the employment. Houston v. Lovington Storage Co., 75 N.M. 60, 400 P.2d 476 (1965).

When evidence on disability is primarily or substantially all documentary, the appellate court is as well positioned as the trial court to consider and weigh the evidence and determine the facts disclosed thereby; however, the trial court's finding is to be included in the weighing and review. Martinez v. Universal Constructors, Inc., 83 N.M. 283, 491 P.2d 171 (Ct. App. 1971).

Where doctor's testimony was presented to trial court by depositions, the appellate court was still bound by trial court's findings as to that testimony, if supported by substantial evidence. Brannon v. Well Units, Inc., 82 N.M. 253, 479 P.2d 533 (Ct. App. 1970).

Trial court can properly consider deposition testimony of treating physician. Martinez v. Universal Constructors, Inc., 83 N.M. 283, 491 P.2d 171 (Ct. App. 1971).

Trial court to determine credibility and weight of witnesses. - There is a conflict in the evidence concerning plaintiff's present disability. The credibility of the witnesses and the weight to be given their testimony are to be determined by the trial court and not by the appellate court. Mares v. City of Clovis, 79 N.M. 759, 449 P.2d 667 (Ct. App. 1968).

Although plaintiff testified that he suffered an accidental injury while at work on a certain date, there is evidence which contradicts plaintiff. It was for the trial court to resolve the conflict. Montoya v. Leavell-Brennand Constr. Co., 81 N.M. 616, 471 P.2d 186 (Ct. App. 1970).

It was for the trial court, as the trier of the facts, and not for this court, to determine the credibility of the witnesses, the weight to be given their respective testimonies, and wherein the truth lay, and that the witnesses upon whose credibility the trial court was required to pass were medical experts, and that the differences and conflicts to be resolved arose out of their medical opinions as to the causes and nature of plaintiff's disabling condition, does not alter the rule. Wood v. Citizens Std. Life Ins. Co., 82 N.M. 271, 480 P.2d 161 (1971).

It was not the duty of the appellate court to weigh the testimony of the doctors, but rather, the duty of the trier of fact; and although there was testimony of the medical experts from which the trial court might have found other than it did, nevertheless, it was for the trial court, as the fact finder, to evaluate all the evidence and determine where the truth lay. Moorhead v. Gray Ranch Co., 90 N.M. 220, 561 P.2d 493 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Trier of facts to determine weight and conflicts of medical witnesses. - Once a medical witness has qualified to give an expert medical opinion upon a particular issue, the weight, if any, to be given his opinion on this issue, and the resolution of conflicts between his opinion and the opinions of other medical experts on the issue, are for the trier of the facts. Wood v. Citizens Std. Life Ins. Co., 82 N.M. 271, 480 P.2d 161 (1971).

Where two medical experts express contrary opinions on causation, a conflict arises and such conflict must be resolved by the trier of facts. Chaffins v. Jelco, Inc., 82 N.M. 666, 486 P.2d 75 (Ct. App.), cert. quashed, 83 N.M. 22, 487 P.2d 1092 (1971).

Where testimony of medical experts was conflicting on cause of injury the supreme court of New Mexico held it was within the province of the trier of fact to evaluate and choose between the conflicting views of the experts on this question. Irvin v. Rainbo Baking Co., 76 N.M. 213, 413 P.2d 693 (1966).

The testimony of a physician is opinion testimony and as such is not conclusive, and the trier of the facts may accept, reject or give such weight only as it deems such evidence is entitled to have, even though uncontradicted. Where medical testimony is conflicting

the court's determination will be affirmed. Renfro v. San Juan Hosp., 75 N.M. 235, 403 P.2d 681 (1965); Perea v. Gorby, 94 N.M. 325, 610 P.2d 212 (Ct. App. 1980).

The mere production of one or more experts who testify to the causal connection does not satisfy the burden imposed upon the workman by the section if there is other expert testimony expressing a contrary opinion, as when such conflict in the proof arises, the trier of the facts must resolve the disagreement and determine the true facts. Gallegos v. Kennedy, 79 N.M. 590, 446 P.2d 642 (1968).

Compensation not payable until and unless a work-related accident produces an injury which becomes disabling. Casias v. Zia Co., 93 N.M. 78, 596 P.2d 521 (Ct. App.), cert. denied, 93 N.M. 8, 595 P.2d 1203 (1979).

Determination of amount of compensation. - If the court finds that a workman's injury resulted in a prejudgment terminated disability, he is paid "the amount then due." If a workman's injury resulted in a post-judgment disability, he is also paid compensation "at regular intervals during the continuance of his disability." Sena v. Gardner Bridge Co., 93 N.M. 358, 600 P.2d 304 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Voluntary payment of benefits as evidence. - Admission by an employer that it voluntarily paid an employee workmen's compensation benefits is competent evidence of every relevant fact necessary under this section to allow the employee recovery of benefits after the voluntary payments cease. Medrano v. Ray Willis Constr. Co., 96 N.M. 643, 633 P.2d 1241 (Ct. App. 1981).

Failure to find positive evidence not fatal to claim. - If there are any facts and circumstances sufficient to raise a reasonable inference that the employee met an accident on the job, the failure to find positive evidence is not fatal to the claim. Sena v. Continental Cas. Co., 97 N.M. 753, 643 P.2d 622 (Ct. App. 1982).

Expert testimony not limited to specialists. - Subsection B does not limit expert testimony on causation to a specialist in the area of injury. Turner v. New Mexico State Hwy. Dep't, 98 N.M. 256, 648 P.2d 8 (Ct. App. 1982) (decided under prior law).

Expert medical testimony. - A psychologist cannot render "expert medical testimony" under subsection B of this statute. Fierro v. Stanley's Hdwe., 104 N.M. 401, 722 P.2d 652 (Ct. App. 1985), rev'd on other grounds, 104 N.M. 50, 716 P.2d 241 (1986).

Use of the phrase "expert medical testimony" in Subsection B does not limit the qualification of expert testimony to licensed physicians. Madrid v. University of Cal., 105 N.M. 715, 737 P.2d 74 (1987).

Licensed psychologist was qualified to provide expert medical testimony of causation of plaintiff's claimed mental condition. Madrid v. University of Cal., 105 N.M. 715, 737 P.2d 74 (1987).

A chiropractor may offer expert medical testimony regarding causation. Vallejos v. KNC, Inc. - A Rogers Co., 105 N.M. 530, 735 P.2d 530 (1987).

A doctor's opinion testimony was substantial evidence for finding of 80% partial permanent disability. Roybal v. County of Santa Fe, 79 N.M. 99, 440 P.2d 291 (1968).

Conflict between treating physician and specialist. - If treating physician's testimony was sufficient to support a finding of no disability, it was the trial court's function to resolve the conflict between treating physician's testimony and that of specialist. Martinez v. Universal Constructors, Inc., 83 N.M. 283, 491 P.2d 171 (Ct. App. 1971).

Where expert witness had no knowledge of pertinent information. - Where pertinent information existed about which expert witness apparently had no knowledge, his opinion cannot serve as the basis for compliance with this section. Niederstadt v. Ancho Rico Consol. Mines, 88 N.M. 48, 536 P.2d 1104 (Ct. App.), cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975).

Medical expert may properly express his opinion in percentages as to the impairment of the physical functions of a claimant. Hales v. Van Cleave, 78 N.M. 181, 429 P.2d 379 (Ct. App.), cert. denied, 78 N.M. 198, 429 P.2d 657 (1967).

Totally disabled notwithstanding the medical opinion. - The claimant is wholly unable to perform the usual tasks of a common laborer which was what he was doing when he was injured, and he is entirely unable to perform any work for which he is qualified. This is true, notwithstanding the doctor's statement that claimant is "20 percent permanently disabled, no matter what he does." Although this testimony may be accurate "medically," under the section if he can no longer do the work he was doing when injured, and cannot do the only work for which he is qualified, he is "legally" totally disabled. Quintana v. Trotz Constr. Co., 79 N.M. 109, 440 P.2d 301 (1968).

Unable to perform work due to anxiety reaction. - That the outward manifestations of the anxiety reaction could be controlled by medication does not alter the fact that plaintiff still was unable to perform any type of work such as he had formerly been able to do, or which, by reason of his age, mental condition, training and experience, he would have been able to do. Roybal v. County of Santa Fe, 79 N.M. 99, 440 P.2d 291 (1968).

If compensation or traumatic neurosis is present as a result of a work-connected injury, and claimant's earning powers are thereby adversely affected, there is no reason why the same is not compensable. Ross v. Sayers Well Servicing Co., 76 N.M. 321, 414 P.2d 679 (1966).

Finding of disability as ultimate fact. - A finding that a workman, to a stated percentage extent, is partially and permanently disabled is a finding of an ultimate fact. McClesky v. N.C. Ribble Co., 80 N.M. 345, 455 P.2d 849 (Ct. App.), cert. denied, 80 N.M. 317, 454 P.2d 974 (1969).

The failure of the court to adopt an express finding on the issue of causation and plaintiff's mental condition does not require denial of an award of medical benefits for treatment of depression where other findings adopted by the court are sufficient to support the court's ultimate findings on this issue. Montney v. State ex rel. State Hwy. Dep't, 108 N.M. 326, 772 P.2d 360 (Ct. App. 1989).

Trial court's finding affirmed if substantial evidence. - Trial court's finding that plaintiff did not sustain an accidental injury arising out of and in the course of his employment must be affirmed if there is substantial evidence to support the finding on this point and supreme court will not weigh the evidence. Jacquez v. McKinney, 78 N.M. 641, 436 P.2d 501 (1968).

Finding of disability contrary to evidence. - Where the evidence shows the claimant was substantially and continuously employed in comparable work, except for short intervals, the verdict of the trial jury finding claimant totally and permanently disabled for 115 weeks is contrary to the undisputed evidence in the case, and should be vacated and set aside. Baca v. Swift & Co., 74 N.M. 211, 392 P.2d 407 (1964).

Failure of trial court to find concerning plaintiff's ability to perform usual tasks of work performed when injured was not a failure to find an ultimate fact. McCleskey v. N.C. Ribble Co., 80 N.M. 345, 455 P.2d 849 (Ct. App.), cert. denied, 80 N.M. 317, 454 P.2d 974 (1969).

Failure to find fact regarded as finding against party having burden. - Even if omissions were made, it is the rule in this jurisdiction that a failure by the trial court to find a material fact must be regarded as a finding against the party having the burden of establishing such fact. Baker v. Shufflebarger & Assocs., 77 N.M. 50, 419 P.2d 250 (1966).

Scope of review on appeal. - If the necessary medical evidence is produced, the degree of disability is a question of fact for the fact-finder; and if there is substantial evidence in the record to support a disability finding, it is binding on a reviewing court. Smith v. Trailways Bus Sys., 96 N.M. 79, 628 P.2d 324 (Ct. App. 1981).

The appellate court, on appeal, in reviewing workmen's compensation cases considers only evidence and inferences that may be reasonably drawn therefrom in the light most favorable to support the findings of the trial court and does not weigh conflicting evidence or the credibility of the witnesses. Turner v. New Mexico State Hwy. Dep't, 98 N.M. 256, 648 P.2d 8 (Ct. App. 1982).

Where conflicting medical testimony is presented as to whether a medical probability of causal connection existed between myocardial infarction and the work being performed, the trial court's determination will be affirmed. Bufalino v. Safeway Stores, Inc., 98 N.M. 560, 650 P.2d 844 (Ct. App. 1982).

The question on appeal is not whether there is evidence to support an alternative result

but, rather, whether the trial court's result is supported by substantial evidence. Bagwell v. Shady Grove Truck Stop, 104 N.M. 14, 715 P.2d 462 (Ct. App. 1986).

Law reviews. - For comment, "Witnesses - Privileged Communications - Physician-Patient Privilege in Workmen's Compensation Cases," see 7 Nat. Resources J. 442 (1967).

For note, "Workmen's Compensation in New Mexico: Preexisting Conditions and the Subsequent Injury Act," see 7 Nat. Resources J. 632 (1967).

For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

For case note, "WORKERS' COMPENSATION LAW: A Clinical Psychologist Is Qualified to Give Expert Medical Testimony Regarding Causation: Madrid v. University of California, d/b/a Los Alamos National Laboratory," see 18 N.M.L. Rev. 637 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 223 to 239; 82 Am. Jur. 2d Workmen's Compensation §§ 509 to 539.
Medical testimony based on patient's history, 51 A.L.R. 1051; 79 A.L.R. 857; 98 A.L.R. 788.
Injury while crossing or walking along railroad or street railway tracks, going to or from work, as arising out of and in course of employment, 50 A.L.R.2d 363.
Compensation for injury or death on or near golf course, 82 A.L.R.2d 1183.
Suicide as compensable under Workmen's Compensation Act, 15 A.L.R.3d 616.
Workmen's compensation: injury or death due to storms, 42 A.L.R.3d 385.
Injury sustained while attending employer-sponsored social affair as arising out of and in the course of employment, 47 A.L.R.3d 566.
Employer's liability for injury caused by food or drink purchased by employee in plant facilities, 50 A.L.R.3d 505.
99 C.J.S. Workmen's Compensation §§ 152 to 257; 100 C.J.S. Workmen's Compensation § 461.

II. Accident in Course of Employment.

Claimant seeking recovery under workmen's compensation was required to prove a compensable claim by showing an accidental injury arising out of and in the course of employment that was reasonably incident to his employment, and was required to establish causal connection as a medical probability by expert medical testimony. Geeslin v. Goodno, Inc., 77 N.M. 408, 423 P.2d 603 (1967).

The burden rests on a plaintiff in a case of this kind to show that a decedent's death was proximately caused by an accident arising out of and in the course of his employment. Campbell v. Schwers-Campbell, Inc., 59 N.M. 385, 285 P.2d 497 (1955) (decided under

former law).

To recover workmen's compensation, the claimant must have sustained an accidental injury arising out of and in the course of his employment. Montoya v. Leavell-Brennand Constr. Co., 81 N.M. 616, 471 P.2d 186 (Ct. App. 1970).

Under Workmen's Compensation Act, recovery is allowed only "when the workman has sustained an accidental injury arising out of, and in the course of his employment." In the absence of such showing, there can be no recovery. Jacquez v. McKinney, 78 N.M. 641, 436 P.2d 501 (1968).

Claims under the Workmen's Compensation Act are allowed only when they involve job-related injuries. Holliday v. Talk of Town, Inc., 98 N.M. 354, 648 P.2d 812 (Ct. App. 1982).

Factors must coexist. - "Course of employment," as used in Subsection A, refers to the time, place and circumstances under which the injury occurred: "arise out of," as used in Subsection A, relates to the cause of the injury. Both of these factors must coexist; one without the other is not enough. Gutierrez v. Artesia Pub. Schools, 92 N.M. 112, 583 P.2d 476 (Ct. App. 1978).

"Course of employment" refers to the time, place and circumstances under which the injury occurred, and is synonymous with the term "while at work." Thigpen v. County of Valencia, 89 N.M. 299, 551 P.2d 989 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Whether an injury occurs in the course of employment relates to the time, place and circumstances under which the accident takes place. Sena v. Continental Cas. Co., 97 N.M. 753, 643 P.2d 622 (Ct. App. 1982); Barton v. Las Cositas, 102 N.M. 312, 694 P.2d 1377 (Ct. App. 1984).

The words "in the course of [his] employment" relate to the time, place and circumstances under which the accident takes place. An accident arises in the course of the employment when it occurs within the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto. Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964).

"Accidental injury" or "accident" is an unlooked for mishap, or untoward event which is not expected or designed. Lyon v. Catron County Comm'rs, 81 N.M. 120, 464 P.2d 410 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970); Herndon v. Albuquerque Pub. Schools, 92 N.M. 635, 593 P.2d 470 (Ct. App. 1978); Hernandez v. Home Educ. Livelihood Program, Inc., 98 N.M. 125, 645 P.2d 1381 (Ct. App. 1982) (specially concurring opinion); Bufalino v. Safeway Stores, Inc., 98 N.M. 560, 650 P.2d 844 (Ct. App. 1982).

For injury to "arise out of" the employment, there must be a showing that the injury was caused by a risk to which the plaintiff was subjected by his employment. The employment must contribute something to the hazard of the fall. Compensation has been denied where the risk was common to the public. Williams v. City of Gallup, 77 N.M. 286, 421 P.2d 804 (1966); Gutierrez v. Artesia Pub. Schools, 92 N.M. 112, 583 P.2d 476 (Ct. App. 1978); Losinski v. Drs. Corcoran, Barkoff & Stagnone, 97 N.M. 79, 636 P.2d 898 (Ct. App. 1981).

A worker's injuries arise out of his employment if the injury is caused by a risk the worker is subjected to in his employment. Barton v. Las Cositas, 102 N.M. 312, 694 P.2d 1377 (Ct. App. 1984).

Where risk incidental to employment. - A risk is incidental to the employment, for the purposes of Subsection A(2), only where the risk belongs to or is connected with what an employee must do in fulfilling her contract. Velkovitz v. Penasco Indep. School Dist., 96 N.M. 587, 633 P.2d 695 (Ct. App. 1980), rev'd on other grounds, 96 N.M. 577, 633 P.2d 685 (1981).

To "arise out of" employment, there must have been causal connection between the employment and the injury so that the injury is reasonably incident to the employment. Brundage v. K.L. House Constr. Co., 74 N.M. 613, 396 P.2d 731 (1964).

If an injury can be seen to have followed as a natural incident of work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. Gutierrez v. Artesia Pub. Schools, 92 N.M. 112, 583 P.2d 476 (Ct. App. 1978).

An injury arises out of the employment when it is caused by a risk to which the worker is subjected in the employment. Sena v. Continental Cas. Co., 97 N.M. 753, 643 P.2d 622 (Ct. App. 1982).

Injury must have origin in risk connected with employment. - The "arising out of" requirement excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause; the causative danger must be peculiar to the work, it must not be independent of the relation of master and servant. After the event it must appear that the accidental injury had its origin in a risk connected with the employment and to have flowed from that risk as a rational consequence. McDaniel v. City of Albuquerque, 99 N.M. 54, 653 P.2d 885 (Ct. App. 1982).

Injury is said to arise in the course of employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while he is fulfilling his duties or engaged in doing something incidental thereto. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976).

Course of employment as finding of fact. - Where trial court simply stated that on the date of a claimed accident, the plaintiff did not incur an accident or suffer an injury arising out of and in the course of his employment, such finding was not a conclusion of law but a proper ultimate finding of fact, and claim that trial court failed to make findings of fact was without merit. Bell v. Kenneth P. Thompson Co., 76 N.M. 420, 415 P.2d 546 (1966).

In workman's compensation, ultimate facts to be determined by trial court as a basis for the conclusion as to whether the claim is a compensable one are whether an injury sustained by a workman arose out of and in the course of his employment. Brundage v. K.L. House Constr. Co., 74 N.M. 613, 396 P.2d 731 (1964).

Reasonable inferences drawn from proven facts. - Where decedent met her death by reason of an unexplained assault on her by her coemployee while she was at work at her usual place of employment, it is not necessary that the essential facts necessary to a recovery be proved by direct evidence; they may be established by reasonable inferences drawn from proven facts. Ensley v. Grace, 76 N.M. 691, 417 P.2d 885 (1966).

Where there is substantial evidence that the death of an employee results from an accident and the accident occurs during his hours of work, at a place where his duties require him to be, or where he might properly have been in the performance of such duties, the trier of the facts may reasonably conclude therefrom, as a natural inference, that the accident arises out of and in the course of the employment, and that the injury was reasonably incident to the employment. Ensley v. Grace, 76 N.M. 691, 417 P.2d 885 (1966).

Natural inference of course of employment. - Where there is substantial evidence that the death of an employee resulted from accident and that the accident occurred during his hours of work, at a place where his duties required him to be, or where he might properly have been in the performance of such duties, the jury or other trier of the issues of fact may reasonably conclude therefrom, as a natural inference, that the accident arose out of and in the course of the employment. Southwestern Portland Cement Co. v. Simpson, 135 F.2d 584 (10th Cir. 1943); Campbell v. Schwers-Campbell, Inc., 59 N.M. 385, 285 P.2d 497 (1955) (decided under former law).

Presumption that death arose out of employment. - Where trial judge found that employer failed to rebut the presumption that employee's death by shooting arose out of his employment, judge, as fact finder, was entitled to presume that employee's death arose out of his employment but was not required to make this presumption, and upon weighing the evidence, could properly resolve the issue against employer. Mortgage Inv. Co. v. Griego, 108 N.M. 240, 771 P.2d 173 (1989).

Scope of employment is to be determined from directions of employer, and not from any agreement between the employee and her fellow employees; thus, the fact that an employee agreed with her fellow employees to form a car pool at a shopping center

before proceeding to a required conference was of no consequence to the scope of her employment. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976).

Controlling factor whether general servant of employer or special servant of another. - In the case of Weese v. Stoddard, 63 N.M. 20, 312 P.2d 545 (1957), in considering the test for determining whether a general servant of one employer can become the special or particular servant of another, the court said: "The controlling factor in determining this question is: Whose work is being performed and who controlled and directed the agent in his work?" Brown v. Pot Creek Logging & Lumber Co., 73 N.M. 178, 386 P.2d 602 (1963).

Special errand rule applicable where employee on special mission. - Where deceased employee who, along with three others, was ordered by the defendant-employer to attend a special two-day health and social services department meeting (all of whom had been requested by their respective supervisors to form a car pool and to return overnight to their home town between the two sessions in order to save fuel and reduce travel costs), picked up the three other employees at an agreed on meeting place, a parking lot, and proceeded in her car to the meeting, and at the close of the first day's session, after discharging her three colleagues in the same parking lot, drove out of the parking lot and immediately thereafter was involved in the accident which resulted in her death, the supreme court held that the special errand rule was applicable in that deceased was on a special mission for her employer and was within the scope of her employment from the moment she left home until the moment she would have returned home at the end of the day, and therefore, her fatal injuries arose out of and in the course of her employment, and the "going and coming" rule was inapplicable. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976).

The special errand rule states that when an employee, having identifiable time and space limits on his employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976).

Question of law where facts undisputed. - Where the historical facts of the case are undisputed, the question whether the accident arose out of and in the course of the employment is a question of law. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976); Losinski v. Drs. Corcoran, Barkoff & Stagnone, 97 N.M. 79, 636 P.2d 898 (Ct. App. 1981).

And freely reviewable. - The conclusion of law that the accident arose out of the course of employment is freely reviewable. Losinski v. Drs. Corcoran, Barkoff & Stagnone, 97 N.M. 79, 636 P.2d 898 (Ct. App. 1981).

Error where record does not rebut presumption of employment. - Where claimant lost her life while engaged in her employment as a result of being shot by her coemployee for unexplained reasons, and, as the evidence of record in no way serves to rebut the presumption that death arose out of her employment, the trial court erred in finding that death did not arise out of the employment. Ensley v. Grace, 76 N.M. 691, 417 P.2d 885 (1966).

Unnecessary that workman be subjected to unusual or extraordinary condition or hazard not usual to his employment for an injury to be an accidental injury under the compensation act. Lyon v. Catron County Comm'rs, 81 N.M. 120, 464 P.2d 410 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970).

Denial of compensation where injury due to personal animosity. - Where the trial court's finding was that the injury in this case was the result of personal animosity, rather than arising out of the employee's work and there was substantial evidence to support this finding, appellate court affirmed denial of workmen's compensation. Valdez v. Glover Packing Co., 83 N.M. 570, 494 P.2d 983 (Ct. App. 1972).

Where employer consented to practice as within employment. - Uncontradicted proof is established that plaintiff's deceased did not depart from his employment in watering his horses while on call during his shift because his employer knew and consented to this practice; he was performing the duties of his employment. Thigpen v. County of Valencia, 89 N.M. 299, 551 P.2d 989 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Recreational activity on employer's premises. - Where a recreational activity regularly occurs on the employer's premises, and the employer in essence, established, promoted, acquiesced in and condoned both the recreational facility and the activities and, in fact, provided the equipment, an accidental injury resulting therefrom satisfies both the "arising out of" and "in the course of employment" requirements. Kloer v. Municipality of Las Vegas, 106 N.M. 594, 746 P.2d 1126 (Ct. App. 1987).

Workman who sustained fatal injuries while returning to his home town for a dual purpose - (1) to enter a hospital, and (2) to accomplish some necessary item of employment as shown by the trial court's findings of fact, was entitled to benefits under this section. Clark v. Electronic City, 90 N.M. 477, 565 P.2d 348 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Deviation from route. - Taking a somewhat roundabout route, or being off the shortest line between the origin and destination, does not in itself remove the traveller from the course of employment; it must be shown in addition that the deviation was aimed at reaching some specific personal objective. Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964).

Employee killed while performing other work not in employment. - Where decedent was employed by employer to clean a shed for client, but was killed while unloading heavy

machinery, work for which he was neither qualified nor employed to perform, and work that employer did not know about and had not even contemplated, the fatal accident did not arise out of decedent's employment with employer. Green v. Manpower, Inc., 81 N.M. 788, 474 P.2d 80 (Ct. App. 1970).

Special employee of another while working off-duty from employer. - Where claimant was regularly employed by the defendant corporation, but the particular work or employment giving rise to injury was undertaken on off-duty hours from the regular job, he was doing work for another corporation away from the premises of his regular employer and was so engaged when his injury occurred, then claimant was a special employee of the other corporation. Brown v. Pot Creek Logging & Lumber Co., 73 N.M. 178, 386 P.2d 602 (1963).

Claimant was not performing service for employer where she intended to give her supervisor a ride home. McDonald v. Artesia Gen. Hosp., 73 N.M. 188, 386 P.2d 708 (1963).

If strain of claimant's usual exertions causes collapse from back weakness, injury is accidental. Lyon v. Catron County Comm'rs, 81 N.M. 120, 464 P.2d 410 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970).

Malfunction of body as accidental injury. - A malfunction of the body itself, such as a fracture of the disc or tearing a ligament or blood vessel, caused or accelerated by doing work required or expected in employment is an accidental injury within the meaning and intent of the compensation act. Lyon v. Catron County Comm'rs, 81 N.M. 120, 464 P.2d 410 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970); Herndon v. Albuquerque Pub. Schools, 92 N.M. 635, 593 P.2d 470 (Ct. App. 1978).

An internal malfunction of the body caused by on-the-job activity is a compensable injury under the Workmen's Compensation Act. Powers v. Riccobene Masonry Constr., Inc., 97 N.M. 20, 636 P.2d 291 (Ct. App. 1980).

Stress induced heart attack. - There was abundant competent evidence to support the trial court's finding that job-related stress, i.e., stress as it related to a firefighter's job, induced the firefighter's heart attack, and that the heart attack caused his death, even though the deceased died in his sleep, because he was nonetheless on duty at the station house at the time. Oliver v. City of Albuquerque, 106 N.M. 350, 742 P.2d 1055 (1987).

Stress of labor aggravating preexisting infirmity as accident. - If the stress of labor aggravates or accelerates the development of a preexisting infirmity causing an internal breakdown of that part of the structure, a personal injury by accident does occur. Herndon v. Albuquerque Pub. Schools, 92 N.M. 635, 593 P.2d 470 (Ct. App. 1978); Powers v. Riccobene Masonry Constr., Inc., 97 N.M. 20, 636 P.2d 291 (Ct. App. 1980).

Mental breakdown resulting from termination not compensable. - Employee who suffered a mental breakdown from being terminated from defendant's employ may not recover workmen's compensation benefits because claimant did not suffer an accidental injury arising out of his employment since the risk that the employment might be terminated was not a risk incident to the performance of claimant's work, and was not peculiar to claimant's employment. Kern v. Ideal Basic Indus., 101 N.M. 801, 689 P.2d 1272 (Ct. App. 1984).

Psychological disability caused by stress arising out of and in the course of employment is compensable. This presupposes the existence of an actual job condition which causes the stress (actual stress), rather than a perceived condition that does not exist (imagined stress). Candelaria v. General Elec. Co., 105 N.M. 167, 730 P.2d 470 (Ct. App. 1986); Lopez v. Smith's Mgt. Corp., 106 N.M. 416, 744 P.2d 544 (Ct. App. 1986).

Rupture. - Claimant's view that he had suffered an injury while lubricating a machine was upheld where there was testimony that he did not complain of feeling any pain earlier in the day and a physician testified that claimant's rupture was caused by leaning over and reaching with his lubricating tool in hand. Beyale v. Arizona Pub. Serv. Co., 105 N.M. 112, 729 P.2d 1366 (Ct. App. 1986).

A gradual, noise-induced hearing loss is an accidental injury compensable under this section and is not an occupational disease. Cisneros v. Molycorp, Inc., 107 N.M. 788, 765 P.2d 761 (Ct. App. 1988).

Disability, resulting from gun accidentally discharged while cleaning, compensable. - Claimant's disability resulting from a self-inflicted gunshot wound was compensable, where his employer failed to rebut the presumption against suicide and there was sufficient evidence to support a finding that the gun accidentally discharged while claimant was cleaning it, for sometimes use on the job. Neel v. State Distribs., Inc., N.M. 727 P.2d 567 (Ct. App. 1986); Neel v. State Distribs., Inc., 105 N.M. 359, 732 P.2d 1382 (Ct. App. 1986).

Where city meter reader fell off motor scooter used in his employment, even though there was evidence that meter reader had been subject to fainting spells, fall off scooter was held to arise out of meter reader's employment. Williams v. City of Gallup, 77 N.M. 286, 421 P.2d 804 (1966).

Employee shot on employer's premises connected with employment. - Where the mentally disturbed husband was aroused by an act of decedent while he was at work, and the husband then went to the employer's premises while decedent was there at work, and shot him, the risk was connected with the employment and the injury arose out of the employment. Hence, the exclusionary provision of the insurance policy precludes recovery where policy excludes "injury arising out of, or in the course of, any employment," and plaintiff is seeking to recover the remaining balance unpaid after recovery under the workmen's compensation law. Roskell v. Prudential Ins. Co. of Am. 529 F.2d 1 (10th Cir. 1976).

Shooting of deputy sheriff as accidental injury. - Uncontradicted evidence that plaintiff's decedent, a deputy sheriff, was found dead of shotgun wounds seated in the driver's seat of his patrol car, and that the shotgun which did not have a trigger guard was sitting over the hump of the transmission on the floor, established an accidental injury arising out of deputy's employment. Thigpen v. County of Valencia, 89 N.M. 299, 551 P.2d 989 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Injury while loading car not incident to employment. - Where workman during regular working hours was engaged in loading his soiled workclothes into his car so as to have them cleaned as was required by his employer, and in so doing moved or jostled a shotgun which was kept in the trunk of his car for personal use so as to inflict a fatal wound, such accident was not reasonably incident to his employment for purposes of this section. Ward v. Halliburton Co., 76 N.M. 463, 415 P.2d 847 (1966).

Not acting in course of employment. - Where decedent was not fulfilling the duties of his employment or engaged in doing something incidental thereto, he was not acting in the course of his employment. Gutierrez v. Artesia Pub. Schools, 92 N.M. 112, 583 P.2d 476 (Ct. App. 1978).

General rule is that employment begins when employee reaches place of work and ends after he leaves his place of work. Barton v. Las Cositas, 102 N.M. 312, 694 P.2d 1377 (Ct. App. 1984).

But "special errand" or "special mission" for employer constitutes exception. - An exception to the general rule that employment begins when the employee reaches his place of work and ends when he leaves his place of work exists where the employee is on a "special errand" or "special mission" for the employer. An employer may agree that the employee's duties begin and end someplace other than the employee's place of work. Barton v. Las Cositas, 102 N.M. 312, 694 P.2d 1377 (Ct. App. 1984).

Application of special errand exception. - The special errand exception has been applied where: (1) there is an express or implied request that the service be performed after fixed working hours; (2) the trip involved was an integral part of the services performed for the employer; and (3) the task performed was special in the sense that it was not a regular and recurring task performed during normal working hours. Barton v. Las Cositas, 102 N.M. 312, 694 P.2d 1377 (Ct. App. 1984).

Burden on plaintiff to show exception to "going and coming" rule. - The burden of showing that a plaintiff falls within an exception to the "going and coming" rule rests upon the plaintiff. Barton v. Las Cositas, 102 N.M. 312, 694 P.2d 1377 (Ct. App. 1984).

Trip to or from doctor's office. - Normally, a trip to or from a doctor's office is only compensable under the Workmen's Compensation Act if the injury to be treated was work-related and compensable under the act. Barton v. Las Cositas, 102 N.M. 312, 694 P.2d 1377 (Ct. App. 1984).

Salesman on plane trip awarded for sales achievement was not in course of employment where he was engaged in a noncompulsory social activity and was not fulfilling any duties of his employment and was not engaged in something incidental to his duties during the flight. Beckham v. Estate of Brown, 100 N.M. 1, 664 P.2d 1014 (Ct. App. 1983).

Murder of employee by third person for reasons personal to third person and not connected with the employee's employment is a "risk" personal to the employee, and risks personal to a claimant and unrelated to his employment are universally held noncompensable. Gutierrez v. Artesia Pub. Schools, 92 N.M. 112, 583 P.2d 476 (Ct. App. 1978).

Claimant must prove labor caused or accelerated physical malfunction. - It was not necessary for claimant to prove that his disc ruptured while he was working, as long as he was able to prove that his labor caused or accelerated the physical malfunction. Powers v. Riccobene Masonry Constr., Inc., 97 N.M. 20, 636 P.2d 291 (Ct. App. 1980).

Liability of earlier employer for injury's aggravation releases subsequent employer liability. - A disabled employee is not required to seek relief from subsequent employer for aggravation of an injury, where evidence showed that such aggravation resulted from a prior injury for which an earlier employer was liable, and from which the employee had never recovered. Perea v. Gorby, 94 N.M. 325, 610 P.2d 212 (Ct. App. 1980).

Judgment entered against defendant in face of plaintiff's unchallenged findings. - Where unchallenged findings of fact established that at the time of trial plaintiff was totally disabled and unable to obtain and retain gainful employment, and that this disability began and had continued without interruption since plaintiff's injury in the course of his employment by defendant, judgment must be entered against defendant for total disability. Perea v. Gorby, 94 N.M. 325, 610 P.2d 212 (Ct. App. 1980).

Employer's voluntary payment of employee's benefits admission of accident. - By voluntarily paying an injured employee workmen's compensation benefits, the employer admits that the employee's disability was a natural and direct result of an accident arising out of and in the course of his employment, and relieves plaintiff of the burden of establishing any causal connection as a medical probability by expert medical testimony. Perea v. Gorby, 94 N.M. 325, 610 P.2d 212 (Ct. App. 1980). But see Romero v. S.S. Kresge Co., 95 N.M. 484, 623 P.2d 998 (Ct. App. 1981); Medrano v. Ray Willis Constr. Co., 96 N.M. 643, 633 P.2d 1241 (Ct. App. 1981).

Voluntary payment of compensation benefits is merely competent evidence as to any issue in a workmen's compensation suit and does not create any presumptions or shifts in the original burden. Romero v. S.S. Kresge Co., 95 N.M. 484, 623 P.2d 998 (Ct. App. 1981). See Medrano v. Ray Willis Constr. Co., 96 N.M. 643, 633 P.2d 1241 (Ct. App. 1981).

Where the sufficiency of the evidence to support the findings that claimant was injured at a time when he was not acting within the scope of his employment, and the injury occurred after he had left his employment, is not directly attacked, they are, therefore, binding upon this court. McAfoos v. Borden Implement Co., 75 N.M. 50, 400 P.2d 470 (1965).

III. Disability As Result of Accident.

Section only requires claimant to prove, by reasonable medical probability, causal connection between the accident and the disability and does not require the claimant to prove disability by a reasonable medical certainty. Archuleta v. Safeway Stores, Inc., 104 N.M. 769, 727 P.2d 77 (Ct. App. 1986).

The term "natural and direct" as used in this section signifies "an understandable and reasonable proximity of cause and effect as distinguished from remote and doubtful consequences resulting from a given occurrence." Weston v. Carper Drilling Co., 77 N.M. 220, 421 P.2d 435 (1966); Stuckey v. Furr Food Cafeteria, 72 N.M. 15, 380 P.2d 172 (1963).

Burden on plaintiff to prove death result of employment. - Burden is on plaintiff to prove the infarction and consequent death were direct results of decedent's employment, and plaintiff is required to establish this causal connection as a medical probability by expert medical testimony. Bertelle v. City of Gallup, 81 N.M. 755, 473 P.2d 369 (Ct. App. 1970).

Where defendants deny that plaintiff's alleged disability was natural and direct result of an accident, the workman must prove the causal connection as a medical probability by expert medical testimony and failure to establish such causal connection prevents recovery. Gallegos v. Kennedy, 79 N.M. 590, 446 P.2d 642 (1968).

Denial that a disability is a natural and direct result of an accident is a condition precedent to the duty of a workman to establish the medical probability of a causal connection. Medrano v. Ray Willis Constr. Co., 96 N.M. 643, 633 P.2d 1241 (Ct. App. 1981).

For an accidental injury to be compensable, the disability must be a natural and direct result of the accident and where such a result is denied, causation must be established as a medical probability by expert medical testimony. This causation requirement applies to any claim for worker's compensation; it makes no difference whether the claim is for a first, second or successive accidental injury. Gonzales v. Stanke-Brown & Assocs., 98 N.M. 379, 648 P.2d 1192 (Ct. App. 1982).

Burden of proof of causal connection. - Subsection B places the burden of persuasion upon the widow. The statute did not shift the burden of persuasion once she introduced evidence which would have supported a finding in her favor and even after the introduction of conflicting evidence, it remained her burden to convince the trial court of such causal connection as a medical probability. Mayfield v. Keeth Gas Co., 81 N.M. 313, 466 P.2d 879 (Ct. App. 1970).

Where widow had the burden of persuading the trial court as to causation of death and doctor's testimony raised a conflict in regard to the widow's theory of death, no benefit resulted to widow. Mayfield v. Keeth Gas Co., 81 N.M. 313, 466 P.2d 879 (Ct. App. 1970).

This section imposes the burden upon the claimant to establish a causal connection between the disability and the accident as a medical probability by expert medical testimony, when the defendant has denied that the disability is a natural and direct result of the accident. If the expert testimony is conflicting, it must be such as to convince the trial court of such causal connection as a medical probability. Torres v. Kennecott Copper Corp., 76 N.M. 623, 417 P.2d 435 (1966); Perea v. Gorby, 94 N.M. 325, 610 P.2d 212 (Ct. App. 1980).

This section does not require that plaintiff in a psychological injury case establish that other life stresses played no part in his disability. Lopez v. Smith's Mgt. Corp., 106 N.M. 416, 744 P.2d 544 (Ct. App. 1986).

This section requires that medical testimony be produced to establish causal connection between an accident and disability not by direct and uncontroverted evidence, but as a medical probability, such as opinion evidence of a medical expert. Corzine v. Sears, Roebuck & Co., 80 N.M. 418, 456 P.2d 892 (Ct. App.), cert. denied, 80 N.M. 388, 456 P.2d 221 (1969).

No recovery on failure to establish causal connection. - Where there has been a failure to establish the causal connection required by statute, there can be no recovery in workmen's compensation. Torres v. Kennecott Copper Corp., 76 N.M. 623, 417 P.2d 435 (1966).

Not having established the causal connection required by Subsection B of this section, plaintiff cannot recover. Romero v. Zia Co., 76 N.M. 686, 417 P.2d 881 (1966).

Nonmedical evidence no avail where causal connection not established. - Absent the establishment of causal connection as a medical probability, as required under this section, nonmedical evidence would be of no avail. Renfro v. San Juan Hosp., 75 N.M. 235, 403 P.2d 681 (1965).

Expert medical testimony must establish causation. - Except in the most obvious cases, causation must be established by expert medical testimony. Chavez v. Lectrosonics, Inc., 93 N.M. 495, 601 P.2d 728 (Ct. App. 1979).

It is encumbent upon claimant to present one or more medical experts to testify that in his or their opinion there is a medical probability of causal connection between the accident alleged and the disability claimed. Renfro v. San Juan Hosp., 75 N.M. 235, 403 P.2d 681 (1965).

Where causation is denied the workman must establish that causal connection is a medical probability by expert medical testimony. Chaffins v. Jelco, Inc., 82 N.M. 666, 486 P.2d 75 (Ct. App.), cert. quashed, 83 N.M. 22, 487 P.2d 1092 (1971).

Where causal connection is denied by an employer, in order to prevail, it is encumbent upon a claimant to present one or more qualified medical experts to testify that in his or their opinion there is a causal connection as a medical probability as opposed to possibility. Corzine v. Sears, Roebuck & Co., 80 N.M. 418, 456 P.2d 892 (Ct. App.), cert. denied, 80 N.M. 388, 456 P.2d 221 (1969); Yates v. Matthews, 71 N.M. 451, 379 P.2d 441 (1963); Weston v. Carper Drilling Co., 77 N.M. 220, 421 P.2d 435 (1966); Anderson v. Mackey, 93 N.M. 40, 596 P.2d 253 (1979).

Medical testimony is necessary to establish the causal connection between an accidental injury and a resulting compensable disability, but it does not resolve the questions of the date of commencement or the degree of compensable disability. Sedillo v. Levi-Strauss Corp., 98 N.M. 52, 644 P.2d 1041 (Ct. App. 1982).

If a disability is established by expert medical testimony to be the result of an accidental injury, as a medical probability, as opposed to a medical possibility, the requirements of the section have been satisfied. Stuckey v. Furr Food Cafeteria, 72 N.M. 15, 380 P.2d 172 (1963).

This section provides that compensation shall be allowed only when the workman suffers a disability established by expert medical testimony to be the natural and direct result of the accident as a medical probability, and it is not sufficient that causal connection be established by expert testimony as merely a medical possibility. Gammon v. Ebasco Corp., 74 N.M. 789, 399 P.2d 279 (1965).

The 1959 statute requires the workman to establish a causal connection between the accidental injury and the claimed disability as a medical probability by expert medical testimony, if it be denied that the disability is a natural and direct result of the accident. Stuckey v. Furr Food Cafeteria, 72 N.M. 15, 380 P.2d 172 (1963).

In language that connotes statutory requirements. - The medical expert need not state his opinion as to the causal connection between accident and disability in positive, dogmatic language or in the exact language of the section, but he must testify in language the sense of which reasonably connotes precisely what the section categorically requires. Gammon v. Ebasco Corp., 74 N.M. 789, 399 P.2d 279 (1965); Trujillo v. Beaty Elec. Co., 91 N.M. 533, 577 P.2d 431 (Ct. App. 1978).

The medical expert need not state his opinion in positive, dogmatic language or in the

exact language of this section, but he must testify in language the sense of which reasonably connotes precisely what the statute categorically requires. Corzine v. Sears, Roebuck & Co., 80 N.M. 418, 456 P.2d 892 (Ct. App.), cert. denied, 80 N.M. 388, 456 P.2d 221 (1969).

Medical opinion as to the requisite causal connection must be in language, the sense of which reasonably connotes precisely what the statute categorically requires. Bertelle v. City of Gallup, 81 N.M. 755, 473 P.2d 369 (Ct. App. 1970).

"Medical probability" and "medical possibility" of causation distinguished. - A logical distinction can be made between "medical probability" and "medical possibility" in a workmen's compensation case. A possible cause only becomes "probable" when in the absence of other reasonable causal explanations it becomes more likely than not that the injury in question was a result of its action. Bufalino v. Safeway Stores, Inc., 98 N.M. 560, 650 P.2d 844 (Ct. App. 1982).

And "medical possibility" insufficient for award of compensation. - An award of compensation should be denied: (1) if a court must speculate as to whether a workman's disability was caused by the accident; or (2) if an expert testifies that as a medical possibility, as opposed to a medical probability, the workmen's disability was caused by the accident. Bufalino v. Safeway Stores, Inc., 98 N.M. 560, 650 P.2d 844 (Ct. App. 1982).

Medical testimony on causation does not require proof to absolute certainty. Chavez v. Lectrosonics, Inc., 93 N.M. 495, 601 P.2d 728 (Ct. App. 1979).

Licensed osteopathic physicians and surgeons may give expert medical testimony as to causation. Medina v. Original Hamburger Stand, 105 N.M. 78, 728 P.2d 488 (Ct. App. 1986).

Uncontradicted medical opinion as conclusive of causal connection. - Where medical opinion based on the facts has been expressed and is uncontradicted, the evidence is conclusive as to the establishment, as a medical probability, of the causal connection between the accident and the disability as required in this section. Casaus v. Levi Strauss & Co., 90 N.M. 558, 566 P.2d 107 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Where causal connection has been denied and must be established by medical testimony as a medical probability, and where medical opinion based on the facts has been expressed and is uncontradicted, the evidence is conclusive upon the court as trier of the facts. Ross v. Sayers Well Servicing Co., 76 N.M. 321, 414 P.2d 679 (1966).

The evidence being uncontradicted, the trial court should have found that plaintiff suffered a disability between March 22, 1967 and September 7, 1967, as a natural and direct result of the accident. Mares v. City of Clovis, 79 N.M. 759, 449 P.2d 667 (Ct. App. 1968).

The uncontradicted medical evidence rule states that where medical opinion based on the facts has been expressed and uncontradicted, the evidence is conclusive upon the court as trier of fact. The rule is based on Subsection B, which requires that the claimant prove a causal connection between the disability and the accident as a medical probability by expert medical testimony. Beltran v. Van Ark Care Center, 107 N.M. 273, 756 P.2d 1 (Ct. App. 1988).

The uncontradicted medical evidence rule has no application where the testimony claimed to be uncontroverted is equivocal, contradicted, or subject to reasonable doubt. Beltran v. Van Ark Care Center, 107 N.M. 273, 756 P.2d 1 (Ct. App. 1988).

But trier of fact may weigh testimony. - The testimony of a doctor concerning whether a workman's injury, suffered in the course of his employment, caused the disability for which compensation was sought, was opinion testimony and as such was not conclusive, and the trier of the facts could accept, reject or give such weight only as it deemed the same entitled to have, even though uncontradicted. Montano v. Saavedra, 70 N.M. 332, 373 P.2d 824 (1962).

Medical opinion as to the claimant's ability to perform heavy labor does not establish causal connection between disability and accident as required by this section. Weston v. Carper Drilling Co., 77 N.M. 220, 421 P.2d 435 (1966).

Uncontradicted medical evidence rule is an exception to the general rule that a trial court can accept or reject expert opinion as it sees fit. The rule is based on Subsection B of this section, which requires the worker to prove causal connection between disability and accident as a medical probability by expert medical testimony. Because this section requires a certain type of proof, uncontradicted evidence in the form of that type of proof is binding on the trial court. Hernandez v. Mead Foods, Inc., 104 N.M. 67, 716 P.2d 645 (Ct. App. 1986).

Subsection B and the uncontradicted medical evidence rule only apply to the causation issue; on other issues, such as percentage of disability, the medical testimony may be contradicted by the other facts and circumstances of the case. Hernandez v. Mead Foods, Inc., 104 N.M. 67, 716 P.2d 645 (Ct. App. 1986).

Uncontradicted testimony need not be accepted as true if (1) the witness is shown to be unworthy of belief, or (2) his testimony is equivocal or contains inherent improbabilities, (3) concerns a transaction surrounded by suspicious circumstances, or (4) is contradicted, or subjected to reasonable doubt as to its truth or veracity, by legitimate inferences drawn from the facts and circumstances of the case. Hernandez v. Mead Foods, Inc., 104 N.M. 67, 716 P.2d 645 (Ct. App. 1986).

When doctor unqualified to make opinion on psychological disability. - Where a doctor states that he is not trained in psychological diagnosis or psychology, he is not qualified to state an opinion based upon a medical probability that employee's psychological

disability was caused by a job-related accident. Anderson v. Mackey, 93 N.M. 40, 596 P.2d 253 (1979).

Expert, without pertinent information on prior injuries, cannot give opinion. - The rule, that when pertinent information regarding prior injuries existed about which the expert apparently had no knowledge, his opinion cannot serve as the basis for compliance with this section, is only applicable when there is uncontradicted testimony of a medical expert that the information on prior injuries is pertinent. Mendez v. Southwest Community Health Servs., 104 N.M. 608, 725 P.2d 584 (Ct. App. 1986).

"Accident" is required. - A causal connection between work done and an injury is insufficient; an accident is required. Gonzales v. Stanke-Brown & Assocs., 98 N.M. 379, 648 P.2d 1192 (Ct. App. 1982).

Causal connection between false representation and injury. - Where an employer proves a previous permanent disability and shows that by medical testimony the risk of injury in his employment has increased, the employer has established a causal connection between the false representation and the injury. Chavez v. Lectrosonics, Inc., 93 N.M. 495, 601 P.2d 728 (Ct. App. 1979).

When no causal connection between false representation and injury. - If an employee proves that his physical condition and disability is such that he was able to perform the same duties in his prior employment without any physical difficulty, he was able to perform the same duties before he made application for his present employment, and he was able to perform the duties of his present employment, no causal connection exists between the false representation and the injury. Chavez v. Lectrosonics, Inc., 93 N.M. 495, 601 P.2d 728 (Ct. App. 1979).

Once causation is established by appropriate medical evidence, the absence of medical testimony as to the extent of disability does not bar a disability award. The extent of disability may be established by the plaintiff. Garcia v. Genuine Parts Co., 90 N.M. 124, 560 P.2d 545 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977); Marez v. Kerr-McGee Nuclear Corp., 93 N.M. 9, 595 P.2d 1204 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

It is not the burden of movants to show there was no possibility of securing medical opinion evidence to the effect that there existed the probable causal connection required by this statute. Bertelle v. City of Gallup, 81 N.M. 755, 473 P.2d 369 (Ct. App. 1970).

Causal connection even where preexisting condition. - There was substantial evidence to establish a causal connection between the plaintiff's accidental injury and his resulting disability, even though his injury was attributable in part to a preexisting condition. Moorhead v. Gray Ranch Co., 90 N.M. 220, 561 P.2d 493 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Failure to prove accident aggravated preexisting condition. - Where widow failed to prove by expert medical testimony that deceased's weight gain was caused or resulted from the employee's accident and treatment, she failed to prove that the accident or treatment aggravated a preexisting condition. Mayfield v. Keeth Gas Co., 81 N.M. 313, 466 P.2d 879 (Ct. App. 1970).

Burden not met where several factors could have caused disability. - The burden of proof, under facts such as are present here, is not met if the medical testimony only goes so far as to establish that any one of the several separate factors involved, within the realm of medical probability, could have caused the disability, leaving it to the trier of the facts to take his choice. Such testimony does not rise above speculation and surmise. Renfro v. San Juan Hosp., 75 N.M. 235, 403 P.2d 681 (1965).

Effect of earlier injury on present disability. - Where the claimant did not inform his doctor of an earlier back injury and his doctor did not learn of that injury until cross-examination at trial where he stated that he could not judge the possible effect of the earlier accident on claimant's present disability, evidence indicating plaintiff's prior injury was to another part of his back was sufficient with doctor's testimony to establish a causal connection between claimant's later injury and his present disability. Maes v. John C. Cornell, Inc., 86 N.M. 393, 524 P.2d 1009 (Ct. App. 1974).

Subsequent disability result of same accident. - Even though an accident causes a disability which results in payment of compensation for a time, the employer is not necessarily relieved of the further duty to pay compensation for a subsequent disability, which is the "natural and direct result" of the same accident. Linton v. Mauer-Neuer Meat Packers, 71 N.M. 305, 378 P.2d 126 (1963).

Disability resulting from a second accident, regardless of a preexisting condition, is compensable by the employer and compensation insurer at the time of the second accident. Gonzales v. Stanke-Brown & Assocs., 98 N.M. 379, 648 P.2d 1192 (Ct. App. 1982).

Where doctor's opinion fell short of raising issue. - Doctor's opinion that an infarction would more likely result from exertion than from sleeping or slight physical activity fell far short of raising a genuine issue of fact on the causal connection as a medical probability between the infarction and decedent's work activities, or the strain he sustained in the performance thereof. Bertelle v. City of Gallup, 81 N.M. 755, 473 P.2d 369 (Ct. App. 1970).

Uncontradicted medical testimony. - Where widow's primary theory of causation of death was that her husband developed a circulatory problem due to the inactivity of the right extremity following accident, that as a result of this circulatory problem an embolism developed in the right leg and that death resulted from a pulmonary embolism, and the widow introduced evidence, through an expert medical witness, in support of her theory, her expert's testimony, if uncontradicted, was sufficient to meet

the causation requirement of this section. Mayfield v. Keeth Gas Co., 81 N.M. 313, 466 P.2d 879 (Ct. App. 1970).

§ 52-1-29. Notice to employer.

A. 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.

B. No written notice is required to be given where the employer or any superintendent or foreman or other agent in charge of the work in connection with which the accident occurred had actual knowledge of its occurrence.

History: 1953 Comp., § 59-10-13.4, enacted by Laws 1959, ch. 67, § 8; 1989, ch. 263, § 19.

I. General Consideration.
II. Notice of Accident and Injury.
III. Actual Knowledge.

I. General Consideration.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes in Subsection A.

Failure to give notice not jurisdictional question. - Under this section when the question of notice is not raised in the trial court and since failure to give notice does not present a jurisdictional question, the question cannot be raised in the supreme court for the first time. Alspaugh v. Mountain States Mut. Cas. Co., 66 N.M. 126, 343 P.2d 697 (1959).

The provision found in this section is a mandatory requirement upon which the right of action rests, and not a mere formality to be lightly put aside. Ogletree v. Jones, 44 N.M. 567, 106 P.2d 302 (1940), overruled on other grounds, Yardman v. Cooper, 65 N.M. 450, 339 P.2d 473 (1959); Montell v. Orndorff, 67 N.M. 156, 353 P.2d 680 (1960); Herndon v. Albuquerque Pub. Schools, 92 N.M. 635, 593 P.2d 470 (Ct. App. 1978).

Right to recover which is dependent on finding that the requirements of the section have been met cannot stand in the absence of such a finding. Geeslin v. Goodno, Inc., 75 N.M. 174, 402 P.2d 156 (1965).

Finding of compliance is necessary in order to support judgment for the workman, particularly where a request for a contrary finding has been made. Geeslin v. Goodno, Inc., 75 N.M. 174, 402 P.2d 156 (1965).

Proof of notice not essential for liability. - Proof of notice in a workmen's compensation case is not essential to establish liability. It is an affirmative defense asserted by the employer, which the employer must prove. Mosher v. Bituminous Ins. Co., 96 N.M. 674, 634 P.2d 696 (Ct. App. 1981).

Section protects the employer, giving him notice so that he may investigate the facts and circumstances and question witnesses and is intended to prevent the filing of fictitious claims where lack of time makes proof of genuineness difficult. Herndon v. Albuquerque Pub. Schools, 92 N.M. 635, 593 P.2d 470 (Ct. App. 1978).

Effect on action against Subsequent Injury Fund. - When a worker is barred for lack of notice from bringing an action against the worker's employer, an action against the Subsequent Injury Fund is also barred. Jimerson v. Arapahoe Drilling, 107 N.M. 716, 764 P.2d 143 (Ct. App. 1988).

When the act speaks of the occurrence of injury or the occurrence of the hernia, it refers to compensable injuries and these occur when disability appears - in other words, when the injury or hernia becomes manifest. Montell v. Orndorff, 67 N.M. 156, 353 P.2d 680 (1960).

No filing of suit until 31 days elapsed from failure to pay. - Section 52-1-30 NMSA 1978 bars the filing of suit until 31 days have elapsed from such failure or refusal to pay. Swallows v. City of Albuquerque, 59 N.M. 328, 284 P.2d 216 (1955), aff'd, 61 N.M. 265, 298 P.2d 945 (1956) (decided under former law).

Time is tolled for beginning of payments until employer is notified pursuant to the act that the employee is claiming compensation resulting from the accident. Swallows v. City of Albuquerque, 59 N.M. 328, 284 P.2d 216 (1955), aff'd, 61 N.M. 265, 298 P.2d 945 (1956) (decided under former law).

Statute of limitations is not tolled for minor dependent, nor where it has run on the workman may it be revived in favor of the children at the workman's death, and the claimant must bring himself strictly within the limitations. Thus, the claim is lost by failure to file as provided by statute. Employers Mut. Liab. Ins. Co. v. Jarde, 73 N.M. 371, 388 P.2d 382 (1963).

It is trial court that resolves conflicts, even where evidence on question of latent injury is conflicting. Hammond v. Kersey, 83 N.M. 430, 492 P.2d 1293 (Ct. App. 1972).

Timely filing question of fact. - The authorities are well nigh unanimous that whether a claim for compensation was timely filed or whether good cause exists for the delay in filing are ordinarily questions of fact, and may become questions of law only where the facts are not in dispute. Buffington v. Continental Cas. Co., 69 N.M. 365, 367 P.2d 539 (1961).

Finding of fact regarding notice intermingled with conclusion of law. - In workmen's compensation case involving notice under 59-10-13, 1953 Comp. (now repealed), where there was no specific finding by trial court under the "finding of fact" concerning notice of a compensable injury, but where one of the conclusions of law read in part that plaintiff did not give the defendant notice of a compensable injury within the time and manner provided by law, that portion of the conclusion was a finding of ultimate fact although intermingled with the conclusion of law. Clark v. Duval Corp., 82 N.M. 720, 487 P.2d 148 (Ct. App. 1971).

Supreme court views trial court's judgment in most favorable light. - In a workmen compensation action, the supreme court is required to view the judgment of the trial court in its most favorable light. Waymire v. Signal Oil Field Serv., Inc., 77 N.M. 297, 422 P.2d 34 (1966).

Judgment reversed where suit prematurely filed. - Where it is clear that the suit was prematurely filed, the judgment for the claimant will be reversed and the cause remanded with instruction to dismiss his claim. Swallows v. City of Albuquerque, 59 N.M. 328, 284 P.2d 216 (1955), aff'd, 61 N.M. 265, 298 P.2d 945 (1956) (decided under former law).

Where employee returned to work after notice of injury. - Where employer had notice of the accident and a compensable injury, the fact that the employee came back to work, but was later discharged, did not as a matter of law establish that there was no right to continuing compensation, but rather that the question was properly for the jury. Roberson v. Powell, 78 N.M. 69, 428 P.2d 471 (1967).

Increase award of attorney's fees. - In a workmen's compensation case, where the transcript and extended briefs show that considerable time and effort were expended in the lower court in litigating the issues, and that various depositions were taken by the parties, and the amounts of the medical bills involved and the maximum compensation benefits secured for the claimant are substantial, the supreme court may increase an award of attorney's fees from $1000 to $1500. Waymire v. Signal Oil Field Serv., Inc., 77 N.M. 297, 422 P.2d 34 (1966).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 442 to 456.
Waiver of notice of injury or claim, 78 A.L.R. 1306.

Action by employee for injury as claim or notice of claim, 98 A.L.R. 529.
100 C.J.S. Workmen's Compensation §§ 445 to 457.

II. Notice of Accident and Injury.

Notice is condition to right of workman to recover compensation. Geeslin v. Goodno, Inc., 75 N.M. 174, 402 P.2d 156 (1965).

Once notice becomes an issue, the plaintiff has to prove notice in order to obtain a judgment for compensation. Aguilar v. Penasco Indep. School Dist. No. 6, 100 N.M. 625, 674 P.2d 515 (1984).

Once notice is put in issue, the worker must prove compliance with the statutory requirement. Nunez v. Smith's Mgt. Corp., 108 N.M. 186, 769 P.2d 99 (Ct. App. 1988).

Notice as required by statute is condition precedent to the right to plaintiff to recover compensation. Sanchez v. Azotea Contractors, 84 N.M. 764, 508 P.2d 34 (Ct. App. 1973).

Cannot recover where failure to comply with mandatory wording. - Where appellee was required to stop working in May of 1960 and was hospitalized for a week for dermatitis, in June of 1960 appellee sought help from the state labor commission in order to secure compensation for his dermatitis, appellee knew of his condition and was not in conformity with this section and appellee cannot recover for this condition because of his failure to comply with the mandatory words of this section. Sanchez v. James H. Rhodes & Co., 74 N.M. 112, 391 P.2d 336 (1964).

Failure to notify as bar to recovery. - Present knowledge of injury to shoulder entitling claimant to compensation, and known to him during four months or more when he was without work because of the condition, but at no time communicated to employer, was in fact and law a failure to timely comply with the provisions of this section and barred recovery under 52-1-31 NMSA 1978. Roberson v. Powell, 78 N.M. 69, 428 P.2d 471 (1967).

If plaintiff gave no notice as required by this section or failed to file his claim within one year after relator failed or refused to pay compensation as required by this section, all of plaintiff's "claim for the recovery of compensation, all his right to the recovery of compensation and the bringing of any legal proceeding for the recovery of compensation" would be barred and the same is true if the case was prematurely filed. State ex rel. Kermac Nuclear Fuels Corp. v. Larrazolo, 70 N.M. 475, 375 P.2d 118 (1962).

The failure to give notice within the allotted time is a conclusive bar to any suit for compensation where plaintiff was timely advised by the treating physician that he had

suffered a left direct inguinal hernia. Michael v. Bauman, 76 N.M. 225, 413 P.2d 888 (1966).

Reason for 30-day notice to employer of accident or injury sustained by an employee is to enable the employer to examine into the facts while they are accessible and also to employ skilled physicians or surgeons to care for the employee so as to speed his recovery and protect himself against simulated or exaggerated claims. Lozano v. Archer, 71 N.M. 175, 376 P.2d 963 (1962).

Purpose of the notice requirement is: (1) to enable the employer to investigate the accident while the facts are accessible and (2) if necessary, to employ doctors to speed recovery. Beckwith v. Cactus Drilling Corp., 84 N.M. 565, 505 P.2d 1241 (Ct. App. 1972), cert. denied, 84 N.M. 560, 505 P.2d 1236 (1973).

Purpose of notice requirement of this section is to enable the employer to investigate the facts while they are accessible and, if necessary, to employ doctors so as to speed recovery. Another purpose of the notice requirement is to allow the employer to protect himself against simulated or aggravated claims. Clark v. Duval Corp., 82 N.M. 720, 487 P.2d 148 (Ct. App. 1971).

Purpose of the notice provision of the section is to allow the employer, or its insurance company, to investigate the accident. Collins v. Big Four Paving, Inc., 77 N.M. 380, 423 P.2d 418 (1967).

The purpose of this section is to enable the employer to investigate the facts and circumstances in order to protect against fictitious, simulated, or aggravated claims, and, if necessary, to allow the employer to provide medical care for the employee so as to speed his recovery. Martinez v. Darby Constr. Co., N.M. , 782 P.2d 904 (1989).

Primary purpose of requiring employee to give 30 days written notice is to enable the employer to investigate the facts while they are accessible and, if necessary, to employ doctors so as to speed recovery. Waymire v. Signal Oil Field Serv., Inc., 77 N.M. 297, 422 P.2d 34 (1966).

Aspect of notice to employer involved is notice of accident. Ortiz v. Ortiz & Torres Dri-Wall Co., 83 N.M. 452, 493 P.2d 418 (Ct. App. 1972).

This section requires notice of accident as well as notice of injury. Bell v. Kenneth P. Thompson Co., 76 N.M. 420, 415 P.2d 546 (1966).

Notice of accident, not notice of compensable injury. - In workmen's compensation case, where employer admittedly had knowledge of plaintiff's accident arising out of the course of his employment, and of a "no lost time" injury where medical attention was provided by the employer, the only question being whether the employer had knowledge of a "compensable" injury, employer could not be said to have such knowledge as a matter of law where there was evidence that defendants had no knowledge of facts

indicating additional medical attention was necessary and that defendants had no knowledge of the fact that plaintiff considered his claim to be compensable. Clark v. Duval Corp., 82 N.M. 720, 487 P.2d 148 (Ct. App. 1971).

Applicability of 30-day provision for written notice. - The 30-day provision for written notice in Subsection A of this section also applies to the substitute provision for actual knowledge in Subsection B. Herndon v. Albuquerque Pub. Schools, 92 N.M. 635, 593 P.2d 470 (Ct. App. 1978).

Time, place and cause of injury must be definite and certain. - With reference to the date of the accident, the time, place and cause of the injury must be definite and certain to determine whether the employer had written notice or actual knowledge of the accident within 30 days after its occurrence pursuant to this section. Herndon v. Albuquerque Pub. Schools, 92 N.M. 635, 593 P.2d 470 (Ct. App. 1978).

Determination of whether an employer had actual knowledge is made from a consideration of the totality of the facts and circumstances. Powers v. Riccobene Masonry Constr., Inc., 97 N.M. 20, 636 P.2d 291 (Ct. App. 1980).

Actual knowledge by employer of accident does not excuse giving of written notice. Rather, the knowledge must be of an accident and compensable injury. Roberson v. Powell, 78 N.M. 69, 428 P.2d 471 (1967).

To avoid the requirement of written notice only actual knowledge of the accident is required; however, such actual knowledge must be acquired within the time provided for giving written notice. Anaya v. Big Three Indus., Inc., 86 N.M. 168, 521 P.2d 130 (Ct. App. 1974).

Although notice need not be pleaded in first instance in order to state a cause of action, when placed in issue, proof of compliance with this section must be present in order to support a judgment for a workman. Geeslin v. Goodno, Inc., 75 N.M. 174, 402 P.2d 156 (1965).

Reasons for lateness in both notice and claim. - This law does not expect the impossible of the employee, lateness of both notice and claim may be excused for various reasons, including the following: impossibility of knowing that an apparently minor accident would later develop into a compensable injury; reasonable inability to recognize a disease or disabling condition in an early or latent state; medical opinion that the injury is not serious or is nonindustrial; voluntary payment of benefits by the employer, or assurances that the employee will be taken care of, inducing the employee to refrain from making claim; and disability preventing the making of the claim, due to mental or physical incapacity, minority and the like. Montell v. Orndorff, 67 N.M. 156, 353 P.2d 680 (1960).

Notice issue not litigated where first raised in opening statement. - Trial court did not abuse its discretion in refusing to allow employer to litigate the issue of whether

employee gave notice of an alleged accident where employer first raised the issue in its opening statement and where employee would have been prejudiced either by its inclusion as an issue in the case or by another continuance. Beyale v. Arizona Pub. Serv. Co., 105 N.M. 112, 729 P.2d 1366 (Ct. App. 1986).

For purposes of notice to the employer, actual disability is not required but only that the claimant has knowledge, or with the exercise of reasonable diligence should have knowledge, that more likely than not he is impaired and unable, at least to some percentage extent, to perform work for which he is suited. Martinez v. Darby Constr. Co., N.M. , 782 P.2d 904 (1989).

In case of latent injury workman must give notice but only after he knew, or should have known by the exercise of reasonable diligence, that he had incurred a compensable injury by accident arising out of and in the course of his employment. Brown v. Safeway Stores, Inc., 82 N.M. 424, 483 P.2d 305 (Ct. App. 1970); Powers v. Riccobene Masonry Constr., Inc., 97 N.M. 20, 636 P.2d 291 (Ct. App. 1980).

Where an employee's injury resulted from an internal degeneration of a body part rather than an external incident, he could not have been expected to give notice until after the injury manifested itself. Powers v. Riccobene Masonry Constr., Inc., 97 N.M. 20, 636 P.2d 291 (Ct. App. 1980).

If claimant's injury was latent, notice requirements would apply only after he knew, or should have known by the exercise of reasonable diligence, that he had incurred a compensable injury. Hammond v. Kersey, 83 N.M. 430, 492 P.2d 1293 (Ct. App. 1972).

Claimant not relieved of timely filing where does not know full extent of injury. - The mere fact that a claimant, from a medical standpoint, does not know the full extent of his injury does not relieve him from timely filing his claim for workmen's compensation. Letteau v. Reynolds Elec. & Eng'r Co., 60 N.M. 234, 290 P.2d 1072 (1955) (decided under former law).

Notice in casual conversation is insufficient. Bolton v. Murdock, 62 N.M. 211, 307 P.2d 794 (1957) (decided under former law).

Casual conversation short of notice. - Where the only evidence of notice was the casual conversation between the appellant and the supervisor, the facts fall short of the evidence necessary to support a claim that notice existed. Simmons v. International Minerals & Chem. Corp., 77 N.M. 100, 419 P.2d 756 (1966).

Where there was failure to make finding on notice issue, cause must be remanded to the trial court. Geeslin v. Goodno, Inc., 75 N.M. 174, 402 P.2d 156 (1965).

Time for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease. Montell v. Orndorff, 67 N.M. 156, 353 P.2d 680 (1960).

Time for giving notice begins to run when employee knows, or by the exercise of reasonable diligence should know, that he has sustained an injury by accident in the course of his employment. Bell v. Kenneth P. Thompson Co., 76 N.M. 420, 415 P.2d 546 (1966); Powers v. Riccobene Masonry Constr., Inc., 97 N.M. 20, 636 P.2d 291 (Ct. App. 1980); Martinez v. Darby Constr. Co., N.M. , 782 P.2d 904 (1989).

Period limited for this notice begins to run from the time the workman knows, or should know by the exercise of reasonable diligence, that he has sustained injury by accident in the course of his employment. Anaya v. Big Three Indus., Inc., 86 N.M. 168, 521 P.2d 130 (Ct. App. 1974); Langley v. Navajo Freight Lines, 70 N.M. 34, 369 P.2d 774 (1962).

Period for written notice does not begin to run until plaintiff is charged with knowledge of his compensable injury. Rohrer v. Eidal Int'l, 79 N.M. 711, 449 P.2d 81 (Ct. App. 1968).

The period for giving notice for workmen's compensation begins to run when the claimant knows of his injury. Sanchez v. James H. Rhodes & Co., 74 N.M. 112, 391 P.2d 336 (1964).

Verbal report satisfies requirement of notice. - The supreme court is committed to the doctrine that the verbal reporting of the accident and injury to the employer or his agent satisfies the requirement of written notice or actual notice in the section. Baca v. Swift & Co., 74 N.M. 211, 392 P.2d 407 (1964).

Insufficient notice where does not state where or when accident happened. - Where the written notice stated the nature of the injury and listed the cause of injury as "the lifting of heavy objects in the course of employment," but did not state where or when the accident was supposed to have happened, the notice contained no reference from which the accident could be identified and was insufficient. Bell v. Kenneth P. Thompson Co., 76 N.M. 420, 415 P.2d 546 (1966).

Delay in notice reasonable where only surgeon made connection between pain and injury. - Where, in addition to plaintiff's testimony that he did not realize the connection between his leg problem and the industrial accident until after five months, there was medical testimony that it is not uncommon for a patient suffering a leg problem like plaintiff's to fail to connect the leg pain with a back injury and in fact several experienced doctors failed to make the connection while treating plaintiff, as the only person who reasonably should have made the connection between the two was an orthopedic surgeon, the court's holding that plaintiff's delay in notifying his employer was reasonable was supported by substantial evidence. Brown v. Safeway Stores, Inc., 82 N.M. 424, 483 P.2d 305 (Ct. App. 1970).

Written notice to defendants' insurance carrier by plaintiff's doctor was sufficient compliance with the statutory notice requirements. Moorhead v. Gray Ranch Co., 90 N.M. 220, 561 P.2d 493 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Oral notice to company doctor not sufficient. - A company doctor, not shown to be in a position of authority, is not an employer, superintendent, foreman or other agent in charge of the work in connection with which the disablement was occasioned, and therefore oral notice to the company doctor was insufficient. Sanchez v. Azotea Contractors, 84 N.M. 764, 508 P.2d 34 (Ct. App. 1973).

Hospital not estopped from claiming lack of notice in treating own employee's injury. - In action by cook at state hospital for workmen's compensation benefits, the trial court did not err in refusing to conclude that hospital was estopped from claiming lack of notice on the basis of evidence that the treatment room clerk at the state hospital failed to make reports of appellant's treatments by the staff physician, and the supervisors' failure to make an accident report of the accident and injury, where the staff physician was authorized to treat employees for nonemployment-connected ailments as well as for on-the-job injuries. Higgins v. Board of Dirs. of N.M. State Hosp., 73 N.M. 502, 389 P.2d 616 (1964).

Statement of claim or group insurance form as written notice. - Statement of claim, or group insurance form, describing claimant's injury and showing that it arose out of his employment and signed by employer's terminal manager, constituted written notice to employer of the injury. Langley v. Navajo Freight Lines, 70 N.M. 34, 369 P.2d 774 (1962).

Log notation not sufficient as written notice. - Where the log for December 15 reported "plaintiff injured back," the log was delivered to the employer, and apart from the notation in the log, the employer had no knowledge concerning the incident until April 28, 1970, log notation did not suffice as written notice. Hammond v. Kersey, 83 N.M. 430, 492 P.2d 1293 (Ct. App. 1972).

Insurance adjuster as agent of employer in receiving notice. - Insurance adjuster's trial testimony, that he had acted for the employer in connection with a prior injury of plaintiff-employee and was acting for the employer in receiving the written notice in this case, is substantial evidence of his agency and constitutes the receipt of written notice by the employer. Anaya v. Big Three Indus., Inc., 86 N.M. 168, 521 P.2d 130 (Ct. App. 1974).

III. Actual Knowledge.

Actual knowledge of accident or injury means knowledge of a compensable injury and involves more than the mere happening of an accident. Baca v. Swift & Co., 74 N.M. 211, 392 P.2d 407 (1964).

Actual knowledge of accident as contemplated by the act means actual knowledge of a compensable injury. In latent injury cases the workman is not entitled to compensation, nor can there be a failure or refusal to pay until the injury becomes apparent. Swallows

v. City of Albuquerque, 59 N.M. 328, 284 P.2d 216 (1955), aff'd, 61 N.M. 265, 298 P.2d 945 (1956) (decided under former law).

"Actual knowledge" does not mean first-hand knowledge under the section, but only "knowledge" as the word is used in common parlance. It is knowledge sufficient to impress a reasonable man, i.e., knowledge obtained in the daily affairs of life, but not absolute certainty. Collins v. Big Four Paving, Inc., 77 N.M. 380, 423 P.2d 418 (1967).

To constitute "actual knowledge," which will excuse giving of "notice in writing," there must be knowledge on the part of the employer, or a superintendent, foreman or other agent in charge of the work in connection with which the accident occurred, that an accident has occurred, and this must be accompanied by knowledge of a compensable injury. Smith v. State, 79 N.M. 25, 439 P.2d 242 (Ct. App. 1968).

"Actual knowledge" which would serve to excuse written notice is not conferred by a verbal statement to the employer at least 13 days after the claimed accident giving rise to the injury. Scott v. General Equip. Co., 74 N.M. 73, 390 P.2d 660 (1964).

Only actual knowledge of accident required to avoid written notice. - Since 1959, the statutory notice provision has not required actual knowledge of injury to avoid the requirement of written notice; only actual knowledge of the accident is required. Beckwith v. Cactus Drilling Corp., 84 N.M. 565, 505 P.2d 1241 (Ct. App. 1972), cert. denied, 84 N.M. 560, 505 P.2d 1236 (1973).

Knowledge which employer must have to excuse formal notice is of compensable injury. Roberson v. Powell, 78 N.M. 69, 428 P.2d 471 (1967).

Knowledge which will excuse written notice, under this section, must be of an accident and compensable injury. Lyon v. Catron County Comm'rs, 81 N.M. 120, 464 P.2d 410 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970).

To excuse notice, there must be knowledge of the "occurrence" by a superior in charge of the work. The "occurrence" can mean nothing but the "accident" when considered in the context in which it appears in this section. In this regard the section differs from its form prior to its amendment by Laws 1959, ch. 67, § 8, which changed the word "injury" to "accident" in this section, and the change was a significant one. Wilson v. Navajo Freight Lines, 73 N.M. 470, 389 P.2d 594 (1964).

To excuse giving of "notice in writing," there must be actual knowledge on the part of the employer, or a superintendent, foreman or other agent in charge of the work in connection with which the accident occurred. This doctrine is stated affirmatively and without exception, and the same rule applies under the Occupational Disease Act. Sanchez v. Azotea Contractors, 84 N.M. 764, 508 P.2d 34 (Ct. App. 1973).

Notice requirement satisfied where defendant had actual knowledge. - Although plaintiff failed to show that a genuine factual issue existed as to when defendant acquired actual

knowledge of a compensable injury, the notice requirement was satisfied since defendant had actual knowledge of the accident. On this basis summary judgment for defendant was reversed. Norris v. Amax Chem. Corp., 84 N.M. 587, 506 P.2d 93 (Ct. App. 1973).

As long as plaintiff's employer had actual knowledge of the accident, the notice requirement was complied with; and the record showed there were oral conversations notifying the foreman that the plaintiff had sustained an injury, after which he was put on light work. Moorhead v. Gray Ranch Co., 90 N.M. 220, 561 P.2d 493 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Since employers had actual knowledge of employee's two accidents, the notice requirement was satisfied. Thus, defendants' claim of lack of notice of the low back and spine injuries is without merit. Beckwith v. Cactus Drilling Corp., 84 N.M. 565, 505 P.2d 1241 (Ct. App. 1972), cert. denied, 84 N.M. 560, 505 P.2d 1236 (1973).

Notice of accident where employer had actual knowledge. - It was not necessary for the plaintiff to give notice of an injury to his knee or knees after the 1973 accident, but only that he give notice of the accident; notice was given because the defendants had actual knowledge of the 1973 accident, and notice was also given of total disability in 1975. Moorhead v. Gray Ranch Co., 90 N.M. 220, 561 P.2d 493 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

No need to determine written notice where actual knowledge found. - Where the supreme court concludes that the trial court's finding that employer had actual knowledge of employee's injury is supported by substantial evidence, the supreme court need not determine whether written notice was given. Waymire v. Signal Oil Field Serv., Inc., 77 N.M. 297, 422 P.2d 34 (1966).

Fact that verbal report had been made was not, in itself, determinative of the question of "actual knowledge" within the meaning of this section. All of the circumstances had to be considered; verbal notice was only one of the circumstances. Gutierrez v. Wellborn Paint Mfg. Co., 79 N.M. 676, 448 P.2d 477 (Ct. App. 1968).

Verbal notice 34 days after accident not actual knowledge. - Where verbal notice is the only circumstance on which the employer can be charged with actual knowledge and this verbal notice was not given until 34 days after the accident, this is insufficient to charge the employer with "actual knowledge." Rohrer v. Eidal Int'l, 79 N.M. 711, 449 P.2d 81 (Ct. App. 1968).

Verbal notice is considered in determining employer's actual knowledge. However, the "verbal notice" is not determinative in and of itself. All the facts and circumstances must be considered, including the promptness of the verbal notice. Rohrer v. Eidal Int'l, 79 N.M. 711, 449 P.2d 81 (Ct. App. 1968).

Verbal report as actual notice. - The verbal reporting of an injury by accident arising out of and in the course of employment to the employer, or to his manager, where manager referred employee to a doctor, satisfies the requirement of "actual knowledge." Lozano 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. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

An oral report of an accident and injury, given by an employee to his supervisor, coupled with ongoing contact with the supervisor regarding the employee's condition, satisfies the requirement of actual knowledge of Subsection B. Mosher v. Bituminous Ins. Co., 96 N.M. 674, 634 P.2d 696 (Ct. App. 1981).

An employer had adequate notice of a compensable injury where the claimant told his supervisor, at the time he was fitted for hearing aids, that his hearing loss was work-related. The statute of limitations (52-1-31 NMSA 1978) was tolled by the employer's subsequent failure to file a report of the accident. Cisneros v. Molycorp, Inc., 107 N.M. 788, 765 P.2d 761 (Ct. App. 1988) (decided under pre-1987 version of 52-1-58 NMSA 1978).

Notice given or excused in time allotted. - An inquiry concerning "actual knowledge" is relevant only within the time allotted for giving written notice. Specifically, if notice is not given or excused within the time provided by Subsection A of this section, the claim is barred. Rohrer v. Eidal Int'l, 79 N.M. 711, 449 P.2d 81 (Ct. App. 1968).

The actual knowledge in Subsection B which excuses written notice must have been acquired within the time allotted for the written notice. Norris v. Amax Chem. Corp., 84 N.M. 587, 506 P.2d 93 (Ct. App. 1973).

Totality of facts and circumstances determines actual knowledge. - It is the totality of the facts and circumstances that determines whether the employer has "actual knowledge." Rohrer v. Eidal Int'l, 79 N.M. 711, 449 P.2d 81 (Ct. App. 1968); Herndon v. Albuquerque Pub. Schools, 92 N.M. 635, 593 P.2d 470 (Ct. App. 1978); Urioste v. Sideris, 107 N.M. 733, 764 P.2d 504 (Ct. App. 1988).

Employer's accident report manifests acknowledgment of notice. - Where an employer, after having been informed of an accident and injury, makes out a report of the accident and injury, these facts manifest an acknowledgment of notice of the accident and injury. Herndon v. Albuquerque Pub. Schools, 92 N.M. 635, 593 P.2d 470 (Ct. App. 1978).

Mere knowledge not actual knowledge. - Where actual knowledge of an accident is a prerequisite to recovery, the employer must know, without making any investigation or inquiry, that an accident happened; mere knowledge of an employer that a claimant injured his back falls short of actual knowledge of an accident. Herndon v. Albuquerque Pub. Schools, 92 N.M. 635, 593 P.2d 470 (Ct. App. 1978).

Casual conversations not sufficient to charge knowledge. - Where plaintiff had developed a blister on her foot while at work, and there is nothing to evidence that

defendant knew just what caused the blister, or that the subsequent infection and resulting disability were connected with this blister, casual conversations between claimant and defendant-employer concerning the existence and the time of development of the blister, and subsequent casual conversations concerning the fact that claimant's foot was hurting and that she had consulted a doctor or doctors were not sufficient to charge defendant with knowledge of the occurrence of an accident and of a compensable injury resulting therefrom. Smith v. State, 79 N.M. 25, 439 P.2d 242 (Ct. App. 1968).

Under the section requiring notice be given or the employer must have actual knowledge of the cause of the injury, a casual conversation between appellee and foreman does not give actual knowledge of what caused appellee's chest pains. Sanchez v. James H. Rhodes & Co., 74 N.M. 112, 391 P.2d 336 (1964).

This section requires actual knowledge on the part of the employer, "or any superintendent or foreman or other agent in charge of the work in connection with [which] such injury occurred," before written notice is to be dispensed with. Notice in casual conversation is insufficient. It is not enough for one to say he is injured and even show the injured limb without some showing that notice was given or that the employer had actual knowledge of what caused it. This knowledge which the statute requires means "more than just putting upon inquiry and involves more than knowledge of the mere happening of an accident." And the knowledge which the employer must have to excuse a formal notice is of a compensable injury. Daulton v. Laughlin Bros. Drilling Co., 73 N.M. 232, 387 P.2d 336 (1963).

It is not enough for one to say he is injured and even show injured limb without some showing that notice was given or that the employer had actual knowledge of what caused it. And the knowledge which the employer must have to excuse a formal notice is of a compensable injury. Bolton v. Murdock, 62 N.M. 211, 307 P.2d 794 (1957) (decided under former law).

Conduct may warrant inference of actual knowledge. - Conduct on the part of an employer or agent in charge of the work may be sufficient to warrant a reasonable inference that he had actual knowledge of the accident and injury. Lyon v. Catron County Comm'rs, 81 N.M. 120, 464 P.2d 410 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970).

No actual knowledge where employee suffered pain and soreness after day of using sledge hammer and declined to foreman to use hammer next day stating he was hurt and asked employer's secretary if company had doctor because he had hurt his shoulder; employer did not have actual knowledge of compensable injury. Bolton v. Murdock, 62 N.M. 211, 307 P.2d 794 (1957) (decided under former law).

Notice of result to flow from employment injury is excused where the employee had no knowledge of the true seriousness and expert medical attention was necessary to establish causal relation. Geeslin v. Goodno, Inc., 77 N.M. 408, 423 P.2d 603 (1967).

Supervisor's statement relevant to show knowledge. - Supervisor's excluded statement that he had instructed claimant to have injury taken care of and that insurance would cover the bill was clearly relevant as tending to show knowledge on his part of the accident and a compensable injury. Lyon v. Catron County Comm'rs, 81 N.M. 120, 464 P.2d 410 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970).

Knowledge that workman sick at work not sufficient to excuse notice. - Where a long haul driver for defendant, while on a trip for defendant as a driver of a truck along with another driver, suffered a heart attack requiring his hospitalization for some 35 days and where no written notice was given within 30 days after the heart attack occurred, but defendant's superiors had knowledge of plaintiff's hospitalization very shortly after the occurrence, defendant was charged with knowledge that plaintiff became sick while performing his duties as a truck driver; even that he had a heart condition, and that his sickness and hospitalization resulted from a heart attack. Still, there was nothing more than the employer's knowledge that the workman became sick while at work, and such knowledge was insufficient to excuse written notice. Wilson v. Navajo Freight Lines, 73 N.M. 470, 389 P.2d 594 (1964).

Making accident report and insurance paying bills as acknowledgment of notice. - The fact that the superintendent, after having been informed of the accident and injury, made out a report of the accident and injury, and the insurance carrier paid certain medical bills, manifests an acknowledgment by the appellants of notice of the accident and injury, and therefore, the appellants had actual knowledge of the accident and injury. Geeslin v. Goodno, Inc., 77 N.M. 408, 423 P.2d 603 (1967).

Actual knowledge where employer notified insurance company of employee's disappearance. - When the employer in workmen's compensation case satisfied itself that plane carrying employees had disappeared, presumably crashed in the mountains in the dead of winter, and so advised its insurance company, it had actual knowledge of the occurrence, and compensation to employee's survivors should have been tendered within 31 days thereafter. Collins v. Big Four Paving, Inc., 77 N.M. 380, 423 P.2d 418 (1967).

Employer's knowledge of potential hernia not knowledge of compensable hernia. - An employer's actual knowledge of the enlarged ring or relaxation, a potential hernia, did not constitute actual knowledge of a compensable left hernia after it occurred. Flournoy v. E.P. Campbell Drilling Co., 74 N.M. 336, 393 P.2d 449 (1964).

Where employee only casually mentioned injury to driller and tool pusher and did not give notice in writing, the employer had no actual knowledge of the occurrence within the time limit and, as a matter of law, no notice was given. Daulton v. Laughlin Bros. Drilling Co., 73 N.M. 232, 387 P.2d 336 (1963).

Uncontradicted evidence of employer's actual knowledge. - The trial court could not properly disregard the uncontradicted evidence that the employer had actual knowledge of the alleged accident by March 23 as none of the situations in Medler v. Henry, 44

N.M. 275, 101 P.2d 398 (1940), are applicable here on the question of actual knowledge of the alleged accident. Ortiz v. Ortiz & Torres Dri-Wall Co., 83 N.M. 452, 493 P.2d 418 (Ct. App. 1972).

Evidence that partners had actual knowledge. - Evidence of a report, filled out by one partner and signed by the other partner, together with the evidence of plaintiff's conversation with each of the partners concerning his back pain, would be sufficient to sustain a finding that defendants had actual knowledge of the alleged accident. Ortiz v. Ortiz & Torres Dri-Wall Co., 83 N.M. 452, 493 P.2d 418 (Ct. App. 1972).

§ 52-1-30. Payment of compensation benefits; installments.

Compensation shall be paid by the employer to the worker in installments. The first installment shall be paid not later than thirty-one days after the date of the occurrence of the disability. Remaining installments shall be paid twice a month at intervals not more than sixteen days apart in sums as nearly equal as possible.

History: 1978 Comp., § 52-1-30, enacted by Laws 1987, ch. 235, § 14.

Effective dates. - Laws 1987, ch. 235 contained no effective date provision, but, pursuant to N.M. Const., art IV, § 23, is effective on June 19, 1987.

Employer to fail to pay in order to confer court jurisdiction. - In order to confer jurisdiction in the district courts, the employer must have either failed or refused to make compensation payments to the injured workman as provided in the act before he is entitled to file a claim; such failure cannot occur before the employer has breached his duty to pay which can occur no sooner than 31 days after the date of injury. Martinez v. Wester Bros. Whsle. Produce Co., 69 N.M. 375, 367 P.2d 545 (1961).

Thus it will be seen that in order to confer jurisdiction in the district courts, the employer must have either failed or refused to make compensation payments to the injured workman as provided in the act before he is entitled to file a claim. Fresquez v. Farnsworth & Chambers Co., 60 N.M. 384, 291 P.2d 1102 (1955) (decided under former law).

Jurisdiction is conferred on the court to award installment compensation payments only when the employer has failed or refused to make such installment payments as provided in the Workmen's Compensation Act. Moody v. Hastings, 72 N.M. 132, 381 P.2d 207 (1963).

Seeking lump sum while receiving installments. - Injured worker was not precluded from filing a petition for a hearing upon the appropriateness of a lump sum award even while he was receiving maximum compensation benefits in periodic installments. Raines v. W.A. Klinger & Sons, 107 N.M. 668, 763 P.2d 684 (1988).

While installments being paid, no failure entitling to sue arises. - So long as the 16-day periodic installments are being paid, even though the contingent and suspensory first week's installment is unpaid, no refusal or failure to pay entitling the claimant to sue arises. Fresquez v. Farnsworth & Chambers Co., 60 N.M. 384, 291 P.2d 1102 (1955) (decided under former law).

This section bars filing of suit until 31 days have elapsed from such failure or refusal to pay. Swallows v. City of Albuquerque, 59 N.M. 328, 284 P.2d 216 (1955), aff'd, 61 N.M. 265, 298 P.2d 945 (1956) (decided under former law).

Payment of accrued compensation after thirty-first day. - Although at the first moment of the fifth week after the injury, four weeks' compensation had accrued, only two of them, at most, should have been paid by the end of the thirty-first day by reason of the 16-day statute. Fresquez v. Farnsworth & Chambers Co., 60 N.M. 384, 291 P.2d 1102 (1955) (decided under former law).

Claim filed less than 31 days after injury is prematurely filed as to installment compensation benefits and must be dismissed. Moody v. Hastings, 72 N.M. 132, 381 P.2d 207 (1963).

Limitations period of two years and 31 days. - The time periods of this section and Subsection A of 52-1-31 NMSA 1978 are to be added together to compute the maximum time period in which a compensation claim may be filed. Thus, the maximum period of time to file a worker's compensation claim is two years and 31 days from the date of the occurrence of the disability. Cole v. J.A. Drake Well Serv., 106 N.M. 484, 745 P.2d 392 (Ct. App. 1987).

Limitations began to run where injury became apparent. - Where, following blows to head, workman suffered convulsions, was hospitalized, had recurrent headaches, suffered loss of memory and was assigned a helper for the first time at work; injury, for the purpose of workman's compensation, had become reasonably apparent, or should have become reasonably apparent, and statute of limitations began to run. Bowers v. Wayne Lovelady Dodge, Inc., 80 N.M. 475, 457 P.2d 994 (Ct. App. 1969).

Actual knowledge of accident as contemplated by Workmen's Compensation Act means actual knowledge of a compensable injury. In latent injury cases the workman is not entitled to compensation, nor can there be a failure or refusal to pay until the injury becomes apparent. Swallows v. City of Albuquerque, 59 N.M. 328, 284 P.2d 216 (1955), aff'd, 61 N.M. 265, 298 P.2d 945 (1956) (decided under former law).

Claim subject to dismissal where prematurely filed. - A suit for compensation prematurely filed subjects the complaint, or claim as it is spoken of in the section, to dismissal. Fresquez v. Farnsworth & Chambers Co., 60 N.M. 384, 291 P.2d 1102 (1955) (decided under former law).

Petition is not prematurely filed when workman contends that he is totally and permanently disabled. Briscoe v. Hydro Conduit Corp., 88 N.M. 568, 544 P.2d 283 (Ct. App. 1975) (decided under former law).

Medical benefits not subject to limitations. - It was not the intention of the legislature to make the medical benefits provided under 52-1-49 NMSA 1978 subject to the limitations of this section. Valdez v. McKee, 76 N.M. 340, 414 P.2d 852 (1966).

No limitation on payment of medical and hospital benefits. - Installment compensation payments shall be made semimonthly, except that the first installment shall be paid not later than 31 days after the date of the injury. As to medical and hospital benefits, which the injured workman is entitled to under the act, there is no limitation except that after injury and continuing so long as medical or surgical attention is reasonably necessary, the employer shall furnish all reasonable medical, surgical and hospital services, and medicine, not exceeding $700. Martinez v. Wester Bros. Whsle. Produce Co., 69 N.M. 375, 367 P.2d 545 (1961).

Best interests generally served by periodic installments. - Generally, the best interests of the claimant will be served by paying the compensation in regular installments as wages are paid; periodic payments supply, in a measure, the loss of a regular pay check. Codling v. Aztec Well Servicing Co., 89 N.M. 213, 549 P.2d 628 (Ct. App. 1976).

Complaint dismissed because filed prematurely. - Where employee's injury occurred on August 8, and on September 12 he filed in the district court his complaint, the cause was dismissed on the ground that it was prematurely filed. Fresquez v. Farnsworth & Chambers Co. 238 F.2d 709 (10th Cir. 1956) (decided under former law).

Determination of total permanent disability as prerequisite. - This section of the Workmen's Compensation Act has as a prerequisite a determination of "total permanent disability." Where the claim filed in the trial court is not a case of "total permanent disability," but still seeks a lump-sum settlement, it is therefore subject to dismissal under Rule 12(b)(6), N.M.R. Civ. P. (see now Rule 1-012B(6)). Sanchez v. Kerr-McGee Co., 83 N.M. 766, 497 P.2d 977 (Ct. App. 1972).

Technical default though payments made. - Where record showed that two installments, although paid late, were nevertheless paid, defendants were in technical default, but workmen's compensation claim based on this default was moot because liability for those installments was extinguished by the payment. Montoya v. Zia Co., 82 N.M. 774, 487 P.2d 202 (Ct. App. 1971).

Payment of compensation installments after filing of premature claim does not waive such premature filing nor confer jurisdiction upon the district court. Moody v. Hastings, 72 N.M. 132, 381 P.2d 207 (1963).

Payment of claims may constitute admission against interest by employer or insurer. However, an admission can be rebutted or explained and is by no means conclusive. Michael v. Bauman, 76 N.M. 225, 413 P.2d 888 (1966).

Admission of total permanent disability. - Defendants' admission by affidavit that they were paying plaintiff the maximum amount of compensation benefits provided by law, coupled with a failure to deny the claim in plaintiff's complaint, and affidavit that he was permanently disabled was an admission of total permanent disability. Briscoe v. Hydro Conduit Corp., 88 N.M. 568, 544 P.2d 283 (Ct. App. 1975).

Plaintiff's attorneys entitled to compensation if cause successful. - The plaintiff's attorneys are entitled to compensation for representing the plaintiff in the trial of this cause only if said cause is successful. Fresquez v. Farnsworth & Chambers Co., 60 N.M. 384, 291 P.2d 1102 (1955) (decided under former law).

Judgment reversed where suit filed prematurely. - Where it is clear that the suit was prematurely filed, the judgment for the claimant will be reversed and the cause remanded with instruction to dismiss his claim. Swallows v. City of Albuquerque, 59 N.M. 328, 284 P.2d 216 (1955), aff'd, 61 N.M. 265, 298 P.2d 945 (1956) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 649 to 658, 689, 690.
99 C.J.S. Workmen's Compensation §§ 337 to 352; 101 C.J.S. Workmen's Compensation §§ 826 to 835.

§ 52-1-31. Claim to be filed for workers' compensation; effect of failure to give required notice or to file claim within time allowed.

A. If an employer or his insurer fails or refuses to pay a worker any installment of compensation to which the worker is entitled under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978], after notice has been given as required by Section 52-1-29 NMSA 1978, it is the duty of the worker insisting on the payment of compensation to file a claim therefor as provided in the Workers' Compensation Act not later than one year after the failure or refusal of the employer or insurer to pay compensation. This one-year period of limitations shall be tolled during the time a worker remains employed by the employer by whom he was employed at the time of such accidental injury, not to exceed a period of one year. If the worker fails to give notice in the manner and within the time required by Section 52-1-29 NMSA 1978 or if the worker fails to file a claim for compensation within the time required by this section, his claim for compensation, all his right to the recovery of compensation and the bringing of any proceeding for the recovery of compensation are forever barred.

B. In case of the death of a worker who would have been entitled to receive compensation if death had not occurred, claim for compensation may be filed on behalf

of his eligible dependents to recover compensation from the employer or his insurer. Payment may be received or claim filed by any person whom the director or the court may authorize or permit on behalf of the eligible beneficiaries. No claim shall be filed, however, to recover compensation benefits for the death of the worker unless he or someone on his behalf or on behalf of his eligible dependents has given notice in the manner and within the time required by Section 52-1-29 NMSA 1978 and unless the claim is filed within one year from the date of the worker's death.

History: 1953 Comp., § 59-10-13.6, enacted by Laws 1959, ch. 67, § 10; 1963, ch. 269, § 6; 1967, ch. 151, § 1; 1986, ch. 22, § 8; 1987, ch. 235, § 15.

Cross-references. - As to effect of failure of workman to file claim or bring suit by reason of conduct of employer, see 52-1-36 NMSA 1978.

The 1986 amendment substituted "52-1-29 NMSA 1978" for "59-10-13.4 New Mexico Statutes Annotated, 1953 Compilation" in three places and deleted "legal" before "proceeding" in the last sentence of Subsection A.

The 1987 amendment, effective June 19, 1987, substituted "workers' " for "workmen's" throughout the section and in Subsection B substituted "director or the court" for "court" near the beginning of the second sentence.

Effective dates. - Laws 1986, ch. 22, § 103 makes the amendment of this section effective on December 1, 1986.

This section and 52-1-46 NMSA 1978 must be read and applied together and do not provide two separate and unrelated methods by which dependents may obtain benefits on the basis of the death of a worker. Shaw v. Warner, 101 N.M. 22, 677 P.2d 635 (Ct. App. 1984).

Applicability to Subsequent Injury Act. - The one-year period of limitations in the Workers' Compensation Act was not applicable by operation of 52-2-12 NMSA 1978, to a claim for reimbursement against the Subsequent Injury Fund. Hernandez v. Levi Strauss, Inc., 107 N.M. 644, 763 P.2d 78 (Ct. App. 1988) (decided under law existing prior to 1988 enactment of 52-2-14 NMSA 1978).

One-year limitation applicable in probate situation. - Workmen's compensation one-year statute of limitations, not Probate Code's four-month limitation, applied to workmen's compensation action filed against employer, a sole proprietorship being run by personal representative after death of sole proprietor. Lucero v. Northrip Logging Co., 101 N.M. 420, 683 P.2d 1342 (Ct. App. 1984).

No provision for extension of time limit for filing claim. - Section 37-1-17 NMSA 1978 prohibits 37-1-14 NMSA 1978 from applying in workmen's compensation and occupational disablement cases, since both the Workmen's Compensation Act and the Occupational Disablement Law contain specific statutes of limitations in this section and

52-3-16 NMSA 1978, and neither act provides a saving clause allowing for an extension of the specified time limit for filing a claim. Ortega v. Shube, 93 N.M. 584, 603 P.2d 323 (Ct. App. 1979).

Section 37-1-10 NMSA 1978 inapplicable to workmen's compensation. - Section 37-1-10 NMSA 1978, which provides a one-year extension for minors and incapacitated persons on limitation periods on certain actions, does not apply to workmen's compensation actions. Howie v. Stevens, 102 N.M. 300, 694 P.2d 1365 (Ct. App. 1984).

Minor not deprived of due process by application of limitation period. - Howie v. Stevens, 102 N.M. 300, 694 P.2d 1365 (Ct. App. 1984).

Statute of limitations jurisdictional. - The statute of limitations in workmen's compensation cases affects the right of action and is jurisdictional, with the burden on the claimant to prove compliance therewith; however, the claimant must not necessarily allege compliance in the first instance. Armijo v. United States Cas. Co., 67 N.M. 470, 357 P.2d 57 (1960).

The limitations statute, as to workmen's compensation, is what has frequently been termed a jurisdictional matter, and the burden is on the claimant to prove compliance therewith. Baker v. Shufflebarger & Assocs., 77 N.M. 50, 419 P.2d 250 (1966); Linton v. Mauer-Neuer Meat Packers, 71 N.M. 305, 378 P.2d 126 (1963).

The limitation of time for filing is a condition precedent to the right to maintain the action, and as this limitation provision is jurisdictional, it may not be waived. Garza v. W.A. Jourdan, Inc., 91 N.M. 268, 572 P.2d 1276 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977).

Limitation law effective on date of disability controls. - Where plaintiff was first injured on March 24, 1967, when the 1963 amendment was still in effect, and a year later returned to full employment for six years (having received workmen's compensation during the interim period), and on May 16, 1974, again suffered an alleged job accident and was totally disabled, it was held that the 1967 statute of limitation applied because the date of disability is critical and the law effective at that time controls; the 1974 claim for compensation did not relate back seven years to the date of the first accident since the whole philosophy upon which workmen's compensation is based, as the public policy of this state, militates against such a contention. De La Torre v. Kennecott Copper Corp., 89 N.M. 683, 556 P.2d 839 (Ct. App. 1976).

Limitation on remedy and right. - The limitation in the compensation statute for enforcing the right was a limitation not only on the remedy but on the right as well. Keilman v. Dar Tile Co., 74 N.M. 305, 393 P.2d 332 (1964).

Section does not apply where the action against insurance agency was one for damages for its negligent conduct in failing to secure the coverage agreed upon; the section limiting the time for filing the action under the Workmen's Compensation Act does not apply. Jernigan v. New Amsterdam Cas. Co., 74 N.M. 37, 390 P.2d 278 (1964).

Claimant must not necessarily allege compliance in the first instance, as it is a matter of proof, not formality of pleading. Whether a claim is timely filed, or whether good cause exists for delay, are questions of fact and only become questions of law where the facts are not in dispute. Linton v. Mauer-Neuer Meat Packers, 71 N.M. 305, 378 P.2d 126 (1963).

Employer-employee relationship necessary for application of Subsection A. - For the tolling provision in Subsection A to apply, there must have been an employer-employee relationship which continued after the accident; one need not be actually working and receiving compensation for the work to remain employed within the meaning of the statute. Segura v. Kaiser Steel Corp., 102 N.M. 535, 697 P.2d 954 (Ct. App. 1984).

Burden of proof of defense of accord and satisfaction in workmen's compensation proceeding was upon defendants, and the failure of the trial court to make the finding must be considered as a finding against the defendants. Baker v. Shufflebarger & Assocs., 78 N.M. 642, 436 P.2d 502 (1968).

Rule of civil procedure applicable. - Rule 6, N.M.R. Civ. P. (now see Rule 1-006), providing the method of computation of time, should be applicable generally to the Workmen's Compensation Law. Keilman v. Dar Tile Co., 74 N.M. 305, 393 P.2d 332 (1964).

Method utilized in computing time. - Whether the case was timely filed under Rule 6(a), N.M.R. Civ. P. (now see Rule 1-006A) or under 12-2-2 NMSA 1978, 12-2-2 NMSA 1978 is irrelevant as these two provisions considered together make it amply clear that whether a limitation is considered procedural or substantive, whether it is a limitation on the right and remedy, or on only the remedy is immaterial so far as the method to be utilized in computing time is concerned. Keilman v. Dar Tile Co., 74 N.M. 305, 393 P.2d 332 (1964).

Late filing has no affect upon plaintiff's medical expenses since the limitation provision of Subsection A does not apply to them., overruled on other grounds, Lasater v. Home Oil Co., 83 N.M. 567, 494 P.2d 980 (Ct. App. 1972); Schiller v. Southwest Air Rangers, Inc., 87 N.M. 476, 535 P.2d 1327 (1975).

Offer of settlement does not extend limitation period. - Where employer's insurance company makes an offer of $200 in December 1956, as a compromise settlement and the payment of medical expenses for an alleged injury in September 1955, such offer

does not extend the one-year statute of limitations and so bars a claim for such injuries filed on November 27, 1957. West v. Valley Sales & Serv. Co., 66 N.M. 149, 343 P.2d 1038 (1959).

Offers to settle do not toll the statute of limitations unless the offers are coupled by conduct that reasonably leads the workman to believe compensation will be paid. Knippel v. Northern Communications, Inc., 97 N.M. 401, 640 P.2d 507 (Ct. App. 1982).

Negotiations do not bar running of statute. - Mere negotiations, without more, are insufficient as a matter of law to estop an assertion of the statute of limitations as a bar. Knippel v. Northern Communications, Inc., 97 N.M. 401, 640 P.2d 507 (Ct. App. 1982).

Statute of limitations was not tolled by employer's alleged fraud or misrepresentation in telling plaintiff's father that plaintiff was not covered by workmen's compensation. Howie v. Stevens, 102 N.M. 300, 694 P.2d 1365 (Ct. App. 1984).

Time limitation applies only to worker's claim against his employer or insurance carrier, and not to claims against the fund by either the worker, the employer, or the insurance carrier. Duran v. Xerox Corp., 105 N.M. 277, 731 P.2d 973 (Ct. App. 1986).

Trial by jury on workmen's compensation issue. - Where the court was alerted to the fact that the claimant wished to present a workmen's compensation issue to a jury for their determination, and under statute as it existed at the time, claimant was entitled to a jury trial and to have the jury pass upon disputed questions of fact, for the trial court to determine the issue on the basis only of the claim and claimant's discovery deposition, in effect, prevented the plaintiff from having a trial by jury. Armijo v. United States Cas. Co., 67 N.M. 470, 357 P.2d 57 (1960).

Timely filing of claim as question of fact. - Whether a claim for compensation was timely filed or whether good cause exists for the delay in the filing are ordinarily questions of fact, and may become questions of law only where the facts are not in dispute. Armijo v. United States Cas. Co., 67 N.M. 470, 357 P.2d 57 (1960); Pena v. New Mexico Hwy. Dep't, 100 N.M. 408, 671 P.2d 656 (Ct. App. 1983).

Where failure of trial court to announce finding on issue of statute of limitations, the court assumed that the action was not timely filed. Baker v. Shufflebarger & Assocs., 77 N.M. 50, 419 P.2d 250 (1966).

Material issue of fact whether statutory limitation period had run. - Where plaintiff was injured almost three years before filing of claim but there was evidence that he did not attribute his back problems to the accident until sometime less than a year before filing his claim, there was a material issue of fact as to whether the statutory limitation period had run, and summary judgment on this issue was improper. Huerta v. New Jersey Zinc Co., 84 N.M. 713, 507 P.2d 460 (Ct. App.), cert. denied, 84 N.M. 696, 507 P.2d 443 (1973).

Claims for amount greater than settlement offer. - Section 52-1-36 NMSA 1978 held to be only applicable to amount offered in settlement and claims for a greater amount under the section are time barred, as the only compensation the defendants led anyone to believe would be paid was the settlement offer made by defendant; therefore, failure to bring suit for a greater amount under the act was not caused by actions of defendant-employer. Lucero v. White Auto Stores, Inc., 60 N.M. 266, 291 P.2d 308 (1955) (decided under former law).

Harmless error where claimant not entitled to recover. - Where trial court disallowed plaintiff's claim because the disability was not the natural and direct result of the accident, which, on appeal, is supported by the evidence, and claimant was properly denied any compensation in the trial court, to reverse and remand because the trial court was in error in its finding that plaintiff's claim was barred by the statute of limitations would be meaningless, because claimant is not entitled to recover. The error of the trial court is harmless. Salazar v. Lavaland Heights Block Co., 75 N.M. 211, 402 P.2d 948 (1965).

Lulling claimant into feeling of security as conduct excusing filing. - Payments made and accepted could just as effectively lull claimant into a reasonable feeling of security as to his being entitled to compensation under New Mexico law as would continued voluntary payment of wages, and would accordingly be conduct excusing the filing of the claim within one year after the right to compensation arose. Reed v. Fish Eng'r Corp., 74 N.M. 45, 390 P.2d 283 (1964), aff'd, 76 N.M. 760, 418 P.2d 537 (1966).

No evidence claimant led to believe compensation would be paid. - Where there was no evidence in the record that the plaintiff had in any way been led to believe that compensation benefits would be paid, court's finding that the statute of limitations on filing had been avoided was in error., overruled on other grounds., Lasater v. Home Oil Co., 83 N.M. 567, 494 P.2d 980 (Ct. App. 1972); Schiller v. Southwest Air Rangers, Inc., 87 N.M. 476, 535 P.2d 1327 (1975).

If employer led employee to believe that he was considered in "employment" for workmen's compensation, or if it became reasonably apparent to plaintiff that he was considered in "employment" and was entitled to compensation, the section was tolled. De La Torre v. Kennecott Copper Corp., 89 N.M. 683, 556 P.2d 839 (Ct. App. 1976).

Employer's conduct lulling claimant into security excused his failure to file. - Where facts support an inference that the payments were not knowingly received under the Utah law so as to bar the action, the conduct of defendants having lulled plaintiff into a feeling of security as to his being entitled to compensation under New Mexico law, their conduct excused plaintiff's failure to file the claim within one year after the right to compensation arose. Reed v. Fish Eng'r Corp., 76 N.M. 760, 418 P.2d 537 (1966).

Not applicable to provisions concerning safety devices. - Although this statute of limitations is jurisdictional and need not be raised as an affirmative defense, it nevertheless does not apply to the statutory penalty section relating to increase or

reduction in compensation for failure to supply safety devices (52-1-10 NMSA 1978). Garza v. W.A. Jourdan, Inc., 91 N.M. 268, 572 P.2d 1276 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977).

Section begins to run when compensable injury reasonably apparent. - As soon as it becomes reasonably apparent, or should become reasonably apparent to a workman that he has an injury on account of which he is entitled to compensation and the employer fails or refuses to make payment, he has a right to file a claim and the section begins to run from that date. There is nothing in the act as this court reads it which indicates that the running of the section may be delayed until a more serious disability is ascertainable. Cordova v. Union Baking Co., 80 N.M. 241, 453 P.2d 761 (Ct. App. 1969); Lent v. Employment Sec. Comm'n, 99 N.M. 407, 658 P.2d 1134 (Ct. App. 1982).

Period of limitation does not commence to run until it becomes reasonably apparent, or should become reasonably apparent, to the workman that he has an injury for which he is entitled to compensation. Gomez v. Hausman Corp., 83 N.M. 400, 492 P.2d 1263 (Ct. App. 1971), cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972).

Where the claimant was originally paid a few dollars' compensation for a relatively small injury and more than a year later developed serious trouble with his hand which had also been injured in the original accident, although apparently superficially, court sustained a recovery, holding that the section began to run from the time of the employer's failure to pay compensation for the latent injury, not from the time of the accident. Linton v. Mauer-Neuer Meat Packers, 71 N.M. 305, 378 P.2d 126 (1963).

The statute of limitations begins to run in workmen's compensation cases as soon as it becomes reasonably apparent, or should become reasonably apparent, to a workman that he has an injury on account of which he is entitled to compensation, and his employer fails or refuses to make payment. Romero v. American Furn. Co., 86 N.M. 661, 526 P.2d 803 (Ct. App.), cert. denied, 86 N.M. 657, 526 P.2d 799 (1974); ABF Freight Sys. v. Montano, 99 N.M. 259, 657 P.2d 115 (1982).

In cases of latent injury, the time period for notice of claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable, compensable character of his latent injury. Smith v. Dowell Corp., 102 N.M. 102, 692 P.2d 27 (1984).

In workmen's compensation case where trial court found as a fact that physician who treated plaintiff released him to return to his full duties soon after his accident and that it did not become and should not have become apparent to plaintiff that he had suffered a compensable injury under this act until four years later when physician told him that his workload should be lightened, statute of limitations did not begin to run until the time when plaintiff received such notice of compensable injury. Duran v. New Jersey Zinc Co., 83 N.M. 38, 487 P.2d 1343 (1971).

When disability discovered rather than at accidental occurrence. - The period of limitation does not commence to run until it becomes reasonably apparent, or should become reasonably apparent, to the workman that he has an injury for which he is entitled to compensation; therefore, time does not begin to run until the disability is discovered rather than from the accidental occurrence. De La Torre v. Kennecott Copper Corp., 89 N.M. 683, 556 P.2d 839 (Ct. App. 1976); Casias v. Zia Co., 93 N.M. 78, 596 P.2d 521 (Ct. App.), cert. denied, 93 N.M. 8, 595 P.2d 1203 (1979).

The statute of limitations does not commence to run until the wage earning ability of the injured workman has been decreased as a result of the accidental injury. Salazar v. Lavaland Heights Block Co., 75 N.M. 211, 402 P.2d 948 (1965).

And includes any compensable disability which arises. - The wording of the limitation statute indicates that the period of limitation begins to run from the time of employer's failure to pay compensation when the disability can be ascertained and the duty to pay arises. This language does not mean the particular class of disability for which compensation is asked but any compensable disability which arises from an accident and eventually results in the class of disability for which claim is made. The section makes no distinction between loss of specific body members such as the right index finger and injuries to other parts of the body not specifically mentioned which result or may result in a form of disability, permanent or otherwise. Noland v. Young Drilling Co., 79 N.M. 444, 444 P.2d 771 (Ct. App. 1968).

Commencement where disability of gradually developing nature. - Where claimant suffered from a gradually developing job-related stomach ulcer, her disability commenced, for purposes of triggering the statute of limitations, when she became totally disabled and could no longer work, more than eight years following the onset of her symptoms. Zengerle v. City of Socorro, 105 N.M. 797, 737 P.2d 1174 (Ct. App. 1986).

When employer is deemed to have failed to make payment. - At the point it becomes or should become reasonably apparent to the worker that workmen's compensation benefits are owed, the employer, by not doing anything, fails to make payment. ABF Freight Sys. v. Montano, 99 N.M. 259, 657 P.2d 115 (1982).

Time period after final installment for a reduced amount. - A claimant has one year from the date of receipt of a final reduced installment payment to file his claim for workers' compensation. Rodriguez v. X-Pert Well Serv., Inc., 107 N.M. 428, 759 P.2d 1010 (Ct. App. 1988).

Limitations period of two years and 31 days. - The time periods of 52-1-30 NMSA 1978 and this section are to be added together to compute the maximum time period in which a compensation claim may be filed. Thus, the maximum period of time to file a worker's compensation claim is two years and 31 days from the date of the occurrence of the disability. Cole v. J.A. Drake Well Serv., 106 N.M. 484, 745 P.2d 392 (Ct. App. 1987).

Subsection B does not authorize recovery for predeath disability benefits. Holliday v. Talk of Town, Inc., 102 N.M. 540, 697 P.2d 959 (Ct. App. 1985).

Workman on notice when suffered partial loss of use of member. - Whether or not he can continue in his prior employment, a workman is put on notice of a compensable scheduled injury when it becomes or should reasonably become apparent to him that he suffered "a partial loss of use" of the scheduled body member. Romero v. American Furn. Co., 86 N.M. 661, 526 P.2d 803 (Ct. App.), cert. denied, 86 N.M. 657, 526 P.2d 799 (1974).

Mere fact he did not know full extent of his injury from a medical standpoint did not excuse him from filing his claim. Gonzales v. Coe, 59 N.M. 1, 277 P.2d 548 (1954) (decided under former law).

Burden upon claimant to prove filing within statutory period. - Where the filing of the claim for compensation in the office of the clerk of the district court, not later than the end of the statutory period after failure or refusal of the employer to pay the same, is limitation on the right of action, which is wholly statutory, and not a mere limitation upon the remedy, and is absolute and unconditional, the burden is upon the claimant to prove compliance therewith. Maestas v. American Metal Co., 37 N.M. 203, 20 P.2d 924 (1933); Sanchez v. Bernalillo County, 57 N.M. 217, 257 P.2d 909 (1953) (decided under former law).

Section does not commence to run anew as to each remedial procedure. - It would be unreasonable and require legislation by interpretation to hold that the section commences to run anew as to each or any particular remedial procedure which is employed in an effort to effect a cure or relief from the results of an injury. Noland v. Young Drilling Co., 79 N.M. 444, 444 P.2d 771 (Ct. App. 1968).

All injuries producing compensable disability and subsequently becoming more serious should be treated alike and the same rule applied to all of them. It is not meant that a workman will lose the statutory benefit unless he files claim for a noncompensable injury which he has no reason to believe will result in a serious and compensable injury. Nor does it mean that he can disregard a compensable injury and wait until permanent incapacity results therefrom before he is obliged to file his claim. As soon as it becomes reasonably apparent, or should become reasonably apparent, to a workman that he has an injury on account of which he is entitled to compensation and the employer fails or refuses to make payment, he has a right to file a claim and the statute begins to run from that date. Noland v. Young Drilling Co., 79 N.M. 444, 444 P.2d 771 (Ct. App. 1968).

Circumstances not suspicious so as to run limitation statute. - Where claimant under Workmen's Compensation Act had allegedly told lawyer that insurer refused to pay, had allegedly been disabled from time of injury to trial, had continued to complain of back

pain and had continued seeing his doctor and that claimant's insurer had paid part of doctor's bills and had offered claimant a settlement, circumstances were not "suspicious" so as to run one-year statute of limitations on filing of claim. Salazar v. Lavaland Heights Block Co., 75 N.M. 211, 402 P.2d 948 (1965).

Informing supervisor at time of injury. - An employer had adequate notice of a compensable injury where the claimant told his supervisor, at the time he was fitted for hearing aids, that his hearing loss was work-related. The statute of limitations was tolled by the employer's subsequent failure to file a report of the accident. Cisneros v. Molycorp, Inc., 107 N.M. 788, 765 P.2d 761 (Ct. App. 1988) (decided under pre-1987 version of 52-1-58 NMSA 1978).

Failure to notify employer as bar to recovery. - Present knowledge of injury to shoulder entitling claimant to compensation, and known to him during four months or more when he was without work because of the condition, but at no time communicated to employer, was in fact and law a failure to timely comply with the provisions of 52-1-29 NMSA 1978 and barred recovery under this section. Roberson v. Powell, 78 N.M. 69, 428 P.2d 471 (1967).

If plaintiff gave no notice as required by 52-1-29 NMSA 1978 or failed to file his claim within one year after relator failed or refused to pay compensation as required by the section, all of plaintiff's "claim for the recovery of compensation, all his right to the recovery of compensation and the bringing of any legal proceeding for the recovery of compensation" would be barred and the same is true if the case was prematurely filed. State ex rel. Kermac Nuclear Fuels Corp. v. Larrazolo, 70 N.M. 475, 375 P.2d 118 (1962).

As a condition precedent. - Notice, where required, is a condition precedent to recovery, and is a mandatory requirement upon which the right of action rests, and this knowledge (of the existence of a compensable injury) which the section requires means more than just putting upon inquiry and involves more than knowledge of the mere happening of an accident. Sanchez v. Bernalillo County, 57 N.M. 217, 257 P.2d 909 (1953) (decided under former law).

Failure to file within one year as bar. - Where the first proceeding for the recovery of compensation is dismissed for being prematurely filed and the second one is filed more than a year after failure or refusal to make payment of compensation when due, the later action is barred. Fresquez v. Farnsworth & Chambers Co. 238 F.2d 709 (10th Cir. 1956) (decided under former law).

Workman must file his claim for permanent total disability within one year and 31 days of the notice that the insurer will pay him only for the loss of the specific member; he need not wait until the specified period has run and then seek a determination of excess disability, if any, by reason of the loss of the member. Gonzales v. Gackle Drilling Co., 67 N.M. 130, 353 P.2d 353 (1960).

And insurance agent misinforming claimant did not toll statute. - Claimant's claim to workmen's compensation benefits was barred by statutory limitation when complaint was filed more than one year after employer's discontinuation of payments, and insurance agent's misinforming claimant of latest date payments covered did not act to toll the statute. Stasey v. Stasey, 77 N.M. 436, 423 P.2d 869 (1967).

Limitation does not apply to claim for medical expenses. - The one-year statute applies only after failure or refusal to pay installments of compensation - not when medical payments are not paid. Accordingly, the one-year limitation of this section does not apply to claims for the payment of medical expenses. Nasci v. Frank Paxton Lumber Co., 69 N.M. 412, 367 P.2d 913 (1961).

Limitation does not apply to claim for medical expenses. - The statute of limitations does not apply to medical expenses, and medical expenses may be claimed even though the right to claim installment payments of compensation may be barred. Zengerle v. City of Socorro, 105 N.M. 797, 737 P.2d 1174 (Ct. App. 1986).

It is the nonpayment of periodic disability benefit installments, not the nonpayment of medical benefits, that controls the running of the statute in workers' compensation cases. Hutcherson v. Dawn Trucking Co., 107 N.M. 358, 758 P.2d 308 (Ct. App. 1988).

Employer's obligation to pay compensation depends on whether plaintiff had disability as defined in 52-1-24 and 52-1-25 (see now 52-1-25 and 52-1-26) NMSA 1978. Cordova v. Union Baking Co., 80 N.M. 241, 453 P.2d 761 (Ct. App. 1969).

Where there is possible case of latent injury, the trial court should listen to all the evidence and should not determine as a matter of law that the claim could not be presented. Linton v. Mauer-Neuer Meat Packers, 71 N.M. 305, 378 P.2d 126 (1963).

Claim not precluded where injection enabled worker to return to work. - Where, whatever the doctor's prior diagnosis, an injection enabled worker to fully do his work after his return to work, because the record substantially indicates that worker was able to fully perform his job duties, it is clear that the trial court could have determined that he was not disabled and there is substantial evidence to support the ultimate findings of the trial court on the question of statute of limitations. The trial court will be affirmed in its determination that Subsection A did not operate to preclude the worker's subsequent claim. Romero v. General Elec. Corp., 104 N.M. 652, 725 P.2d 1220 (Ct. App. 1986).

And rate calculated as of date when injury later prevented him from working. - Where a worker receives worker's compensation and then returns to work, if there is substantial evidence to show that he worked at full capacity after his return to work, it is proper to conclude that he did not know, or should not have known, of his disability until he was later unable to work. Because the compensable rate is calculated as of the date the workman knew or should have known of his disability, that rate should be calculated as of the later date when his injury prevented him from working. Romero v. General Elec. Corp., 104 N.M. 652, 725 P.2d 1220 (Ct. App. 1986).

Where employer relieved of duty to compensate when worker returns to work. - If an employer is relieved of the duty to pay compensation during the period in which an injured worker returns to work, the employee's obligation to file a suit during such period is suspended and the statute of limitations is thereby tolled. Cordova v. City of Albuquerque, 71 N.M. 491, 379 P.2d 781 (1962).

No failure to pay compensation where there was no evidence that plaintiff's pain prevented him, in any manner whatsoever, from performing all of the duties of his job until January 15, 1970, just as he had prior to the accident; there was no suggestion in the evidence that the plaintiff did not earn the wages paid him after the accident, it followed that there was no failure or refusal to pay compensation prior to January 15, 1970, and the trial court's finding that the plaintiff knew at all times, or by the exercise of reasonable diligence should have known, that he suffered a compensable injury on July 27, 1966, was not supported by substantial evidence and, therefore, was erroneous. Gomez v. Hausman Corp., 83 N.M. 400, 492 P.2d 1263 (Ct. App. 1971), cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972).

Workman is not required to cease work and file his claim merely because he continues under the care of a doctor, or suffers some pain or had been told that at some future time an additional operation may be required as a result of the injury suffered, and on the contrary, it is clear that a workman may not recover for any period during which his earning ability is as much as before the injury; therefore, the trial court erred in applying the statute of limitations as a bar to recovery of compensation payments where workman returned to work after initial treatment and did not file a claim for additional treatment until he underwent surgery at a later date. Rayburn v. Boys Super Mkt., Inc., 74 N.M. 712, 397 P.2d 953 (1964).

Claimant as employee though on sick leave lay-off status. - Where the plaintiff ceased actual work with his employer and went on sick leave lay-off status on May 16, 1974, receiving weekly benefits under a weekly benefit plan for nonjob related disability, and remained an employee to the extent that when his illness was terminated and he was well enough to return to work, he would be returned to his regular employment, and up to the date of his retirement on April 1, 1975 he was technically carried in the company records as an employee, it was held that the facts established that plaintiff remained in employment until April 1, 1975 as a matter of law, and thus his claim was not barred by the statute of limitations. De La Torre v. Kennecott Copper Corp., 89 N.M. 683, 556 P.2d 839 (Ct. App. 1976).

Rights of dependents not saved from running of limitations. - There is no provision in the Workmen's Compensation Act which saves the rights of dependents under disability from the running of limitations, although, as appears in this section, when dependents are shown to be entitled to benefits, the court has authority to appoint a person to receive the same for such dependents in such portions and amounts as it may determine to be for the best interests of them and of the public. The time within which such benefits must be claimed, however, is nowhere enlarged in favor of claimants

under disability. Sanchez v. Bernalillo County, 57 N.M. 217, 257 P.2d 909 (1953) (decided under former law).

Continued payment of salary not payment of compensation. - Supreme court declines to hold that the continued payment of plaintiff's salary amounted to payment of compensation so as to suspend his right under the act to sue. Hathaway v. New Mexico State Police, 57 N.M. 747, 263 P.2d 690 (1953) (decided under former law).

Vocational rehabilitation benefits suit not precluded. - Employee was not precluded from maintaining a suit to recover vocational rehabilitation benefits on the alleged ground that he did not, prior to commencing the suit, seek such benefits nor was he refused them before commencing the suit. Maitlen v. Getty Oil Co., 105 N.M. 370, 733 P.2d 1 (Ct. App. 1987).

Compensation claim files are public records. - The worker's compensation division maintains worker's compensation claim files in the course of its statutory function of adjudicating claims filed by workers, which makes them public records within the meaning of state freedom of information laws. 1988 Op. Att'y Gen. No. 88-16.

Law reviews. - For article, "Survey on New Mexico Law, 1982-83: Workmen's Compensation," see 14 N.M.L. Rev. 211 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation § 75; 82 Am. Jur. 2d Workmen's Compensation §§ 480, 482 to 495, 684.
Limitation of time for filing claim under act is jurisdictional, 78 A.L.R. 1294.
99 C.J.S. Workmen's Compensation § 280; 100 C.J.S. Workmen's Compensation §§ 436, 461, 468 to 482.

§§ 52-1-32 to 52-1-35. Repealed. 52-1-35.

Repeals. - Laws 1986, ch. 22, § 102 repeals former 52-1-32 through 52-1-35 NMSA 1978, relating to procedures in making claims for workmen's compensation benefits, effective May 21, 1986. For provisions of former sections, see Original Pamphlet and 1985 Cumulative Supplement. For present comparable provisions, see 52-5-5 NMSA 1978 et seq.

Repeal, as to question of district court jurisdiction, unconstitutional. - To the extent that repeal of 52-1-32 to 52-1-35 NMSA 1978 by Laws 1986, ch. 22, § 102 deprives a claimant of a forum between May 21 and December 1, 1986 for resolution of a legislatively-created right, that portion of § 102 is unconstitutional, when applied to the very narrow question of jurisdiction over a claimant who has filed or will file a claim in district court prior to December 1, 1986. Wylie Corp. v. Mowrer, 104 N.M. 751, 726 P.2d 1381 (1986).

§ 52-1-36. Effect of failure of worker to file claim by reason of conduct of employer.

The failure of any person entitled to compensation under the Workers' Compensation Act [this article] 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.

History: Laws 1937, ch. 92, § 13; 1941 Comp., § 57-914; 1953 Comp., § 59-10-14; Laws 1959, ch. 67, § 15; 1986, ch. 22, § 9; 1989, ch. 263, § 20.

Cross-references. - As to effect of failure to give required notice or to file claim within time allowed, see 52-1-31 NMSA 1978.

The 1986 amendment inserted "or" preceding, and deleted "or bring suit" following, "file any claim".

The 1989 amendment, effective June 16, 1989, made minor stylistic changes in the catchline and throughout the section.

Effective dates. - Laws 1986, ch. 22, § 103 makes the amendment of this section effective on December 1, 1986.

Misrepresentation that employee will receive benefits is only reason workmen's compensation limitation period is tolled. Howie v. Stevens, 102 N.M. 300, 694 P.2d 1365 (Ct. App. 1984).

Conduct of employer lulling employee excused failure to file. - Where facts support an inference that the payments were not knowingly received under the Utah law so as to bar the action, the conduct of employers having lulled employee into a feeling of security as to his being entitled to compensation under New Mexico law, their conduct excused employee's failure to file the claim within one year after the right to compensation arose. Reed v. Fish Eng'r Corp., 76 N.M. 760, 418 P.2d 537 (1966).

And insurance agent's misinformation did not toll statute. - Claimant's claim to workmen's compensation benefits was barred by statutory limitation when complaint was filed more than one year after employer's discontinuation of payments, and insurance agent's misinforming claimant of latest date payments covered did not act to toll the section. Stasey v. Stasey, 77 N.M. 436, 423 P.2d 869 (1967).

Statute requires not only that claimant be led to believe that compensation would be paid but this belief must cause him to delay the filing beyond the statutory period in order for claimant to avoid the statute of limitations for filing., overruled on other grounds, Lasater v. Home Oil Co., 83 N.M. 567, 494 P.2d 980 (Ct. App. 1972); Schiller v. Southwest Air Rangers, Inc., 87 N.M. 476, 535 P.2d 1327 (1975).

Where compensation insurer's adjuster advised injured workman that he had a legitimate claim which would be acted upon as soon as investigation was completed, the workman's failure to sue within the time prescribed by the act was excused. Elsea v. Broome Furn. Co., 47 N.M. 356, 143 P.2d 572 (1943).

Course of conduct, not specific communication, is the dispositive inquiry in deciding whether the statute of limitations has been tolled by employer's or insurer's conduct. Although such course of conduct during the relevant time period is of crucial significance, the conduct may be inferred from actions occurring both before and after the period of time during which the statute would have run otherwise. Hutcherson v. Dawn Trucking Co., 107 N.M. 358, 758 P.2d 308 (Ct. App. 1988).

Where compensation insurer's conduct had reasonably led claimant to believe that compensation would be paid and liability was not denied until after statutory time for filing suit had elapsed, supreme court was not disposed to set any specific time within which the action must be filed short of one year after the date on which liability was first denied. Elsea v. Broome Furn. Co., 47 N.M. 356, 143 P.2d 572 (1943).

Where the conduct of an insurer, in a workmen's compensation action, may have reasonably led the claimant to believe compensation benefits would be paid, the insurer has failed to show that no genuine issue of fact exists as to the tolling of the statute of limitations. Owens v. Eddie Lu's Fine Apparel, 95 N.M. 176, 619 P.2d 852 (Ct. App. 1980).

Conduct did not mislead claimant. - Where on two occasions employer expressly informed claimant that he would not receive any more workmen's compensation benefits, and claimant worked for employer after such time, sometimes regularly and sometimes irregularly and from time to time he received sick leave and vacation pay, but at no time during that period did he receive any workmen's compensation benefits, and he knew that fact and continued employment under those circumstances, as a matter of law, did not constitute conduct which would reasonably lead claimant to believe that he would be paid workmen's compensation benefits. Silva v. Sandia Corp. 246 F.2d 758 (10th Cir. 1957).

Limitation not avoided where no evidence of misleading. - Where there was no evidence in the record that the plaintiff had in any way been led to believe that compensation benefits would be paid, court's finding that the statute of limitations on filing had been avoided was in error., overruled on other grounds, Lasater v. Home Oil Co., 83 N.M. 567, 494 P.2d 980 (Ct. App. 1972); Schiller v. Southwest Air Rangers, Inc., 87 N.M. 476, 535 P.2d 1327 (1975).

Payments made and accepted could effectively lull claimant into reasonable feeling of security as to his being entitled to compensation under New Mexico law as would continued voluntary payment of wages, and would accordingly be conduct excusing the filing of the claim within one year after the right to compensation arose. Reed v. Fish Eng'r Corp., 74 N.M. 45, 390 P.2d 283 (1964), aff'd, 76 N.M. 760, 418 P.2d 537 (1966).

Immaterial that other factors contributed to delay. - As long as claimant's delay in suing was caused in part by conduct of employer and compensation insurer, the fact that other considerations also contributed to claimant's delay was immaterial in view of the statutory provision that it is necessary only to connect claimant's delay in whole or in part with the conduct of the employer or insurer to excuse failure to file within the statutory period. Elsea v. Broome Furn. Co., 47 N.M. 356, 143 P.2d 572 (1943).

Negotiations do not bar running of statute of limitations. - Mere negotiations, without more, are insufficient as a matter of law to estop an assertion of the statute of limitations as a bar. Knippel v. Northern Communications, Inc., 97 N.M. 401, 640 P.2d 507 (Ct. App. 1982).

Claims for amounts greater than settlement offer. - This section held to be only applicable to amount offered in settlement and claims for a greater amount under the section are time barred, as the only compensation the defendants led anyone to believe would be paid was the settlement offer made by defendant; therefore, failure to bring suit for a greater amount under the act was not caused by actions of defendant-employer. Lucero v. White Auto Stores, Inc., 60 N.M. 266, 291 P.2d 308 (1955).

Compromise offer not extend limitation period. - Where employer's insurance company makes an offer of $200 in December 1956, as a compromise settlement and the payment of medical expenses for an alleged injury in September 1955, such offer does not extend the one-year statute of limitations and so bars a claim for such injuries filed on November 27, 1957. West v. Valley Sales & Serv. Co., 66 N.M. 149, 343 P.2d 1038 (1959).

Employee though on sick leave lay-off status. - Where the plaintiff ceased actual work with his employer and went on sick leave lay-off status on May 16, 1974, receiving weekly benefits under a weekly benefit plan for nonjob related disability, and remained an employee to the extent that when his illness was terminated and he was well enough to return to work, he would be returned to his regular employment, and up to the date of his retirement on April 1, 1975, he was technically carried in the company records as an employee, the facts established that plaintiff remained in employment until April 1, 1975, as a matter of law, and thus his claim was not barred by the statute of limitations. De La Torre v. Kennecott Copper Corp., 89 N.M. 683, 556 P.2d 839 (Ct. App. 1976).

Sufficiency of notice. - While a casual statement of the injury by employee to his employer is not enough to satisfy requirement of notice, the employee is not required to anticipate the results which will flow from the injury when he does not know at the time what the results will be. Elsea v. Broome Furn. Co., 57 N.M. 356, 143 P.2d 572 (1943).

Failure to give notice is excused where employee had no knowledge of the true seriousness of his injury and expert medical attention was necessary to establish causal relation between the injury and the result flowing therefrom. Elsea v. Broome Furn. Co., 47 N.M. 356, 143 P.2d 572 (1943).

Tolling of period to sue under 52-1-65 NMSA 1978. - Voluntary payment of compensation benefits pursuant to the law of another state is not in itself sufficient to toll the filing requirements of 52-1-65 NMSA 1978; tolling of the time to sue provision depends upon whether a worker was reasonably led to believe that New Mexico compensation would be paid. Ryan v. Bruenger M. Trucking, 100 N.M. 15, 665 P.2d 277 (Ct. App. 1983).

Time is tolled for beginning of payments until the employer is notified pursuant to the act that the employee is claiming compensation resulting from the accident. Swallows v. City of Albuquerque, 59 N.M. 328, 284 P.2d 216 (1955).

Reference in testimony treated as explanatory of delay. - A reference made by the claimant and his attorney to cost of employing counsel as part of direct examination, was treated as explanatory of claimant's delay in bringing suit and it was not under the circumstances prejudicial to the employer and insurer. Elsea v. Broome Furn. Co., 47 N.M. 356, 143 P.2d 572 (1943).

And cured by court's direction to jury. - If reference was erroneously made by claimant and his attorney to cost of employing counsel as explanatory of claimant's delay in bringing suit and as to reasonableness of claimant's failure to employ counsel during the negotiations, the error was cured by the court's direction to the jury to disregard statements about the attorney fees and similar matters. Elsea v. Broome Furn. Co., 47 N.M. 356, 143 P.2d 572 (1943).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity of provision invalidating contract of employee to waive right to compensation, 84 A.L.R. 1297.
100 C.J.S. Workmen's Compensation Acts §§ 450 to 456, 469 to 479.

§ 52-1-37. Repealed.

Repeals. - Laws 1986, ch. 22, § 102 repeals former 52-1-37 NMSA 1978, as amended by L. 1959, ch. 67, § 16, relating to venue of workmen's compensation claims, effective May 21, 1986. For provisions of former section, see Original Pamphlet. For present comparable provisions, see 52-5-1 NMSA 1978 et seq.

§ 52-1-38. Judgment; provisions; execution; subrogation; contempts.

A. All judgments based upon a supplementary compensation order pursuant to Section 52-5-10 NMSA 1978 shall be against the defendants and each of them for the amount then due and shall also contain an order upon the defendants for the payment to the worker, at regular intervals during the continuance of his disability, the further amounts he is entitled to receive. The judgment shall be so framed as to accomplish the purpose

and intent of the Workers' Compensation Act [this article] in all particulars. In addition to executions for any amount already due in the judgment, executions for amounts to become due in the future shall be issued by the clerk of the court at any time after the time provided in the judgment for the payment thereof if the worker files his affidavit with the clerk that the same is unpaid and that his disability still continues; provided, however, if application is made for a physical examination of the worker under Section 52-1-51 NMSA 1978, issuance of execution shall await the further order of a workers' compensation judge.

B. All judgments and executions based upon a supplementary compensation order pursuant to Section 52-5-10 NMSA 1978 issued in workers' compensation cases shall be governed by the laws of this state with respect to judgments or executions in civil cases and shall have the same force and effect.

C. When a judgment or execution based upon a supplementary compensation order pursuant to Section 52-5-10 NMSA 1978 is paid or satisfied by a defendant who has an agreement that the judgment or execution should have been paid or satisfied by another party as insurer, guarantor, surety or otherwise, the defendant is entitled to judgment over against the party in the same case. Application for judgment shall be made within ninety days after judgment is paid or execution satisfied. Notice shall be given to the party against whom judgment over is sought, and the application shall be heard according to the procedures for notice and hearing of motions in other civil actions.

D. In any case where the employer has failed to file the undertaking or certificate required by Section 52-1-4 NMSA 1978, the court has power to enforce compliance with any judgment or order granted in a case against the employer by proceedings in contempt against a party failing or refusing to comply.

History: Laws 1929, ch. 113, § 15; C.S. 1929, § 156-115; 1941 Comp., § 57-916; 1953 Comp., § 59-10-16; Laws 1959, ch. 67, § 17; 1986, ch. 22, § 10; 1989, ch. 263, § 21.

Cross-references. - As to executions and foreclosures, see 39-4-1 NMSA 1978 et seq. As to judgments, see Rules 1-054 to 1-063.

The 1986 amendment, in Subsections A, B, and C, inserted "based upon a supplementary compensation order pursuant to Section 36 of this act"; near the end of Subsection A, substituted "52-1-51 NMSA 1978" for "59-10-20 New Mexico Statutes Annotated, 1953 Compilation" and "a hearing officer" for "the court in the premises"; and, in Subsection D, substituted "52-1-4 NMSA 1978" for "59-10-3 New Mexico Statutes Annotated, 1953 Compilation."

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judge" for "hearing officer" at the end of the last sentence of Subsection A, and made minor stylistic changes throughout the section.

Effective dates. - Laws 1986, ch. 22, § 103 makes the amendment of this section effective on December 1, 1986.

Right to benefits in reaching jurisdictional minimum for removal. - A possibility that payments of workmen's compensation benefits will terminate before the total reaches the jurisdictional minimum necessary for the federal district court to entertain the case after removal is immaterial if the right to all the payments is in issue, since future payments under the act are not in any proper sense contingent, although they may be decreased or cut off altogether by the operation of conditions subsequent. Valencia v. Stearns Roger Mfg. Co. 124 F. Supp. 670 (D.N.M. 1954).

Doctrine of de minimis. - Even though the court recognizes the doctrine of de minimis, still, this being a workmen's compensation case, appellant must be granted all compensation to which he is entitled. Stolworthy v. Morrison-Kaiser F & S, 72 N.M. 1, 380 P.2d 13 (1963).

Rules of civil procedure applicable. - The rules of civil procedure relative to the methods of presentation and reservation in lower court of grounds of review are applicable to actions under the Workmen's Compensation Act. Cavins v. Armstrong & Armstrong, 37 N.M. 141, 19 P.2d 747 (1933); Moore v. Phillips Petroleum Co., 36 N.M. 153, 9 P.2d 692 (1932) (decided under prior law).

Where there is conflicting evidence as to date claimant gave his employer notice of his injury, it was for the trial court to resolve this conflict. Rohrer v. Eidal Int'l, 79 N.M. 711, 449 P.2d 81 (Ct. App. 1968).

For the trial court to resolve conflict in plaintiff's testimony concerning the date he had knowledge of his compensable injury. Rohrer v. Eidal Int'l, 79 N.M. 711, 449 P.2d 81 (Ct. App. 1968).

In determining right of compensation the court must find whether the employee's injury resulted in a disability that terminated before judgment was entered or whether the employee's injury resulted in total or partial disability in existence at the time judgment was entered. Sena v. Gardner Bridge Co., 93 N.M. 358, 600 P.2d 304 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Postjudgment Interest. - Granting of interest is within discretion of trial court and is not a matter of right under this section. Trujillo v. Beaty Elec. Co., 91 N.M. 533, 577 P.2d 431 (Ct. App. 1978).

There is nothing which indicates that 56-8-4A NMSA 1978, providing a basis for computing interest on judgments, should not apply in workmen's compensation cases. Candelaria v. General Elec. Co., 105 N.M. 167, 730 P.2d 470 (Ct. App. 1986).

The court in its discretion may allow postjudgment interest on compensation benefits payable by the subsequent injury fund and awarded to an injured or disabled workman.

Allowance of interest, however, is limited to that portion of a judgment against the fund in favor of an injured worker, and the fund is not liable for the payment of interest on that portion of reimbursement payable by the fund to an employer or its carrier. Additionally, any award of postjudgment interest does not commence to run upon compensation benefits until the time fixed for their payment. Mares v. Valencia County Sheriff's Dep't, 106 N.M. 744, 749 P.2d 1123 (Ct. App. 1988).

Payment of maximum weeks until condition subsequent. - Under the Workmen's Compensation Act the court requires the person liable to continue to pay the amount due the workman for a maximum of 550 weeks, subject to its termination, should the court subsequently adjudge that the disability had ceased, this latter provision coming into play in a manner analogous to a condition subsequent in the contract. Valencia v. Stearns Roger Mfg. Co. 124 F. Supp. 670 (D.N.M. 1954).

Increase of payments due to increase of disability. - In absence of authority in the compensation act allowing an increase in payments because of an increase of disability after judgment has been entered, the courts cannot aid the injured workman in obtaining such increase except under procedures permissible under statute or general law. Hudson v. Herschbach Drilling Co., 46 N.M. 330, 128 P.2d 1044 (1942).

Sufficiency of evidence establishing disability. - In action by employee for injuries sustained in driving a truck for his employer, the evidence was sufficient to establish serious and permanent injuries to claimant's back, totally disabling him from doing anything but very light work sitting down, and that such injuries were not caused by an old injury from which he had entirely recovered. Robinson v. Mittry Bros., 43 N.M. 357, 94 P.2d 99 (1939).

Judgments in workmen's compensation cases must be drawn to carry out purposes of the Workmen's Compensation Act. Johnson v. C & H Constr. Co., 78 N.M. 423, 432 P.2d 267 (Ct. App. 1967).

Judgment absolute in form. - As right to contest question of total and permanent disability is statutory, it exists even though judgment awarding compensation for total and permanent disability is absolute in form, and judgment instead of being absolute in form should provide that claimant was entitled to recover for 550 weeks, subject to termination, should the court subsequently determine that the disability had ceased. La Rue v. Johnson, 47 N.M. 260, 141 P.2d 321 (1943).

More than one judgment or order. - Under the provisions of the Workmen's Compensation Act, there may be more than one judgment or order on issues under the act. Johnson v. C & H Constr. Co., 78 N.M. 423, 432 P.2d 267 (Ct. App. 1967).

Findings sustained by substantial evidence not disturbed on appeal. - Where judgment has been rendered against a claimant under this act and the findings of the court denying the claim are sustained by substantial evidence, it will not be disturbed on appeal. Courtney v. Nevada Consol. Copper Corp., 44 N.M. 390, 103 P.2d 118 (1940).

Judgment complies with section. - Where a judgment provides for the payment of weekly benefits of a specified amount from the date of the accident to entry of the judgment and plaintiff is to receive temporary total disability payments until some change occurs in his condition, the judgment complies with this section. Pacheco v. Alamo Sheet Metal Works, Inc., 91 N.M. 730, 580 P.2d 498 (Ct. App. 1978).

Findings of trial court conclusive. - In compensation proceedings for the death of a workman who fell from a platform while engaged in his ordinary work of roofing, where there was a dispute as to whether the death was caused by the fall or by a heart attack preceding the fall, the findings of the trial court on this point are conclusive. Christensen v. Dysart, 42 N.M. 107, 76 P.2d 1 (1938).

Subsection A plainly mandates that a quantifiable sum be specified for medical expenses proved at trial. Diatteo v. County of Dona Ana, 104 N.M. 599, 725 P.2d 575 (Ct. App. 1986).

Jurisdiction to reopen award. - Under Workmen's Compensation Act district court retains jurisdiction after expiration of 30-day period during which it generally retains jurisdiction over its judgments to reopen its award for disability and to suspend or reduce the amount awarded by reason of claimant's refusal to undergo proposed surgery to reduce the percentage of his disability. Fowler v. W.G. Constr. Co., 51 N.M. 441, 188 P.2d 160 (1947).

Mandamus would not lie to review granting of new trial in workmen's compensation case even though grounded on lack of jurisdiction. State ex rel. Gallegos v. MacPherson, 63 N.M. 133, 314 P.2d 891 (1957).

Cause remanded where court failed to make finding on compensation. - Where, although requested to do so, the trial court failed to find one way or another on compensation to be paid between the time defendant ceased paying benefits and the entry of judgment for plaintiff, the cause was remanded for a finding on compensation, if any, payable to plaintiff during this time period. Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974).

Appellate court cannot weigh testimony on appeal. Robinson v. Mittry Bros., 43 N.M. 357, 94 P.2d 99 (1939).

Appellate court will not substitute its judgment for that of trial court as to the credibility of the witnesses. Rohrer v. Eidal Int'l, 79 N.M. 711, 449 P.2d 81 (Ct. App. 1968).

Law reviews. - For comment on Johnson v. C & H Constr. Co., 78 N.M. 423, 432 P.2d 267 (Ct. App. 1967), see 8 Nat. Resources J. 522 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 572 to 612.
Review of findings as to dependency of beneficiary, 13 A.L.R. 722; 30 A.L.R. 1253; 35

A.L.R. 1066; 39 A.L.R. 313; 53 A.L.R. 218; 86 A.L.R. 865; 100 A.L.R. 1090.
General or special employer as employer of injured employee, review of findings as to, 34 A.L.R. 775; 58 A.L.R. 1467; 152 A.L.R. 816.
Denial of review of facts on appeal under Workmen's Compensation Act as denial of due process of law, 39 A.L.R. 1064.
Notice of injury, review of finding as to excuse for failure to give, or as to prejudice to employer because of failure to give, 78 A.L.R. 1281; 92 A.L.R. 505; 107 A.L.R. 816; 145 A.L.R. 1263.
Constitutionality, construction, application and effect of provisions of Workmen's Compensation Act in relation to costs or expenses on appeal or review, 79 A.L.R. 678.
Res judicata as regards decisions or awards under act, 122 A.L.R. 550.
Retroactive application of statutes regarding enforcement of awards under Workmen's Compensation Act, 155 A.L.R. 558.
100 C.J.S. Workmen's Compensation §§ 638 to 659; 101 C.J.S. Workmen's Compensation § 846.

§ 52-1-39. Repealed.

Repeals. - Laws 1986, ch. 22, § 102 repeals former 52-1-39 NMSA 1978, as enacted by Laws 1959, ch. 67, § 18, relating to appeals to the supreme court, effective May 21, 1986. For provisions of former section, see Original Pamphlet. For present comparable provisions, see 52-5-8 NMSA 1978.

§ 52-1-40. Waiting period.

No compensation benefits shall be allowed under the provisions of the Workers' Compensation Act [this article] for any accidental injury which does not result in the workers' death or in a disability which lasts for more than seven days; provided, however, if the period of the workers' disability lasts for more than four weeks from the date of his accidental injury, compensation benefits shall be allowed from the date of disability.

History: 1953 Comp., § 59-10-18.1, enacted by Laws 1959, ch. 67, § 19; 1989, ch. 263, § 22.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes.

Limitation begins to run where injury reasonably apparent. - Where, following blows to head, workman suffered convulsions, was hospitalized, had recurrent headaches, suffered loss of memory and was assigned a helper for the first time at work, injury, for the purpose of workman's compensation, had become reasonably apparent, or should have become reasonably apparent, and statute of limitations began to run. Bowers v. Wayne Lovelady Dodge, Inc., 80 N.M. 475, 457 P.2d 994 (Ct. App. 1969).

As soon as it becomes reasonably apparent, or should become reasonably apparent to a workman that he has an injury on account of which he is entitled to compensation and the employer fails or refuses to make payment he has a right to file a claim and the statute begins to run from that date. Bowers v. Wayne Lovelady Dodge, Inc., 80 N.M. 475, 457 P.2d 994 (Ct. App. 1969).

The limitation statute does not provide that a workman lose seven consecutive days of work before the limitation period begins to run. Bowers v. Wayne Lovelady Dodge, Inc., 80 N.M. 475, 457 P.2d 994 (Ct. App. 1969).

First week's compensation provisional. - The first week's compensation is payable solely in the event the disability, if temporary only, is of more than four weeks duration, is permanent or results in death. Liability for this first week's compensation is, at best, then, only provisional. Fresquez v. Farnsworth & Chambers Co., 60 N.M. 384, 291 P.2d 1102 (1955) (decided under former law).

Award of one day's benefits is not contemplated by the Workmen's Compensation Act. Grudzina v. New Mexico Youth Diagnostic & Dev. Center, 104 N.M. 576, 725 P.2d 255 (Ct. App. 1986).

While payments being made, no right to sue arises. - So long as the 16-day periodic installments are being paid, even though the contingent and suspensory first week's installment be unpaid, no refusal or failure to pay entitling the claimant to sue arises. Fresquez v. Farnsworth & Chambers Co., 60 N.M. 384, 291 P.2d 1102 (1955) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation § 383.

§ 52-1-41. Compensation benefits; total disability.

A. For total disability, the worker shall receive, during the period of that disability, sixty-six and two-thirds percent of his average weekly wages, not to exceed a maximum compensation of ninety dollars ($90.00) a week, effective July 1, 1975; and not to exceed a maximum compensation of sixty-six and two-thirds percent of the average weekly wage in the state, a week, effective January 1, 1976; and not to exceed a maximum compensation of seventy-eight percent of the average weekly wage in the state, a week, effective July 1, 1976; and not to exceed a maximum compensation of eighty-nine percent of the average weekly wage in the state, a week, effective July 1, 1977; and not to exceed a maximum compensation of one hundred percent of the average weekly wage in the state, a week, effective July 1, 1978; and not to exceed a maximum compensation of eighty-five percent of the average weekly wage in the state, a week, effective July 1, 1987; and to be not less than a minimum compensation of thirty-six dollars ($36.00) a week but in no event to exceed a period of seven hundred

weeks, except for total disability resulting from:

(1) primary mental impairment, in which case the maximum period is one hundred weeks; or

(2) secondary mental impairment, in which case the maximum period is the maximum period allowable for the disability produced by the physical impairment or one hundred weeks, whichever is greater.

B. Where the worker's average weekly wages are less than thirty-six dollars ($36.00) a week, the compensation to be paid the worker shall be his full weekly wages.

C. For the purpose of the Workers' Compensation Act [this article], the average weekly wage in the state shall be determined by the employment security division of the labor department on or before June 30 of each year and shall be computed from all wages reported to the employment security division from employing units, including reimbursable employers, in accordance with the regulations of the division for the preceding calendar year, divided by the total number of covered employees divided by fifty-two. The first such determination by the employment security division of the average weekly wage in the state shall be made on or before June 30, 1975, from reported wages and covered employees for the calendar year ending December 31, 1974.

D. The average weekly wage in the state, determined as provided in Subsection C of this section, shall be applicable for the full period during which compensation is payable when the date of the occurrence of an accidental injury falls within the calendar year commencing January 1 following the June 30 determination.

E. Unless the computation provided for in Subsection C of this section results in an increase or decrease of two dollars ($2.00) or more, raised to the next whole dollar, the statewide average weekly wage determination shall not be changed for any calendar year.

History: 1953 Comp., § 59-10-18.2, enacted by Laws 1959, ch. 67, § 20; 1965, ch. 252, § 1; 1967, ch. 151, § 2; 1969, ch. 173, § 1; 1971, ch. 261, § 3; 1973, ch. 240, § 5; 1975, ch. 284, § 8; 1986, ch. 22, § 11; 1987, ch. 235, § 16; 1989, ch. 263, § 23.

Cross-references. - As to total disability, see 52-1-25 NMSA 1978.

The 1986 amendment, in Subsection B, substituted "department" for "commission" in four places.

The 1987 amendment, effective June 19, 1987, substituted "worker" for "workmen" wherever it appears throughout the section; in Subsection A toward the end of the opening clause inserted "and not to exceed a maximum compensation of eighty-five percent of the average weekly wage in the state, a week, effective July 1, 1987",

substituted "seven hundred weeks, except for total disability resulting from" for "six hundred weeks", inserted Paragraphs (1) and (2) and designated the former last sentence of the subsection as Subsection B; redesignated the subsequent subsections accordingly; in Subsections D and E substituted "Subsection C" for "Subsection B"; and made minor changes in language and punctuation throughout the section.

The 1989 amendment, effective June 16, 1989, in Subsection C, substituted "division of the labor department" for "department" in the first sentence and substituted "division" for "department" throughout both sentences.

Effective dates. - Laws 1986, ch. 22, § 103 makes the amendment of this section effective on December 1, 1986.

Limitation on benefits does not violate due process. - In view of the overall economic benefits of the Workmen's Compensation Act, the limitation on disability benefits imposed by this section does have a reasonable relation to the economic purpose of the act and therefore does not violate due process. Casillas v. S.W.I.G., 96 N.M. 84, 628 P.2d 329 (Ct. App.), appeal dismissed, 454 U.S. 934, 102 S. Ct. 467, 70 L. Ed. 2d 242 (1981).

This section provided for total disability and clarified the statutes theretofore existing. Boggs v. D & L Constr. Co., 71 N.M. 502, 379 P.2d 788 (1963).

Sections to be read together. - Each of the three sections are part of the same legislative act and are to be read together so as to give effect to each of the sections. Witcher v. Capitan Drilling Co., 84 N.M. 369, 503 P.2d 652 (Ct. App. 1972), cert. quashed, 85 N.M. 380, 512 P.2d 953 (1973).

Compensation based on disability, not physical impairment. - The fact that compensation is not limited to the scheduled injury section does not, however, mean that compensation outside the scheduled injury section is to be awarded on the basis of physical impairment. Compensation, apart from the scheduled injury section, is based on disability. "Physical impairment" does not automatically equate with "disability." Willcox v. United Nuclear Homestake Sapin Co., 83 N.M. 73, 488 P.2d 123 (Ct. App. 1971).

Where in fact there is a total disability, compensation under the workmen's compensation statute is to be paid for the disability without regard to whether the workman has a bodily impairment distinct from scheduled injuries. Witcher v. Capitan Drilling Co., 84 N.M. 369, 503 P.2d 652 (Ct. App. 1972), cert. quashed, 85 N.M. 380, 512 P.2d 953 (1973).

Impairment and disability contrasted. - If a workman is able to perform his usual tasks, despite a defect or infirmity limiting or making useless a member or limb of the body, the workman is physically impaired, but not functionally disabled, because the act is not concerned with a workman's physical injury. It is concerned with capacity to work.

Therefore, nondisabling pain does not constitute a compensable injury. Neither does a psychiatric or mental impairment. Perez v. International Minerals & Chem. Corp., 95 N.M. 628, 624 P.2d 1025 (Ct. App. 1981).

Impairment does not automatically equate with disability. Gonzales v. Stanke-Brown & Assocs., 98 N.M. 379, 648 P.2d 1192 (Ct. App. 1982).

When impairment equates with disability. - If a member or limb of a body is defective or infirm and creates a condition whereby a workman is wholly or partially unable to perform the usual tasks in the work he was performing at the time of his injury, and is wholly or partially unable to perform any work for which he is fitted, "physical impairment" equates with total or partial disability. Perez v. International Minerals & Chem. Corp., 95 N.M. 628, 624 P.2d 1025 (Ct. App. 1981).

Section invoked when impairment amounts to disability. - If one suffers a scheduled injury which causes a physical impairment but does not create disability, 52-1-43 NMSA 1978 will apply. When the impairment amounts to a disability, this section and 52-1-42 NMSA 1978 are properly invoked. American Tank & Steel Corp. v. Thompson, 90 N.M. 513, 565 P.2d 1030 (1977).

If a worker is totally disabled due to an injury, then he or she is entitled to disability under this section, even if the disability results from the loss of or injury to a scheduled member that is enumerated under 52-1-43 NMSA 1978. Hise Constr. v. Candelaria, 98 N.M. 759, 652 P.2d 1210 (1982).

"Average weekly wage," as used in this section, has statutory meaning. Gilliland v. Hanging Tree, Inc., 92 N.M. 23, 582 P.2d 400 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978) See 52-1-20 NMSA 1978.

Subsection A means that a workman cannot be totally disabled doubly. To construe it otherwise would grant a workman a "windfall," fundamentally inconsistent with the nature of the Workmen's Compensation Act. Rollins v. Albuquerque Pub. Schools, 92 N.M. 795, 595 P.2d 765 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Total disability may be temporary. - The language of this section contemplates that total disability may be temporary. Pacheco v. Alamo Sheet Metal Works, Inc., 91 N.M. 730, 580 P.2d 498 (Ct. App. 1978).

Pain as disability. - A severe pain which does disable a workman is a compensable injury. A workman may retain all of the normal bodily functions of his organs and still be so weak or be in such pain that he would be totally or partially disabled from retaining or obtaining remunerative employment. Perez v. International Minerals & Chem. Corp., 95 N.M. 628, 624 P.2d 1025 (Ct. App. 1981).

Degree of disability is question of fact for trial court, and the primary test for disability is plaintiff's capacity to perform work. Trujillo v. Tanuz, 85 N.M. 35, 508 P.2d 1332 (Ct. App. 1973).

Medical payments as compensation. - Medical payments have been ruled to be compensation for the purpose of allowing attorney fees under 52-1-54 NMSA 1978, and if they are compensation for one purpose they should be compensation for all purposes. Since plaintiff's employer had failed to pay a medical bill, the trial court erred in dismissing his action alleging total disability and seeking a lump-sum award on grounds of premature filing. Briscoe v. Hydro Conduit Corp., 88 N.M. 568, 544 P.2d 283 (Ct. App. 1975).

Rate of compensation should be based upon applicable law on date of disability, where total disability commenced in January of 1975, the rate of compensation should be based upon the statutory rate in effect at that time and not on the rate in effect at the time of the 1973 accident. Moorhead v. Gray Ranch Co., 90 N.M. 220, 561 P.2d 493 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Applicable rate of compensation in determining amount of award is that rate in effect on the date of disability, not the date of the accident. Lamont v. New Mexico Military Inst., 92 N.M. 804, 595 P.2d 774 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Date of disability is the date the workman knows or should know he has suffered a compensable injury. Turner v. Shop-Rite Foods, Inc., 99 N.M. 56, 653 P.2d 887 (Ct. App. 1982).

Benefits are based upon the rate in effect when the workman becomes disabled. After a workman is disabled the rate does not escalate each time he returns to work. Turner v. Shop-Rite Foods, Inc., 99 N.M. 56, 653 P.2d 887 (Ct. App. 1982).

Voluntary payment of maximum compensation benefits over period of time does not establish total permanent disability, and such payment is not an admission by the employer of the totality or permanency of any injury. Armijo v. Co-Con Constr. Co., 92 N.M. 295, 587 P.2d 442 (Ct. App.), cert. denied, 92 N.M. 260, 586 P.2d 1089 (1978).

Maximum compensation benefits for total disability cannot exceed that provided for in this section. Rollins v. Albuquerque Pub. Schools, 92 N.M. 795, 595 P.2d 765 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

When claim of injury filed prematurely. - Employee's claim for a first injury is filed prematurely where she is receiving maximum compensation benefits for a second injury, both arising out of the same employment and the same employer. Rollins v. Albuquerque Pub. Schools, 92 N.M. 795, 595 P.2d 765 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

No change in amount of compensation payable during disability. - The amount of compensation to be paid for disability from the date the disability began, does not change during the period that disability continues; the maximum compensation payable is limited to the benefits payable when the disability began, and continues for the full period of that disability. Casias v. Zia Co., 94 N.M. 723, 616 P.2d 436 (Ct. App. 1980).

Rate of compensation in effect on date of disability applies, not the date of the accident. Purcella v. Navajo Freight Lines, 95 N.M. 306, 621 P.2d 523 (Ct. App. 1980).

Disability resulting from a second accident, regardless of a preexisting condition, is compensable by the employer and compensation insurer at the time of the second accident. Gonzales v. Stanke-Brown & Assocs., 98 N.M. 379, 648 P.2d 1192 (Ct. App. 1982).

Judge's unconcurred opinion on escalating benefits not court of appeal's decision. - Where a judge's opinion concerning escalating benefits under the Workmen's Compensation Act is not concurred in by another judge, her view concerning escalating benefits is not a decision of the court of appeals and a judgment on remand which does not provide for escalating benefits complies with the mandate and opinion of the court of appeals. Casias v. Zia Co., 94 N.M. 723, 616 P.2d 436 (Ct. App. 1980).

Award of one day's benefits is not contemplated by the Workmen's Compensation Act. Grudzina v. New Mexico Youth Diagnostic & Dev. Center, 104 N.M. 576, 725 P.2d 255 (Ct. App. 1986).

Law reviews. - For note, "Workmen's Compensation in New Mexico: Preexisting Conditions and the Subsequent Injury Act," see 7 Nat. Resources J. 632 (1967).

For article, "Survey of New Mexico Law, 1979-80: Workmen's Compensation," see 11 N.M.L. Rev. 235 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 339, 340, 342, 358, 364.
99 C.J.S. Workmen's Compensation §§ 289 to 301; 101 C.J.S. Workmen's Compensation § 896.

§ 52-1-42. Compensation benefits; partial disability; maximum duration of benefits.

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 as provided in Section 52-1-41 NMSA 1978. The percentage shall be determined by the workers' compensation judge pursuant to the provisions of Section 52-1-26 NMSA 1978. The duration of partial disability benefits shall in no event be longer than five hundred weeks except for partial disability resulting from:

(1) primary mental impairment, in which case the maximum period is one hundred weeks; or

(2) secondary mental impairment, in which case the maximum period is the maximum period allowable for the disability produced by the physical impairment or one hundred weeks, whichever is greater.

History: 1953 Comp., § 59-10-18.3, enacted by Laws 1959, ch. 67, § 21; 1963, ch. 269, § 2; 1965, ch. 252, § 2; 1975, ch. 284, § 9; 1986, ch. 22, § 12; 1987, ch. 235, § 17; 1989, ch. 263, § 24.

Cross-references. - As to partial disability, see 52-1-26 NMSA 1978.

The 1986 amendment divided the provisions of the former section into the present three sentences, substituted the 1978 statutory citations for the corresponding 1953 citations, and substituted "hearing officer" for "court" in the second sentence, and made minor stylistic changes.

The 1987 amendment, effective June 19, 1987, substituted "workers' " for "workmen's" in the first sentence, in the second sentence substituted "52-1-26" for "52-1-25", and in the third sentence substituted "five hundred weeks except for partial disability resulting from" for "six hundred weeks" and added Paragraphs (1) and (2).

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judge" for "hearing officer" in the second sentence in the introductory paragraph.

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

Statutory obfuscation legitimated. - Sections 52-1-41, 52-1-42 and 52-1-43 NMSA 1978 may seem inconsistent and hard to understand to some lay and professional people, but these provisions are the law in New Mexico. Maschio v. Kaiser Steel Corp., 100 N.M. 455, 672 P.2d 284 (Ct. App. 1983).

For there to be workmen's compensation award, there must be disability and the compensation payable is measured in terms of disability. McCleskey v. N.C. Ribble Co., 80 N.M. 345, 455 P.2d 849 (Ct. App.), cert. denied, 80 N.M. 317, 454 P.2d 974 (1969).

Compensation based on decreased earning ability. - The Workmen's Compensation Act under Laws 1959, ch. 67 provided that compensation payments not be based upon the injury itself, but rather upon the decreased earning ability produced by the injury. Brownlee v. Lincoln County Livestock Co., 76 N.M. 137, 412 P.2d 562 (1966).

This section provided for partial disability and clarified the statutes theretofore existing. Boggs v. D & L Constr. Co., 71 N.M. 502, 379 P.2d 788 (1963).

Definition of "disability" is the disablement of the workman to earn wages in the same kind of work, or work of a similar nature for which he is trained, or is accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. Brownlee v. Lincoln County Livestock Co., 76 N.M. 137, 412 P.2d 562 (1966).

Statute must be construed in its entirety, and the words "he earns or is able to earn" should be considered together to arrive at "wage earning ability." Batte v. Stanley's, 70 N.M. 364, 374 P.2d 124 (1962).

Construed in pari materia. - Each of the three sections are part of the same legislative act and are to be read together so as to give effect to each of the sections. Witcher v. Capitan Drilling Co., 84 N.M. 369, 503 P.2d 652 (Ct. App. 1972), cert. quashed, 85 N.M. 380, 512 P.2d 953 (1973).

Applicable rate of compensation in determining amount of award is that rate in effect on the date of disability, not the date of the accident. Lamont v. New Mexico Military Inst., 92 N.M. 804, 595 P.2d 774 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979); Purcella v. Navajo Freight Lines, 95 N.M. 306, 621 P.2d 523 (Ct. App. 1980).

When one invokes section, one also invokes the limitation on partial disability benefits stated in this section. Newhoff v. Good Housekeeping, Inc., 94 N.M. 621, 614 P.2d 33 (Ct. App. 1980).

Compensation based on disability not physical impairment. - The fact that compensation is not limited to the scheduled injury section does not, however, mean that compensation outside the scheduled injury section is to be awarded on the basis of physical impairment. Compensation, apart from the scheduled injury section, is based on disability. "Physical impairment" does not automatically equate with "disability." Willcox v. United Nuclear Homestake Sapin Co., 83 N.M. 73, 488 P.2d 123 (Ct. App. 1971).

Section invoked when impairment amounts to disability. - If one suffers a scheduled injury which causes a physical impairment but does not create disability, 52-1-43 NMSA 1978 will apply. When the impairment amounts to a disability, 52-1-41 NMSA 1978 and this section are properly invoked. American Tank & Steel Corp. v. Thompson, 90 N.M. 513, 565 P.2d 1030 (1977).

Impairment does not automatically equate with disability. Gonzales v. Stanke-Brown & Assocs., 98 N.M. 379, 648 P.2d 1192 (Ct. App. 1982).

Disability "separate and distinct" from scheduled injury. - In order for a court to award a worker benefits under the partial disability benefits section, there must be a separate and distinct impairment to other parts of the body in addition to the disability resulting from injury to a scheduled member. Ranville v. J.T.S. Enters., Inc., 101 N.M. 803, 689 P.2d 1274 (Ct. App. 1984).

In order to obtain partial disability benefits and not be limited to scheduled injury benefits, plaintiff was required to establish a separate and distinct impairment to other body parts in addition to the injury to her knee. Beltran v. Van Ark Care Center, 107 N.M. 273, 756 P.2d 1 (Ct. App. 1988).

The separate and distinct injury necessary to remove a plaintiff from the scheduled injury section must result from or be attributable to the accident or injury to the scheduled member. The question of whether a separate and distinct impairment exists is one for the finder of fact to determine. Beltran v. Van Ark Care Center, 107 N.M. 273, 756 P.2d 1 (Ct. App. 1988).

Since an injured worker proved separate and distinct impairment to other parts of his body in addition to his scheduled member injuries, he was entitled to partial disability benefits under this section, and not just to benefits under 52-1-43 NMSA 1978 (specific body members). Harrison v. Animas Valley Auto & Truck Repair, 107 N.M. 373, 758 P.2d 787 (1988).

Wages earned after injury are not necessarily determinative of the question of post-injury earning ability. Batte v. Stanley's, 70 N.M. 364, 374 P.2d 124 (1962).

Degree of disability is question of fact for trial court, and the primary test for disability is plaintiff's capacity to perform work. Trujillo v. Tanuz, 85 N.M. 35, 508 P.2d 1332 (Ct. App. 1973).

Finding of disability as ultimate fact. - A finding that a workman, to a stated percentage extent, is partially and permanently disabled is a finding of an ultimate fact. McClesky v. N.C. Ribble Co., 80 N.M. 345, 455 P.2d 849 (Ct. App.), cert. denied, 80 N.M. 317, 454 P.2d 974 (1969).

Failure to make findings not error where ultimate findings support judgment. - In a workman's compensation case, the failure of the trial court to make findings as to functional disability, employability in the open market, ability to pass preemployment physicals, pain and suffering while engaged in gainful employment and employer's sympathy did not constitute fundamental error. Findings made as to decrease in wages, reduction of earning capacity and medical disability were sufficient under Rule 52(B)(a)(2), N.M.R. Civ. P. (see now Rule 1-052B(a)(2)), and such ultimate findings amply sustained the judgment under the provisions of this section. Scott v. Homestake-Sapin, 72 N.M. 268, 383 P.2d 239 (1963).

No compensation outside schedule where no finding of disability. - Where court finds a 30% physical impairment to the body as a whole, but it also finds that plaintiff did not suffer a "partial disability," then not having established a "disability," plaintiff is not entitled to compensation outside the scheduled injury section. Willcox v. United Nuclear Homestake Sapin Co., 83 N.M. 73, 488 P.2d 123 (Ct. App. 1971).

Although payment of full wages following injury is not conclusive on the question of earning ability, it may be indicative. Brownlee v. Lincoln County Livestock Co., 76 N.M. 137, 412 P.2d 562 (1966).

Question whether there is additional bodily injury giving rise to award beyond that specifically provided for in 52-1-43 NMSA 1978 is for the jury to decide. Reck v. Robert E. McKee Gen. Contractors, 59 N.M. 492, 287 P.2d 61 (1955) (decided under former law).

Award not justified where earning more in other kind of work. - That claimant is disabled to some extent for a former occupation of ranch work does not justify an award for partial disability when, from a factual standpoint, he is receiving a higher weekly wage than he was earning prior to the injury in another kind of work, which a person of his mentality and attainments can do. Brownlee v. Lincoln County Livestock Co., 76 N.M. 137, 412 P.2d 562 (1966).

To support conclusion that earning ability is less than actual earnings, there must be a finding of fact to support that conclusion. Brownlee v. Lincoln County Livestock Co., 76 N.M. 137, 412 P.2d 562 (1966).

Failure of trial court to find concerning plaintiff's ability to perform usual tasks of the work performed when injured was not a failure to find an ultimate fact. McCleskey v. N.C. Ribble Co., 80 N.M. 345, 455 P.2d 849 (Ct. App.), cert. denied, 80 N.M. 317, 454 P.2d 974 (1969).

Finding of reduction in earning capacity does not follow from a finding of impairment of body function. Batte v. Stanley's, 70 N.M. 364, 374 P.2d 124 (1962).

It is not improper to award only 15% disability where the decrease in earning capacity has been shown to be 30%. Pies v. Bekins Van & Storage Co., 70 N.M. 361, 374 P.2d 122 (1962).

Failure to show evidence of wages earned after notice of disability does not preclude a finding of partial disability under this section. Sanchez v. City of Albuquerque, 75 N.M. 137, 401 P.2d 583 (1965).

Return to previous employment relieves employer of duty to pay. - A return to previous employment and payment of regular wages for the performance of usual duties, absent any suspicious circumstances, relieves the employer of the duty of making compensation payments during such period of regular employment and payment of regular wages. Cordova v. City of Albuquerque, 71 N.M. 491, 379 P.2d 781 (1962).

Where injury is confined to member with the remainder of the body being unaffected, compensation is limited to that provided for injury to the hand, even though age, lack of training for other work "or other conditions peculiar" to appellant has resulted in reduced

ability in him to perform his duties with a resultant reduction of earnings. Lee v. United States Fid. & Guar. Co., 66 N.M. 351, 348 P.2d 271 (1960).

Recovery limited for knee disability. - A plaintiff whose sole injury is a 50% disability to one knee has a recovery which is limited to the scheduled injury provision in 52-1-43 NMSA 1978. Maschio v. Kaiser Steel Corp., 100 N.M. 455, 672 P.2d 284 (Ct. App. 1983).

Lost eye compensated under scheduled injury section following recovery from "separate and distinct" disability. - Plaintiff who was legally blind in his injured eye had "lost his eye" and, upon recovery from traumatic neurosis, no longer suffering from impairment "separate and distinct" from loss of that eye, should be compensated under the scheduled injury section. Ranville v. J.T.S. Enters., Inc., 101 N.M. 803, 689 P.2d 1274 (Ct. App. 1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 339, 340, 342, 382 to 384.
99 C.J.S. Workmen's Compensation §§ 301 to 303.

§ 52-1-43. Compensation benefits; injury to specific body members.

A. 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 the following periods:

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING TABLE:

Injury Compensation Benefits
Number of Weeks
(1) one arm at or near shoulder, dextrous member..... 200 weeks
(2) one arm at elbow, dextrous member..... 160 weeks
(3) one arm between wrist at elbow, dextrous member..... 150 weeks
(4) one arm at or near shoulder, nondextrous member..... 175 weeks
(5) one arm at elbow, nondextrous member..... 155 weeks
(6) one arm between wrist and elbow, nondextrous member.. 140 weeks
(7) one hand, dextrous member..... 125 weeks
(8) one hand, nondextrous member..... 110 weeks
(9) one thumb and the metacarpal bone thereof..... 55 weeks
(10) one thumb at the proximal joint..... 34 weeks
(11) one thumb at the second distal joint..... 22 weeks
(12) one first finger and the metacarpal bone thereof.... 28 weeks
(13) one first finger at the proximal joint..... 22 weeks
(14) one first finger at the second joint..... 17 weeks

(15) one first finger at the distal joint..... 12 weeks
(16) one second finger and the metacarpal bone thereof... 22 weeks
(17) one second finger at the proximal joint..... 17 weeks
(18) one second finger at the second joint..... 12 weeks
(19) one second finger at the distal joint..... 10 weeks
(20) one third finger and the metacarpal bone thereof.... 17 weeks
(21) one third finger at the proximal joint..... 12 weeks
(22) one third finger at the second joint..... 10 weeks
(23) one third finger at the distal joint..... 10 weeks
(24) one fourth finger and the metacarpal bone thereof... 14 weeks
(25) one fourth finger at the proximal joint..... 14 weeks
(26) one fourth finger at the second joint..... 10 weeks
(27) one fourth finger at the distal joint..... 7 weeks
(28) loss of all fingers on one hand where thumb and..... 70 weeks
palm remain.....
(29) one leg at or near hip joint, so as to preclude the. 200 weeks
use of an artificial limb.....
(30) one leg at or above the knee, where stump remains... 150 weeks
sufficient to permit the use of an artificial limb.....
(31) one leg between knee and ankle..... 130 weeks
(32) one foot at the ankle..... 115 weeks
(33) one great toe with the metatarsal bone thereof..... 35 weeks
(34) one great toe at the proximal joint..... 17 weeks
(35) one great toe at the second joint..... 12 weeks
(36) one toe other than the great toe with the..... 14 weeks
metatarsal bone thereof.....
(37) one toe other than the great toe at the proximal.... 10 weeks
joint.....
(38) one toe other than the great toe at second or..... 8 weeks
distal joint.....
(39) loss of all toes on one foot at proximal joint..... 40 weeks
(40) eye by enucleation..... 130 weeks
(41) total blindness of one eye..... 120 weeks
(42) total deafness in one ear..... 40 weeks
(43) total deafness in both ears..... 150 weeks.

B. 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.

C. In cases of actual amputation of the arm or leg, the workers' compensation judge in his discretion may award compensation benefits in excess of the period hereinafter stated if there is substantial evidence to support a finding that, because of the worker's advanced age, lack of education or lack of training, he has in fact a partial disability which will disable him longer than the time specified in the foregoing schedule. The

additional compensation period may not in any event exceed twice the time specified in the foregoing schedule for such injury.

D. In determining the worker's compensation benefits payable to a worker under this section for a disability resulting from a scheduled injury, the worker is entitled to be compensated as provided in Subsection A of this section up to the date the worker is released from regular treatment by his primary treating health care provider, as defined in Section 52-4-1 NMSA 1978, if he is in fact totally disabled during that time. Any compensation paid up to that date shall be in addition to the compensation allowed under Subsection A of this section, but in no event shall any worker be entitled to compensation for a period in excess of seven hundred weeks.

History: 1978 Comp., § 52-1-31, enacted by Laws 1987, ch. 235, § 18; 1989, ch. 263, § 25.

Repeals and reenactments. - Laws 1987, ch. 235, § 18 repealed a former 52-1-43 NMSA 1978, as reenacted by Laws 1986, ch. 22, § 13, and enacted a new 52-1-43 NMSA 1978, effective June 19, 1987. For provisions of former section see 1986 Cumulative Supplement.

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judge" for "hearing officer" in the first sentence of Subsection C.

Compiler's notes. - Laws 1987, ch. 235, § 54A, effective June 19, 1987, repealed Laws 1986, ch. 22, § 105 which had formerly repealed this section effective July 1, 1987.

Statutory obfuscation legitimated. - Sections 52-1-41, 52-1-42 and 52-1-43 NMSA 1978 may seem inconsistent and hard to understand to some lay and professional people, but these provisions are the law in New Mexico. Maschio v. Kaiser Steel Corp., 100 N.M. 455, 672 P.2d 284 (Ct. App. 1983).

Scheduled injury section limits only benefits payable for "partial disability"; it does not limit benefits where there is a "total disability." Witcher v. Capitan Drilling Co., 84 N.M. 369, 503 P.2d 652 (Ct. App. 1972), cert. quashed, 85 N.M. 380, 512 P.2d 953 (1973).

Construed in pari materia. - Each of the three sections are part of the same legislative act and are to be read together so as to give effect to each of the sections. Witcher v. Capitan Drilling Co., 84 N.M. 369, 503 P.2d 652 (Ct. App. 1972), cert. quashed, 85 N.M. 380, 512 P.2d 953 (1973).

This section was in part a reenactment of the so-called scheduled injury section which now attempts to provide compensation not only for the loss of specific body members, but the loss of use thereof. Boggs v. D & L Constr. Co., 71 N.M. 502, 379 P.2d 788 (1963).

Compensation based on disability not physical impairment. - The fact that compensation is not limited to the scheduled injury section does not, however, mean that compensation outside the scheduled injury section is to be awarded on the basis of physical impairment. Compensation, apart from the scheduled injury section, is based on disability. "Physical impairment" does not automatically equate with "disability." Willcox v. United Nuclear Homestake Sapin Co., 83 N.M. 73, 488 P.2d 123 (Ct. App. 1971).

Disability separate and distinct from scheduled injury. - In order to obtain partial disability benefits and not be limited to scheduled injury benefits, plaintiff was required to establish a separate and distinct impairment to other body parts in addition to the injury to her knee. Beltran v. Van Ark Care Center, 107 N.M. 273, 756 P.2d 1 (Ct. App. 1988).

The separate and distinct injury necessary to remove a plaintiff from the scheduled injury section must result from or be attributable to the accident or injury to the scheduled member. The question of whether a separate and distinct impairment exists is one for the finder of fact to determine. Beltran v. Van Ark Care Center, 107 N.M. 273, 756 P.2d 1 (Ct. App. 1988).

Since an injured worker proved separate and distinct impairment to other parts of his body in addition to his scheduled member injuries, he was entitled to partial disability benefits under 52-1-42 NMSA 1978, and not just to benefits under this section (specific body members). Harrison v. Animas Valley Auto & Truck Repair, 107 N.M. 373, 758 P.2d 787 (1988).

Impairment and disability contrasted. - If a workman is able to perform his usual tasks, despite a defect or infirmity limiting or making useless a member or limb of the body, the workman is physically impaired, but not functionally disabled, because the act is not concerned with a workman's physical injury. It is concerned with capacity to work. Therefore, nondisabling pain does not constitute a compensable injury. Neither does a psychiatric or mental impairment. Perez v. International Minerals & Chem. Corp., 95 N.M. 628, 624 P.2d 1025 (Ct. App. 1981).

Section applicable when impairment does not create disability. - If one suffers a scheduled injury which causes a physical impairment but does not create disability, this section will apply. When the impairment amounts to a disability, 52-1-41 NMSA 1978 and 52-1-42 NMSA 1978 are properly invoked. American Tank & Steel Corp. v. Thompson, 90 N.M. 513, 565 P.2d 1030 (1977).

When impairment equates with disability. - If a member or limb of a body is defective or infirm and creates a condition whereby a workman is wholly or partially unable to perform the usual tasks in the work he was performing at the time of his injury, and is wholly or partially unable to perform any work for which he is fitted, "physical

impairment" equates with total or partial disability. Perez v. International Minerals & Chem. Corp., 95 N.M. 628, 624 P.2d 1025 (Ct. App. 1981).

"Physical impairment" does not automatically equate with "disability." "Physical impairment" denotes a defect or infirmity limiting or making useless a member or limb of the body. Candelaria v. Hise Constr., 98 N.M. 763, 652 P.2d 1214 (Ct. App. 1981), aff'd in part, rev'd in part, 98 N.M. 759, 652 P.2d 1210 (1982).

Total disability covered by 52-1-41 NMSA 1978. - If a worker is totally disabled due to an injury, then he or she is entitled to disability under 52-1-41 NMSA 1978, even if the disability results from the loss of or injury to a scheduled member that is enumerated under this section. Hise Constr. v. Candelaria, 98 N.M. 759, 652 P.2d 1210 (1982).

Benefits are allowed for total disability when the total disability results from the loss of, or injury to, a scheduled member. Mendez v. Southwest Community Health Servs., 104 N.M. 608, 725 P.2d 584 (Ct. App. 1986).

Where an injury to a scheduled member results in total disability, the scheduled member section does not prohibit compensation based on such total disability. Archuleta v. Safeway Stores, Inc., 104 N.M. 769, 727 P.2d 77 (Ct. App. 1986).

But court cannot conclude both total disability and scheduled injury. - Where the court both found and concluded that plaintiff was totally disabled but it also concluded and entered judgment for a scheduled injury, the judgment was reversed and remanded for a new judgment which conformed to the finding of total disability. Mendez v. Southwest Community Health Servs., 104 N.M. 608, 725 P.2d 584 (Ct. App. 1986).

Primary test for disability is the capacity to perform work. Adams v. Loffland Bros. Drilling Co., 82 N.M. 72, 475 P.2d 466 (Ct. App. 1970).

Determination of degree of disability is a question of fact for the fact finder and if there is substantial evidence in the record to support a finding, the appellate court is bound thereby. Adams v. Loffland Bros. Drilling Co., 82 N.M. 72, 475 P.2d 466 (Ct. App. 1970).

Degree of disability is a question of fact for trial court, and the primary test for disability is plaintiff's capacity to perform work. Trujillo v. Tanuz, 85 N.M. 35, 508 P.2d 1332 (Ct. App. 1973).

Question whether there is additional bodily injury giving rise to award beyond that specifically provided for in this section is for the jury to decide. Reck v. Robert E. McKee Gen. Contractors, 59 N.M. 492, 287 P.2d 61 (1955) (decided under former law).

Statute does not allow adding one scheduled injury to another scheduled injury and thereby claiming that the second scheduled injury is an involvement of other parts of the body. Montoya v. Sanchez, 79 N.M. 564, 446 P.2d 212 (1968).

No error in not limiting recovery to schedule. - There is no error in the court's refusal to limit the recovery to the period provided by the schedule. Quintana v. Trotz Constr. Co., 79 N.M. 109, 440 P.2d 301 (1968).

Impairment distinct from schedule immaterial where total disability. - Where in fact there is a total disability, compensation under the workmen's compensation statute is to be paid for the disability without regard to whether the workman has a bodily impairment distinct from scheduled injuries. Witcher v. Capitan Drilling Co., 84 N.M. 369, 503 P.2d 652 (Ct. App. 1972), cert. quashed, 85 N.M. 380, 512 P.2d 953 (1973).

In order to establish that healing period extended beyond number of weeks specified in Subsection A, claimant was required to show that he was totally disabled during such extended time. Hedgecock v. Vandiver, 82 N.M. 140, 477 P.2d 316 (Ct. App. 1970).

Strict application of section creates inequities in remedy provided to injured workmen who are totally disabled and unable to return to gainful employment because of injuries to a scheduled body member. American Tank & Steel Corp. v. Thompson, 90 N.M. 513, 565 P.2d 1030 (1977).

Section does not take into consideration the occupation of the worker and how the loss of the specific member of the body may affect his or her ability to perform the duties of his or her job. Hise Constr. v. Candelaria, 98 N.M. 759, 652 P.2d 1210 (1982).

An injury to the hip is an injury to the body as a whole, even if it results in pain, impairment, etc., to a member, i.e., the leg. Nelson v. Nelson Chem. Corp., 105 N.M. 493, 734 P.2d 273 (Ct. App. 1987).

Disability to knee. - A plaintiff whose sole injury is a 50% disability to one knee has a recovery which is limited to the scheduled injury provision in this section. Maschio v. Kaiser Steel Corp., 100 N.M. 455, 672 P.2d 284 (Ct. App. 1983).

Total blindness in one eye. - Where claimant lost 98% of vision in her left eye while at home and made no claim for benefits and later lost 80% of vision in her right eye as a result of a hemorrhage suffered at work, she was entitled to benefits for total blindness of one eye, not for total disability. Crane v. San Juan County, 100 N.M. 600, 673 P.2d 1333 (Ct. App. 1983).

Lost eye compensated under this section following recovery from "separate and distinct" disability. - Plaintiff who was legally blind in his injured eye had "lost his eye" and, upon recovery from traumatic neurosis, no longer suffering from impairment "separate and distinct" from loss of that eye, should be compensated under this section. Ranville v. J.T.S. Enters., Inc., 101 N.M. 803, 689 P.2d 1274 (Ct. App. 1984).

Loss of use of injured eye judged on basis of uncorrected vision. Ranville v. J.T.S. Enters., Inc., 101 N.M. 803, 689 P.2d 1274 (Ct. App. 1984).

Without correction, impairment to the plaintiff's left eye is 100%; if sight to this eye is corrected to potential, the impairment may be reduced to 90-95%. However, compensation is not based on corrected vision. Fierro v. Stanley's Hdwe., 104 N.M. 401, 722 P.2d 652 (Ct. App. 1985), rev'd on other grounds, 104 N.M. 50, 716 P.2d 241 (1986).

Shoulder injury is a non-scheduled injury. Carter v. Mountain Bell, N.M. 727 P.2d 956 (Ct. App. 1986).

Accidental injuries to the nervous system are compensable when resulting in disability. Webb v. Hamilton, 78 N.M. 647, 436 P.2d 507 (1968).

Where eye cannot be corrected by glasses as well. - If plaintiff was injured in the course of his employment, and as a result one eye cannot be corrected by glasses as well after the injury as before, he is entitled to compensation whether or not there is a change in his vision without glasses. Sessing v. Yates Drilling Co., 74 N.M. 550, 395 P.2d 824 (1964).

Partial loss of vision. - Where the disability is not total blindness in one eye, but only partial loss of vision, the section requires that the compensation shall be measured by the extent of the disability. Webb v. Forrest Currell Lumber Co., 68 N.M. 187, 360 P.2d 380 (1961).

Injury justified award. - A code welder who sustained an accidental injury to his right thumb, right index finger and the webbing between the thumb and finger, without further impairment to his body, as a natural and direct result of an accident, with the ability to use some, but not all, of the tools necessary to perform the usual tasks of a welder, was equally justified to an award of total and permanent disability under 52-1-24 NMSA 1978 or an award for a scheduled injury under this section. American Tank & Steel Corp. v. Thompson, 90 N.M. 513, 565 P.2d 1030 (1977).

Pain as compensable injury. - A severe pain which does disable a workman is a compensable injury. A workman may retain all of the normal bodily functions of his organs and still be so weak or be in such pain that he would be totally or partially disabled from retaining or obtaining remunerative employment. Perez v. International Minerals & Chem. Corp., 95 N.M. 628, 624 P.2d 1025 (Ct. App. 1981).

Claimant receiving scheduled injury benefits based on 60% loss of use of nondexterous hand not barred from seeking additional compensation for psychiatric injury by insurer's payment of maximum benefits for 60% of required period rather than, as required by statute, payment of 60% of maximum benefits for required period. Paternoster v. La Cuesta Cabinets, Inc., 101 N.M. 773, 689 P.2d 289 (Ct. App. 1984).

Finding supported by substantial evidence prevails over conflicting opinion. - The trial court's finding of 15 to 20% loss of use of the left leg, supported by medical testimony, prevails over a conflicting judgment of the district court ordering payment of 100% of the amount of the compensation rate for loss of a leg. When a finding supported by substantial evidence conflicts with an opinion, the finding prevails. Roybal v. Chavez Concrete & Excavation Contractors, 102 N.M. 428, 696 P.2d 1021 (Ct. App. 1985).

Law reviews. - For comment, "Witnesses - Privileged Communications - Physician-Patient Privilege in Workmen's Compensation Cases," see 7 Nat. Resources J. 442 (1967).

For note, "Workmen's Compensation in New Mexico: Preexisting Conditions and the Subsequent Injury Act," see 7 Nat. Resources J. 632 (1967).

For article, "Survey on New Mexico Law, 1982-83: Workmen's Compensation," see 14 N.M.L. Rev. 211 (1984).

For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 339, 343, 350 to 356, 384.
99 C.J.S. Workmen's Compensation §§ 306 to 317.

§ 52-1-44. Compensation benefits; facial disfigurement.

For serious permanent disfigurement about the face or head, the workers' compensation judge may allow, in addition to other compensation benefits that may be allowed under the Workers' Compensation Act [this article], an additional sum for compensation on account of the serious permanent disfigurement as he deems just but not to exceed a maximum of twenty-five hundred dollars ($2,500).

History: 1953 Comp., § 59-10-18.5, enacted by Laws 1959, ch. 67, § 23; 1967, ch. 151, § 4; 1986, ch. 22, § 14; 1989, ch. 263, § 26.

The 1986 amendment substituted "hearing officer" for "court".

The 1989 amendment, effective June 16, 1989, substituted "worker's compensation judge" for "hearing officer", and made minor stylistic changes.

Effective dates. - Laws 1986, ch. 22, § 103 makes the amendment of this section effective on December 1, 1986.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation § 573.

99 C.J.S. Workmen's Compensation § 199; 101 C.J.S. Workmen's Compensation § 854.

§ 52-1-45. Compensation benefits; hernia; proof of claim; failure to be operated [upon]; examination; medical care.

A worker, in order to be entitled to compensation for a hernia, must clearly prove:

A. that the hernia is of recent origin;

B. that its appearance was accompanied by pain;

C. that it was immediately preceded by some accidental strain suffered in the course of the employment; and

D. that it did not exist prior to the date of the alleged injury. If a worker, after establishing his right to compensation for a hernia as above provided, elects to be operated upon, the operating fee and reasonable hospital expenses shall be paid by the employer or his or its insurer. In case such worker elects not to be operated upon and the hernia becomes strangulated in the future, the results from the strangulation shall not be compensated; provided, before the worker is compelled to prove the facts above mentioned, in order to be entitled to compensation for hernia, the employer must first prove that he caused the worker to be physically examined, previous to his employment, for the existence of a hernia; and, provided further, that where the employer has not made provisions for and does not have at the service of the worker adequate surgical, hospital and medical facilities and attention or fails to offer them during the period necessary, the worker shall have the right to select the surgeon to operate upon him and the hospital where the operation is to be performed and the worker is to be treated therefor.

History: 1953 Comp., § 59-10-18.6, enacted by Laws 1959, ch. 67, § 24; 1963, ch. 269, § 4; 1989, ch. 263, § 27.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes throughout the section.

"Occurrence" refers to. - When the act speaks of the occurrence of injury or the occurrence of the hernia, it refers to compensable injuries and these occur when disability appears - in other words, when the injury or hernia becomes manifest. Montell v. Orndorff, 67 N.M. 156, 353 P.2d 680 (1960).

If employer does not show that he caused workman to be physically examined prior to employment to determine the possible existence of a hernia, the employee is relieved from proving certain facts specified in the section. There, then, remains only the normal

burden of proof to be met by plaintiffs in all workmen's compensation cases set out in 52-1-28 NMSA 1978. Michael v. Bauman, 76 N.M. 225, 413 P.2d 888 (1966).

To be compensable hernia there must be a protrusion and mere proof of an enlarged ring or potential hernia is not proof that employee sustained a compensable hernia. Flournoy v. E.P. Campbell Drilling Co., 74 N.M. 336, 393 P.2d 449 (1964).

Actual knowledge of potential hernia not knowledge of compensable hernia. - An employer's actual knowledge of the enlarged ring or relaxation, a potential hernia, did not constitute actual knowledge of a compensable left hernia after it occurred. Flournoy v. E.P. Campbell Drilling Co., 74 N.M. 336, 393 P.2d 449 (1964).

And conclusive bar to compensation. - The failure to give notice within the allotted time is a conclusive bar to any suit for compensation where plaintiff was timely advised by the treating physician that he had suffered a left direct inguinal hernia. Michael v. Bauman, 76 N.M. 225, 413 P.2d 888 (1966).

Time for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease. Montell v. Orndorff, 67 N.M. 156, 353 P.2d 680 (1960).

No proof that hernia sustained while working for employer. - Testimony that plaintiff had a slight enlargement of his right inguinal ring which is referred to as a potential hernia, by no means a condition which disabled him from performing any kind of work whatever, and it was only a long period of time after he had severed his employment with this defendant, and had worked at hard labor for another employer, that a doctor testified that he was suffering from a direct inguinal hernia does not constitute proof that his hernia was sustained while he was employed by his previous employer. Flournoy v. E.P. Campbell Drilling Co., 74 N.M. 336, 393 P.2d 449 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation § 398.
99 C.J.S. Workmen's Compensation § 306.

§ 52-1-46. Compensation benefits for death.

Subject to the limitation of compensation payable under Subsection G of this section, if an accidental injury sustained by a worker proximately results in his death within the period of two years following his accidental injury, compensation shall be paid in the amount and to the persons entitled thereto, as follows:

A. if there are no eligible dependents, except as provided in Subsection C of Section 52-1-10 NMSA 1978 of the Workers' Compensation Act, the compensation shall be limited to the funeral expenses, not to exceed three thousand dollars ($3,000), and the expenses provided for medical and hospital services for the deceased, together with all

other sums which the deceased should have been paid for compensation benefits up to the time of his death;

B. if there are eligible dependents at the time of the worker's death, payment shall consist of a sum not to exceed three thousand dollars ($3,000) for funeral expenses and expenses provided for medical and hospital services for the deceased, together with such other sums as the deceased should have been paid for compensation benefits up to the time of his death and compensation benefits to the eligible dependents as hereinafter specified, subject to the limitations on maximum periods of recovery provided in Sections 52-1-41 through 52-1-43 and 52-1-47 NMSA 1978;

C. if there are eligible dependents entitled thereto, compensation shall be paid to the dependents or to the person authorized by the director or appointed by the court to receive the same for the benefit of the dependents in such portions and amounts, to be computed and distributed as follows:

(1) to the child or children, if there is no widow or widower entitled to compensation, sixty-six and two-thirds percent of the average weekly wage of the deceased;

(2) to the widow or widower, if there are no children, sixty-six and two-thirds percent of the average weekly wage of the deceased, until remarriage; or

(3) to the widow or widower, if there is a child or children living with the widow or widower, forty-five percent of the average weekly wage of the deceased, or forty percent if such child is not or all such children are not living with a widow or widower and, in addition thereto, compensation benefits for the child or children which shall make the total benefits for the widow or widower and child or children sixty-six and two-thirds percent of the average weekly wage of the deceased. When there are two or more children, the compensation benefits payable on account of such children shall be divided among such children, share and share alike; and

(4) two years' compensation benefits in one lump sum shall be payable to a widow or widower upon remarriage; however, the total benefits shall not exceed the maximum compensation benefit as provided in Subsection B of this section;

D. if there is neither widow, widower nor children, compensation may be paid to the father and mother or the survivor of them, if dependent to any extent upon the worker for support at the time of the worker's death, twenty-five percent of the average weekly wage of the deceased, and in no event shall the maximum compensation to such dependents exceed the amounts contributed by the deceased worker for their care; provided that if the father and mother or the survivor of them was totally dependent upon such worker for support at the time of the worker's death, he or they shall be entitled to fifty percent of the average weekly wage of the deceased;

E. if there is neither widow, widower nor children nor dependent parent, then to the brothers and sisters and grandchildren if actually dependent to any extent upon the

deceased worker for support at the time of the worker's death, thirty-five percent of the average weekly wage of the deceased worker with fifteen percent additional for brothers and sisters and grandchildren in excess of two, with a maximum of sixty-six and two-thirds percent of the average weekly wage of the deceased, and in no event shall the maximum compensation to partial dependents exceed the respective amounts contributed by the deceased worker for their care;

F. in the event of the death or remarriage of the widow or widower entitled to compensation benefits as provided in this section, the surviving children shall then be entitled to compensation benefits computed and paid as provided in Paragraph (1) of Subsection C of this section for the remainder of the compensable period. In the event compensation benefits payable to children as provided in this section are terminated as provided in Subsection E of Section 52-1-17 NMSA 1978, a surviving widow or widower shall then be entitled to compensation benefits computed and paid as provided in Paragraphs (2) and (4) of Subsection C of this section for the remainder of the compensable period; and

G. no compensation benefits payable by reason of a worker's death shall exceed the maximum weekly compensation benefits as provided in Sections 52-1-41 through 52-1-43 and 52-1-47 NMSA 1978, and no dependent or any class thereof, other than a widow, widower or children, shall in any event be paid total benefits in excess of seven thousand five hundred dollars ($7,500) exclusive of funeral expenses and the expenses provided for medical and hospital services for the deceased paid for by the employer.

History: 1953 Comp., § 59-10-18.7, enacted by Laws 1959, ch. 67, § 25; 1963, ch. 269, § 5; 1965, ch. 252, § 3; 1967, ch. 151, § 5; 1969, ch. 173, § 3; 1972, ch. 65, § 2; 1973, ch. 240, § 7; 1975, ch. 284, § 11; 1977, ch. 275, § 2; 1986, ch. 22, § 15; 1987, ch. 235, § 19.

Cross-references. - As to dependents, see 52-1-17 NMSA 1978. As to child, see 52-1-18 NMSA 1978.

The 1986 amendment purported to amend this section but effected no change.

The 1987 amendment, effective June 19, 1987, substituted "worker" for "workman" throughout the section; in Subsections A and B substituted "three thousand dollars ($3,000)" for "one thousand five hundred dollars ($1,500)"; in Subsection A substituted "1978" for "1953"; in Subsection B substituted "limitations on maximum periods of recovery provided in Sections 52-1-41 through 52-1-43 and 52-1-47 NMSA 1978" for "limitation of the maximum period of recovery of compensation of six hundred weeks" at the end; in Subsection C substituted "authorized by the director or appointed by the court" for "appointed by the court"; in Subsection G substituted "Sections 52-1-41 through 52-1-43 and 52-1-47 NMSA 1978" for "Section 52-1-41"; and made numerous minor changes in language and punctuation throughout the section.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section is effective on May 21, 1986.

Greater benefits for dependents not violative of equal protection. - This section setting greater benefits for dependent survivors of a deceased workman than for nondependent survivors is well within legislative prerogatives and is not violative of equal protection. Sanchez v. M.M. Sundt Constr. Co., 103 N.M. 294, 706 P.2d 158 (Ct. App. 1985).

This section and 52-1-31 NMSA 1978 must be read and applied together and do not provide two separate and unrelated methods by which dependents may obtain benefits on the basis of the death of a worker. Shaw v. Warner, 101 N.M. 22, 677 P.2d 635 (Ct. App. 1984).

Claim for increased disability benefits not abated by employee's death. - Where employee had sought an increase in disability benefits prior to death and was appealing an adverse summary judgment at time of his death, claim for increased compensation did not abate by reason of his death since Subsections A and B authorize payment, after death, of benefits that should have been paid prior to death. Holliday v. Talk of Town, Inc., 102 N.M. 540, 697 P.2d 959 (Ct. App. 1985).

Separate classes of dependents not unconstitutional. - Establishment of surviving parents as a separate class for purposes of awarding death benefits, apart from that of surviving spouses and dependent children, is not an unconstitutional distinction, nor violative of equal protection of the laws. Gallegos v. Homestake Mining Co., 97 N.M. 717, 643 P.2d 281 (Ct. App. 1982).

Surviving spouse and children coequal dependents. - Under the statutory scheme adopted in this section for distribution of death benefits to worker's survivors, the surviving spouse and children of the deceased worker are of the same coequal class of dependents eligible for death benefits. Employers Nat'l Ins. Co. v. Winters, 101 N.M. 315, 681 P.2d 741 (Ct. App. 1984).

Stepchildren and natural children treated equally. - Under this section, for purposes of awarding survivor's benefits, dependent minor stepchildren, whether adopted or not, and natural children are treated equally, and each is entitled to share alike. Schall v. Schall, 97 N.M. 665, 642 P.2d 1124 (Ct. App. 1982).

Legislative intent of 52-1-17 NMSA 1978 and this section is to give benefits only to those who are "eligible dependents" and not "heirs" as in the case of descent and distribution. Clauss v. Electronic City, 93 N.M. 75, 596 P.2d 518 (Ct. App. 1979).

Intent of legislature was to create at least two and possibly three classes: the class of dependent widow, widower or children, Subsection C; the class of dependent father and mother or the survivor thereof, Subsection D; and possibly the class of dependent

brother and sister, Subsection E. Employers Mut. Liab. Ins. Co. v. Jarde, 73 N.M. 371, 388 P.2d 382 (1963).

Legislative purpose in changing law. - The court does not see in this section any legislative purpose to make any fundamental or basic changes in the law as it existed, but rather an effort to make it more readable and understandable. This being true, it becomes clear that the provision for payment to a dependent mother in D is included within the language of C, providing for payment to several dependents in various classifications following, now numbered (1) to (6) and D, E and F, but previously being numbered (1) to (7). Employers Mut. Liab. Ins. Co. v. Jarde, 73 N.M. 371, 388 P.2d 382 (1963).

Act contains no exception tolling limitation by reason of minority or incompetency. The court, on numerous occasions, has held that the limitation for the filing of a workmen's compensation claim is jurisdictional and that failure to file the same within the statutory period requires a dismissal of the action. Selgado v. New Mexico State Hwy. Dep't, 66 N.M. 369, 348 P.2d 487 (1960).

Dependent compensation only where workman entitled. - Considering the Workmen's Compensation Act as a whole, it was not intended that there should be compensation to dependents who were not able to make out a case which would have entitled the workman to compensation if death had not ensued. The basis of every claim, whether by the workman or by his dependent, is an injury for which public policy, as declared by the section casts responsibility upon the employer or upon the industry. Sanchez v. Bernalillo County, 57 N.M. 217, 257 P.2d 909 (1953) (decided under former law).

Partial dependency where employee contributed to support and claimant relied thereon. - Actual partial dependency may exist even if the evidence shows that the claimant could have existed without the contributions of the deceased employee. It depends upon whether the deceased employee had actually contributed to claimant's support and whether he relied upon such earnings in whole or in part for his livelihood. Ferris v. Thomas Drilling Co., 62 N.M. 283, 309 P.2d 225 (1957) (decided under former law).

Existence of actual partial dependency is a question of fact to be proved by the evidence. Ferris v. Thomas Drilling Co., 62 N.M. 283, 309 P.2d 225 (1957) (decided under former law).

Whether partial dependency under Subsection D exists is a question of fact to be decided in each case and to be proven under the evidence. Gallegos v. Homestake Mining Co., 97 N.M. 717, 643 P.2d 281 (Ct. App. 1982).

Dependency, under the Act, is a question of fact to be decided in each case upon the particular facts of that case. Lopez v. Schultz & Lindsay Constr. Co., 79 N.M. 485, 444 P.2d 996 (Ct. App.), cert. denied, 79 N.M. 448, 444 P.2d 775 (1968).

Determination of dependency turns upon whether the deceased workman had actually

contributed to his parents' support and whether his parents relied upon such contributions in whole or in part for their livelihood. Gallegos v. Homestake Mining Co., 97 N.M. 717, 643 P.2d 281 (Ct. App. 1982).

Payments to several dependents in portions and amounts. - It is clear from the language used in this section that payments are to be made to several dependents in "portions and amounts" as should be determined by the court, with consideration being given to "the necessities of the case and the best interests of the dependents and of the public." Employers Mut. Liab. Ins. Co. v. Jarde, 73 N.M. 371, 388 P.2d 382 (1963).

Payments to dependent minor daughter do not foreclose right of dependent mother, so long as the total payments do not exceed the maximum provided in the section. Employers Mut. Liab. Ins. Co. v. Jarde, 73 N.M. 371, 388 P.2d 382 (1963).

Evidence to support finding of not dependent. - If there is substantial support in the evidence for the finding that plaintiffs were not dependent to any extent upon the decedent within the meaning, purpose and intent of the Workmen's Compensation Act, then plaintiffs must fail on appeal. Lopez v. Schultz & Lindsay Constr. Co., 79 N.M. 485, 444 P.2d 996 (Ct. App.), cert. denied, 79 N.M. 448, 444 P.2d 775 (1968).

Where employee died from causes other than injury, the dependents of a deceased workman may not recover that portion of a compensation award which was payable after the death of the workman. Cranford v. Farnsworth & Chambers Co. 261 F.2d 8 (10th Cir. 1958) (decided under former law).

Sections provide for continuing jurisdiction over award. - Both this section and 52-1-56 NMSA 1978 provide for a continuing jurisdiction of the court over a compensation award. Clauss v. Electronic City, 93 N.M. 75, 596 P.2d 518 (Ct. App. 1979).

Subsection F provision for continued payment of compensation benefits to surviving eligible children of a deceased workman is subject to the entitlement of a surviving spouse on remarriage to the payment of lump sum benefits provided in Subdivision C(4). Employers Nat'l Ins. Co. v. Winters, 101 N.M. 315, 681 P.2d 741 (Ct. App. 1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 53, 229; 82 Am. Jur. 2d Workmen's Compensation §§ 531, 629.
Dead man's statute, competency of witness in proceeding for death under Workmen's Compensation Act as affected by, 77 A.L.R.2d 680.
99 C.J.S. Workmen's Compensation §§ 321 to 329.

§ 52-1-47. Limitations on compensation benefits.

Subject to the limitation of compensation payable under Subsection G of Section 52-1-46 NMSA 1978:

A. compensation benefits for any combination of disabilities or any combination of disabilities and death shall not be payable for a period in excess of seven hundred weeks;

B. compensation benefits for any combination of disabilities or any combination of disabilities and death shall not exceed an amount equal to seven hundred multiplied by the maximum weekly compensation payable at the time of the accidental injury resulting in the disability or death under Section 52-1-41 NMSA 1978, exclusive of increased compensation which may be awarded under Sections 52-1-10 and 52-1-46 NMSA 1978 and exclusive of any attorney fees awarded under Section 52-1-54 NMSA 1978;

C. in no case shall compensation benefits for disability continue after the disability ends or after the death of the injured worker; and

D. the 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 different parts of 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.

History: 1953 Comp., § 59-10-18.8, enacted by Laws 1959, ch. 67, § 26; 1963, ch. 269, § 8; 1967, ch. 151, § 6; 1968, ch. 46, § 1; 1969, ch. 173, § 4; 1971, ch. 261, § 4; 1973, ch. 240, § 8; 1975, ch. 284, § 12; 1987, ch. 235, § 20.

The 1987 amendment, effective June 19, 1987, in the opening clause substituted "52-1-46 NMSA 1978" for "59-10-18.7 NMSA 1953"; in Subsection A substituted "any combination of disabilities or any combination of" for "disability or death or any combination of disability or" and substituted "seven hundred weeks" for "six hundred weeks"; in Subsection B deleted "disability or death or" following "compensation benefits for" at the beginning, substituted "seven hundred" for "six hundred" near the middle, substituted "52-1-41 NMSA 1978" for "59-10-18.2 NMSA 1953" near the middle, substituted "Sections 52-1-10 and 52-1-46 NMSA 1978" for "Sections 59-10-7 and 59-10-18.7 NMSA 1953" and at the end substituted "52-1-54 NMSA 1978" for "59-10-23 NMSA 1953"; and substituted "worker" for "workman" in Subsections C and D.

Compensation is indemnification for injury sustained. This has nothing to do with the salary. Roybal v. County of Santa Fe, 79 N.M. 99, 440 P.2d 291 (1968).

Section allocation of burden in successive injuries situation. - This section is not merely a device for preventing a double recovery; it is an affirmative allocation of the burden in a successive injuries situation and when that burden falls squarely upon the employer at the time of the prior injury, and the fact that the subsequent employer has made some payments can be of no aid to this employer. Maes v. John C. Cornell, Inc., 86 N.M. 393, 524 P.2d 1009 (Ct. App. 1974).

Where a deduction is sought under Subsection D, the burden of proof to establish a right to a deduction is ordinarily shared by the second employer and the Subsequent Injury Fund. Lea County Good Samaritan Village v. Wojcik, 108 N.M. 76, 766 P.2d 920 (Ct. App. 1988).

Where a second employer withdraws its request for credit at the beginning of trial, the Subsequent Injury Fund has the burden of proof to establish both its right to a reduction and the amount of the reduction. Lea County Good Samaritan Village v. Wojcik, 108 N.M. 76, 766 P.2d 920 (Ct. App. 1988).

Section not applicable where payments from subsequent accident. - This section does not apply to the situation in the instant case as the payments for which a credit is sought result from a subsequent and not a prior accident. Maes v. John C. Cornell, Inc., 86 N.M. 393, 524 P.2d 1009 (Ct. App. 1974).

Subsequent Injury Act. - Under the Subsequent Injury Act (52-2-1 to 52-2-13 NMSA 1978), the employer or insurance carrier is solely responsible for payment of compensation benefits for the first eight weeks of disability and is not entitled to reimbursement for this period. Thereafter, the subsequent injury fund is liable to the worker for its apportioned share of compensation benefits (payable twice a month) for the remainder of the maximum period of 600 (now 700) weeks. Compensation benefits are limited to the maximum weekly benefits payable at the time of the accidental injury. Mares v. Valencia County Sheriff's Dep't, 106 N.M. 744, 749 P.2d 1123 (Ct. App. 1988).

No conflict with § 52-1-56 providing for alteration of benefits. - This section simply sets general limitations on compensation benefits and does not conflict with or alter 52-1-56 NMSA 1978, relating to increasing, reducing or terminating a compensation award. Jaramillo v. Kaufman Plumbing & Heating Co., 103 N.M. 400, 708 P.2d 312 (1985).

The word "recovery" does not necessarily imply a complete return to the normal or usual state. It is correctly used in referring to a return toward a normal or usual state. Hales v. Van Cleave, 78 N.M. 181, 429 P.2d 379 (Ct. App.), cert. denied, 78 N.M. 198, 429 P.2d 657 (1967).

No overlap of benefits where injury to same member or function. - Subsection D does not state that a workman may not receive compensation benefits for successive injuries. It does state that when there are successive injuries to the same member or function, benefits for the subsequent injury may not duplicate benefits paid or payable for the prior injury. It is the overlap in benefits to which the reduction applies. Gurule v. Albuquerque-Bernalillo County Economic Opportunity Bd., 84 N.M. 196, 500 P.2d 1319 (Ct. App.), cert. denied, 84 N.M. 180, 500 P.2d 1303 (1972); Smith v. Trailways Bus Sys., 96 N.M. 79, 628 P.2d 324 (Ct. App. 1981).

The subsection D reduction applies when there is an overlap in compensation benefits resulting from two injuries to the same member or function or different parts of the same member or function, and if the compensation benefits would, in whole or in part, duplicate benefits paid or payable as a result of the prior injury. The reduction applies notwithstanding the fact that the worker has recovered from the prior injuries and there is no offset for the total amount paid on the first injury. Smith v. City of Albuquerque, 105 N.M. 125, 729 P.2d 1379 (Ct. App. 1986).

Entitled to compensation though receiving unemployment compensation. - Claimant is entitled to claim workmen's compensation, even though he applied for and received unemployment compensation for the same period, in the absence of any statutory provisions to the contrary. Winter v. Roberson Constr. Co., 70 N.M. 187, 372 P.2d 381 (1962).

Plaintiff's receipt of unemployment compensation benefits would not bar her receipt of total disability benefits, absent any statute precluding double recovery in such a situation. Mendez v. Southwest Community Health Servs., 104 N.M. 608, 725 P.2d 584 (Ct. App. 1986).

In determining credit, must characterize payments made after injury. - The allowance of credit is dependent on the employer's intention, and in determining intention, "wages" and "compensation" are to be considered in accordance with the following usage of those terms: "compensation" of an employee in the form of wages or salary for services performed does not have the same meaning as the word "compensation" in the Workmen's Compensation Act. The former is remuneration for work done; the latter is indemnification for injury sustained. Therefore the question is one of determining whether the wages were paid in lieu of disability payments. In arriving at an answer, it is necessary to characterize payments made during the period of employment subsequent to the injury. This characterization turns on the facts of each case. Roybal v. County of Santa Fe, 79 N.M. 99, 440 P.2d 291 (1968).

Proof failing to delineate allocation of benefits. - Denial of credit was proper where the proof offered failed to clearly delineate what portion of the remaining settlement was specifically allocated for compensation benefits, future medical expenses, vocational rehabilitation benefits, if any, or other specific benefits. Absent such evidence, the trial court could not properly calculate the amount of any deduction under Subsection D. Lea County Good Samaritan Village v. Wojcik, 108 N.M. 76, 766 P.2d 920 (Ct. App. 1988).

A failure of a settlement, or order approving settlement, to itemize the particular components of the award will not foreclose the Subsequent Injury Fund from presenting evidence in order to secure a reduction in appropriate cases and to prevent double recovery. Lea County Good Samaritan Village v. Wojcik, 108 N.M. 76, 766 P.2d 920 (Ct. App. 1988).

If payment of wages was intended to be in lieu of compensation, credit for the wages is allowed. However, since there is seldom any direct evidence on whether such an

intention lay behind the payment, it must be inferred from the circumstances surrounding the payment and the most important of these circumstances seems to be the question whether the injured man really earned his wages. If he is paid his regular wage although he does no work at all, it is a reasonable inference that the allowance is in lieu of compensation. Roybal v. County of Santa Fe, 79 N.M. 99, 440 P.2d 291 (1968).

Regular pay to injured workman as compensation. - When the employee is given light or reduced work at his old pay, if that rate of pay is not ordinarily offered to workers performing those duties, the expenditure can only be explained as provision of regular financial benefits to a work-injured man - in other words, workmen's compensation. Roybal v. County of Santa Fe, 79 N.M. 99, 440 P.2d 291 (1968).

Intent of employer in paying for labor. - If the man is giving a dollar's worth of labor for every dollar he is paid, the intention of the employer cannot be said to be that of supplying a substitute for workmen's compensation; it is simply to purchase these services from this man on the same terms as from any other man. Roybal v. County of Santa Fe, 79 N.M. 99, 440 P.2d 291 (1968).

Reduction of benefits proper to eliminate overlap. - A reduction in benefits for a subsequent injury equal to the value of payments remaining under an earlier judgment at the time of the second injury is proper where it eliminates the overlap in benefits. Smith v. Trailways Bus Sys., 96 N.M. 79, 628 P.2d 324 (Ct. App. 1981).

Apportionment of liability for subsequent injuries. - The employer and compensation carrier at the time of a first accidental injury remain liable for compensation benefits payable for the disability resulting therefrom. The employer and compensation carrier at the time of second accidental injury are initially liable for the disability resulting from the second accidental injury, to the full extent of the disability. Liability for the disability resulting from the second accidental injury is reduced to the extent of benefits paid or payable for the disability resulting from the first accidental injury if the requirements of Subsection D are met. Gonzales v. Stanke-Brown & Assocs., 98 N.M. 379, 648 P.2d 1192 (Ct. App. 1982).

No change in amount of compensation payable during disability. - The amount of compensation to be paid for disability from the date the disability began does not change during the period that disability continues; the maximum compensation payable is limited to the benefits payable when the disability began, and continues for the full period of that disability. Casias v. Zia Co., 94 N.M. 723, 616 P.2d 436 (Ct. App. 1980).

Awarded but unaccrued benefits for disability terminate upon death. Holliday v. Talk of Town, Inc., 102 N.M. 540, 697 P.2d 959 (Ct. App. 1985).

Evidence not sufficient to find current disability from injury. - An injury to employee's low back in the same area that was previously injured while working for defendant employers was not sufficient to find that plaintiff's partial permanent disability as of the

time of trial was the same disability which followed the subsequent injury or to find that the current disability was due in part to the subsequent injury. Reed v. Fish Eng'r Corp., 76 N.M. 760, 418 P.2d 537 (1966).

Benefits not duplicate where claimant partially recovered. - Under Subsection D, compensation benefits payable to claimant did not entirely duplicate benefits he received for prior injury where plaintiff had partially recovered from prior injury, returned to work and subsequently suffered identical injury. Gurule v. Albuquerque-Bernalillo County Economic Opportunity Bd., 84 N.M. 196, 500 P.2d 1319 (Ct. App.), cert. denied, 84 N.M. 180, 500 P.2d 1303 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 340 to 345, 384.
99 C.J.S. Workmen's Compensation § 296.

§ 52-1-48. Additional limitation on benefits.

The benefits that the worker shall receive during the entire period of disability and the benefits for death shall be based on and limited to the benefits in effect on the date of the accidental injury resulting in the disability or death.

History: 1953 Comp., § 59-10-18.9, enacted by Laws 1975, ch. 284, § 13; 1989, ch. 263, § 28.

The 1989 amendment, effective June 16, 1989, made a minor stylisitic change.

No due process right to greater disability benefits. - An injured worker does not have a due process property right to disability benefits greater than those conferred by the legislature. Casillas v. S.W.I.G., 96 N.M. 84, 628 P.2d 329 (Ct. App.), appeal dismissed, 454 U.S. 934, 102 S. Ct. 467, 70 L. Ed. 2d 242 (1981).

Benefits begin at the time of disability. Lovato v. Duke City Lumber Co., 97 N.M. 545, 641 P.2d 1092 (Ct. App. 1982).

Benefit rate determined as of date of injury. - When benefits are wrongfully terminated or reduced, the rate of compensation is to be determined to reflect the average weekly wage as of the date of the injury resulting in disability, rather than as of the date that the trial court determines disability. Varos v. Union Oil Co., 101 N.M. 713, 688 P.2d 31 (Ct. App. 1984).

The trial court's award of compensation payments should reflect the amount of benefits properly payable on the date of the workman's accidental injury resulting in disability, not the amount payable at the time of trial. Amos v. Gilbert W. Corp., 103 N.M. 631, 711 P.2d 908 (Ct. App. 1985).

Disability begins when a compensable injury manifests itself and wage-earning capacity is effected. Lovato v. Duke City Lumber Co., 97 N.M. 545, 641 P.2d 1092 (Ct. App. 1982).

The date of disability is the date the workman knows or should know he has suffered a compensable injury. Turner v. Shop-Rite Foods, Inc., 99 N.M. 56, 653 P.2d 887 (Ct. App. 1982).

No change in amount of compensation payable during disability. - The amount of compensation to be paid for disability from the date the disability began does not change during the period that disability continues; the maximum compensation payable is limited to the benefits payable when the disability began, and continues for the full period of that disability. Casias v. Zia Co., 94 N.M. 723, 616 P.2d 436 (Ct. App. 1980).

Attorney's fees. - There is no reason to distinguish an award of attorney's fees from any other benefit to which a claimant is entitled, and the law in effect at the time of the claimant's injury, rather than the law in effect at the time of the award of compensation benefits, applies to the determination of the claimant's attorney's fees. Bateman v. Springer Bldg. Materials Corp., 108 N.M. 655, 777 P.2d 383 (Ct. App. 1989).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Workmen's Compensation," see 11 N.M.L. Rev. 235 (1981).

For article, "Survey on New Mexico Law, 1982-83: Workmen's Compensation," see 14 N.M.L. Rev. 211 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation § 346.

§ 52-1-49. Medical and related benefits; artificial members.

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

B. In case the employer has made provisions for and has at the service of the worker at the time of the accident adequate medical or related services or facilities and offers to furnish these services or facilities during the period necessary, then the employer shall be under no obligation to furnish additional medical or related services than those so provided; provided, however, that the employer furnishing such medical and related services shall be liable to the worker 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 worker but only to the extent and amounts for which the worker would be able to impose liability on the person, partnership, corporation or association

employed by the employer to care for the worker. In the event, however, that any employer becomes so liable to the worker, it shall be optional with the worker 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 worker 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 worker to his employer; and, if the worker elects to hold the employer liable for the injuries, the cause of action of the worker 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 worker's name.

C. In all cases where the injury is such as to permit the use of artificial members, including teeth and eyes, the employer shall furnish the artificial members.

History: 1953 Comp., § 59-10-19.1, enacted by Laws 1959, ch. 67, § 27; 1963, ch. 269, § 3; 1965, ch. 252, § 4; 1971, ch. 261, § 5; 1973, ch. 240, § 9; 1977, ch. 275, § 3; 1987, ch. 235, § 21.

The 1987 amendment, effective June 19, 1987, substituted "worker" for "workman" throughout the section; in Subsection A substituted "related treatment" for "surgical attention" near the beginning and substituted "physical therapy, medical, psychiatric, psychological" for "physical rehabilitation services, medical" near the middle; in Subsection B rewrote the first sentence; and made minor changes in language and punctuation throughout the section.

Provisions of the Act are remedial in nature and must be construed liberally. Montoya v. Anaconda Mining Co., 97 N.M. 1, 635 P.2d 1323 (Ct. App. 1981).

But strained construction proscribed. - The Workmen's Compensation Act is remedial in nature and its language is to be liberally construed, but a strained construction is proscribed. Those rights and remedies can only be received when specified by statute. Armstrong v. Stearns-Roger Elec. Contractors, 99 N.M. 275, 657 P.2d 131 (Ct. App. 1982).

Right to payment for medical and hospital expenses is substantive right and must be measured by the provisions of the act in force at the time the cause of action accrues. Noffsker v. K. Barnett & Sons, 72 N.M. 471, 384 P.2d 1022 (1963).

No retroactive effect to amendment increasing medical benefits. - To give the amendment increasing the maximum allowable medical benefits under workmen's compensation a retroactive effect would alter a substantial term of the contract existing between employer and employee at the time of injury, contrary to the constitutional provisions prohibiting impairment of contracts. Noffsker v. K. Barnett & Sons, 72 N.M. 471, 384 P.2d 1022 (1963).

This section requires a written election by employee before employer is liable for additional benefits under the compensation act, and only if the workman who makes the election is the cause of action then assigned to the employer who may institute proceedings thereon in any court having jurisdiction in the workman's name. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975).

This section relates to torts of persons other than employer, or another employee of the employer, or the insurer, guarantor or surety of the employer, under certain specified circumstances, extending the tort liability of the employer beyond that recognized in the law of torts, upon an election by the employee, but it in no way affects the tort liability of third persons furnished by the employer to render reasonable medical and hospital services to the injured employee. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975).

Services incident to and concomitant part of compensable injury. - The medical and surgical treatment which the employee is entitled to receive by former 59-10-19, 1953 Comp., is incidental to and a concomitant part of a compensable injury for which the employer is liable under the act; and the employer is only liable for such services where the employee would be entitled to compensation. State ex rel. Gibbins v. District Court, 65 N.M. 1, 330 P.2d 964 (1958) (decided under former law).

Statute does not require such causal connection between industrial accident suffered by employee in 1960 and surgery performed on employee in 1963, but required that the medical and surgical attention be reasonably necessary not exceeding former maximum five-year period. Mirabal v. Robert E. McKee, Gen. Contractor, 77 N.M. 213, 421 P.2d 127 (1966).

Treatment must be reasonable, adequate, and timely. - An employer is required under this section to provide appropriate "reasonable" and "adequate" medical treatment in a timely manner. Eldridge v. Aztec Well Servicing Co., 105 N.M. 660, 735 P.2d 1166 (Ct. App. 1987).

Treatment to be reasonably necessary. - Medical treatment for which payment is sought in a compensation case must be shown to be reasonably necessary. Diatteo v. County of Dona Ana, 104 N.M. 599, 725 P.2d 575 (Ct. App. 1986).

Bill for medical services rendered is prima facie proof of reasonableness. Diatteo v. County of Dona Ana, 104 N.M. 599, 725 P.2d 575 (Ct. App. 1986).

Treatment held to be unnecessary. - Findings of a hearing officer that the installation of a hot tub in the claimant's home following his back injury was unreasonable and medically unnecessary were supported by substantial evidence. Davis v. Los Alamos Nat'l Lab., 108 N.M. 587, 775 P.2d 1304 (Ct. App. 1989).

Award of medical expenses is properly made despite absence of finding of disability. Diatteo v. County of Dona Ana, 104 N.M. 599, 725 P.2d 575 (Ct. App. 1986).

Section grants future medical services as matter of right, if related to the compensable injury. Chavira v. Gaylord Broadcasting Co., 95 N.M. 267, 620 P.2d 1292 (Ct. App.), cert. denied, 95 N.M. 299, 621 P.2d 516 (Ct. App. 1980).

To the extent that Hermandez v. Mead Foods, Inc., 104 N.M. 67, 716 P.2d 645 (1986), implies that a court can decide now that a claimant will never suffer a relapse of a compensable injury and never be entitled to future medical benefits, it is incorrect and not to be followed. Graham v. Presbyterian Hosp. Center, 104 N.M. 490, 723 P.2d 259 (Ct. App. 1986).

Where there was an accidental injury arising out of and in the course of employment, where there is a claim for current and past medical benefits together with a claim for unspecified and unspecifiable future medical benefits, and where the court finds that the defendants are not liable for the past and current medical expenses, either because plaintiff has fully recovered or because plaintiff is faking pain or for whatever reason, the court may dismiss the main part of the claim with prejudice, but it cannot dismiss the claim for future medical benefits with prejudice. Graham v. Presbyterian Hosp. Center, 104 N.M. 490, 723 P.2d 259 (Ct. App. 1986).

Subsections A and B to be construed together. - Subsections A and B deal with the same subject matter; thus, they are in pari materia and must be construed together so as to give effect to the provisions of both. In addition, these two subsections must be considered together and read as a whole, with all provisions considered in relation to each other, in order to determine the legislative intent. 1978 Op. Att'y Gen. No. 78-6.

"Reasonable" in Subsection A and "adequate" in Subsection B describe same standard. - Subsection A requires the employer to pay for "reasonable" medical services, while Subsection B indicates the employer is obligated to pay for "adequate" medical services. Taken in context, the words "reasonable" and "adequate" appear to describe the same standard. Bowles v. Los Lunas Schools, N.M. , 781 P.2d 1178 (Ct. App. 1989).

Employer's liability under Subsection B. - Where there has been an election to hold the employer liable for injuries under Subsection B, the recovery is limited to the payment of compensatory damages and related benefits, not common-law damages. Fields v. D & R Tank & Equip. Co., 103 N.M. 141, 703 P.2d 918 (Ct. App. 1985).

"Furnish" requires more than a passive willingness to respond to a demand. Garcia v. Genuine Parts Co., 90 N.M. 124, 560 P.2d 545 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977); Trujillo v. Beaty Elec. Co., 91 N.M. 533, 577 P.2d 431 (Ct. App. 1978).

No authority for present award of future medical expenses. - The Workmen's Compensation Act contains neither authorization nor suggestion for a present award of future medical expenses and temporary disability benefits where the claimant refuses

the present administration of such treatment and it is only speculative whether the treatment will ever be undertaken in the future. Dudley v. Ferguson Trucking Co., 61 N.M. 166, 297 P.2d 313 (1956) (decided under former law).

Nothing in this section, or in any other section of the Workmen's Compensation Act, suggests that the injured employee may presently recover judgment against the employer, or the insurer, for medical expenses which may at some time in the future prove necessary as a result of the injury. Hales v. Van Cleave, 78 N.M. 181, 429 P.2d 379 (Ct. App.), cert. denied, 78 N.M. 198, 429 P.2d 657 (1967); Gearhart v. Eidson Metal Prods., 92 N.M. 763, 595 P.2d 401 (Ct. App. 1979).

Medical benefits not limited by other section. - It was not the intention of the legislature to make the medical benefits provided under this section subject to the limitations of 52-1-30 NMSA 1978. Valdez v. McKee, 76 N.M. 340, 414 P.2d 852 (1966).

Employer's liability 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, and beyond the duty to use due care in selecting the doctor and hospital, there is normally no liability of the employer for the tortious conduct of the doctor or hospital. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975).

Injured workmen's cause of action assigned to employer. - This section does not contemplate a subrogation to the extent of any amounts the employer may have paid; rather, the entire cause of action of the injured workman is assigned to the employer and the injured workman may look to the employer for damages for his injuries, and not for benefits under the Workmen's Compensation Act, resulting in a shifting of tort liability from the tort-feasor to the employer under the circumstances prescribed and upon the election by the employee in the manner provided. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975).

Burden is on claimant to show reasonableness of services of a doctor, however proof of a bill from a doctor for services rendered is considered sufficient as prima facie proof of reasonableness. Scott v. Transwestern Tankers, Inc., 73 N.M. 219, 387 P.2d 327 (1963).

Purpose of Subsection B was to give workmen the option of holding their employers liable for the negligence of the doctors or other medical personnel treating them for their work-related injuries, or to hold the doctors or other medical personnel liable directly. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975).

Supreme court construes Subsection B in favor of claimant, as it is required to do since this act is remedial legislation and must be construed liberally to effect its purpose. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975).

Before defendants can avoid liability under Paragraph B of this section, they must have provided medical services or they must have affirmatively offered the services. Garcia v.

Genuine Parts Co., 90 N.M. 124, 560 P.2d 545 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Subsection B of this section extends normal tort liability of 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, by allowing the employee to elect to hold the employer responsible for the injuries he sustains as a result of this subsequent tortious conduct, and, if he so elects to hold the employer liable, his cause of action against the third person shall be assigned to the employer, who may institute proceedings thereon in any court having jurisdiction, in the workman's name. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975).

Ordinary tort law governs acts of medical personnel treating employee. - This section coupled with 52-1-6 and 52-1-56 NMSA 1978 clearly demonstrate a legislative intent that ordinary tort law, except as modified by this section and 52-1-56 NMSA 1978, shall govern the tortious acts of medical personnel and hospitals charged with the care and treatment of an employee for a compensable accident. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975) (decided under prior law).

Obligation to furnish artificial member. - Subsections A and B involve only the employer's obligation to furnish medical, surgical and hospital services. The language "the employer shall furnish all reasonable surgical, medical . . . and hospital services and medicine" is not broad enough in scope to include the obligation to furnish an artificial member. The term "services" is defined as any result of useful labor which does not produce a tangible commodity., overruled on other grounds, Cromer v. J.W. Jones Constr. Co., 79 N.M. 179, 441 P.2d 219 (Ct. App. 1968); Schiller v. Southwest Air Rangers, Inc., 87 N.M. 476, 535 P.2d 1327 (1975).

Cost of furnishing artificial members by employer is not an item includable within the limitation expressed in Subsection A. This interpretation accords with the view often expressed by the New Mexico supreme court, namely, that the workmen's compensation statute is to be liberally construed in favor of the employee., overruled on other grounds, Cromer v. J.W. Jones Constr. Co., 79 N.M. 179, 441 P.2d 219 (Ct. App. 1968); Schiller v. Southwest Air Rangers, Inc., 87 N.M. 476, 535 P.2d 1327 (1975).

Cost of artificial member not limited. - It would appear proper that Subsection C is an exception to Subsections A and B and so treating Subsection C, the cost of obtaining an artificial member would not be includable in the limitation on medical expenditures in Subsection A., overruled on other grounds, Cromer v. J.W. Jones Constr. Co., 79 N.M. 179, 441 P.2d 219 (Ct. App. 1968); Schiller v. Southwest Air Rangers, Inc., 87 N.M. 476, 535 P.2d 1327 (1975).

Training in use of artificial arm is to be considered medical service and consequently would fall within Subsections A and B, subject to limitations as expenditure as set forth

therein., overruled on other grounds, Cromer v. J.W. Jones Constr. Co., 79 N.M. 179, 441 P.2d 219 (Ct. App. 1968); Schiller v. Southwest Air Rangers, Inc., 87 N.M. 476, 535 P.2d 1327 (1975).

Claimant was not required to apply to district court prior to receiving additional medical and surgical services not exceeding former $1,500 limit. Mirabal v. Robert E. McKee, Gen. Contractor, 77 N.M. 213, 421 P.2d 127 (1966).

Plaintiff was not required to utilize his own private insurance to pay for injury which arose out of and in the course of his employment, since defendants could not shift the burden when by law they were the responsible parties; and by giving only a qualified authorization for surgery, limited in dollar amount, defendants were in effect denying plaintiff the reasonably necessary medical and surgical attention to which he had a statutory right. Bennett v. Lane Plumbing Co., 89 N.M. 790, 558 P.2d 59 (Ct. App. 1976).

No reimbursement for travel expenses. - The trial court concluded that plaintiff is not entitled to reimbursement for travel expenses in making trips from Duncan, Arizona, where he moved with his parents after his injury and his release from the hospital, to Silver City, New Mexico and return, and from Duncan to Tucson and return. Hales v. Van Cleave, 78 N.M. 181, 429 P.2d 379 (Ct. App.), cert. denied, 78 N.M. 198, 429 P.2d 657 (1967).

Reasonable travel expenses necessarily incurred in receiving medical treatment come within the language of Subsection A. Gonzales v. Bates Lumber Co., 96 N.M. 422, 631 P.2d 328 (Ct. App. 1981).

Chiropractic treatment required. - An employer who is subject to the Workmen's Compensation Act (Chapter 52, Article 1 NMSA 1978) is legally obligated under this section to provide chiropractic treatment to injured employees. 1978 Op. Att'y Gen. No. 78-6.

Nursing care provided by spouse. - Wife was properly compensated for 24-hour, semi-skilled nursing care she provided to her husband, based on an hourly rate. Shadbolt v. Schneider, Inc., 103 N.M. 544, 710 P.2d 738 (Ct. App. 1985).

Where there is no evidence that employer was ever requested to provide services provided by other than company doctor and there is no evidence, nor is there a finding that private physician's services came about because the treatment by employer's doctors was unreasonable or inadequate, then there is nothing in the record providing a basis for holding employer liable for physician's bill under this section. Beckwith v. Cactus Drilling Corp., 84 N.M. 565, 505 P.2d 1241 (Ct. App. 1972), cert. denied, 84 N.M. 560, 505 P.2d 1236 (1973).

Claimant refusing medical services waives including such costs in award. - This statute clearly imposes an obligation on the part of the employer to furnish all reasonable

medical services to the injured employee unless, as stated in the act, "the workman refuses to allow them to be so furnished." A claimant, in not permitting defendants to furnish such services, waived his right to require that the cost of such services be included in the award. Hedgecock v. Vandiver, 82 N.M. 140, 477 P.2d 316 (Ct. App. 1970).

Where the workman declined a direct offer of medical services of a doctor of the employer's choice and sought treatment on his own, the employer is under no obligation to pay the workman's doctor. Tafoya v. S & S Plumbing Co., 97 N.M. 249, 638 P.2d 1094 (Ct. App. 1981).

Employee's recovery for medical services independently incurred limited. - An injured employee may not recover for medical services independently incurred by him unless the employer has failed to provide such services. Cardenas v. United Nuclear Homestake Partners, 97 N.M. 46, 636 P.2d 317 (Ct. App. 1981).

An employer is not liable when a claimant bypasses the employer's provisions for reasonably necessary medical care and seeks his own doctor and is injured. Armstrong v. Stearns-Roger Elec. Contractors, 99 N.M. 275, 657 P.2d 131 (Ct. App. 1982).

This state recognizes the existence of certain exceptions to the general rule limiting an employee's right to seek independent medical treatment at the employer's expense where the employer has indicated a willingness to furnish such treatment; these exceptions include situations where the employer, although passively expressing a willingness to furnish medical treatment, fails to do so in fact, where the employer has not actually refused medical services but has failed to make arrangements in advance and in cases where the employer, although indicating a willingness to furnish medical and surgical aid, has failed to make suitable arrangements for such care in cases of emergency. Montoya v. Anaconda Mining Co., 97 N.M. 1, 635 P.2d 1323 (Ct. App. 1981).

Employee must give employer opportunity to furnish services. - An employee injured in a compensable job related accident may not ordinarily incur medical expenses for which an employer is to be held responsible under this section without first giving the employer a reasonable opportunity to furnish such services. Montoya v. Anaconda Mining Co., 97 N.M. 1, 635 P.2d 1323 (Ct. App. 1981); Eldridge v. Aztec Well Servicing Co., 105 N.M. 660, 735 P.2d 1166 (Ct. App. 1987).

Employer not precluded from investigation to avoid liability. - Employer who failed to point to any action taken by them by way of inquiry into the necessity of surgery performed on employee could not argue that they were precluded from making an adequate investigation and avoid liability. Mirabal v. Robert E. McKee, Gen. Contractor, 77 N.M. 213, 421 P.2d 127 (1966).

Medical testimony as basis for conclusion that disability result of accident. - Despite conflicts between the experts, the testimony of claimant's doctor revealed a sufficient

basis for the conclusion that claimant's disability resulted from the accident, and that surgery was necessary, where he testified that he received from the claimant a history of the accident and a history of pain since the accident, that the conservative therapy employed by other physicians for over one year had not improved the claimant's condition, that in surgery abnormal intervertebral disc tissue was removed from the claimant, and that after surgery the claimant's prognosis had improved considerably. Provencio v. New Jersey Zinc Co., 86 N.M. 538, 525 P.2d 898 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Adequate provision where workman both employer and employee. - This statute was not intended to cover only those situations where an employer actually maintains hospital and medical facilities for the employees. Where the workman was both employer and employee, and after sustaining an injury during the course of his employment, was admitted to the hospital for surgery and other medical treatment, giving notice to his insurer which then undertook its obligation to pay medical expenses as well as compensation, it was held that under these circumstances the employer did make provisions for and furnish hospital and medical facilities to the employee within the meaning of the section, since the employer, through its insurance company, paid the employee's medical bills, which was all that was necessary under the circumstances; thus the workman had the option of holding either his employer or the medical personnel liable for negligent treatment furnished in connection with his work-related injuries. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975).

Payments by insurer to employee presumed for original injury where there was no court determination as to the compensation award or as to whether the compensation paid by the insurer was for the original injury or for an alleged aggravation caused by an alleged improper blood transfusion, and the employer's insurer paid the employee benefits which were less than a total permanent award (paying him for a period and then discontinuing payments) altogether, without a release having been obtained, the employee neither giving an election in writing as required by this section nor filing suit against the employer for additional workmen's compensation benefits for the alleged malpractice, but instead electing to sue the physicians, technicians and hospital; then under the facts, any payments made by the insurer to the employee must be presumed to be benefits for his original injury, and it was not entitled to reimbursement from the employee where he settled with the hospital and doctors. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975).

Employee has no right to select own physician. - The provisions of the Workmen's Compensation Act make it clear that an employee does not have an absolute right to select his own physician, osteopath, dentist or chiropractor, especially if the employer has made provision at the time of the accident to provide such health care services to the employee as are reasonably necessary. 1977 Op. Att'y Gen. No. 77-13.

Employer has right in first instance to select physician or surgeon to care for injured employees, and the injured employee may not recover for medical services incurred by

him unless the employer has failed to provide such services. Valdez v. McKee, 76 N.M. 340, 414 P.2d 852 (1966).

Question of right to choose doctor supplements section. - Section 52-4-1C NMSA 1978, insofar as it addresses the question of a worker's right to choose his or her own doctor, supplements, rather than modifies, this section. Bowles v. Los Lunas Schools, N.M. , 781 P.2d 1178 (Ct. App. 1989).

Claimant must show expenditures were justified from medical standpoint, were of reasonable amount, and that some request or demand, however informal, was made upon the employer or insurer to provide the articles or services. Dudley v. Ferguson Trucking Co., 61 N.M. 166, 297 P.2d 313 (1956) (decided under former law).

Once employer provides for medical services and offers those services to workman, the employer is not liable for services other than those offered absent a demand or request for the additional services. But where the employer terminates the services previously offered, the employer at that point has failed to provide such services, and thereafter, no request or demand for further services is necessary. Provencio v. New Jersey Zinc Co., 86 N.M. 538, 525 P.2d 898 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Employer not required to furnish care for tortious acts of doctor. - This section nowhere requires the employer to furnish either compensation or medical or hospital care for the employee as a result of the injuries he sustained by reason of subsequent tortious act of the doctors or the hospital. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975).

Limitation of adequate services. - Subsection A of this section, among other things, sets a limit as to the cost of medical services to be provided to the workman without a demand. It does not, however, require the payment of all the medical costs not exceeding the statutory limit because Subsection B provides the employer is not obliged to furnish additional services where he has provided for "adequate" services. Gregory v. Eastern N.M. Univ., 81 N.M. 236, 465 P.2d 515 (Ct. App. 1970).

Once services are provided in an adequate form by the employer, he is under no further obligation. 1978 Op. Att'y Gen. No. 78-6.

Once the employer provides for medical services, which are reasonably necessary, and offers those services to the workman, the employer is not liable for services other than those offered. Salcido v. Transamerica Ins. Group, Inc., 102 N.M. 344, 695 P.2d 494 (Ct. App. 1983).

Failure to provide adequate services. - When company doctors ignore diagnostic information and fail to advise either the patient or the patient's employer of a condition requiring attention, the employee is not afforded adequate medical services. Sedillo v. Levi-Strauss Corp., 98 N.M. 52, 644 P.2d 1041 (Ct. App. 1982).

Plaintiff is entitled to reasonable future medical expenses, beyond the date of the last termination of compensation payments. Ideal Basic Indus., Inc. v. Evans, 91 N.M. 460, 575 P.2d 1345 (1978).

Obligation for payment for medical treatment is to workman, not to physician. - Although the Workmen's Compensation Act imposes the obligation for payment of reasonable medical treatment to an injured workman on the employer-insurer, that obligation is to the workman, not to the treating physician. Speer v. Cimosz, 97 N.M. 602, 642 P.2d 205 (Ct. App. 1982).

Trial court cannot restrict or terminate substantive right to payment for continuing medical and surgical attention for an injury. Gearhart v. Eidson Metal Prods., 92 N.M. 763, 595 P.2d 401 (Ct. App. 1979).

Applicability of uncontradicted medical testimony rule. - The uncontradicted medical testimony rule, which is a limited exception to the trial court's discretion to weigh expert testimony and discard such testimony where it is deemed unreliable in light of other evidence, does not apply to medical testimony elicited on the reasonableness and necessity of plaintiff's medical treatments, which was fully rebuttable. Graham v. Presbyterian Hosp. Center, 104 N.M. 490, 723 P.2d 259 (Ct. App. 1986).

Supplemental medical bills. - If a supplemental medical bill reflects therapy to the same parts of the body as a previous bill admitted into evidence, then, absent a showing of a new injury or complication unrelated to the accidental injury, the trial court should accept the supplemental bill as prima facie proof of a reasonable and necessary medical expense. Pritchard v. Halliburton Servs., 104 N.M. 102, 717 P.2d 78 (Ct. App.), cert. denied, 103 N.M. 798, 715 P.2d 71 (1986).

Where plaintiff's testimony on cross-examination cast doubt on her credibility, including her credibility with her doctors, substantial evidence supported the finding that the treatments and procedures in question were not necessary and, hence, not compensable. Graham v. Presbyterian Hosp. Center, 104 N.M. 409, 723 P.2d 259 (Ct. App. 1986).

Finding that defendants made provision for adequate treatment which was supported by substantial evidence would not be disturbed on appeal. Gregory v. Eastern N.M. Univ., 81 N.M. 236, 465 P.2d 515 (Ct. App. 1970).

Employer's failure to provide services. - In the event of the employer's failure to provide services in accordance with the statutory standard, the worker may seek the services of another health provider and require the employer to pay for such services, provided such treatment is related to the injury and is reasonable and necessary. The question of whether the employer has provided services in accordance with that standard is ordinarily a question of fact and depends on the circumstances of the particular case. Bowles v. Los Lunas Schools, N.M. , 781 P.2d 1178 (Ct. App. 1989).

Law reviews. - For comment, "Witnesses - Privileged Communications - Physician-Patient Privilege in Workmen's Compensation Cases," see 7 Nat. Resources J. 442 (1967).

For survey, "Workmen's Compensation," see 6 N.M. L. Rev. 413 (1976).

For annual survey of New Mexico law relating to workmen's compensation, see 13 N.M.L. Rev. 495 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 356, 391 to 399.
Value of home services provided by victim's relative, 65 A.L.R.4th 142.
Workers' compensation: recovery for home service provided by spouse, 67 A.L.R.4th 765.
Workers' compensation: reasonableness of employee's refusal of medical services tendered by employer, 72 A.L.R.4th 905.
99 C.J.S. Workmen's Compensation §§ 266 to 277.

§ 52-1-50. Vocational rehabilitation services.

A. The purpose of this section is the restoration of the disabled worker to gainful employment, preferably that for which he has had training or experience.

B. Vocational rehabilitation services are those services designed to return the worker to gainful employment, in the following priority:

(1) pre-injury job with the same employer;

(2) modified work with the same employer;

(3) job related to former employment; or

(4) suitable employment in a nonrelated work field.

C. Subject to the requirements imposed upon the worker and the other limitations of this section, the employer shall furnish vocational rehabilitation services for the worker who has suffered an injury that is covered by the Workers' Compensation Act [this article]. When, as a result of the injury, the worker is unable to perform the pre-injury job with the same employer or unable to perform modified work with the same employer, he shall be entitled to vocational rehabilitation evaluation, counseling and training if necessary to return the worker to either a job related to his former employment or suitable employment in a nonrelated field. The total amount required to be paid by an employer for vocational evaluation and counseling shall not exceed two thousand five hundred dollars ($2,500).

D. The employer shall notify the worker in writing of the provisions of this section within thirty days of the first report of injury required to be filed by the employer under Section 52-1-58 NMSA 1978 if the worker is at the time partially or totally disabled.

E. To be entitled to vocational rehabilitation services or benefits, a disabled worker shall notify the employer in writing that he has been released within one hundred twenty days from the date that he is released from regular treatment by his primary treating health care provider as defined in Section 52-4-1 NMSA 1978. In the event the worker fails to notify the employer, the employer shall not be liable for any vocational rehabilitation benefits.

F. A referral for an evaluation of a worker for suitability for vocational rehabilitation services shall be made by the employer of a worker who notifies the employer under Subsection E of this section. If the evaluation or vocational rehabilitation services are requested and these services are not voluntarily offered by the employer or if offered but not accepted by the worker, the workers' compensation judge upon application affording the parties an opportunity to be heard may determine whether the worker needs evaluation or vocational rehabilitation services and shall cooperate with and refer promptly all cases in need of such services to the appropriate public or private agencies in this state or where necessary in any other state for such services.

G. A worker who is entitled to vocational rehabilitation training shall receive payment for board, lodging, tuition, travel and all other expenses, including the cost or charges for the vocational rehabilitation training, for a period of time not to exceed two years from the date vocational rehabilitation training is determined to be necessary. Any benefits to which a worker is entitled under this section shall not be considered or paid as part of any lump sum settlement of a claim by a worker, and payment by the employer shall only be required as services are incurred.

H. It shall be the responsibility of the worker to submit to all reasonable requests for evaluations made by the employer or required by the workers' compensation judge as may be necessary to determine the need for or to develop a plan for vocational rehabilitation. However, the worker shall not be required to bear the cost of any evaluation requested by the employer notwithstanding the limitation on expenditures specified in Subsection C of this section. If the worker refuses to submit to evaluation or to accept vocational rehabilitation training pursuant to an order of a workers' compensation judge, the employer's liability to the worker shall be limited to medical and partial disability benefits under the Workers' Compensation Act.

History: 1978 Comp., § 52-1-50, enacted by Laws 1987, ch. 235, § 22; 1989, ch. 263, § 29.

Repeals and reenactments. - Laws 1987, ch. 235, § 22 repealed former 52-1-50 NMSA 1978, as amended by Laws 1986, ch. 22, § 16, and enacted a new 52-1-50 NMSA 1978, effective June 19, 1987. For provisions of the former section see 1986 Cumulative Supplement.

The 1989 amendment, effective June 16, 1989, made a minor stylistic change in Subsection E, and substituted "workers' compensation judge" for "hearing officer" throughout Subsections F and H.

Purpose of section. - This section was added for the benefit of the workmen as an additional obligation of the employer. Ruiz v. City of Albuquerque, 91 N.M. 526, 577 P.2d 424 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

Vocational rehabilitation arises after such partial disability has occurred that a workman is unable to return to his former job, yet he desires to retrain himself for suitable employment. It is a means for retraining an injured employee in an effort to direct his limited physical capability into other useful channels of productivity. Malczewski v. McReynolds Constr. Co., 96 N.M. 333, 630 P.2d 285 (Ct. App. 1981).

Section places no dollar limit on cost of vocational rehabilitation services. - The $3,000 expense limit set out in this section applies only to the special expenses of board, lodging, travel, etc., incurred during rehabilitation and was not intended to impose a dollar limit on the cost of vocational rehabilitation services under the Workmen's Compensation Act. The only limit on the expense of rehabilitation under the act is reasonableness. Garcia v. Schneider, Inc., 105 N.M. 234, 731 P.2d 377 (Ct. App. 1986) (decided under prior law).

Entitlement for vocational rehabilitation benefits is dependent upon an inability to return to one's former job. Hernandez v. Mead Foods, Inc., 104 N.M. 67, 716 P.2d 645 (Ct. App. 1986).

Benefits must be necessary to restore to suitable employment. - Injured employee who was not able to return to work as security guard was not entitled to rehabilitation benefits in order to attend business school to enhance his opportunities in his new position as co-manager of a condominium complex, since such benefits were not necessary "to restore him to suitable employment." Nichols v. Teledyne Economic Dev. Co., 103 N.M. 393, 707 P.2d 1203 (Ct. App. 1985) (decided under prior law).

Mandatory nature of section. - In addition to medical, hospital and partial disability benefits, this section provides that "the employee shall be entitled to such vocational rehabilitation services . . . as may be necessary to restore him to suitable employment . . . ." This is mandatory language. Although this section provides that "The court shall determine whether a disabled employee needs vocational rehabilitation services . . .," this determination does not rest within the discretion of the trial court. If there is sufficient evidence to warrant vocational rehabilitation, the court must award an employee compensation for that purpose. Ruiz v. City of Albuquerque, 91 N.M. 526, 577 P.2d 424 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978) (decided under prior law).

This section is mandatory in that an employee shall be entitled to such vocational rehabilitation services as may be necessary to restore him to suitable employment. Sanchez v. Homestake Mining Co., 102 N.M. 473, 697 P.2d 156 (Ct. App. 1985).

Suit not precluded despite failure to seek benefits prior to suit. - Employee was not precluded from maintaining a suit to recover vocational rehabilitation benefits on the alleged ground that he did not, prior to commencing the suit, seek such benefits nor was he refused them before commencing the suit. Maitlen v. Getty Oil Co., 105 N.M. 370, 733 P.2d 1 (Ct. App. 1987).

Need for benefits must be established. - While this section is mandatory in nature, plaintiff must present sufficient evidence to warrant an award of vocational rehabilitation expenses; where plaintiff has not established a need for rehabilitation benefits on the record, the trial court has no basis for an award of rehabilitation benefits. Lopez v. Smith's Mgt. Corp., 106 N.M. 416, 744 P.2d 544 (Ct. App. 1986).

Burden of establishing need on worker. - Under this chapter, an injured worker is entitled to such vocational rehabilitation services as are necessary to return her to suitable employment. While this requirement is mandatory in nature, the worker has the burden of presenting sufficient evidence so as to establish a need for rehabilitation benefits. Gutierrez v. Amity Leather Prods. Co., 107 N.M. 26, 751 P.2d 710 (Ct. App. 1988).

Employee's decision to undertake rehabilitation. - The ultimate decision to undertake vocational rehabilitation as ordered rests with the employee. Aranda v. D.A. & S. Oil Well Servicing, Inc., 98 N.M. 217, 647 P.2d 419 (Ct. App. 1982); Sanchez v. Homestake Mining Co., 102 N.M. 473, 697 P.2d 156 (Ct. App. 1985).

The district court may order the employee to submit to vocational evaluation at the cost and expense of the employer and order the employer and the insurer to submit to the court the results of such evaluation, provided, however, that the employee agrees to undertake vocational evaluation by requests made to the court and the employer and the insurer. Aranda v. D.A. & S. Oil Well Servicing, Inc., 98 N.M. 217, 647 P.2d 419 (Ct. App. 1982).

Need for benefits must be established. - The worker's failure to establish the need for rehabilitation prevents him from filing suit for reimbursement of the costs of such services. Garcia v. Albuquerque Pub. Schools, 99 N.M. 741, 663 P.2d 1198 (Ct. App. 1983).

Law reviews. - For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation § 387.
Workers' compensation: vocational rehabilitation statutes, 67 A.L.R.4th 612.

§ 52-1-51. Physical examinations of claimant; unsanitary or injurious practices by claimant; testimony of physicians.

A. Any employer or insurer shall be entitled to have a physical examination of the claimant by a physician of its choice before or after the filing of a claim or before or after an award of compensation in order to determine the extent of the claimant's disability, subject to the following regulations:

(1) notice in writing shall be delivered to or served upon the claimant specifying the time and place where it is intended to conduct the examination. Such notice shall be given at least ten days prior to the time stated in the notice. Delivery by registered mail is permitted;

(2) such examination shall be by a physician qualified to practice medicine under the law of this state or of the state or county wherein the claimant resides;

(3) the place at which such examination is to be conducted shall not involve an unreasonable amount of travel for the claimant in all the circumstances. It shall not be necessary for a claimant who lives outside this state to come into this state for such an examination;

(4) within thirty days after the examination, the claimant shall be compensated by the party requesting the examination for all necessary and reasonable expenses incidental to submitting to the examination, including the cost of travel, meals, lodging, loss of pay or other like direct expense, but the amount to be compensated for meals and lodging shall not exceed that allowed for nonsalaried public officers under the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978];

(5) examinations may not be required more frequently than at six-month intervals; except that upon application to the workers' compensation judge having jurisdiction of the claim and after reasonable cause shown therefor, examination within a less interval may be ordered. In considering such application, the workers' compensation judge should exercise care to prevent harassment of the claimant;

(6) the claimant shall be entitled to have a physician or an attorney of his own choice or both present at such examination. The claimant shall pay such physician or attorney himself; and

(7) the claimant shall be furnished with a copy of the report of the physical examination made by the physician making the examination on behalf of the employer or insurer.

B. If a claimant fails or refuses to submit to examination in accordance with the notice and if the requirements of Paragraph (1) of Subsection A of this section have been satisfied, he shall forfeit all workers' compensation benefits which would accrue or become due to him except for such failure or refusal to submit to examination during the

period that he persists in such failure and refusal unless he is by reason of disability unable to appear for examination.

C. If any worker persists in any unsanitary or injurious practice which tends to imperil, retard or impair his recovery or increase his disability or refuses to submit to such medical or surgical treatment as is reasonably essential to promote his recovery, the workers' compensation judge may in his discretion reduce or suspend the workers' compensation benefits.

D. Any physician selected by the employer and paid by the employer who makes or is present at an examination of the claimant conducted pursuant to this section may be required to testify as to the conduct thereof and the findings made. Communications made by the claimant upon such examination to such physician shall not be considered privileged.

E. A worker may have a physician or other health care provider of his choice, as defined in Section 52-4-1 NMSA 1978, other than the physician chosen by the employer under Subsection A of this section examine him and evaluate his injury. In that event, the worker shall pay for the services of that examiner unless the final determination of the worker's claim is that the worker's claim of impairment is correct and differed from the employer's physician's opinion of percentage of impairment by more than twenty percent, in which case the employer shall pay directly to the worker's examiner or reimburse the worker for the amounts charged by the worker's examiner for the evaluation of impairment.

History: Laws 1929, ch. 113, § 19; C.S. 1929, § 156-119; 1941 Comp., § 57-920; Laws 1947, ch. 109, § 1; 1953 Comp., § 59-10-20; Laws 1986, ch. 22, § 17; 1987, ch. 235, § 23; 1989, ch. 263, § 30.

The 1986 amendment, in the first undesignated paragraph, deleted "in the district court" after "the filing of a claim"; in Subsection E, substituted "hearing officer" for "court" in two places; in the second undesignated paragraph, substituted "Subsection A of this section" for "Subsection 1 above," near the end of the third undesignated paragraph, substituted "hearing officer" for "court"; and made minor stylistic changes.

The 1987 amendment, effective June 19, 1987, designated the former paragraphs of this section as lettered subsections and the former lettered paragraphs of the first paragraph as numbered paragraphs; in Subsection A(4) added at the end "but the amount to be compensated for meals and lodging shall not exceed that allowed for nonsalaried public officers under the Per Diem and Mileage Act" at the end; in Subsection B substituted "Paragraph (1) of Subsection A" for "Subsection A"; added Subsection E; and made minor changes in language and punctuation throughout the section.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes in Subsections A(1) and D, and substituted "workers' compensation judge" for "hearing officer" throughout Subsections A(5) and C.

Effective dates. - Laws 1986, ch. 22 contains no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section is effective on May 21, 1986.

Jurisdiction to reopen award. - Under Workmen's Compensation Act district court retains jurisdiction after expiration of 30-day period during which it generally retains jurisdiction over its judgments to reopen its award for disability and to suspend or reduce the amount awarded by reason of claimant's refusal to undergo proposed surgery to reduce the percentage of his disability. Fowler v. W.G. Constr. Co., 51 N.M. 441, 188 P.2d 160 (1947).

Questions of law and fact. - While this section appears to be generally recognized and applied, there is of course some variation in its application. Where the evidence is undisputed on the issue, the question becomes one of law; where there is a conflict in the evidence, it is one of fact. Where a question of law is presented, the courts may make a final determination of it. Where disputed questions of fact are present and undecided, it is necessary to remand the case for further proceedings. Rhodes v. Cottle Constr. Co., 68 N.M. 18, 357 P.2d 672 (1960).

"Persist in any injurious practice," as used in this section, means that a workman must, as a matter of habit, go on resolutely or stubbornly in spite of opposition, importunity or warning, to inflict or tend to inflict injury to himself. Martinez v. Zia Co., 99 N.M. 80, 653 P.2d 1226 (Ct. App. 1982).

Physician may express opinion in percentages of impairment. - An examining physician or an attending physician, when testifying as a medical expert, may express his opinion in percentages as to the impairment of the physical functions of the claimant, and further, an examining physician or an attending physician when testifying as a medical expert, after taking into consideration the claimant's age, education, training, general physical and mental capacity, and ability to obtain and retain gainful employment, may express his opinion as to the percentage of disability of the claimant. Seal v. Blackburn Tank Truck Serv., 64 N.M. 282, 327 P.2d 797 (1958).

Error in considering unsworn testimony of two physicians. - In a case under the Workmen's Compensation Act, the trial court commits prejudicial error in considering in evidence over plaintiff's objections the unsworn testimony of two surgeons when no additional evidence has been offered after an earlier hearing when the court announced it did not feel the defendant had sustained its burden of showing plaintiff's condition had changed for the better, but when after receiving these letters the court did not feel the defendant had sustained its burden of proof. Ennen v. Southwest Potash Co., 65 N.M. 307, 336 P.2d 1062 (1959).

Suspension of benefits depends on whether refusal unreasonable. - Question of whether refusal to submit to medical treatment should result in a reduction or suspension of compensation turns on a determination of whether the refusal is unreasonable. Brooks v. Hobbs Mun. Schools, 101 N.M. 707, 688 P.2d 25 (Ct. App. 1984).

Refusal to undergo serious risk surgery not unreasonable. - Refusal to undergo major surgery which is attended by serious risk of life or to member of the body is not unreasonable and compensation should not be denied to injured workman on that account. Fowler v. W.G. Constr. Co., 51 N.M. 441, 188 P.2d 160 (1947).

If the operation be of a major character and attended with serious risk to life or member, an injured employee's refusal to submit to such operation is deemed not unreasonable, and compensation should not be denied on that account. Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974); Evans v. Stearns-Roger Mfg. Co. 253 F.2d 383 (10th Cir. 1958).

An employee may not be denied compensation because of his failure or refusal to accept medical treatment unless it be shown that such refusal was arbitrary and unreasonable, and this is a question of fact which must be supported by substantial evidence. Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974).

An employee may not be denied compensation because of his failure or refusal to accept medical treatment unless it be shown that such refusal was arbitrary and unreasonable. Rhodes v. Cottle Constr. Co., 68 N.M. 18, 357 P.2d 672 (1960).

Before worker may be compelled to undergo serious medical or surgical treatment at the risk of suspension or reduction of his or her compensation, defendants must show the employability of the worker for a particular job or jobs following the successful treatment. Brooks v. Hobbs Mun. Schools, 101 N.M. 707, 688 P.2d 25 (Ct. App. 1984).

Showing necessary for court to reduce compensation. - Absent a showing that a repeat myelogram is essential to promote the plaintiff's recovery, the court cannot exercise its discretion in reducing or suspending the plaintiff's compensation where the plaintiff refused to submit to medical or surgical treatment. Aranda v. D.A. & S. Oil Well Servicing, Inc., 98 N.M. 217, 647 P.2d 419 (Ct. App. 1982).

Refusal to lose weight not refusal of medical treatment. - Where testimony of several doctors indicates that it is not "reasonably essential" for a workmen's compensation claimant to lose weight in order to promote his recovery, the claimant's failure to lose weight does not constitute a refusal to receive medical treatment such that compensation should be denied. Gonzales v. Bates Lumber Co., 96 N.M. 422, 631 P.2d 328 (Ct. App. 1981).

Right of refusal does not depend entirely on medical opinion. - This statute does not make the right of refusal to submit to medical treatment depend entirely upon medical opinion. Rhodes v. Cottle Constr. Co., 68 N.M. 18, 357 P.2d 672 (1960).

The question whether plaintiff acted reasonably or not in refusing an operation is a question of fact and the trial court is not limited to expert testimony in considering the question. Rhodes v. Cottle Constr. Co., 68 N.M. 18, 357 P.2d 672 (1960).

A workmen's compensation plaintiff's fear of a surgical procedure is evidence to be considered on the question of a reasonable refusal thereof but is not sufficient in itself to require a finding that refusal was reasonable. Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974).

But refusal of simple operation may reduce compensation. - When workman's incapacity can be removed by a simple surgical operation which does not involve serious suffering or danger but he refuses to undergo such treatment, compensation payment may be suspended or reduced. Fowler v. W.G. Constr. Co., 51 N.M. 441, 188 P.2d 160 (1947).

It is in the discretion of the court to reduce or suspend compensation if the workman shall refuse to submit to medical or surgical treatment as is reasonably essential to promote his recovery. Dudley v. Ferguson Trucking Co., 61 N.M. 166, 297 P.2d 313 (1956).

Where workman refuses to submit to medical or surgical treatment as is reasonably essential to promote his recovery, the court may in its discretion reduce or suspend his compensation. The matter is clearly one within the discretion of the trial court, but the discretion is judicial and subject to review by court of appeals. Evans v. Stearns-Rogers Mfg. Co. 253 F.2d 383 (10th Cir. 1958).

Where, although there was conflicting testimony, substantial evidence showed a "particular need" for a surgical procedure called a myelogram in order to diagnose, evaluate and determine the proper treatment for an injured workman's back injury, and that the risks involved were minimal, the court of appeals held that defendants had met their burden of proving that refusal to undergo the procedure was arbitrary and unreasonable and affirmed the lower court's reduction of compensation. Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974).

An injured workman will be denied compensation for an incapacity which may be removed or modified by an operation of a simple character, not involving serious suffering or danger. A refusal to undergo an operation under such circumstances is deemed unreasonable. Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974).

Where evidence indicated that proposed surgery to claimant's injured heel to reduce the percentage of his disability would not be dangerous to life or limb, claimant's refusal to

undergo the operation was not reasonable and an order reducing the compensation awarded him was justified. Fowler v. W.G. Constr. Co., 51 N.M. 441, 188 P.2d 160 (1947).

Where evidence supported finding that injured workman had unreasonably refused to undergo a myelogram, the court of appeals held that the trial court did not err in reducing his compensation to 15%, the amount of disability which it was testified he would probably continue to have after undergoing the myelogram and the treatment indicated by the results thereof. Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974).

Lower court order, involving surgery for removal of a herniated vertebrae in which the injured workman's refusal to submit to corrective surgery was permitted, to reduce the amount of his award was held to be erroneous and an abuse of discretion. Evans v. Stearns-Roger Mfg. Co. 253 F.2d 383 (10th Cir. 1958).

Where a myelogram was needed to aid in determining whether a disc problem existed and, if so, at what level, but it was not known what treatment, if any, would be indicated by the myelogram and, thus, not known what surgery, if any, would be indicated, the trial court's decision to reduce compensation if a myelogram is performed and plaintiff refuses the treatment indicated, if any, had no basis other than speculation, and was reversed by the court of appeals. Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974).

Retaining jurisdiction to change compensation after results of surgery. - Trial court did not err in directing that if appellant agreed, defendants should furnish operation to alleviate effects of residual disability and in retaining jurisdiction to increase compensation payments if justified after the results of the surgery could be appraised, as such an order was provided for in this section. Yanez v. Skousen Constr. Co., 78 N.M. 756, 438 P.2d 166 (1968).

Aggravation or extension of injury not compensable. - The rule requiring injured workmen to submit to surgical treatment reasonably essential to their recovery is but an adaptation of the familiar principle that aggravation or extension of an injury is not compensable, or that one may not recover for an aggravation of an injury caused by his own act. Evans v. Stearns-Roger Mfg. Co. 253 F.2d 383 (10th Cir. 1958).

Provision relating to privileged communication with physician. - Plaintiff's contention that an examining doctor's testimony was not admissible at trial because of the provisions of 38-6-6 NMSA 1978 as that section was worded prior to its amendment by Laws 1973, ch. 223, § 1, was without merit since the record indicated that defendants sought and paid for the examination. Therefore, the provisions in this section controlled. Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974).

Myelogram in nature of surgical procedure. - Where the evidence supports the inference that a certain procedure called a myelogram would be performed in a hospital and

would require both a surgeon and a radiologist, the courts of appeals considered myelography to be in the nature of a surgical procedure. Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974).

A myelogram is a standard surgical procedure that would assist doctors in discovering the source of plaintiff's illness or sickness. Aranda v. D.A. & S. Oil Well Servicing, Inc., 98 N.M. 217, 647 P.2d 419 (Ct. App. 1982).

Operation for laminectomy cannot be categorized as "simple" one to which no risk of life or limb attaches. Evans v. Stearns-Roger Mfg. Co. 253 F.2d 383 (10th Cir. 1958).

Not improper where plaintiff's attorneys involved in malpractice against doctor. - Where a certain doctor examined and evaluated plaintiff at the request of plaintiff's first attorney, who withdrew from the case at an early stage, and defendants deposed him, and subsequently on motion of the defendants, the trial court ordered a second examination by this doctor who then testified at trial over plaintiff's objection, it was held that the reexamination and reevaluation was not improperly authorized by the trial court merely because plaintiff's attorneys at trial were involved in a medical malpractice action against the doctor, and the record did not show that the trial court abused its discretion in so ordering. Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974).

Failure to provide copy of report held not prejudicial. - Failure to provide claimant's counsel with a copy of a physician's independent medical report did not require reversal, where claimant never requested a copy of the report and there was no prejudice to claimant in not having it before trial. Sanchez v. National Elec. Supply Co., 105 N.M. 97, 728 P.2d 1366 (Ct. App. 1986).

Continuance not required by failure to furnish claimant with copy of report. - Although Subsection G requires the claimant be furnished with a copy of the report, failure to comply does not automatically require a continuance. Sanchez v. National Elec. Supply Co., 105 N.M. 97, 728 P.2d 1366 (Ct. App. 1986).

Law reviews. - For comment, "Witnesses - Privileged Communications - Physician-Patient Privilege in Workmen's Compensation Cases," see 7 Nat. Resources J. 442 (1967).

For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 457, 458.
99 C.J.S. Workmen's Compensation § 318; 100 C.J.S. Workmen's Compensation §§ 484, 485, 537.

§ 52-1-52. Exemption from creditors.

A. Compensation benefits shall be exempt from claims of creditors and from any attachment, garnishment or execution and shall be paid only to such worker or his personal representative or such other persons as the court may, under the terms hereof, appoint to receive or collect compensation benefits.

B. Notwithstanding the provisions of Subsection A of this section, compensation benefits being paid or owing to a worker shall be considered wages for the purpose of securing support for a minor dependent. No order may be entered against such benefits which results in the worker retaining less than one hundred dollars ($100) a week or an amount each week equal to forty times the federal minimum wage rate if legally required to support minor dependents other than those for whom the action is brought.

History: Laws 1929, ch. 113, § 20; C.S. 1929, § 156-120; 1941 Comp., § 57-921; 1953 Comp., § 59-10-21; Laws 1983, ch. 78, § 1; 1984, ch. 95, § 1; 1989, ch. 263, § 31.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes throughout the section.

Section not unconstitutional on either due process or equal protection grounds. Pedrazza v. Sid Fleming Contractor, 94 N.M. 59, 607 P.2d 597 (1980).

Dependent residing outside country at time of injury barred from common-law remedies. - Resident dependents residing outside the United States at the time of the worker's injury are barred from pursuing their common-law remedies due to the exclusive remedy provisions under the Workmen's Compensation Act. Kent Nowlin Constr. Co. v. Gutierrez, 99 N.M. 389, 658 P.2d 1116 (1982), appeal dismissed, 462 U.S. 1126, 103 S. Ct. 3104, 77 L. Ed. 2d 1359 (1983).

Domicile of child conceived before father's injury is domicile of mother at time of child's birth. - Where the mother of an accident victim's illegitimate unborn child returned to Mexico following the accident but before the child's birth, the child is domiciled in Mexico and is not a "resident of the United States at the time of the injury." Gomez v. Snyder Ranch, 101 N.M. 44, 678 P.2d 219 (Ct. App. 1983).

Temporary residence in foreign country. - Where the employee's wife moved to Mexico, at her husband's direction, to take care of his mother, without any legal separation and in readiness to return whenever called, and remained there until his death, she is not precluded by this section from receiving compensation for his death. Gallup Am. Coal Co. v. Lira, 39 N.M. 496, 50 P.2d 430 (1935).

Bankruptcy debtor's checking account containing proceeds exempt. - Debtor's checking account, consisting of the proceeds of the settlement of the workmen's compensation

claim, may be exempted from claims of creditors under this section. Waldman v. Nolen, 65 Bankr. 1014 (Bankr. D.N.M. 1986).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31 Am. Jur. 2d Exemptions §§ 16, 117, 124; 81 Am. Jur. 2d Workmen's Compensation § 214.
Workers' compensation: incarceration as terminating benefits, 54 A.L.R.4th 241.
99 C.J.S. Workmen's Compensation §§ 330, 343.

§ 52-1-53. [Accident prevention laws not affected.]

Nothing in this act [Chapter 52, Article 1 NMSA 1978] contained shall repeal any existing law providing for the installation or maintenance of any device, means or method for the prevention of accidents in any occupational pursuit.

History: Laws 1929, ch. 113, § 21; C.S. 1929, § 156-121; 1941 Comp., § 57-922; 1953 Comp., § 59-10-22.

§ 52-1-54. Fee restrictions; appointment of attorneys by the director or workers' compensation judge; penalty for violations.

A. It shall be unlawful for any person to receive or agree to receive any fees or payment directly or indirectly in connection with any claim for compensation under the Workers' Compensation Act [this article] except as provided in this section.

B. In all cases where the jurisdiction of the workers' compensation division is invoked to approve a settlement of a compensation claim under the Workers' Compensation Act, the director or workers' compensation judge, unless the claimant is represented by an attorney, may in his discretion appoint an attorney to aid the workers' compensation judge in determining whether the settlement should be approved and, in the event of an appointment, a reasonable fee for the services of the attorney shall be fixed by the workers' compensation judge subject to the limitation of Subsection G of this section.

C. In all cases where the jurisdiction of the workers' compensation division is invoked to approve a settlement of a compensation claim under the Workers' Compensation Act and the claimant is represented by an attorney, the total amount paid or to be paid by the employer in settlement of the claim shall be stated in the settlement papers. The workers' compensation judge shall determine and fix a reasonable fee for claimant's attorney, taking into account any sum previously paid, and the fee fixed by the workers' compensation judge shall be the limit of the fee received or to be received by the attorney in connection with the claim subject to the limitation of Subsection G of this section.

D. In all cases where compensation to which any person is entitled under the provisions of the Workers' Compensation Act is refused and the claimant shall thereafter collect compensation through proceedings before the workers' compensation division or courts in an amount in excess of the amount offered in writing by an employer five business days or more prior to the informal hearing before the division, then the compensation to be paid the attorney for the claimant shall be fixed by the workers' compensation judge hearing the claim or the courts upon appeal in the amount the workers' compensation judge or courts deem reasonable and proper subject to the limitation of Subsection G of this section. In determining and fixing a reasonable fee, the workers' compensation judge or courts shall take into consideration:

(1) the sum, if any, offered by the employer:

(a) before the worker's attorney was employed;

(b) after the attorney's employment but before proceedings were commenced; and

(c) in writing five business days or more prior to the informal hearing;

(2) the present value of the award made in the worker's favor; and

(3) the failure of a party or parties to participate in a good faith manner in informal claim resolution methods adopted by the director.

E. In all actions arising under the provisions of Section 52-1-56 NMSA 1978 where the jurisdiction of the workers' compensation division is invoked to determine the question whether the claimant's disability has increased or diminished and the claimant is represented by an attorney, the workers' compensation judge or courts upon appeal shall determine and fix a reasonable fee for the services of the claimant's attorney only if the claimant is successful in establishing that his disability has increased or if the employer is unsuccessful in establishing that the claimant's disability has diminished. The fee when fixed by the workers' compensation judge or courts upon appeal shall be the limit of the fee received or to be received by the attorney for services in the action subject to the limitation of Subsection G of this section.

F. In determining reasonable attorneys' fees, the workers' compensation judge shall consider only those benefits to the worker that the attorney is responsible for securing. The value of future medical benefits shall not be considered in determining attorneys' fees.

G. 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.

H. The payment of attorneys' fees determined under this section shall be shared by the worker and the employer, with the worker paying one-fourth of the amount and the employer paying three-fourths of the amount.

I. It is unlawful for any person except a licensed attorney to receive or agree to receive any fee or payment in connection with any claim for compensation under the Workers' Compensation Act.

J. Nothing in this section applies to attorneys or agents representing employers or insurance carriers in any matter arising from a claim under the Workers' Compensation Act.

K. Every person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars ($50.00) or more than five hundred dollars ($500), to which may be added imprisonment in the county jail for a term not exceeding ninety days.

L. Nothing in this section shall restrict a claimant from being represented before the workers' compensation division by a nonattorney as long as that nonattorney receives no compensation for such representation from the claimant.

History: 1978 Comp., § 52-1-54, enacted by Laws 1987, ch. 235, § 24; 1989, ch. 263, § 32.

Repeals and reenactments. - Laws 1987, ch. 235, § 24 repealed former 52-1-54 NMSA 1978, as reenacted by Laws 1986, ch. 22, § 18 concerning attorney's fees, cost, penalties for violation, and enacted a new 52-1-54 NMSA 1978, effective June 19, 1987. For provisions of former section see 1986 Cumulative Supplement.

The 1989 amendment, effective June 16, 1989, substituted "worker's compensation judge" for "hearing officer" in the catchline and throughout the section, added Subsection D(3), substituted "workers' compensation division" for "administration" throughout the section, and made minor stylistic changes throughout the section.

Compiler's notes. - Laws 1987, ch. 235, § 54A, effective June 19, 1987, repealed Laws 1986, ch. 22, § 105 which had formerly repealed this section effective July 1, 1987.

Provision does not violate due process clause. - Provision for allowance of reasonable attorney's fee does not violate the due process clauses of the federal and state constitutions. New Mexico State Hwy. Dep't v. Bible, 38 N.M. 372, 34 P.2d 295 (1934).

Section should be applied to ensure adequate compensation of workmen's compensation claimants but avoid excessive legal fees. Superintendent of Ins. v. Mountain States Mut. Cas. Co., 104 N.M. 605, 725 P.2d 581 (Ct. App. 1986).

Law in effect at time of injury governs award. - There is no reason to distinguish an award of attorney's fees from any other benefit to which a claimant is entitled, and the law in effect at the time of a claimant's injury, rather than the law in effect at the time of the award of compensation benefits, applies to a determination of the claimant's attorney's fees. Bateman v. Springer Bldg. Materials Corp., 108 N.M. 655, 777 P.2d 383 (Ct. App. 1989).

Acceptance of hearing officer's resolution as settlement offer. - Hearing officer's recommended resolution, which was accepted by the employer, was properly considered as an offer of settlement within the meaning of the statute. Davis v. Los Alamos Nat'l Lab., 108 N.M. 587, 775 P.2d 1304 (Ct. App. 1989).

This section is not based on contingent fee standard, but as the trial court did take into consideration in fixing a reasonable fee the sum offered by the defendants and the present value of the award made in the workman's favor, then amount awarded as attorney's fee was not an abuse of discretion. Trujillo v. Tanuz, 85 N.M. 35, 508 P.2d 1332 (Ct. App. 1973).

Award of attorney's fee is authorized in each case, and the award is for an amount the trial court deems reasonable and proper. The amount awarded will not be disturbed except for an abuse of discretion. Salazar v. Kaiser Steel Corp., 85 N.M. 254, 511 P.2d 580 (Ct. App.), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973).

An attorney for claimant in prosecuting claimant's suit through the lower court and supreme court is entitled to an allowance for compensation in addition to the compensation awarded claimant. Points v. Wills, 44 N.M. 31, 97 P.2d 374 (1939).

Where injured employee notified his employer of injury within time prescribed by law, and the employer paid compensation for a short period of time, and thereafter refused to pay further compensation, employee, filing and being allowed claim for such further compensation, was entitled to attorney's fee for trial in district court. Wells v. Gulf Ref. Co., 42 N.M. 378, 79 P.2d 921 (1938).

When it is determined by the court, from the evidence before it, that a claimant is legally entitled to benefits which have been refused him and a recovery thereof is allowed, the court is authorized under the section to award attorney fees to the claimant and the

award for the services of appellee's attorneys, though not supported by direct evidence, must stand. Scott v. Transwestern Tankers, Inc., 73 N.M. 219, 387 P.2d 327 (1963).

Attorney's fees awarded even though employer does not appeal. - The statutory authority to award attorney's fees exists even though the employer is satisfied with the trial court judgment and an unsuccessful claimant appeals in an effort to obtain a part of the compensation awarded to a successful claimant. Aragon v. Anaconda Mining Co., 98 N.M. 65, 644 P.2d 1054 (Ct. App. 1982).

Attorney fees can be awarded in suit for medical expenses only. Minnerup v. Stewart Bros. Drilling Co., 93 N.M. 561, 603 P.2d 300 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1979).

Amount of fees to be fixed and allowed by court is discretionary. Mascarenas v. Kennedy, 74 N.M. 665, 397 P.2d 312 (1964).

The award of attorney's fees in a workmen's compensation case is discretionary with the court. Herndon v. Albuquerque Pub. Schools, 92 N.M. 287, 587 P.2d 434 (1978).

The amount of the award is within the sound discretion of the trial court. Manzanares v. Lerner's, Inc., 102 N.M. 391, 696 P.2d 479 (1985); Smith v. Trailways, Inc., 103 N.M. 741, 713 P.2d 557 (Ct. App. 1986).

"Present value of the award" means value computed as of date of award to the workman. Davis v. Homestake Mining Co., 105 N.M. 2, 727 P.2d 941 (Ct. App. 1986).

Attorney's fees are not "compensation" for the purpose of allowing attorney fees. Archuleta v. Safeway Stores, Inc., 104 N.M. 769, 727 P.2d 77 (Ct. App. 1986).

Award is not to be set at a specific percentage of the recovery. Candelaria v. General Elec. Co., 105 N.M. 167, 730 P.2d 470 (Ct. App. 1986).

Award for double representation (i.e., by two attorneys) was impermissible under this section which speaks of "attorney" in the singular. While there is no restriction on the number of attorneys a worker may engage, a reasonable fee will be allowed only for single representation. Archuleta v. Safeway Stores, Inc., 104 N.M. 769, 727 P.2d 77 (Ct. App. 1986).

Fee based on facts existing when services rendered. - As a general matter, the claimant's attorney's fee should be based on the facts as to his services in the compensation case as of the time the services were rendered, and should not be at the mercy of subsequent or collateral events over which he has no control. Davis v. Homestake Mining Co., 105 N.M. 2, 727 P.2d 941 (Ct. App. 1986).

Claim initiation is court "proceeding". - Initiation of a claim for workman's compensation benefits is a court "proceeding." Rumpf v. Rainbo Baking Co., 96 N.M. 1, 626 P.2d 1303 (Ct. App. 1981).

Guidelines to determine amount to award for attorney's fees in workmen's compensation cases include the following considerations: the chilling effect of miserly fees upon the ability of an injured workman to obtain adequate representation; the fees normally charged in the locality for similar legal services; and the amount involved. Fryar v. Johnsen, 93 N.M. 485, 601 P.2d 718 (1979).

In arriving at a proper attorney fee, it is proper for a trial court to consider the amount of the compensation award, and to use a percentage of that award as one factor, along with the requirements of this section and the Fryar factors, i.e., (1) the chilling effect of miserly fees upon the ability of an injured workman to obtain adequate representation; (2) the time and effort expended by the attorney; (3) the extent to which the issues were contested; (4) the novelty and complexity of the issues involved; (5) the fees normally charged in the locality for similar legal services; (6) the ability, experience, skill and reputation of the attorney; (7) the relative success of the workman in the court proceeding; (8) the amount involved; and (9) the rate of inflation. Woodson v. Phillips Petroleum Co., 102 N.M. 333, 695 P.2d 483 (1985).

Factors in determining attorney's fees. - In addition to those stated in Subsection D of this section, factors to be considered in awarding attorney's fees include the length of the transcript of the proceedings in the trial court, the amount of the award and the results. Gearhart v. Eidson Metal Prods., 92 N.M. 763, 595 P.2d 401 (Ct. App. 1979).

In determining the amount to award for attorney's fees in workmen's compensation cases the courts consider the following factors: the relative success of the workman in the court proceedings; the extent to which the issues were contested; the complexity of the issues; the ability, standing, skill and experience of the attorney; the rise in the cost of living; and the time and effort expended by the attorney in the particular case. Fryar v. Johnsen, 93 N.M. 485, 601 P.2d 718 (1979); Gonzales v. Bates Lumber Co., 96 N.M. 422, 631 P.2d 328 (Ct. App. 1981).

In most instances, a lawyer's skill, ability, experience and standing in the legal community, and the rising cost of living, as well as other recognized factors may be judicially noticed in fixing an attorney's fee in a workmen's compensation case. Woodson v. Phillips Petroleum Co., 102 N.M. 333, 695 P.2d 483 (1985).

Length of disability to be considered. - In determining the amount of the proper award of attorney fees, the trial court should calculate the award in part upon the evidence in the case indicating whether there is a likelihood that the disability will extend beyond a six-month period. Amos v. Gilbert W. Corp., 103 N.M. App. 631, 711 P.2d 908 (1985).

Amount of recovery is one of factors to be considered in determining the amount of the fee to be allowed to the attorney for the claimant. Seal v. Blackburn Tank Truck Serv., 64 N.M. 282, 327 P.2d 797 (1958).

The amount of the award of attorney's fees is discretionary with the trial court, and in exercising that discretion, the trial court must consider the mandatory provisions of Subsection D. Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974).

The award of attorney fees is discretionary with the trial court and will not be disturbed except for abuse of discretion. Adams v. Loffland Bros. Drilling Co., 82 N.M. 72, 475 P.2d 466 (Ct. App. 1970); Pacheco v. Alamo Sheet Metal Works, Inc., 91 N.M. 730, 580 P.2d 498 (Ct. App. 1978); Gearhart v. Eidson Metal Prods., 92 N.M. 763, 595 P.2d 401 (Ct. App. 1979); Marez v. Kerr-McGee Nuclear Corp., 93 N.M. 9, 595 P.2d 1204 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

And will not be disturbed except for abuse of discretion. - Amount of the award of attorney fees is discretionary with the trial court, and will not be disturbed except for abuse of discretion. Ortega v. New Mexico State Hwy. Dep't, 77 N.M. 185, 420 P.2d 771 (1966); Lamont v. New Mexico Military Inst., 92 N.M. 804, 59 P.2d 774 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

No abuse of discretion. - Awarding to plaintiff $1000 as an attorney's fee pursuant to this section does not shock the conscience of the court and was no abuse of discretion. Trujillo v. Tanuz, 85 N.M. 35, 508 P.2d 1332 (Ct. App. 1973).

The award of attorney's fees is discretionary and will not be disturbed in the absence of an abuse of discretion. Where, although the trial may have been short and the issues not complex, disability was thoroughly contested, and in addition, counsel gained very substantial results for the claimant, the appellate court would not say as a matter of law, that the $4250 awarded claimant as attorney's fees, based on 15% of his total recovery, was an abuse of discretion. Gallegos v. Duke City Lumber Co., 87 N.M. 404, 534 P.2d 1116 (Ct. App. 1975).

Where the record in this case shows a hearing on defendants' motion for summary judgment and two trials and the proceedings show the claim was contested on the issues of employment in New Mexico, filing of the claim within the proper time, the extent of disability and the recovery for certain medical bills, there was no abuse of discretion by the trial court in setting the attorney fee at $2600 with an additional award to plaintiff of $1000 for the services of his attorney in representing him in this appeal. Reed v. Fish Eng'r Corp., 76 N.M. 760, 418 P.2d 537 (1966).

Award of compensation affirmed, and an additional award was given to plaintiff of $1250 for the services of his attorney in this appeal. Quintana v. East Las Vegas Mun. School Dist., 82 N.M. 462, 483 P.2d 936 (Ct. App. 1971); Brown v. Safeway Stores, Inc., 82 N.M. 424, 483 P.2d 305 (Ct. App. 1970).

Hearing officer did not abuse his discretion in refusing to award attorney's fees in a lump sum payable by the employer and, instead, awarding attorney's fees to be paid out of the claimant's bi-weekly compensation. Strong v. Sysco Corporation/Nobel Sysco, 108 N.M. 639, 776 P.2d 1258 (1989).

Attorney's time spent and effort expended relevant but not dispositive. - The time spent and the effort expended by the attorney, while relevant, is not always dispositive of the amount of attorney fees to be awarded. Fryar v. Johnsen, 93 N.M. 485, 601 P.2d 718 (1979).

An award of attorney's fees may not be based solely on the amount of time the plaintiff's attorney has expended on the litigation. Jennings v. Gabaldon, 97 N.M. 416, 640 P.2d 522 (Ct. App. 1982).

Amount of work expended by attorney not determinative factor in fixing a reasonable attorney's fee. Marez v. Kerr-McGee Nuclear Corp., 93 N.M. 9, 595 P.2d 1204 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

But failure to consider work performed abuse of discretion. - Although the amount of work performed by an attorney is not determinative of the amount of his fee, the failure to consider the work performed is an abuse of discretion. Lamont v. New Mexico Military Inst., 92 N.M. 804, 595 P.2d 774 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Even if case is settled before trial, attorney is entitled to adequate compensation for work necessarily done on the case. Woodson v. Phillips Petroleum Co., 102 N.M. 333, 695 P.2d 483 (1985).

Effect of ambiguity in defendant's written offer. Where the defendant makes a written offer of settlement more than 30 days prior to trial, but there is ambiguity in the offer concerning medical expenses and weaseling in the offer concerning attorney fees, it cannot be later held that the plaintiff failed to collect compensation in excess of the amount offered. Aguilar v. Penasco Indep. School Dist. No. 6, 100 N.M. 625, 674 P.2d 515 (1984).

Factors not included in section for determining attorney's fees. - Subsection D does not include among those considerations for determining a reasonable attorney's fee the amount of work expended by a claimant's attorney, the novelty and difficulty of the issues involved nor the amount of work performed. Lamont v. New Mexico Military Inst., 92 N.M. 804, 595 P.2d 774 (Ct. App.), cert. denied, 92 N.M. 674, 593 P.2d 1078 (1979).

Determination of present value for purposes of Subsection D(2) is not controlled by the five percent reference of 52-1-30B NMSA 1978. Johnsen v. Fryar, 96 N.M. 323, 630 P.2d 275 (Ct. App. 1980).

Possibility of future reduction in benefits cannot be feasible consideration in the award of attorney fees since such a possibility cannot always be anticipated. Marez v. Kerr-McGee Nuclear Corp., 93 N.M. 9, 595 P.2d 1204 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

Fees awarded only when award of compensation. - Plaintiff's request for an award of attorney's fees is premature as attorney's fees are awarded only when there has been an award of compensation and at this point there is no such award. Ortiz v. Ortiz & Torres Dri-Wall Co., 83 N.M. 452, 493 P.2d 418 (Ct. App. 1972).

Medical and hospital expenses are compensation for purpose of allowing attorney's fees under Subsection D. Schiller v. Southwest Air Rangers, Inc., 87 N.M. 476, 535 P.2d 1327 (1975).

Attorneys' fees may only be awarded when there has been recovery of compensation by the claimant. Employers Mut. Liab. Ins. Co. v. Jarde, 73 N.M. 371, 388 P.2d 382 (1963).

The allowance of attorney fees is limited to recovery of compensation and an appellant who has failed to sustain his claim is not entitled to a fee, in addition to the amount allowed by the trial court, by reason of the appeal. Rowland v. Reynolds Elec. Eng'r Co., 55 N.M. 287, 232 P.2d 689 (1951).

The recovery of compensation is a prerequisite to the allowance of attorneys' fees. Sisneros v. Breese Indus., Inc., 73 N.M. 101, 385 P.2d 960 (1963).

Plaintiff's attorney in workmen's compensation proceeding is not entitled to an attorney fee unless compensation is recovered herein. Geeslin v. Goodno, Inc., 75 N.M. 174, 402 P.2d 156 (1965).

Where the supreme court reverses a holding by the trial court that a claim under the Workmen's Compensation Act is premature, no attorney's fees can be granted the appellant for his appeal if no award has yet been made. Magee v. Albuquerque Gravel Prods. Co., 65 N.M. 314, 336 P.2d 1066 (1959).

Recovery of compensation is a prerequisite to the allowance of attorneys' fees. Witt v. Marcum Drilling Co., 73 N.M. 466, 389 P.2d 403 (1964); Morgan v. Public Serv. Co., 98 N.M. 775, 652 P.2d 1226 (Ct. App. 1982).

Until there has been an award of compensation at the trial court level, an allowance of attorney's fees in a workmen's compensation case is improper. Phelps Dodge Corp. v. Guerra, 92 N.M. 47, 582 P.2d 819 (1978).

The award of attorney's fees must be predicated upon a successful recovery by the claimant of workmen's compensation or other medical or related benefits to which the

workman is entitled. Montoya v. Anaconda Mining Co., 97 N.M. 1, 635 P.2d 1323 (Ct. App. 1981).

Although formal award of compensation not required. - A formal award of compensation by the trial court is not required before attorney's fees are appropriate. So long as the claimant receives compensation due to the services performed by his attorney, such as initiating a claim for benefits after payments are refused by the employer, the claimant is entitled to an award of reasonable attorney's fees. Rumpf v. Rainbo Baking Co., 96 N.M. 1, 626 P.2d 1303 (Ct. App. 1981).

Not allowed unless recovery exceeds amount tendered. - An attorney's fee shall not be allowed unless the recovery in court "exceeds the amount tendered by the employer prior to court proceedings." Rhodes v. Cottle Constr. Co., 68 N.M. 18, 357 P.2d 672 (1960).

Where the employer and carrier, 30 days or more prior to trial, offered to compromise and settle plaintiff's claim for the sum of $2420.48, which sum was to include attorney's fees, which offer was declined, and subsequently the trial court found that plaintiff was entitled to receive $2420.38 for doctor and hospital fees and 22 weeks of compensation, it was held that the amount offered was not the same as the amount received, since plaintiff's attorney's fee would have to be deducted therefrom, and consequently, plaintiff should have been granted an award of reasonable attorney's fees consistent with the law. Bennett v. Lane Plumbing Co., 89 N.M. 790, 558 P.2d 59 (Ct. App. 1976).

Award of attorneys' fees should have run to claimant and not to attorneys. Scott v. Transwestern Tankers, Inc., 73 N.M. 219, 387 P.2d 327 (1963).

Judgment of attorneys' fees by the court runs to the claimant but such award of attorney's fees is for claimant's attorney. Reed v. Styron, 69 N.M. 262, 365 P.2d 912 (1961).

No fee where no increase in compensation. - Where plaintiff was successful in removing a limitation upon compensation benefits and successful in requiring a remand for a decision concerning compensation benefits from the time compensation was terminated until the date of entry of judgment, but these two successes did not yet increase his compensation, no attorney's fees were awarded for these two items on appeal; for two other successful points of appeal which resulted in a financial benefit to plaintiff, he was awarded attorney's fees in the amount of $1500. Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974).

Since the plaintiff recovered less than the amount offered in settlement the trial court properly held that he is not entitled to an attorney's fee. Hales v. Van Cleave, 78 N.M. 181, 429 P.2d 379 (Ct. App.), cert. denied, 78 N.M. 198, 429 P.2d 657 (1967); Davis v. Los Alamos Nat'l Lab., 108 N.M. 587, 775 P.2d 1304 (Ct. App. 1989).

Where appellee offered the exact amount for which judgment was subsequently

entered, the court had no power under the section to grant attorneys' fees. Lee v. United States Fid. & Guar. Co., 66 N.M. 351, 348 P.2d 271 (1960).

Where no final judgment has been previously rendered, attorney's fees for hearing resulting in judgment reducing previously stipulated disability are controlled by Subsection D rather than Subsection E of this section. Turrieta v. Creamland Quality Chekd Dairies, Inc., 77 N.M. 192, 420 P.2d 776 (1966).

Subsection E is restricted in its effect to proceedings seeking either reduction or increase of disability payments subsequent to the entry of judgment in a compensation case pursuant to 52-1-56 NMSA 1978. Turrieta v. Creamland Quality Chekd Dairies, Inc., 77 N.M. 192, 420 P.2d 776 (1966).

Where record showed settlement offers made to plaintiff both before suit was filed and prior to trial, there was nothing showing the trial court failed to consider the mandatory provisions of this section. Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974).

Evidentiary basis must support an award of attorney's fees. Jennings v. Gabaldon, 97 N.M. 416, 640 P.2d 522 (Ct. App. 1982).

An award of fees must have evidentiary support. Candelaria v. General Elec. Co., 105 N.M. 167, 730 P.2d 470 (Ct. App. 1986).

Where plaintiff's attorneys submitted statements of services rendered, this was "evidentiary support" for the award of attorneys fees in a workmen's compensation case. Lopez v. K.B. Kennedy Eng'r Co., 95 N.M. 507, 623 P.2d 1021 (Ct. App. 1981).

Attorneys' affidavits of services rendered, the trial court's first-hand knowledge of the attorneys' work on the issues and proceedings, and the outcome of that work are sufficient evidentiary support for an award under this section. Gonzales v. Bates Lumber Co., 96 N.M. 422, 631 P.2d 328 (Ct. App. 1981).

Trial court's consideration of plaintiff's motion. - Where certain nonmandatory items relied on by plaintiff were presented to the trial court by motion some two and one half months before the trial court's letter opinion awarding $1500 as attorney's fees, it could not be said as a matter of law that the trial court failed to consider plaintiff's motion or that it failed to give proper weight, under the law, to the items listed in the motion. Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974).

Where employer had terminated compensation and medical services, and both were obtained through court proceedings at which counsel represented claimant, there was no evidence of an abuse of discretion by the trial court in awarding attorney's fees of $4500. Provencio v. New Jersey Zinc Co., 86 N.M. 538, 525 P.2d 898 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Amount of attorney's fees awarded is reviewable only for an abuse of discretion under this section. Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974).

Even when made pursuant to Subsection D, the attorney's fee award is reviewable for abuse of discretion. Provencio v. New Jersey Zinc Co., 86 N.M. 538, 525 P.2d 898 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Record showed attorney's services. - Where, although plaintiff never offered any specific or detailed evidence of services performed by his attorney, a reading of the record clearly showed the attorney prepared the complaint for plaintiff, took depositions and represented plaintiff in the trial of the case, and the record failed to show an offer of settlement, and recovery was effected by plaintiff, plaintiff was entitled to recover attorney's fees. Brannon v. Well Units, Inc., 82 N.M. 253, 479 P.2d 533 (Ct. App. 1970).

Refusal to award attorney's fees not error. - Where there is no dispute as to defendants' liability for medical prescriptions, and where there is no evidence that, in advance of the hearing, defendants were asked to pay or refused to pay for such prescriptions, the trial court does not err in refusing to award attorney's fees. Tafoya v. Leonard Tire Co., 94 N.M. 716, 616 P.2d 429 (Ct. App. 1980).

Review of reasonableness of fees precluded where defendants failed to request findings of fact. - Where defendants failed to request findings of fact, conclusions of law and failed to include any evidence in the record on attorney's fees, this precluded review of the question of the reasonableness of the fees awarded in the trial court. Lopez v. K.B. Kennedy Eng'r Co., 95 N.M. 507, 623 P.2d 1021 (Ct. App. 1981).

Attorney's fees recoverable as separate award. - In workmen's compensation suits, attorney's fees awarded for successful representation of injured claimants are recoverable against the employer as a separate and distinct award, apart from the workman's award. Brazfield v. Mountain States Mut. Cas. Co., 93 N.M. 417, 600 P.2d 1207 (Ct. App.), cert. denied, 93 N.M. 205, 598 P.2d 1165 (1979).

Attorney fees not taxed as costs. - This section requires attorney fees to be compensation and not taxed as costs. Genuine Parts Co. v. Garcia, 92 N.M. 57, 582 P.2d 1270 (1978).

Separate hearing on the issue of attorneys' fees is permissible, but not required. Morgan v. Public Serv. Co., 98 N.M. 775, 652 P.2d 1226 (Ct. App. 1982); Sanchez v. Homestake Mining Co., 102 N.M. 473, 697 P.2d 156 (Ct. App. 1985).

Fee based on percentage of final award. - An appellate court cannot say as a matter of law that the trial court abused its discretion merely because its award of attorney's fees was based on a percentage figure of the final award. Marez v. Kerr-McGee Nuclear Corp., 93 N.M. 9, 595 P.2d 1204 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

In calculating proper attorney's fees, the trial court may not base the award on a flat percentage of the total net award. Jennings v. Gabaldon, 97 N.M. 416, 640 P.2d 522 (Ct. App. 1982).

A trial court is not to base attorney's fees purely upon some percentage of the workman's recovery, but neither is a trial court prohibited from using a percentage of the recovery as a factor in its determination of what shall constitute a reasonable fee. Woodson v. Phillips Petroleum Co., 102 N.M. 333, 695 P.2d 483 (1985).

Award held not excessive. - An award of $15,000 in attorney fees, which was about 23% of the compensation award, was not excessive. Candelaria v. General Elec. Co., 105 N.M. 167, 730 P.2d 470 (Ct. App. 1986).

Medical expenses are compensation for purposes of determining award of attorney's fees. Such expenses, however, are those that have already occurred, not expenses that might occur in the future. Board of Educ. v. Quintana, 102 N.M. 433, 697 P.2d 116 (1985).

Determination of present value of award. - In computing the present value of a workmen's compensation award as a factor in determining attorney's fees, the five percent discount rate mentioned in former 52-1-30B NMSA 1978 in calculating lump-sum awards was to be considered as a minimum level in the range of discount figures and not the ceiling. In computing the discount, the formula referred to in UJI Civ. 18.22 (now see Instruction 13-1822) was an appropriate standard. Jennings v. Gabaldon, 97 N.M. 416, 640 P.2d 522 (Ct. App. 1982).

Trial court must make specific findings as to each Fryar and statutory factor as to which there is evidentiary support in determining attorney's fees. Sanchez v. Homestake Mining Co., 102 N.M. 473, 697 P.2d 156 (Ct. App. 1985), citing Fryar v. Johnsen, 93 N.M. 485, 601 P.2d 718 (1979).

Counsel's statement of hours spent on case as basis for finding. - Whether a statement of counsel as to the number of hours spent on a case is sworn or not goes to the weight which should be accorded the statement, and to its admissibility; the fact that counsel's statement was not under oath should, like the fact that it was not corroborated by other evidence, affect the weight with which the statement is taken, but it does not make the statement an improper basis for a finding. Woodson v. Phillips Petroleum Co., 102 N.M. 333, 695 P.2d 483 (1985).

Attorney's fees on appeal are authorized if the employer refuses to pay compensation and the claimant thereafter collects compensation in the trial court. In this situation, attorney's fees may be awarded against the employer, both in the trial court and on appeal. Lauderdale v. Hydro Conduit Corp., 89 N.M. 579, 555 P.2d 700 (Ct. App. 1976).

The use of the phrase "or the supreme court upon appeal" in former Subsection D of

this section was merely a matter of legislative imprecision and was not meant to bar awards of attorney fees on appeal; rather, it was to be understood as though it read "and the supreme court upon appeal." Shahan v. Beasley Hot Shot Serv., Inc., 91 N.M. 462, 575 P.2d 1347 (Ct. App. 1978).

Fees on cross-appeal. - Where plaintiff claims attorney fees on appeal if he won the appeal proper or the cross-appeal, and where he received no additional compensation, he is not entitled to attorney fees on his appeal. However, where he has successfully defended against the cross-appeal, he is entitled to an attorney fee for such services. Willcox v. United Nuclear Homestake Sapin Co., 83 N.M. 73, 488 P.2d 123 (Ct. App. 1971).

Fees where only result of hearing was lump-sum award. - Where plaintiff made a demand for lump-sum settlement and the amount of compensation demanded was not in excess of what plaintiff was first awarded and plaintiff was already receiving maximum compensation, then although the sole result of the hearing was to lump-sum that amount, less discount, rather than pay over a period of 500 weeks award of employee's attorney's fee was not error. Livingston v. Loffland Bros., 86 N.M. 375, 524 P.2d 991 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974).

Excessive fee reduced. - Where the trial of the case consumed less than one day, the transcript contained 135 pages of which 103 consisted of the bill of exceptions, claimant testified and called three other witnesses and the defendants called one defense witness, a fee of $2500 was excessive and was reduced to $1750. Seal v. Blackburn Tank Truck Serv., 64 N.M. 282, 327 P.2d 797 (1958).

Considering the issues in the case, the length of the transcript of the proceedings in the trial court, together with the amount of the award and results achieved on behalf of appellee, there was an abuse of discretion and award of $3,000 attorney's fee was excessive to the extent of $1,000. Ortega v. New Mexico State Hwy. Dep't, 77 N.M. 185, 420 P.2d 771 (1966).

Award of fees even though prior judgment reduced. - A workman is entitled to an award of attorney's fees in connection with a hearing to modify a prior judgment allowing benefits, where the employer is unsuccessful in its claim that the workman no longer has any disability, even if the prior judgment is ordered reduced. Jaramillo v. Kaufman Plumbing & Heating Co., 103 N.M. 400, 708 P.2d 312 (1985).

Attorney's fees awarded under wrong statute. - Workers' compensation division's possible error in awarding attorney fees under the wrong statute does not make the award error for lack of jurisdiction. Tallman v. Arkansas Best Freight, 108 N.M. 124, 767 P.2d 363 (Ct. App. 1988).

Compromise not set aside due to ignorance of law change. - Where a compromise settlement has been reached without fraud or imposition, a party may not have that compromise set aside on the basis that he was ignorant of an antecedent change in the

general law which affects the matter which has been compromised as it is the policy of the law to favor compromise and settlement. Esquibel v. Brown Constr. Co., 85 N.M. 487, 513 P.2d 1269 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Oral stipulation for compromise in court binding as written agreement. - Where the record of the "settlement proceedings" before the trial court shows a settlement had been reached, shows the details of the settlement and the trial court's approval of that settlement, and the record shows the parties contemplated putting the terms of the settlement in a written agreement to be signed by the parties, but there is nothing showing the settlement was not to be effective until this was done, then an oral stipulation for the compromise and settlement of claims growing out of personal injuries made in open court in the presence of the parties and preserved in the record of the court is as binding as a written agreement. Esquibel v. Brown Constr. Co., 85 N.M. 487, 513 P.2d 1269 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Fee premature where case remanded for new trial. - Where an order reducing plaintiff's compensation under New Mexico Workmen's Compensation Act is appealed from and must be reversed and the cause remanded for a new trial on the application for diminution of the award for compensation, any pronouncement upon the question of attorney's fees is premature. Ennen v. Southwest Potash Co., 65 N.M. 307, 336 P.2d 1062 (1959).

Erroneous statement regarding cost of attorney. - If reference was erroneously made by claimant and his attorney to cost of employing counsel as explanatory of claimant's delay in bringing suit and as to reasonableness of claimant's failure to employ counsel during the negotiations, the error was cured by the court's direction to the jury to disregard statements about the attorney fees and similar matters. Elsea v. Broome Furn. Co., 47 N.M. 356, 143 P.2d 572 (1943).

Claimed prejudice must be clearly shown. - If prejudice is claimed as result of erroneous admission of evidence in the trial of a compensation claim the prejudice must be clearly shown or it will be considered that instruction to the jury to disregard the inadmissible evidence properly cured the error. Elsea v. Broome Furn. Co., 47 N.M. 356, 143 P.2d 572 (1943).

Additional fees where other rights determined. - An award to plaintiff of additional attorney's fees for services of his attorneys in this court is not limited to instances where those services produce increased compensation, but may be given where other rights, sometimes of equal importance, may be determined in his favor by virtue of the appeal. Mann v. Board of County Comm'rs, 58 N.M. 626, 274 P.2d 145 (1954).

Additional attorney's fees allowed where compensation increased. - To avoid a policy or a practice which would discourage representation or the taking of appeals where counsel feels that an injured workman has been aggrieved at the trial court level, and to preserve the right of an injured workman to have representation where the employer has appealed, an appellate court should allow additional attorney's fees where the

compensation award was also increased. Herndon v. Albuquerque Pub. Schools, 92 N.M. 287, 587 P.2d 434 (1978).

In an appeal, a workman has the right to seek an increase in compensation payments and if successful, he is entitled to payment of a reasonable attorney fee. Romo v. Raton Coca Cola Co., 96 N.M. 765, 635 P.2d 320 (Ct. App. 1981).

Or where right to compensation affirmatively determined. - For legal services rendered in an appeal which affirmatively determines plaintiff's right to payment of past compensation benefits and attorney fees, plaintiff is entitled to an additional attorney fee. Romo v. Raton Coca Cola Co., 96 N.M. 765, 635 P.2d 320 (Ct. App. 1981).

Or where additional legal services required by employer's actions. - If by conduct prior to an appeal, an employer causes additional legal services to be rendered in an appeal, separate and apart from the appeal itself, and the additional services rendered benefit the workman, the workman is entitled to an attorney fee for additional services rendered. Romo v. Raton Coca Cola Co., 96 N.M. 765, 635 P.2d 320 (Ct. App. 1981).

Attorney's fee deemed excessive. - Where the attorney for the plaintiff filed a motion to dismiss the appeal, a four-page memorandum brief in support of this motion and a 15-page answer brief, in which only 14 cases were cited, the fee of $14,435.75 is excessive to the extent of $1,500. Fryar v. Johnsen, 93 N.M. 485, 601 P.2d 718 (1979).

Award not allowed where based on unsuccessful claim for lump-sum award. - Where a demand for a lump-sum award has been refused and a claimant successfully obtains a lump-sum award in court proceedings, attorney's fees may be awarded. An attorney fee award based on an unsuccessful claim for a lump-sum award is erroneous because not authorized. Morgan v. Public Serv. Co., 98 N.M. 775, 652 P.2d 1226 (Ct. App. 1982).

Increase in disability. - Where a disability has increased in the sense that it will continue to the end of the period for which 52-1-42 NMSA 1978 allows compensation, three years longer than the district court last predicated, the plaintiff's disability has increased, within the meaning of Subsection E of this section. Martinez v. Ralph Johnson Rig, Inc., 91 N.M. 717, 580 P.2d 485 (Ct. App. 1978).

Fees for medical witnesses not assessed against defendant. - The court is not required to assess against the defendants the fees allowed any medical witness and like attorneys' fees, other fees and expenses must be borne by the parties themselves, in the absence of a statute shifting the incidence of such expenses. Hales v. Van Cleave, 78 N.M. 181, 429 P.2d 379 (Ct. App.), cert. denied, 78 N.M. 198, 429 P.2d 657 (1967).

Law reviews. - For comment on Johnson v. C & H Constr. Co., 78 N.M. 423, 432 P.2d 267 (Ct. App. 1967), see 8 Nat. Resources J. 522 (1968).

For survey, "Workmen's Compensation," see 6 N.M. L. Rev. 413 (1976).

For article, "Survey of New Mexico Law, 1979-80: Workmen's Compensation," see 11 N.M.L. Rev. 235 (1981).

For annual survey of New Mexico law relating to workmen's compensation, see 13 N.M.L. Rev. 495 (1983).

For article, "Survey on New Mexico Law, 1982-83: Workmen's Compensation," see 14 N.M.L. Rev. 211 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 437, 644 to 647.
Attorney's compensation for services in connection with claim under Workmen's Compensation Act, 159 A.L.R. 912.
101 C.J.S. Workmen's Compensation §§ 817 to 822.

§ 52-1-55. Physical examinations; statements regarding dependents; pre-employment physical condition statements.

A. It is the duty of the worker at the time of his employment or thereafter at the request of the employer to submit himself to examination by a physician or surgeon duly authorized to practice medicine in the state, who shall be paid by the employer, for the purpose of determining his physical condition.

B. It is also the duty of the worker, if required, to give the names, addresses, relationship and degree of dependency of his dependents, if any, or any subsequent change thereof to the employer, and when the employer or his insurance carrier requires, the worker shall make a detailed verified statement relating to such dependents, matters of employment and other information incident thereto.

C. It is also the duty of the worker, if requested by the employer or his insurance carrier, to make a detailed verified statement as part of an application for employment disclosing specifically any pre-existing permanent physical impairment as that term is defined in Section 52-2-6 NMSA 1978.

History: Laws 1929, ch. 113, § 23; C.S. 1929, § 156-123; 1941 Comp., § 57-924; 1953 Comp., § 59-10-24; 1987, ch. 235, § 25.

The 1987 amendment, effective June 19, 1987, designated the former two paragraphs as set out in the main pamphlet as Subsections A and B; substituted "worker" for "workman" and made minor changes in language and punctuation throughout those subsections; and added Subsection C.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 457, 458, 535.

§ 52-1-56. Diminution; termination or increase of compensation.

The workers' compensation judge may, upon the application of the employer, worker or other person bound by the compensation order, fix a time and place for hearing upon the issue of claimant's recovery. If it appears upon such hearing that diminution or termination of disability has taken place, the workers' compensation judge shall order diminution or termination of payments of compensation as the facts may warrant. If it appears upon such hearing that the disability of the worker has become more aggravated or has increased without the fault of the worker, the workers' compensation judge shall order an increase in the amount of compensation allowable as the facts may warrant. Hearings shall not be held more frequently than at six-month intervals. In the event the employer or other person upon whose application the hearing is had to diminish or terminate compensation is unsuccessful in diminishing or terminating the compensation previously awarded to the worker, the worker shall be entitled to recover from the applicant all reasonable and necessary expenses incidental to his attending the hearing, including the cost of travel, meals, lodging, loss of pay or other like direct expense together with his costs. If the worker has, prior to his application to the workers' compensation judge, made demand in writing to the employer or other person bound by the compensation order for examination as provided in Section 52-1-51 NMSA 1978 for the purpose of determining whether compensation should be increased and if the employer or other person bound by the compensation order has failed to provide the examination within a period of one month after receipt of the demand or, after the examination, has denied to the worker any increase in compensation, then if the worker is successful in obtaining an increase of compensation, he is entitled to recover from the employer or other person bound by the compensation order all reasonable and necessary expenses incidental to his attending the hearing, including the cost of travel, meals, lodging, loss of pay or other like direct expense together with his costs. The compensation of the worker as previously awarded shall continue while the hearing is pending. If the applicant decides to have the worker examined after he has come to the place of hearing pursuant to notice given, he shall pay the worker his expenses necessarily incurred in attending the hearing before the worker is required to submit to such examination, but such worker is not entitled to receive expense money more than one time for the same trip.

History: 1978 Comp., § 52-1-56, enacted by Laws 1987, ch. 235, § 26; 1989, ch. 263, § 33.

I. General Consideration.

Cross-references. - As to filing insurance policy or security bond in district court clerks' office, see 52-1-4 NMSA 1978.

Repeals and reenactments. - Laws 1987, ch. 235, § 26 repealed former 52-1-56 NMSA 1978, as reenacted by Laws 1986, ch. 22, § 19, and enacted a new 52-1-56 NMSA 1978, effective June 19, 1987. For provisions of the former section see 1986 Cumulative Supplement.

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judge" for "hearing officer" several times, and made minor stylistic changes.

Workmen's compensation statutes should be liberally and fairly construed in the workman's favor to insure the full measure of his exclusive statutory remedy. Evans v. Stearns-Roger Mfg. Co. 253 F.2d 383 (10th Cir. 1958).

Purpose of section is to protect workman, or those claiming the right to receive payment, and whatever right the employer or its insurer has to reimbursement follows payment of compensation but does not precede it. Brown v. Arapahoe Drilling Co., 70 N.M. 99, 370 P.2d 816 (1962).

Dismissal of claim with prejudice contrary to Act's policy. - Dismissal with prejudice of a workman's compensation claim, even when the claimant's attorney agreed to dismissal, is contrary to the policy of the Workmen's Compensation Act as it deprives the workman of his right to reopen his claim if and when labor problems develop which are related to the compensable injury. Rumpf v. Rainbo Baking Co., 96 N.M. 1, 626 P.2d 1303 (Ct. App. 1981).

Act not written with intent that it be penuriously interpreted that a workman be bound by a "one-shot" chance at showing his ability or inability to perform the tasks of his usual occupation or other work he is fitted by past history to do. Glover v. Sherman Power Tongs, 94 N.M. 587, 613 P.2d 729 (Ct. App. 1980).

Sections provide for continuing jurisdiction over award. - Both 52-1-46 NMSA 1978 and this section provide for a continuing jurisdiction of the court over a compensation award. Clauss v. Electronic City, 93 N.M. 75, 596 P.2d 518 (Ct. App. 1979).

This act has no extra-territorial effect. Kandelin v. Lee Moor Contracting Co., 37 N.M. 479, 24 P.2d 731 (1933).

Statute is reimbursement statute and there is but one cause of action. Herrera v. Springer Corp., 85 N.M. 6, 508 P.2d 1303 (Ct. App.), rev'd on other grounds, 85 N.M. 201, 510 P.2d 1072 (1973).

This section does not deal with right of subrogation, but with the right of reimbursement. Therefore, the general law of subrogation is not applicable to the right of reimbursement

accorded by this section. Herrera v. Springer Corp., 85 N.M. 6, 508 P.2d 1303 (Ct. App.), rev'd on other grounds, 85 N.M. 201, 510 P.2d 1072 (1973).

"Claim". - As used in Workmen's Compensation Act, the word "claim" is synonymous with "demand"; it means the assertion of liability against another. Ritter v. Albuquerque Gas & Elec. Co., 47 N.M. 329, 142 P.2d 919 (1943).

Section is unquestionably intended to meet effect of changes which could occur in a workman's physical condition, as related to a compensable injury (whether the change be for better or worse), during the period for which compensation could be paid. Glover v. Sherman Power Tongs, 94 N.M. 587, 613 P.2d 729 (Ct. App. 1980).

Credit for overpayment, not exceeding value of award, should be fashioned to avoid termination of benefits. - A credit is appropriate for overpayments made under an employer's good faith belief that he is discharging his statutory obligation, if the prejudgment overpayments are intended by the employer to be compensation payments and not a mere gratuity, but unless the overpayment equals or exceeds the value of the compensation award, an award of credit should be fashioned to avoid immediate termination of benefits because such termination violates the central scheme of the act. Paternoster v. La Cuesta Cabinets, Inc., 101 N.M. 773, 689 P.2d 289 (Ct. App. 1984).

Increase of "disability" required. - Under the provisions of this section, an increase or aggravation of "disability" is required. Holliday v. Talk of Town, Inc., 98 N.M. 354, 648 P.2d 812 (Ct. App. 1982).

Physical impairment does not automatically equate with disability. Tafoya v. Leonard Tire Co., 94 N.M. 716, 616 P.2d 429 (Ct. App. 1980).

Nondisabling pain is not compensable. Tafoya v. Leonard Tire Co., 94 N.M. 716, 616 P.2d 429 (Ct. App. 1980).

Termination for failure to appear for deposition held reversible error. - Termination of an employee's workmen's compensation benefits for failure to appear for a scheduled deposition was reversible error, where his status as an excludable alien made him legally not eligible to enter the United States, constituting an excuse for noncompliance, and alternative methods of discovery were available and could have been utilized. Sandoval v. United Nuclear Corp., 105 N.M. 105, 729 P.2d 503 (Ct. App. 1986).

Provision for reexamination of a workman, when first enacted, provided for relief for the employer only when an injured workman's condition had improved or his disability had terminated. It was later amended to put the workman on a par with the employer, so if the disability had become more aggravated or increased without fault on his part the court might order an increase. Segura v. Jack Adams Gen. Contractor, 64 N.M. 413, 329 P.2d 432 (1958).

Periodic payments rule while lump-sum awards exception. - Although the "best interest" of the plaintiff is the guide in determining whether a lump sum should be awarded, periodic compensation payments are the rule, and lump-sum awards are the exception, and in applying this exception the purpose of workmen's compensation must be kept in mind, that is the public policy that compensation shall be made in a certain amount, to secure the injured employee against want, and to avoid his becoming a public charge. Arther v. Western Co. of N. Am., 88 N.M. 157, 538 P.2d 799 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Generally, the best interests of the claimant will be served by paying the compensation in regular installments as wages are paid; periodic payments supply, in a measure, the loss of a regular pay check. Codling v. Aztec Well Servicing Co., 89 N.M. 213, 549 P.2d 628 (Ct. App. 1976).

Where exceptional circumstances warrant. - Lump-summing should only be permitted when it appears that exceptional circumstances warrant the departure from the general scheme; however, once a departure is warranted there should be no hesitancy in making a lump-sum award, which may be made either in whole or in part so long as it is made because of exceptional circumstances. Codling v. Aztec Well Servicing Co., 89 N.M. 213, 549 P.2d 628 (Ct. App. 1976).

As each request for a lump-sum payment is unique, a precise enumeration of what factual ingredients constitute special circumstances is impossible, but in each case which has granted a lump-sum award, a certain factual situation has emerged which, by its quantum and quality of evidence, has convincingly portrayed the existence of exceptional circumstances. Codling v. Aztec Well Servicing Co., 89 N.M. 213, 549 P.2d 628 (Ct. App. 1976).

A lump-sum award should be calculated on a sound annuity basis and should not be permitted for the purpose of beating the actuarial tables; thus the claimant has the burden of showing that it is in his best interest and the lack of lump-summing would create a manifest hardship where relief is essential to protect claimant and his family from want, privation or to facilitate the production of income or to help in a rehabilitation program, and depending on the circumstances, the payment of debts may or may not be an important factor. Codling v. Aztec Well Servicing Co., 89 N.M. 213, 549 P.2d 628 (Ct. App. 1976).

Evidence insufficient to support lump-sum award. - Evidence that 50% partially permanently disabled plaintiff was married and had four children ranging from age 11 months to 11 years, was unemployed but actively pursuing an electro-mechanical technology program which he was scheduled to complete in a little over a year, after which he hoped to get a job with a power plant as an electronics technician, that his family had a total monthly income of approximately $1350 ($800 of which would terminate shortly) and that it cost $700 to $800 a month to live and that if granted a lump-sum award plaintiff's wife would like to stay home and take care of the baby; he would pay the medical bills; he would pay off the land and car; and he would place the

balance in a savings account for a supplementary program was insufficient to support a lump-sum award. Codling v. Aztec Well Servicing Co., 89 N.M. 213, 549 P.2d 628 (Ct. App. 1976).

Reopening lump-sum judgment. - A lump-sum judgment, fully paid and satisfied, is conclusive under the Workmen's Compensation Act, and absent stipulation to the contrary may not be reopened under a claim of aggravation or increase in disability of the workman. Durham v. Gulf Interstate Eng'r Co., 74 N.M. 277, 393 P.2d 15 (1964).

Judgment payable in installments is not final until the full statutory period has elapsed. Durham v. Gulf Interstate Eng'r Co., 74 N.M. 277, 393 P.2d 15 (1964).

Judgment not final until full statutory period elapsed. - Judgment that claimant was partially disabled in the amount of 50% and that his disability would continue for a period of 250 weeks is not final until the full statutory period of 550 weeks has elapsed and the court therefore retained jurisdiction to amend or correct the verdict. Churchill v. City of Albuquerque, 66 N.M. 325, 347 P.2d 752 (1959) (decided under prior law).

Nonfiling employers pursuant to 52-1-4 NMSA 1978 are guilty of a misdemeanor and subject to fine. Quintana v. Nolan Bros., 80 N.M. 589, 458 P.2d 841 (Ct. App. 1969).

Admission of liability established right to compensation. - This section and 52-1-30 (see now 52-5-12) NMSA 1978 authorize lump-sum awards only where the right to compensation has been previously established. Where defendants in their answer admitted death from injuries arising out of and in the course of employment, and contested only the propriety of a lump-sum award, their admission of liability sufficiently established plaintiff's right to compensation and authorized a lump-sum award under the section. Arther v. Western Co. of N. Am., 88 N.M. 157, 538 P.2d 799 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Accepting compensation not election of remedies. - By accepting compensation which in no sense is considered as representing full compensation for injuries, no election of remedies could have been intended by the legislature. But when damages are sought and recovered from the tort-feasor, the amount of the recovery is for the full loss or detriment suffered by the injured party and makes him financially whole. Castro v. Bass, 74 N.M. 254, 392 P.2d 668 (1964).

Discretion to reduce compensation where workman refuses treatment. - Where workman refuses to submit to medical or surgical treatment as is reasonably essential to promote his recovery, the court may in its discretion reduce or suspend his compensation. The matter is clearly one within the discretion of the trial court, but the discretion is judicial and subject to review by court of appeals. Evans v. Stearns-Roger Mfg. Co. 253 F.2d 383 (10th Cir. 1958).

Refusal of operation not unreasonable where serious risk. - If the operation be of a major character and attended with serious risk of life or member, the rule is that an

injured employee's refusal to submit to such operation is deemed not unreasonable, and compensation should not be denied on that account. Evans v. Stearns-Roger Mfg. Co. 253 F.2d 383 (10th Cir. 1958).

Operation for laminectomy cannot be categorized as "simple" one to which no risk of life or limb attaches. Evans v. Stearns-Roger Mfg. Co. 253 F.2d 383 (10th Cir. 1958).

Order reducing award abuse of discretion. - Lower court order, involving surgery for removal of a herniated vertebrae in which the injured workman's refusal to submit to corrective surgery was permitted, to reduce the amount of his award was held to be erroneous and an abuse of discretion. Evans v. Stearns-Roger Mfg. Co. 253 F.2d 383 (10th Cir. 1958).

Employer's liability not diminished where employee works. - To hold that the employer's liability should be diminished because his injured workman has seen fit to suffer the discomforts of his infirmity and obtain employment, rather than to simply exist on the compensation the law allows him, seems inconsistent with the purpose and intent of the Workmen's Compensation Act. Evans v. Stearns-Roger Mfg. Co. 253 F.2d 383 (10th Cir. 1958).

Accepting lesser amount of compensation not deny appeal. - Under Workmen's Compensation Law, a workman cannot be denied the right of appeal by his acceptance of a compensation award in an amount less than that to which he is entitled. Evans v. Stearns-Roger Mfg. Co. 253 F.2d 383 (10th Cir. 1958).

Receiving benefits under other statute not forbidden. - There is no provision in the compensation statute forbidding benefits to an injured workman on the ground that he is receiving benefits under some other local or federal statute. Snead v. Adams Constr. Co., 72 N.M. 94, 380 P.2d 836 (1963).

Payments as separate not community property. - Payments under this act are based upon degree of disability of injured workman, not loss of earning power, so that such payments are considered the separate property of injured workman rather than community property for purpose of divorce settlement. Richards v. Richards, 59 N.M. 308, 283 P.2d 881 (1955).

Recovery of claim against insurer by employer. - An employer, who pays the hospital and medical expenses and compensation of his injured employee after notice to his compensation insurer, and after refusal of the insurer to pay or demand suit, may recover from the insurer notwithstanding a provision of the policy that no action should lie against the company unless the claim has been fixed or rendered certain by final judgment. Stahmann v. Maryland Cas. Co., 44 N.M. 289, 101 P.2d 1021 (1940).

Ordinary tort law governs tortious acts of medical personnel and employee. - Section 52-1-49 NMSA 1978 coupled with 52-1-6 NMSA 1978 and this section clearly demonstrate a legislative intent that ordinary tort law, except as modified by 52-1-49

NMSA 1978 and this section, shall govern the tortious acts of medical personnel and hospitals charged with the care and treatment of an employee for a compensable accident. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975) (decided under prior law).

Right of workman to recover damages for injuries occasioned by negligence or wrong of a person other than the employer is not affected by the Workmen's Compensation Act. Herrera v. Springer Corp., 85 N.M. 6, 508 P.2d 1303 (Ct. App.), rev'd on other grounds, 85 N.M. 201, 510 P.2d 1072 (1973).

Injured employee releasing claim for compensation. - In absence of statute to the contrary, an injured employee may in consideration of a contract for life employment release or dismiss his claim against an employer for personal injuries previously incurred or forego his right to prosecute therefor. Ritter v. Albuquerque Gas & Elec. Co., 47 N.M. 329, 142 P.2d 919 (1943).

Law reviews. - For comment on Johnson v. C & H Constr. Co., 78 N.M. 423, 432 P.2d 267 (Ct. App. 1967), see 8 Nat. Resources J. 522 (1968).

For survey, "Workmen's Compensation," see 6 N.M. L. Rev. 413 (1976).

For comment, "Comparative Fault Principles Do Not Affect Negligent Employer's Right to Full Reimbursement of Compensation Benefits Out of Worker's Partial Third-Party Recovery - Taylor v. Delgarno Transp., Inc.," see 14 N.M.L. Rev. 437 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 426 to 440, 459 to 468, 590.
Leaving state or locality of employment after the injury as affecting right to compensation, 162 A.L.R. 1462.
Right of health or accident insurer to intervene in workers' compensation proceeding to recover benefits previously paid to claimant or beneficiary, 38 A.L.R.4th 355.
101 C.J.S. Workmen's Compensation §§ 849 to 912.

II. Hearing.

Judgment for compensation in workman's compensation case may be reopened during the remainder of the statutory period after the original judgment, for the purpose of requesting an increase or decrease in compensation benefits, except in rare circumstances. Glover v. Sherman Power Tongs, 94 N.M. 587, 613 P.2d 729 (Ct. App. 1980).

Jurisdiction to reopen award. - Under Workmen's Compensation Act district court retains jurisdiction after expiration of 30-day period during which it generally retains jurisdiction over its judgments to reopen its award for disability and to suspend or

reduce the amount awarded by reason of claimant's refusal to undergo proposed surgery to reduce the percentage of his disability. Fowler v. W.G. Constr. Co., 51 N.M. 441, 188 P.2d 160 (1947).

Right to apply for increase in amount of payments, should an individual's condition undergo a change for the worse, is a right enjoyed in all cases where payments extend over 550 weeks, the period applicable for all cases of permanent disability, total or partial, except instances of permanent partial for unscheduled injuries. Mann v. Board of County Comm'rs, 58 N.M. 626, 274 P.2d 145 (1954) (decided under prior law).

Who may apply for diminution. - Under this section a person bound by a judgment awarding compensation may apply for a diminution of benefits. Genuine Parts Co. v. Garcia, 92 N.M. 57, 582 P.2d 1270 (1978).

Award of compensation required. - The only essential element necessary to allow an employer to proceed for diminution or termination of disability is the fact that a "workman has been awarded compensation." Whether the disability is total or partial, permanent or temporary, plays no role in any subsequent hearing. Short v. Associated Milk Producers, Inc., 92 N.M. 204, 585 P.2d 649 (Ct. App. 1978).

No limitation on time to file application to reopen. - This section did not give trial court the authority to place a time limitation on when plaintiff, who had been awarded benefits previously, could file an application to reopen. Application filed any time within period for which compensation was allowable was timely. Martinez v. Earth Resources Co., 90 N.M. 590, 566 P.2d 838 (Ct. App. 1977).

Application presented any time within compensation period. - Application to decrease or terminate compensation may be presented at any time within the period for which compensation is allowable. Norvell v. Barnsdall Oil Co., 41 N.M. 421, 70 P.2d 150 (1937).

And not affected by provisions limiting time of proceedings. - Generally, an application to decrease or terminate compensation under a prior award, not being an original proceeding, is not affected by the provision of an act fixing the time within which original proceedings for compensation must be instituted and is not affected by statutory provisions applicable to modification of judgments generally. Norvell v. Barnsdall Oil Co., 41 N.M. 421, 70 P.2d 150 (1937).

Even while original award on appeal. - Though application to decrease or terminate compensation may be made to district court pending appeal from original award, employer's motion asking supreme court to instruct and direct district court to take testimony and make findings and to certify to supreme court the testimony and findings and conclusions was denied. Norvell v. Barnsdall Oil Co., 41 N.M. 421, 70 P.2d 150 (1937).

Res judicata not apply to judgment. - In view of provisions of the section, the ordinary rules of res judicata cannot apply to a judgment rendered on the merits after trial. In fact, in such a case except for loss of a specific member of the body there is no final judgment as it is generally understood short of 550 weeks when either party may come into court and have a hearing on a decrease or increase of disability and have a new judgment rendered in accordance with new findings. Segura v. Jack Adams Gen. Contractor, 64 N.M. 413, 329 P.2d 432 (1958).

Evidentiary hearing with new finding and judgment. - The issue of a change in plaintiff's condition subsequent to the prior award is to be resolved at an evidentiary hearing resulting in new findings and a judgment in accordance with the new findings. Goolsby v. Pucci Distrib. Co., 80 N.M. 59, 451 P.2d 308 (Ct. App. 1969).

Employer bears burden to establish diminution or termination of disability. - Pursuant to this section, once a workman receives an award for total temporary disability which does not specify a precise date for termination or reevaluation of the disability, an employer seeking modification of the award has the burden of proof to establish that the workman's disability has diminished or terminated. Amos v. Gilbert W. Corp., 103 N.M. App. 631, 711 P.2d 908 (1985).

Shifting burden of proof. - Where there was testimony from the doctor that appellee was improved over his previous condition, but this testimony referred to appellee's ability to do lighter jobs and did not relate to his ability to return to his former work, this was insufficient to shift the burden of proof to the claimant. Lucero v. Koontz, 69 N.M. 417, 367 P.2d 916 (1962).

Court may extend compensation time. - In the case of a change in the workman's condition subsequent to the original award, the trial court may extend the length of time compensation is to be paid. Goolsby v. Pucci Distrib. Co., 80 N.M. 59, 451 P.2d 308 (Ct. App. 1969).

Motion for increased compensation. - Judgment entered after trial in workmen's compensation case did not bar a motion for increased compensation award, nor did satisfaction of that judgment, since motion for increased award did not allege failure to pay the judgment, but was concerned with compensation for disability subsequent to the period covered by the judgment. Burton v. Jennings Bros., 88 N.M. 95, 537 P.2d 703 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Application for extension of payment time. - The trial court was acting within its jurisdiction when it heard the application for an extension of payment time, and for necessary medical and hospital expenses. Segura v. Jack Adams Gen. Contractor, 64 N.M. 413, 329 P.2d 432 (1958).

Not apply where injury occurred before effective date. - Claimant was not entitled to the benefits of Laws 1951, ch. 205, § 3 which allowed a workman whose injuries have been aggravated a hearing before a district judge and an additional award if the facts warrant

it, where he was injured on January 4, 1951, and the 1951 amendment did not become effective until June 8, 1951. Davis v. Meadors-Cherry Co., 65 N.M. 21, 331 P.2d 523 (1958).

Not error to reduce benefits where workman in new vocation. - The testimony which indicates that appellant learned a new vocation, obtained employment and attended to it satisfactorily and that he should be able to do so indefinitely is such that appellant is no longer considered totally disabled and, therefore, it was not error for the trial court to reduce appellant's compensation benefits to 20% of total. Bartlett v. Shaw, 76 N.M. 753, 418 P.2d 533 (1966).

Where documents do not resolve disability. - The trial court did not err in denying additional benefits on the basis of documents relied on in the motion where the documents did not provide a basis for resolving the question of disability as defined in the Workmen's Compensation Law. Goolsby v. Pucci Distrib. Co., 80 N.M. 59, 451 P.2d 308 (Ct. App. 1969).

Instruction permitting jury to speculate as erroneous. - Instruction which was calculated to cause jury to take a chance on its verdict when there was available a sure means of correcting it six months later, if wrong, permitted jury to speculate upon the results of judicial proceedings and was erroneous and highly prejudicial. Martin v. La Motte, 55 N.M. 579, 237 P.2d 923 (1951).

Substantial evidence for award. - Medical expert's testimony of 100 percent permanent disability was substantial evidence for an award of partial permanent disability. Tafoya v. S & S Plumbing Co., 97 N.M. 249, 638 P.2d 1094 (Ct. App. 1981).

Retroactive modification of benefits. - Despite the language in former Subsection A requiring continuation of compensation while a hearing is pending on the issue of the diminution or termination of compensation, the court could make a determination of the date that the workman's disability changed, determine the extent of his disability from that date onward, and make a retroactive modification of benefits. Jaramillo v. Kaufman Plumbing & Heating Co., 103 N.M. 400, 708 P.2d 312 (1985).

§ 52-1-57. Repealed.

Repeals. - Laws 1987, ch. 235, § 54B repeals 52-1-57 NMSA 1978 as enacted by Laws 1929, ch. 113, § 25 relating to employer's accident reports to insurance department, effective June 19, 1987. For provisions of former section, see 1978 Original Pamphlet.

§ 52-1-58. Reports to be filed with director.

It is the duty of every employer of labor in this state subject to the provisions of the

Workers' Compensation Act [this article] or the employer's workers' compensation insurance carrier to make a written report to the director of all accidental injuries which may occur to any of his employees during the course of their employment and which result in lost time of an employee of more than seven days. Such reports shall be made within ten days after such accidental injury upon forms approved by the director and shall contain such information concerning the accident or injury as may be required by the director. Upon request of the director, it is also the duty of every workers' compensation self-insurer and insurance carrier to file with the director closing reports upon the closing of a claim on forms approved by the director. Annual reports will be required on a form approved by the director.

History: Laws 1937, ch. 92, § 14; 1941 Comp., § 57-927; 1953 Comp., § 59-10-27; Laws 1986, ch. 22, § 20; 1987, ch. 235, § 27; 1989, ch. 263, § 34.

The 1986 amendment substituted "director" for "labor commissioner" in the catchline and throughout the section and made minor stylistic changes.

The 1987 amendment, effective June 19, 1987, in the first sentence substituted "Workers' " for "Workmen's", inserted "or the employer's workers' compensation insurance carrier" preceding "to make a written report", deleted "compensable" preceding "accidental injuries" and inserted at the end "and which result in lost time of an employee of more than seven days"; in the second sentence substituted "upon forms approved by the director" for "upon forms to be furnished by the director"; and added the last sentence.

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation self-insurer and" for "employer or the employer's" in the third sentence, and added the last sentence.

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

Claim files are public records. - The worker's compensation division maintains worker's compensation claim files in the course of its statutory function of adjudicating claims filed by workers, which makes them public records within the meaning of state freedom of information laws. 1988 Op. Att'y Gen. No. 88-16.

Supervisor informed at time of injury. - An employer had adequate notice of a compensable injury where the claimant told his supervisor, at the time he was fitted for hearing aids, that his hearing loss was work-related. The statute of limitations (52-1-31 NMSA 1978) was tolled by the employer's subsequent failure to file a report of the accident. Cisneros v. Molycorp, Inc., 107 N.M. 788, 765 P.2d 761 (Ct. App. 1988) (decided under pre-1987 version of 52-1-58 NMSA 1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation § 546.

Employer's tort liability to worker for concealing workplace hazard or nature or extent of injury, 9 A.L.R.4th 778.

§ 52-1-59. Effect of failure to file report.

No claim for compensation under the Workers' Compensation Act [this article], as it now provides or as it may hereafter be amended, shall be barred prior to the filing of such report or within thirty days thereafter, but this section does not shorten the time now provided for filing claims with the director.

History: Laws 1937, ch. 92, § 15; 1941 Comp., § 57-928; 1953 Comp., § 59-10-28; Laws 1986, ch. 22, § 21; 1989, ch. 263, § 35.

The 1986 amendment substituted "director" for "district court" and made minor stylistic changes.

The 1989 amendment, effective June 16, 1989, made a minor stylistic change.

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

The word "barred" in the section does not apply to laches and the legislative history shows that this section was enacted in connection with the limitation period. Anaya v. City of Santa Fe, 80 N.M. 54, 451 P.2d 303 (1969).

Workman cannot avoid limitations because employer failed to file report. - A workman failing to file his claim in court within the statutory period after learning of the extent and seriousness of his disability cannot avoid the bar of limitations by asserting that the employer failed to file with the labor commissioner a report concerning a compensable injury where the employer had no reason to believe that a compensable injury had occurred. Sanchez v. Bernalillo County, 57 N.M. 217, 257 P.2d 909 (1953).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Employer's tort liability to worker for concealing workplace hazard or nature or extent of injury, 9 A.L.R.4th 778.
100 C.J.S. Workmen's Compensation § 441.

§ 52-1-60. Notice to director of date of payment.

A. It is also the duty of every employer's workers' compensation insurance carrier to notify the director of the date on which the initial payment of any claim for compensation has been made within ten days of such payment.

B. The director shall promptly thereafter provide to the child support enforcement

bureau of the human services department the name, social security number, home address and employer of all injured workers reported.

History: Laws 1937, ch. 92, § 16; 1941 Comp., § 57-929; 1953 Comp., § 59-10-29; Laws 1983, ch. 78, § 2; 1986, ch. 22, § 22; 1989, ch. 263, § 36.

The 1986 amendment substituted "director" for "labor commissioner" in the catchline and throughout the section.

The 1989 amendment, effective June 16, 1989, in Subsection A, substituted "employer's workers' compensation insurance carrier" for "employer of labor within this state subject to the provisions of the Workmen's Compensation Act", and deleted "to any of his employees" following "claim for compensation".

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

§ 52-1-61. Penalty for failure to file report.

Failure to file any of the reports mentioned in Sections 52-1-58 through 52-1-60 NMSA 1978 or to give such information to the director as may be required by the Workers' Compensation Act [this article] within the time prescribed shall subject the offender to a fine of not less than twenty-five dollars ($25.00) or more than one hundred dollars ($100) for violation of the provisions of that act.

History: Laws 1937, ch. 92, § 17; 1941 Comp., § 57-930; 1953 Comp., § 59-10-30; Laws 1986, ch. 22, § 23; 1989, ch. 263, § 37.

The 1986 amendment substituted "Sections 52-1-58 through 52-1-60 NMSA 1978," for "the three preceding sections" and "director" for "labor commissioner" and made minor stylistic changes.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes.

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

§ 52-1-62. Director to enforce Workers' Compensation Act.

For the purpose of enforcing the Workers' Compensation Act [this article], there are hereby conferred upon the director the following powers and duties:

A. when any employer subject to the provisions of the Workers' Compensation Act fails to comply with Section 52-1-4 NMSA 1978 relating to the filing of an undertaking in the

nature of insurance or security for the payment of benefits under the Workers' Compensation Act, the director is empowered to institute in his own name an action in the district court of Santa Fe county or the county where the employer resides or has his principal office or place of business to enjoin the employer from continuing his business operations until he has complied with the provisions of Section 52-1-4 NMSA 1978, and upon a showing of the facts above recited, the court shall grant such injunction. In any such action, the attorney general or district attorney for the judicial district where the action is brought shall represent the director; and

B. for the purpose of ascertaining the correctness of any reported wage expenditure, the number of men employed and other information necessary in the administration of the Workers' Compensation Act, the director may, upon his own initiative or upon request of any interested party, hold hearings and subpoena all books, records and payrolls of any employer subject to the provisions of the Workers' Compensation Act which show or reflect in any way upon the amount of wage expenditures of such employer or other facts, data or statistics appertaining to the purposes of that act.

History: Laws 1937, ch. 92, § 18; 1941 Comp., § 57-931; 1953 Comp., § 59-10-31; Laws 1986, ch. 22, § 24; 1989, ch. 263, § 38.

The 1986 amendment, in the catchline and throughout the section, substituted "director" for "labor commissioner"; in the introductory paragraph, deleted "additional" before "powers and duties"; in Subsection A, substituted "Section 52-1-4 NMSA 1978" for "Section 3 of said Act"; in Subsection B, deleted "in the manner provided by Section 8 of Chapter 9, Laws of 1931" after "hold hearings"; and made minor stylistic changes throughout the section.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes in the catchline and throughout the section.

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

Failure to comply subjects employer to injunction. - Failure to comply with 52-1-4 NMSA 1978 subjects the employer to an injunction from continuing his business operations until he has complied. Quintana v. Nolan Bros., 80 N.M. 589, 458 P.2d 841 (Ct. App. 1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Prohibition to control workmen's compensation boards and officers, 115 A.L.R. 32; 159 A.L.R. 627.
100 C.J.S. Workmen's Compensation §§ 378 to 386.

§ 52-1-63. Educational institutions exempt.

Any educational institution in this state employing student labor in aid of students

attending the institution by enabling students to defray their tuition and expenses and in which institution any class of machinery or appliances are [is] used for instruction or otherwise and which would subject the institution to the terms of the Workers' Compensation Act [this article] as engaging in a hazardous calling or business as defined by that act is hereby exempted from the terms and operations of the Workers' Compensation Act as to any liability accruing to any student so employed; provided, the terms of that act shall in no way relieve any institution from any liability for damages or injuries to any student which would otherwise be recoverable by law.

History: Laws 1939, ch. 232, § 1; 1941 Comp., § 57-932; 1953 Comp., § 59-10-32; Laws 1989, ch. 263, § 39.

The 1989 amendment, effective June 16, 1989, added the catchline, and made minor stylistic changes.

Compiler's notes. - The bracketed word "is" was inserted by the compiler.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation § 116.
Workers' compensation: student athlete as "employee" of college or university providing scholarship or similar financial assistance, 58 A.L.R.4th 1259.
99 C.J.S. Workmen's Compensation § 57.

§ 52-1-64. Extra-territorial coverage.

If an employee, while working outside the territorial limits of this state, suffers an injury on account of which he or, in the event of his death, his dependents would have been entitled to the benefits provided by the Workers' Compensation Act [this article], had such injury occurred within this state, such employee or, in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by that act, provided that at the time of such injury:

A. his employment is principally localized in this state;

B. he is working under a contract of hire made in this state in employment not principally localized in any state;

C. he is working under a contract of hire made in this state in employment principally localized in another state whose workers' compensation law is not applicable to his employer; or

D. he is working under a contract of hire made in this state for employment outside the United States and Canada.

History: 1953 Comp., § 59-10-33.1, enacted by Laws 1975, ch. 241, § 1; 1989, ch. 263, § 40.

Repeals and reenactments. - Laws 1975, ch. 241, § 1, repeals 59-10-33.1, 1953 Comp., relating to extraterritorial coverage, and enacts the above section.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes throughout the section.

Legislature desired to protect resident employees who were assigned by their employers to work outside of the state temporarily. Franklin v. Geo. P. Livermore, Inc., 58 N.M. 349, 270 P.2d 983 (1954) (decided under prior law).

Need not work in New Mexico before being assigned elsewhere. - Claim that in order for employment relationship to exist in New Mexico the claimant must work for the employer in New Mexico before being assigned to work elsewhere is without merit. Franklin v. Geo. P. Livermore, Inc., 58 N.M. 349, 270 P.2d 983 (1954) (decided under prior law).

No formality is required to accomplish effective hiring. Words or conduct may be sufficient. Roan v. D.W. Falls, Inc., 72 N.M. 464, 384 P.2d 896 (1963) (decided under prior law).

Employment not permanent transfer where for particular job. - Employment of decedent to work in Nevada did not constitute a permanent assignment or transfer although decedent left New Mexico for several months at a time, since his employment was for a particular job which could not be classed as permanent employment. Roan v. D.W. Falls, Inc., 72 N.M. 464, 384 P.2d 896 (1963) (decided under prior law).

Permanent assignment or transfer not effective. - Where as an incident of claimant's employment, claimant was furnished transportation from his parked private car in New Mexico, work having during day proceeded into Arizona, and employee was returned to his car in employer's truck at close of workday, permanent transfer from New Mexico to Arizona was not effective until claimant was returned to where he had left the private car in this state on his last day of work in New Mexico. La Rue v. El Paso Natural Gas Co., 57 N.M. 93, 254 P.2d 1059 (1953) (decided under prior law).

Where claimant never departed from New Mexico as a result of employment in Texas which was at most just a temporary job, there was no permanent assignment within the meaning of the proviso of the extraterritorial statute. Franklin v. Geo. P. Livermore, Inc., 58 N.M. 349, 270 P.2d 983 (1954) (decided under prior law).

Denial of recovery in Arizona not preventing recovery. - Denial of compensation under Arizona Workmen's Compensation Act did not prevent a recovery under the New Mexico act where an Arizona resident, while employed on hazardous occupation which had that day progressed from New Mexico into Arizona so that his actual work in New

Mexico had been completed, was injured on or about the Arizona-New Mexico line while drawing pay and being returned in employer's truck to his own private transportation in New Mexico. La Rue v. El Paso Natural Gas Co., 57 N.M. 93, 254 P.2d 1059 (1953) (decided under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 99 C.J.S. Workmen's Compensation §§ 22 to 24.

§ 52-1-65. Credit for benefits furnished or paid under laws of other jurisdictions.

The payment or award of benefits under the workers' compensation law of another state, territory, province or foreign nation to an employee or his dependents otherwise entitled on account of such injury or death to the benefits of the Workers' Compensation Act [this article] shall not be a bar to a claim for benefits under that act; provided that claim under that act is filed within one year after such injury or death. If compensation is paid or awarded under that act:

A. the medical and related benefits furnished or paid for by the employer under such other workers' compensation law on account of such injury or death shall be credited against the medical and related benefits to which the employee would have been entitled under the Workers' Compensation Act had claim been made solely under that act;

B. the total amount of all income benefits paid or awarded the employee under such other workers' compensation law shall be credited against the total amount of income benefits which would have been due the employee under the Workers' Compensation Act had claim been made solely under that act; and

C. the total amount of death benefits paid or awarded under such other workers' compensation law shall be credited against the total amount of death benefits due under the Workers' Compensation Act.

History: 1953 Comp., § 59-10-33.2, enacted by Laws 1975, ch. 241, § 2; 1989, ch. 263, § 41.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes throughout the section.

Tests for Compensation award in one state as bar to award in another. - Whether the payment of benefits under a workmen's compensation law of another state shall bar the award of supplemental benefits under New Mexico law is dependent upon the application of two tests as enunciated by the United States supreme court: (1) the state first granting an award must announce in unmistakable language, either by statute or judicial decision, that its award is intended to be final and conclusive of all the

employee's rights against the employer (and the insurer) growing out of the injury; that the award under its statute is a completely exclusive remedy, precluding a subsequent recovery under the laws of another state, and (2) the award in the first state must be res judicata in that state. Chapman v. John St. John Drilling Co., 73 N.M. 261, 387 P.2d 462 (1963) (decided under prior law).

Transitory employees. - Although neither this section nor 52-1-66 NMSA 1978 expressly provide that New Mexico benefits are to be paid a transitory employee injured in this state, both statutes contemplate that New Mexico benefits are to be paid and that benefits from another state do not control the permissible recovery in this state. Burns v. Transcon Lines, 92 N.M. 791, 595 P.2d 761 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Legislative intent to avoid "res judicata" complexities. - It is reasonable to presume that in enacting this section, the legislature intended to avoid the complexities involved in the application of "full faith and credit" and "res judicata" in workmen's compensation cases. Webb v. Arizona Pub. Serv. Co., 95 N.M. 603, 624 P.2d 545 (Ct. App. 1981).

Benefits neither barred nor offset by receipt of federal benefits. - Workmen's compensation benefits awarded under the New Mexico Workmen's Compensation Act are not barred or even offset by the receipt of any federal benefits. Clemmer v. Carpenter, 98 N.M. 302, 648 P.2d 341 (Ct. App. 1982).

Tolling of period to sue. - Voluntary payment of compensation benefits pursuant to the law of another state is not in itself sufficient to toll the filing requirements of this section; tolling of the time to sue provision depends upon whether a worker was reasonably led to believe that New Mexico compensation would be paid. Ryan v. Bruenger M. Trucking, 100 N.M. 15, 665 P.2d 277 (Ct. App. 1983).

Effect of award under another state's statute. - An award made under the workmen's compensation statute of a state will not bar a proceeding against the same person under the applicable statute of a sister state, unless the first state has declared by statute or by court decision that is remedy, if pursued to an award, should be exclusive. Webb v. Arizona Pub. Serv. Co., 95 N.M. 603, 624 P.2d 545 (Ct. App. 1981).

Under full faith and credit, New Mexico determines case where no res judicata. - In view of the construction of its own judgments by the courts of Texas, the court concludes that the appeal from the award of the Texas industrial accident board by the claimant in this case denies that award the requisite finality to make it res judicata in Texas, and thus the lower New Mexico court was free under the full faith and credit clause to hear and determine the claim to compensation under the New Mexico Workmen's Compensation Law. Chapman v. John St. John Drilling Co., 73 N.M. 261, 387 P.2d 462 (1963) (decided under prior law).

An appeal from judgment prevents its operation as res judicata. Chapman v. John St. John Drilling Co., 73 N.M. 261, 387 P.2d 462 (1963) (decided under prior law).

Federal question where one state refuses credit to judgment of another. - The effect of a state's prior award under a workmen's compensation law on the ability of a different state to award supplemental benefits under its own workmen's compensation statute is a question involving the federal constitution as when a state court refuses credit to the judgment of a sister state because of its opinion of the nature of the cause of action or the judgment in which it is merged, an asserted federal right is denied and the sufficiency of the grounds of denial are for supreme court of the United States to decide. Chapman v. John St. John Drilling Co., 73 N.M. 261, 387 P.2d 462 (1963) (decided under prior law).

Accepting Texas payments not waiving New Mexico rights. - Claimant did not waive any rights he had under the New Mexico Workers' Compensation Act by accepting compensation payments under the Texas act. Franklin v. Geo. P. Livermore, Inc., 58 N.M. 349, 270 P.2d 983 (1954) (decided under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 365, 366.

§ 52-1-66. Nonresident employers employing workers in state; requirement for insurance; enforcement.

A. Every employer not domiciled in the state that employs three or more workers within the state, whether that employment is permanent, temporary or transitory and whether the workers are residents or nonresidents of the state, shall comply with the provisions of Section 52-1-4 NMSA 1978 and, unless self-insured, shall obtain a worker's compensation insurance policy or an endorsement to an existing policy, issued in accordance with the provisions of Section 59A-17-10.1 NMSA 1978. An employer who does not comply with the foregoing requirement shall be barred from recovery by legal action for labor or materials furnished during any period of time in which he was not in compliance with the requirements of this section and, if the noncomplying employment is in an activity for which the employer is licensed under the provisions of the Construction Industries [Licensing] Act, then the employer's license is subject to revocation or suspension for the violation.

B. The construction industries division of the regulation and licensing department, or a local government that is carrying out those duties, shall not issue any permit required for a contractor to undertake a construction contract if that contract is for an amount in excess of one hundred thousand dollars ($100,000) unless the contractor has filed with the division proof of compliance with Subsection A of this section.

History: 1978 Comp., § 52-1-66, enacted by Laws 1988, ch. 119, § 1.

Repeals and reenactments. - Laws 1988, ch. 119, § 1 repeals 52-1-66 NMSA 1978, as amended by Laws 1986, ch. 22, § 25, and enacts the above section, effective May 18, 1988. For provisions of former section, see 1987 Replacement Pamphlet.

Construction Industries Licensing Act. - See 60-13-1 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 83 to 89.
99 C.J.S. Workmen's Compensation §§ 22 to 25.

§ 52-1-67. Locale of employment; definitions.

A. A person's employment is principally localized in this or another state when:

(1) his employer has a place of business in this or such other state and he regularly works at or from such place of business; or

(2) if Paragraph (1) of this subsection is not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other state.

B. An employee whose duties require him to travel regularly in the service of his employer in this and one or more other states may, by written agreement with his employer, provided [provide] that his employment is principally localized in this or another such state, and, unless such other state refuses jurisdiction, such agreement shall be given effect under the Workers' Compensation Act [this article].

C. As used in Sections 52-1-64 through 52-1-67 NMSA 1978:

(1) "United States" includes only the states of the United States and the District of Columbia;

(2) "state" includes any state of the United States, the District of Columbia or any province of Canada; and

(3) "carrier" includes any insurance company licensed to write workers' compensation insurance in any state of the United States or any state or provincial fund which insures employers against their liabilities under a workers' compensation law.

History: 1953 Comp., § 59-10-33.4, enacted by Laws 1975, ch. 241, § 4; 1989, ch. 263, § 42.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes in Subsection B and C(3), and substituted "Sections 52-1-64 through 52-1-67 NMSA 1978" for "Sections 59-10-33.1 through 59-10-33.4 NMSA 1953" in the introductory paragraph of Subsection C.

Employment not permanent transfer where for particular job. - Employment of decedent to work in Nevada did not constitute a permanent assignment or transfer although

decedent left New Mexico for several months at a time, since his employment was for a particular job which could not be classed as permanent employment. Roan v. D.W. Falls, Inc., 72 N.M. 464, 384 P.2d 896 (1963) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 99 C.J.S. Workmen's Compensation § 24.

§ 52-1-68. Reciprocal recognition of extra-territorial coverage with other jurisdictions.

For the purpose of effecting mutually satisfactory reciprocal arrangements with other states respecting extra-territorial jurisdictions, the director of workers' compensation division is empowered to promulgate special and general regulations not inconsistent with the provisions of the Workers' Compensation Act [this article] and, with the approval of the governor, to enter into reciprocal agreements with appropriate boards, commissions, officers or agencies of other states having jurisdiction over workers' compensation claims.

History: 1953 Comp., § 59-10-33.6, enacted by Laws 1975, ch. 241, § 5; 1989, ch. 263, § 43.

The 1989 amendment, effective June 16, 1989, substituted "director of workers' compensation division" for "commission", and made minor stylistic changes.

§ 52-1-69. Repealed.

Repeals. - Laws 1986, ch. 22, § 102 repeals former 52-1-69 NMSA 1978, as enacted by Laws 1959, ch. 67, § 29, relating to limitation on filing claims, effective May 21, 1986. For provisions of former section, see Original Pamphlet. For present comparable provisions, see 52-5-18 NMSA 1978.

§ 52-1-70. Offset of unemployment compensation benefits.

A. No total disability benefits shall be payable under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] for any weeks in which the injured worker has received or is receiving unemployment compensation benefits, except as provided in this section.

B. If a worker is entitled to receive unemployment compensation benefits and would otherwise be entitled to receive total disability benefits, the unemployment compensation benefits shall be primary and total disability benefits shall be

supplemental only, and the sum of the two benefits shall not exceed the amount of total disability benefits that would otherwise be payable.

History: 1978 Comp., § 52-1-70, enacted by Laws 1987, ch. 235, § 28.

Effective dates. - Laws 1987, ch. 235 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23 is effective on June 19, 1987.

Article 2

Subsequent Injuries

§ 52-2-1. Subtitle.

This act shall be known as the "Subsequent Injury Act."

History: 1953 Comp., § 59-10-126, enacted by Laws 1961, ch. 134, § 1.

Meaning of "this act". - The words "this act" refer to Laws 1961, ch. 134, compiled herein as 52-2-1 to 52-2-5, 52-2-7 to 52-2-13 NMSA 1978.

Law reviews. - For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

§ 52-2-2. Declaration of policy and legislative intent.

As a guide to the interpretation and application of the Subsequent Injury Act, the 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;

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 Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978], constitute a reasonable approach to the solution of the problem of employing physically handicapped persons; and

D. that the Subsequent Injury Act shall not be construed to create, provide, augment, diminish or affect in any way the workers' compensation benefits due to an injured employee. The payment of compensation to an injured employee under the Workers' Compensation Act shall be determined without regard to the Subsequent Injury Act, and the provisions of the Subsequent Injury Act shall be considered only in determining whether an employer or his insurance carrier is entitled to reimbursement from the subsequent injury fund created in Section 52-2-4 NMSA 1978.

History: 1953 Comp., § 59-10-127, enacted by Laws 1961, ch. 134, § 2; 1986, ch. 22, § 45; 1986, ch. 57, § 1; 1988, ch. 109, § 1; 1989, ch. 263, § 44.

1986 amendments. - Identical amendments to this section were enacted by Laws 1986, ch. 22, § 45 and Laws 1986, ch. 57, § 1, which substituted "the Subsequent Injury Fund" for "this act" in both the introductory paragraph and Subsection C and deleted "by injury" following "handicapped" at the end of Subsection A. This section is set out above as amended by Laws 1986, ch. 57, § 1. See 12-1-8 NMSA 1978.

The 1988 amendment, effective March 8, 1988, substituted "Workers' Compensation Act" for "Workmen's Compensation Act" in Subsection C; added Subsection D; and made minor stylistic changes.

The 1989 amendment, effective June 16, 1989, in Subsection D substituted "that the Subsequent Injury Act" for "this act" in the first sentence and "in Section 52-2-4 NMSA 1978" for "herein" at the end of the second sentence.

Effective dates. - Laws 1986, ch. 57 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 21, 1986.

Subsequent Injury Act. - See 52-2-1 NMSA 1978 and notes thereto.

Meaning of "this act". - See 52-2-1 NMSA 1978 and notes thereto.

Workmen's Compensation Act is remedial legislation and must be liberally construed to effect its purpose. Mascarenas v. Kennedy, 74 N.M. 665, 397 P.2d 312 (1964).

Law reviews. - For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

§ 52-2-3. Definitions.

The definitions contained in the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978], except as specifically provided in the Subsequent Injury Act, shall apply to the Subsequent Injury Act. As used in the Subsequent Injury Act:

A. "permanent physical impairment" means 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 presented in the American medical association's guides to the evaluation of permanent impairment, copyright 1984, 1977 or 1971, or comparable publications by the American medical association; and

B. "compensation order" means an order duly authorized by a workers' compensation judge pursuant to the Workers' Compensation Act ordering payments from the subsequent injury fund.

History: 1953 Comp., § 59-10-128, enacted by Laws 1961, ch. 134, § 3; reenacted by Laws 1986, ch. 22, § 46; 1989, ch. 263, § 45.

Cross-references. - As to the definitions of "director" and "hearing officer", see § 52-1-1.1. As to total disability, see 52-1-25 NMSA 1978. As to partial disability, see 52-1-26 NMSA 1978.

The 1986 amendment substituted the present section for the former section which read: "As used in this Subsequent Injury Act 'permanent physically [physical] impairment' means a permanent physical condition which is, or which is likely to be, an obstacle to employment; and the words 'disability,' 'partial disability' and 'total disability' shall have the same meaning as defined in and construed under the Workmen's Compensation Act."

The 1989 amendment, effective June 16, 1989, made minor stylistic changes in the undesignated introductory paragraph and in Subsection B, and substituted "workers' compensation judge" for "hearing officer" in Subsection B.

Effective dates. - Laws 1986, ch. 22 contains no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section is effective on May 21, 1986.

Applicability. - Laws 1986, ch. 22, § 101 makes the 1986 amendment of this section applicable to claims for injuries and deaths occurring, and occupational diseases manifesting themselves, on or after May 21, 1986. All claims filed after December 1, 1986, shall be filed with the director of the workmen's compensation administration.

Compiler's notes. - Laws 1987, ch. 235, § 54A, effective June 19, 1987, repealed Laws 1986, ch. 22, § 105 which had formerly repealed this section effective July 1, 1987.

Subsequent Injury Act. - See 52-2-1 NMSA 1978 and notes thereto.

Law reviews. - For note, "Workmen's Compensation in New Mexico: Preexisting Conditions and the Subsequent Injury Act," see 7 Nat. Resources J. 632 (1967).

For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 99 C.J.S. Workmen's Compensation §§ 298, 304, 305.

§ 52-2-3.1. Recompiled.

Recompilations. - This section, regarding definitions of "director" and "hearing officer", has been recompiled as § 52-1-1.1.

§ 52-2-4. Subsequent injury fund.

A special fund to be known as the "subsequent injury fund" is established for the purpose of carrying out the provisions of the Subsequent Injury Act. The fund shall be derived from the following sources:

A. the employer or his insurance carrier shall pay to the superintendent of insurance the sum of one thousand dollars ($1,000) as indemnity benefits for the death of an employee when a final determination is made that there is no beneficiary entitled to death benefits under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978];

B. each employer or his insurance carrier shall quarterly, under regulations prescribed by the superintendent of insurance, pay to the superintendent of insurance a percentage not to exceed three percent of the money paid out during such quarter as compensation benefits and medical benefits, exclusive of attorneys' fees and related benefits. The above percentage shall be determined once before the end of each fiscal year by the superintendent of insurance so as to provide a sufficient income to meet payments from the fund for the next fiscal year; provided that for the first fiscal year, the percentage shall be one-half of one percent; and

C. the superintendent of insurance shall deposit all such money collected by him with the state treasurer, who shall credit such deposits and accrued interest thereon to the subsequent injury fund. The deposits made shall be a separate fund for payments authorized under the provisions of the Subsequent Injury Act.

History: 1953 Comp., § 59-10-129, enacted by Laws 1961, ch. 134, § 4; 1986, ch. 57, § 2; 1988, ch. 109, § 2.

The 1986 amendment substituted "three percent" for "one percent" in the first sentence of Subsection B, and made minor stylistic changes throughout the section.

The 1988 amendment, effective March 8, 1988, substituted "Workers' Compensation Act" for "Workmen's Compensation Act" in Subsection A; substituted "compensation benefits and medical benefits, exclusive of attorneys' fees and related benefits" for "compensation benefits exclusive of medical and related benefits and attorneys' fees" in the first sentence in Subsection B; and inserted "and accrued interest thereon" in Subsection C.

Effective dates. - Laws 1986, ch. 57 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 21, 1986.

Subsequent Injury Act. - See 52-2-1 NMSA 1978 and notes thereto.

Act to be construed liberally. - The provisions of the Subsequent Injury Act should be construed liberally, to give effect to its stated purposes and announced legislative intent. Vaughn v. United Nuclear Corp., 98 N.M. 481, 650 P.2d 3 (Ct. App. 1982).

Law reviews. - For note, "Workmen's Compensation in New Mexico: Preexisting Conditions and the Subsequent Injury Act," see 7 Nat. Resources J. 632 (1967).

For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 100 C.J.S. Workmen's Compensation § 358; 101 C.J.S. Workmen's Compensation § 837.

§ 52-2-5. Payments from fund; claims against fund.

A. The superintendent of insurance may authorize payments from the subsequent injury fund for the following purposes, whether or not a compensation order has been entered:

(1) the reimbursement to the employer or its insurance carrier of the fund's portion of benefits payable to an injured worker under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] as apportioned under the Subsequent Injury Act;

(2) the payment to the worker of the fund's portion of benefits payable to the injured worker if a worker brings an action under Subsection D of this section;

(3) the payment of fees to attorneys who represent the superintendent of insurance and the subsequent injury fund and of fees to other professional advisers to the superintendent of insurance in connection with the superintendent's administration of the subsequent injury fund; and

(4) the payment of any other expenses ancillary to the superintendent's administration of the subsequent injury fund.

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

C. The superintendent of insurance shall be a party to all proceedings wherein a compensation order is sought against the superintendent of insurance and the fund.

D. A worker may assert a claim against the fund only when the worker's employer is no longer doing business in New Mexico or is bankrupt and the employer or its insurance carrier cannot for reason of the cessation of business or bankruptcy assert a claim against the fund. The worker's claim is limited to apportionment of benefits under the Subsequent Injury Act to recover amounts that the fund would have paid the employer or its insurance carrier as reimbursement. The fund shall not be liable to the worker for any amounts for which the employer or its insurance carrier would be liable to the worker under the Workers' Compensation Act. The worker takes the place of and assumes the status of the worker's employer on the claim against the fund. The fund shall be liable only to the worker, and not the employer or its insurance carrier, for any portion of benefits which the fund would have paid to the employer or its insurance carrier.

E. A worker shall not assert a claim against the fund except as provided in Subsection D of this section.

History: 1953 Comp., § 59-10-130, enacted by Laws 1961, ch. 134, § 5; 1969, ch. 112, § 1; 1975, ch. 298, § 1; reenacted by Laws 1986, ch. 22, § 47; 1988, ch. 109, § 3.

The 1986 amendment rewrote the section to the extent that a detailed comparison is impracticable. The provisions of the former section are set out in the Original Pamphlet.

The 1988 amendment, effective March 8, 1988, rewrote the section to the extent that a detailed analysis is impracticable. For former provisions, see the 1987 Replacement Pamphlet.

Effective dates. - Laws 1986, ch. 22, § 103 makes the amendment of this section effective on December 1, 1986.

Subsequent Injury Act. - See 52-2-1 NMSA 1978 and notes thereto.

Employee has initial burden of proving applicability of this article. Smith v. Trailways, Inc., 103 N.M. 741, 713 P.2d 557 (Ct. App. 1986).

Mandatory filing provisions of former Subsection C abrogated. - By repealing the mandatory filing requirements of § 8 of the Subsequent Injury Act, and replacing them with the permissive filing provisions of 52-2-6A NMSA 1978, the legislature clearly expressed an intention to abrogate the mandatory filing provisions of former Subsection C of this section, as they conflicted with the latter enactment. Vaughn v. United Nuclear Corp., 98 N.M. 481, 650 P.2d 3 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 101 C.J.S. Workmen's Compensation § 837.

§ 52-2-6. Certificates of pre-existing permanent physical impairment; contents; effect.

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.

B. 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. It shall be signed and acknowledged by the worker and a physician duly licensed to practice medicine in New Mexico or in any state bordering New Mexico.

C. In the event any worker suffers a compensable injury as defined by the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978], the certificate shall have the effect of limiting the employer's liability as between the employer or its insurance carrier and the subsequent injury fund to the disability attributable to the physical impairment arising from the current injury.

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 physical impairment, which certifies that the impairment exists, is executed and filed with the superintendent of insurance.

History: 1953 Comp., § 59-10-130.1, enacted by Laws 1975, ch. 298, § 2; 1986, ch. 22, § 48; 1986, ch. 57, § 3; 1987, ch. 235, § 29; 1988, ch. 109, § 4.

1986 amendments. - Identical amendments to this section were enacted by Laws 1986, ch. 22, § 48 and Laws 1986, ch. 57, § 3, which substituted "Any workman" for "Any

worker" in Subsection A, in Subsection B substituted "the permanent physical impairment of the body as a whole" for "disability as defined in the Workmen's Compensation Act" in the first sentence and deleted the former last sentence which read: "The certificate shall state whether the pre-existing impairment was caused by accidental injury.", substituted "exists" for "was the result of an accidental injury" in Subsection D; and substituted "the certificate" for "such certificate" in both Subsections B and C. This section is set out above as amended by Laws 1986, ch. 57, § 3. See 12-1-8 NMSA 1978.

The 1987 amendment, effective June 19, 1987, substituted "worker" for "workman" throughout the section; in Subsection A inserted "permanent" preceding "physical impairment" at the end; in Subsection B inserted "permanent physical" preceding "impairment" in the first part of the first sentence; in Subsection C inserted "physical impairment arising from the" near the end; in Subsection D inserted "permanent" preceding "physical impairment"; and added Subsection E.

The 1988 amendment, effective March 8, 1988, substituted "Subject to the limitations on the applicability of the Subsequent Injury Act in Subsection D of this section, any worker may file" for "any worker may at any time file" in Subsection A; in the second sentence in Subsection B, substituted "in New Mexico or in any state bordering New Mexico" for "in the state of New Mexico"; in Subsection C, substituted "worker" for "workman" and "employer's liability as between the employer or its insurance carrier and the subsequent injury fund" for "employer's liability under the Workers' Compensation Act"; in Subsection D, substituted the current provisions for "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"; and deleted former Subsection E, regarding disclosure of a pre-existing permanent physical impairment.

Effective dates. - Laws 1986, ch. 57 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 21, 1986.

Subsequent Injury Act. - See 52-2-1 NMSA 1978 and notes thereto.

The 1988 amendment should not be applied retroactively. Jojola v. Aetna Life & Cas., N.M. , 782 P.2d 395 (Ct. App. 1989).

Subsection A abrogates filing provisions of 52-2-5 NMSA 1978. - By repealing the mandatory filing requirements of § 8 of the Subsequent Injury Act, and replacing them with the permissive filing provisions of Subsection A of this section, the legislature clearly expressed an intention to abrogate the mandatory filing provisions of former 52-2-5C NMSA 1978, as they conflicted with the later enactment. Vaughn v. United Nuclear Corp., 98 N.M. 481, 650 P.2d 3 (Ct. App. 1982).

The language of this section, in light of previous legislative history, evinces a legislative intent to allow certificates to be filed after the occurrence of a second injury where the

employer has actual knowledge of the employee's prior disability. Vaughn v. United Nuclear Corp., 98 N.M. 481, 650 P.2d 3 (Ct. App. 1982); Fiero v. Stanley's Hdwe., 104 N.M. 50, 716 P.2d 241 (1986).

Purpose is to give employer actual knowledge. - Actual knowledge serves the legislative purpose of providing the employer with notice of a preexisting injury. To permit an employer's effort in ascertaining knowledge to substitute for actual knowledge when the certificate is filed after the subsequent injury would effectively nullify the certificate requirements of this section. Padilla v. Chavez, 105 N.M. 349, 732 P.2d 876 (Ct. App. 1987).

Objective of the certificate requirement is not to require registration of a handicapped employee, but to provide notice to an employer of any preexisting disability of an employee and to document the nature and extent of such a disability. Vaughn v. United Nuclear Corp., 98 N.M. 481, 650 P.2d 3 (Ct. App. 1982).

Purpose of the second injury principle is to prevent discrimination in the hiring of handicapped workers. It follows that an employer is not going to discriminate on the basis of something he does not know. This is the reason that this section makes the Subsequent Injury Act applicable only when the provisions regarding a certificate of preexisting physical impairment have been met. 1966 Op. Att'y Gen. No. 66-50 (opinion rendered under former law).

Certificate may be executed and filed after the second injury, as long as the employer had actual knowledge of the worker's preexisting disability, such that recovery will be allowed under the Subsequent Injury Act. Duran v. Xerox Corp., 105 N.M. 277, 731 P.2d 973 (Ct. App. 1986).

Unamended erroneous admission held binding. - Despite its argument that its admission as to its lack of knowledge of an injured employee's preexisting physical impairment was a typographical error, where the defendant-employer did not seek permission from the trial court for leave to amend or withdraw the admission, the admission was binding in its effect. Schreck v. Plastech Research Div., 107 N.M. 786, 765 P.2d 759 (Ct. App. 1988) (decided under pre-1988 version of 52-2-6 NMSA 1978).

Physical impairment and disability are distinct concepts in the law: impairment is a physical defect, whereas disability relates to the capacity to perform work. It would be unreasonable to require that such a distinction be strictly reflected in certificates of preexisting impairment under the Subsequent Injury Act. Vaughn v. United Nuclear Corp., 98 N.M. 481, 650 P.2d 3 (Ct. App. 1982).

Fund's liability not contingent on whether preexisting impairment compensable. - The preexisting physical impairment need not be compensable under the Workmen's Compensation Act nor must the employee have used the workmen's compensation remedy, rather than seeking a private settlement, in order for the subsequent injury fund to be liable. Gutierrez v. City of Gallup, 102 N.M. 647, 699 P.2d 120 (Ct. App. 1984).

Where disability result only of later injury. - Subsequent injury fund was not liable for any of employee's disability, even where employee filed certificate of preexisting disability eight years before, where doctor testified and court then found that employee's present disability was a result of a later injury and that injury alone. Sentry Ins. Co. v. Gallegos, 87 N.M. 249, 531 P.2d 1222 (Ct. App.), cert. denied, 87 N.M. 239, 531 P.2d 1212 (1975).

Law reviews. - For note, "Workmen's Compensation in New Mexico: Preexisting Conditions and the Subsequent Injury Act," see 7 Nat. Resources J. 632 (1967).

For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

§ 52-2-7. Restrictions on lump sum payments from fund.

No compensation order directing lump sum payments from the subsequent injury fund shall be authorized except as provided in the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978].

History: 1953 Comp., § 59-10-131, enacted by Laws 1961, ch. 134, § 6; 1986, ch. 22, § 49; 1989, ch. 263, § 46.

The 1986 amendment inserted "lump sum" in the catchline and substituted the present section for the provisions of the former section, as enacted by Laws 1961, ch. 134, § 6 and as set out in the Original Pamphlet.

The 1989 amendment, effective June 16, 1989, made a minor stylistic change.

Effective dates. - Laws 1986, ch. 22, § 103 makes the amendment of this section effective on December 1, 1986.

Employer may proceed against the fund after settling with an injured worker, unless the settlement permits an inference that the employer waived that right. Duran v. Xerox Corp., 105 N.M. 277, 731 P.2d 973 (Ct. App. 1986).

Reimbursement of excess payments. - The fund is required to reimburse the employer for all payments made in excess of his apportioned liability. Duran v. Xerox Corp., 105 N.M. 277, 731 P.2d 973 (Ct. App. 1986).

Further liability not precluded by lump-sum settlement. - A court-approved lump-sum settlement between the worker and his employer and its carrier did not preclude a further adjudication of the fund's liability to the workman. Romero v. Cotton Butane Co., N.M. , 728 P.2d 483 (Ct. App. 1986).

§ 52-2-8. Collection of money due fund.

The superintendent of insurance is authorized to institute any proceedings necessary to recover unpaid or delinquent contributions to the subsequent injury fund from employers or their insurance carriers under the provisions of this Subsequent Injury Act.

History: 1953 Comp., § 59-10-132, enacted by Laws 1961, ch. 134, § 7.

Subsequent Injury Act. - See 52-2-1 NMSA 1978 and notes thereto.

§ 52-2-9. Compensable injuries.

A. When an employee of an employer subject to the provisions of the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] who has a permanent physical impairment and who incurs a subsequent disability by accident arising out of and in the course of his employment which results in a disability that is materially and substantially greater than that which would have resulted from the subsequent injury alone, then the employer or his insurance carrier shall pay awards of compensation for the combined condition of disability as provided in Section 52-2-11 NMSA 1978 and all medical and related expenses provided by the Workers' Compensation Act.

B. If the subsequent disability of an employee with a permanent physical impairment results in his death, the employer or his insurance carrier shall pay the compensation for death according to Section 52-2-11 NMSA 1978 and all medical and related expenses, including funeral expenses, provided by the Workers' Compensation Act.

History: 1953 Comp., § 59-10-134, enacted by Laws 1961, ch. 134, § 9; 1987, ch. 235, § 30.

The 1987 amendment, effective June 19, 1987, substituted "Workers' " for "Workmen's"; substituted "Section 52-2-11 NMSA 1978" for "Section 11 of this subsequent injury act" in Subsections A and B; in Subsection A deleted "permanent" preceding "disability" near the middle.

Four things determine applicability of act where preexisting impairment. - Assuming a certificate of preexisting impairment and assuming that procedural requirements are met, applicability of the act depends on four things: (a) a preexisting permanent physical impairment; (b) a subsequent disability compensable under the Workmen's Compensation Act; (c) the subsequent disability must be permanent and (d) the subsequent disability must be materially and substantially greater than that which would have resulted from the subsequent injury alone. Ballard v. Southwest Potash Corp., 80 N.M. 10, 450 P.2d 448 (Ct. App. 1969).

Where preexisting disability not in fact disabling. - Finding of the trial court that the 15% partial permanent disability, set forth in the certificate of preexisting disability was, in truth and in fact, not disabling so as to interfere with his ability to work in any particular,

establishes that plaintiff did not have a preexisting disability under the Workmen's Compensation Act even when the doctor's answers to questions raised a conflict in the evidence concerning the application of the Subsequent Injury Act. Ballard v. Southwest Potash Corp., 80 N.M. 10, 450 P.2d 448 (Ct. App. 1969).

Subsequent injury need not alone result in permanent disability in order to justify recovery from the subsequent injury fund, where the subsequent injury in combination with the pre-existing permanent physical impairment does result in permanent disability. Smith v. Trailways, Inc., 103 N.M. 741, 713 P.2d 557 (Ct. App. 1986).

Full compensation of disability though part due to preexisting condition. - Where there is a direct relationship or causal connection between the accidental injury and the resulting disability the employee is entitled to compensation to the full extent of the disability even though attributable in part to a preexisting condition, notwithstanding that acceleration or aggravation may be absent. Reynolds v. Ruidoso Racing Ass'n, 69 N.M. 248, 365 P.2d 671 (1961) (decided under former law).

Where a person suffers an accidental injury growing out of and in the course of his employment, he is entitled to be compensated for his disability as it thereafter existed, notwithstanding the disability would not have been so great had he not been suffering from a preexisting condition at the time of the injury. Reynolds v. Ruidoso Racing Ass'n, 69 N.M. 248, 365 P.2d 671 (1961).

The question of compensability is not affected by the fact that because of a preexisting physical condition a workman was rendered more susceptible to injury than are workmen normally. Reynolds v. Ruidoso Racing Ass'n, 69 N.M. 248, 365 P.2d 671 (1961) (decided under former law).

Subsequent disability must be greater than first injury alone. - This section does not require that any portion of a disability attributable to the initial injury be greater than that of the second, merely that the entire subsequent disability be "materially and substantially" greater than the first injury alone. Vaughn v. United Nuclear Corp., 98 N.M. 481, 650 P.2d 3 (Ct. App. 1982).

Proportionate liability may be assessed between employer and fund. - The trial court may assess proportionate liability between an employer and the fund for all compensation benefits, including weekly benefits, costs, rehabilitation expenses, medical expenses and attorney's fees in favor of an injured workman. Vaughn v. United Nuclear Corp., 98 N.M. 481, 650 P.2d 3 (Ct. App. 1982).

Expert medical testimony to establish medical causation question. - Where worker suffered four accidental injuries to the same area of his body, whether his disability was materially and substantially greater than that which would have resulted from the last injury was essentially a medical causation question that ordinarily must be established by expert medical testimony. Cano v. Smith's Food King, N.M. , 781 P.2d 322 (Ct. App. 1989).

Law reviews. - For note, "Workmen's Compensation in New Mexico: Preexisting Conditions and the Subsequent Injury Act," see 7 Nat. Resources J. 632 (1967).

§ 52-2-10. Repealed.

Repeals. - Laws 1986, ch. 22, § 102 repeals former 52-2-10 NMSA 1978, as enacted by Laws 1961, ch. 134, § 10, relating to certification of employers qualified as self-insured, effective May 21, 1986. For provisions of former section, see Original Pamphlet.

§ 52-2-11. Liability for payment.

A. Liability for payments for injuries compensable from the subsequent injury fund shall be apportioned between the employer or his insurance carrier and the fund according to the following schedule:

(1) the employer or his insurance carrier shall pay without reimbursement from the fund all compensation benefits for the first eight weeks for the combined condition of disability or for death provided under the Workers' Compensation Act [Chapter 52, Article 1 NMSA], and for any period thereafter liability shall be apportioned in the discretion of the superintendent of insurance or by the compensation order; and

(2) all payments of workers' compensation benefits shall be initially paid to the worker or his dependents entitled thereto by the employer or his insurance carrier and the sums paid for which the subsequent injury fund is liable shall be repaid to the employer or his insurance carrier making payments from the fund at the end of each quarter during which payment is made.

B. No employer or insurance carrier shall be entitled to reimbursement from the subsequent injury fund for any workers' compensation benefits paid until and unless he shall have made all contributions required pursuant to Section 52-2-4 NMSA 1978.

History: 1953 Comp., § 59-10-136, enacted by Laws 1961, ch. 134, § 11; reenacted by Laws 1986, ch. 22, § 50; 1988, ch. 109, § 5.

The 1986 amendment rewrote the section to the extent that a detailed comparison is impracticable. The provisions of the former section are set out in the Original Pamphlet.

The 1988 amendment, effective March 8, 1988, designated the introductory paragraph as present Subsection A; redesignated former Subsection A as present Subsection A(1), substituting therein "Workers' Compensation Act" for "Workmen's Compensation Act", and inserting "in the discretion of the superintendent of insurance or"; deleted former Subsection B regarding payment of compensation benefits not yet reduced to a compensation order; redesignated former Subsection C as present Subsection A(2),

inserting "workers" and substituting "worker" for "employee" near the beginning; redesignated former Subsection C(1) as present Subsection B, substituting "for any workers' compensation benefits paid" for "for any payment so made"; and deleted former Subsection C(2), regarding payment of installment payments if the employer or his insurance carrier has settled his liability under the act with approval by a hearing officer.

Effective dates. - Laws 1986, ch. 22, § 103 makes the amendment of this section effective on December 1, 1986.

Four things determine applicability of act where preexisting impairment. - Assuming a certificate of preexisting impairment and assuming that procedural requirements are met, applicability of the act depends on four things: (a) a preexisting permanent physical impairment; (b) a subsequent disability compensable under the Workmen's Compensation Act; (c) the subsequent disability must be permanent and (d) the subsequent disability must be materially and substantially greater than that which would have resulted from the subsequent injury alone. Ballard v. Southwest Potash Corp., 80 N.M. 10, 450 P.2d 448 (Ct. App. 1969).

Where preexisting disability not in fact disabling. - Finding of the trial court that the 15% partial permanent disability, set forth in the certificate of preexisting disability was, in truth and in fact, not disabling so as to interfere with his ability to work in any particular, establishes that plaintiff did not have a preexisting disability under the Workmen's Compensation Act even when the doctor's answers to questions raised a conflict in the evidence concerning the application of the Subsequent Injury Act. Ballard v. Southwest Potash Corp., 80 N.M. 10, 450 P.2d 448 (Ct. App. 1969).

Apportionment of liability where act applicable. - If the Subsequent Injury Act is applicable, then liability for compensation is apportioned between the employer or its insurance carrier and the subsequent injury fund. Ballard v. Southwest Potash Corp., 80 N.M. 10, 450 P.2d 448 (Ct. App. 1969).

Proportionate liability may be assessed between employer and fund. - The trial court may assess proportionate liability between an employer and the fund for all compensation benefits, including weekly benefits, costs, rehabilitation expenses, medical expenses and attorney's fees in favor of an injured workman. Vaughn v. United Nuclear Corp., 98 N.M. 481, 650 P.2d 3 (Ct. App. 1982).

Further liability not precluded by lump-sum settlement. - A court-approved lump-sum settlement between the worker and his employer and its carrier did not preclude a further adjudication of the fund's liability to the workman. Romero v. Cotton Butane Co., N.M. , 728 P.2d 483 (Ct. App. 1986).

Determination of fund's liability. - The fund's liability is the difference between the compensation payable for the combined injury and the compensation which would have been payable as a result of the second injury alone. Smith v. Trailways, Inc., 103 N.M.

741, 713 P.2d 557 (Ct. App. 1986).

Under the Subsequent Injury Act (52-2-1 to 52-2-13 NMSA 1978), the employer or insurance carrier is solely responsible for payment of compensation benefits for the first eight weeks of disability and is not entitled to reimbursement for this period. Thereafter, the subsequent injury fund is liable to the worker for its apportioned share of compensation benefits (payable twice a month) for the remainder of the maximum period of 600 (now 700) weeks. Compensation benefits are limited to the maximum weekly benefits payable at the time of the accidental injury. Mares v. Valencia County Sheriff's Dep't, 106 N.M. 744, 749 P.2d 1123 (Ct. App. 1988).

Workers' burden of proof. - Workers who allege the liability of the fund directly to themselves have the burden of proving that issue. Romero v. Cotton Butane Co., N.M. , 728 P.2d 483 (Ct. App. 1986).

Employer has burden of proving apportionment between itself and fund. Smith v. Trailways, Inc., 103 N.M. 741, 713 P.2d 557 (Ct. App. 1986).

Employer may proceed against the fund after settling with an injured worker, unless the settlement permits an inference that the employer waived that right. Duran v. Xerox Corp., 105 N.M. 277, 731 P.2d 973 (Ct. App. 1986).

Approval of a prior settlement between the worker and an employer should not result in a total payment by the fund of amounts in excess of its apportioned liability. Duran v. Xerox Corp., 105 N.M. 277, 731 P.2d 973 (Ct. App. 1986).

Finding insufficient to support apportionment. - In a worker's compensation case, while the trial court concluded that the employer was 20% liable and the subsequent injury fund 80% liable, no finding supported this conclusion. In contrast to this conclusion, the judgment ordered the fund to reimburse the employer for 90% of all amounts it paid the worker. Because of the conflict between the judgment and the trial court's findings and conclusions, the cause was remanded for adoption of additional findings and conclusions so as to clearly delineate the percentage of liability to be properly apportioned between the employer and the fund based upon the worker's disability. Mares v. Valencia County Sheriff's Dep't, 106 N.M. 744, 749 P.2d 1123 (Ct. App. 1988).

Law reviews. - For note, "Workmen's Compensation in New Mexico: Preexisting Conditions and the Subsequent Injury Act," see 7 Nat. Resources J. 632 (1967).

§ 52-2-12. Awards.

The payments prescribed by the Subsequent Injury Act shall be subject to the same limitations in time and in amount as those under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978], including specifically Section 52-1-31 NMSA 1978. A compensation order for compensation benefits payable under the Subsequent Injury

Act shall be subject to the same rights of modification thereof as are contained in the Workers' Compensation Act. Appeals under the Subsequent Injury Act may be taken in the manner provided in the Workers' Compensation Act for judicial review of decisions by a workers' compensation judge. All rights of subrogation provided in the Workers' Compensation Act are preserved to the employer or its insurance carrier and are hereby extended to the subsequent injury fund to be exercised by the superintendent of insurance represented by the attorney general of New Mexico or other counsel retained by the superintendent of insurance.

History: 1953 Comp., § 59-10-137, enacted by Laws 1961, ch. 134, § 12; 1986, ch. 22, § 51; 1988, ch. 109, § 6; 1989, ch. 263, § 47.

The 1986 amendment substituted "compensation order" for "judgment" in the second sentence and made minor stylistic changes.

The 1988 amendment, effective March 8, 1988, substituted "Workers' Compensation Act, including specifically Section 52-1-31 NMSA 1978" for "Workmen's Compensation Act" in the first sentence, and "Workers' Compensation Act" for "Workmen's Compensation Act" in the second and present fourth sentences; inserted the present third sentence; and inserted "or other counsel retained by the superintendent of insurance" at the end of the last sentence.

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judge" for "hearing officer" in the next-to-last sentence, and made a minor stylistic change in the last sentence.

Effective dates. - Laws 1986, ch. 22, § 103 makes the amendment of this section effective on December 1, 1986.

Subsequent Injury Act. - See 52-2-1 NMSA 1978 and notes thereto.

Liability of subsequent injury fund. - Under this article, the employer or insurance carrier is solely responsible for payment of compensation benefits for the first eight weeks of disability and is not entitled to reimbursement for this period. Thereafter, the subsequent injury fund is liable to the worker for its apportioned share of compensation benefits (payable twice a month) for the remainder of the maximum period of 600 (now 700) weeks. Compensation benefits are limited to the maximum weekly benefits payable at the time of the accidental injury. Mares v. Valencia County Sheriff's Dep't, 106 N.M. 744, 749 P.2d 1123 (Ct. App. 1988).

§ 52-2-13. Repealed.

Repeals. - Laws 1988, ch. 109, § 8 repeals 52-2-13 NMSA 1978, as amended by Laws 1986, ch. 22, § 52, relating to determination of rights, effective March 8, 1988. For provisions of former section, see 1987 Replacement Pamphlet.

§ 52-2-14. Employers' statute of limitations; notice.

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.

History: 1978 Comp., § 52-2-14, enacted by Laws 1988, ch. 109, § 7.

Emergency clauses. - Laws 1988, ch. 109, § 9 made the act effective immediately. Approved March 8, 1988.

Applicable period prior to section's enactment. - Prior to the 1988 enactment of this section, there was no specific period of limitations for actions against the Subsequent Injury Fund contained in the Subsequent Injury Act, and an employer's claim for reimbursement from the fund was not sufficiently analogous to a claim for personal injuries so as to justify invocation of the statute of limitations (37-1-8 NMSA 1978) on this theory. Therefore, the four-year limitations period in 37-1-4 NMSA 1978 for "all other actions not * * * otherwise provided for and specified" was the applicable statute. Hernandez v. Levi Strauss, Inc., 107 N.M. 644, 763 P.2d 78 (Ct. App. 1988).

Where an employer seeks to file a suit against the Subsequent Injury Fund for reimbursement, and where this section is not applicable, the period of limitations on such claim begins to run from the time the employer knew or should have known it had a claim against the fund. Hernandez v. Levi Strauss, Inc., 107 N.M. 644, 763 P.2d 78 (Ct. App. 1988).

Running of limitations period. - The filing of a certificate of preexisting physical impairment is a procedural prerequisite to recovery that has no effect on the running of the statute of limitations. The limitations period begins to run when an employer knows or should know that a subsequent, compensable injury has occurred, whether or not a

certificate has been filed. City of Roswell v. Chavez, 108 N.M. 608, 775 P.2d 1325 (Ct. App. 1989).

Article 3

Occupational Disease Disablement

§ 52-3-1. Name of act.

This act shall be known as the "New Mexico Occupational Disease Disablement Law."

History: 1941 Comp., § 57-1101, enacted by Laws 1945, ch. 135, § 1; 1953 Comp., § 59-11-1.

Cross-references. - As to Occupational Health and Safety Act not to supersede or affect this act, see 50-9-21 NMSA 1978.

Meaning of "this act". - The words "this act" refer to Laws 1945, ch. 135, compiled herein as 52-3-1 to 52-3-5, 52-3-7 to 52-3-14, 52-3-29 to 52-3-32, 52-3-34 to 52-3-41, 52-3-43 to 52-3-46, 52-3-48 to 52-3-54 NMSA 1978.

Reinstatement of act. - The decision in State ex rel. Hovey Concrete Prods. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957), in effect reinstated the Occupational Disease Disablement Act. 1959-60 Op. Att'y Gen. No. 59-125.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Application of rules of procedure. - Language in 52-3-18 NMSA 1978 is comparable to 52-1-34 NMSA 1978 of the present Workmen's Compensation Law and under the rules noted above requires application of the rules of civil procedure in cases arising under the Occupational Disease Disablement Law unless not reasonable to do so. Holman v. Oriental Refinery, 75 N.M. 52, 400 P.2d 471 (1965).

Rule for leave to amend applicable. - Rule 15(a), N.M.R. Civ. P., providing for freely granting of leave to amend when justice requires, is applicable to proceedings under the Occupational Disease Disablement Law. Holman v. Oriental Refinery, 75 N.M. 52, 400 P.2d 471 (1965).

Applicability of estoppel doctrine in Occupational Disease Disablement Law. - Even though the Workmen's Compensation Act does not specifically provide for equitable defenses, nevertheless, the appellate court has considered equitable claims and defenses in workmen's compensation proceedings; therefore, by analogy, if the elements of estoppel are established, the doctrine can be applied in a case arising

under the New Mexico Occupational Disease Disablement Law. McDonald v. Kerr-McGee Corp., 93 N.M. 192, 598 P.2d 654 (Ct. App. 1979).

Asbestosis as occupational disease. - By analogy to silicosis, asbestosis is an occupational disease contracted gradually in the course of employment, and not a physical harm compensable under the doctrine of strict liability in tort. Bassham v. Owens-Corning Fiber Glass Corp. 327 F. Supp. 1007 (D.N.M. 1971).

Reasonable attorney's fee on appeal. - Seven hundred and fifty dollars is fixed as a reasonable attorney's fee for cost on appeal under Occupational Disease Disablement Law. Holman v. Oriental Refinery, 75 N.M. 52, 400 P.2d 471 (1965).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Workmen's Compensation," see 11 N.M.L. Rev. 235 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d, Workmen's Compensation §§ 296 to 298.
56 C.J.S. Master and Servant § 173; 99 C.J.S. Workmen's Compensation §§ 4, 169.

§ 52-3-2. Employers who come within the New Mexico Occupational Disease Disablement Law.

A. The following employers, when the conditions and hazards inherent in the occupation involved are such as to expose the employees to any of the hazards of occupational disease, shall be subject to the provisions of the New Mexico Occupational Disease Disablement Law: the state and each county, municipality, school district, drainage, irrigation or conservancy district and public institution and administrative board thereof, every charitable organization and every private person, firm or corporation engaged in carrying on business or trade within the state having in service four or more employees regularly employed in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, except employers of ranching or agricultural laborers and employers of private domestic servants; provided, however, effective January 1, 1978, the provisions of the New Mexico Occupational Disease Disablement Law shall apply to employers of three or more employees, except employers of ranching or agricultural laborers and employers of private domestic servants and, effective January 1, 1990, the provisions of the New Mexico Occupational Disease Disablement Law shall apply to all employers of employees, except employers of ranching or agricultural laborers and employers of private domestic servants. Employers who have in service less than four employees and after January 1, 1978 less than three employees, employers of ranching or agricultural laborers, employers of private domestic servants and partners and self-employed persons and, effective January 1, 1990, employers of ranching or agricultural laborers, employers of private domestic servants and partners and self-employed persons shall have the right to come under the terms of the New Mexico Occupational Disease Disablement Law by complying with the provisions hereof.

B. The term "regularly employed", as herein used, unless the context otherwise requires, shall include all employments in the usual course of the trade, business, profession or occupation of the employer, whether continuous throughout the year or for only a portion of the year.

C. Any person, firm or corporation engaged in the performance of work as an independent contractor shall be deemed an employer within the meaning of this section. The term "independent contractor", as herein used, is defined to be any person, association or corporation engaged in the performance of any work for another, who, while so engaged, is independent of the employer in all that pertains to the execution of the work, is not subject to the rule or control of the employer, is engaged only in the performance of a definite job or piece of work and is subordinate to the employer only in effecting a result in accordance with the employer's design.

D. For the purposes of the New Mexico Occupational Disease Disablement Law, an individual who performs services as a qualified real estate salesperson shall not be treated as an employee and the person for whom the services are performed shall not be treated as an employer.

E. For the purpose of Subsection D of this section, a "qualified real estate salesperson" means an individual who:

(1) is a licensed real estate salesperson, associate broker or broker under contract with a real estate firm;

(2) receives substantially all of his remuneration, whether or not paid in cash, for the services performed as a real estate salesperson, associate broker or broker under contract with a real estate firm in direct relation to sales or other output, including the performance of services, rather than to the number of hours worked; and

(3) performs services pursuant to written contract between himself and the person for whom the services are performed, and the contract provides that the individual will not be treated as an employee with respect to such services.

History: 1941 Comp., § 57-1102, enacted by Laws 1945, ch. 135, § 2; 1953 Comp., § 59-11-2; Laws 1971, ch. 261, § 6; 1972, ch. 65, § 3; 1973, ch. 239, § 1; 1975, ch. 317, § 1; 1987, ch. 260, § 2; 1989, ch. 263, § 48.

The 1987 amendment, effective June 19, 1987, added Subsections D and E.

The 1989 amendment, effective June 16, 1989, in Subsection A added all of the language of the first sentence beginning with "and, effective January 1, 1990", and inserted "and, effective January 1, 1990, employers of ranching or agricultural laborers, employers of private domestic servants and partners and self-employed persons" in the

second sentence; and substituted "Subsection D" for "Subsectin B" in the introductory paragraph of Subsection E.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Subject to act until notice of rejection. - Once an employer has come under the act he remains subject thereto until he complies with giving notice of rejection in the manner by the act provided. 1945-46 Op. Att'y Gen. No. 4778.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 53 Am. Jur. 2d Master and Servant §§ 123, 124.

§ 52-3-3. Definitions; employee, and lessee in mines.

The term "employee" as used in the New Mexico Occupational Disease Disablement Law means:

A. every person in the service of the state, and of a county, city, town, municipal corporation or school district, including the regular members of lawfully constituted police and fire departments of cities and towns;

B. every person in the service of any employer subject to the New Mexico Occupational Disease Disablement Law including aliens and minors legally or illegally permitted to work for hire, but not including a person whose employment is casual and is not the usual course of the trade, business or occupation of the employer, and not including ranching or agricultural workers and domestic servants of employers exempt under Section 52-3-2 NMSA 1978 unless the employer shall so elect; and

C. lessees of mining property and their employees who are engaged in the performance of work which is a part of the business conducted by the lessor, and over whose work the lessor retains supervision or control, are within the meaning of this section employees of such lessor.

History: 1941 Comp., § 57-1103, enacted by Laws 1945, ch. 135, § 3; 1953 Comp., § 59-11-3; Laws 1975, ch. 317, § 2.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 54 Am. Jur. 2d Mines and Minerals §§ 167, 177.

§ 52-3-3.1. Recompiled.

Recompilations. - This section, regarding definitions of "director" and "hearing officer", has been recompiled as § 52-1-1.1.

§ 52-3-4. Definitions.

As used in the New Mexico Occupational Disease Disablement Law:

A. "award" means the final compensation order made by the workers' compensation judge pursuant to Section 52-5-7 NMSA 1978;

B. "compensation" means the payments and benefits provided for in the New Mexico Occupational Disease Disablement Law;

C. "compensation order" means a compensation order of the workers' compensation division issued by a workers' compensation judge pursuant to Section 52-5-7 NMSA 1978; and

D. "disablement" means:

(1) the total physical incapacity, by reason of an occupational disease, of an employee to perform any work for remuneration or profit in the pursuit in which the employee was engaged, provided that silicosis, when complicated by active tuberculosis of the lungs, shall be presumed to result in disablement; or

(2) the partial physical incapacity of an employee, by reason of an occupational disease, to perform to some percentage extent any work for which he is fitted by age, education and training.

History: 1978 Comp., § 52-3-4, enacted by Laws 1987, ch. 235, § 31; 1989, ch. 263, § 49.

Cross-references. - As to the definitions of "director" and "hearing officer", see § 52-1-1.1.

Repeals and reenactments. - Laws 1987, ch. 235, § 31 repealed former 52-3-4 NMSA 1978, as amended by Laws 1986, ch. 22, §§ 53, 54, and enacted a new 52-3-4, effective June 19, 1987.

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judge" for "hearing officer" in Subsections A and C, "division" for "administration" in Subsection C, and "an employee" for "a worker" in Subsection D(2).

Compiler's notes. - Laws 1987, ch. 235, § 54A, effective June 19, 1987, repealed Laws 1986, ch. 22, § 105 which had formerly repealed this section effective July 1, 1987.

As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Benefits payable for occupational disease. - The reference in 52-3-49 NMSA 1978 to any kind of work does not change the provision that benefits are payable for disablement by reason of an occupational disease. Vincent v. United Nuclear-Homestake Partners, 89 N.M. 704, 556 P.2d 1180 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Thus, "disablement" under this section, giving an ordinary meaning to "incapacity," may mean total physical unfitness, by reason of occupational disease, to perform any work for remuneration in the pursuit in which the workman was engaged. Salazar v. Kaiser Steel Corp., 85 N.M. 254, 511 P.2d 580 (Ct. App.), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973) (decided under prior law).

Construed in pari materia. - The provisions in 52-3-14 and 52-3-15 NMSA 1978 which refer to total and partial disablement, do not change the definition of disablement and do not provide that compensation is payable for partial disablement; the word "total" in 52-3-14 NMSA 1978 is a redundancy since the only disablement under the section is for total physical incapacity by reason of an occupational disease. Vincent v. United Nuclear-Homestake Partners, 89 N.M. 704, 556 P.2d 1180 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976) (decided under prior law).

Fact workman able to perform other work does not affect disablement. - If the proof brings plaintiff within the statutory definition of disablement, the fact that he is still able to work in other fields does not alter this situation. A finding that plaintiff had worked as an underground miner for 27 years, and that he became totally disabled from work as an underground miner, supported the conclusion of disablement, and his work since the date of disablement, other than as an underground miner, had no legal effect on the judgment of disablement. Vincent v. United Nuclear-Homestake Partners, 89 N.M. 704, 556 P.2d 1180 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976) (decided under

prior law).

When the employee was disabled from working as a filling station operator because of the occupational disease, he was disabled from following "the pursuit in which he was engaged" and the court did not err in so ruling. That he is still able to work in other fields does not alter this situation. Holman v. Oriental Refinery, 75 N.M. 52, 400 P.2d 471 (1965) (decided under prior law).

Work after finding of disability. - A workman may, from a clinical standpoint, be totally and permanently disabled but through sheer drive of willpower and habit continue for some time at his job; therefore, that employees worked for varying periods of time after the date the trial court found them to be disabled does not require a ruling that the men were not disabled as a matter of law. Salazar v. Kaiser Steel Corp., 85 N.M. 254, 511 P.2d 580 (Ct. App.), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973) (decided under prior law).

Suffer entire loss of earning ability not mean helplessness. - Although the requirements of this section are more definite and specific than the requirements for total disability under the workmen's compensation law, to suffer an entire loss of wage earning ability does not mean that a workman must be in a state of absolute helplessness, or unable to do work of any kind. Salazar v. Kaiser Steel Corp., 85 N.M. 254, 511 P.2d 580 (Ct. App.), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973) (decided under prior law).

Plaintiff who developed an allergic disorder after inhaling paint fumes and was thus unable to work any longer as a painter was entitled to compensation under this act, even though he might possibly have obtained work in another field. Herrera v. Fluor Utah, Inc., 89 N.M. 245, 550 P.2d 144 (Ct. App.), cert. denied, 89 N.M. 321, 551 P.2d 1368 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 339 to 343.
56 C.J.S. Master and Servant § 187; 99 C.J.S. Workmen's Compensation §§ 299 to 305.

§ 52-3-5. Acceptance.

A. Every employer of four or more employees, subject to the provisions of the New Mexico Occupational Disease Disablement Law, and, effective January 1, 1978, every such employer of three or more employees and, effective January 1, 1990, all employers of employees shall be conclusively presumed to have accepted the provisions of the New Mexico Occupational Disease Disablement Law.

B. Election on the part of the employer or of employers of private domestic servants or of employers of ranching or agricultural laborers or of a person whom the services of a qualified real estate salesperson are performed exempt from the New Mexico

Occupational Disease Disablement Law under the provisions of Section 52-3-2 NMSA 1978 and partners or self-employed persons to be subject to the New Mexico Occupational Disease Disablement Law may be made by filing in the office of the superintendent of insurance a written statement to the effect that he accepts the provisions of the New Mexico Occupational Disease Disablement Law or an insurance or security undertaking as required by Section 52-3-9 NMSA 1978.

C. Every employee shall be conclusively presumed to have accepted the provisions of the New Mexico Occupational Disease Disablement Law if his employer is subject to its provisions and has complied with its requirements, including insurance.

D. Such compliance with the provisions of the New Mexico Occupational Disease Disablement Law, including the provisions for insurance, shall be construed to be a surrender by the employer and the employee of their rights to any other method, form or amount of compensation or determination thereof or to any cause of action, action at law, suit in equity or statutory or common law right or remedy or proceeding whatever for or on account of such disablement or death of such employee resulting therefrom than as provided in the New Mexico Occupational Disease Disablement Law 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.

History: 1941 Comp., § 57-1105, enacted by Laws 1945, ch. 135, § 5; 1953 Comp., § 59-11-5; Laws 1971, ch. 261, § 7; 1972, ch. 65, § 4; 1973, ch. 239, § 2; 1975, ch. 317, § 3; 1980, ch. 88, § 1; 1987, ch. 260, § 3; 1989, ch. 263, § 50.

Cross-references. - As to when right to compensation exclusive, see 52-3-8 NMSA 1978.

The 1987 amendment, effective June 19, 1987, inserted "or of a person whom the services of a qualified real estate salesperson are performed" in Subsection B.

The 1989 amendment, effective June 16, 1989, inserted "and, effective January 1990, all employers of employees" in Subsection A, and deleted "of less than four, and after January 1, 1978 less than three, employees" following "employer" near the beginning of Subsection B.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

§ 52-3-6. Application of provisions of the New Mexico Occupational Disease Disablement Law to certain corporations' employees.

A. Notwithstanding any provisions to the contrary in the New Mexico Occupational Disease Disablement Law, an employee, as defined in Subsection F of this section, of a business or professional corporation who is also an employee as defined in the New Mexico Occupational Disease Disablement Law may affirmatively elect not to accept the provisions of the New Mexico Occupational Disease Disablement Law.

B. Each employee desiring to affirmatively elect not to accept the provisions of the New Mexico Occupational Disease Disablement Law may do so by filing an election in the office of the director.

C. Each employee desiring to revoke his affirmative election not to accept the provisions of the New Mexico Occupational Disease Disablement Law may do so by filing a revocation of the affirmative election with the occupational disease disablement insurer and in the office of the director. The revocation shall become effective thirty days after filing. The employee shall cause a copy of the revocation to be mailed to the board of directors of the business or professional corporation.

D. The filing of an affirmative election not to accept the provisions of the New Mexico Occupational Disease Disablement Law shall create a conclusive presumption that such employee is not covered by the New Mexico Occupational Disease Disablement Law until the effective date of a revocation filed pursuant to this section. The filing of an affirmative election not to accept the provisions of the New Mexico Occupational Disease Disablement Law shall apply to all corporations in which the employee has a financial interest.

E. In counting the number of workers of an employer to determine whether the employer comes within the New Mexico Occupational Disease Disablement Law, an employee who has filed an affirmative election not to be subject to the New Mexico Occupational Disease Disablement Law shall also be counted as one of the workers employed by such employer.

F. For purposes of this section:

(1) "executive officer" means the chairman of the board, president, vice president, secretary or treasurer; and

(2) "employee" means an executive officer owning ten percent or more of the outstanding stock of the business or professional corporation.

History: 1953 Comp., § 59-11-5.1, enacted by Laws 1975, ch. 317, § 4; 1980, ch. 88, § 2; 1987, ch. 235, § 32.

The 1987 amendment, effective June 19, 1987, in Subsection A substituted "who is also an employee" for "as a workman" preceding "as defined in"; substituted "director" for

"superintendent of insurance" in Subsections B and C; in Subsection E substituted "workers" for "workmen"; and made a minor word change in Subsection F.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

§ 52-3-7. Defenses to action by employee.

In an action against an employer who has not complied with Section 52-3-9 NMSA 1978 to recover damages for an occupational disease sustained by an employee while engaged in the line of his duty as such, or for death resulting from occupational diseases so sustained in which recovery is sought upon the ground of want of ordinary care of the employer or of the officer, agent or servant of the employer, it shall not be a defense:

A. that the employee, either expressly or impliedly assumed the risk of the hazard complained of as due to the employer's negligence;

B. that the occupational disease or death was caused, in whole or in part, by the want of ordinary care of a fellow servant; or

C. that the occupational disease or death was caused, in whole or in part, by the want of ordinary care of the employee where such want of care was not wilful.

Any employer who has complied with the provisions of this act, including the provisions relating to insurance, shall not be subject to any other liability whatsoever for the disablement of or death of any employee from occupational disease, except as in this act provided; and all causes of action, actions at law, suits in equity and proceedings whatever, and all statutory and common-law rights and remedies for and on account of such death of, or occupational disease of, any such employee and accruing to any and all persons whomsoever, are hereby abolished except as in this act provided.

History: 1941 Comp., § 57-1106, enacted by Laws 1945, ch. 135, § 6; 1953 Comp., § 59-11-6; Laws 1973, ch. 239, § 3.

Meaning of "this act". - See 52-3-1 NMSA 1978 and notes thereto.

The New Mexico Rules of Procedure for the district courts provide that there shall be only one form of action, "civil action." See Rule 1-002.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Law reviews. - For note, "Comparative v. Contributory Negligence: The Effect of Plaintiff's Fault," see 6 N.M. L. Rev. 171 (1975).

§ 52-3-8. Right to compensation; exclusive when.

The right to the compensation provided for in this act, in lieu of any other liability whatsoever, to any and all persons whomsoever, for any disablement from occupational disease or death resulting therefrom, shall obtain in all cases where the following conditions occur:

A. where at the time of disablement both employer and employee are subject to the provisions of this act; and where the employer has complied with the provisions hereof regarding insurance;

B. where at the time of disablement the employee is performing service arising out of and in the course of his employment;

C. where the disablement or death is proximately caused by an occupational disease arising out of and in the course of his employment, and is not intentionally self-inflicted.

History: 1941 Comp., § 57-1107, enacted by Laws 1945, ch. 135, § 7; 1953 Comp., § 59-11-7.

Meaning of "this act". - See 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Receipt of retirement benefits would not prevent a workman from receiving occupational disease benefits if disablement has been established. Salazar v. Kaiser Steel Corp., 85 N.M. 254, 511 P.2d 580 (Ct. App.), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 56 C.J.S. Master and Servant § 173.

§ 52-3-9. Filing insurance under the New Mexico Occupational Disease Disablement Law.

A. Every employer subject to the New Mexico Occupational Disease Disablement Law shall file in the office of the director evidence of workers' occupational disease disablement insurance coverage in the form of a certificate containing that information required by regulation of the director. In case any employer is able to show to the satisfaction of the director that he is financially solvent and that providing insurance coverage is unnecessary, the director shall issue him a certificate to that effect, which

shall be filed in lieu of the certificate of insurance. The director shall provide by regulation the procedures for reviewing, renewing and revoking any certificate excusing an employer from filing a certificate of insurance, including provisions permitting the director to condition the issuance of the certificate upon the employer's proving adequate security.

B. Any certificate of the director filed under the provisions of this section shall show the post office address of that employer.

C. Every contract or policy insuring against liability for workers' occupational disease disablement benefits or certificate which is filed under the provisions of this section shall provide that the insurance carrier or the employer shall be directly and primarily liable to the worker and, in event of his death, his dependents, to pay the compensation for which the employer is liable.

D. The state, counties, municipalities, school districts, drainage, irrigation or conservancy districts, public institutions and administrative boards thereof shall not be required to file a certificate under the provisions of this section.

History: 1978 Comp., § 52-3-9, enacted by Laws 1987, ch. 235, § 33.

Repeals and reenactments. - Laws 1987, ch. 235, § 33, repeals former 52-3-9 NMSA 1978, as amended by Laws 1986, ch. 22, § 55 and enacts the above section, effective June 19, 1987. For provisions of former section, see 1986 Cumulative Supplement to this pamphlet.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

§ 52-3-9.1. Filing insurance policy or security bond in office of director; fee.

Every employer subject to the New Mexico Occupational Disease Disablement Law who files in the office of the director any insurance policy or certificate thereof, bond or undertaking pursuant to the provisions of Section 52-3-9 NMSA 1978 shall pay to the director upon the initial filing, or any amendment thereto, a filing fee of five dollars ($5.00). No filing fee shall be required under this section if a filing fee is being paid under the provisions of Section 52-1-4.1 NMSA 1978 and if the insurance policy or evidence thereof being filed pertains to coverage under both the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] and the New Mexico Occupational Disease Disablement Law.

History: 1978 Comp., § 52-3-9.1, enacted by Laws 1980, ch. 88, § 4; 1987, ch. 235, § 34.

The 1987 amendment, effective June 19, 1987, in the first sentence substituted "director" for "superintendent of insurance" both places it appears, and substituted "five dollars ($5.00)" for "one dollar twenty-five cents ($1.25)" at the end, and in the second sentence substituted "Workers' " for "Workmen's".

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

§ 52-3-9.2. Destruction of policies, bonds and undertakings.

From and after the expiration of three years following the date of filing any insurance policy or certificate thereof, bond or undertaking pursuant to the provisions of Section 52-3-9 NMSA 1978, the director may, in his discretion, authorize the destruction of such insurance policies, certificates, bonds and undertakings.

History: 1978 Comp., § 52-3-9.2, enacted by Laws 1980, ch. 88, § 5; 1987, ch. 235, § 35.

The 1987 amendment, effective June 19, 1987, substituted "director" for "superintendent of insurance".

§ 52-3-9.3. Repealed.

Repeals. - Laws 1987, ch. 235, § 54B repeals 52-3-9.3 NMSA 1978 as enacted by laws 1980, ch. 88, § 8 relating to temporary certificates of self-insurance, effective June 19, 1987. For provisions of former section, see 1986 Cumulative Supplement to this pamphlet.

§ 52-3-10. Employer liability for compensation; conditions when no payment to be made.

A. There is imposed upon every employer a liability for the payment of compensation to every employee of such employer who suffers total disablement by reason of an occupational disease arising out of his employment, subject to the following conditions:

(1) no compensation shall be paid when the last day of injurious exposure of the employee to the hazards resulting in an occupational disease occurred prior to the passage of the New Mexico Occupational Disease Disablement Law; and

(2) no compensation shall be paid in case of silicosis or asbestosis unless during the ten years immediately preceding the disablement the injured employee was exposed to harmful quantities of silicon dioxide dust or asbestos dust for a total period of no less than twelve hundred fifty work shifts in employment in this state and unless disablement results within two years from the last day upon which the employee actually worked for the employer against whom compensation is claimed. For the purpose of computing work shifts under this section, employment for less than one-half of a normal shift shall be disregarded, and employment for one-half or more of a normal shift shall be deemed a full shift.

B. There is imposed upon every employer a liability for the payment of compensation to the dependents of every employee in cases where death results from an occupational disease arising out of his employment, subject to the following conditions:

(1) no compensation shall be paid when the last day of exposure of the employee to the hazards resulting in death from occupational disease occurred prior to the passage of the New Mexico Occupational Disease Disablement Law;

(2) no compensation shall be paid for death from silicosis or asbestosis unless during the ten years immediately preceding the disablement the deceased employee was exposed to harmful quantities of silicon dioxide dust or asbestos dust for a period of not less than twelve hundred fifty work shifts in this state;

(3) no compensation shall be paid for death from silicosis or asbestosis unless the death results within two years from the last day upon which the employee actually worked for the employer against whom compensation is claimed, except in those cases where death results during a period of continuous disablement from silicosis or asbestosis for which compensation has been paid or awarded or for which a claim, compensable but for such death, is on file with the director, and in these cases compensation shall be paid if death results within five years from the last day upon which the employee actually worked for the employer against whom compensation is claimed; and

(4) no compensation shall be paid for death from an occupational disease other than silicosis or asbestosis unless death results within one year from the last day upon which the employee actually worked for the employer against whom compensation is claimed, except in those cases where death results during a period of continuous disablement from an occupational disease other than silicosis or asbestosis for which compensation has been paid or awarded or for which a claim, compensable but for such death, is on file with the director, and in these cases compensation shall be paid if death results within three years from the last day upon which the employee actually worked for the employer against whom compensation is claimed.

C. The time limits prescribed by this section shall not apply in the case of an employee whose disablement or death is due to occupational exposure to radioactive or

fissionable materials, provided no compensation shall be paid in such a case unless such disablement or death occurs within ten years from the last day upon which the employee actually worked for the employer against whom compensation is claimed.

History: 1941 Comp., § 57-1110, enacted by Laws 1945, ch. 135, § 10; 1953 Comp., § 59-11-10; Laws 1965, ch. 39, § 1; 1973, ch. 239, § 4; 1986, ch. 22, § 56.

The 1986 amendment, in Subsections B(3) and (4), substituted "director" for "clerk of the district court"; and made minor stylistic changes.

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

"Death" and "disablement" provisions in Subsection C do not apply independently. A disablement claim filed within the 10-year period may be used to make a death claim timely when the death claim is filed after the 10-year period has elapsed. Hubbs v. Sandia Corp., 98 N.M. 389, 648 P.2d 1202 (Ct. App. 1982).

Determination of estoppel through analysis of facts. - Whether or not the conduct of an employer constitutes estoppel, thereby precluding its reliance on the defense available under Subsection A(2), can be determined only through an analysis of the facts. McDonald v. Kerr-McGee Corp. 598 P.2d 654 (Ct. App. 1979).

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Limitation on silicosis claim. - Surviving spouse's claim for death benefits, filed within one year after her husband died of silicosis, was untimely under Subsection B(3), where her husband died sixteen years after the date of his last employment. Tapia v. Springer Transf. Co., 106 N.M. 461, 744 P.2d 1264 (Ct. App. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 56 C.J.S. Master and Servant § 128.

§ 52-3-11. Last employer liable; exception.

Where compensation is payable for an occupational disease the only employer liable shall be the employer in whose employment the employee was last injuriously exposed to the hazards of employment resulting in such disease, provided that in the case of silicosis or asbestosis the only employer liable shall be the employer in whose employment the employee was last exposed to harmful quantities of silicon dioxide (SiO_2) dust or asbestos dust during a period of sixty days or more.

History: 1941 Comp., § 57-1111, enacted by Laws 1945, ch. 135, § 11; 1953 Comp., § 59-11-11.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Where radiation injury under penultimate employer was tremendous and under present employer was little, because any amount was injurious, the last (present) employer is liable under this section because all that is required of the last injurious exposure is that it be injurious. McCormick v. United Nuclear Corp., 89 N.M. 740, 557 P.2d 589 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 296 to 298.
56 C.J.S. Master and Servant § 128; 99 C.J.S. Workmen's Compensation § 169.

§ 52-3-12. Not applicable in certain cases.

This act shall not be construed to apply to business pursuits or employments which according to law are so engaged in interstate commerce as to be not subject to the legislative power of the state, nor to persons injured while they are so engaged.

History: 1941 Comp., § 57-1112, enacted by Laws 1945, ch. 135, § 12; 1953 Comp., § 59-11-12.

Cross-references. - As to extraterritorial coverage, see 52-3-55 NMSA 1978.

Meaning of "this act". - See 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

§ 52-3-13. Dependents defined; determination of.

A. The following persons, and they only, shall be deemed dependents and entitled to compensation under the provisions of the New Mexico Occupational Disease Disablement Law:

(1) a child under eighteen years of age or incapable of self-support and unmarried or under twenty-three years of age if enrolled as a full-time student in any accredited educational institution;

(2) the widow or widower, only if living with the deceased at the time of his death or legally entitled to be supported by him, including a divorced spouse entitled to alimony;

(3) a parent or grandparent only if actually dependent, wholly or partially, upon the deceased;

(4) a grandchild, brother or sister only if under eighteen years of age, or incapable of self-support, and wholly dependent upon the deceased.

The relation of dependency must exist at the time of the disablement.

(5) questions as to who constitute dependents, and the extent of their dependency, shall be determined as of the date of the disablement and their right to any death benefits shall cease upon the happening of any one of the following contingencies:

(a) upon the marriage of the widow or widower;

(b) upon a child, grandchild, brother or sister reaching the age of eighteen years, unless at such time said child, grandchild, brother or sister is physically or mentally incapacitated from earnings, or upon a dependent child, grandchild, brother or sister becoming self-supporting prior to attaining said age, or, if a child, grandchild, brother or sister over eighteen who is enrolled as a full-time student in any accredited educational institution ceases to be so enrolled or reaches the age of twenty-three. A child, grandchild, brother or sister who originally qualified as a dependent by virtue of being less than eighteen years of age may, upon reaching age eighteen, continue to qualify if physically or mentally incapable of self-support and actually dependent or enrolled in an educational institution;

(c) upon the death of any dependent.

B. As used in this section the term "child" includes stepchildren, adopted children, posthumous children, wholly dependent grandchildren and acknowledged illegitimate children, but does not include married children unless dependent. The words "adopted" and "adoption" as used in the New Mexico Occupational Disease Disablement Law shall include cases where persons are treated as adopted as well as those of legal adoption.

History: 1941 Comp., § 57-1113, enacted by Laws 1945, ch. 135, § 13; 1953 Comp., § 59-11-13; Laws 1965, ch. 299, § 1; 1973, ch. 46, § 1; 1977, ch. 276, § 1.

Compiler's notes. - It appears that Paragraph (5) of Subsection A is not actually a part of Subsection A, but it has been so designated because it is set out in the acts in such manner.

As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

§ 52-3-14. Compensation; limitations.

A. The compensation to which an employee who has suffered disablement, or his dependents, shall be entitled under the New Mexico Occupational Disease Disablement Law is limited to the provisions of that law. No compensation shall be due or payable under the New Mexico Occupational Disease Disablement Law for any disablement which does not result in either the temporary disablement of the employee lasting for more than seven days or in his permanent disablement as herein described or death; provided, however, that if the period of temporary disablement of the employee lasts for more than four weeks from the date of the disablement, compensation under the New Mexico Occupational Disease Disablement Law shall be payable in addition to the amount hereinafter stated in a like amount for the first seven days after the date of disablement. But for any such disablement for which compensation is payable under the New Mexico Occupational Disease Disablement Law, the employer shall in all proper cases, as herein provided, pay to the disabled employee or to some person authorized by the director to receive the same, for the use and benefit of the beneficiaries entitled thereto, compensation at regular intervals of no more than sixteen days apart, in accordance with the following, less proper deductions on account of default in failure to give notice of such disablement as required in Section 52-3-19 NMSA 1978.

B. For total disablement, the employee shall receive sixty-six and two-thirds percent of his average weekly wage, not to exceed a maximum compensation of:

(1) ninety dollars ($90.00) a week, effective July 1, 1975;

(2) sixty-six and two-thirds percent of the average weekly wage in the state, a week, effective January 1, 1976;

(3) seventy-eight percent of the average weekly wage in the state, a week, effective July 1, 1976;

(4) eighty-nine percent of the average weekly wage in the state, a week, effective July 1, 1977;

(5) one hundred percent of the average weekly wage in the state, a week, effective July 1, 1978; and

(6) eighty-five percent of the average weekly wage in the state, a week, effective July 1, 1987;

or to be less than a minimum compensation of thirty-six dollars ($36.00) a week, during

the period of such disablement, but in no event to exceed a period of seven hundred weeks; provided, however, that where his wages are less than thirty-six dollars ($36.00) a week, then the compensation to be paid such employee shall be the full amount of such weekly wages; provided further that the benefits paid or payable during a [an] employee's entire period of disablement shall be based on and limited to the benefits in effect on the date of the occurrence of the disablement.

C. For partial disablement, the benefits shall be a percentage of the benefits payable for total disablement calculated under Subsection B of this section as that percentage is determined pursuant to the provisions of Section 52-3-4 NMSA 1978. In no event shall the duration of benefits extend longer than five hundred weeks.

D. For the purpose of the New Mexico Occupational Disease Disablement Law, the average weekly wage in the state shall be determined by the employment security division of the labor department on or before June 30 of each year and shall be computed from all wages reported to the employment security division from employing units, including reimbursable employers, in accordance with the regulations of the employment security division for the preceding calendar year, divided by the total number of covered employees divided by fifty-two. The first such determination by the employment security division of the average weekly wage in the state shall be made on or before June 30, 1975 from reported wages and covered employees for the calendar year ending December 31, 1974.

E. The average weekly wage in the state, determined as provided in Subsection D of this section, shall be applicable for the full period during which compensation is payable when the date of the occurrence of the disablement falls within the calendar year commencing January 1 following the June 30 determination.

F. Unless the computation provided for in Subsection D of this section results in an increase or decrease of two dollars ($2.00) or more, raised to the next whole dollar, the statewide average weekly wage determination shall not be changed for any calendar year.

G. In case death proximately results from the disablement within the period of two years, compensation benefits to be paid such employee shall be in the amounts and to the persons as follows:

(1) if there are no dependents, the compensation shall be limited to the funeral expenses not to exceed three thousand dollars ($3,000) and the expenses provided for medical and hospital services for the deceased, together with such other sums as the deceased may have been paid for disablement; or

(2) if there are dependents at the time of death, the payment shall consist of a sum not to exceed three thousand dollars ($3,000) for funeral expenses and expenses provided for medical and hospital services for the deceased, together with such other sums as the deceased may have been paid for disability, and a percentage hereinafter specified

for average weekly wages subject to the limitations of the New Mexico Occupational Disease Disablement Law to continue for the period of seven hundred weeks from the date of death of such employee; provided that the total death compensation, unless otherwise specified, payable in any of the cases hereinafter mentioned shall not be less than the minimum weekly compensation provided in Subsection B of this section or more than the maximum weekly compensation provided in Subsection B of this section and shall be based on and limited to the benefits in effect on the date of the occurrence of the disablement. If there are dependents entitled thereto, compensation shall be paid to the dependents or to the person authorized by the director or the court to receive the same for the benefit of the dependents in such portions and amounts as the director or the court, bearing in mind the necessities of the case and the best interests of the dependents and of the public, may determine, to be computed on the following basis and distributed to the following persons:

(a) to the child or children if there is no widow or widower entitled to compensation, sixty-six and two-thirds percent of the average weekly wage of the deceased;

(b) to the widow or widower, if there are no children, sixty-six and two-thirds percent of the average weekly wage of the deceased, until remarriage;

(c) to the widow or widower, if there is a child or children living with the widow or widower, forty-five percent of the average weekly wage of the deceased, or forty percent, if such child is not or all such children are not living with a widow or widower, and in addition thereto, compensation benefits for the child or children which shall make the total benefits for the widow or widower and child or children sixty-six and two-thirds percent of the average weekly wage of the deceased. When there are two or more children, the compensation benefits payable on account of such children shall be divided among such children, share and share alike;

(d) two years' compensation benefits in one lump sum shall be payable to a widow or widower upon remarriage; however, the total benefits shall not exceed the maximum compensation benefits as provided in Paragraph (2) of this subsection;

(e) if there is neither widow, widower nor children, then to the father and mother or the survivor of them if dependent to any extent upon the employee for support at the time of his death, twenty-five percent of the average weekly wage of the deceased; provided that if such father and mother or the survivor of them was totally dependent upon such employee for support at the time of his death, he or they shall be entitled to fifty percent of the average weekly wage of the deceased, subject to the maximum weekly compensation provided for in Subsection B of this section;

(f) no disablement benefits payable by reason of an employee's death shall exceed the maximum weekly compensation provided for in Subsection B of this section, and no dependent or any class thereof other than a widow or widower or children shall in any event be paid total benefits in excess of seven thousand five hundred dollars ($7,500) exclusive of funeral expenses and the expenses provided for medical and hospital

services for the deceased paid for by the employer.

If there is neither widow, widower nor children nor dependent parent, then to the brothers and sisters, if actually dependent to any extent upon the deceased for support at the time of his death, thirty-five percent of the average weekly wage of the deceased, with fifteen percent additional for brothers or sisters in excess of two, with a maximum of sixty-six and two-thirds percent to be paid to their guardian; provided that the maximum compensation to partial dependents shall not exceed the respective amounts therefor contributed by the deceased employee or the maximum weekly compensation provided for in Subsection B of this section; and

(g) in the event of the death or remarriage of the widow or widower entitled to compensation under this subsection, the surviving children shall then be entitled to compensation computed and paid as in Subparagraph (a) of this paragraph for the remainder of the compensable period, and in the event compensation benefits payable to children as provided in this section are terminated as provided in Paragraph (5) of Subsection A of Section 52-3-13 NMSA 1978, a surviving widow or widower shall then be entitled to compensation benefits computed and paid as provided in Subparagraphs (b) and (d) of this paragraph for the remainder of the compensable period.

History: 1941 Comp., § 57-1114, enacted by Laws 1945, ch. 135, § 14; 1949, ch. 113, § 1; 1951, ch. 184, § 1; 1953 Comp., § 59-11-14; Laws 1965, ch. 299, § 2; 1967, ch. 152, § 1; 1969, ch. 247, § 1; 1971, ch. 261, § 8; 1973, ch. 239, § 5; 1975, ch. 317, § 5; 1977, ch. 276, § 2; 1986, ch. 22, § 57; 1987, ch. 235, § 36; 1989, ch. 263, § 51.

The 1986 amendment, in the last sentence in Subsection A, substituted "Section 52-3-19 NMSA 1978" for "Section 59-11-16.1 NMSA 1953"; added present Subsection C, and redesignated former Subsection C as present Subsection D and subsequent subsections accordingly; in present Subsection D, substituted references to the employment services division of the human services department for references to the employment security commission; in Subsections E and F, substituted "Subsection D" for "Subsection C"; in Subsection G, inserted "benefits" in the introductory paragraph; and in Subsection G(2)(g), substituted "this paragraph" for "paragraph (2) of this subsection" near the beginning, "this paragraph" for "paragraph (2) of Subsection F of this section" near the end, and "Section 52-3-13 NMSA 1978" for "Section 59-11-13"; and made minor stylistic changes.

The 1987 amendment, effective June 19, 1987, substituted "employee" for "workman" throughout the section; in Subsection A substituted "director" for "court" near the middle of the last sentence; in Subsection B inserted Paragraph (6) and in the undesignated material following that paragraph substituted "seven hundred weeks" for "six hundred weeks"; in Subsection C inserted "calculated under Subsection B of this section" following "benefits payable for total disablement" in the first sentence and at the end of the second sentence substituted "five hundred weeks" for "six hundred weeks and the basis for the calculation of the dollar amount of the benefits under this section shall not exceed one hundred percent of the average weekly wage in the state"; in Subsection D

substituted "security department" for "services division" in the first and second sentences, near the beginning of the first sentence substituted "security department" for "services division of the human services department" and near the end substituted "employment security department" for "division"; in Subsection G, in Paragraphs (1) and (2) substituted "three thousand dollars ($3,000)" for "one thousand five hundred dollars ($1,500)", in Paragraph (2) substituted "seven hundred weeks" for "six hundred weeks", near the middle of the first sentence and in the second sentence substituted "authorized by the director or the court" for "appointed by the court" and inserted "director of the" following "in such portions and amounts as the"; and made numerous minor changes in language and punctuation throughout the section.

The 1989 amendment, effective June 16, 1989, in Subsection D substituted "division of the labor department" for "department" in the first sentence and "division" for "department" throughout the subsection; and made minor stylistic changes in Subsection G(2).

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Definition of disability not changed. - The provisions in this section and 52-3-15 NMSA 1978, which refer to total and partial disablement, do not change the definition of disablement and do not provide that compensation is payable for partial disablement; the word "total" in this section is a redundancy since the only disablement under the section is for total physical incapacity by reason of an occupational disease. Vincent v. United Nuclear-Homestake Partners, 89 N.M. 704, 556 P.2d 1180 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

§ 52-3-15. Disablement compensation restrictions; medical and related services; artificial members.

A. No compensation shall be allowed for the first seven days after the employee has suffered disablement unless such disablement continues for a period of more than four weeks after the disablement occurs, nor in any case unless the employer is notified thereof within the period specified in Section 52-3-16 NMSA 1978.

B. After disablement and continuing so long as medical and surgical attention is reasonably necessary, the employer shall furnish all reasonable surgical, physical therapy, medical, osteopathic, chiropractic, dental, optometry and hospital services and

medicine unless the employee refuses to allow them to be furnished by the employer.

C. In case the employer has made provisions for, and has [at] at the service of the employee at the time of the disablement, adequate medical or related services or facilities and offers to furnish such during the period necessary, then the employer shall be under no obligation to furnish additional medical or related services than those so provided; provided, however, that the employer furnishing such medical and related services shall be liable to the employee for disablement 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 employee but only to the extent and amounts for which the employee would be able to impose liability on the person, partnership, corporation or association employed by the employer to care for the employee. In the event, however, that any employer becomes so liable to the employee, it shall be optional with the employee disabled in such a manner to accept the foregoing provisions and hold the employer liable for such disablement or to reject such provisions and retain the right to sue the person, partnership, corporation or association employed by the employer who so disables the employee through neglect, lack of skill or care. Such election to accept or reject the provisions of this section shall be made by a notice in writing, signed and dated, given by the employee to his employer; and, if the employee elects to hold the employer liable for such injuries, the cause of action of the employee against such third person shall be assigned to the employer, who may institute proceedings thereon in any court having jurisdiction in the employee's name.

D. In all cases where the disablement is such as to permit the use of artificial members, including teeth and eyes, the employer shall furnish such artificial members.

History: 1941 Comp., § 57-1114a, enacted by Laws 1951, ch. 184, § 2; 1953 Comp., § 59-11-15; Laws 1965, ch. 299, § 3; 1971, ch. 261, § 9; 1973, ch. 239, § 6; 1977, ch. 276, § 3; 1987, ch. 235, § 37.

The 1987 amendment, effective June 19, 1987, substituted "employee" for "workman" throughout the section; in Subsection A substituted "Section 52-3-16 NMSA 1978" for "Section 59-11-15.1 NMSA 1953"; in Subsection B inserted "physical therapy" preceding "medical" and "dental, optometry" following "chiropractic"; in Subsection C rewrote the first sentence; in Subsection D deleted the former first two sentences as set out in the main pamphlet; and made numerous minor changes in language and punctuation throughout the section.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972) (decided under prior law).

Definition of disability not changed. - The provisions in 52-3-14 NMSA 1978 and this section, which refer to total and partial disablement, do not change the definition of disablement and do not provide that compensation is payable for partial disablement; the word "total" in 52-3-14 NMSA 1978 is a redundancy since the only disablement

under the section is for total physical incapacity by reason of an occupational disease. Vincent v. United Nuclear-Homestake Partners, 89 N.M. 704, 556 P.2d 1180 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976) (decided under prior law).

In absence of evidence of wages, earnings or disability percentile, and in light of plaintiff's admission at oral argument that there was no proof of a percentage of disability and her failure to refute court's conclusion, the court's judgment denying recovery was not erroneous even though the act authorizes payment for partial disability. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

§ 52-3-16. Claim to be filed for occupational disease disablement benefits; effect of failure to give required notice or to file claim within time allowed.

A. If any employer or his insurer fails or refuses to pay a worker any installment of benefits to which the worker is entitled under the New Mexico Occupational Disease Disablement Law, after notice has been given as required by Section 52-3-19 NMSA 1978, it is the duty of the worker insisting on the payment of benefits to file a claim therefor as provided in the New Mexico Occupational Disease Disablement Law not later than one year after the failure or refusal of the employer or insurer to pay benefits.

B. If the worker fails to give notice in the manner and within the time required by Section 52-3-19 NMSA 1978 or if the worker fails to file a claim for benefits within the time required by this section, his claim for benefits, all his right to the recovery of benefits and the bringing of any proceeding for the recovery of compensation are forever barred.

C. In case of the death of a worker who would have been entitled to receive benefits if death had not occurred, claim for benefits may be filed on behalf of his eligible dependents to recover benefits from the employer or his insurer.

D. Payment may be received or claim filed by any person whom the court may authorize or permit on behalf of the eligible beneficiaries.

E. No claim shall be filed, however, to recover benefits for the death of the worker unless he or someone on his behalf or on behalf of his eligible dependents has given notice in the manner and within the time required by Section 52-3-19 NMSA 1978 and unless the claim is filed within one year from the date of the worker's death.

History: 1953 Comp., § 59-11-15.1, enacted by Laws 1965, ch. 299, § 4; 1986, ch. 22, § 58; 1989, ch. 263, § 52.

The 1986 amendment, in Subsections A, B, and E, substituted "52-3-19 NMSA 1978" for "59-11-16.1 New Mexico Statutes Annotated, 1953 Compilation".

The 1989 amendment, effective June 16, 1989, made minor stylistic changes throughout the section.

Effective dates. - Laws 1986, ch. 22, § 103 makes the amendment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Requirement that written claim be filed within 90 days is mandatory. Holman v. Oriental Refinery, 75 N.M. 52, 400 P.2d 471 (1965).

No provision for extension of time limit to file claim. - Section 37-1-17 NMSA 1978 prohibits 37-1-14 NMSA 1978 from applying in workmen's compensation and occupational disablement cases, since the Workmen's Compensation Act and the Occupational Disablement Law contain specific statutes of limitations in 52-1-31 NMSA 1978 and this section, and neither act provides a saving clause allowing for an extension of the specified time limit for filing a claim. Ortega v. Shube, 93 N.M. 584, 603 P.2d 323 (Ct. App. 1979).

§ 52-3-17. Vocational rehabilitation services.

A. The purpose of this section is the restoration of the disabled employee to gainful employment, preferably that for which he has had training or experience.

B. Vocational rehabilitation services are those services designed to return the employee to gainful employment, in the following priority:

(1) pre-injury job with the same employer;

(2) modified work with the same employer;

(3) job related to former employment; or

(4) suitable employment in a nonrelated work field.

C. Subject to the requirements imposed upon the employee and the other limitations of this section, the employer shall furnish vocational rehabilitation services for the employee who has suffered disablement that is covered by the New Mexico Occupational Disease Disablement Law. When, as a result of the injury, the employee is unable to perform the pre-injury job with the same employer or unable to perform modified work with the same employer, he shall be entitled to vocational rehabilitation evaluation, counseling and training if necessary to return the employee to either a job related to his former employment or suitable employment in a nonrelated field. The total amount required to be paid by an employer for vocational evaluation and counseling

shall not exceed two thousand five hundred dollars ($2,500).

D. The employer shall notify the employee in writing of the provisions of this section within thirty days of the first report of disablement required to be filed by the employer under Section 52-3-51 NMSA 1978 if the employee is at the time disabled.

E. To be entitled to vocational rehabilitation services or benefits, a disabled employee must notify the employer in writing that he has been released within one hundred twenty days from the date that he is released from regular treatment by his primary treating health care provider as defined in Section 52-4-1 NMSA 1978. In the event the employee fails to notify the employer, the employer shall not be liable for any vocational rehabilitation benefits.

F. A referral for an evaluation of a [an] employee for suitability for vocational rehabilitation services shall be made by the employer of an employee who notifies the employer under Subsection E of this section. If the evaluation or vocational rehabilitation services are requested and these services are not voluntarily offered by the employer or if offered but not accepted by the employee, the workers' compensation judge upon application affording the parties an opportunity to be heard may determine whether the employee needs evaluation or vocational rehabilitation services and shall cooperate with and refer promptly all cases in need of such services to the appropriate public or private agencies in this state or where necessary in any other state for such services.

G. An employee who is entitled to vocational rehabilitation training shall receive payment for board, lodging, tuition, travel and all other expenses, including the cost or charges for the vocational rehabilitation training, for a period of time not to exceed two years from the date vocational rehabilitation training is determined to be necessary. Any benefits to which an employee is entitled under this section shall not be considered or paid as part of any lump sum settlement of a claim by an employee and payment by the employer shall only be required as services are incurred.

H. It shall be the responsibility of the employee to submit to all reasonable requests for evaluations made by the employer or required by the workers' compensation judge, as may be necessary, to determine the need for or to develop a plan for vocational rehabilitation. However, the employee shall not be required to bear the cost of any evaluation requested by the employer, notwithstanding the limitation on expenditures specified in Subsection C of this section. If the employee refuses to submit to evaluation or to accept vocational rehabilitation training pursuant to an order of a workers' compensation judge, the employer's liability to the employee shall be limited to medical and disability benefits under the New Mexico Occupational Disease Disablement Law.

History: 1978 Comp., § 52-3-17, enacted by Laws 1987, ch. 235, § 38; 1989, ch. 263, § 53.

Repeals and reenactments. - Laws 1987, ch. 235, ch. 38 repealed the former 52-3-17 NMSA 1978, as amended by Laws 1986, ch. 22, § 59 and enacted a new 52-3-17 NMSA 1978, effective June 19, 1987. For provisions of former section, see 1986 Cumulative Supplement.

The 1989 amendment, effective June 16, 1989, in Subsection C substituted all of the present language of the first sentence following "suffered" for "an injury that is covered by the Workers' Compensation Act"; in Subsection D substituted "disablement" for "injury" and "52-3-51" for "52-1-58"; and substituted "workers' compensation judge" for "hearing officer" throughout Subsections F and H.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

§ 52-3-18. Determination by worker's compensation division of the labor department.

All issues of fact or law arising under the New Mexico Occupational Disease Disablement Law shall be determined by the worker's compensation division of the labor department pursuant to the provisions of Chapter 52 NMSA 1978.

History: 1953 Comp., § 59-11-16, enacted by Laws 1965, ch. 299, § 5; 1986, ch. 22, § 60; 1987, ch. 342, § 29.

The 1986 amendment substituted "Determination by workmen's compensation administration" for "Trial by court" in the catchline, and substituted "determined by the workmen's compensation administration pursuant to the provisions of Chapter 52 NMSA 1978" for "tried exclusively by the court".

The 1987 amendment, effective July 1, 1987, substituted "worker's compensation division of the labor department" for "workmen's compensation administration".

Effective dates. - Laws 1986, ch. 22, § 103 makes the amendment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Application of rules of procedure. - Language in this section is comparable to 52-1-34 NMSA 1978 of the present Workmen's Compensation Law and under the rules noted above requires application of the rules of civil procedure in cases arising under the

Occupational Disease Disablement Law unless not reasonable to do so. Holman v. Oriental Refinery, 75 N.M. 52, 400 P.2d 471 (1965).

Relation back of amended complaint. - All that is required by 52-3-42 NMSA 1978 is the timely filing of a complaint. As noted, this section provides that this may be done informally, but so long as facts are pleaded from which the employee's rights may be determined, defects may be corrected. An amended claim may relate back to the date of the original claim if such amended claim arose out of the same conduct, transaction or occurrence as the claim set forth in the original complaint. If it did, it will be related back to the date of the filing of the original complaint. Holman v. Oriental Refinery, 75 N.M. 52, 400 P.2d 471 (1965).

§ 52-3-19. Notice to employer.

A. Any worker claiming to be entitled to benefits under the New Mexico Occupational Disease Disablement Law from any employer shall give notice in writing to his employer of the occupational disease within thirty days after the beginning of such disablement; unless, by reason of his disablement 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 beginning of such disablement.

B. No written notice is required to be given where the employer or any superintendent or foreman or other agent in charge of the work in connection with which the disablement was occasioned had actual knowledge of such disablement.

History: 1953 Comp., § 59-11-16.1, enacted by Laws 1965, ch. 299, § 6; 1989, ch. 263, § 54.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes in Subsection A.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Notice as required by statute is a condition precedent to the right to plaintiff to recover compensation. Sanchez v. Azotea Contractors, 84 N.M. 764, 508 P.2d 34 (Ct. App. 1973).

Requirement that a written claim be filed within 90 days is mandatory. Holman v. Oriental Refinery, 75 N.M. 52, 400 P.2d 471 (1965).

Actual knowledge required to excuse notice. - In workmen's compensation cases, to excuse the giving of "notice in writing," there must be actual knowledge on the part of the employer, or a superintendent, foreman or other agent in charge of the work in

connection with which the accident occurred. This doctrine is stated affirmatively and without exception, and the same rule applies under the Occupational Disease Act. Sanchez v. Azotea Contractors, 84 N.M. 764, 508 P.2d 34 (Ct. App. 1973).

Where claimant had no knowledge of disability. - Where the doctor told claimants to get out of the mine but did not tell the men they were disabled and instead notified the union which requested the men be evaluated of claimants' disability, then the claimants had no knowledge of their disablement until contacted by a representative of their union and therefore had no duty to give notice of their injury to their employer unless the union notified them of their disability. Salazar v. Kaiser Steel Corp., 85 N.M. 254, 511 P.2d 580 (Ct. App.), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973).

A company doctor, not shown to be in a position of authority, is not an employer, superintendent, foreman or other agent in charge of the work in connection with which the disablement was occasioned, and therefore oral notice to the company doctor was insufficient. Sanchez v. Azotea Contractors, 84 N.M. 764, 508 P.2d 34 (Ct. App. 1973).

§ 52-3-20. Payment of benefits in installments.

Benefits shall be paid by the employer to the worker in installments. The first installment shall be paid not later than thirty-one days after the date of occurrence of the disablement. Remaining installments shall be paid twice a month at intervals not more than sixteen days apart, in sums as nearly equal as possible.

History: 1953 Comp., § 59-11-16.2, enacted by Laws 1965, ch. 299, § 7; 1989, ch. 263, § 55.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes.

§§ 52-3-21 to 52-3-24. Repealed.

Repeals. - Laws 1986, ch. 22, § 102 repeals 52-3-21 through 52-3-24 NMSA 1978, enacted by Laws 1965, ch. 299, relating to the filing and trial of claims, effective May 21, 1986. For provisions of former section, see Original Pamphlet. For present comparable provisions, see 52-3-18 NMSA 1978.

§ 52-3-25. Effect of failure of worker to file claim by reason of conduct of employer.

The failure of any person entitled to benefits under the New Mexico Occupational Disease Disablement Law to give any notice or file any claim within the time fixed by that law shall not deprive the person of the right to benefits 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 benefits would be paid.

History: 1953 Comp., § 59-11-16.7, enacted by Laws 1965, ch. 299, § 12; 1986, ch. 22, § 61; 1989, ch. 263, § 56.

Cross-references. - As to effect of failure to give required notice or to file claim within time allowed, see 52-3-16 NMSA 1978. As to effect of failure of employee to file claim or bring suit by reason of conduct of employer, see 52-3-50 NMSA 1978.

The 1986 amendment deleted "or bring suit" after "to file claim" in the catchline and after "or file any claim" near the middle of the section and made minor stylistic changes.

The 1989 amendment, effective June 16, 1989, made a minor stylistic change in the catchline.

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Company closing office. - This section is not applicable where no evidence appears in the record that defendant company's conduct in closing the tunnel office without knowledge of any claim of plaintiff led plaintiff to believe his compensation would be paid. Sanchez v. Azotea Contractors, 84 N.M. 764, 508 P.2d 34 (Ct. App. 1973).

§§ 52-3-26 to 52-3-30. Repealed.

Repeals. - Laws 1986, ch. 22, § 102 repeals former 52-3-26 through 52-3-30 NMSA 1978, relating to judgment, appeals, and venue of claims, effective May 21, 1986. For provisions of former sections, see Original Pamphlet and 1985 Cumulative Supplement. For present comparable provisions, see 52-3-18 NMSA 1978.

§ 52-3-31. Repealed.

Repeals. - Laws 1983, ch. 153, § 1, repeals 52-3-31 NMSA 1978, relating to disablement or death payment due to silicosis or asbestosis.

Laws 1983, ch. 153, contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

§ 52-3-32. Occupational diseases; proximate causation.

The occupational diseases defined in Section 52-3-33 NMSA 1978 shall be deemed to arise out of the employment only if there is a direct causal connection between the

conditions under which the work is performed and the occupational disease and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease need not have been foreseen or expected but after its contraction must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence. In all cases where the defendant denies that an alleged occupational disease is the material and direct result of the conditions under which work was performed, the worker must establish that causal connection as a medical probability by medical expert testimony. No award of compensation benefits shall be based on speculation or on expert testimony that as a medical possibility the causal connection exists.

History: 1941 Comp., § 57-1119, enacted by Laws 1945, ch. 135, § 19; 1953 Comp., § 59-11-20; Laws 1965, ch. 299, § 17; 1989, ch. 263, § 57.

The 1989 amendment, effective June 16, 1989, substituted "defined in Section 52-3-33 NMSA 1978" for "hereinafter defined" in the first sentence, and made a minor stylistic change in the next-to-last sentence.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Establishment of neurosis as compensable disease under this law. - Since anxiety neurosis can be a work-connected injury compensable under the Workmen's Compensation Act, by analogy, a petitioner's anxiety neurosis should be equally compensable under the Occupational Disease Disablement Law, if it is established that his neurosis is peculiar to his occupation, is due to causes in excess of the ordinary hazards of employment as such and is attributable to exposure to or contact with radioactive materials in the course of his employment. Martinez v. University of Cal., 93 N.M. 455, 601 P.2d 425 (1979).

Determination of disease as occupational disease. - Whether an employee's anxiety neurosis is an occupational disease depends upon whether there is a recognizable link between the disease and some distinctive feature of his job. Martinez v. University of Cal., 93 N.M. 455, 601 P.2d 425 (1979).

Link between neurosis and occupation established compensable injury. - The highly toxic and dangerous materials the petitioner worked with, coupled with the incidences of cancer, blindness and fatal illness among petitioner's fellow workers, provides a "recognizable link" between his neurosis and his occupation as a foundry technician, therefore, the petitioner is eligible for benefit under the Occupational Disease Disablement Law. Martinez v. University of Cal., 93 N.M. 455, 601 P.2d 425 (1979).

Petitioner not required to show anxiety neurosis suffered exclusively by members of his occupation in order for him to qualify for benefits under the act. Martinez v. University of Cal., 93 N.M. 455, 601 P.2d 425 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 53 Am. Jur. 2d Master and Servant § 145; 82 Am. Jur. 2d Workmen's Compensation §§ 240, 293, 296.
99 C.J.S. Workmen's Compensation §§ 163, 169.

§ 52-3-33. Occupational diseases; definition.

As used in the New Mexico Occupational Disease Disablement Law, "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 as such and includes any disease due to, or attributable to, exposure to or contact with any radioactive material by an employee in the course of his employment.

History: 1953 Comp., § 59-11-21, enacted by Laws 1973, ch. 239, § 7.

Occupational Disease Disablement Law. - See 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

An occupational disease must result from the occupation, not the workplace, in order to be compensable. Chadwick v. Public Serv. Co., 105 N.M. 272, 731 P.2d 968 (Ct. App. 1986).

Disease must be natural incident of particular occupation. - To come within the definition, an occupational disease must be a disease which is a natural incident of a particular occupation, and must attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of that attending employment in general. Marable v. Singer Bus. Machs., 92 N.M. 261, 586 P.2d 1090 (Ct. App. 1978).

Meaning of "peculiar to". - The phrase "peculiar to" is not used in the sense that the disease must be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather in the sense that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations. Martinez v. University of Cal., 93 N.M. 455, 601 P.2d 425 (1979).

Occupational disease does not include a disease which results from peculiar conditions surrounding the workmen's employment as long as the nature of that work is not more likely to cause the disability than other kinds of employment carried on under the same

conditions. Marable v. Singer Bus. Machs., 92 N.M. 261, 586 P.2d 1090 (Ct. App. 1978).

A gradual, noise-induced hearing loss is an accidental injury compensable under 52-1-28 NMSA 1978 of the Workers' Compensation Act, and is not an occupational disease. Cisneros v. Molycorp, Inc., 107 N.M. 788, 765 P.2d 761 (Ct. App. 1988).

An allergy may be an occupational disease; whether it is an occupational disease depends upon whether there is a recognizable link between the disease and some distinctive feature of the claimant's job. Chadwick v. Public Serv. Co., 105 N.M. 272, 731 P.2d 968 (Ct. App. 1986).

Allergic reaction may be compensable under the Workmen's Compensation Act rather than as an occupational disease. Chadwick v. Public Serv. Co., 105 N.M. 272, 731 P.2d 968 (Ct. App. 1986).

Allergy caused by airborne substances at a generating station is not a distinctive feature of the work of a mechanic, and the risk of such a disease is not a hazard common to a mechanic's job. Chadwick v. Public Serv. Co., 105 N.M. 272, 731 P.2d 968 (Ct. App. 1986).

Allergic disorder which resulted from an employee's inhalation of paint fumes while on the job qualified as an occupational disease as defined in this section, even where plaintiff was allergic to substances found in other occupations besides painting, and where other employees were exposed to fumes but did not become ill. Herrera v. Fluor Utah, Inc., 89 N.M. 245, 550 P.2d 144 (Ct. App.), cert. denied, 89 N.M. 321, 551 P.2d 1368 (1976).

Female employee cannot recover for occupational disease caused by harassment by male employees, since it is not a natural incident of the employment. It is not linked with a process used by the employer by which the disease is caused; therefore, it is not an occupational disease. Marable v. Singer Bus. Machs., 92 N.M. 261, 586 P.2d 1090 (Ct. App. 1978).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Workmen's Compensation," see 11 N.M.L. Rev. 235 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 296 to 298.
Mental disorders as compensable under workmen's compensation acts, 97 A.L.R.3d 161.
Cancer as compensable under workers' compensation acts, 19 A.L.R.4th 639.
99 C.J.S. Workmen's Compensation § 169.

§ 52-3-34. When complicated with other diseases; payments.

In cases of disablement or death from silicosis, complicated with tuberculosis of the lungs, compensation shall be payable as for disablement or death from silicosis alone. In case of disablement or death from silicosis when complicated with any disease other than tuberculosis of the lungs, compensation shall be reduced as provided in Section 30 [52-3-43 NMSA 1978].

History: 1941 Comp., § 57-1121, enacted by Laws 1945, ch. 135, § 21; 1953 Comp., § 59-11-22.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

§ 52-3-35. Termination of compensation; reopening award; time; limits.

Payment of compensation for disablement shall cease upon the termination of the disablement. An application to terminate compensation awarded may be made to the director by any person in interest, or the termination may be decided by the workers' compensation judge upon his own motion. Notice of decision as to termination shall be given by the workers' compensation judge to all parties in interest. Where the disablement has terminated and within one year thereafter, or in case of silicosis or asbestosis within two years, the disablement recurs as a result of the occupational disease for which the award was made, the workers' compensation judge may order resumption of compensation if claim therefor is made within sixty days after the recurrence of the disablement.

History: 1941 Comp., § 57-1122, enacted by Laws 1945, ch. 135, § 22; 1953 Comp., § 59-11-23; Laws 1986, ch. 22, § 62; 1989, ch. 263, § 58.

The 1986 amendment, throughout the section, substituted "hearing officer" and "director" for "court" and made minor stylistic changes.

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judge" for "hearing officer" several times throughout the section.

Effective dates. - Laws 1986, ch. 22, § 103 makes the amendment of this section effective on December 1, 1986.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 101 C.J.S. Workmen's Compensation § 837.

§ 52-3-36. Conversion to lump-sum payment.

The workers' compensation judge may approve an agreement for the conversion of disease disablement benefits into a lump-sum payment.

History: 1978 Comp., § 52-3-36, enacted by Laws 1987, ch. 235, § 39; 1989, ch. 263, § 59.

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judge" for "hearing officer".

Effective dates. - Laws 1987, ch. 235 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 19, 1987.

§ 52-3-37. Compensation exempt from execution.

Compensation shall be exempt from claims of creditors and from any attachment, garnishment or execution, and shall be paid only to such claimant or his personal representative, or such other persons as the court may, under the terms hereof, appoint to receive or collect the same. No claim or judgment for compensation, under this act, shall accrue to or be recovered by relatives or dependents not residents of the United States.

History: 1941 Comp., § 57-1124, enacted by Laws 1945, ch. 135, § 24; 1953 Comp., § 59-11-25.

Meaning of "this act". - See 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

§ 52-3-38. Minor deemed sui juris.

A minor working at an age and at an occupation legally permitted shall be deemed of the age of majority for the purpose of the New Mexico Occupational Disease Disablement Law, and no other person shall have any cause of action or right to

compensation for disablement of the minor worker, but in the event of the approval of an agreement for lump sum settlement of compensation to the minor, the sum shall be paid only to the legally appointed guardian of the minor.

History: 1941 Comp., § 57-1125, enacted by Laws 1945, ch. 135, § 25; 1953 Comp., § 59-11-26; Laws 1989, ch. 263, § 60.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes.

Occupational Disease Disablement Law. - See 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

§ 52-3-39. Physical examinations of claimant; unsanitary or injurious practices by claimant; testimony of physicians.

A. Any employer or insurer shall be entitled to have a physical examination of the claimant by a physician of its choice before or after the filing of a claim or before or after an award of compensation in order to determine the extent of the claimant's disablement, subject to the following regulations:

(1) notice in writing shall be delivered to or served upon the claimant specifying the time and place where it is intended to conduct the examination. Such notice shall be given at least ten days prior to the time stated in the notice. Delivery by registered mail is permitted;

(2) such examination shall be by a physician qualified to practice medicine under the law of this state or of the state or county wherein the claimant resides;

(3) the place at which such examination is to be conducted shall not involve an unreasonable amount of travel for the claimant in all the circumstances. It shall not be necessary for a claimant who lives outside this state to come into this state for such an examination;

(4) within thirty days after the examination, the claimant shall be compensated by the party requesting the examination for all necessary and reasonable expenses incidental to submitting to the examination, including the cost of travel, meals, lodging, loss of pay or other like direct expense, but the amount to be compensated for meals and lodging shall not exceed that allowed for nonsalaried public officers under the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978];

(5) examinations may not be required more frequently than at six-month intervals; except that upon application to the workers' compensation judge having jurisdiction of

the claim and after reasonable cause shown therefor, examination within a less interval may be ordered. In considering such application, the workers' compensation judge should exercise care to prevent harassment of the claimant;

(6) the claimant shall be entitled to have a physician or an attorney of his own choice or both present at such examination. The claimant shall pay such physician or attorney himself; and

(7) the claimant shall be furnished with a copy of the report of the physical examination made by the physician making the examination on behalf of the employer or insurer.

B. If a claimant fails or refuses to submit to examination in accordance with the notice and if the requirements of Paragraph (1) of Subsection A of this section have been satisfied, he shall forfeit all disablement compensation benefits which would accrue or become due to him except for such failure or refusal to submit to examination during the period that he persists in such failure and refusal unless he is by reason of disability unable to appear for examination.

C. If any employee persists in any unsanitary or injurious practice which tends to imperil, retard or impair his recovery or increase his disability or refuses to submit to such medical or surgical treatment as is reasonably essential to promote his recovery, the workers' compensation judge may in his discretion reduce or suspend the employee's disablement compensation benefits.

D. Any physician selected by the employer and paid by the employer who makes or is present at an examination of the claimant conducted pursuant to this section may be required to testify as to the conduct thereof and the findings made. Communications made by the claimant upon such examination to such physician shall not be considered privileged.

E. An employee may have a physician or other health care provider of his choice, as defined in Section 52-4-1 NMSA 1978, other than the physician chosen by the employer under Subsection A of this section, examine him and evaluate his condition. In that event, the employee shall pay for the services of that examiner unless the final determination of the employee's claim is that his claim of disablement is correct and differed from the employer's physician's opinion of percentage of disablement by more than twenty percent, in which case the employer shall pay directly to the employee's examiner or reimburse the employee for the amounts charged by the employee's examiner for the evaluation of disablement.

History: 1978 Comp., § 52-3-39, enacted by Laws 1987, ch. 235, § 40; 1989, ch. 263, § 61.

Repeals and reenactments. - Laws 1987, ch. 235, § 40 repealed former 52-3-39 NMSA 1978, as amended by Laws 1986, ch. 22, § 63 and enacted a new 52-3-39 NMSA 1978,

effective June 19, 1987. For provisions of former section, see 1986 Cumulative Supplement.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes in Subsections A(1) and D, and substituted "workers' compensation judge" for "hearing officer" throughout Subsections A(5) and C.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 386, 457, 458.
99 C.J.S. Workmen's Compensation §§ 318, 319; 100 C.J.S. Workmen's Compensation § 484.

§ 52-3-40. Autopsy in death claims.

A. On the filing of a claim for compensation for death from an occupational disease where an autopsy is necessary to ascertain the cause of death, it may be ordered by the workers' compensation judge and shall be made by a qualified person designated by the workers' compensation judge. Any interested person may designate a licensed physician to attend the autopsy, and the findings of the person performing the autopsy shall be filed with the workers' compensation judge and be a public record. All proceedings for compensation shall be suspended upon the refusal of a claimant or claimants to permit the autopsy when so ordered.

B. When an autopsy has been performed pursuant to any order of the workers' compensation judge, no cause of action therefor shall be against any person, firm or corporation participating in or requesting the autopsy.

History: 1941 Comp., § 57-1127, enacted by Laws 1945, ch. 135, § 27; 1953 Comp., § 59-11-28; reenacted by Laws 1986, ch. 22, § 64; 1989, ch. 263, § 62.

The 1986 amendment designated the provisions of the former section as present Subsections A and B; and substituted "hearing officer" for "court" and made minor stylistic changes throughout the section.

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judge" for "hearing officer" throughout the section.

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation § 543.
100 C.J.S. Workmen's Compensation § 458.

§ 52-3-41. Absence; employee to give notices of.

Any employee to whom compensation has been allowed or awarded who desires to leave the locality in which he was employed shall report to his attending physician for examination and shall notify the director in writing of his intention, accompanying the notice with a certificate from the attending physician setting forth the exact nature of the disablement and the condition of the employee with a statement of the probable length of time the disablement will continue. The director may, after the receipt of the request and certificate, consent that the employee leave the locality and give notice thereof to the employer. Otherwise, no compensation shall be paid during such absence. The director shall have the authority to order any employee to return for treatment or further examination to the locality in which he was employed, and in the event of noncompliance with the order, no further payments of compensation shall be made by the employer.

History: 1941 Comp., § 57-1128, enacted by Laws 1945, ch. 135, § 28; 1953 Comp., § 59-11-29; Laws 1986, ch. 22, § 65.

The 1986 amendment substituted "director" for "court" throughout the section and made minor stylistic changes.

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

§ 52-3-42. Limitation on filing of claims; rights barred unless timely filed.

The right to benefits under the New Mexico Occupational Disease Disablement Law for disablement or death from an occupational disease shall be forever barred unless

written claim is filed with the workers' compensation administration within the time provided:

A. if the claim is made by an employee and based upon silicosis, asbestosis, poisoning by benzol or its poisonous derivatives or any other disease except as provided in this section, it must be filed within one year from the date of the beginning of disablement of the employee; but

B. in cases involving radiation injury or disability, the one-year period for filing claims shall not begin to run until the employee:

(1) sustains such injury or disability; and

(2) knows or by the exercise of reasonable diligence should know of the existence of the injury or disability and its possible relationship to his employment;

C. if the claim is made by a dependent of an employee and based upon death resulting from an occupational disease, it must be filed within one year after the date of death of the employee; and

D. in the event that after disablement or death the employer or his surety has commenced the payment of benefits hereunder, without a claim being filed therefor, the times provided in Subsections A, B and C of this section shall not begin to run until thirty-one days after the employer or surety discontinues the payment of compensation.

History: 1953 Comp., § 59-11-30, enacted by Laws 1965, ch. 299, § 18; 1971, ch. 261, § 11; 1986, ch. 22, § 66; 1989, ch. 263, § 63.

The 1986 amendment, in the introductory language, substituted "the workmen's compensation administration" for "the court"; in Subsection D, inserted "in Subsections A, B and C of this section"; and made minor stylistic changes.

The 1989 amendment, effective June 16, 1989, made a minor stylistic change in the undesignated introductory paragraph.

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

Occupational Disease Disablement Law. - See 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Relation back of amended complaint. - All that is required by this section is the timely filing of a complaint. As noted, 52-3-18 NMSA 1978 provides that this may be done

informally, but so long as facts are pleaded from which the employee's rights may be determined, defects may be corrected. An amended claim may relate back to the date of the original claim if such amended claim arose out of the same conduct, transaction or occurrence as the claim set forth in the original complaint. If it did, it will be related back to the date of the filing of the original complaint. Holman v. Oriental Refinery, 75 N.M. 52, 400 P.2d 471 (1965).

Limitation on silicosis claim. - Surviving spouse's claim for death benefits, filed, pursuant to Subsection C, within one year after her husband died of silicosis, was untimely under 52-3-10B(3) NMSA 1978, where her husband died sixteen years after the date of his last employment. Tapia v. Springer Transf. Co., 106 N.M. 461, 744 P.2d 1264 (Ct. App. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - When statute of limitations begins to run as to cause of action for development of latent industrial or occupational disease, 1 A.L.R.4th 117.
100 C.J.S. Workmen's Compensation § 468(8).

§ 52-3-43. When occupational disease aggravated by other diseases.

Where an occupational disease is aggravated by any other disease or infirmity not itself compensable, or where disablement or death from any other cause not itself compensable is aggravated, prolonged, accelerated or in any wise contributed to by an occupational disease, the compensation payable under this act shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disablement or death, as such occupational disease as a causative factor bears to all the causes of such disablement or death, such reduction to be effected by reducing the number of weekly payments.

History: 1941 Comp., § 57-1130, enacted by Laws 1945, ch. 135, § 30; 1953 Comp., § 59-11-31.

Meaning of "this act". - See 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Reduction in benefits provided for by this section is for occupational disease aggravated by other disease or infirmity "not itself compensable" and for "other cause not itself compensable" which is aggravated by an occupational disease. Vincent v. United Nuclear-Homestake Partners, 89 N.M. 704, 556 P.2d 1180 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 99 C.J.S. Workmen's Compensation § 298.

§ 52-3-44. No liability prior to effective date.

Nothing in this act shall create any liability on the part of any employer where disablement or death occurred prior to the date on which this act becomes effective nor for death or injury by accident arising out of and in the course of employment.

History: 1941 Comp., § 57-1131, enacted by Laws 1945, ch. 135, § 31; 1953 Comp., § 59-11-32.

Meaning of "this act". - See 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 99 C.J.S. Workmen's Compensation § 21.

§ 52-3-45. Employees [Employee's] willful misconduct, willful self-exposure; defined.

Notwithstanding anything herein contained no employee or dependent of any employee shall be entitled to receive compensation for disablement or death from an occupational disease when such disablement or death, wholly or in part, was caused by the willful misconduct, willful self-exposure or willful disobedience to such reasonable rules and regulations as may be adopted by the employer and which rules and regulations have been and are kept posted in conspicuous places in and about the premises of the employer, or otherwise brought to the attention of such employee. As used in this section the term "willful self-exposure" shall include:

A. failure or omission on the part of an employee or applicant for employment truthfully to state in writing to the best of his knowledge in answer to any inquiry made by the employer, the place, duration and nature of previous employment;

B. failure or omission on the part of an applicant for employment to truthfully state in writing to the best of his knowledge in answer to an inquiry made by the employer, whether or not he had previously been disabled, laid off or compensated in damages, or otherwise, because of any physical disability;

C. failure or omission on the part of an employee or applicant for employment truthfully to give in writing to the best of his knowledge in answer to any inquiry made by the employer, full information about the previous status of his health, previous medical and hospital attention and direct and continuous exposure to active pulmonary tuberculosis.

History: 1941 Comp., § 57-1132, enacted by Laws 1945, ch. 135, § 32; 1953 Comp., § 59-11-33.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

§ 52-3-46. Compensation limited to Occupational Disease Disablement Law; not additional to that provided for accidents.

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 Occupational Disease Disablement Law shall be payable nor shall any compensation be payable under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] for any occupational disease.

History: 1941 Comp., § 57-1133, enacted by Laws 1945, ch. 135, § 33; 1953 Comp., § 59-11-34; Laws 1973, ch. 239, § 8; 1989, ch. 263, § 64.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes.

Occupational Disease Disablement Law. - See 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

§ 52-3-47. Fee restrictions; appointment of attorneys by the director or workers' compensation judge; penalty for violations.

A. It shall be unlawful for any person to receive or agree to receive any fees or payment directly or indirectly in connection with any claim for compensation under the New Mexico Occupational Disease Disablement Law except as provided in this section.

B. In all cases where the jurisdiction of the workers' compensation division is invoked to approve a settlement of a compensation claim under the New Mexico Occupational Disease Disablement Law, the director or workers' compensation judge, unless the claimant is represented by an attorney, may in his discretion appoint an attorney to aid the workers' compensation judge in determining whether the settlement should be approved. In the event of such an appointment, a reasonable fee for the services of the attorney shall be fixed by the workers' compensation judge subject to the limitation of Subsection G of this section.

C. In all cases where the jurisdiction of the workers' compensation division is invoked to approve a settlement of a compensation claim under the New Mexico Occupational Disease Disablement Law and the claimant is represented by an attorney, the total amount paid or to be paid by the employer in settlement of the claim shall be stated in the settlement papers and the workers' compensation judge shall determine and fix a reasonable fee for claimant's attorney, taking into account any sum previously paid. The fee fixed by the workers' compensation judge shall be the limit of the fee received or to be received by the attorney in connection with the claim, subject to the limitation of Subsection G of this section.

D. In all cases where compensation to which any person is entitled under the provisions of the New Mexico Occupational Disease Disablement Law is refused and the claimant shall thereafter collect compensation through proceedings before the workers' compensation division or courts in an amount in excess of the amount offered in writing by an employer five business days or more prior to the informal hearing before the division, then the compensation to be paid the attorney for the claimant shall be fixed by the workers' compensation judge hearing the claim or the courts upon appeal in the amount the workers' compensation judge or courts deem reasonable and proper, subject to the limitation of Subsection G of this section. In determining and fixing a reasonable fee, the workers' compensation judge or courts shall take into consideration:

(1) the sum, if any, offered by the employer:

(a) before the employee's attorney was employed;

(b) after the attorney's employment but before proceedings were commenced; and

(c) in writing five business days or more prior to the informal hearing; and

(2) the present value of the award made in the employee's favor.

E. In all actions arising under the provisions of Section 52-3-35 NMSA 1978, where the jurisdiction of the workers' compensation division is invoked to determine the question of whether the claimant's disablement has terminated and the claimant is represented by an attorney, the workers' compensation judge or courts upon appeal shall determine and fix a reasonable fee for the services of the claimant's attorney only if the employer is unsuccessful in establishing that the claimant's disablement has terminated. The fee when fixed by the workers' compensation judge or courts upon appeal shall be taxed as part of the costs against the employer and shall be the limit of the fee received or to be received by the attorney for services in the action, subject to the limitation of Subsection G of this section.

F. In determining reasonable attorneys' fees, the workers' compensation judge shall consider only those benefits to the employee that the attorney is responsible for securing. The value of future medical benefits shall not be considered in determining attorneys' fees.

G. 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 occupational disease of 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 disabled employee's claims and the disabled employee 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 employee. Any determination of bad faith shall be made by the workers' compensation judge through a separate factfinding proceeding.

H. The payment of attorneys' fees determined under this section shall be shared by the employee and the employer, with the employee paying one-fourth of the amount and the employer paying three-fourths of the amount.

I. It shall be unlawful for any person except a licensed attorney to receive or agree to receive any fee or payment in connection with any claim for compensation under the New Mexico Occupational Disease Disablement Law.

J. Nothing contained in this section shall be construed to apply to attorneys or agents representing employers or insurance carriers in any matter arising from a claim under the New Mexico Occupational Disease Disablement Law.

K. Every person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars ($50.00) or more than five hundred dollars ($500), to which may be added imprisonment in the county jail for a term not exceeding ninety days.

L. Nothing in this section shall restrict a claimant from being represented before the workers' compensation division by a nonattorney as long as that nonattorney receives no compensation for such representation from the claimant.

History: 1978 Comp., § 52-3-47, enacted by Laws 1987, ch. 235, § 41; 1989, ch. 263, § 65.

Repeals and reenactments. - Laws 1987, ch. 235, § 41 repealed the former 52-3-47 NMSA 1978, as enacted by Laws 1986, ch. 22, § 67 and enacted a new 52-3-47 NMSA 1978, effective June 19, 1987. For provisions of former section, see 1986 Cumulative Supplement.

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judge" for "hearing officer" in the catchline and throughout the section, and "workers'

compensation division" or "division" for "administration" throughout the section, and made minor stylistic changes throughout the section.

Compiler's notes. - Laws 1987, ch. 235, § 54A, effective June 19, 1987, repealed Laws 1986, ch. 22, § 105 which had formerly repealed this section effective July 1, 1987.

As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

An award of an attorney's fee is authorized in each case, and the award is for an amount the trial court deems reasonable and proper. The amount awarded will not be disturbed except for an abuse of discretion. Salazar v. Kaiser Steel Corp., 85 N.M. 254, 511 P.2d 580 (Ct. App.), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973).

No abuse of discretion. - Where the attorney's fee award is approximately 18% of the only showing as to the present value of the judgment and less than 16% of the total amount of the judgment, this court cannot say the trial court abused its discretion. Salazar v. Kaiser Steel Corp., 85 N.M. 254, 511 P.2d 580 (Ct. App.), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973).

Where the issues were hard fought and well tried and included exclusive medical testimony on the diagnosis of pneumoconiosis, the tests used in reaching that diagnosis, as well as the method used in conducting the tests and the court found difficult legal considerations applying to each of the issues, an award of 18% of the present value of the judgment was not an abuse of discretion. Salazar v. Kaiser Steel Corp., 85 N.M. 254, 511 P.2d 580 (Ct. App.), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973).

Neither does the fact that the union aided the plaintiffs in matters preliminary to suit or the fact of similar pleadings and issues, depositions applicable to all four cases, combined hearings on motions, pretrial and trial, show, as a matter of law, that the trial court abused its discretion in setting the amount of attorney's fees at 18% of the present value of the judgment. Salazar v. Kaiser Steel Corp., 85 N.M. 254, 511 P.2d 580 (Ct. App.), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 644 to 647.
101 C.J.S. Workmen's Compensation §§ 817 to 822.

§ 52-3-48. Employee to submit to examination and give information regarding self.

A. It is the duty of the employee at the time of his employment or thereafter from time to time at the request of the employer to submit himself to examination by a physician or surgeon duly authorized to practice medicine, who shall be paid by the employer, for the purpose of determining his physical condition.

B. It is also the duty of the employee if requested by his employer to give the names, addresses, relationship and degree of dependency of his dependents, if any, or any subsequent change thereof to the employer, and when the employer or his insurance carrier requires, the employee shall make a detailed verified statement relating to such dependents, matters of employment and other information incident thereto.

C. It is also the duty of the employee, if requested by the employer or his insurance carrier, to make a detailed verified statement as part of an application for employment disclosing specifically a pre-existing permanent physical impairment as that term is defined in Section 52-2-6 NMSA 1978.

History: 1941 Comp., § 57-1135, enacted by Laws 1945, ch. 135, § 35; 1953 Comp., § 59-11-36; 1987, ch. 235, § 42.

The 1987 amendment, effective June 19, 1987, added Subsection C and made minor changes in language throughout the section.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

§ 52-3-49. Rights and liabilities of employer and employee after award; penalty for failure to file undertaking or become exempt therefrom.

A. Any employee awarded compensation for disablement under the New Mexico Occupational Disease Disablement Law shall, previous to the due date of any installment of compensation provided for in the compensation order upon the order of the workers' compensation judge if requested by his employer or any other person bound by the compensation order, submit himself to medical examination by a physician licensed to practice medicine at a place designated by the person so demanding and which shall be reasonably convenient for the employee, and the employee may have a licensed physician present of his own election. The person requesting such examination shall, at the employee's request, bear the cost of transportation and necessary travel expense to and from the point of examination if the point of examination is more than twenty-five miles from the residence of the employee. The purpose of the examination shall be to determine whether the employee has recovered so that his earning power at any kind of work is restored, and the workers' compensation judge shall be empowered to hear evidence upon such issue. If it is disclosed upon such hearing that termination

of disablement has taken place, the workers' compensation judge shall order termination of payment of compensation. If the employee in such cases refuses to submit to examination or obstructs the same, his right to payments shall be suspended until an examination has taken place, and no compensation shall be payable during the period of refusal.

B. The right of any employee or, in case of his death, of those entitled to receive payment or damages for injuries occasioned to him by the negligence or wrong of any person other than the employer as hereinafter defined, shall not be affected by the New Mexico Occupational Disease Disablement Law; but he or they, as the case may be, shall not be allowed to receive payment or recover damages therefor and also claim compensation from the employer hereunder, and in such case the receipt of compensation from the employer hereunder shall operate as an assignment to the employer, his or its insurer, guarantor or surety, as the case may be, of any cause of action, to the extent of the liability of the employer to the employee occasioned by such injury which the employee or his legal representative or others may have against any other party for such injuries or death.

C. Any employer who fails in any case covered by the New Mexico Occupational Disease Disablement Law to file undertaking of insurance, guaranty or security for the payment of compensation which may become due hereunder or, in lieu thereof, the certificate of the superintendent of insurance as herein provided within the time herein required, shall be deemed guilty of a misdemeanor and shall be punishable by a fine of not more than one thousand dollars ($1,000) for any such offense.

History: 1941 Comp., § 57-1136, enacted by Laws 1945, ch. 135, § 36; 1953 Comp., § 59-11-37; Laws 1980, ch. 88, § 7; 1986, ch. 22, § 68; 1989, ch. 263, § 66.

The 1986 amendment substituted "compensation order" for "judgment" and "hearing officer" for "court" in Subsection A and made minor stylistic changes throughout the section.

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judge" for "hearing officer" several times in Subsection A, and made a minor stylistic change in Subsection B.

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Benefits payable for occupational disease. - The reference in this section to any kind of work does not change the provision that benefits are payable for disablement by reason of an occupational disease. Vincent v. United Nuclear-Homestake Partners, 89 N.M. 704, 556 P.2d 1180 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

§ 52-3-50. Effect of failure of employee to file claim by reason of conduct of employer.

The failure of any person entitled to compensation under the New Mexico Occupational Disease Disablement Law to give notice of disablement or file claim within the time fixed by that law shall not deprive the person of the right to compensation where 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.

History: 1941 Comp., § 57-1137, enacted by Laws 1945, ch. 135, § 37; 1953 Comp., § 59-11-38; Laws, 1986, ch. 22, § 69.

The 1986 amendment substituted "the New Mexico Occupational Disease Disablement Law" for "this act" and made minor stylistic changes.

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Cross-references. - As to effect of failure of workman to file claim or bring suit by reason of conduct of employer, see 52-3-25 NMSA 1978.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

§ 52-3-51. Reports to be filed with director.

It is the duty of every employer of labor in this state subject to the provisions of the New Mexico Occupational Disease Disablement Law or the employer's disease disablement compensation insurance carrier to make a written report to the director of all claims for disablement which may be filed by any of his employees during the course of their employment. Such reports shall be made within ten days after the employer has received notice from the employee of the disablement and upon forms to be furnished by the director containing such information as he may require. Upon request of the director, it is also the duty of the employer or the employer's insurance carrier to file with

the director closing reports upon the closing of a claim upon forms approved by the director.

History: 1941 Comp., § 57-1138, enacted by Laws 1945, ch. 135, § 38; 1953 Comp., § 59-11-39; Laws 1986, ch. 22, § 70; 1987, ch. 235, § 43.

The 1986 amendment substituted "director" for "labor commissioner" in the catchline and in two places in the section and made minor stylistic changes.

The 1987 amendment, effective June 19, 1987, inserted "or the employer's disease disablement compensation insurance carrier" preceding "to make a written report to the director" in the middle of the first sentence, added to the end of the second sentence "containing such information as he may require", and added the third sentence.

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 101 C.J.S. Workmen's Compensation § 915.

§ 52-3-52. Notice to director.

Every employer of labor within this state subject to the provisions of the New Mexico Occupational Disease Disablement Law or his insurer shall notify the director of the date on which the initial payment of compensation under the New Mexico Occupational Disease Disablement Law has been made, within ten days after such payment.

History: 1941 Comp., § 57-1139, enacted by Laws 1945, ch. 135, § 39; 1953 Comp., § 59-11-40; Laws 1986, ch. 22, § 71.

The 1986 amendment substituted "director" for "labor commissioner of date of payment" in the catchline and substituted "director" for "labor commissioner" and "the New Mexico Occupational Disease Disablement Law" for "this act" in two places in the section.

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

§ 52-3-53. Penalty for failure to file report.

Failure to file any of the reports mentioned in Sections 52-3-51 and 52-3-52 NMSA 1978 or to give such information to the director as may be required by the New Mexico Occupational Disease Disablement Law within the time prescribed shall subject the offender to a fine of not less than twenty-five dollars ($25.00) nor more than one hundred dollars ($100).

History: 1941 Comp., § 57-1140, enacted by Laws 1945, ch. 135, § 40; 1953 Comp., § 59-11-41; Laws 1986, ch. 22, § 72.

The 1986 amendment substituted "the reports mentioned in Sections 52-3-51 and 52-3-52 NMSA 1978" for "the reports mentioned in the two preceding sections," "director" for "labor commissioner" and "the New Mexico Occupational Disease Disablement Law" for "this act," and made minor stylistic changes.

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

§ 52-3-54. Director to enforce the New Mexico Occupational Disease Disablement Law.

For the purpose of enforcing the New Mexico Occupational Disease Disablement Law, there are hereby conferred upon the director the following powers and duties, so that when any employer subject to the provisions of the New Mexico Occupational Disease Disablement Law fails to comply with Section 52-3-9 NMSA 1978 relating to the filing of an undertaking in the nature of insurance or security for the payment of benefits under the New Mexico Occupational Disease Disablement Law, the director is hereby empowered to institute in his own name an action in the district court of Santa Fe county or the county wherein the employer resides or has his principal office or place of

business to enjoin the employer from continuing his business operations until he has complied with the provisions of Section 52-3-9 NMSA 1978, and upon a showing of the facts above recited, the court shall grant the injunction. In any such action, the attorney general or district attorney for the judicial district wherein the action is brought shall represent the director.

History: 1941 Comp., § 57-1141, enacted by Laws 1945, ch. 135, § 41; 1953 Comp., § 59-11-42; Laws 1986, ch. 22, § 73.

The 1986 amendment, in the catchline, substituted "Director" for "Labor Commissioner" and inserted "the New Mexico"; throughout the section, substituted "director" for "labor commissioner," "the New Mexico Occupational Disease Disablement Law" for "this act" and "said act," and "Section 52-3-9 NMSA 1978" for "Section 8 of this act"; and made minor stylistic changes.

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Liberal construction applies to law. - Liberal construction under the Workmen's Compensation Act applies only to the law and not to the facts. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972).

§ 52-3-55. Extraterritorial coverage.

If an employee, while working outside the territorial limits of this state suffers an occupational disease on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by the New Mexico Occupational Disease Disablement Law had such disease occurred within this state, such employee, or in the event of his death resulting from such disease his dependents, shall be entitled to the benefits provided by this act [52-3-55 to 52-3-59 NMSA 1978], provided that at the time of such disease:

A. his employment is principally localized in this state;

B. he is working under a contract of hire made in this state in employment not principally localized in any state;

C. he is working under a contract of hire made in this state in employment principally localized in another state whose occupational disease disablement law is not applicable to his employer; or

D. he is working under a contract of hire made in this state for employment outside the United States and Canada.

History: 1953 Comp., § 59-11-43, enacted by Laws 1975, ch. 268, § 1.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 87 Am. Jur. 2d Workmen's Compensation §§ 84 to 88.
99 C.J.S. Workmen's Compensation §§ 23 to 25.

§ 52-3-56. Credit for benefits furnished or paid under laws of other jurisdictions.

The payment or award of benefits under the occupational disease disablement law of another state, territory, province or foreign nation to an employee or his dependents otherwise entitled on account of such occupational disease to the benefits of this act [52-3-55 to 52-3-59 NMSA 1978] shall not be a bar to a claim for benefits under this act; provided that claim under this act is filed within one year after such occupational disease. If compensation is paid or awarded under this act:

A. the medical and related benefits furnished or paid for by the employer under such other occupational disease disablement law on account of such occupational disease shall be credited against the medical and related benefits to which the employee would have been entitled under this act had claim been made solely under this act;

B. the total amount of all income benefits paid or awarded the employee under such other occupational disease disablement law shall be credited against the total amount of income benefits which would have been due the employee under this act, had claim been made solely under this act; and

C. the total amount of death benefits paid or awarded under such other occupational disease disablement law shall be credited against the total amount of death benefits due under this act.

History: 1953 Comp., § 59-11-43.1, enacted by Laws 1975, ch. 268, § 2.

§ 52-3-57. Injuries in transitory employment in New Mexico.

If an employee is entitled to the benefits of the New Mexico Occupational Disease Disablement Law by reason of an occupational disease sustained in this state in employment by an employer who is domiciled in another state and who has not secured the payment of compensation as required by the New Mexico Occupational Disease

Disablement Law, the employer or his carrier may file with the director a certificate issued by the commission or agency of the other state having jurisdiction over occupational disease disablement claims certifying that the employer has secured the payment of compensation under the occupational disease disablement law of the other state and that with respect to the occupational disease the employee is entitled to the benefits provided under such law. In such event:

A. the filing of the certificate shall constitute an appointment by the employer or his carrier of the director as his agent for acceptance of the service of process in any proceeding brought by the employee or his dependents to enforce his or their rights under the New Mexico Occupational Disease Disablement Law on account of the occupational disease;

B. the director shall send to the employer or carrier, by registered or certified mail, the address shown on the certificate, a true copy of any notice of claim or other process served on the director by the employee or his dependents in any proceeding brought to enforce his or their rights under the New Mexico Occupational Disease Disablement Law;

C. if such:

(1) employer is a qualified self-insurer under the occupational disease disablement law of the other state, the employer shall, upon submission of evidence satisfactory to the director of his ability to meet his liability to the employee under the New Mexico Occupational Disease Disablement Law, be deemed to be a qualified self-insurer under the New Mexico Occupational Disease Disablement Law; or

(2) employer's liability under the occupational disease disablement law of the other state is insured, the employer's carrier, as to such employee or his dependents only, shall be deemed to be an insurer authorized to write insurance under and be subject to the New Mexico Occupational Disease Disablement Law; provided, however, that unless its contract with the employer requires it to pay an amount equivalent to the compensation benefits provided by the New Mexico Occupational Disease Disablement Law, its liability for income benefits or medical and related benefits shall not exceed the amount of such benefits for which the insurer would have been liable under the occupational disease disablement law of the other state;

D. if the total amount for which the employer's insurance is liable under Subsection C of this section is less than the total of the compensation benefits to which the employee is entitled under the New Mexico Occupational Disease Disablement Law, the director may, if he deems it necessary, require the employer to file security satisfactory to the director to secure the payment of benefits due the employee or his dependents under the New Mexico Occupational Disease Disablement Law; and

E. upon compliance with the requirements of Subsection C of this section, the employer,

as to such employee only, shall be deemed to have secured the payment of compensation under the New Mexico Occupational Disease Disablement Law.

History: 1953 Comp., § 59-11-43.2, enacted by Laws 1975, ch. 268, § 3; 1986, ch. 22, § 74.

The 1986 amendment, throughout the section, substituted "the New Mexico Occupational Disease Disablement Law" for "this act" and "director" for "labor commissioner," and made minor stylistic changes.

Effective dates. - Laws 1986, ch. 22, § 103 made the amendment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

§ 52-3-58. Locale of employment.

A. A person's employment is principally localized in this or another state when:

(1) his employer has a place of business in this or such other state and he regularly works at or from such place of business; or

(2) if Paragraph (1) of this subsection is not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other state.

B. An employee whose duties require him to travel regularly in the service of his employer in this and one or more other states may, by written agreement with his employer, provide that his employment is principally localized in this or another state, and, unless the other state refuses jurisdiction, the agreement shall be given effect under the New Mexico Occupational Disease Disablement Law.

C. As used in Sections 52-3-55 through 52-3-58 NMSA 1978:

(1) "United States" includes only the states of the United States and the District of Columbia;

(2) "state" includes any state of the United States, the District of Columbia or any province of Canada; and

(3) "carrier" includes any insurance company licensed to write workers' compensation insurance in any state of the United States or any state or provincial fund which insures employers against their liabilities under an occupational disease disablement law.

History: 1953 Comp., § 59-11-43.3, enacted by Laws 1975, ch. 268, § 4; 1989, ch. 263, § 67.

The 1989 amendment, effective June 16, 1989, substituted "Sections 52-3-55 through 52-3-58 NMSA 1978" for "Sections 59-11-43 through 59-11-43.4 NMSA 1953" in the introductory paragraph of Subsection C, and made minor stylistic changes throughout the section.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

§ 52-3-59. Reciprocal recognition of extra-territorial coverage with other jurisdictions.

For the purpose of effecting mutually satisfactory reciprocal arrangements with other states respecting extra-territorial jurisdictions, the employment security division of the labor department is empowered to promulgate special and general regulations not inconsistent with the provisions of the New Mexico Occupational Disease Disablement Law and, with the approval of the governor, to enter into reciprocal agreements with appropriate boards, commissions, officers or agencies of other states having jurisdiction over workers' compensation claims.

History: 1953 Comp., § 59-11-43.5, enacted by Laws 1975, ch. 268, § 5; 1989, ch. 263, § 68.

The 1989 amendment, effective June 16, 1989, substituted "employment security division of the labor department" for "commission", and made minor stylistic changes.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

§ 52-3-60. Offset of unemployment compensation benefits.

A. No total disablement benefits shall be payable under the New Mexico Occupational Disease Disablement Law for any weeks in which the disabled employee has received or is receiving unemployment compensation benefits, except as provided in this section.

B. If an employee is entitled to receive unemployment compensation benefits and would otherwise be entitled to receive total disablement benefits, the unemployment compensation benefits shall be primary, and the total disablement benefits shall be supplemental only, and the sum of the two benefits shall not exceed the amount of total disablement benefits that would otherwise be payable.

History: 1978 Comp., § 52-3-60, enacted by Laws 1987, ch. 235, § 44.

Effective dates. - Laws 1987, ch. 235 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23 became effective on June 19, 1987.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Article 4

Health Care Providers

§ 52-4-1. Definitions; restrictions on choice of health care providers prohibited under policies of workers' compensation and occupational disease disablement.

A. As used in this section, "health care provider" means:

(1) any hospital which is maintained by the state or any political subdivision of the state, or any place which is currently licensed as a hospital by the health and environment department and has accommodations for resident bed patients, a licensed professional registered nurse always on duty or call, a laboratory and an operating room where surgical operations are performed, but does not include a convalescent or nursing or rest home;

(2) an optometrist licensed pursuant to the provisions of Chapter 61, Article 2 NMSA 1978;

(3) a chiropractor licensed pursuant to the provisions of Chapter 61, Article 4 NMSA 1978;

(4) a dentist licensed pursuant to the provisions of Chapter 61, Article 5 NMSA 1978;

(5) a physician licensed pursuant to the provisions of Chapter 61, Article 6 NMSA 1978;

(6) a podiatrist licensed pursuant to the provisions of Chapter 61, Article 8 NMSA 1978;

(7) an osteopathic physician licensed pursuant to the provisions of Chapter 61, Article 10 NMSA 1978;

(8) a psychologist who is duly licensed or certified in the state where the service is rendered, holding a doctorate degree in psychology and having at least two years clinical experience in a recognized health setting, or who has met the standards of the national register of health services providers in psychology; or

(9) a certified nurse-midwife licensed by the board of nursing as a registered nurse and

registered with the behavioral health services division of the health and environment department as a certified nurse-midwife.

B. As used in this section, "health services contract" means any workers' compensation or occupational disease disablement insurance policy or contract which provides for payment, reimbursement or indemnification for treatment or care of persons for the cure, correction, prevention or diagnosis of any physical or mental condition.

C. Whenever any health services contract issued, delivered, issued for delivery, entered into, amended or renewed after the effective date of this section provides for payment, reimbursement or indemnification for any service which is within the lawful scope of practice of a health care provider in this state, such payment, reimbursement or indemnification shall not be denied when such service is rendered by the health care provider, provided such treatment is related to the injury and is reasonable and necessary. Nothing contained in the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] or the New Mexico Occupational Disease Disablement Law shall be construed to deny or limit the right of a worker, if he has availed himself of such services as are provided pursuant to those acts and such services have proven unsatisfactory, to seek the services of a health care provider; provided that the employer's payment, pursuant to this section, shall not constitute furnishing such services for purposes of Section 52-1-49 NMSA 1978.

History: 1978 Comp., § 52-4-1, enacted by Laws 1983, ch. 116, § 1; 1989, ch. 263, § 69.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes in the catchline and throughout the section, and inserted "behavioral" in Subsection A(9).

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Laws 1983, ch. 16, § 2 made the act effective immediately. Approved March 31, 1983.

Subsection C supplements, rather than modifies, 52-1-49 NMSA 1978, which sets forth the employer's general obligation to furnish medical services. Bowles v. Los Lunas Schools, N.M. , 781 P.2d 1178 (Ct. App. 1989).

Worker is eligible to receive and have insurance carrier pay for services of chiropractor if the care was related to a compensable disability and such services are deemed reasonable and necessary. Salcido v. Transamerica Ins. Group, Inc., 102 N.M. 217, 693 P.2d 583 (1985).

Employer's failure to provide services. - In the event of the employer's failure to provide services in accordance with the statutory standard, the worker may seek the services of another health provider and require the employer to pay for such services, provided such treatment is related to the injury and is reasonable and necessary. The question of

whether the employer has provided services in accordance with that standard is ordinarily a question of fact and depends on the circumstances of the particular case. Bowles v. Los Lunas Schools, N.M. , 781 P.2d 1178 (Ct. App. 1989).

Law reviews. - For case note, "WORKERS' COMPENSATION LAW: A Clinical Psychologist Is Qualified to Give Expert Medical Testimony Regarding Causation: Madrid v. University of California, d/b/a Los Alamos National Laboratory," see 18 N.M.L. Rev. 637 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 391 to 399.
Workers' compensation: reasonableness of employee's refusal of medical services tendered by employer, 72 A.L.R.4th 905.
99 C.J.S. Workmen's Compensation §§ 266 to 277.

Article 5

Workers' Compensation Division

§ 52-5-1. Purpose.

It is the intent of the legislature in creating the workers' compensation division of the labor department that the laws administered by it to provide a workers' benefit system be interpreted to assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers who are subject to the provisions of the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] and the New Mexico Occupational Disease Disablement Law. It is the specific intent of the legislature that benefit claims cases be decided on their merits and that the common law rule of "liberal construction" based on the supposed "remedial" basis of workers' benefits legislation shall not apply in these cases. The workers' benefit system in New Mexico is based on a mutual renunciation of common law rights and defenses by employers and employees alike. Accordingly, the legislature declares that the Workers' Compensation Act and the New Mexico Occupational Disease Disablement Law are not remedial in any sense and are not to be given a broad liberal construction in favor of the claimant or employee on the one hand, nor are the rights and interests of the employer to be favored over those of the employee on the other hand.

History: 1978 Comp., § 52-5-1, enacted by Laws 1987, ch. 342, § 30; 1989, ch. 263, § 70.

Cross-references. - As to authority to establish workers' compensation division, see N.M. Const., art. III, § 1.

Repeals and reenactments. - Laws 1987, ch. 342, § 30 repealed former 52-5-1 NMSA 1978, as enacted by Laws 1986, ch. 22, § 27, relating to creation of workmen's

compensation administration, effective July 1, 1987, and enacted a new 52-5-1 NMSA 1978. For provisions of former section, see 1986 Cumulative Supplement.

The 1989 amendment, effective June 16, 1989, inserted "of the labor department" near the beginning of the first sentence, and made a minor stylistic change in the last sentence.

Compiler's notes. - Laws 1987, ch. 235, § 45, purporting to amend this section effective June 19, 1987, designating the former provisions as Subsection A and in that subsection substituting "workers' " for "workmen's" and adding a Subsection B, setting forth the intent of the legislature in creating the workers' compensation administration, was approved on April 9, 1987. However, Laws 1987, ch. 342, § 30, repealing and reenacting this section (see above note) was approved on April 10, 1987. The section was set out as repealed and reenacted by Laws 1987, ch. 342, § 30. See 12-1-8 NMSA 1978.

As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

All claims to be filed with division. - Commencing on December 1, 1986, all claims, regardless of when the injury or death may have occurred, shall be filed with the workmen's compensation administration (now the workers' compensation division). Wylie Corp. v. Mowrer, 104 N.M. 751, 726 P.2d 1381 (1986).

Law reviews. - For case note, "WORKERS' COMPENSATION LAW: A Clinical Psychologist Is Qualified to Give Expert Medical Testimony Regarding Causation: Madrid v. University of California, d/b/a Los Alamos National Laboratory," see 18 N.M.L. Rev. 637 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Workmen's Compensation §§ 79 to 82.
100 C.J.S. Workmen's Compensation §§ 369 to 377.

§ 52-5-2. Director; appointment; employees; workers' compensation judges.

A. The workers' compensation division shall be in the charge of a director who shall be appointed by the governor for a term of five years with the consent of the senate. The appointed director shall serve and have the authority of that office during the period of time prior to final action by the senate confirming or rejecting the appointment. The appointment shall be made on the basis of administrative ability, education, training and experience relevant to the duties of the director. Upon the expiration of the term, the director shall continue to serve until the successor is appointed and qualified. Before entering upon the duties, the director shall subscribe to an oath to faithfully discharge the duties of the office. The director shall devote full time to the duties of the office.

B. The director shall appoint necessary workers' compensation judges, provided that no workers' compensation judge shall be appointed prior to September 1, 1986 and not more than two workers' compensation judges shall be appointed prior to April 1, 1987. Workers' compensation judges shall not be subject to the provisions of the Personnel Act except as provided by Subsection C of this section. Workers' compensation judges shall be appointed for an initial term of one year and shall be compensated at a rate not more than ninety percent of that of district court judges. Ninety days prior to the expiration of a workers' compensation judge's term, the director shall review his performance. If approved by the director, the workers' compensation judge may be reappointed to a subsequent five-year term.

C. Workers' compensation judges shall be lawyers licensed to practice law in this state and shall have a minimum five years' experience as a practicing lawyer. They shall devote their entire time to their duties and shall not engage in the private practice of law and shall not hold any other position of trust or profit or engage in any occupation or business interfering with or inconsistent with the discharge of their duties as a workers' compensation judge. A workers' compensation judge shall be required to conform to canons 1, 2, 3, 4, 5 and 7 [Canons 21-100 to 21-500, 21-700] of the code of judicial conduct as adopted by the supreme court, and violation of those canons shall be exclusive grounds for dismissal prior to the expiration of his term. A workers' compensation judge dismissed prior to the expiration of his term shall be entitled to the provisions of Section 10-9-18 NMSA 1978 with respect to that dismissal.

D. Workers' compensation judges shall have the same immunity from liability for their adjudicatory actions as district court judges.

History: Laws 1986, ch. 22, § 28; 1987, ch. 235, § 46; 1987, ch. 342, § 31; 1989, ch. 263, § 71.

The 1987 amendments. - Laws 1987, ch. 235, § 46, effective June 19, 1987, substituting "workers' " for "workmen's" in Subsections A and B and making a minor word change in Subsection C, was approved on April 9, 1987. However, Laws 1987, ch. 342, § 31, effective July 1, 1987, deleting former Subsections A and B relating to appointment, term, powers and duties of director, redesignating former Subsections C and D as present Subsections A and B, making minor stylistic changes therein, and adding present Subsection C, was approved on April 10, 1987. The section is set out as amended by Laws 1987, ch. 342, § 31. See 12-1-8 NMSA 1978.

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judges" for "hearing officers" and "workers' compensation judge" for "hearing officer" in the catchline and throughout the section, added present Subsection A, redesignated former Subsections A through C as present Subsections B through D, and substituted "Subsection C" for "Subsection B" in the second sentence of present Subsection B.

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective on July 1, 1986.

Personnel Act. - See 10-9-1 NMSA 1978 and notes thereto.

§ 52-5-3. Reports.

The director shall prepare and publish such statistical and informational reports and analyses based on reports and records available that, in his opinion, will be useful in increasing public understanding of the purposes, effectiveness, costs, coverage and administrative procedures of workers' compensation and vocational rehabilitation and in providing basic information regarding the occurrence and sources of work injuries to public and private agencies engaged in industrial injury prevention activities.

History: Laws 1986, ch. 22, § 29; 1987, ch. 342, § 32; 1989, ch. 263, § 72.

The 1987 amendment, effective July 1, 1987, inserted "of the worker's compensation division of the labor department" near the beginning of the section.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes.

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective on July 1, 1986.

§ 52-5-4. Authority to adopt rules, regulations and fee schedules.

A. The director is authorized to adopt reasonable rules and regulations, after notice and public hearing, for effecting the purposes of the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] or the New Mexico Occupational Disease Disablement Law. Such rules and regulations shall include provisions for procedures in the nature of conferences or other techniques to dispose of cases informally or to expedite claim adjudication, narrow issues and simplify the methods of proof at hearings. All rules and regulations shall be published upon adoption and be made available to the public and, if not inconsistent with law, shall be binding on the administration of the Workers' Compensation Act or the New Mexico Occupational Disease Disablement Law. All rules and regulations adopted shall be filed in accordance with the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978].

B. Such rules and regulations shall include provisions for procedures in the nature of conferences or other techniques to dispose of cases informally or to expedite claim adjudication, narrow issues and simplify the methods of proof at hearings.

C. The director shall promulgate and enforce schedules of reimbursement for such nonprofessional services as providing testimony and depositions, the production of

records or the completion of medical capacity forms to health care providers as defined in Section 52-4-1 NMSA 1978 as he deems appropriate and necessary in the administration of the Workers' Compensation Act or the New Mexico Occupational Disease Disablement Law.

History: Laws 1986, ch. 22, § 30; 1989, ch. 263, § 73.

The 1989 amendment, effective June 16, 1989, substituted "regulations and fee schedules" for "and regulations" in the catchline, designated the formerly undesignated provisions as Subsection A and made minor stylistic changes therein, and added Subsections B and C.

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective on July 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

§ 52-5-5. Claims; informal conferences.

A. When a dispute arises under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] or the New Mexico Occupational Disease Disablement Law, any party may file a claim with the director no sooner than thirty-one days from the date of injury or the occurrence of the disabling disease. The director shall assist workers and employees not represented by counsel in the preparation of the claim document.

B. The director shall prepare a form of claim which shall be available to all parties. The claim shall state concisely in numbered paragraphs the questions at issue or in dispute which the claimant expects to be determined with sufficient particularity that the responding or opposing party may be notified adequately of the claim and its basis, including, if applicable, the specific benefit which is due and not paid.

C. Upon receipt, every claim shall be evaluated by the director or his designee, who shall then contact all parties and attempt to informally resolve the dispute. Within sixty days after receipt of the claim, the director shall issue his recommendations for resolution and provide the parties with a copy by certified mail, return receipt requested. Within thirty days of receipt of the recommendation of the director, each party shall notify the director on a form provided by him of the acceptance or rejection of the recommendation. A party failing to notify the director waives any right to reject the recommendation and is bound conclusively by the director's recommendation unless, upon application made to the director within thirty days after the foregoing deadline, the director finds that the party's failure to notify was the result of excusable neglect. If either party makes a timely rejection of the director's recommendation, the claim shall be assigned to a workers' compensation judge for hearing.

D. Each party to a dispute shall have a peremptory right to disqualify one workers' compensation judge; provided that the employer and its insurer shall constitute a single party for purposes of this subsection.

History: Laws 1986, ch. 22, § 31; 1987, ch. 235, § 47; 1989, ch. 263, § 74.

The 1987 amendment, effective June 19, 1987, in Subsection A in the first sentence deleted "bona fide" preceding "dispute" near the beginning, substituted "Workers' " for "Workmen's" and added to the end "no sooner than thirty-one days from the date of injury or the occurrence of the disabling disease" and in the second sentence substituted "workers and employees" for "workmen"; in Subsection C in the second sentence substituted "sixty days" for "thirty days", and added to the end of the fourth sentence "unless, upon application made to the director within thirty days after the foregoing deadline, the director finds that the party's failure to notify was the result of excusable neglect".

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judge" for "hearing officer" in the last sentence of Subsection C, and added Subsection D.

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Filing in improper venue. - The one-year statute of limitations under this section was satisfied by the diligent filing of the complaint, although it was in an improper venue. The statutory period was tolled during the pendency of the action, including the time consumed on appeal. Bracken v. Yates Petroleum Corp., 107 N.M. 463, 760 P.2d 155 (1988) (decided under prior law).

Time limit. - The language of Subsection C indicates a legislative intent that a time limit exist on the authority of the director to vacate or modify a recommended disposition, thus requiring (1) a showing of good cause, and (2) that the motion for reconsideration was made within 30 days following receipt by the parties of the hearing officer's proposed informal recommendation. Armijo v. Save 'N Gain, N.M. , 771 P.2d 989 (Ct. App. 1989).

The division should not be deprived of administrative jurisdiction when the issuance of recommended resolutions are delayed beyond the prescribed statutory time limit. Armijo v. Save 'N Gain, N.M. , 771 P.2d 989 (Ct. App. 1989).

Failure of the director to comply with the legislative time constraints imposed by Subsection C permits the parties to either waive any delay in the rendition of the informal resolution and await the recommended resolution or, if no informal resolution

has been filed after the expiration of the 60-day period, to invoke its rights to a prompt hearing on the merits before a hearing officer without further delay and without the necessity of awaiting the issuance of an informal settlement recommendation. Armijo v. Save 'N Gain, N.M. , 771 P.2d 989 (Ct. App. 1989).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation § 442 et seq.
100 C.J.S. Workmen's Compensation § 458 et seq.

§ 52-5-6. Authority of the director to conduct hearings.

A. Hearings shall be held in the county in which the injury or disablement occurred for which the claim is being made unless the parties agree otherwise.

B. The workers' compensation judge shall have the power to preserve and enforce order during hearings; administer oaths; issue subpoenas to compel the attendance and testimony of witnesses, the production of books, papers, documents and other evidence or the taking of depositions before a designated individual competent to administer oaths; examine witnesses; enter noncriminal sanctions for misconduct; and do all things conformable to law which may be necessary to enable him to discharge the duties of his office effectively.

C. In addition to the noncriminal sanctions that may be ordered by the workers' compensation judge, any person committing any of the following acts in a proceeding before a workers' compensation judge may be held accountable for his conduct in accordance with the provisions of Subsection D of this section:

(1) disobedience of or resistance to any lawful order or process;

(2) misbehavior during a hearing or so near the place of the hearing as to obstruct it;

(3) failure to produce any pertinent book, paper or document after having been ordered to do so;

(4) refusal to appear after having been subpoenaed;

(5) refusal to take the oath or affirmation as a witness; or

(6) refusal to be examined according to law.

D. The director may certify to the district court of the district in which the acts were committed the facts constituting any of the acts specified in Paragraphs (1) through (6) of Subsection C of this section. The court shall hold a hearing and if the evidence so warrants may punish the offending person in the same manner and to the same extent as for contempt committed before the court, or it may commit the person upon the same

conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the court.

History: Laws 1986, ch. 22, § 32; 1987, ch. 235, § 48; 1989, ch. 263, § 75.

The 1987 amendment, effective June 19, 1987, in Subsection A substituted the present provisions for "Hearings shall be held at such places as the director finds most convenient for the parties and most appropriate for ascertaining their rights".

The 1989 amendment, effective June 16, 1989, inserted "or disablement" in Subsection A, substituted "workers' compensation judge" for "hearing officer" throughout Subsections B and C, inserted "enter noncriminal sanctions for misconduct" near the end of Subsection B, and added all of the language of the introductory paragraph of Subsection C preceding "any person".

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective on December 1, 1986.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 476 to 479.
100 C.J.S. Workmen's Compensation § 581 et seq.

§ 52-5-7. Hearing procedure.

A. When matters in dispute cannot be resolved by informal conference or other techniques, the director shall transmit a copy of the claim to the other parties with notice to respond by written answer. The other parties shall respond with a written answer within twenty days after receiving a notice or within such extension of that time as the director may allow. If no timely answer is filed by a party after notice, a workers' compensation judge may, if he determines it to be appropriate, grant the relief sought against that party. However, if, in order to enable the workers' compensation judge to enter an order and carry out its effect, it is necessary to take an account, determine the amount of benefits due, establish the truth of any claims by evidence or make an investigation of any matter, the workers' compensation judge may conduct such hearings as he deems necessary and proper.

B. A hearing shall be held for determining the questions at issue within sixty days of the filing of the answer. All parties in interest shall be given at least twenty days' notice of the hearing and of the issues to be heard, served personally or by mail. Following the presentation of the evidence, the workers' compensation judge shall determine the questions at issue and file the decision with the director within thirty days, unless the time for filing the decision is extended by the mutual agreement of the parties. At the time of filing, a certified copy of the decision shall be sent by first class mail to all interested parties at the last known address of each. The decision of the workers' compensation judge shall be made in the form of a compensation order, appropriately

titled to show its purpose and containing a report of the case, findings of fact and conclusions of law and, if appropriate, an order for the payment of benefits under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] or the New Mexico Occupational Disease Disablement Law.

C. The decision of the workers' compensation judge shall be final and conclusive as to all matters adjudicated by him upon the expiration of the thirtieth day after a copy of the decision has been mailed to the parties, unless prior to that day a party in interest seeks judicial review of the decision pursuant to Section 52-5-8 NMSA 1978.

D. All hearings before the workers' compensation judge shall be open to the public. The director shall by regulation provide for the preparation of a record of each hearing.

E. The director may authorize a workers' compensation judge or his duly authorized representative to enter at any reasonable time the premises where an injury or death has occurred and to make such examination of any tool, appliance, process, machinery or environmental or other condition as may be relevant to a determination of the cause and circumstances of the injury, disablement or death.

F. The testimony of any witness may be taken by deposition or interrogatories according to the rules of civil procedure for the district courts and may be taken before any workers' compensation judge or any person authorized to take testimony, but discovery procedure shall be conducted only upon the workers' compensation judge's findings that good cause exists. The cost and expense of any discovery procedure allowed by the workers' compensation judge shall be paid by the employer, and in no event shall an unsuccessful claimant be responsible for the cost and expense of any discovery procedure. No costs shall be charged, taxed or collected by the workers' compensation judge except fees for witnesses who testify under subpoena. The witnesses shall be allowed the same fee for attendance and mileage as is fixed by the law in civil actions, except that the workers' compensation judge may assess against the employer the fees allowed any expert witness, as provided in Section 38-6-4 NMSA 1978, whose examination of the claimant, report or hearing attendance the workers' compensation judge deems necessary for resolution of matters at issue.

History: Laws 1986, ch. 22, § 33; 1987, ch. 235, § 49; 1989, ch. 263, § 76.

The 1987 amendment, effective June 19, 1987, in Subsection B at the end of the third sentence substituted "the mutual agreement of the parties" for "the director" and near the end of the fifth sentence substituted "Workers' " for "Workmen's"; in Subsection C substituted "Section 52-5-8 NMSA 1978" for "Section 34 of this act"; in Subsection F near the end of the second sentence substituted "claimant" for "claimant-workman", in the middle of the fourth sentence deleted "medical or vocational rehabilitation" preceding "witness" and near the end substituted "claimant" for "workman".

The 1989 amendment, effective June 16, 1989, inserted "disablement" near the end of Subsection E, and substituted "workers' compensation judge" for "hearing officer" several times throughout the section.

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Law reviews. - For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation § 540 et seq.
100 C.J.S. Workmen's Compensation § 581 et seq.

§ 52-5-8. Judicial review of decision by workers' compensation judge.

A. Any party in interest may, within thirty days of mailing of the final order of the workers' compensation judge, file a notice of appeal with the court of appeals.

B. A decision of a workers' compensation judge is reviewable by the court of appeals in the manner provided for other cases and is subject to stay proceedings as provided by the rules of civil procedure for the district courts, except that the appeal shall be advanced on the calendar and disposed of as promptly as possible.

C. When an appeal is taken to the court of appeals by the worker or the person appointed by a court of competent jurisdiction to act on behalf of dependents, he is entitled to the record of the hearing and proceedings in the case, which shall be prepared, transcribed, certified and forwarded by the director to the clerk of the court of appeals without cost. No docket fee or other costs shall be charged the worker on appeal.

History: Laws 1986, ch. 22, § 34; 1989, ch. 263, § 77.

The 1989 amendment, effective June 16, 1989, substitute "workers' compensation judge" for "hearing officer" in the catchline and in Subsections A and B, and made minor stylistic changes in Subsection C.

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective on December 1, 1986.

Notice of appeal from a final disposition order of the workers' compensation administration had to be filed with 30 days from the date of the order, as provided in Rule 2-601A, rather than within 30 days, of mailing of the final order as provided in Subsection A. Tzortzis v. County of Los Alamos, 108 N.M. 418, 773 P.2d 363 (Ct. App. 1989).

Standard of review. - The whole record review standard applies to Court of Appeals review of workers' compensation cases decided by the workers' compensation division. Tallman v. Arkansas Best Freight, 108 N.M. 124, 767 P.2d 363 (Ct. App. 1988).

Appellate court considers evidence in most favorable light. - In reviewing a workmen's compensation case, the appellate court will consider the evidence, and the inferences that may be drawn reasonably therefrom, in the light most favorable to support the findings. Moorhead v. Gray Ranch Co., 90 N.M. 220, 561 P.2d 493 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977); Marez v. Kerr-McGee Nuclear Corp. 93 N.M. 9, 595 P.2d 1204 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

That supports the finding. - In workmen's compensation cases, as in other cases, an appellate court, in determining whether or not a finding of the trial court is supported by substantial evidence, considers only that evidence and the reasonable inferences deducible therefrom, which support the finding, and this evidence and these inferences are viewed in their most favorable light to support the finding. Lucero v. Los Alamos Constructors, Inc., 79 N.M. 789, 450 P.2d 198 (Ct. App. 1969).

Appellate review of a workman's compensation case requires that the appellate court view the entire record in the light most favorable to support the trial court's findings; considering any reasonable inferences that can be drawn therefrom to support the findings, and disregarding any inferences to the contrary. Gallegos v. Duke City Lumber Co., 87 N.M. 404, 534 P.2d 1116 (Ct. App. 1975).

If there is substantial evidence to support the findings of the trial court they will not be disturbed. Moorhead v. Gray Ranch Co., 90 N.M. 220, 561 P.2d 493 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977); Marez v. Kerr-McGee Nuclear Corp., 93 N.M. 9, 595 P.2d 1204 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

In viewing the evidence in compensation hearing to determine whether or not it substantially supports the findings, it must be viewed, together with all reasonable inferences deducible therefrom, in the light most favorable to support the findings. Lopez v. Schultz & Lindsay Constr. Co., 79 N.M. 485, 444 P.2d 996 (Ct. App.), cert. denied, 79 N.M. 448, 444 P.2d 775 (1968).

And part unfavorable not considered. - Where judgment was rendered for plaintiff in action for compensation, on jury's special findings, part of physician's testimony unfavorable to plaintiff would not be considered on appeal. Robinson v. Mittry Bros., 43 N.M. 357, 94 P.2d 99 (1939) (decided under former law).

Evidence to be stated as favorably as possible. - Where the sole question on appeal was whether there was substantial evidence of a causal connection between accident and disability, the evidence was to be stated as favorably as possible in support of the special verdict that "plaintiff's disability, and his suffering from atrophy and his blindness" were caused "by an accident." James v. Aguadero Corp., 39 N.M. 159, 42 P.2d 775 (1935) (decided under former law).

In reviewing workmen's compensation cases an appellate court considers only evidence and inferences that may be reasonably drawn therefrom, in the light most favorable to support the findings. Quintana v. East Las Vegas Mun. School Dist., 82 N.M. 462, 483 P.2d 936 (Ct. App. 1971).

For trial court to weigh all evidence. - It was not the duty of the appellate court to weigh the testimony of the doctors, but rather, the duty of the trier of fact; and although there was testimony of the medical experts from which the trial court might have found other than it did, nevertheless, it was for the trial court, as the fact finder, to evaluate all the evidence and determine where the truth lay. Moorhead v. Gray Ranch Co., 90 N.M. 220, 561 P.2d 493 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

The credibility of the witnesses and the weight to be given their testimony in compensation hearings are to be determined by the trial court and not by the appellate court. The appellate court may not properly substitute its judgment for that of the trial court as to the credibility of any witness or as to the weight to be given his testimony. It is not for the appellate court to say what testimony should be given credence and what should be disbelieved. Lopez v. Schultz & Lindsay Constr. Co., 79 N.M. 485, 444 P.2d 996 (Ct. App.), cert. denied, 79 N.M. 448, 444 P.2d 775 (1968); Marez v. Kerr-McGee Nuclear Corp., 93 N.M. 9, 595 P.2d 1204 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

It is not the function of an appellate court to substitute its judgment for that of the trier of fact. Its sole duty is to determine if the findings of fact are supported by substantial evidence. Gallegos v. Duke City Lumber Co., 87 N.M. 404, 534 P.2d 1116 (Ct. App. 1975).

Final order or judgment under this section means an order or judgment in the current proceeding that determines the issues of law and of fact necessary to be determined in that proceeding. The current proceeding must have been completely disposed of so far as the court has power to dispose of it. Johnson v. C & H Constr. Co., 78 N.M. 423, 432 P.2d 267 (Ct. App. 1967).

Appeal not dismissed because claimant accepts benefits. - The claimant's appeal should not be dismissed because accepted benefits under the judgment. Howard v. El Paso Natural Gas Co., 98 N.M. 184, 646 P.2d 1248 (Ct. App. 1982).

Subsection B does not provide that appeal for benefit of attorney be free to the attorney or that the public bear the cost of the appeal. Holloway v. New Mexico Office Furn., 99

N.M. 525, 660 P.2d 615 (Ct. App. 1983); Manzanares v. Lerner's, Inc., 102 N.M. 391, 696 P.2d 479 (1985).

The legislature did not intend to permit interlocutory appeals from the workers' compensation division, and appellate review is limited to final orders as specified in Subsection A. Sanchez v. Bradbury & Stamm Constr., N.M. , 781 P.2d 319 (Ct. App. 1989).

No interlocutory appellate review of nonfinal orders. - Subsection B does not provide statutory authority for interlocutory appellate review of nonfinal administrative orders of the workers' compensation division. Sanchez v. Bradbury & Stamm Constr., N.M. , 781 P.2d 319 (Ct. App. 1989).

Order reopening lacked finality to render it appealable. - The order reopening the claim for workmen's compensation lacked the finality indispensable to render it an appealable order under this section or under Supreme Court Rule 5(2) (now superseded). Davis v. Meadors-Cherry Co., 63 N.M. 285, 317 P.2d 901 (1957).

No final judgment where disability and attorney fees not determined. - Since the issues of disability and attorney fees were before the court and have not been determined, this proceeding has not been disposed of so far as the court had power to dispose of it. Since further judicial action is essential, there is no final judgment or order as to this proceeding. Johnson v. C & H Constr. Co., 78 N.M. 423, 432 P.2d 267 (Ct. App. 1967).

Order opening up judgment in workmen's compensation case is not final order, but merely interlocutory and not appealable. Davis v. Meadors-Cherry Co., 63 N.M. 285, 317 P.2d 901 (1957) (decided under former law).

Workman is entitled to record of hearing without cost when he takes an appeal. 1969 Op. Att'y Gen. No. 69-37.

This section entitles workman to transcript of testimony when the parties are unable to agree on a statement of facts. 1969 Op. Att'y Gen. No. 69-37.

Except where issues can be determined without transcript. - This section does not require a transcript of the testimony to be furnished without cost in those cases where the issues on appeal can be determined without a transcript of the testimony or with a partial transcript of the testimony. 1969 Op. Att'y Gen. No. 69-37.

Mandamus will lie to determine the proper place of trial, before trial, where great delay and expense would result from pursuing an appeal and where a change in venue was made without authority. State ex rel. Cardenas v. Swope, 58 N.M. 296, 270 P.2d 708 (1954) (decided under former law).

Where historical facts of case are undisputed, the question whether the accident arose out of and in the course of the employment is a question of law. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976).

Issue whether determination is finding of fact or conclusion of law is itself a question of law and, therefore, freely reviewable in the supreme court. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976).

And whether reviewable. - In workmen's compensation cases findings of fact are reviewable only to the extent of determining whether they are supported by substantial evidence, whereas conclusions of law are freely reviewable. Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976).

Review of judgment was limited to correction of errors at law. New Mexico State Hwy. Dep't v. Bible, 38 N.M. 372, 34 P.2d 295 (1934); De Lost v. Phelps Dodge Corp., 33 N.M. 15, 261 P. 811 (1927) (decided under former law).

Failure to object in district court. - Where an employer against whom an award was made failed to object in the district court to the award on the ground that it was excessive, such question could not be raised in the supreme court for the first time. Albuquerque & Cerrillos Coal Co. v. Lermuseaux, 25 N.M. 686, 187 P. 560 (1920) (decided under former law).

Supreme court not bound by trial court's conclusion. - In workmen's compensation case, supreme court is not bound by the trial court's conclusion, but may independently draw its own conclusion from the facts. Ward v. Halliburton Co., 76 N.M. 463, 415 P.2d 847 (1966).

Appealing interlocutory decision. - Assuming that an interlocutory appeal is authorized in workmen's compensation cases the judgment is not such an interlocutory decision since neither the issue of disability nor of attorney fees has been disposed of on the merits. Johnson v. C & H Constr. Co., 78 N.M. 423, 432 P.2d 267 (Ct. App. 1967).

Law reviews. - For comment on Johnson v. C & H Constr. Co., 78 N.M. 423, 432 P.2d 267 (Ct. App. 1967), see 8 Nat. Resources J. 522 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 613 to 642.
99 C.J.S. Workmen's Compensation § 287; 100 C.J.S. Workmen's Compensation §§ 669 to 781; 101 C.J.S. Workmen's Compensation §§ 782 to 816(2).

§ 52-5-9. Application for modification of compensation order.

A. Compensation orders are reviewable subject to the conditions stated in this section upon application of any party in interest in accordance with the procedures relating to

hearings. The workers' compensation judge, after a hearing, may issue a compensation order to terminate, continue, reinstate, increase, decrease or otherwise properly affect compensation benefits provided by the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] or the New Mexico Occupational Disease Disablement Law or in any other respect, consistent with those acts, modify any previous decision, award or action.

B. A review may be obtained upon application of a party in interest filed with the director at any time within two years after the date of the last payment or the denial of benefits upon the following grounds:

(1) change in condition;

(2) mistake, inadvertence, surprise or excusable neglect;

(3) clerical error or mistake in mathematical calculations;

(4) newly discovered evidence which by due diligence could not have been discovered prior to the issuance of the compensation order;

(5) fraud, misrepresentation or other misconduct of an adverse party;

(6) the compensation order is void; or

(7) the compensation order has been satisfied, released or discharged or a prior order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the order should have prospective application.

History: Laws 1986, ch. 22, § 35; 1989, ch. 263, § 78.

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judge" for "hearing officer" in the second sentence of Subsection A and made a minor stylistic change in that sentence.

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 590 to 606.
Workers' compensation: incarceration as terminating benefits, 54 A.L.R.4th 241.
100 C.J.S. Workmen's Compensation § 849 to 890.

§ 52-5-10. Enforcement of payment in default.

A. In the event of default in the payment of compensation due under a compensation order, the person to whom compensation is payable may, after the thirtieth day from the date on which the compensation became due and before the lapse of one year from that due date, make application for a supplementary compensation order declaring the amount of compensation in default. The application shall be filed with the director, who shall forthwith notify the employer and the issuer of the filing of the application, giving opportunity to be heard in respect of the application. In the absence of an allegation and proof of fraud in the procurement of the compensation order and if the workers' compensation judge determines that payment of compensation is in default, the workers' compensation judge shall make and file a supplementary compensation order declaring the amount of the compensation in default. In case the payment in default is an installment of an award of determinable amount, the workers' compensation judge may, in his discretion, declare the entire balance of the award due. The claimant or workers' compensation judge may file a certified copy of the supplementary compensation order with the clerk of any district court.

B. The applicant or director may thereafter petition such district court for entry of judgment upon the supplementary compensation order, serving notice of the petition on the employer and any other person in default. If the employer maintains no place of business in the state, he shall be deemed to have appointed the superintendent of insurance as his agent for the purpose of acceptance of service of process in all matters under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] or the New Mexico Occupational Disease Disablement Law or related thereto. If the court finds the supplementary compensation order valid, the court shall enter judgment against the person in default for the amount due under the order. No fees shall be required for the filing of a supplementary compensation order, for the petition for judgment, for the entry of judgment or for any enforcement procedure for the judgment. No supersedeas bond shall be granted by any court with respect to a judgment entered under this section.

C. Proceedings to enforce a compensation order or decision shall not be instituted other than as provided by the Workers' Compensation Act.

History: Laws 1986, ch. 22, § 36; 1989, ch. 263, § 79.

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judge" for "hearing officer" several times in Subsection A, and made minor stylistic changes in Subsections B and C.

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 607 to 612.
101 C.J.S. Workmen's Compensation §§ 836 to 848.

§ 52-5-11. Minors and incompetents.

A. If a guardian or legal representative has been appointed for a person who is incompetent or a minor, payment of compensation benefits under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] or the New Mexico Occupational Disease Disablement Law shall be made to the guardian or legal representative.

B. If no guardian or legal representative has been appointed and notwithstanding any provisions of law to the contrary, the compensation benefits payable to a minor or incompetent person may, upon approval of the director after hearing, be paid by the employer in whole or in such part as the director determines for and on behalf of the minor or incompetent person directly to the person caring for, supporting or having custody of the minor or incompetent person, without requiring the appointment of a guardian or legal representative. The director may petition a court of competent jurisdiction for appointment of a guardian or other representative to receive compensation benefits payable to, or to represent in compensation proceedings, any person who is incompetent or a minor.

C. The director may require of a guardian or other legal representative or of any person to whom compensation benefits may be paid under this section an accounting of the disposition of the funds received by the person under the Workers' Compensation Act or the New Mexico Occupational Disease Disablement Law and for and on behalf of the minor or incompetent person.

D. Nothing in the Workers' Compensation Act or the New Mexico Occupational Disease Disablement Law precludes the payment of compensation benefits directly to a minor or incompetent person with the approval of the director.

E. The payment of compensation by the employer in accordance with the order of the director discharges the employer from all further obligation as to that compensation.

History: Laws 1986, ch. 22, § 37; 1989, ch. 263, § 80.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes throughout the section.

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

§ 52-5-12. Payment; periodic or lump sum.

A. It is stated policy for the administration of the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] and the New Mexico Occupational Disease Disablement Law that it is in the best interest of the injured worker that he receive benefit payments on a periodic basis. Except as provided in Subsection B of this section, lump sum payments in exchange for the release of the employer from liability for future payments of compensation or medical benefits shall be allowed only upon agreement of all parties or under special circumstances, as when it can be demonstrated that lump sum payments are clearly in the best interests of the parties.

B. Periodic compensation payments under the Workers' Compensation Act for disability arising from primary mental impairments or secondary mental impairments shall be paid as incurred and shall not be included in any lump sum payments. Vocational rehabilitation benefits under the Workers' Compensation Act and the New Mexico Occupational Disease Disablement Law shall be paid as incurred and shall not be included in any lump sum payments.

History: Laws 1986, ch. 22, § 38; 1987, ch. 235, § 50.

The 1987 amendment, effective June 19, 1987, designated the former provisions as Subsection A and in the first sentence of that subsection substituted "Workers' " for "Workmen's" and inserted at the beginning of the second sentence "Except as provided in Subsection B of this section"; added Subsection B; and made minor language changes in Subsection A.

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Legislature's policy on lump-sum payments does not deprive employer of due process. - The legislature has established the policy for the award of lump-sum payments by providing that a lump-sum settlement must be in the best interests of the parties entitled to compensation; all parties in interest must have due notice of a hearing; and lastly, that no lump-sum settlement could be made for less than a payment equal to the present value of all future payments of compensation computed at 5% discount, compounded annually. Such an award does not deprive employer of due process of law or equal protection of the law (decided under prior law). Livingston v. Loffland Bros., 86 N.M. 375, 524 P.2d 991 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974).

Not unconstitutional delegation of authority. - The section awarding lump sum payment to the employee is not an unconstitutional delegation of authority by the legislature and does not deprive the employer of his right to due process of law. Livingston v. Loffland

Bros., 86 N.M. 375, 524 P.2d 991 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974).

Lump-sum payment exception rather than rule. - Although the "best interest" of the plaintiff is the guide in determining whether a lump sum should be awarded, periodic compensation payments are the rule, and lump-sum awards are the exception, and in applying this exception the purpose of workmen's compensation must be kept in mind, that is the public policy that compensation shall be made in a certain amount, to secure the injured employee against want, and to avoid his becoming a public charge. Arther v. Western Co. of N. Am., 88 N.M. 157, 538 P.2d 799 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Three factors determine an award of lump-sum: (1) total permanent disability; (2) rehabilitation of the workman and (3) the best interest of the workman. Lane v. Levi Strauss & Co., 92 N.M. 504, 590 P.2d 652 (Ct. App. 1979).

Court hearing and determination required. - This section requires a court hearing and determination as a forerunner to lump-sum payment so that an employer would not be prejudiced by a voluntary payment of benefits to an employee. Armijo v. Co-Con Constr. Co., 92 N.M. 295, 587 P.2d 442 (Ct. App.), cert. denied, 92 N.M. 260, 586 P.2d 1089 (1978).

Right to installment benefits prerequisite to lump-sum award. - A claim for medical benefits may not be utilized as a device to obtain a lump-sum award because medical benefits are not the same as installment compensation payments, and the right to installment compensation benefits must be established as a prerequisite to a lump-sum award. Minnerup v. Stewart Bros. Drilling Co., 93 N.M. 561, 603 P.2d 300 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1979).

Only exceptional circumstances permit lump-sum award. - Lump summing should only be permitted when it appears that exceptional circumstances warrant the departure from the general scheme; however, once a departure is warranted there should be no hesitancy in making a lump-sum award, which may be made either in whole or in part so long as it is made because of exceptional circumstances. Codling v. Aztec Well Servicing Co., 89 N.M. 213, 549 P.2d 628 (Ct. App. 1976).

As each request for a lump-sum payment is unique, a precise enumeration of what factual ingredients constitute special circumstances is impossible, but in each case which has granted a lump-sum award, a certain factual situation has emerged which, by its quantum and quality of evidence, has convincingly portrayed the existence of exceptional circumstances. Codling v. Aztec Well Servicing Co., 89 N.M. 213, 549 P.2d 628 (Ct. App. 1976).

Generally, a lump sum is awarded only when present, pressing need is shown, and the spectre of distant deprivation to plaintiff is simply insufficient to warrant a lump-sum award. Zamora v. CDK Contracting Co., 106 N.M. 309, 742 P.2d 521 (Ct. App. 1987).

Exceptional circumstances necessary for lump-sum award. - Where maximum compensation benefits for disability are not being paid, a suit to establish disability may be brought, and if total permanent disability is established, a lump-sum may be awarded where exceptional circumstances warrant a departure from payments of compensation in installments. Minnerup v. Stewart Bros. Drilling Co., 93 N.M. 561, 603 P.2d 300 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Lump-sum payments are justified only when exceptional circumstances exist. Woodson v. Phillips Petroleum Co., 102 N.M. 333, 695 P.2d 483 (1985).

And each case considered independently. - Each request for a lump-sum payment stands or falls on its own merits, and each case must be considered according to the evidence produced to determine whether sufficient "special circumstances" exist to bring the request within the exception of Subsection B. Padilla v. Frito-Lay, Inc., 97 N.M. 354, 639 P.2d 1208 (Ct. App. 1981).

A precise enumeration of what factual ingredients constitute special circumstances is impossible; the propriety of a lump-sum award in each case stands or falls on its own merits. Woodson v. Phillips Petroleum Co., 102 N.M. 333, 695 P.2d 483 (1985).

Periodic compensation payments are rule and lump-sum awards are the exception; because lump-summing is a departure it should only be permitted when it appears that exceptional circumstances warrant the departure. Lamont v. New Mexico Military Inst., 92 N.M. 804, 595 P.2d 774 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979); Spidle v. Kerr-McGee Nuclear Corp., 96 N.M. 290, 629 P.2d 1219 (1981).

Periodic payments ordinarily serve the policy of this article; the award of a lump sum is the exception. Padilla v. Frito-Lay, Inc., 97 N.M. 354, 639 P.2d 1208 (Ct. App. 1981).

Best interests of parties entitled to compensation is determinative factor in a lump-sum award. Lamont v. New Mexico Military Inst., 92 N.M. 804, 595 P.2d 774 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Lump-sum award only where compensation right previously established. - Section 52-1-56 NMSA 1978 and this section authorize lump-sum awards only where the right to compensation has been previously established. Where defendants in their answer admitted death from injuries arising out of and in the course of employment, and contested only the propriety of a lump-sum award, their admission of liability sufficiently established plaintiff's right to compensation and authorized a lump-sum award under the section. Arther v. Western Co. of N. Am., 88 N.M. 157, 538 P.2d 799 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Lump-sum awards may be obtained through court proceedings only where the right to compensation has been previously established. Neumann v. A.S. Horner, Inc., 99 N.M. 603, 661 P.2d 503 (Ct. App. 1983).

Matter is vested in trial court's discretion whether to grant lump-sum award. Boughton v. Western Nuclear, Inc., 99 N.M. 723, 663 P.2d 382 (Ct. App. 1983).

And discretion not abused in awarding widow benefits for house and daughter's care. - The trial court does not abuse its discretion in awarding a widow worker's compensation benefits in a lump sum to purchase a house and raise her daughter in a home (rather than an apartment) environment, to attend a nursing school, and for future medical care for her daughter's physical condition. Boughton v. Western Nuclear, Inc., 99 N.M. 723, 663 P.2d 382 (Ct. App. 1983).

Lump-sum awarded only if it promotes public policy. - Proof that a lump-sum award is in the best interest of the recipient will not justify a court in ordering such an award if to do so would undermine the public policy which the statute is intended to promote. Spidle v. Kerr-McGee Nuclear Corp., 96 N.M. 290, 629 P.2d 1219 (1981); Boughton v. Western Nuclear, Inc., 99 N.M. 723, 663 P.2d 382 (Ct. App. 1983).

Claimant's burden to show lump-sum award in his best interests. - A lump-sum award should be calculated on a sound annuity basis and should not be permitted for the purpose of beating the actuarial tables; thus the claimant has the burden of showing that it is in his best interest and that the lack of lump summing would create a manifest hardship where relief is essential to protect claimant and his family from want, privation or to facilitate the production of income or to help in a rehabilitation program, and depending on the circumstances, the payment of debts may or may not be an important factor. Codling v. Aztec Well Servicing Co., 89 N.M. 213, 549 P.2d 628 (Ct. App. 1976).

Petitioner's burden of proof. - A petitioner for a lump-sum award has the burden of showing that it is in his best interest and that the failure to award a lump sum would create a manifest hardship where relief is essential to protect the claimant and his family from want or privation, to facilitate the production of income for the claimant or to help the claimant in a rehabilitation program. Padilla v. Frito-Lay, Inc., 97 N.M. 354, 639 P.2d 1208 (Ct. App. 1981); Boughton v. Western Nuclear, Inc., 99 N.M. 723, 663 P.2d 382 (Ct. App. 1983); Woodson v. Phillips Petroleum Co., 102 N.M. 333, 695 P.2d 483 (1985).

The term "to facilitate the production of income," as used in the Padilla v. Frito-Lay test (see annotation above), does not mean maximizing return on investment. Merrifield v. Auto-Chlor Sys., 100 N.M. 263, 669 P.2d 739 (Ct. App. 1983).

Expert testimony not required. - There is no mandatory requirement in the workmen's compensation law that the claimant produce expert testimony at a hearing to obtain an advance payment of compensation. Padilla v. Frito-Lay, Inc., 97 N.M. 354, 639 P.2d 1208 (Ct. App. 1981).

Sufficient findings to support lump-sum award. - Trial court's findings that the financial interests of plaintiff, a 21-year-old widow who had been married to her deceased husband about one month, and had no children, would be best served by a lump-sum

settlement because of its investment potential and because she could remarry the day after a lump-sum settlement, or die the day after a lump-sum settlement, without losing any future payments, was not sufficient to support a lump-sum award. Arther v. Western Co. of N. Am., 88 N.M. 157, 538 P.2d 799 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Lump-sum benefits were properly awarded where the court was concerned that the mothers of the dependent children of the deceased would mismanage the funds, and a lump-sum award was the best way to secure the services of a conservator at a reasonable cost. Sowders v. MFG Drilling Co., 103 N.M. 267, 705 P.2d 172 (Ct. App. 1985).

Review of lump-sum award. - Where the district court determines that a lump-sum payment is in the best interest of the claimant and the public, a reviewing court will not disturb the award in the absence of an abuse of discretion. Spidle v. Kerr-McGee Nuclear Corp., 96 N.M. 290, 629 P.2d 1219 (1981).

Lump-sum award upheld. - Hearing officer did not abuse his discretion in refusing to award attorney's fees in a lump sum payable by employer and, instead, awarding attorney's fees to be paid out of claimant's bi-weekly compensation. Strong v. Sysco Corporation/Nobel Sysco, 108 N.M. 639, 776 P.2d 1258 (1989).

Voluntary payment of maximum compensation benefits over period of time does not establish total permanent disability, and such payment is not an admission by the employer of the totality or permanency of any injury. Armijo v. Co-Con Constr. Co., 92 N.M. 295, 587 P.2d 442 (Ct. App.), cert. denied, 92 N.M. 260, 586 P.2d 1089 (1978); Neumann v. A.S. Horner, Inc., 99 N.M. 603, 661 P.2d 503 (Ct. App. 1983).

Rehabilitation is restoration of individual to his greatest potential - physically, mentally, socially and vocationally. Lane v. Levi Strauss & Co., 92 N.M. 504, 590 P.2d 652 (Ct. App. 1979).

In case of partial disability. - The enactment of this section (former 52-1-30 NMSA 1978) meant that the district court was required to proceed under that section when ordering lump-sum settlements in cases of "total permanent disability or death," but this section did not change the applicability of 52-1-56 NMSA 1978 to lump-sum settlements in other categories, such as partial disability. Codling v. Aztec Well Servicing Co., 89 N.M. 213, 549 P.2d 628 (Ct. App. 1976) (decided under prior law).

Temporary disability is that which lasts for a limited time only while the workman is undergoing treatment and this classification anticipates that eventually there will be either complete recovery or an impaired bodily condition which is static. Lane v. Levi Strauss & Co., 92 N.M. 504, 590 P.2d 652 (Ct. App. 1979).

Thirty-one day period for paying first compensation installment has no applicability to one-year limitation period within which the claimant was required to bring suit after

termination of her employment, and the 31-day period could not be tacked on to a one-year limitation. Owens v. Eddie Lu's Fine Apparel, 95 N.M. 176, 619 P.2d 852 (Ct. App. 1980).

Filing separate claim to determine total permanent disability. - This section gave plaintiff the right to file a petition, a separate claim, a separate proceeding, under the Workmen's Compensation Act, to determine if he had a case of total permanent disability, and if so, if it was in the best interests of the parties entitled to compensation to grant him a lump-sum award. The purpose of the section was to give a workman an early opportunity to solve an economic problem. Briscoe v. Hydro Conduit Corp., 88 N.M. 568, 544 P.2d 283 (Ct. App. 1975) (decided under prior law).

Law reviews. - For annual survey of New Mexico law relating to workmen's compensation, see 13 N.M.L. Rev. 495 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 653 to 657.
Tort liability of worker's compensation insurer for wrongful delay or refusal to make payments due, 8 A.L.R.4th 902.

§ 52-5-13. Approval of lump sum settlement by workers' compensation judge.

The lump sum payment agreement entered into between the worker or his dependents and the employer shall be presented to the workers' compensation judge for approval upon a joint petition signed by all parties and verified by the worker or his dependents. The workers' compensation judge shall in every case assure that the worker or his dependents understand the terms and conditions of the proposed settlement, and he may require a hearing for that purpose. All parties shall have the right to attend any such hearing and present testimony.

History: Laws 1986, ch. 22, § 39; 1989, ch. 263, § 81.

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judge" for "hearing officer" in the catchline and in the first two sentences, and made minor stylistic changes.

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective on December 1, 1986.

§ 52-5-14. Order of approval.

A. If the workers' compensation judge finds the lump sum payment agreement to be fair, equitable and consistent with provisions of the Workers' Compensation Act [Chapter 52,

Article 1 NMSA 1978] or the New Mexico Occupational Disease Disablement Law, he shall approve the agreement by order, and the order shall not be set aside or modified except as provided in the applicable law. The workers' compensation judge may refuse to approve a settlement if he does not believe that it provides substantial justice to the parties.

B. Amounts payable as compensation may be converted to a lump sum settlement by agreement of the parties after having been approved by the workers' compensation judge. In making lump sum settlements, the payment due the worker or his dependents shall not be discounted at a greater rate than a sum equal to the present value of all future payments of compensation benefits computed at a five percent discount compounded annually.

History: Laws 1986, ch. 22, § 40; 1989, ch. 263, § 82.

The 1989 amendment, effective June 16, 1989, substituted "workers' compensation judge" for "hearing officer" and made minor stylistic changes throughout the section.

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

Effect of repudiation of agreed upon offer prior to approval. - A hearing officer (now workers' compensation judge) may not disapprove payment of a lump sum settlement which has been fairly negotiated, signed, and filed by the parties, solely on grounds that the offeror has elected to repudiate the contract before approval of payment is granted, even when the repudiation is due to the death of the offeree. Spadaro v. University of N.M. Bd. of Regents, 107 N.M. 402, 759 P.2d 189 (1988).

§ 52-5-15. Awards; provisions.

All awards shall be against the employer for the amount then due and shall contain an order upon the employer for the payment to the worker, at regular intervals during the time he is entitled to receive compensation, of the further amounts he is entitled to receive. The awards shall be so framed as to accomplish the purpose and intent of the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] or the New Mexico Occupational Disease Disablement Law in all particulars.

History: Laws 1986, ch. 22, § 41; 1989, ch. 263, § 83.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes.

Effective dates. - Laws 1986, ch. 22, § 103 makes the enactment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

There was no authorization for the cost of copying charges as "valid expenses." Archuleta v. Safeway Stores, Inc., 104 N.M. 769, 727 P.2d 77 (Ct. App. 1986) (decided under former 52-1-35 NMSA 1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 572 to 579.
100 C.J.S. Workmen's Compensation §§ 638 to 648.

§ 52-5-16. Physical examination of worker; statements regarding dependents.

A. It is the duty of the worker, at the time of his employment or thereafter at the request of the employer, to submit himself to examination by a physician authorized to practice medicine in the state, who shall be paid by the employer, for the purpose of determining the worker's physical condition.

B. It is the duty of the worker, if required, to give the employer the names, addresses, relationships and degree of dependency of the worker's dependents, if any, or any subsequent change thereof. When the employer requires, the worker shall make a detailed verified statement relating to such dependents, matters of employment and other information incident thereto.

History: Laws 1986, ch. 22, § 42; 1989, ch. 263, § 84.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes throughout the section.

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective on December 1, 1986.

§ 52-5-17. Subrogation.

The right of any worker or employee or, in case of his death, of those entitled to receive payment or damages for injuries or disablement occasioned to him by the negligence or wrong of any person other than the employer or any other employee of the employer, including a management or supervisory employee, shall not be affected by the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] or the New Mexico Occupational Disease Disablement Law, but the claimant shall not be allowed to receive payment or

recover damages for those injuries or disablement and also claim compensation from the employer. In such case, the receipt of compensation from the employer shall operate as an assignment to the employer or his insurer, guarantor or surety of any cause of action, to the extent of payment by the employer to or on behalf of the worker or employee for compensation or any other benefits to which the worker or employee was entitled under the Workers' Compensation Act or the New Mexico Occupational Disease Disablement Law and which were occasioned by the injury or disablement, which the worker or employee or his legal representative or others may have against any other party for the injury or disablement.

History: Laws 1986, ch. 22, § 43; 1987, ch. 235, § 51; 1989, ch. 263, § 85.

The 1987 amendment, effective June 19, 1987, substituted "worker or employee" for "workman" once in the first sentence and twice in the second sentence; inserted "or disablement" following "injuries" near the end of the first sentence and near the end of the second sentence; in the first sentence substituted "employee" for "workman" in two places and substituted "Workers' " for "Workmen's"; in the second sentence inserted "or on behalf of " following "payment by the employer" and inserted "or any other benefits to which the worker or employee was entitled under the Workers' Compensation Act or the New Mexico Occupational Disease Disablement Law and which were" preceding "occasioned by the injury".

The 1989 amendment, effective June 16, 1989, inserted "or disablement" near the beginning at the first sentence and near the end of the second sentence.

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective on December 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

The legislature intended that (1) an injured workman shall not be denied the right to recover damages caused by the negligence of a third person because he has received workmen's compensation benefits for the same injury, but, (2) he shall not be allowed to retain both the compensation benefits and the damages recovered from such third person, and (3) the section, by operation of law, assigns to the employer so much of the judgment or payments received from such third person as the injured workman received as compensation benefits. Reed v. Styron, 69 N.M. 262, 365 P.2d 912 (1961).

This is a reimbursement statute and there is but a single cause of action in employee, even though a part of the recovery is to be paid to the employer or his insurer. Royal Indem. Co. v. Southern Cal. Petroleum Corp., 67 N.M. 137, 353 P.2d 358 (1960).

This section is a reimbursement statute and provides a right of reimbursement for benefits paid under the Workmen's Compensation Act by an employer who is negligent or whose negligence concurs with that of a third person in causing the injury. There is

only a single cause of action in the employee against the third person and the right of the compensation insurance carrier to reimbursement follows the success or failure of the employee against such third person. Reed v. Styron, 69 N.M. 262, 365 P.2d 912 (1961).

This section plainly intends to prevent dual recovery, and an erroneous selection or election of remedy should not be construed as forever terminating the right to receive the benefits of the Workmen's Compensation Act. The employer, or its insurer, had the right to reimbursement of any amounts paid the employee, in the event the employee successfully sued a third party but the right to indemnity is not such a right as should operate to destroy the benefits of the workmen's compensation statute. Brown v. Arapahoe Drilling Co., 70 N.M. 99, 370 P.2d 816 (1962).

An employee receiving compensation has right to sue third party tort-feasor responsible for his injury; this right is for the entire amount of damages suffered by the workman with the employer or his insurer to be reimbursed out of any amounts received. Herrera v. Springer Corp., 85 N.M. 6, 508 P.2d 1303 (Ct. App.), rev'd on other grounds, 85 N.M. 201, 510 P.2d 1072 (1973); Castro v. Bass, 74 N.M. 254, 392 P.2d 668 (1964).

Receipt of benefits no bar to action against third-party. - Although the estate of the deceased has received workmen's compensation benefits from the lessor by means of a settlement agreement, the plaintiff is not denied the right to bring suit against a third-party tort-feasor; moreover, the lessor's compensation carrier may gain the right of reimbursement from the carrier-lessee depending on the success or failure of the plaintiff at trial. Matkins v. Zero Refrigerated Lines, 93 N.M. 511, 602 P.2d 195 (Ct. App. 1979).

Recovery from third-party tort-feasor for full loss suffered. - Where a claimant has sought relief from a third-party tort-feasor, the amount of the recovery is for the full loss or detriment suffered by the injured party and makes him financially whole. Seminara v. Frank Seminara Pontiac-Buick, Inc., 95 N.M. 22, 618 P.2d 366 (Ct. App. 1980).

Claimant receiving verdict from third party barred from subsequent compensation claims. - Where claimant elects to sue third-party tort-feasor and receives a verdict with a judgment of zero damages, he is then barred from making a subsequent workmen's compensation claim. Seminara v. Frank Seminara Pontiac-Buick, Inc., 95 N.M. 22, 618 P.2d 366 (Ct. App. 1980).

Where a claimant has sought relief from a third party, the amount of the recovery is for the full loss or detriment suffered by the injured party and makes him financially whole, and, thus, any subsequent compensation claim is barred. Britz v. Joy Mfg. Co., 97 N.M. 595, 642 P.2d 198 (Ct. App. 1982).

Having been made "financially whole" by a damage award, the plaintiff may not retain both compensation benefits and the damages recovered. Strickland v. Roosevelt

County Rural Elec. Coop., 99 N.M. 335, 657 P.2d 1184 (Ct. App. 1982), cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

Employer's right of reimbursement following joint tort. - Where a workman has obtained a verdict against third party tortfeasors for a work-related injury and the verdict, under comparative fault principles, includes a determination that the employer is at fault and such fault is a proximate cause of the workman's injury, such a determination does not reduce or affect the employer's right to be reimbursed for amounts paid in compensation and medical benefits. Taylor v. Delgarno Transp., Inc., 100 N.M. 138, 667 P.2d 445 (1983).

Workman is indispensable party in suit to recover damages from a third party tort-feasor under this section even though the employer's insurer has paid the employee under the Workmen's Compensation Act because it is the workman who has the claim against the third party. Herrera v. Springer Corp., 85 N.M. 6, 508 P.2d 1303 (Ct. App.), rev'd on other grounds, 85 N.M. 201, 510 P.2d 1072 (1973).

Compensation insurer not indispensable party to workmen's suit. - As the right to collect is in the workman, the compensation insurer does not own the right to enforce liability and cannot release the third party from liability, and therefore is not an indispensable party to the workmen's suit. Herrera v. Springer Corp., 85 N.M. 6, 508 P.2d 1303 (Ct. App.), rev'd on other grounds, 85 N.M. 201, 510 P.2d 1072 (1973).

The underlying concern with third party actions is that the claimant will receive a "double recovery." Transport Indem. Co. v. Garcia, 89 N.M. 342, 552 P.2d 473 (Ct. App.), cert. denied, 90 N.M. 9, 558 P.2d 621 (1976).

Provisions for assignments valid. - Provisions of the Workmen's Compensation Act providing for assignments of personal injury causes of action are valid. Motto v. State Farm Mut. Auto. Ins. Co., 81 N.M. 35, 462 P.2d 620 (1969).

An insured can, through a subrogation clause, assign his cause of action, but the insured must abide by the terms of the clause in order to collect. Motto v. State Farm Mut. Auto. Ins. Co., 81 N.M. 35, 462 P.2d 620 (1969).

Assignment of action. - An employee who receives compensation from employer's insurer for an injury does not assign his entire cause of action against a third party for damages. This question is determined by the Workmen's Compensation Act. Kandelin v. Lee Moor Contracting Co., 37 N.M. 479, 24 P.2d 731 (1933).

Although the workmen's compensation statutes do not create a right of subrogation or assignment in an insurer, but merely the right to reimbursement, a claimant may voluntarily assign his rights to an insurer which may bring an action in its own name against the party responsible for the workmen's injuries. Seaboard Fire & Marine Ins. Co. v. Kurth, 96 N.M. 631, 633 P.2d 1229 (Ct. App. 1980).

No compensation where full recovery of damages. - Plaintiff having recovered his damages representing payment in full for his injuries - not merely partial reimbursement of lost pay as is true when he is paid workmen's compensation - he may not thereafter claim compensation in addition. To allow him to do so would amount to a receipt of payment or recovery of damages while at the same time claiming compensation which is specifically prohibited by the section. Castro v. Bass, 74 N.M. 254, 392 P.2d 668 (1964).

This section is intended to deny an injured workman both compensation from his employer and a recovery from the third party, and if he has collected from the negligent party causing the injury he cannot thereafter recover compensation. Castro v. Bass, 74 N.M. 254, 392 P.2d 668 (1964).

Employer entitled to reimbursement where employee sues third party tort-feasors. - Once an employee has recovered a judgment against a third party tort-feasor, that employee may not thereafter claim compensation for the same injury, and the employer, or its insurer, has the right to reimbursement of any amounts paid the employee, in the event the employee successfully sues a third party, since the intent of the Workmen's Compensation Act is to prevent double recovery. This is also true where the employee settles the claim against the third party tort-feasor. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975).

This section of the New Mexico Workmen's Compensation Act has been consistently interpreted as a reimbursement statute involving only one cause of action, under which the workman sues the third party tort-feasor for the entire amount of damages and the employer or insurer is reimbursed out of amounts received by the workman. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975).

Right to reimbursement not waived by failure to participate in trial. - The insurer's right to reimbursement is established by this section and that right is not waived by failure to participate in the trial of the workman's action against the third party. Herrera v. Springer Corp., 85 N.M. 6, 508 P.2d 1303 (Ct. App.), rev'd on other grounds, 85 N.M. 201, 510 P.2d 1072 (1973).

But payments presumed for original injury where there was no court determination as to the compensation award or as to whether the compensation paid by the insurer was for the original injury or for an alleged aggravation caused by an alleged improper blood transfusion, and the employer's insurer paid the employee benefits which were less than a total permanent award (paying him for a period and then discontinuing payments) altogether, without a release having been obtained, the employee neither giving an election in writing as required by 52-1-49 NMSA 1978 nor filing suit against the employer for additional workmen's compensation benefits for the alleged malpractice, but instead electing to sue the physicians, technicians and hospital; then under the facts any payments made by the insurer to the employee must be presumed to be benefits for his original injury, and it was not entitled to reimbursement from the employee where

he settled with the hospital and doctors. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975).

Debtor-creditor relationship where recovery against third party. - This section creates a conditional debtor-creditor relationship. That condition is operative only if a third party recovery is made by the claimant. Accordingly, the carrier cause of action, upon the happening of the condition, is against the claimant and not the third party. Transport Indem. Co. v. Garcia, 89 N.M. 342, 552 P.2d 473 (Ct. App.), cert. denied, 90 N.M. 9, 558 P.2d 621 (1976).

Carrier charged with proportionate share of costs for action against third party. - Workmen's Compensation Acts are to be liberally interpreted in favor of the workman. Where no guidance is given, fundamental fairness must be the guidelines. In the instant case, it was the claimant who bore the burden of the expense and risk of litigation of the third party action. It would be unduly burdensome on the claimant to pay all of the expenses and by the same token it would unjustly enhance the economic position of the carrier not to assess a portion of the costs against it. Accordingly, the carrier should be charged with his proportionate share of the costs. Transport Indem. Co. v. Garcia, 89 N.M. 342, 552 P.2d 473 (Ct. App.), cert. denied, 90 N.M. 9, 558 P.2d 621 (1976).

Employer's negligence as affecting his action against third party. - This statute omits any mention of the situation where negligence of the employer is to be considered as affecting the employer's right of action against a third party; thus, there is but one cause of action, and the employer or his insurer is specifically granted reimbursement in this single cause of action. Royal Indem. Co. v. Southern Cal. Petroleum Corp., 67 N.M. 137, 353 P.2d 358 (1960).

Consolidation of actions. - Where an insurer's cause of action has been consolidated with employee's, against party causing employee's injury, the vacation of such order of consolidation is erroneous. Kandelin v. Lee Moor Contracting Co., 37 N.M. 479, 24 P.2d 731 (1933).

Resolution of issues between workman and third party controls both the rights and liabilities of the compensation insurer as if the workman obtains a settlement, or recovers from the tort-feasor; the right to reimbursement is established, and if the workman fails to recover, the right to reimbursement is lost. Herrera v. Springer Corp., 85 N.M. 6, 508 P.2d 1303 (Ct. App.), rev'd on other grounds, 85 N.M. 201, 510 P.2d 1072 (1973).

Insurance company as party plaintiff. - If an insurance company, claiming a right to reimbursement for funds expended, and the insurance carrier for the defendants, is not allowed to become a party plaintiff, it will forfeit its rights to reimbursement under this section. Varney v. Taylor, 71 N.M. 444, 379 P.2d 84 (1963).

Can intervene. - An insurance company, claiming a right to reimbursement for funds expended, can intervene as a party-plaintiff when the same company is the insurance

carrier for the defendants only under such conditions as would properly protect all the parties to the litigation. Varney v. Taylor, 71 N.M. 444, 379 P.2d 84 (1963).

And bound by judgment. - Whether or not an insurance company, claiming a right to reimbursement for funds expended, can intervene as a party plaintiff in a suit brought by decedent's survivors against defendant for which company is also the insurance carrier, it will be bound by the judgment in such case. Varney v. Taylor, 71 N.M. 444, 379 P.2d 84 (1963).

Insurance company not compelled to be party. - The workmen's compensation insurance company is not "compelled by law" to be a party in an action for damages against a third party. Schulte v. Baber Well Servicing Co., 98 N.M. 547, 650 P.2d 831 (Ct. App. 1982).

Immunity of coemployee. - The immunity of an employee for an injury done to a fellow employee is not limited to negligent injury; rather, the provisions of the Workmen's Compensation Act accord immunity for all causes of action, all common-law rights and remedies, for negligence or wrong including intentional torts. Gallegos v. Chastain, 95 N.M. 551, 624 P.2d 60 (Ct. App. 1981).

Workman giving release to third person. - A workman injured by a third person while employed is at liberty to settle with the third person for any sum, even less than he would have received under this act, but if he does, he may not recover compensation. A release to the third person gives nothing to be assigned to the employer. White v. New Mexico Hwy. Comm'n, 42 N.M. 626, 83 P.2d 457 (1938).

Applicable statute of limitations. - Where a workers' compensation insurer settles with an injured worker, receives an assignment of his negligence cause of action to the extent of the payment, and seeks reimbursement from a third party, the relevant statute of limitations is not § 37-1-4 (four-year period), which governs unspecified actions, but § 37-1-8 (three-year period), which governs actions for personal injury, which begins to run on a subrogated insurer's action against a third-party tortfeasor at the same time that the statute of limitations would begin to run on an action by the insured, or his personal representative in the event of the death of the insured. American Gen. Fire & Cas. Co. v. J.T. Constr. Co., 106 N.M. 195, 740 P.2d 1179 (Ct. App. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 429 to 432.
101 C.J.S. Workmen's Compensation §§ 992 to 1011.

§ 52-5-18. Limitation on filing claims.

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.

History: Laws 1986, ch. 22, § 44; 1989, ch. 263, § 86.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes.

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective on December 1, 1986.

Purpose of section is to save the employer the expense and cost of litigation. Armijo v. Co-Con Constr. Co., 92 N.M. 295, 587 P.2d 442 (Ct. App.), cert. denied, 92 N.M. 260, 586 P.2d 1089 (1978).

Where maximum compensation benefits are being paid, this section bars a suit to establish liability for compensation. Arther v. Western Co. of N. Am., 88 N.M. 157, 538 P.2d 799 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

One purpose of section is to bar suit to establish liability for compensation. Rollins v. Albuquerque Pub. Schools, 92 N.M. 795, 595 P.2d 765 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Section applicable when maximum compensation benefits are being paid by reason of a second injury. Rollins v. Albuquerque Pub. Schools, 92 N.M. 795, 595 P.2d 765 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Not applicable where liability admitted. - This section bars a suit to establish liability for compensation, and it was not applicable where liability was admitted by payment of workmen's compensation benefits. Briscoe v. Hydro Conduit Corp., 88 N.M. 568, 544 P.2d 283 (Ct. App. 1975).

"No claim shall be filed" means any workman receiving maximum compensation benefits is totally disabled and shall not file a claim regardless of what accidental injury or injuries caused total disability. Rollins v. Albuquerque Pub. Schools, 92 N.M. 795, 595 P.2d 765 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

"Maximum compensation benefits" means benefits paid for total disability. Rollins v. Albuquerque Pub. Schools, 92 N.M. 795, 595 P.2d 765 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Disability must be in issue to determine award. - Disability not being an issue for decision where the plaintiff was being paid maximum compensation benefits, the trial court erred in deciding that plaintiff was totally and permanently disabled and in

awarding a lump-sum for that disability. Minnerup v. Stewart Bros. Drilling Co., 93 N.M. 561, 603 P.2d 300 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1979).

Employee's claim for first injury filed prematurely where she is receiving maximum compensation benefits for a second injury, both arising out of the same employment and the same employer. Rollins v. Albuquerque Pub. Schools, 92 N.M. 795, 595 P.2d 765 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Right to seek relief limited. - By this section, a workman is denied the right to seek any relief, other than the penalty, which bears upon or is related to receiving compensation benefits. Armijo v. Co-Con Constr. Co., 92 N.M. 295, 587 P.2d 442 (Ct. App.), cert. denied, 92 N.M. 260, 586 P.2d 1089 (1978).

Petition for lump-sum payment would conflict with section. - While a workman is receiving maximum compensation benefits, to allow a petition to be filed for a lump-sum payment under 52-1-30 NMSA 1978 (repealed, see now 52-5-12 NMSA 1978) would directly conflict with this section. Armijo v. Co-Con Constr. Co., 92 N.M. 295, 587 P.2d 442 (Ct. App.), cert. denied, 92 N.M. 260, 586 P.2d 1089 (1978).

Seeking lump sum while receiving installments. - Injured worker was not precluded from filing a petition for a hearing upon the appropriateness of a lump sum award even while he was receiving maximum compensation benefits in periodic installments. Raines v. W.A. Klinger & Sons, 107 N.M. 668, 763 P.2d 684 (1988).

Liability admitted by payment of maximum compensation benefits. - It has been suggested that when liability is established, a claim filed for a lump-sum award is not premature. Rollins v. Albuquerque Pub. Schools, 92 N.M. 795, 595 P.2d 765 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Payment of maximum benefits bars suit. - Payment of maximum compensation benefits by an employer, without a court order, makes this section applicable and, so long as such maximum compensation benefits are being paid, a suit to establish the right to compensation is barred. Minnerup v. Stewart Bros. Drilling Co., 93 N.M. 561, 603 P.2d 300 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1979).

When maximum compensation benefits are refused or reduced, a workman can then file a claim for maximum compensation benefits to establish total disability arising out of the original and any subsequent accidental injuries. Rollins v. Albuquerque Pub. Schools, 92 N.M. 795, 595 P.2d 765 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Claimant not prevented from moving for change in compensation as the district court hasjurisdiction, when compensation is being paid, to decrease, increase or terminate the payments, and to order a lump-sum settlement. Livingston v. Loffland Bros., 86 N.M. 375, 524 P.2d 991 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974) (decided under prior law).

Claim based upon employer's miscalculation becomes moot upon payment of arrearages. - A claim based on the employer's miscalculation of the amount of weekly benefits becomes moot where liability for that miscalculation is extinguished by the payment of arrearages. Patterson v. City of Albuquerque, 99 N.M. 632, 661 P.2d 1331 (Ct. App. 1983).

Insurer's unauthorized variation on statutory payment scheme will not preclude payment of additional benefits. - Claimant receiving scheduled injury benefits based on 60% loss of use of nondexterous hand was not barred from seeking additional compensation for psychiatric injury by insurer's payment of maximum benefits for 60% of required period rather than, as required by statute, payment of 60% of maximum benefits for required period. Paternoster v. La Cuesta Cabinets, Inc., 101 N.M. 773, 689 P.2d 289 (Ct. App. 1984).

Error in dismissing action where employer failed to pay medical bill. - Medical payments have been ruled to be compensation for the purpose of allowing attorney fees under 52-1-54 NMSA 1978, and if they are compensation for one purpose they should be compensation for all purposes. Since plaintiff's employer had failed to pay a medical bill, the trial court erred in dismissing his action alleging total disability and seeking a lump-sum award on grounds of premature filing. Briscoe v. Hydro Conduit Corp., 88 N.M. 568, 544 P.2d 283 (Ct. App. 1975).

§ 52-5-19. Assessment for funding division.

On June 30 of each year, the taxation and revenue department shall assess each employer doing business within the state an amount equal to three dollars ($3.00) multiplied by the number of employees the employer has on that date that are subject to the provisions of the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978]. At the same time, there is assessed against each such employee a charge of three dollars ($3.00) which shall be deducted from the wages of the employee by the employer in the month of July and remitted to the department along with the assessment of the employer. The assessments shall be remitted by July 31 of the year in which they are made. The taxation and revenue department may deduct from the gross assessments an amount not to exceed five percent of the gross assessments to reimburse the department for costs of administration. The department shall pay over the net assessments collected to the state treasurer to be deposited by him in a fund hereby created and to be known as the "workers' compensation administration fund". Expenditures shall be made from this fund on vouchers signed by the director for the necessary expenses of the workers' compensation administration in accordance with the approved budget of the workers' compensation division. The workers' compensation assessment authorized in this section shall be administered and enforced under the provisions of the Tax Administration Act [Chapter 7, Article 1 NMSA 1978].

History: 1978 Comp., § 52-5-19, enacted by Laws 1987, ch. 235, § 52; 1988, ch. 71, § 2; 1989, ch. 263, § 87.

The 1988 amendment, effective March 8, 1988, substituted "June 30" for "July 1" in the first sentence, rewrote the former fourth sentence so as to constitute the present fourth and fifth sentences by adding all of the language beginning with "may deduct" in the fourth sentence and by adding "The department" and inserting "net" in the fifth sentence, substituted "division" for "administration" in the sixth sentence, and added the seventh sentence.

The 1989 amendment, effective June 16, 1989, substituted "division" for "administration" in the catchline.

Effective dates. - Laws 1987, ch. 235 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23 became effective on June 19, 1987.

Article 6

Group Self-Insurance

§ 52-6-1. Short title.

Sections 75 through 99 [52-6-1 to 52-6-25 NMSA 1978] of this act may be cited as the "Group Self-Insurance Act".

History: Laws 1986, ch. 22, § 75.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 Am. Jur. 2d Workmen's Compensation §§ 650, 663, 664.
100 C.J.S. Workmen's Compensation §§ 354 to 356.

§ 52-6-2. Definitions.

As used in the Group Self-Insurance Act [52-6-1 to 52-6-25 NMSA 1978]:

A. "administrator" means an individual, partnership or corporation engaged by a group's board of trustees to carry out the policies established by that board and to provide day-to-day management of the group;

B. "group" means a not-for-profit unincorporated association consisting of two or more public hospital employers or private employers which are engaged in the same or similar type of business, are members of the same bona fide trade or professional

association which has been in existence for not less than five years and who enter into agreements to pool their liabilities for workers' compensation benefits; except that public hospital employers shall segregate their accounting records and investment accounts from those of private employers in accordance with applicable state law;

C. "insolvent" means the inability of a group to pay its outstanding lawful obligations as they mature in the regular course of business, as may be shown either by an excess of its required reserves and other liabilities over its assets or by its not having sufficient assets to reinsure all of its outstanding liabilities after paying all accrued claims owed by it;

D. "net premium" means premium derived from standard premium adjusted by any advance premium discounts;

E. "private employer" means every employer which is not a public employer or a public hospital employer;

F. "public employer" means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions and all school districts and all political subdivisions of the state or any of their agencies, instrumentalities or institutions. Public employer does not include a public hospital employer;

G. "public hospital employer" means any local, county, district, city-county or other public hospital or health related facility, whether operating in wholly or partially owned or leased premises;

H. "service company" means a person or entity which provides services not provided by the administrator, including claims adjustment; safety engineering; compilation of statistics and the preparation of premium, loss and tax reports; preparation of other required self-insurance reports; development of members' assessments and fees; and administration of a claim fund;

I. "standard premium" means the premium derived from the manual rates adjusted by experience modification factors but before advance premium discounts;

J. "superintendent" means the superintendent of insurance designated by the state corporation commission; and

K. "workers' compensation benefits" means benefits pursuant to the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] and the New Mexico Occupational Disease Disablement Law.

History: Laws 1986, ch. 22, § 76; 1987, ch. 11, § 1; 1989, ch. 263, § 88.

The 1987 amendment, effective June 19, 1987, in Subsection B, deleted the subdesignations (1) and (2), inserted "public hospital employers or" preceding "private

employers", and substituted the exception for "or (2) a not-for-profit unincorporated association consisting of two or more employers, all of which are public hospital employers, who enter into agreements to pool their liabilities for workmen's compensation benefits".

The 1989 amendment, effective June 16, 1989, made minor stylistic changes in Subsections B and K.

Effective dates. - Laws 1986, ch. 22, § 103 made the enactment of this section effective July 1, 1986.

Compiler's notes. - As to the New Mexico Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 and notes thereto.

§ 52-6-3. Scope.

The provisions of the Group Self-Insurance Act [52-6-1 to 52-6-25 NMSA 1978] apply to groups. Except as provided by the provisions of that act, groups which are issued a certificate of approval by the superintendent shall not be deemed to be insurers or businesses of insurance and shall not be subject to the provisions of the Insurance Code [Chapter 59A NMSA 1978] or other insurance laws and regulations.

History: Laws 1986, ch. 22, § 77.

Effective dates. - Laws 1986, ch. 22, § 103 makes the enactment of this section effective December 1, 1986.

§ 52-6-4. Authority to act as a group.

No person, association or other entity shall act as a group unless it has been issued a certificate of approval by the superintendent.

History: Laws 1986, ch. 22, § 78.

Effective dates. - Laws 1986, ch. 22 contains no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section is effective on May 21, 1986.

§ 52-6-5. Initial approval and continued approval to act as a group; qualifications.

A. A proposed group shall file with the superintendent an application for a certificate of

approval accompanied by a nonrefundable filing fee in an amount established by the superintendent. The application shall include the group's name, location of its principal office, date of organization, name and address of each member and such other information as the superintendent may reasonably require, together with the following:

(1) proof of compliance with the provisions of Subsection B of this section;

(2) a copy of the articles of association, if any;

(3) a copy of agreements with the administrator and with any service company;

(4) a copy of the bylaws of the proposed group;

(5) a copy of the agreement between the group and each member securing the payment of workers' compensation benefits, which shall include provision for payment of assessments as provided for in Section 52-6-20 NMSA 1978;

(6) designation of the initial board of trustees and administrator;

(7) the address in this state where the books and records of the group will be maintained at all times;

(8) a pro forma financial statement on a form acceptable to the superintendent showing the financial ability of the group to pay the workers' compensation obligations of its members; and

(9) proof of payment to the group by each member of not less than twenty-five percent of that member's first year estimated annual net premium on a date approved by the superintendent. Each payment shall be considered to be part of the first year premium payment of each member, if the proposed group is granted a certificate of approval.

B. To obtain and to maintain its certificate of approval, a group shall comply with the following requirements as well as any other requirements established by law or regulation:

(1) a combined net worth of all members of a group of private employers of at least one million dollars ($1,000,000);

(2) security in a form and amount prescribed by the superintendent which shall be provided by either a surety bond, security deposit or financial security endorsement or any combination thereof. If a surety bond is used to meet the security requirement, it shall be issued by a corporate surety company authorized to transact business in this state. If a security deposit is used to meet the security requirement, securities shall be limited to bonds or other evidences of indebtedness issued, assumed or guaranteed by the United States of America, or by an agency or instrumentality thereof; certificates of deposit in a federally insured bank; shares or savings deposits in a federally insured

savings and loan association or credit union; or any bond or security issued by a state of the United States of America and backed by the full faith and credit of the state. Any such securities shall be deposited with the superintendent and assigned to and made negotiable by the superintendent pursuant to a trust document acceptable to the superintendent. Interest accruing on a negotiable security so deposited shall be collected and transmitted to the depositor, provided the depositor is not in default. A financial security endorsement, issued as part of an acceptable excess insurance contract, may be used to meet all or part of the security requirement. The bond, security deposit or financial security endorsement shall be for the benefit of the state solely to pay claims and associated expenses and payable upon the failure of the group to pay workers' compensation benefits it is legally obligated to pay. The superintendent may establish and adjust requirements of the amount of security based on differences among groups in their size, types of local government services provided by members of the group, years in existence and other relevant factors; provided that the superintendent may not require an amount lower than one hundred thousand dollars ($100,000) for any group during its first year of operation. Subsequent to the first year of operation, the superintendent may waive the requirements of this paragraph;

(3) specific and aggregate excess insurance in a form, in an amount and by an insurance company acceptable to the superintendent. The superintendent may establish minimum requirements for the amount of specific and aggregate excess insurance based on differences among groups in their size, types of employment, years in existence and other relevant factors and may permit a group to meet this requirement by placing in a designated depository securities of the type referred to in Paragraph (2) of this subsection;

(4) an estimated annual standard premium of at least two hundred fifty thousand dollars ($250,000) during a group's first year of operation. Thereafter, the annual standard premium shall be at least five hundred thousand dollars ($500,000);

(5) an indemnity agreement jointly and severally binding the group and each member thereof to meet the workers' compensation obligations of each member. The indemnity agreement shall be in a form prescribed by the superintendent and shall include minimum uniform substantive provisions prescribed by the superintendent. Subject to the superintendent's approval, a group may add other provisions needed because of its particular circumstances. The requirements of this paragraph shall only apply to private employers;

(6) a fidelity bond for the administrator in a form and amount prescribed by the superintendent; and

(7) a fidelity bond for the service company in a form and amount prescribed by the superintendent. The superintendent may also require the service company providing claim services to furnish a performance bond in a form and amount prescribed by the superintendent.

C. A group shall notify the superintendent of any change in the information required to be filed under Subsection A of this section or in the manner of its compliance with Subsection B of this section no later than thirty days after such change.

D. The superintendent shall evaluate the information provided by the application required to be filed under Subsection A of this section to assure that no gaps in funding exist and that funds necessary to pay workers' compensation benefits will be available on a timely basis.

E. The superintendent shall act upon a completed application for a certificate of approval within sixty days. If, because of the number of applications, the superintendent is unable to act upon an application within that period, the superintendent shall have an additional sixty days to so act.

F. The superintendent shall issue to the group a certificate of approval upon finding that the proposed group has met all requirements, or the superintendent shall issue an order refusing such certificate, setting forth reasons for such refusal upon finding that the proposed group does not meet all requirements.

G. Each group shall be deemed to have appointed the superintendent as its attorney to receive service of legal process issued against it in this state. The appointment shall be irrevocable, shall bind any successor in interest and shall remain in effect as long as there is in this state any obligation or liability of the group for workers' compensation benefits.

History: Laws 1986, ch. 22, § 79; 1989, ch. 263, § 89.

The 1989 amendment, effective June 16, 1989, substituted "Section 52-6-20 NMSA 1978" for "Section 19 of the Group Self-Insurance Act" in Subsection A(5), and made minor stylistic changes throughout the section.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-6. Certificate of approval; termination.

A. The certificate of approval issued by the superintendent to a group authorizes the group to provide workers' compensation benefits. The certificate of approval remains in effect until terminated at the request of the group or revoked by the superintendent, pursuant to provisions of Section 52-6-23 NMSA 1978.

B. The superintendent shall not grant the request of any group to terminate its certificate of approval unless the group has insured or reinsured all incurred workers' compensation obligations with an authorized insurer under an agreement filed with and

approved in writing by the superintendent. Such obligations shall include both known claims and associated expenses and claims incurred but not reported and associated expenses.

C. Subject to approval of the superintendent, a group may merge with another group engaged in the same or similar type of business only if the resulting group assumes in full all obligations of the merging groups. The superintendent may hold a hearing on the merger and shall do so if any party, including a member of either group, so requests.

History: Laws 1986, ch. 22, § 80; 1989, ch. 263, § 90.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes in Subsections A and B.

Effective dates. - Laws 1986, ch. 22 contains no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section is effective on May 21, 1986.

§ 52-6-7. Examinations.

The superintendent may examine the affairs, transactions, accounts, records and assets and liabilities of each group as often as the superintendent deems advisable. The expense of such examinations shall be assessed against the group in the same manner that insurers are assessed for examinations.

History: Laws 1986, ch. 22, § 81.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-8. Board of trustees; membership, powers, duties and prohibitions.

Each group shall be operated by a board of trustees which shall consist of not less than five persons whom the members of a group elect for stated terms of office. At least two-thirds of the trustees shall be employees, officers or directors of members of the group. The group's administrator, service company or any owner, officer, employee of or any other person affiliated with such administrator or service company shall not serve on the board of trustees of the group. All trustees shall be residents of this state or officers of corporations authorized to do business in this state. The board of trustees of each group shall ensure that all claims are paid promptly and take all necessary precautions to safeguard the assets of the group, including all of the following:

A. the board of trustees shall:

(1) maintain responsibility for all money collected or disbursed from the group and segregate all money into a claims fund account and an administrative fund account. At least seventy percent of the net premium shall be placed into a designated depository for the sole purpose of paying claims, allocated claims expenses, reinsurance or excess insurance and special fund contributions, including second injury and other loss-related funds. This shall be called the claims fund account. The remaining net premium shall be placed into a designated depository for the payment of taxes, general regulatory fees and assessments and administrative costs. This shall be called the administrative fund account. The superintendent may approve an administrative fund account of more than thirty percent, and a claims fund account of less than seventy percent, only if the group shows to the superintendent's satisfaction that:

(a) more than thirty percent is needed for an effective safety and loss control program; or

(b) the group's aggregate excess insurance attaches at less than seventy percent;

(2) maintain minutes of its meetings and make such minutes available to the superintendent;

(3) designate an administrator to carry out the policies established by the board of trustees and to provide day-to-day management of the group and delineate in the written minutes of its meetings the areas of authority it delegates to the administrator; and

(4) retain an independent certified public accountant to prepare the statement of financial condition required by Subsection A of Section 52-6-12 NMSA 1978; and

B. the board of trustees shall not:

(1) extend credit to individual members for payment of a premium, except pursuant to payment plans approved by the superintendent; or

(2) borrow any monies from the group or in the name of the group except in the ordinary course of business, without first advising the superintendent of the nature and purpose of the loan and obtaining prior approval from the superintendent.

History: Laws 1986, ch. 22, § 82; 1987, ch. 11, § 2.

The 1987 amendment, effective June 19, 1987 substituted "money" for "monies" in the first sentence of Subsection A(1); substituted "Section 52-6-12 NMSA 1978" for "Section 11 of the Group Self-Insurance Act" at the end of Subsection A(4); and substituted "superintendent" for "commissioner" in Subsection B(2).

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-9. Group membership; termination; liability.

A. An employer joining a group after the group has been issued a certificate of approval shall:

(1) submit an application for membership to the board of trustees or its administrator; and

(2) if applicable, enter into the indemnity agreement required by Paragraph (5) of Subsection B of Section 52-6-5 NMSA 1978.

Membership takes effect no earlier than each member's date of approval. The application for membership and its approval shall be maintained as permanent records of the board of trustees.

B. Individual members of a group shall be subject to cancellation by the group pursuant to the bylaws of the group. In addition, individual members may elect to terminate their participation in the group. The group shall notify the superintendent of the termination or cancellation of a member within ten days and shall maintain coverage of each canceled or terminated member for thirty days after such notice, at the terminating member's expense, unless the group is notified sooner by the superintendent that the canceled or terminated member has procured workers' compensation insurance, has become an approved self-insurer or has become a member of another group.

C. The group shall pay all workers' compensation benefits for which each member incurs liability during its period of membership. A private employer member who elects to terminate its membership or is canceled by a group remains jointly and severally liable for workers' compensation obligations of the group and its members which were incurred during the canceled or terminated member's period of membership.

D. A group member is not relieved of its workers' compensation liabilities incurred during its period of membership except through payment by the group or the member of required workers' compensation benefits.

E. The insolvency or bankruptcy of a member does not relieve the group or any other member of liability for the payment of any workers' compensation benefits incurred during the insolvent or bankrupt member's period of membership.

History: Laws 1986, ch. 22, § 83; 1989, ch. 263, § 91.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes throughout the section.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-10. Service companies.

A. No service company or its employees, officers or directors shall be an employee, officer or director of, or have either a direct or indirect financial interest in, an administrator. No administrator or its employees, officers or directors shall be an employee, officer or director of, or have either a direct or indirect financial interest in, a service company.

B. The service contract shall state that unless the superintendent permits otherwise the service company shall handle, to their conclusion, all claims and other obligations incurred during the contract period.

History: Laws 1986, ch. 22, § 84.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-11. Licensing of agent.

Except for a salaried employee of a group, its administrator or its service company, any person soliciting membership in a group shall be a licensed solicitor or agent pursuant to the provisions of the Insurance Code [Chapter 59A NMSA 1978].

History: Laws 1986, ch. 22, § 85.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-12. Financial statements; other reports.

A. Each group shall submit to the superintendent a statement of financial condition audited by an independent certified public accountant on or before the last day of the sixth month following the end of the group's fiscal year. The financial statement shall be on a form prescribed by the superintendent and shall include actuarially appropriate

reserves for:

(1) known claims and associated expenses;

(2) claims incurred but not reported and associated expenses;

(3) unearned premiums; and

(4) bad debts, which reserves shall be shown as liabilities. An actuarial opinion regarding reserves for:

(a) known claims and associated expenses; and

(b) claims incurred but not reported and associated expenses shall be included in the audited financial statement.

The actuarial opinion shall be given by a member of the American academy of actuaries or other qualified loss reserve specialist as defined in the annual statement adopted by the national association of insurance commissioners.

B. The superintendent may prescribe the format and frequency of other reports which may include payroll audit reports, summary loss reports and quarterly financial statements.

History: Laws 1986, ch. 22, § 86.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-13. Premium tax.

A group shall be subject to a premium tax of nine-tenths of one percent.

History: Laws 1986, ch. 22, § 87; 1987, ch. 145, § 1.

The 1987 amendment, effective June 19, 1987, substituted "a premium tax of nine-tenths of one percent" for "the premium tax imposed pursuant to Section 59A-6-2 NMSA 1978".

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-14. Subsequent injury fund.

A group shall be subject to the provisions of the Subsequent Injury Act.

History: Laws 1986, ch. 22, § 88.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

Subsequent Injury Act. - See 52-2-1 NMSA 1978 and notes thereto.

§ 52-6-15. Misrepresentation prohibited.

No person shall make a material misrepresentation or omission of a material fact in connection with the solicitation of membership of a group.

History: Laws 1986, ch. 22, § 89.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-16. Investments.

Funds not needed for current obligations may be invested by the board of trustees in accordance with the provisions of Article 9 of the Insurance Code [Chapter 59A NMSA 1978] applicable to investments.

History: Laws 1986, ch. 22, § 90.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-17. Rates; reporting.

A. Every group shall adhere to the uniform classification system, uniform experience rating plan and manual rules filed with the superintendent by an advisory organization designated by the superintendent.

B. Premium contributions to the group shall be determined by applying the manual rates and rules to the appropriate classification of each member which shall be adjusted by each member's experience credit or debit. Subject to approval by the superintendent,

premium contributions may also be reduced by an advance premium discount reflecting the group's expense levels and loss experience.

C. Notwithstanding Subsection B of this section, a group may apply to the superintendent for permission to make its own rates. Such rates shall be based on at least three years of the group's experience.

D. Each group shall be audited at least annually by an auditor acceptable to the superintendent to verify proper classifications, experience rating, payroll and rates. A report of the audit shall be filed with the superintendent in a form acceptable to him. A group or any member thereof may request a hearing on any objections to the classifications. If the superintendent determines that as a result of an improper classification a member's premium contribution is insufficient, he shall order the group to assess that member an amount equal to the deficiency. If the superintendent determines that as a result of an improper classification a member's premium is excessive, he shall order the group to refund to the member the excess collected. The audit shall be at the expense of the group.

History: Laws 1986, ch. 22, § 91; 1987, ch. 11, § 3.

The 1987 amendment, effective June 19, 1987, substituted "three" for "five" years in Subsection C.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-18. Refunds.

A. Any money for a fund year in excess of the amount necessary to fund all obligations for that fund year may be declared to be refundable by the board of trustees not less than twelve months after the end of the fund year.

B. Each member shall be given a written description of the refund plan at the time of application for membership. A refund for any fund year shall be paid only to those employers who remain participants in the group for the entire fund year. Payment of a refund based on a previous fund year shall not be contingent on continued membership in the group after that fund year.

History: Laws 1986, ch. 22, § 92.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-19. Premium payment; reserves.

A. Each group shall establish to the satisfaction of the superintendent a premium payment plan which shall include:

(1) an initial payment by each member of at least twenty-five percent of that member's annual premium before the start of the group's fund year; and

(2) payment of the balance of each member's annual premium in monthly or quarterly installments during that fund year.

B. Each group shall establish and maintain actuarially appropriate loss reserves which shall include reserves for:

(1) known claims and associated expenses; and

(2) claims incurred but not reported and associated expenses.

C. Each group shall establish and maintain bad debt reserves based on the historical experience of the group or other groups.

History: Laws 1986, ch. 22, § 93.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-20. Deficits and insolvencies.

A. If the assets of a group are at any time insufficient to enable the group to discharge its legal liabilities and other obligations and to maintain the reserves required of it under the Group Self-Insurance Act [52-6-1 to 52-6-25 NMSA 1978], it shall forthwith make up the deficiency or levy an assessment upon its members for the amount needed to make up the deficiency.

B. In the event of a deficiency in any fund year, such deficiency shall be made up immediately, either from:

(1) surplus from a fund year other than the current fund year;

(2) administrative funds;

(3) assessment of the membership, if ordered by the group; or

(4) such alternate method as the superintendent may approve or direct.

The superintendent shall be notified prior to any transfer of surplus funds from one fund year to another.

C. If the group fails to assess its members or to otherwise make up such deficit within thirty days, the superintendent shall order it to do so.

D. If the group fails to make the required assessment of its members within thirty days after the superintendent orders it to do so, or if the deficiency is not fully made up within sixty days after the date on which such assessment is made, or within such longer period of time as may be specified by the superintendent, the group shall be deemed to be insolvent.

E. The superintendent shall proceed against an insolvent group in the same manner as the superintendent would proceed against an insolvent domestic insurer in this state as prescribed by the Insurance Code [Chapter 59A NMSA 1978]. The superintendent shall have the same powers and limitations in such proceedings as are provided under that code, except as otherwise provided in the Group Self-Insurance Act.

F. In the event of the liquidation of a group, the superintendent shall levy an assessment upon its members for such an amount as the superintendent determines to be necessary to discharge all liabilities of the group, including the reasonable cost of liquidation.

History: Laws 1986, ch. 22, § 94.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-21. Monetary penalties.

After notice and opportunity for a hearing, the superintendent may impose a monetary penalty on any person or group found to be in violation of any provision of the Group Self-Insurance Act [52-6-1 to 52-6-25 NMSA 1978] or of any rules or regulations promulgated thereunder. The monetary penalty shall not exceed one thousand dollars ($1,000) for each act or violation and shall not exceed ten thousand dollars ($10,000) in the aggregate. The amount of the monetary penalty shall be paid to the superintendent for credit to the general fund.

History: Laws 1986, ch. 22, § 95.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-22. Cease and desist orders.

A. After notice and opportunity for a hearing, the superintendent may issue an order requiring a person or group to cease and desist from engaging in an act or practice found to be in violation of any provision of the Group Self-Insurance Act [52-6-1 to 52-6-25 NMSA 1978] or of any rules or regulations promulgated thereunder.

B. Upon a finding, after notice and opportunity for a hearing, that any person or group has violated any cease and desist order, the superintendent may do either or both of the following:

(1) impose a monetary penalty of not more than ten thousand dollars ($10,000) for each and every act or violation of such order not to exceed an aggregate monetary penalty of one hundred thousand dollars ($100,000); or

(2) revoke the group's certificate of approval or any insurance license held by the person.

History: Laws 1986, ch. 22, § 96.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-23. Revocation of certificate of approval.

A. After notice and opportunity for a hearing, the superintendent may revoke a group's certificate of approval if it:

(1) is found to be insolvent;

(2) fails to pay any premium tax, regulatory fee or assessment or special fund contribution imposed upon it; or

(3) fails to comply with any of the provisions of the Group Self-Insurance Act [52-6-1 to 52-6-25 NMSA 1978], with any rules or regulations promulgated thereunder or with any lawful order of the superintendent within the time prescribed.

B. The superintendent may revoke a group's certificate of approval if, after notice and opportunity for hearing, he finds that:

(1) any certificate of approval that was issued to the group was obtained by fraud;

(2) there was a material misrepresentation in the application for the certificate of approval; or

(3) the group or its administrator has misappropriated, converted, illegally withheld or refused to pay over upon proper demand any money that belongs to a member, an employee of a member or a person otherwise entitled to it and that have been entrusted to the group or its administrator in its fiduciary capacities.

History: Laws 1986, ch. 22, § 97.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-24. Notice and hearing; appeal.

Notice and hearing required by the provisions of Sections 21 through 23 [52-6-21 to 52-6-23 NMSA 1978] of the Group Self-Insurance Act shall be given and held pursuant to the applicable provisions of Article 4 of the Insurance Code [Chapter 59A NMSA 1978]. A party may appeal from an order of the superintendent made after a hearing pursuant to Section 59A-4-20 NMSA 1978.

History: Laws 1986, ch. 22, § 98.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

§ 52-6-25. Rules and regulations.

The superintendent may make rules and regulations necessary to implement the provisions of the Group Self-Insurance Act [52-6-1 to 52-6-25 NMSA 1978] pursuant to Section 59A-2-9 NMSA 1978.

History: Laws 1986, ch. 22, § 99.

Effective dates. - Laws 1986, ch. 22 contained no effective date provision relating to this section, but, pursuant to N.M. Const., art. IV, § 23, this section became effective on May 21, 1986.

Applicability. - Laws 1986, ch. 22, § 101 makes Chapter 22, with specific exceptions, applicable to claims for injuries and deaths occurring in occupational diseases manifesting themselves on or after December 1, 1986. All claims filed after December 1, 1986 shall be filed with the director of the workmen's compensation administration.