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.

ANNOTATIONS

Cross references. — For Occupational Disease Disablement Law, *see* 52-3-1 NMSA 1978 et seq.

For no compensation payable under Workers' Compensation Act for occupational disease, *see* 52-3-46 NMSA 1978.

For when members of New Mexico mounted patrol are covered by Workers' Compensation Act, *see* 29-6-5 NMSA 1978.

For premiums for workers' compensation insurance as material furnished in remedies against contractors performance bond, *see* 48-2-17 NMSA 1978.

For hospital liens upon personal injury damages recovered not including workers' compensation, *see* 48-8-1 NMSA 1978.

For Occupational Health and Safety Act not to supersede or affect Workers' Compensation Act, *see* 50-9-21 NMSA 1978.

For Workers' Compensation Assigned Risk Pool Act, *see* 59A-33-1 NMSA 1978 et seq.

For safety devices required by Mining Safety Act as also required by Workers' Compensation Act, *see* 69-8-15 NMSA 1978.

I. GENERAL CONSIDERATION.

Sufficient evidence of employment. — Where worker testified that employer’s manager hired worker to drive employer’s truck and instructed worker to take the truck to a gas station and purchase fuel and that worker discovered a defective light while

inspecting the truck in preparation for driving it and was trying to get information on having the light fixed when worker was injured; a fax dated after the accident referred to the manager's efforts to find a replacement driver for worker from another trucking company; and employer filed an injury report with the workers' compensation administration in the employer's home state, there was sufficient evidence to support the finding that worker was an employee of employer. *Nelson v. Homier Distrib. Co., Inc.*, 2009-NMCA-125, 147 N.M. 318, 222 P.3d 690.

Constitutionality upheld. — The court's former ruling in *State ex rel. Hovey Concrete Prods. Co. v. Mechem*, 1957-NMSC-075, 63 N.M. 250, 316 P.2d 1069 is expressly overruled and the creation of a workmen's [workers'] 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*, 1986-NMSC-075, 104 N.M. 751, 726 P.2d 1381.

The Workers' Compensation Act does not violate equal protection. *Sanchez v. M.M. Sundt Const. Co.*, 1985-NMCA-087, 103 N.M. 294, 706 P.2d 158.

The Workers' Compensation Act does not violate substantive due process. *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, 122 N.M. 524, 928 P.2d 250.

Workmen's [Workers'] compensation is not a fundamental right. *Casillas v. S.W.I.G.*, 1981-NMCA-045, 96 N.M. 84, 628 P.2d 329, cert. denied, 96 N.M. 116, 628 P.2d 686, and appeal dismissed, 454 U.S. 934, 102 S. Ct. 467, 70 L. Ed. 2d 242.

Workmen's [Workers'] Compensation Act is neither arbitrary nor discriminatory; its provisions apply to all workers subject to it. *Casillas v. S.W.I.G.*, 1981-NMCA-045, 96 N.M. 84, 628 P.2d 329, cert. denied, 96 N.M. 116, 628 P.2d 686, and appeal dismissed, 454 U.S. 934, 102 S. Ct. 467, 70 L. Ed. 2d 242.

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 [Workers'] Compensation Act by the legislature. *Gonzales v. Sharp & Fellows Contracting Co.*, 1947-NMSC-021, 51 N.M. 121, 179 P.2d 762.

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 Cnty.*, 1953-NMSC-038, 57 N.M. 217, 257 P.2d 909.

Workmen's [Workers'] Compensation Act is not exclusive remedy of the employee. — An employee has a claim against a third party. *Montanez v. Cass*, 1975-NMCA-142, 89 N.M. 32, 546 P.2d 1189, *rev'd in part on other grounds sub nom. N.M. Elec. Serv. Co. v. Montanez*, 1976-NMSC-028, 89 N.M. 278, 551 P.2d 634.

Workmen's [Workers'] 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.*, 1963-NMSC-012, 71 N.M. 294, 378 P.2d 119.

Employer not an insurer. — The Workmen's [Workers'] 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.*, 1956-NMSC-006, 60 N.M. 409, 292 P.2d 99.

Reduction in earning capacity has always been primary concern of workmen's [workers'] compensation legislation. *Webb v. Hamilton*, 1968-NMSC-008, 78 N.M. 647, 436 P.2d 507, *overruled on other grounds by Am. Tank & Steel Corp. v. Thompson*, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

Vocational rehabilitation. — 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.*, 1988-NMCA-006, 107 N.M. 26, 751 P.2d 710.

No express consent by state to be sued in act. — The language appearing in Section 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 [Workers'] 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.*, 1955-NMSC-077, 60 N.M. 41, 287 P.2d 237.

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. N.M. State Hwy. Dep't*, 1951-NMSC-017, 55 N.M. 157, 228 P.2d 945.

No statute forbidding benefits to worker receiving benefits under other statute. — There is no provision in the compensation statute forbidding benefits to an injured

worker on the ground that he is receiving benefits under some other local or federal statute. *Snead v. Adams Constr. Co.*, 1963-NMSC-075, 72 N.M. 94, 380 P.2d 836 (*see* Section 52-1-47.1 NMSA 1978).

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*, 1989-NMCA-002, 108 N.M. 326, 772 P.2d 360, superseded by statute, *Moya v. City of Albuquerque*, 2007-NMCA-057, 141 N.M. 617, 159 P.3d 266.

This section imposes upon board of regents no legal obligation to compensate financially for injuries sustained by their workmen [workers] in the course of their employment. *Zamora v. Regents of Univ. of N.M.*, 1955-NMSC-077, 60 N.M. 41, 287 P.2d 237.

Measure of disability. — There is no presumption in the Workmen's (Workers') Compensation Law that every workman [worker] is completely able-bodied when he enters his employment; the measure of disability under the statute is the relationship between the workman's [worker's] ability to do work prior to the injury, and such ability following the injury. *Snead v. Adams Constr. Co.*, 1963-NMSC-075, 72 N.M. 94, 380 P.2d 836.

If a veterans administration payment is a pension, it cannot be considered to reduce the amount of workmen's [workers'] compensation. *Snead v. Adams Constr. Co.*, 1963-NMSC-075, 72 N.M. 94, 380 P.2d 836.

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 [Workers'] Compensation Act, then plaintiffs must fail on appeal. *Lopez v. Schultz & Lindsay Constr. Co.*, 1968-NMCA-064, 79 N.M. 485, 444 P.2d 996, cert. denied, 79 N.M. 448, 444 P.2d 775.

Compensation benefits not community assets. — Compensation benefits payable under the Workmen's [Workers'] Compensation Act, under this section, for injuries sustained during coverture, are not community assets. *Richards v. Richards*, 1955-NMSC-043, 59 N.M. 308, 283 P.2d 881.

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 [Workers'] 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.*, 1969-NMCA-008, 80 N.M. 10, 450 P.2d 448.

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 [Workers'] 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.*, 1969-NMCA-008, 80 N.M. 10, 450 P.2d 448.

A stroke causally connected to work stress was compensable, even though the worker suffered from a preexisting condition, hypertension, which made the workman [worker] more susceptible to injury. *Shadbolt v. Schneider, Inc.*, 1985-NMCA-086, 103 N.M. 544, 710 P.2d 738, cert. quashed, 104 N.M. 632, 725 P.2d 832 (1986).

Traumatic neurosis compensable. — Traumatic neurosis, when directly caused by an accident within the purview of this act, was compensable. *Jensen v. United Perlite Corp.*, 1966-NMSC-111, 76 N.M. 384, 415 P.2d 356, *overruled on other grounds by American Tank & Steel Corp. v. Thompson*, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

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 [workers'] compensation claims. *State ex rel. Sanchez v. Reese*, 1968-NMSC-186, 79 N.M. 624, 447 P.2d 504 (decided under former law).

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*, 1968-NMSC-186, 79 N.M. 624, 447 P.2d 504 (decided under former law).

Anyone as workman [worker] not excluded. — Nothing in the Workmen's [Workers'] Compensation Act is indicative of an intention to exclude from its benefits anyone who is in fact performing duties of a "workman [worker]." *Shillinglaw v. Owen Shillinglaw Fuel Co.*, 1962-NMSC-047, 70 N.M. 65, 370 P.2d 502.

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.*, 1971-NMCA-043, 82 N.M. 511, 484 P.2d 353.

Employer's liability not diminished because workman [worker] works while on compensation. — To hold that the employer's liability should be diminished because his injured workman (worker) 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 [Workers'] 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*, 1986-NMCA-103, 105 N.M. 17, 727 P.2d 956.

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 [Workers'] Compensation Act even though when he was injured he was merely hanging venetian blinds. *Scofield v. Lordsburg Mun. Sch. Dist.*, 1949-NMSC-027, 53 N.M. 249, 205 P.2d 834 (decided under former law).

Disability en route to cafe compensable where employer gave consent. — Where workman [worker] 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 [worker] ate lunch, disability is compensable. *Sullivan v. Rainbo Baking Co.*, 1962-NMSC-138, 71 N.M. 9, 375 P.2d 326.

II. CONSTRUCTION OF ACT.

This act is remedial legislation and must be liberally construed to effect its purpose. *Lipe v. Bradbury*, 1945-NMSC-002, 49 N.M. 4, 154 P.2d 1000; *Stevenson v. Lee Moor Contracting Co.*, 1941-NMSC-033, 45 N.M. 354, 115 P.2d 342; *Malone v. Swift Fresh Meats Co.*, 1978-NMSC-007, 91 N.M. 359, 574 P.2d 283; *Security Trust v. Smith*, 1979-NMSC-024, 93 N.M. 35, 596 P.2d 248.

Liberal construction. — Workmen's [Workers'] Compensation Act is to be construed liberally. *Corzine v. Sears, Roebuck & Co.*, 1969-NMCA-051, 80 N.M. 418, 456 P.2d 892, cert. denied, 80 N.M. 388, 456 P.2d 221; *Wilson v. Mason*, 1967-NMCA-002, 78 N.M. 27, 426 P.2d 789.

As is true in all humanitarian statutes, remedial in nature, the Workmen's [Workers'] 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.*, 1967-NMSC-212, 78 N.M. 392, 432 P.2d 103, *overruled on other grounds by American Tank & Steel Corp. v. Thompson*, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

The court is committed to liberal construction of the Workmen's [Workers'] Compensation Act in favor of the workman [worker], 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.*, 1954-NMSC-121, 58 N.M. 830, 277 P.2d 542; *Henderson v. Texas-N.M. Pipe Line Co.*, 1942-NMSC-060, 46 N.M. 458, 131 P.2d 269.

Reasonable doubts resolved in favor of employees. — The Workmen's [Workers'] Compensation Act must be liberally construed, and reasonable doubts resolved in favor of employees. *Wilson v. Rowan Drilling Co.*, 1950-NMSC-046, 55 N.M. 81, 227 P.2d 365; *Sena v. Continental Cas. Co.*, 1982-NMCA-060, 97 N.M. 753, 643 P.2d 622, cert. denied, 98 N.M. 336, 648 P.2d 794.

Workmen's [Workers'] compensation statutes should be liberally and fairly construed in the workman's [worker'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 [Workers'] Compensation Act is to be liberally construed in favor of the employee. *Briscoe v. Hydro Conduit Corp.*, 1975-NMCA-147, 88 N.M. 568, 544 P.2d 283; *Briggs v. Zia Co.*, 1957-NMSC-074, 63 N.M. 148, 315 P.2d 217; *Schiller v. Southwest Air Rangers, Inc.*, 1975-NMSC-018, 87 N.M. 476, 535 P.2d 1327; *Anaya v. N.M. Steel Erectors, Inc.*, 1980-NMSC-057, 94 N.M. 370, 610 P.2d 1199.

The Workmen's [Workers'] Compensation Act is to be given a liberal construction in favor of claimants. *Shillinglaw v. Owen Shillinglaw Fuel Co.*, 1962-NMSC-047, 70 N.M. 65, 370 P.2d 502; *Mann v. Board of Cnty. Comm'rs*, 1954-NMSC-088, 58 N.M. 626, 274 P.2d 145.

The Workmen's [Workers'] Compensation Act is to be liberally construed in favor of the claimant. *Yardman v. Cooper*, 1959-NMSC-043, 65 N.M. 450, 339 P.2d 473, *overruled on other grounds by Montell v. Orndorff*, 1960-NMSC-063, 67 N.M. 156, 353 P.2d 680.

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*, 1959-NMSC-009, 65 N.M. 214, 334 P.2d 1116, *overruled on other grounds by Montell v. Orndorff*, 1960-NMSC-063, 67 N.M. 156, 353 P.2d 680; *Anaya v. N.M. Steel Erectors, Inc.*, 1980-NMSC-057, 94 N.M. 370, 610 P.2d 1199.

The court has frequently held that the Workmen's [Workers'] 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.*, 1960-NMSC-013, 66 N.M. 404, 349 P.2d 123.

Liberal construction does not mean total disregard for the statute. *Yardman v. Cooper*, 1959-NMSC-043, 65 N.M. 450, 339 P.2d 473, *overruled on other grounds by Montell v. Orndorff*, 1960-NMSC-063, 67 N.M. 156, 353 P.2d 680; *Varela v. Mounho*, 1978-NMCA-086, 92 N.M. 147, 584 P.2d 194, cert. denied, 92 N.M. 180, 585 P.2d 324.

Liberal construction does not mean enlarging apparent legislative intent. — The statute must be liberally construed in favor of the workman [worker], 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*, 1959-NMSC-076, 66 N.M. 165, 344 P.2d 475.

Liberal construction not to be construed so as to nullify its provisions. — The Workmen's [Workers'] 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.*, 1965-NMSC-053, 75 N.M. 174, 402 P.2d 156; *Security Trust v. Smith*, 1979-NMSC-024, 93 N.M. 35, 596 P.2d 248; *Transamerica Ins. Co. v. Sydow*, 1981-NMCA-121, 97 N.M. 51, 636 P.2d 322.

Court must construe act in reasonable manner. — The supreme court gives to the Workmen's [Workers'] 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.*, 1963-NMSC-044, 71 N.M. 502, 379 P.2d 788, *overruled on other grounds by Am. Tank & Steel Corp. v. Thompson*, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

Beneficent purpose not thwarted by technical refinement. — The Workmen's [Workers'] 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.*, 1962-NMSC-136, 71 N.M. 11, 375 P.2d 327, *overruled on other grounds by Mascarenas v. Kennedy*, 1964-NMSC-179, 74 N.M. 665, 397 P.2d 312.

Technical precision in pleading not required. — Claims for workmen's [workers'] compensation are to be liberally construed and technical precision in pleading is not generally required. *Gonzales v. Gackle Drilling Co.*, 1962-NMSC-063, 70 N.M. 131, 371 P.2d 605.

Rule of liberal construction applies to Workmen's [Workers'] Compensation Law, not to evidence offered in support of a claim under that law. *Guidry v. Petty Concrete Co.*, 1967-NMSC-048, 77 N.M. 531, 424 P.2d 806.

Liberal construction has no application to consideration to be given by trier of fact. — The rule of liberal construction of the Workmen's [Workers'] 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.*, 1969-NMCA-125, 81 N.M. 67, 463 P.2d 43.

Although the Workmen's [Workers'] 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.*, 1968-NMCA-064, 79 N.M. 485, 444 P.2d 996, cert. denied, 79 N.M. 448, 444 P.2d 775; *Brown v. General Ins. Co. of Am.*, 1962-NMSC-040, 70 N.M. 46, 369 P.2d 968.

Claimant not relieved of burden of proof. — The liberal construction of the Workmen's [Workers'] 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*, 1964-NMSC-179, 74 N.M. 665, 397 P.2d 312.

Statute as sui generis. — The Workmen's [Workers'] 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*, 1945-NMSC-002, 49 N.M. 4, 154 P.2d 1000.

Workmen's [Workers'] 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.*, 1977-NMCA-136, 91 N.M. 268, 572 P.2d 1276, cert. denied, 91 N.M. 249, 572 P.2d 1257.

Rights, remedies and procedure exclusive. — Workmen's [Workers'] compensation statutes are sui generis and create rights, remedies and procedures which are exclusive. *Anaya v. City of Santa Fe*, 1969-NMSC-025, 80 N.M. 54, 451 P.2d 303; *Day v. Penitentiary of N.M.*, 1954-NMSC-064, 58 N.M. 391, 271 P.2d 831.

Rules of procedure are not applicable except as specifically provided. — That workmen's [workers'] 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*, 1965-NMSC-029, 75 N.M. 52, 400 P.2d 471.

The workmen's [workers'] 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.*, 1959-NMSC-027, 65 N.M. 314, 336 P.2d 1066.

Employment in violation of federal law still governed by Worker's Compensation Act. — Suit for wrongful death of 16-year-old who died from injuries incurred while

working for employer was barred because the case was governed by the Worker's Compensation Act, despite the fact that the employment of the child was in violation of the Fair Labor Standards Act. The legislature's legalization of employment for 16-year-old workers in Section 50-6-4 NMSA 1978 reflects an intent that the exclusivity of the Worker's Compensation Act apply to such employment. *Boyd v. Permian Servicing Co.*, 1992-NMSC-013, 113 N.M. 321, 825 P.2d 611.

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.*, 1969-NMCA-083, 80 N.M. 589, 458 P.2d 841.

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 [Workers'] 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.*, 1986-NMCA-012, 104 N.M. 605, 725 P.2d 581.

The Workmen's [Workers'] 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.*, 1979-NMCA-068, 93 N.M. 78, 596 P.2d 521, cert. denied, 93 N.M. 8, 595 P.2d 1203.

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. N.M. Steel Erectors, Inc.*, 1980-NMSC-057, 94 N.M. 370, 610 P.2d 1199.

Primary purpose of Workmen's [Workers'] Compensation Act is to keep an injured workman [worker] and his family at least minimally secure financially; public policy demands it. *Aranda v. Miss. Chem. Corp.*, 1979-NMCA-097, 93 N.M. 412, 600 P.2d 1202, cert. denied, 93 N.M. 683, 604 P.2d 821; *Casillas v. S.W.I.G.*, 1981-NMCA-045, 96 N.M. 84, 628 P.2d 329, cert. denied, 96 N.M. 116, 628 P.2d 686, and appeal dismissed, 454 U.S. 934, 102 S. Ct. 467, 70 L. Ed. 2d 242 (1981).

Purpose of Workmen's [Workers'] 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.*, 1974-NMCA-047, 86 N.M. 375, 524 P.2d 991, cert. denied, 86 N.M. 372, 524 P.2d 988.

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.*, 1967-NMSC-043, 77 N.M. 576, 425 P.2d 740.

Spirit of this act flows in direction of workman [worker] and his protection; the compensation carrier should not seek technical, circuitous routes to avoid its responsibilities. *Perea v. Gorby*, 1980-NMCA-048, 94 N.M. 325, 610 P.2d 212.

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.*, 1967-NMSC-043, 77 N.M. 576, 425 P.2d 740.

Purpose of industry carrying burden of injuries. — The basic purpose of the Workmen's [Workers'] 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*, 1976-NMCA-026, 89 N.M. 67, 547 P.2d 72.

Claims for compensation under Workmen's [Workers'] 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 [workers'] compensation. *Cuellar v. American Employers' Ins. Co.*, 1932-NMSC-018, 36 N.M. 141, 9 P.2d 685.

Interests of claimant and public paramount. — Within the policy considerations of the Workmen's [Workers'] Compensation Act the interests of the claimant and the public are paramount. *Codling v. Aztec Well Servicing Co.*, 1976-NMCA-044, 89 N.M. 213, 549 P.2d 628; *Ruiz v. City of Albuquerque*, 1978-NMCA-015, 91 N.M. 526, 577 P.2d 424, cert. denied, 91 N.M. 491, 576 P.2d 297.

Purpose of act. — To prevent claimant from being on welfare rolls was part of legislative scheme of the Workmen's [Workers'] 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.*, 1976-NMCA-044, 89 N.M. 213, 549 P.2d 628.

Right to be sued must be found in act. — The rights and remedies provided by the Workmen's [Workers'] 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.*, 1954-NMSC-064, 58 N.M. 391, 271 P.2d 831.

Decisions of other states persuasive but not binding. — The Workmen's [Workers'] 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*, 1975-NMSC-052, 88 N.M. 292, 540 P.2d 222.

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 [Workers'] Compensation Act. *McKenzie v. Daubenheyer*, 465 F. Supp. 1 (D.N.M. 1977).

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*, 1946-NMSC-002, 49 N.M. 396, 165 P.2d 120 (decided under former law).

III. EMPLOYER-EMPLOYEE RELATIONSHIP.

Workmen's [Workers'] Compensation Act is based upon employer-employee relationship. *Maynerich v. Little Bear Enters., Inc.*, 1971-NMCA-079, 82 N.M. 650, 485 P.2d 984.

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 [Workers'] 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.*, 1971-NMCA-079, 82 N.M. 650, 485 P.2d 984.

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.*, 1966-NMSC-057, 76 N.M. 127, 412 P.2d 555.

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*, 1966-NMSC-264, 77 N.M. 228, 421 P.2d 441.

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.*, 1962-NMSC-047, 70 N.M. 65, 370 P.2d 502.

Corporate officer injured performing duty of employees. — A corporate officer may be considered an employee under the Workmen's [Workers'] Compensation Act, particularly when he is injured while performing a duty which was ordinarily done by employees. *Shillinglaw v. Owen Shillinglaw Fuel Co.*, 1962-NMSC-047, 70 N.M. 65, 370 P.2d 502.

IV. COURSE OF EMPLOYMENT.

Meaning of "date when the compensable injury manifests itself" or "date when the workman [worker] knows or should know he has suffered a compensable injury" is applicable to all of the portions of the Workmen's [Workers'] 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 [worker] at the time when he can no longer earn the same wage. *Casias v. Zia Co.*, 1979-NMCA-068, 93 N.M. 78, 596 P.2d 521, cert. denied, 93 N.M. 8, 595 P.2d 1203.

V. PROCEDURAL MATTERS.

Lack of jurisdiction at any stage of proceeding is controlling consideration to be resolved before going further. *Baker v. Shufflebarger & Assocs.*, 1966-NMSC-189, 77 N.M. 50, 419 P.2d 250, *overruled in part on other grounds by American Tank & Steel Corp. v. Thompson*, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

Federal court jurisdictional minimum met where right to all payments in issue. — A possibility that payments of workmen's [workers'] 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 [workers'] compensation cases are not civil actions but are sui generis. *State ex rel. Sanchez v. Reese*, 1968-NMSC-186, 79 N.M. 624, 447 P.2d 504.

Conventional methods of administration of justice employed. — The New Mexico Workmen's [Workers'] Compensation Act may be classified as one of the "judicial" acts, whereby the workmen's [workers'] 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 [workers'] 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 [workers'] 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 [Workers'] Compensation Act. *State ex rel. Pac. Employers Ins. Co. v. Arledge*, 1950-NMSC-039, 54 N.M. 267, 221 P.2d 562.

Nothing inconsistent in applying general rules covering jury trials to workmen's [workers'] compensation cases. *Bryant v. H.B. Lynn Drilling Corp.*, 1959-NMSC-001, 65 N.M. 177, 334 P.2d 707.

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.*, 1944-NMSC-020, 48 N.M. 158, 146 P.2d 873.

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.*, 1944-NMSC-020, 48 N.M. 158, 146 P.2d 873.

Special interrogatory should cover both requisites to right to compensation set forth in Section 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. *Sw. Portland Cement Co. v. Simpson*, 135 F.2d 584 (10th Cir. 1943).

No provision made for special interrogatories. — The Workmen's [Workers'] 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*, 1959-NMSC-036, 65 N.M. 379, 338 P.2d 110.

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*, 1946-NMSC-002, 49 N.M. 396, 165 P.2d 120 (decided under former law).

No summary judgment for claims filed prior to Laws 1959. — A workmen's [workers'] 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.*, 1962-NMSC-063, 70 N.M. 131, 371 P.2d 605 (decided under former law).

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 [Workers'] 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.*, 1966-NMSC-115, 76 N.M. 412, 415 P.2d 541.

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 [Workers'] 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.*, 1956-NMSC-006, 60 N.M. 409, 292 P.2d 99.

In compensation case, evidence of pecuniary circumstances of parties is incompetent. *Hamilton v. Doty*, 1958-NMSC-139, 65 N.M. 270, 335 P.2d 1067.

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.*, 1970-NMCA-032, 81 N.M. 313, 466 P.2d 879.

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.*, 1962-NMSC-040, 70 N.M. 46, 369 P.2d 968.

Admission of self-serving declaration of deceased workman [worker]. — 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 [workers'] 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.*, 1962-NMSC-040, 70 N.M. 46, 369 P.2d 968.

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*, 1988-NMCA-076, 107 N.M. 648, 763 P.2d 82.

Effect of false representation on application for employment. — A claimant who knowingly and willfully made false representations on his application for employment regarding past employment, and who failed to reveal his prior history of a work-related injury was barred from receiving compensation benefits. *Sanchez v. Memorial Gen. Hosp.*, 1990-NMCA-095, 110 N.M. 683, 798 P.2d 1069, cert. denied, 110 N.M. 653, 798 P.2d 1039.

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 Cnty. Sand & Gravel Co.*, 1956-NMSC-004, 60 N.M. 399, 292 P.2d 93.

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.*, 1956-NMSC-006, 60 N.M. 409, 292 P.2d 99.

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.*, 1956-NMSC-006, 60 N.M. 409, 292 P.2d 99.

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*, 1962-NMSC-014, 69 N.M. 464, 368 P.2d 141.

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.*, 1962-NMSC-136, 71 N.M. 11, 375 P.2d 327, *overruled on other grounds by Mascarenas v. Kennedy*, 1964-NMSC-179, 74 N.M. 665, 397 P.2d 312.

Claimant has burden of proving compensable accident. *Romero v. S.S. Kresge Co.*, 1981-NMCA-001, 95 N.M. 484, 623 P.2d 998, cert. denied, 95 N.M. 593, 624 P.2d 535, *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743.

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., Inc.*, 1966-NMSC-189, 77 N.M. 50, 419 P.2d 250.

No attack on findings where no objection on requested findings. — Where workmen's [workers'] 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 Paragraph B of Rule 1-052 NMRA), the court's findings could not be attacked. *Gillit v. Theatre Enters., Inc.*, 1962-NMSC-141, 71 N.M. 31, 375 P.2d 580.

No denial of appeal right where accepted less compensation than entitled. — Under Workmen's [Workers'] Compensation Law, a workman [worker] 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 [worker'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.*, 1966-NMSC-058, 76 N.M. 132, 412 P.2d 559.

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*, 1989-NMCA-002, 108 N.M. 326, 772 P.2d 360, cert. denied, 108 N.M. 197, 769 P.2d 731.

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.*, 1968-NMCA-064, 79 N.M. 485, 444 P.2d 996, cert. denied, 79 N.M. 448, 444 P.2d 775.

Not weighing conflicting evidence or credibility of witnesses. — In reviewing workmen's [workers'] 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.*, 1972-NMCA-079, 83 N.M. 799, 498 P.2d 686.

Voluntary payment of compensation benefits is merely competent evidence as to any issue in a workman's [worker's] compensation suit and does not create any presumptions or shifts in the original burden. *Romero v. S.S. Kresge Co.*, 1981-NMCA-001, 95 N.M. 484, 623 P.2d 998, cert. denied, 95 N.M. 593, 624 P.2d 535, *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743; *but see Perea v. Gorby*, 1980-NMCA-048, 94 N.M. 325, 610 P.2d 212; *Medrano v. Ray Willis Constr. Co.*, 1981-NMCA-096, 96 N.M. 643, 633 P.2d 1241.

Employer's voluntary payment of employee's benefits admission of accident. — By voluntarily paying an injured employee workmen's [workers'] 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*, 1980-NMCA-048, 94 N.M. 325, 610 P.2d 212; *but see Romero v. S.S. Kresge Co.*, 1981-NMCA-001, 95 N.M. 484, 623 P.2d 998, cert. denied, 95 N.M. 593, 624 P.2d 535, *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743.

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.*, 1981-NMCA-001, 95 N.M. 484, 623 P.2d 998, cert. denied, 95 N.M. 593, 624 P.2d 535, *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743.

Supreme court will not disturb findings where substantial evidence. — It is clear that in workmen's [workers'] 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*, 1963-NMSC-038, 71 N.M. 451, 379 P.2d 441.

Judgment not reversed though rule erroneously applied where evidence substantial. — A workmen's [workers'] 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.*, 1966-NMSC-111, 76 N.M. 384, 415 P.2d 356, *overruled on other*

grounds by American Tank & Steel Corp. v. Thompson, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

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 (rendered under former law).

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 comment, "A Comparison of Workers' Compensation in the United States and Mexico," see 26 N.M.L. Rev. 133 (1996).

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. Univ. of California, d/b/a Los Alamos National Laboratory," see 18 N.M.L. Rev. 637 (1988).

For 1984-88 survey of New Mexico administrative law, 19 N.M.L. Rev. 575 (1990).

For annual survey of New Mexico Workers' Compensation Law, see 20 N.M.L. Rev. 459 (1990).

For note, "Workers' Compensation Law - Bad Faith Refusal of an Insurer To Pay Workers' Compensation Benefits: Russell v. Protective Insurance Company," see 20 N.M.L. Rev. 757 (1990).

For note, "The Sexual Harassment Claim Quandary: Workers' Compensation as an Inadequate and Unavailable Remedy: *Cox v. Chino Mines/Phelps Dodge*," see 24 N.M.L. Rev. 565.

For note, "Tenth Circuit Bankruptcy Appellate Panel Holds Worker's Compensation Premiums Are Not Entitled to Fringe Benefits Priority Status - In Re S. Star Foods, Inc.," see 28 N.M.L. Rev. 487 (1998).

For comment, “A Comparison of Workers’ Compensation in the United States and Mexico,” see 26 N.M. L. Rev. 133 (1996).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 1, 4.

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.

Master's liability for failure to inform servant of disease or physical condition disclosed by medical examination, 69 A.L.R.2d 1213.

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.

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 co-employee as ground of liability despite bar of workers' compensation law, 57 A.L.R.4th 888.

Ownership interest in employer business as affecting status as employee for workers' compensation purposes, 78 A.L.R.4th 973.

Workers' Compensation: Compensability of injuries incurred traveling to or from medical treatment of earlier compensable injury, 83 A.L.R.4th 110.

Eligibility for workers' compensation as affected by claimant's misrepresentation of health or physical condition at time of hiring, 12 A.L.R.5th 658.

Validity, construction and application of workers' compensation provisions relating to nonresident alien dependents, 28 A.L.R.5th 547.

Divorce and separation: workers' compensation benefits as marital property subject to distribution, 30 A.L.R.5th 139.

Uninsured and underinsured motorist coverage: validity, construction and effect of policy provision purporting to reduce coverage by amount paid or payable under workers' compensation law, 31 A.L.R.5th 116.

Collateral source rule: admissibility of evidence of availability to plaintiff of free public special education on issue of amount of damages recoverable from defendant, 41 A.L.R.5th 771.

Violation of employment rule barring claim for worker's compensation, 61 A.L.R.5th 375.

Workers' compensation: availability, rate, or method of calculation of interest on attorney's fees or penalties, 79 A.L.R.5th 201.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of nonsudden stimuli - Right to compensation under particular statutory provisions, 97 A.L.R.5th 1.

99 C.J.S. Workmen's Compensation § 1.

52-1-1.1. Definitions.

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

A. "controlled insurance plan" means a plan of insurance coverage that is established by an owner or principal contractor that requires participation by contractors or subcontractors who are engaged in the construction project, including coverage plans that are for a fixed term of coverage on a single construction site;

B. "director" means the director of the workers' compensation administration;

C. "division" means the workers' compensation administration;

D. "extra-hazardous employer" means an employer whose injury frequencies substantially exceed those that may reasonably be expected in that employer's business or industry;

E. "rolling wrap-up or consolidated insurance plan" means coverage for an ongoing project or series of projects in which the common insurance program remains in place indefinitely and contracted work is simply added as it occurs under the control of one owner or principal contractor;

F. "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 or the New Mexico Occupational Disease Disablement Law;

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

H. "Workmen's Compensation Act" means the Workers' Compensation Act; and

I. "workmen's compensation administration" or "administration" means the workers' compensation administration.

History: Laws 1986, ch. 22, § 26; 1987, ch. 235, § 2; 1989, ch. 263, § 2; 1990 (2nd S.S.), ch. 2, § 1; 2003, ch. 259, § 1; 2003, ch. 263, § 1; 2013, ch. 134, § 1.

ANNOTATIONS

The 2013 amendment, effective July 1, 2013, defined "extra-hazardous employer"; and added Subsection D.

The 2003 amendment, effective June 20, 2003, added new Subsections A and D, which defined "controlled insurance plan" and "rolling wrap-up or consolidated insurance plan" and redesignated the prior subsections accordingly.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "workers' compensation administration" for "workers' compensation division of the labor department" in Subsection A; added present Subsection B; redesignated former Subsections B through E as Subsections C through F; and substituted present Subsection F for the former subsection which read "'workmen's compensation administration' means workers' compensation division of the labor department".

52-1-1.2. Advisory council on workers' compensation and occupational disease disablement; functions and duties; independent medical examinations committee.

A. There is created in the workers' compensation administration an advisory council on workers' compensation and occupational disease disablement. Members of the council shall be appointed by the governor. There shall be six voting members of the council with three members representing employers and three members representing workers. No member representing employers or workers shall be an attorney. Three of the original appointees shall serve for terms of two years, and three shall serve for four years. The members shall determine by lot which members shall serve for four years and which shall serve for two. Thereafter, each member shall be appointed for a term of four years. The council shall elect a chairman from its membership. The director shall be an ex-officio, nonvoting member of the council.

B. Members of the council shall not be paid but shall receive per diem and mileage pursuant to the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

C. The council shall meet at least twice each year. It shall annually review workers' compensation and occupational disease disablement in New Mexico and shall issue a report of its findings and conclusions on or before January 1 of each year. The annual report shall be sent to the governor, the superintendent of insurance, the speaker of the house of representatives, the president pro tempore of the senate, the minority leaders of both houses and the chairmen of all appropriate committees of each house that

review the status of the workers' compensation and occupational disease disablement system. In performing these responsibilities, the council's role shall be strictly advisory, but it may:

(1) make recommendations relating to the adoption of rules and legislation;

(2) make recommendations regarding the method and form of statistical data collections; and

(3) monitor the performance of the workers' compensation and occupational disease disablement system in the implementation of legislative directives.

D. The advisory council on workers' compensation and occupational disease disablement shall appoint a committee composed of three members representing workers and three members representing employers to designate an approved list of health care providers who are authorized to conduct independent medical examinations. The committee shall, to the greatest extent possible, designate only health care providers whose judgments are respected, or not objected to, by recognized representatives of both employer and worker interests and whose judgments are not perceived to favor any particular interest group. Members of the committee shall be immune from personal liability for any official action taken in establishing the approved list of health care providers. The committee shall review and revise the list annually. The terms of the original members shall be two years, and thereafter the terms of the members shall be staggered so that each year the committee appoints one member who represents workers and one member who represents employers. The members shall annually elect a chairman. No member representing employers or workers shall be an attorney.

E. The workers' compensation administration shall cooperate with the council and shall provide information and staff support as reasonably necessary and required by the council and by the committee appointed pursuant to Subsection D of this section.

History: Laws 1990 (2nd S.S.), ch. 2, § 28; 1993, ch. 193, § 1.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, in Subsection A, deleted the former next-to-last sentence, which read "The governor shall also appoint three nonvoting members of the council: one from an insurance company, one health care provider and one attorney", and made a minor stylistic change; made a minor stylistic change in Subsection C; inserted the second and third sentences in Subsection D; and made minor stylistic changes in Subsection E.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

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 three 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 required in the Workers' Compensation Act.

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; 2003, ch. 259, § 2.

ANNOTATIONS

Cross references. — For coverage by state agencies, *see* 52-1-3 NMSA 1978.

For exemption of educational institutions, *see* 52-1-63 NMSA 1978.

For state defense force, workers' compensation, *see* 20-5-16 NMSA 1978.

For 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 2003 amendment, effective June 20, 2003, substituted "three" for "four" near the middle of the section and inserted "in the Workers' Compensation Act" at the end of the section.

I. GENERAL CONSIDERATION.

Purpose of the workmen's [workers'] 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*, 1967-NMSC-036, 77 N.M. 455, 423 P.2d 980.

Workmen's [Workers'] 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*, 1967-NMSC-021, 77 N.M. 428, 423 P.2d 617.

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 [Workers'] 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 Section 52-1-9 NMSA 1978, are present. *Wilson v. Rowan Drilling Co.*, 1950-NMSC-046, 55 N.M. 81, 227 P.2d 365 (decided under former law).

Liberal construction rule applies to law, not evidence. — The rule of liberal construction of the Workmen's [Workers'] Compensation Act applies to the law, not to the evidence offered to support a claim. *Brown v. General Ins. Co. of Am.*, 1962-NMSC-040, 70 N.M. 46, 369 P.2d 968.

New Mexico's workmen's [workers'] compensation statute is based on extrahazardous occupations and pursuits. *Hayes v. Ampex Corp.*, 1973-NMCA-105, 85 N.M. 444, 512 P.2d 1280, *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743.

No express consent by state to be sued in workmen's [workers'] compensation proceeding involving the state penitentiary and the consent is not to rest on implication. *Day v. Penitentiary of N.M.*, 1954-NMSC-064, 58 N.M. 391, 271 P.2d 831.

A suit may not be brought against a state institution under the Workmen's [Workers'] Compensation Act without the express consent of the state. *McWhorter v. Board of Educ.*, 1958-NMSC-015, 63 N.M. 421, 320 P.2d 1025.

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.*, 1958-NMSC-015, 63 N.M. 421, 320 P.2d 1025.

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).

When number of workers calculated. — If an employer has once regularly employed enough workers to come under the Act, he remains there even when the number

employed may temporarily fall below the minimum. *Garcia v. Watson Tile Works, Inc.*, 1990-NMCA-126, 111 N.M. 209, 803 P.2d 1114.

Out-of-state workers of employers. — Under this section all workers employed by a private employer "engaged in carrying on for the purpose of business or trade within this state," wherever employed, must be considered in determining whether the employer is subject to the act. Thus an "out-of-state employer who employed fewer than three workers within the State of New Mexico could still be subject to liability under the act. *Hammonds v. Freymiller Trucking, Inc.*, 1993-NMCA-030, 115 N.M. 364, 851 P.2d 486.

Directors and officers as "workers". — Where corporate payments to directors and officers represented repayment of loans, not wages or salary, the directors and officers were not "workers" as contemplated by this section. *Garcia v. Watson Tile Works, Inc.*, 1990-NMCA-126, 111 N.M. 209, 803 P.2d 1114.

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 [Workers'] 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.*, 1945-NMSC-044, 49 N.M. 356, 164 P.2d 380.

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, Inc.*, 1955-NMSC-083, 60 N.M. 101, 287 P.2d 992.

Employer must show valid employment contract. — If an employer seeks to avail itself of the Workmen's [Workers'] 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*, 1984-NMCA-052, 102 N.M. 300, 694 P.2d 1365, cert. quashed, 102 N.M. 293, 694 P.2d 1358 (1985).

Self-serving declaration of deceased workman [worker]. — 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 [workers'] 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.*, 1962-NMSC-040, 70 N.M. 46, 369 P.2d 968.

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.*, 1962-NMSC-040, 70 N.M. 46, 369 P.2d 968.

Question of compensable injury not affected by workman [worker] being more readily susceptible. — Although a workman [worker] 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, Inc.*, 1955-NMSC-083, 60 N.M. 101, 287 P.2d 992.

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.*, 1964-NMSC-153, 74 N.M. 484, 394 P.2d 996.

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 [workers'] compensation for an injury so sustained. *Witt v. Marcum Drilling Co.*, 1964-NMSC-029, 73 N.M. 466, 389 P.2d 403.

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*, 1939-NMSC-041, 44 N.M. 31, 97 P.2d 374.

Availability of common-law defenses for employer. — Under the Workmen's [Workers'] 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*, 1978-NMCA-075, 92 N.M. 89, 582 P.2d 1302.

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.*, 1969-NMCA-125, 81 N.M. 67, 463 P.2d 43.

II. EMPLOYMENT COVERED.

Workman [Worker] for conservancy district covered. — Workman [Worker] 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 [Workers'] Compensation Act. *Armijo v. Middle Rio Grande Conservancy Dist.*, 1955-NMSC-033, 59 N.M. 231, 282 P.2d 712.

Only injuries "arising out of and in course of" employment are compensable. *Martinez v. Fidel*, 1956-NMSC-023, 61 N.M. 6, 293 P.2d 654.

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.*, 1964-NMSC-153, 74 N.M. 484, 394 P.2d 996.

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*, 1956-NMSC-023, 61 N.M. 6, 293 P.2d 654.

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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65.

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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65.

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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65.

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.*, 1960-NMSC-056, 67 N.M. 230, 354 P.2d 526.

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.*, 1954-NMSC-051, 58 N.M. 314, 270 P.2d 720.

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 [workers'] compensation for death of loader's employee. *Nelson v. Eidal Trailer Co.*, 1954-NMSC-051, 58 N.M. 314, 270 P.2d 720.

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*, 1958-NMSC-041, 64 N.M. 66, 323 P.2d 1104.

Professional classified as independent contractor or "employee". — A professional giving full-time, exclusive services to a business should not be excluded from the definition of "employee" under the Workers' Compensation Act simply because no one in the business has the skills to oversee the details of the professional's work. Thus where the workers' compensation judge did not make findings with regard to whether at the time of the accident the claimant, an accountant performing services for the defendant, was potentially available to other clients or was committed to serving defendant exclusively for the foreseeable future, the case was remanded for further findings and conclusions. *Whittenberg v. Graves Oil & Butane Co.*, 1991-NMCA-142, 113 N.M. 450, 827 P.2d 838, cert. denied, 113 N.M. 352, 826 P.2d 573 (1992).

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.*, 1986-NMCA-079, 104 N.M. 775, 727 P.2d 83.

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 [Workers'] Compensation Act as an "employee." *Bland v. Greenfield Gin Co.*, 1944-NMSC-021, 48 N.M. 166, 146 P.2d 878.

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.*, 1934-NMSC-023, 38 N.M. 254, 31 P.2d 263.

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.*, 1954-NMSC-054, 58 N.M. 349, 270 P.2d 983.

Special employer. — The special employer is liable for workers' compensation when the employee has made a contract of hire, express or implied, with the special employer. The work being done is essentially that of the special employer; and the special employer has the right to control the details of the work. *Rivera v. Sagebrush Sales, Inc.*, 1994-NMCA-119, 118 N.M. 676, 884 P.2d 832, cert. denied, 118 N.M. 585, 883 P.2d 1282; *Hamberg v. Sandia Corp.*, 2008-NMSC-015, 143 N.M. 601, 179 P.3d 1209.

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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65.

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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65.

Novice at a monastery was not a "worker" for purposes of workers' compensation. *Joyce v. Pecos Benedictine Monastery*, 1995-NMCA-054, 119 N.M. 764, 895 P.2d 286.

Where an employer employs four (now three) or more persons in the business he was required to carry workmen's [workers'] compensation insurance or to exempt himself from the Workmen's [Workers'] Compensation Act. *Castillo v. Juarez*, 1969-NMCA-031, 80 N.M. 196, 453 P.2d 217.

Employer covered where employees for all proprietorships totaled more than three. — Defendant who solely owned and operated three businesses as sole proprietorships, and who cumulatively employed a total of four (now three) 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*, 1977-NMCA-048, 90 N.M. 477, 565 P.2d 348, cert. denied, 90 N.M. 636, 567 P.2d 485.

School and conservancy district are included in Workmen's [Workers'] Compensation Act when engaged in an extrahazardous occupation or pursuit. *Armijo v. Middle Rio Grande Conservancy Dist.*, 1955-NMSC-033, 59 N.M. 231, 282 P.2d 712 (decided under former law).

But no authority to sue state. — Although a school district is subject to the provisions of the Workmen's [Workers'] 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.*, 1958-NMSC-015, 63 N.M. 421, 320 P.2d 1025.

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.*, 1936-NMSC-023, 40 N.M. 183, 57 P.2d 283 (decided under former law).

Employees of state highway department are entitled to benefits under this act. *State ex rel. Md. Cas. Co. v. State Hwy. Comm'n*, 1934-NMSC-062, 38 N.M. 482, 35 P.2d 308; *Cuellar v. American Employers' Ins. Co.*, 1932-NMSC-018, 36 N.M. 141, 9 P.2d 685.

Injured work-release program prisoner deemed "employee". — A prisoner who voluntarily participated in a work-release program and was injured while under the direction of a private business was an "employee" of that business and thus entitled to workers' compensation benefits. *Benavidez v. Sierra Blanca Motors*, 1995-NMCA-140,

120 N.M. 837, 907 P.2d 1018, *rev'd in part on other grounds*, 1996-NMSC-045, 122 N.M. 209, 922 P.2d 1205.

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.*, 1973-NMCA-156, 85 N.M. 27, 508 P.2d 1324, cert. denied, 85 N.M. 5, 508 P.2d 1302.

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.*, 1973-NMCA-156, 85 N.M. 27, 508 P.2d 1324, cert. denied, 85 N.M. 5, 508 P.2d 1302.

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.*, 1973-NMCA-156, 85 N.M. 27, 508 P.2d 1324, cert. denied, 85 N.M. 5, 508 P.2d 1302.

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.*, 1973-NMCA-156, 85 N.M. 27, 508 P.2d 1324, cert. denied, 85 N.M. 5, 508 P.2d 1302.

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 [Workers'] Compensation Act on the ground that he was an employee of the county. *Eaton v. Bernalillo Cnty.*, 1942-NMSC-040, 46 N.M. 318, 128 P.2d 738.

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.*, 1962-NMSC-155, 71 N.M. 120, 376 P.2d 180.

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.*, 1964-NMSC-153, 74 N.M. 484, 394 P.2d 996.

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*, 1956-NMSC-023, 61 N.M. 6, 293 P.2d 654.

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.*, 1941-NMSC-033, 45 N.M. 354, 115 P.2d 342.

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.*, 1934-NMSC-020, 38 N.M. 241, 31 P.2d 255.

Employment in timber cutting. — An accident to a workman [worker] employed in a forest, caused by a falling tree, and resulting in his death, arose out of his employment. *Merrill v. Penasco Lumber Co.*, 1922-NMSC-008, 27 N.M. 632, 204 P. 72 (decided under former law).

III. INJURY BY ACCIDENT.

Intentional tort of co-worker. — When a co-worker commits an intentional tort against another worker, such an incident will be considered accidental, and within the scope of the Workers' Compensation Act, where the employer did not intentionally or willfully engage in conduct leading to the incident resulting in the worker's injury, or where the co-worker's intentional conduct cannot be imputed to the employer under the alter ego theory. *Griego v. Patriot Erectors, Inc.*, 2007-NMCA-08, 141 N.M. 844, 161 P.3d 889, cert. denied, 2007-NMCERT-004, 141 N.M. 569, 158 P.3d 459.

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.*, 1945-NMSC-032, 49 N.M. 253, 161 P.2d 867.

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.*, 1945-NMSC-032, 49 N.M. 253, 161 P.2d 867.

Term "accidental injury" as used in Workmen's [Workers'] 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, Inc.*, 1955-NMSC-083, 60 N.M. 101, 287 P.2d 992.

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.*, 1972-NMCA-005, 83 N.M. 452, 493 P.2d 418.

It is unnecessary that workman [worker] 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.*, 1972-NMCA-005, 83 N.M. 452, 493 P.2d 418.

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.*, 1945-NMSC-032, 49 N.M. 253, 161 P.2d 867 (decided under former law).

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.*, 1972-NMCA-005, 83 N.M. 452, 493 P.2d 418.

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 [worker] 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, Inc.*, 1955-NMSC-083, 60 N.M. 101, 287 P.2d 992.

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.*, 1964-NMSC-153, 74 N.M. 484, 394 P.2d 996.

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.*, 1963-NMSC-152, 72 N.M. 447, 384 P.2d 885.

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.*, 1972-NMCA-005, 83 N.M. 452, 493 P.2d 418.

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.*, 1962-NMSC-143, 71 N.M. 154, 376 P.2d 574.

Silicosis not accident. — While workmen's [workers'] compensation acts are given a liberal interpretation in favor of the workman [worker], silicosis does not fall within the purview of an injury by accident. *Aranbula v. Banner Mining Co.*, 1945-NMSC-032, 49 N.M. 253, 161 P.2d 867.

Silicosis is 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.*, 1945-NMSC-032, 49 N.M. 253, 161 P.2d 867.

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.*, 1941-NMSC-033, 45 N.M. 354, 115 P.2d 342.

Contract with employees to operate independently. — All employers covered by Workmen's [Workers'] Compensation Act operate under it unless by contract with employees they show intention to operate independently of it. 1931 Op. Att'y Gen. No. 31-213.

Contractor with less than three employees. — Except as provided in this section, a contractor is not subject to the Workmen's [Workers'] Compensation Act though engaged in extrahazardous activity unless he expressly elects to come under it, if he

has less than four (three) employees. 1945 Op. Att'y Gen. No. 45-4711 (rendered under former law).

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 Op. Att'y Gen. No. 61-16 (rendered under former law).

State department is not subject to the Workmen's [Workers'] Compensation Act as to office employees and others in nonhazardous occupation and may not elect to come under the act or to such employees. 1952 Op. Att'y Gen. No. 52-5598 (rendered under former law).

Applies to state educational institutions. — The Workmen's [Workers'] 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 Op. Att'y Gen. No. 31-299.

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

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

State and political subdivisions. — It was apparent legislative intention that the state and its political subdivisions should come within provisions of the Workmen's [Workers'] 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 Op. Att'y Gen. No. 43-4224.

Employees of state insane asylum, not engaged in "extrahazardous occupation," may be brought under the law by mutual agreement. 1931 Op. Att'y Gen. No. 31-90 (rendered under former law).

Members of voluntary fire department without some contract of employment with city are not entitled to benefits of Workmen's [Workers'] Compensation Act. 1932 Op. Att'y Gen. No. 32-477.

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 Op. Att'y Gen. No. 57-41 (rendered under former law).

Except while under direct supervision of state police officer. — Workmen's [Workers'] compensation coverage includes New Mexico mounted patrol members

should they become injured while working under the direct supervision of a state police officer. 1958 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 [workers'] compensation. 1958 Op. Att'y Gen. No. 58-218.

While interstate truckers need not carry workmen's [workers'] compensation, the workmen [workers] and employer may elect to come under the law by voluntary agreement. 1937 Op. Att'y Gen. No. 37-1511.

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).

For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

For note, “Trends in New Mexico Law 1994-95: Workers’ Compensation Law – New Mexico Clarifies the Meaning of a Special Employer from a Statutory Employer: Rivera v. Sagebrush Sales, Inc.,” see 26 N.M. L. Rev. 655 (1996).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 44, 47, 116 to 136, 157.

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, 105 A.L.R. 580.

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.

Employee's injuries sustained in use of employer's restroom as covered by workers' compensation, 80 A.L.R.5th 417.

99 C.J.S. Workmen's Compensation §§ 37 to 58.

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, 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.

ANNOTATIONS

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.

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.*, 1958-NMSC-015, 63 N.M. 421, 320 P.2d 1025.

School district subject to act. — Although a school district is subject to the provisions of the Workmen's [Workers'] 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.*, 1958-NMSC-015, 63 N.M. 421, 320 P.2d 1025.

Applicability of exclusivity rule. — Employees of the public defender's department who were injured in the course of their employment were employees of the state for purposes of the exclusive remedy provisions of the Workers' Compensation Act, and the exclusivity rule applied to tort claims asserted against the State Highway Department by

such employees. *Singhas v. N.M. State Hwy. Dep't*, 1995-NMCA-089, 120 N.M. 474, 902 P.2d 1077, *aff'd*, 1997-NMSC-054, 124 N.M. 42, 946 P.2d 645.

Because the State Highway Department is not recognized by law as a legal entity distinct from the state itself, the state could not be both employer and third party tortfeasor in an action against the Highway Department by employees of the public defender's department who were injured while traveling in the course of their employment, and the "dual persona" doctrine did not apply to extend immunity to Highway Department under the exclusive remedy provisions of the Workers' Compensation Act. *Singhas v. N.M. State Hwy. Dep't*, 1995-NMCA-089, 120 N.M. 474, 902 P.2d 1077, *aff'd*, 1997-NMSC-054, 124 N.M. 42, 946 P.2d 645.

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.

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

Volunteer fire department. — The village of Hatch need not pay premiums upon insurance for workmen's [workers'] compensation coverage for personnel of the volunteer fire department. 1956 Op. Att'y Gen. No. 56-6505.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 59, 60.

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.

A. As used in the Workers' Compensation Act, 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.

B. "Public employee" includes an unpaid health professional deployed by the department of health within New Mexico in response to a declared public emergency or public health emergency or deployed by the department of health outside New Mexico in response to a request for emergency health personnel made pursuant to the

Emergency Management Assistance Compact [12-10-14, 12-10-15 NMSA 1978]; provided that, for purposes of the Workers' Compensation Act:

(1) the department of health shall be considered to be the employer of the person;

(2) the person's average weekly wage, for the purpose of calculating compensation, shall be considered to be the average weekly wage for similar services performed by paid workers in like employment; and

(3) the person shall not be considered an employee in the calculation of any fee pursuant to Section 52-5-19 NMSA 1978.

C. "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; 2007, ch. 328, § 1.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, added Subsection B.

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

A. Every employer subject to the Workers' Compensation Act 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. The required certificate must be provided by an authorized insurer as defined in Section 59A-1-8 NMSA 1978. 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 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 workers' compensation benefits for which the employer is liable.

D. 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; 1990 (2nd S.S.), ch. 2, § 2.

ANNOTATIONS

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.

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

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "administration" for "division" in the catchline; added the present second sentence in Subsection A; in Subsection C, deleted "for which is" following "certificate" near the beginning and substituted "workers'" for "worker's" near the end; deleted former Subsection D relating to exemptions for certain governmental entities; and redesignated former Subsection E as Subsection D.

Workmen's [Workers'] 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*, 1976-NMCA-017, 89 N.M. 86, 547 P.2d 569, *aff'd*, 1976-NMSC-022, 89 N.M. 252, 550 P.2d 264.

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.*, 1969-NMCA-083, 80 N.M. 589, 458 P.2d 841.

Purpose of mandatory filing requirement is to notify a workman [worker] 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 [worker] is conclusively presumed to have accepted its provisions. *Shope v. Don Coe Constr. Co.*, 1979-NMCA-013, 92 N.M. 508, 590 P.2d 656.

Frustration of legislative intent. — There is a point beyond which the mandatory provisions of the Workmen's [Workers'] 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*, 1979-NMSC-024, 93 N.M. 35, 596 P.2d 248.

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.*, 1987-NMSC-109, 106 N.M. 569, 746 P.2d 1101.

Workman [Worker'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 [worker's] right to the common-law action is conclusive. *Shope v. Don Coe Constr. Co.*, 1979-NMCA-013, 92 N.M. 508, 590 P.2d 656.

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. Internatioal Minerals & Chem. Corp.*, 1967-NMSC-043, 77 N.M. 576, 425 P.2d 740.

Standard in state for foreclosure of employee's common-law remedies is whether the employer has substantially complied with the Workmen's [Workers'] Compensation Act; strict compliance is not necessary. *Security Trust v. Smith*, 1979-NMSC-024, 93 N.M. 35, 596 P.2d 248.

Substantial compliance. — The substantial compliance doctrine requires not only that the employer file proof of insurance coverage before the worker files a suit, but also that the employer actually had maintained workers’ compensation for its employees as of the date of the injury in question. *Peterson v. Wells Fargo Armored Services Corp.*, 2000-NMCA-043, 129 N.M. 158, 3 P.3d 135, cert. denied, 129 N.M. 207, 4 P.3d 35.

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 [Workers'] 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 [Workers'] Compensation Act. *Security Trust v. Smith*, 1979-NMSC-024, 93 N.M. 35, 596 P.2d 248.

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.*, 1980-NMCA-128, 95 N.M. 398, 622 P.2d 706, cert. denied, 95 N.M. 426, 622 P.2d 1046 (1981).

The "shall file" provision in this section is mandatory. *Montano v. Williams*, 1976-NMCA-017, 89 N.M. 86, 547 P.2d 569, *aff'd*, 1976-NMSC-022, 89 N.M. 252, 550 P.2d 264; *Quintana v. Nolan Bros.*, 1969-NMCA-083, 80 N.M. 589, 458 P.2d 841 (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.*, 1969-NMCA-083, 80 N.M. 589, 458 P.2d 841 (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 [workers'] compensation suit, was served pursuant to former 59-10-13.7, 1953 Comp., a failure to file the policy pursuant to this section would not deprive the court of jurisdiction over that insurer. *Quintana v. Nolan Bros.*, 1969-NMCA-083, 80 N.M. 589, 458 P.2d 841 (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.*, 1969-NMCA-083, 80 N.M. 589, 458 P.2d 841 (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 Sections 52-1-6, 52-1-8 and 52-1-9 NMSA 1978. *Quintana v. Nolan Bros.*, 1969-NMCA-083, 80 N.M. 589, 458 P.2d 841 (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*, 1976-NMCA-017, 89 N.M. 86, 547 P.2d 569, *aff'd*, 1976-NMSC-022, 89 N.M. 252, 550 P.2d 264.

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 [Workers'] 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*, 1957-NMSC-002, 62 N.M. 120, 305 P.2d 1067.

Action at law lies in favor of employee against employer. — Where an employer did not carry workmen's [workers'] 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*, 1957-NMSC-002, 62 N.M. 120, 305 P.2d 1067.

When employer does not file insurance policy, the workman [worker] 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*, 1976-NMCA-017, 89 N.M. 86, 547 P.2d 569, *aff'd*, 1976-NMSC-022, 89 N.M. 252, 550 P.2d 264 (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 [workers'] accident took place was not filed with the district court until 40 days after the accident, but where the employer 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.*, 1967-NMSC-043, 77 N.M. 576, 425 P.2d 740.

If common-law action is not filed prior to filing of insurance coverage, even if filed late, the workman [worker] does not escape the provisions of the act. *Shope v. Don Coe Constr. Co.*, 1979-NMCA-013, 92 N.M. 508, 590 P.2d 656.

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 [Workers'] Compensation Act, and the workman [worker] has not been harmed or injured or placed in a disadvantaged position. *Montano v. Williams*, 1976-NMCA-017, 89 N.M. 86, 547 P.2d 569, *aff'd*, 1976-NMSC-022, 89 N.M. 252, 550 P.2d 264.

A technical delay in filing a workmen's [workers'] 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 [Workers'] Compensation Act. *Shope v. Don Coe Constr. Co.*, 1979-NMCA-013, 92 N.M. 508, 590 P.2d 656.

Election of coverage by sole proprietor. — A self-employed person must file either a sworn statement that he has elected to be covered under the Workers' Compensation Act as an employee/worker or file an insurance or security undertaking expressly stating

that he is covered as an employee/worker under the act. Consequently, an insurance certificate demonstrating a self-employed person or sole proprietor has purchased insurance for his workers is insufficient to demonstrate that the sole proprietor had elected to be considered a worker under the act for purposes of coverage. *Junge v. John D. Morgan Constr. Co.*, 1994-NMCA-106, 118 N.M. 457, 882 P.2d 48.

When act no bar to tort action. — Allowing the Workmen's [Workers'] 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*, 1979-NMSC-024, 93 N.M. 35, 596 P.2d 248.

Employer may not invoke estoppel to bar employee where knowingly carried no insurance. — Employer at all times knew that he did not carry workmen's [workers'] 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*, 1957-NMSC-002, 62 N.M. 120, 305 P.2d 1067.

Workman [Worker] is statutory beneficiary of workmen's [workers'] compensation insurance rather than insured. *Herrera v. Springer Corp.*, 1973-NMCA-041, 85 N.M. 6, 508 P.2d 1303, *modified on other grounds*, 1973-NMSC-057, 85 N.M. 201, 510 P.2d 1072.

Excess workers' compensation policies. — Excess workers' compensation insurance policies are not reinsurance policies or indemnity policies excluded from the Property and Casualty Insurance Guaranty Law (Chapter 59A, Article 43 NMSA 1978). *In re Mission Ins. Co.*, 1991-NMSC-080, 112 N.M. 433, 816 P.2d 502.

Excess workers' compensation policies are not excepted from coverage under Subsection C of Section 59A-43-4 NMSA 1978. *In re Mission Ins. Co.*, 1991-NMSC-080, 112 N.M. 433, 816 P.2d 502.

Claims against insolvent insurers. — A self-insured employer who has a claim against an insolvent insurer may qualify such claim as a "covered claim" within the scope of the New Mexico Property and Casualty Insurance Guaranty Law (Chapter 59A, Article 43 NMSA 1978). *In re Mission Ins. Co.*, 1991-NMSC-080, 112 N.M. 433, 816 P.2d 502.

Operating under a certificate of solvency pursuant to this section cannot be equated with an insurance contract or policy. The certificate is simply a way of proving to the state that an employer can satisfy its obligation under the workers' compensation laws. *In re Mission Ins. Co.*, 1991-NMSC-080, 112 N.M. 433, 816 P.2d 502.

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. N.M. State Police*, 1953-NMSC-108, 57 N.M. 747, 263 P.2d 690; *Stevenson v. Lee Moor Contracting Co.*, 1941-NMSC-033, 45 N.M. 354, 115 P.2d 342.

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 [workers'] 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. N.M. State Police*, 1953-NMSC-108, 57 N.M. 747, 263 P.2d 690.

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 Op. Att'y Gen. No. 39-3280.

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 and 59-10-12, 1953 Comp. (now repealed). 1939 Op. Att'y Gen. No. 39-3280 (rendered under former law).

School districts need not carry insurance on all their employees but may also carry multiple insurance on such employees as it chooses. 1943 Op. Att'y Gen. No. 43-4429.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 29, 177 to 182, 675.

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. 580, 151 A.L.R 1358, 180 A.L.R. 1214.

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. Repealed.

ANNOTATIONS

Repeals. — Laws 1999, ch. 172, § 4 repeals 52-1-4.1 NMSA 1978, enacted by Laws 1979, ch. 368, § 2 and as amended by Laws 1987, ch. 235, § 6, relating to fee for filing insurance policy in office of director, effective June 1, 1999.

52-1-4.2. Controlled insurance plan; penalty.

A. An owner or the principal contractor of a construction project may establish and administer a controlled insurance plan, provided the covered project is a construction project, a plant expansion or real property improvements within New Mexico with an aggregate construction value in excess of one hundred fifty million dollars ($150,000,000) expended within a five-year period. As used in this section, "aggregate construction value" includes design, utilities, site excavation, construction costs of improvements to real property and acquisition of equipment and furnishings but does not include the cost of fees or charges associated with financing the construction project.

B. Rolling wrap-ups are prohibited. Controlled insurance plans covering non-contiguous construction sites are prohibited.

C. The owner shall include in any request for proposals for bids a notice that participation in a controlled insurance plan is a requirement of the bid and shall provide a copy of the specifications of the controlled insurance plan. The specifications shall include a statement of the bidding contractor's or subcontractor's responsibilities relative to the plan.

D. A dispute regarding which workers' compensation coverage or insurer is responsible shall be resolved by the administration. An administrative or judicial finding shall include appropriate reimbursement of benefit payments and expenses. For disputed cases as described herein, initial benefits shall be provided by the controlled insurance plan until such time as the coverage dispute is resolved.

E. An owner or principal contractor who enters into a contract for a controlled insurance plan shall file a copy of the contract and evidence of compliance with the requirements of this section with the superintendent of insurance and the workers' compensation administration at least thirty days before the date on which the owner is to begin receiving bids or requests for proposals on the project.

F. An owner or principal contractor using a controlled insurance plan shall distribute any project performance-based refunded premium or dividend to each participating

contractor and subcontractor on a proportional basis if provided in the construction contract.

G. An owner or principal contractor shall provide for a safety plan for an employee engaged in the construction project when the employee is present at the construction project site. The owner or principal contractor of the construction project shall develop and carry out a health and safety program approved by the workers' compensation administration. The plan shall include a protocol that encourages return to work guidelines pursuant to the Workers' Compensation Act.

H. The owner or principal contractor of a construction project that uses a controlled insurance plan shall:

(1) establish a method for timely reporting of job-related injuries to the employer, the insured and the administration;

(2) provide modifier experienced units statistical rating information and any other statistical information required by the superintendent of insurance for all contractors and subcontractors, including losses and payroll, to the appropriate rating service within six months following the end of the annual policy period;

(3) provide contractors or subcontractors or their representatives with actual and specific payroll audit data generated under the controlled insurance plan, as would be customarily provided to the employer from a non-controlled insurance plan; and

(4) provide the same access to information on injured employees as would customarily be available to the employer from a non-controlled insurance plan.

I. In addition to any other penalties provided under the law, a person found to have violated any requirement of this section shall be subject to a penalty pursuant to Section 52-1-61 NMSA 1978.

History: Laws 2003, ch. 263, § 2.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 263 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 20, 2003, 90 days after adjournment of the legislature.

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.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 464, 675.

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

A. The provisions of the Workers' Compensation Act shall apply to employers of three or more workers; provided that act shall apply to all employers engaged in activities required to be licensed under the provisions of the Construction Industries Licensing Act [Chapter 60, Article 13 NMSA 1978] regardless of the number of employees. The provisions of the Workers' Compensation Act shall not apply 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 or farm and ranch laborers, by persons for whom the services of qualified real estate sales persons are performed or by a partner or self-employed person may be made by filing, in the office of the director, 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 worker shall be conclusively presumed to have accepted the provisions of the Workers' Compensation Act if his employer is subject to the provisions of that act 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 worker 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 whatever for or on account of personal injuries or death of the worker 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 worker 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.

E. The Workers' Compensation Act provides exclusive remedies. No cause of action outside the Workers' Compensation Act shall be brought by an employee or dependent against the employer or his representative, including the insurer, guarantor or surety of any employer, for any matter relating to the occurrence of or payment for any injury or death covered by the Workers' Compensation Act. 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 that 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: 1978 Comp., § 52-1-6, enacted by Laws 1990 (2nd S.S.), ch. 2, § 4.

ANNOTATIONS

Repeals and reenactments. — Laws 1990 (2nd S.S.), ch. 2, § 4 repealed 52-1-6 NMSA 1978, as amended by Laws 1990 (2nd S.S.), ch. 2, § 3, and enacted a new section, effective January 1, 1992.

Cross references. — For employees who come within act, *see* 52-1-2 NMSA 1978.

For coverage by state agencies, *see* 52-1-3 NMSA 1978.

For application of provisions of act to certain corporations' employees, *see* 52-1-7 NMSA 1978.

For right to compensation as exclusive, *see* 52-1-9 NMSA 1978.

I. GENERAL CONSIDERATION.

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*, 1978-NMCA-086, 92 N.M. 147, 584 P.2d 194, cert. denied, 92 N.M. 180, 585 P.2d 324.

Independent retaliatory discharge action allowed. — An employee who alleges that he or she was wrongfully discharged in retaliation for filing a workers' compensation action has a cause of action for damages independent from that set out in Section 52-1-28.2 NMSA 1978 (civil penalty for retaliatory discharge). *Michaels v. Anglo Am. Auto Auctions, Inc.*, 1994-NMSC-015, 117 N.M. 91, 869 P.2d 279.

Claim must be against employer. — Claims based on the Occupational Disease Disablement Act or Workers' Compensation Act can be raised only against an employer. *Garrity v. Overland Sheepskin Co.*, 1996-NMSC-032, 121 N.M. 710, 917 P.2d 1382.

No cause of action against insurer for refusal to pay medical claims. — An injured employee who is receiving workmen's [workers'] 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.*, 1982-NMSC-090, 98 N.M. 479, 650 P.2d 1.

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 [Workers'] 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*, 1981-NMCA-014, 95 N.M. 551, 624 P.2d 60, *overruled in part by Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148.

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 [Workers'] Compensation Act. *Segura v. Molycorp, Inc.*, 1981-NMSC-116, 97 N.M. 13, 636 P.2d 284.

Contract substituting less compensation scheme for act invalid. — A contract between an employer and employee providing that the Workmen's [Workers'] 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*, 1938-NMSC-008, 42 N.M. 107, 76 P.2d 1.

There is no express consent by state to be sued in a Workmen's [Workers'] Compensation proceeding involving the state penitentiary and the consent is not to rest on implication. *Day v. Penitentiary of N.M.*, 1954-NMSC-064, 58 N.M. 391, 271 P.2d 831.

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 [Workers'] 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).

Injury subsequent to discharge. — Workers' Compensation Law (Chapter 52, Article 1 NMSA 1978) is not automatically terminated by the firing or quitting of an employee, but applies to injury occurring during a reasonable period while employee winds up affairs and leaves premises. *Martin-Martinez v. 6001, Inc.*, 1998-NMCA-179, 126 N.M. 319, 968 P.2d 1182, cert. denied, 126 N.M. 532, 972 P.2d 351.

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.*, 1988-NMCA-089, 107 N.M. 728, 764 P.2d 499.

Tort law governs acts of hospital in treating employee for accident. — Section 52-1-49 NMSA 1978 coupled with this section and Section 52-1-56 NMSA 1978 clearly demonstrate a legislative intent that ordinary tort law, except as modified by said Sections 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*, 1975-NMSC-052, 88 N.M. 292, 540 P.2d 222.

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 [workers'] compensation law. *Roskell v. Prudential Ins. Co. of Am.*, 529 F.2d 1 (10th Cir. 1976).

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*, 1956-NMSC-032, 61 N.M. 52, 294 P.2d 625.

II. ACCEPTANCE OF THE ACT.

Workers' 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*, 1976-NMCA-017, 89 N.M. 86, 547 P.2d 569, *aff'd*, 89 N.M. 252, 550 P.2d 264.

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*, 1939-NMSC-041, 44 N.M. 31, 97 P.2d 374.

Employer conclusively presumed to accept act where not exempted. — Where an employer had not exempted himself from the operation of the Workmen's [Workers'] Compensation Act, he is conclusively presumed to have accepted its provisions. *Addison v. Tessier*, 1957-NMSC-002, 62 N.M. 120, 305 P.2d 1067 (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*, 1957-NMSC-002, 62 N.M. 120, 305 P.2d 1067.

Where act not followed, no presumption and action at law lies. — Where an employer did not carry workmen's [workers'] compensation insurance, nor had he relieved himself of such requirement as required by Section 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 Section 52-1-8 NMSA 1978 were not available to employer. *Addison v. Tessier*, 1957-NMSC-002, 62 N.M. 120, 305 P.2d 1067 (decided under former law).

The employee could not be conclusively presumed to have accepted the provisions of the Workmen's [Workers'] 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*, 1957-NMSC-002, 62 N.M. 120, 305 P.2d 1067.

Employer cannot invoke estoppel to bar employee's action. — Employer at all times knew that he did not carry workmen's [workers'] 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*, 1957-NMSC-002, 62 N.M. 120, 305 P.2d 1067.

Failure of employer to comply with the filing provisions. — Where an employer did not substantially comply with the filing provisions of the Workers' Compensation Act, the exclusive remedy provisions of this section and Sections 52-1-8 and 52-1-9 NMSA 1978 did not apply to bar a wrongful death action against the employer. *Peterson v. Wells Fargo Armored Servs. Corp.*, 2000-NMCA-043, 129 N.M. 158, 3 P.3d 135, cert. denied, 129 N.M. 207, 4 P.3d 35.

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. 1937), cert. denied, 303 U.S. 644, 58 S. Ct. 644, 82 L. Ed. 1106 (1938).

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

[Workers'] Compensation Act and plaintiff is bound thereby. *Shope v. Don Coe Constr. Co.*, 1979-NMCA-013, 92 N.M. 508, 590 P.2d 656.

Delay in filing does not remove limitation on liability. — A delay in filing pursuant to Section 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.*, 1969-NMCA-083, 80 N.M. 589, 458 P.2d 841.

What constitutes sufficient election by employer to be bound by act. — The decision in *Eaves v. Contract Trucking Co.*, 1951-NMSC-066, 55 N.M. 463, 235 P.2d 530, 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 [Workers'] Compensation Act or the filing of a bond is a sufficient election by the employer to be bound by the act. *Garrison v. Bonfield*, 1953-NMSC-073, 57 N.M. 533, 260 P.2d 718 (decided under former law).

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.*, 1988-NMCA-089, 107 N.M. 728, 764 P.2d 499.

III. EXCLUSIVE REMEDY.

The Workers' Compensation Act does not prohibit a worker from filing an intentional tort action while receiving interim workers' compensation benefits. *Salazar v. Torres*, 2007-NMSC-019, 141 N.M. 559, 158 P.3d 449.

Act's remedy exclusive. — Once the Workmen's [Workers'] 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*, 1979-NMSC-027, 92 N.M. 618, 593 P.2d 59; *Segura v. Molycorp, Inc.*, 1981-NMSC-116, 97 N.M. 13, 636 P.2d 284.

The New Mexico Workmen's [Workers'] 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.*, 1982-NMSC-090, 98 N.M. 479, 650 P.2d 1.

Contribution remedy contravenes exclusive remedy provisions of the Workers' Compensation Act. *Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, 137 N.M. 497, 113 P.3d 320.

Tort claims. — The New Mexico Supreme Court opinion in *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M.272, 34 P.3d 1148, in replacing the "actual intent" test with a three-pronged inquiry to determine "willfulness" did not permit action for tort when worker's injuries were caused by negligence of the employee. *Cordova v. Peavey Co.*, 273 F. Supp. 2d 1213 (D.N.M. 2003).

Tort claim barred. — Summary judgment appropriate where temporary staffing agency employee is injured while performing a task that was not authorized or known about by his employer the injured special employee is limited to compensation under the New Mexico Workers' Compensation Act. *Cordova v. Peavey Co.*, 273 F. Supp. 2d 1213 (D.N.M. 2003).

Claim for refusal to make medical payments barred. — An independent cause of action for bad-faith refusal to make medical payments is barred by the exclusivity provision of this act. *Cruz v. Liberty Mut. Ins. Co.*, 1995-NMSC-006, 119 N.M. 301, 889 P.2d 1223.

Applicability to intentional acts. — Exclusivity provisions of Workers' Compensation Law (Chapter 52, Article 1 NMSA 1978) apply to injury to claimant's hand caused by manager intentionally slamming locker door. *Martin-Martinez v. 6001, Inc.*, 1998-NMCA-179, 126 N.M. 319, 968 P.2d 1182, cert. denied, 126 N.M. 532, 972 P.2d 351.

Worker's claim for intentional spoliation of evidence against his employer was not barred by the act's exclusive remedy provisions. *Coleman v. Eddy Potash, Inc.*, 1995-NMSC-063, 120 N.M. 645, 905 P.2d 185.

Employee's claim for intentional infliction of emotional distress against her employer was not barred by the exclusivity provision of the Workers' Compensation Act, but her claim for infliction of emotional distress against co-employees was barred by that provision. *Snowdon v. State Farm Mut. Auto. Ins. Co.*, 932 F. Supp. 1267 (D. N.M. 1996).

Employer's liability where worker settles with third party. — An injured worker who entered into a stipulated settlement with third party responsible for his injury, making him financially whole, cannot subsequently claim compensation from his employer. Because he received compensation benefits from the employer, he surrendered his rights to any other form of compensation from employer. *Apodaca v. Formwork Specialists*, 1990-NMCA-102, 110 N.M. 778, 800 P.2d 212, cert. denied, 110 N.M. 749, 799 P.2d 1121, *overruled on other grounds by Montoya v. AKAL Sec., Inc.*, 1992-NMSC-056, 114 N.M. 354, 838 P.2d 971.

Exclusivity provision does not preclude action against third party. — The exclusivity provision of the Workmen's [Workers'] Compensation Act does not preclude an employee or his estate from seeking damages against a third party who is not an employer, co-employee, or insurer or guarantor of his employer. *Matkins v. Zero Refrigerated Lines, Inc.*, 1979-NMCA-095, 93 N.M. 511, 602 P.2d 195.

Loss of consortium claim barred. — Since the workers' compensation was the exclusive remedy of a deceased employee's survivors, the claim of the employee's husband for loss of consortium was barred as a remedy at law under the exclusive remedy provisions of the Workers' Compensation Act. *Singhas v. N.M. State Hwy. Dep't*, 1995-NMCA-089, 120 N.M. 474, 902 P.2d 1077, *aff'd*, 1997-NMSC-054, 124 N.M. 42, 946 P.2d 645.

An action for loss of consortium by the spouse of an injured worker is barred by the exclusivity provisions of the Worker's Compensation Act. *Archer v. Roadrunner Trucking, Inc.*, 1997-NMSC-003, 122 N.M. 703, 930 P.2d 1155.

Estate of deceased worker not entitled to recover under employer's uninsured motorist insurance. — Where estate of decedent sought to recover damages under decedent's employer's uninsured/underinsured motorist coverage after decedent was killed in the course of his employment by a co-worker operating an employer-owned motor vehicle, decedent's estate was not entitled to recover damages under the employer's uninsured motorist insurance, because the uninsured motorist statute, 66-5-301(A) NMSA 1978, only benefits persons "legally entitled to recover damages from owners or operators of uninsured motor vehicles", and under the Workers' Compensation Act (WCA), 52-1-1 to -70 NMSA 1978, an employee who was injured in a workplace accident caused by an employer or its representative may only seek a remedy authorized under the WCA, and under the WCA such a employee is not legally entitled to recover damages under the uninsured motorist statute. *Vasquez v. American Cas. Co. of Reading*, 2017-NMSC-003.

IV. EMPLOYERS COVERED.

Special employee, coemployee. — A contractor that is the direct employer of special employees is immune under the act from common law suits brought by other special employees working for the same special employer, but under a different contract with a different direct employer. The contractor is not a special employee in this case, is not a coemployee for purposes of the act, and thus is not immune from suit. *Street v. Alpha Constr. Servs.*, 2006-NMCA-121, 140 N.M. 425, 143 P.3d 187, cert. quashed 2007-NMCERT-004, 141 N.M. 569, 158 P.3d 459.

Burden of proving who is employer. — Once corporation made prima facie showing that it was worker's employer, the burden shifted to worker, who was suing the employer for negligence, to demonstrate the existence of specific evidentiary facts to rebut this conclusion. *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, 137 N.M. 339, 110 P.3d 1076, cert. denied, 2005-NMCERT-004, 137 N.M. 454, 112 P.3d 1111.

Directors and officers as "workers". — Where corporate payments to directors and officers represented repayment of loans, not wages or salary, the directors and officers were not "workers" as contemplated by this section. *Garcia v. Watson Tile Works, Inc.*, 1990-NMCA-126, 111 N.M. 209, 803 P.2d 1114.

Sole proprietor as worker. — A self-employed person must file either a sworn statement that he has elected to be covered under the Workers' Compensation Act as an employee/worker or file an insurance or security undertaking expressly stating that he is covered as an employee/worker under the act. Consequently, an insurance certificate demonstrating a self-employed person or sole proprietor has purchased insurance for his workers is insufficient to demonstrate that the sole proprietor had elected to be considered a worker under the act for purposes of coverage. *Junge v. John D. Morgan Constr. Co.*, 1994-NMCA-106, 118 N.M. 457, 882 P.2d 48.

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*, 1984-NMCA-052, 102 N.M. 300, 694 P.2d 1365, cert. quashed, 102 N.M. 293, 694 P.2d 1358.

When number of workers calculated. — If an employer has once regularly employed enough workers to come under the act, he remains there even when the number employed may temporarily fall below the minimum. *Garcia v. Watson Tile Works, Inc.*, 1990-NMCA-126, 111 N.M. 209, 803 P.2d 1114.

Worker's use of own tools. — Where in an attempt to show that corporation had no right to control his work, worker presented evidence that he used his own tools on the job, this fact is not determinative. *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, 137 N.M. 339, 110 P.3d 1076, cert. denied, 2005-NMCERT-004, 137 N.M. 454, 112 P.3d 1111.

Existence of employment relationship is question of fact. *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, 137 N.M. 339, 110 P.3d 1076, cert. denied, 2005-NMCERT-004, 137 N.M. 454, 112 P.3d 1111.

Co-employee was "a person other than the employer" against whom a negligence action for damages might be maintained. *Hockett v. Chapman*, 1961-NMSC-163, 69 N.M. 324, 366 P.2d 850 (decided under former law).

Total number of employees considered where three proprietorships owned. — 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*, 1977-NMCA-048, 90 N.M. 477, 565 P.2d 348, cert. denied, 90 N.M. 636, 567 P.2d 485.

Applicability to state employees. — Employees of the public defender's department who were injured in the course of their employment were employees of the state for purposes of the exclusive remedy provisions of the Workers' Compensation Act, and the exclusivity rule applied to tort claims asserted against the state highway department by

such employees. *Singhas v. N.M. State Hwy. Dep't*, 1995-NMCA-089, 120 N.M. 474, 902 P.2d 1077, *aff'd*, 1997-NMSC-054, 124 N.M. 42, 946 P.2d 645.

Because the state highway department is not recognized by law as a legal entity distinct from the state itself, the state could not be both employer and third party tortfeasor in an action against the highway department by employees of the public defender's department who were injured while traveling in the course of their employment, and the "dual persona" doctrine did not apply to extend immunity to highway department under the exclusive remedy provisions of the Workers' Compensation Act. *Singhas v. N.M. State Hwy. Dep't*, 1995-NMCA-089, 120 N.M. 474, 902 P.2d 1077, *aff'd*, 1997-NMSC-054, 124 N.M. 42, 946 P.2d 645.

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*, 1959-NMSC-021, 65 N.M. 283, 336 P.2d 323.

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 [worker] injured by ensilage cutting machine was not entitled to workmen's [workers'] compensation. *Graham v. Wheeler*, 1967-NMSC-036, 77 N.M. 455, 423 P.2d 980 (decided under prior law).

V. EMPLOYERS EXCLUDED.

Farm and ranch laborers exclusion does not survive rational basis review. — Section 52-1-6(A) NMSA 1978, which excludes farm and ranch laborers from the provisions of the Workers' Compensation Act, creates differential treatment among injured farm and ranch laborers from other employees of agricultural employers, and such a classification is not supported by evidence in the record nor a firm legal rationale sufficient to establish a rational relationship between the exclusion and the purported interests of cost savings to the agricultural industry, the unique administrative challenges created by farm and ranch workers, the unique economic aspects of agriculture, the protection of New Mexico's farming and ranching traditions, or in the application of tort law for injuries suffered by farm and ranch laborers, while any other workplace injury suffered by an employee of an agricultural employer goes through the workers' compensation system. *Rodriguez v. Brand West Dairy*, 2016-NMSC-029, *aff'g* 2015-NMCA-097, 356 P.3d 546.

Constitutionality of farm and ranch laborers exclusion. — Section 52-1-6(A) NMSA 1978, which excludes farm and ranch laborers from the provisions of the Workers' Compensation Act, violates the guarantee of equal protection where farm and ranch laborers seeking compensation for work-related injuries or disabilities are similarly situated to, but are treated differently than, other workers in the state who are likewise seeking compensation. The government's purported interests in the efficient

administration of workers' compensation cases and in protecting the agricultural industry from the cost of providing workers' compensation coverage are without any rational basis and do not justify the arbitrary classification created by the exclusion. *Rodriguez v. Brand West Dairy*, 2015-NMCA-097, cert. granted, 2015-NMCERT-008, and cert. granted, 2015-NMCERT-008.

Workmen's [Workers'] Compensation Act does not apply to employers in farm and ranch operations. *McKinney v. Davis*, 1972-NMSC-077, 84 N.M. 352, 503 P.2d 332.

"Farm and ranch laborers" construed. — Where a worker's primary responsibilities were performed in a packing shed and were not performed on land where crops were grown, nor were his duties an essential part of the cultivation of crops or related to some essential part of the cultivation process such as irrigation or fertilization, the worker was not a farm laborer. *Holguin v. Billy the Kid Produce, Inc.*, 1990-NMCA-073, 110 N.M. 287, 795 P.2d 92.

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 [Workers'] 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.*, 1980-NMCA-036, 94 N.M. 223, 608 P.2d 535.

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.*, 1980-NMCA-036, 94 N.M. 223, 608 P.2d 535.

"Farm and ranch laborers" construed from the Workmen's [Workers'] Compensation Act, by Subsection A of this section, to the extent of employment of farm labor. *Varela v. Mounho*, 1978-NMCA-086, 92 N.M. 147, 584 P.2d 194, cert. denied, 92 N.M. 180, 585 P.2d 324.

A beekeeper's assistant was a "farm laborer" for purposes of workers' compensation. *Tanner v. Bosque Honey Farm, Inc.*, 1995-NMCA-053, 119 N.M. 760, 895 P.2d 282.

Private employers of farm and ranch laborers are expressly exempted from application of the Workmen's [Workers'] Compensation Act. *Williams v. Cooper*, 1953-NMSC-050, 57 N.M. 373, 258 P.2d 1139.

Exemption of sole executive employee does not exempt the employer. — Section 52-1-6 NMSA 1978 requires all incorporated construction companies to abide by the requirements of the Workers' Compensation Act, even those companies who employ only executive employees that have elected to individually opt out of coverage under 52-1-7 NMSA 1978. *Jackson Constr., Inc. v. Smith*, 2012-NMCA-033, 277 P.3d 470.

Where the sole owner of an incorporated construction company was the president and sole board member of the company; the company did not employ any workers or

executives other than the owner; the owner elected to exempt the owner from coverage under the Workers' Compensation Act pursuant to 52-1-7 NMSA 1978, and the owner acknowledged that the owner was an employee of the company, the company was subject to the act and was required to procure worker's compensation insurance. *Jackson Constr., Inc. v. Smith*, 2012-NMCA-033, 277 P.3d 470.

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 Op. Att'y Gen. No. 55-6289 (opinion rendered under former law).

Extending coverage. — A county or other employer may extend coverage of the Workmen's [Workers'] 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 [workers'] compensation insurance. 1949 Op. Att'y Gen. No. 49-5194 (opinion rendered under former law).

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).

For annual survey of New Mexico Workers' Compensation Law, see 20 N.M.L. Rev. 459 (1990).

For note, "Workers' Compensation Law - Bad Faith Refusal of an Insurer To Pay Workers' Compensation Benefits: Russell v. Protective Insurance Company," see 20 N.M.L. Rev. 757 (1990).

For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

For note, "The District Court Should Make the Initial Determination of Jurisdiction in Workers' Compensation Cases Involving Intentional Tort Claims - Eldridge v. Circle K Corp.," see 28 N.M.L. Rev. 665 (1998).

For note, "Workers' Compensation Law – the Sexual Harassment Claim Quandary: Workers' Compensation as an Inadequate and Unavailable Remedy, Cox v. Chino Mines/Phelps Dodge," see 24 N.M. L. Rev. 565 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 99, 127 to 132.

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 co-employee as ground of liability despite bar of workers' compensation law, 57 A.L.R.4th 888.

Workers' compensation: third-party tort liability of corporate officer to injured workers, 76 A.L.R.4th 365.

Workers' compensation statute as barring illegally employed minor's tort action, 77 A.L.R.4th 844.

Workers' compensation as precluding employee's suit against employer for sexual harassment in the workplace, 51 A.L.R.5th 163.

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.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 128, 129, 161.

52-1-6.2. Safety programs; inspections; penalties; bonuses.

A. Every employer subject to the provisions of the Workers' Compensation Act who has an annual workers' compensation premium liability of fifteen thousand dollars ($15,000) or more or who is a certified self-insurer shall receive an annual safety inspection. The director shall determine the adequacy and structure of the safety inspection, including establishing procedures for appropriate self-inspection. For any

employer who is not self-insured, inspections and recommendations for creating a safer workplace shall be provided upon request by every insurer providing workers' compensation insurance in this state to its workers' compensation insurance policyholders. To enforce this provision, the director may assess a penalty not to exceed five thousand dollars ($5,000) against any employer.

B. The administration shall develop safety programs for employers with an annual workers' compensation premium liability of less than fifteen thousand dollars ($15,000).

C. The superintendent of insurance may assess a penalty against an insurer that refuses to provide annual safety inspections and recommendations. The penalty shall not exceed five thousand dollars ($5,000) per insurer per violation.

D. Any employer who is subject to the provisions of the Workers' Compensation Act 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 who 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 or benefits.

E. The administration shall develop a program to identify extra-hazardous employers. The administration shall notify each identified extra-hazardous employer and the insurance carrier for that employer that the employer has been identified as an extra-hazardous employer.

F. An employer that receives notification under Subsection E of this section shall obtain a safety consultation within thirty days from the administration's safety consultants, the employer's insurer or another professional source approved by the director for that purpose. The safety consultant shall file a written report with the director and the employer setting out any hazardous conditions or practices identified by the safety consultation.

G. The employer, in consultation with the safety consultant, shall, within a reasonable time, formulate a specific accident-prevention plan that addresses the hazards identified by the consultant. An employer that fails to formulate, implement or otherwise comply with the accident-prevention plan shall be subject to a penalty not to exceed five thousand dollars ($5,000).

History: Laws 1989, ch. 263, § 92; 1990 (2nd S.S.), ch. 2, § 5; 2013, ch. 134, § 2.

ANNOTATIONS

The 2013 amendment, effective July 1, 2013, raised the minimum threshold for a mandatory safety visit; providing for accident-prevention plans for extra-hazardous

employers; in Subsection A, at the beginning of the first sentence, deleted "Effective July 1, 1991" and after "premium liability of", deleted "five thousand dollars ($5,000)" and added "fifteen thousand dollars ($15,000)"; in Subsection B, at the beginning of the sentence, after "The", deleted "advisory council on workers' compensation and occupational disease disablement" and added "administration" and after "of less than", deleted "five thousand dollars ($5,000)" and added "fifteen thousand dollars ($15,000)"; and added Subsections E through G.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, rewrote the catchline; added present Subsections A to C; designated the previously existing text as Subsection D, substituting "who" for "that" in two places, and adding "or benefits".

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Workers' compensation: bonus as factor in determining amount of compensation, 84 A.L.R.4th 1055.

52-1-7. Application of provisions of act to certain executive employees or sole proprietors.

A. Notwithstanding any provisions to the contrary in the Workers' Compensation Act, an executive employee of a professional or business corporation or limited liability company, employed by the professional or business corporation or limited liability company as a worker as defined in the Workers' Compensation Act, or a sole proprietor may affirmatively elect not to accept the provisions of the Workers' Compensation Act.

B. Each executive employee or sole proprietor 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 executive employee or sole proprietor 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. An executive employee shall cause a copy of the revocation to be mailed to the board of directors of the professional or business corporation or limited liability company.

D. The filing of an affirmative election not to accept the provisions of the Workers' Compensation Act shall create a conclusive presumption that an executive employee or sole proprietor 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 or limited liability companies in which the executive employee has a financial interest.

E. In determining the number of workers of an employer to determine who comes within the Workers' Compensation Act, an executive 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 employee" means the chairman of the board, president, vice president, secretary, treasurer or other executive officer, if he owns ten percent or more of the outstanding stock, of the professional or business corporation or a ten percent ownership interest in the limited liability company; and

(2) "sole proprietor" means a single individual who owns all the assets of a business, is solely liable for its debts and employs in the business no person other than himself.

History: 1953 Comp., § 59-10-4.1, enacted by Laws 1975, ch. 284, § 4; 1979, ch. 368, § 5; 1987, ch. 235, § 8; 1993, ch. 193, § 2; 2003, ch. 259, § 3.

ANNOTATIONS

Cross references. — For employers who come within act, *see* 52-1-2 NMSA 1978.

For coverage by state agencies, *see* 52-1-3 NMSA 1978.

For application of provisions of act, *see* 52-1-6 NMSA 1978.

For definition of workman, *see* 52-1-16 NMSA 1978.

The 2003 amendment, effective June 20, 2003, inserted "or limited liability company" following "or business corporation" twice in Subsection A; inserted "or limited liability company" following "or business corporation" at the end of Subsection C; inserted "or limited liability companies" following "all corporations or" near the end of Subsection D; and inserted "or a ten percent ownership interest in the limited liability company" near the end of Subsection F(1).

The 1993 amendment, effective June 18, 1993, in the section heading, substituted "executive" for "corporations' " and added "or sole proprietors" at the end; in Subsection A, inserted "executive", deleted "as defined in Subsection F of this section" following "employee", and inserted "or a sole proprietor"; in Subsection B, inserted "executive" and "or sole proprietor"; in Subsection C, inserted "executive" and "or sole proprietor" in the first sentence and substituted "An executive" for "The" in the third sentence; in Subsection D, substituted "an executive" for "such" and inserted "or sole proprietor" in the first sentence, and inserted "executive" in the second sentence; inserted "executive" in Subsection E; and, in Subsection F, deleted the Paragraph (2) designation which formerly appeared before what now reads "or other" in Paragraph (1), added present

Paragraph (2), substituted "executive employee" for "executive officer" and "or other" for " 'employee' means an" in Paragraph (1), and made several minor stylistic changes.

Exemption of sole executive employee does not exempt the employer. — Executive employees may exempt themselves from coverage under the Workers' Compensation Act, but are still counted in determining whether their employer is subject to the act. *Jackson Constr., Inc. v. Smith*, 2012-NMCA-033, 277 P.3d 470.

Where the sole owner of an incorporated construction company was the president and sole board member of the company; the company did not employ any workers or executives other than the owner; the owner elected to exempt the owner from coverage under the Workers' Compensation Act pursuant to Section 52-1-7 NMSA 1978, and the owner acknowledged that the owner was an employee of the company, the company was subject to the act and was required to procure worker's compensation insurance. *Jackson Constr., Inc. v. Smith*, 2012-NMCA-033, 277 P.3d 470.

Directors and officers held not "employees". — Where corporate payments to directors and officers represented repayment of loans, not wages or salary, the directors and officers were not "workers" as contemplated by this section. *Garcia v. Watson Tile Works, Inc.*, 1990-NMCA-126, 111 N.M. 209, 803 P.2d 1114.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation § 175.

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 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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

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 NMRA.

I. GENERAL CONSIDERATION.

Act not invalid class legislation. — Contention that insofar as negligent employers are relieved from the burden of contribution the Workmen's [Workers'] Compensation Act is exemplary of invalid class legislation is devoid of merit. *Beal v. Southern Union Gas Co.*, 1956-NMSC-113, 62 N.M. 38, 304 P.2d 566.

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.*, 1985-NMCA-087, 103 N.M. 294, 706 P.2d 158.

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

Act's remedy exclusive. — Once the Workmen's [Workers'] 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*, 1979-NMSC-027, 92 N.M. 618, 593 P.2d 59.

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.*, 1982-NMCA-140, 98 N.M. 658, 651 P.2d 1302.

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.*, 1982-NMCA-140, 98 N.M. 658, 651 P.2d 1302.

Workmen's [Workers'] 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*, 1976-NMCA-017, 89 N.M. 86, 547 P.2d 569, *aff'd*, 1976-NMSC-022, 89 N.M. 252, 550 P.2d 264.

Purpose of workmen's [workers'] 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, Inc.*, 123 F. Supp. 42 (D.N.M. 1954).

Employee not liable for injury or death of co-employee. — 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 co-employee. *Matkins v. Zero Refrigerated Lines*, 1979-NMCA-095, 93 N.M. 511, 602 P.2d 195.

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 [Workers'] 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*, 1981-NMCA-014, 95 N.M. 551, 624 P.2d 60.

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 [Workers'] 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*, 1955-NMSC-040, 59 N.M. 290, 283 P.2d 623.

Claim must be against employer. — Claims based on the Occupational Disease Disablement Act or Workers' Compensation Act can be raised only against an employer. *Garrity v. Overland Sheepskin Co.*, 1996-NMSC-032, 121 N.M. 710, 917 P.2d 1382.

Injury subsequent to discharge. — The Workers' Compensation Act (Chapter 52, Article 1 NMSA 1978) is not automatically terminated by the firing or quitting of an employee, but applies to injury occurring during a reasonable period while employee winds up affairs and leaves premises. *Martin-Martinez v. 6001, Inc.*, 1998-NMCA-179, 126 N.M. 319, 968 P.2d 1182, cert. denied, 126 N.M. 532, 972 P.2d 351 (1998).

Amnesty to employer where no express indemnity contract. — The exclusive remedy provision of the Workmen's [Workers'] 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.*, 1960-NMSC-053, 67 N.M. 137, 353 P.2d 358.

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.*, 1945-NMSC-032, 49 N.M. 253, 161 P.2d 867.

Worker's claim for intentional spoliation of evidence against his employer was not barred by the act's exclusive remedy provisions. *Coleman v. Eddy Potash, Inc.*, 1995-NMSC-063, 120 N.M. 645, 905 P.2d 185.

II. EMPLOYER LIABILITY.

A. IN GENERAL.

Workmen's [Workers'] 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.*, 1983-NMSC-052, 100 N.M. 138, 667 P.2d 445.

Workmen's [Workers'] Compensation Act abrogates or modifies the Joint Tortfeasor's Contribution 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 [Workers'] Compensation Act, and there can be no contribution. *Beal v. Southern Union Gas Co.*, 1956-NMSC-113, 62 N.M. 38, 304 P.2d 566.

The New Mexico Workmen's [Workers'] 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).

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.*, 1972-NMCA-045, 83 N.M. 710, 496 P.2d 1106, cert. denied, 83 N.M. 698, 496 P.2d 1094.

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.*, 1945-NMSC-032, 49 N.M. 253, 161 P.2d 867.

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.*, 1945-NMSC-032, 49 N.M. 253, 161 P.2d 867.

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.*, 1945-NMSC-032, 49 N.M. 253, 161 P.2d 867 (decided under former law).

Want of ordinary care means negligent conduct on the part of employee. *Gough v. Famariss Oil & Ref. Co.*, 1972-NMCA-045, 83 N.M. 710, 496 P.2d 1106, cert. denied, 83 N.M. 698, 496 P.2d 1094.

Employer may voluntarily relinquish statutory protection of limited liability. — Although the workmen's [workers'] 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*, 1980-NMCA-006, 94 N.M. 311, 610 P.2d 198, cert. denied, 94 N.M. 628, 614 P.2d 545.

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.*, 1972-NMCA-167, 84 N.M. 483, 505 P.2d 78, 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 [Workers'] 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.*, 1956-NMSC-113, 62 N.M. 38, 304 P.2d 566.

Employer is not subject to liability in addition to Workmen's [Workers'] Compensation Act even where the employer voluntarily enters into a contract which also seeks indemnity. *Gulf Oil Corp. v. Rota-Cone Field Operating Co.*, 1972-NMCA-167, 84 N.M. 483, 505 P.2d 78, 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 [Workers']

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*, 1976-NMSC-022, 89 N.M. 252, 550 P.2d 264.

Where an employer did not substantially comply with the filing provisions of the Workers' Compensation Act, the exclusive remedy provisions of this section and 52-1-6 and 52-1-9 NMSA 1978 did not apply to bar a wrongful death action against the employer. *Peterson v. Wells Fargo Armored Servs. Corp.*, 2000-NMCA-043, 129 N.M. 158, 3 P.3d 135, cert. denied, 129 N.M. 207, 4 P.3d 35.

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.*, 1979-NMCA-097, 93 N.M. 412, 600 P.2d 1202, cert. denied, 93 N.M. 683, 604 P.2d 821.

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.*, 1939-NMSC-038, 43 N.M. 357, 94 P.2d 99.

B. INTENTIONAL ACTS.

The willfulness rule from *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148 applies retroactively and a worker may sue in tort using the willfulness test for a non-accidental injury, regardless of when the acts or omissions occurred. *Padilla v. Wall Colmonoy Corp.*, 2006-NMCA-137, 140 N.M. 630, 145 P.3d 110, cert. denied, 2006-NMCERT-010, 140 N.M. 674, 146 P.3d 809.

Applicability to intentional acts. — Exclusivity provisions of Workers' Compensation Law (Chapter 52, Article 1 NMSA 1978) apply to injury to claimant's hand caused by manager intentionally slamming locker door. *Martin-Martinez v. 6001, Inc.*, 1998-NMCA-179, 126 N.M. 319, 968 P.2d 1182, cert. denied, 126 N.M. 532, 972 P.2d 351.

Employer's awareness of task's danger. — The critical measure is whether the employer has, in a specific dangerous circumstance, required the employee to perform a task where the employer is or should clearly be aware that there is a substantial likelihood the employee will suffer injury or death by performing the task. *Dominguez v. Perovich Props., Inc.*, 2005-NMCA-050, 137 N.M. 401, 111 P.3d 721, cert. denied, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

III. DEFENSES.

A. IN GENERAL.

Availability of common-law defenses for employer. — Under the Workmen's [Workers'] 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, if 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*, 1978-NMCA-075, 92 N.M. 89, 582 P.2d 1302.

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*, 1971-NMSC-123, 83 N.M. 336, 491 P.2d 1147.

Employers may not shift the blame for providing safety devices. — Although employer provided safety devices, shifting the blame to fellow employees' failure to properly employ safety devices is not a defense to a workers' compensation claim, which is consistent with 52-1-10 NMSA 1978, which imposes a responsibility on the employer to create a safe work environment by ensuring that safety devices are supplied and properly employed. *Benavides v. Eastern N.M. Med. Ctr.*, 2014-NMSC-037, *rev'g* No. 32,450, mem. op. (N.M. Ct. App. Mar. 25, 2013) (non-precedential).

Employer's responsibility to create a safe workplace. — Where employee nurse slipped and fell on a wet hospital floor, the employer hospital was prohibited from claiming, as a defense, that the custodial staff failed to employ the wet floor signs that were provided by the hospital. *Benavides v. Eastern N.M. Med. Ctr.*, 2014-NMSC-037, *rev'g* No. 32,450, mem. op. (N.M. Ct. App. Mar. 25, 2013) (non-precedential).

Defenses not available where employer not operating under provisions. — Where an employer did not carry workmen's [workers'] compensation insurance, nor had he relieved himself of such requirement as required by Section 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*, 1957-NMSC-002, 62 N.M. 120, 305 P.2d 1067 (decided under former law).

Defense of estoppel not bar to employee's action. — Employer at all times knew that he did not carry workmen's [workers'] 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*, 1957-NMSC-002, 62 N.M. 120, 305 P.2d 1067.

B. DEFENSES ALLOWED.

"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.*, 1972-NMCA-045, 83 N.M. 710, 496 P.2d 1106, cert. denied, 83 N.M. 698, 496 P.2d 1094.

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 [workers'] compensation, but willful misconduct is a defense. *Gough v. Famariss Oil & Ref. Co.*, 1972-NMCA-045, 83 N.M. 710, 496 P.2d 1106, cert. denied, 83 N.M. 698, 496 P.2d 1094.

Employer's avoidance of liability under act. — 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).

In order to create estoppel by acceptance of workmen's [workers'] 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.*, 1971-NMCA-079, 82 N.M. 650, 485 P.2d 984.

Equitable considerations apply to workmen's [workers'] compensation claims and defenses. *Anaya v. City of Santa Fe*, 1969-NMSC-025, 80 N.M. 54, 451 P.2d 303.

Even though the Workmen's [Workers'] Compensation Act does not specifically provide for equitable defenses, this court has considered equitable claims and defenses in workmen's [workers'] compensation proceedings: fraud or mutual mistake, incapacity to contract, estoppel, misconduct, undue influence, misrepresentation or coercion. *Anaya v. City of Santa Fe*, 1969-NMSC-025, 80 N.M. 54, 451 P.2d 303.

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*, 1969-NMSC-025, 80 N.M. 54, 451 P.2d 303.

The question of whether a workmen's [workers'] 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*, 1969-NMSC-025, 80 N.M. 54, 451 P.2d 303.

Delay in filing does not remove limitation on employer's liability. — A delay in filing, pursuant to Section 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.*, 1969-NMCA-083, 80 N.M. 589, 458 P.2d 841.

A delay in filing, pursuant to Section 52-1-4 NMSA 1978, does not necessarily remove the limitations on the employer's liability found in Sections 52-1-6 and 52-1-8 NMSA 1978, and this section. *Quintana v. Nolan Bros.*, 1969-NMCA-083, 80 N.M. 589, 458 P.2d 841.

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 [workers'] compensation for an injury so sustained. *Gough v. Famariss Oil & Ref. Co.*, 1972-NMCA-045, 83 N.M. 710, 496 P.2d 1106, cert. denied, 83 N.M. 698, 496 P.2d 1094.

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.*, 1972-NMCA-045, 83 N.M. 710, 496 P.2d 1106, cert. denied, 83 N.M. 698, 496 P.2d 1094.

IV. SPECIAL EMPLOYER.

Special employer. — Where the plaintiff provided graphic design services to the defendant pursuant to a professional services contract between the defendant and a third party and the plaintiff controlled the details of the conceptualization, design and creation of the projects he worked on while the defendant assigned projects to the plaintiff that were limited to a description of the desired end product, monitored technical performance, and inspected and accepted the plaintiff’s work, the defendant was the plaintiff’s special employer. *Hamberg v. Sandia Corp.*, 2008-NMSC-015, 143 N.M. 601, 179 P.3d 1209.

Tort claim barred. — Summary judgment appropriate where temporary staffing agency employee is injured while performing a task that was not authorized or known about by his employer the injured special employee is limited to compensation under the New

Mexico Workers' Compensation Act. *Cordova v. Peavey Co.*, 273 F. Supp. 2d 1213 (D.N.M. 2003).

A temporary employer was immune from a common law tort claim of a temporary employee since it met the test of special employer; it had contractually assured that the general employer would provide workers' compensation coverage, and the temporary employee had signed a contract agreeing to look to the general employer for his remedy for on-the-job injuries. *Vigil v. Digital Equip. Corp.*, 1996-NMCA-100, 122 N.M. 417, 925 P.2d 883, cert. denied, 122 N.M. 279, 923 P.2d 1164.

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 [workers'] compensation for injuries on the job and may not sue the contractors in tort on negligence. *Shipman v. Macco Corp.*, 1964-NMSC-091, 74 N.M. 174, 392 P.2d 9.

Liability of company hiring employees of temporary agency. — Although the injured employee in this case was directly employed by the temporary agency, the lumberyard where the employee worked is a special employer and thus is liable for workers' compensation. Since the lumberyard provided for workers' compensation coverage through its contract with the temporary agency, the employee was barred from asserting a negligence action against the lumberyard. *Rivera v. Sagebrush Sales, Inc.*, 1994-NMCA-119, 118 N.M. 676, 884 P.2d 832, cert. denied, 118 N.M. 585, 883 P.2d 1282.

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 [worker] was in the special employ of another, but also that such workman's [worker'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. 1937), cert. denied, 303 U.S. 644, 58 S. Ct. 644, 82 L. Ed. 1106 (1938).

V. THIRD PARTY CLAIMS.

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 Section 52-1-9 NMSA 1978. *Royal Indem. Co. v. Southern Cal. Petroleum Corp.*, 1960-NMSC-053, 67 N.M. 137, 353 P.2d 358.

Stranger has no contribution right against employer. — Under New Mexico's Workmen's [Workers'] 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, Inc.*, 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 [Workers'] 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.*, 1956-NMSC-113, 62 N.M. 38, 304 P.2d 566.

Third-party indemnity claim from employer not barred. — The public policy expressed in the workmen's [workers'] 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*, 1980-NMCA-006, 94 N.M. 311, 610 P.2d 198, cert. denied, 94 N.M. 628, 614 P.2d 545.

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.*, 1962-NMSC-029, 70 N.M. 19, 369 P.2d 403.

An action for loss of consortium by the spouse of an injured worker is barred by the exclusivity provisions of the Worker's Compensation Act. *Archer v. Roadrunner Trucking, Inc.*, 1997-NMSC-003, 122 N.M. 703, 930 P.2d 1155.

Law reviews. — 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).

For note, "The District Court Should Make the Initial Determination of Jurisdiction in Workers' Compensation Cases Involving Intentional Tort Claims - Eldridge v. Circle K Corp.," see 28 N.M.L. Rev. 665 (1998).

For note, "Workers' Compensation: Exclusivity, Common Law Remedies, and the Reconsideration of the Actual Intent Test – Delgado v. Phelps Dodge Chino, Inc.," see 32 N.M. L. Rev. 567 (2002).

For note, "Trends in New Mexico Law – 1994-95: Workers' Compensation Law – New Mexico Clarifies the Meaning of a Special Employer as Distinct from a Statutory Employer: Rivera v. Sagebrush Sales, Inc.," see 26 N.M. L. Rev. 655 (1996).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation § 49.

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.

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.

Willful, wanton, or reckless conduct of co-employee as ground of liability despite bar of workers' compensation, 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.

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.

Violation of employment rule barring claim for worker's compensation, 61 A.L.R.5th 375.

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.

ANNOTATIONS

Cross references. — For effect of application of provision of act, *see* 52-1-6 NMSA 1978.

For meaning of "injury by accident arising out of and in the course of employment," *see* 52-1-19 NMSA 1978.

I. GENERAL CONSIDERATION.

No willful and intentional conduct outside of Workers' Compensation Act. — Where defendant, who was plaintiff's employer, modified a rock crusher by removing the protective shield covering the flywheel and adding a step next to the flywheel to make it easier to clear jams and to perform maintenance; plaintiff was injured by the flywheel as plaintiff knelt on the step to clear a jam; there was no evidence that defendant ordered plaintiff to enter the crusher to clear a rock jam; plaintiff was the person designated to turn off the crusher prior to clearing jams; plaintiff chose not to turn off the crusher; defendant trained plaintiff to shut off the crusher to clear jams; and plaintiff was told by two fellow employees to come out of the crusher, plaintiff failed to prove that defendant engaged in intentional conduct that resulted in injury to plaintiff. *Chairez v. James Hamilton Constr. Co.*, 2009-NMCA-093, 146 N.M. 794, 215 P.3d 732, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

Dual-persona and dual-transaction doctrines. — Under the dual-persona doctrine, an employer may be treated as a third party, vulnerable to tort suit by an employer if, and only if, the employer possesses a second persona sufficiently independent from and unrelated to the employer's status as employer. A variation of the dual-persona doctrine is the dual-transaction doctrine where an employee is involved in two transactions with the same person: one involving the employee's employer, and the

other involving an injury that is entirely unrelated to the employee's employment except for the fact that the injury happens to be caused by the same person who employs the employee. *Espinosa v. Albuquerque Pub. Co.*, 1997-NMCA-027, 123 N.M. 605, 943 P.2d 1058, cert. quashed 124 N.M. 589, 953 P.2d 1087 (1998).

Dual persona doctrine not applicable. — Where the employer modified a rock crusher by removing the protective shield covering the flywheel and adding a step next to the flywheel to make it easier to clear jams and to perform maintenance; and the worker was injured by the flywheel as the worker knelt on the step to clear a jam, the employer did not take on a separate persona as an equipment manufacturer, thereby losing its protection under the Workers' Compensation Act. *Chairez v. James Hamilton Constr. Co.*, 2009-NMCA-093, 146 N.M. 794, 215 P.3d 732, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

Special employer doctrine. — Defendant was a special employer where worker was an employee of a contractor that provided contract employees to governmental agencies, defendant selected worker from a list of qualified candidates supplied by the contractor, defendant provided day-to-day technical direction to its contract employees and defendant could direct the contractor to remove any contract employee from the contract with defendant, the contractor was responsible for all decisions relating to hiring, firing, demotions, compensation and employee benefits, all contract employees were considered employees of the contractor, the contractor paid the worker a wage and benefits. *Hamberg v. Sandia Corp.*, 2007-NMCA-078, 142 N.M. 72, 162 P.3d 909, aff'd, 2008-NMSC-015, 143 N.M. 601, 179 P.3d 1209.

An employer may be considered a special employer if the following factors are met: (1) the employee has made a contract of hire, express or implied, with the special employer; (2) the work being done is essentially that of the special employer; and (3) the special employer has the right to control the details of the work. *Hamberg v. Sandia Corp.*, 2007-NMCA-078, 142 N.M. 72, 162 P.3d 909, *aff'd*, 2008-NMSC-015, 143 N.M. 601, 179 P.3d 1209.

Workers' compensation administration lacked jurisdiction to hear claim against Pueblo without an express waiver of sovereign immunity. — Where worker filed a workers' compensation claim with the workers' compensation administration after she suffered an on-the-job injury at Isleta resort and casino, which is located on the Pueblo of Isleta, the workers' compensation judge did not err in granting a defense motion to dismiss for lack of jurisdiction, referencing the Pueblo's tribal sovereign immunity, because absent congressional authorization or an express and unequivocal waiver by a tribe, state courts cannot hear suits against tribes, and in this case, the Pueblo has not unequivocally expressed a waiver of its sovereign immunity. *Mendoza v. Isleta Resort and Casino*, 2020-NMSC-006, *rev'g* 2018-NMCA-038.

An injured worker who is a non-party to a contract is prevented from enforcing compliance with the contract. — Where worker filed a workers' compensation claim with the workers' compensation administration after she suffered an on-the-job injury at

Isleta resort and casino, which is located on the Pueblo of Isleta, and where the claim was dismissed for lack of jurisdiction based on the Pueblo's sovereign immunity, worker did not have a private right of action to enforce the 2015 Indian Gaming Compact, which states that a workers' compensation program will be created, because worker was not a party to the compact, which was a contract between the Pueblo of Isleta and the state of New Mexico. *Mendoza v. Isleta Resort and Casino*, 2020-NMSC-006, *rev'g* 2018-NMCA-038.

Where joinder of an indispensable party is not feasible because of sovereign immunity, the case must be dismissed. — Where worker filed a workers' compensation claim with the workers' compensation administration after she suffered an on-the-job injury at Isleta resort and casino, which is located on the Pueblo of Isleta, the workers' compensation judge did not err in granting a defense motion to dismiss, referencing the Pueblo's tribal sovereign immunity; the Pueblo was an indispensable party to an action against its insurers because the Pueblo's interests could be affected absent its joinder and joinder was not feasible because of the Pueblo's sovereign immunity. If a party is deemed indispensable, the case must be dismissed. *Mendoza v. Isleta Resort and Casino*, 2020-NMSC-006, *rev'g* 2018-NMCA-038.

Waiver of sovereign immunity by Indian casino. — Where worker was injured during the course of her employment at the Isleta resort and casino, and where worker filed a workers' compensation complaint with the workers' compensation administration, naming Isleta casino, the insurance company with which Isleta casino maintained workers' compensation insurance, and the third-party administrator of Isleta casino's workers' compensation insurance policy, and where the workers' compensation judge granted a defense motion to dismiss on grounds of sovereign immunity, the district court erred in granting the motion to dismiss, because the 2015 Indian Gaming Compact, which addressed workers' compensation for tribal gaming enterprise employees, contains an express and unequivocal waiver of sovereign immunity and because worker is a third-party beneficiary to the workers' compensation insurance policy between Isleta casino and its insurance company. *Mendoza v. Isleta Resort & Casino*, 2018-NMCA-038, cert. granted.

Course and scope of employment. — Where a worker who was employed as a "greeter" for his employer was injured when he apprehended a customer carrying a box after a security alarm went off, indicating that the customer was leaving the store without having paid for the merchandise, and where the worker was not given, shown or knew about specific instructions as to the employer's policy on apprehension of shoplifters, the worker's job instructions were to stop customers and check receipts and merchandise if the security system was activated or if merchandise was not in a bag, the employer had no clear policy that a greeter was not to apprehend a shoplifter, and the worker's job description did not state that he had to call security or management when a customer set off the security alarm, the worker's accident arose out of and occurred within the course and scope of his employment. *Grimes v. Wal-Mart Stores Inc.*, 2007-NMCA-028, 141 N.M. 249, 154 P.3d 64, cert. denied, 2007-NMCERT-003, 141 N.M. 401, 156 P.3d 39.

Horseplay. — In New Mexico, an incident constitutes compensable horseplay either if horseplay was a regular incident of employment or if horseplay was not a substantial deviation from employment, considering the extent of the duration, the completeness of the duration, the extent to which horseplay was an accepted part of the employment and the extent to which the nature of the employment might include some horseplay. *Fuerschbach v. Southwest Airlines Co.*, 439 F. 3d 1197 (10th Cir. 2006), 44 A.L.R. 6th 723 (2006).

Date from which notice measured. — The date of disability determines the date from which notice is to be measured. *Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, 137 N.M. 497, 113 P.3d 320.

Work-induced aggravation of injury resulting in disability constituted accident. — Where employee testified that his work activities at subsequent employers aggravated his initial injury, supported by medical expert's testimony, this work-activity-induced aggravation of his shoulder resulting in disability constituted the "accident" for which he is required to give notice. *Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, 137 N.M. 497, 113 P.3d 320.

Nurse injured in care center. — Where defendant care center is in the business of providing care to potentially violent residents, so patient’s admission cannot be deemed as "without just cause", and there is no evidence that the care center subjectively expected the injury to occur or "utterly disregarded" such potential risks, and there is no evidence to suggest that, despite fearing for her safety, plaintiff nurse assistant was ordered to enter the room alone and to approach the agitated patient at a close distance alone, there are no exceptions applicable to plaintiff’s claims for injury and the New Mexico Worker’s Compensation Act’s exclusivity provision bars plaintiff’s claims. *Paehl v. Lincoln Cnty. Care Ctr., Inc.*, 466 F. Supp.2d 1249 (D.N.M. 2004).

Act not invalid class legislation. — Contention that insofar as negligent employers are relieved from the burden of contribution the Workmen's [Workers'] Compensation Act is exemplary of invalid class legislation is devoid of merit. *Beal v. Southern Union Gas Co.*, 1956-NMSC-113, 62 N.M. 38, 304 P.2d 566.

Workmen's [Workers'] Compensation Act abrogates or modifies the Joint Tortfeasor's Contribution 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 [Workers'] Compensation Act, and there can be no contribution. *Beal v. Southern Union Gas Co.*, 1956-NMSC-113, 62 N.M. 38, 304 P.2d 566.

Purpose of workmen's [workers'] 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, Inc.*, 123 F. Supp. 42 (D.N.M. 1954).

Primary purpose of Workmen's [Workers'] Compensation Act is to keep an injured workman [worker] and his family at least minimally secure financially; public policy demands it. *Aranda v. Mississippi Chem. Corp.*, 1979-NMCA-097, 93 N.M. 412, 600 P.2d 1202, cert. denied, 93 N.M. 683, 604 P.2d 821; *Casillas v. S.W.I.G.*, 1981-NMCA-045, 96 N.M. 84, 628 P.2d 329, cert. denied, 96 N.M. 116, 628 P.2d 686, and *appeal dismissed*, 454 U.S. 934, 102 S. Ct. 467, 70 L. Ed. 2d 242 (1981).

Workmen's [Workers'] 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.*, 1979-NMCA-068, 93 N.M. 78, 596 P.2d 521, cert. denied, 93 N.M. 8, 595 P.2d 1203.

Act does not create presumption of employer's liability. — Voluntary payment of workmen's [workers'] compensation benefits does not, by itself, create a presumption that the employer is liable. *Wilson v. Richardson Ford Sales, Inc.*, 1981-NMSC-123, 97 N.M. 226, 638 P.2d 1071.

Workmen's [Workers'] 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.*, 1983-NMSC-052, 100 N.M. 138, 667 P.2d 445.

Applicability to state employees. — Because the state highway department is not recognized by law as a legal entity distinct from the state itself, the state could not be both employer and third party tortfeasor in an action against the highway department by employees of the public defender's department who were injured while traveling in the course of their employment, and the "dual persona" doctrine did not apply to extend immunity to highway department under the exclusive remedy provisions of the Workers' Compensation Act. *Singhas v. N.M. State Hwy. Dep't*, 1995-NMCA-089, 120 N.M. 474, 902 P.2d 1077, *aff'd*, 1997-NMSC-054, 124 N.M. 42, 946 P.2d 645.

Remedy under the New Mexico Workmen's [Workers'] Compensation Act is exclusive. *Chavez v. Kennecott Copper Corp.*, 547 F.2d 541 (10th Cir. 1977); *Sanford v. Presto Mfg. Co.*, 1979-NMCA-059, 92 N.M. 746, 594 P.2d 1202.

The New Mexico Workmen's [Workers'] 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.*, 1982-NMSC-090, 98 N.M. 479, 650 P.2d 1.

The Workmen's [Workers'] Compensation Act is legislation in derogation of the common law and creates exclusive rights, remedies and procedures. *Williams v. Amax Chem. Corp.*, 1986-NMSC-041, 104 N.M. 293, 720 P.2d 1234, *overruled on other grounds by*

Michaels v. Anglo Am. Auto Auctions, Inc., 1994-NMSC-015, 117 N.M. 91, 869 P.2d 279.

The Workers' Compensation Act is the exclusive remedy for workers harmed by an employer's negligence. *Morales v. Reynolds*, 2004-NMCA-098, 136 N.M. 280, 97 P.3d 612, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Act affords exclusive remedy. — Once the Workmen's [Workers'] 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*, 1978-NMSC-057, 91 N.M. 788, 581 P.2d 1283.

The plaintiff's sole remedy is provided by the Workmen's [Workers'] 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.*, 1983-NMCA-016, 99 N.M. 432, 659 P.2d 318.

Once the Workmen's [Workers'] 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*, 1979-NMSC-027, 92 N.M. 618, 593 P.2d 59.

If an employer falls within the scope of the Workers' Compensation Act, the benefits and remedies provided therein are the exclusive remedy for that employer's workers who are injured or killed in accidents "arising out of and in the course of" their employment. *Morales v. Reynolds*, 2004-NMCA-098, 136 N.M. 280, 97 P.3d 612, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Plaintiff's claim fell within the exclusive jurisdiction of the Workers' Compensation Act. — Where plaintiff was in a motor vehicle accident on her way to work, and where she and the other driver involved in the accident were both employees of Los Alamos National Security (LANS), and where the other driver was operating a vehicle owned by LANS, and where Plaintiff filed a complaint in the district court alleging negligence by both the other driver and LANS, the district court did not err in granting defendants' motion for summary judgment, because plaintiff's claim arose in the course and scope of her employment by LANS, thus triggering the exclusivity provision of the Workers' Compensation Act (WCA). The WCA is therefore plaintiff's exclusive remedy and the tort claims brought in the district court were barred. *Finn v. Tullock*, 2023-NMCA-002, *cert granted*.

Estate of deceased worker not entitled to recover under employer's uninsured motorist insurance. — Where estate of decedent sought to recover damages under decedent's employer's uninsured/underinsured motorist coverage after decedent was killed in the course of his employment by a co-worker operating an employer-owned motor vehicle, decedent's estate was not entitled to recover damages under the

employer’s uninsured motorist insurance, because the uninsured motorist statute, 66-5-301(A) NMSA 1978, only benefits persons "legally entitled to recover damages from owners or operators of uninsured motor vehicles", and under the Workers’ Compensation Act (WCA), 52-1-1 to -70 NMSA 1978, an employee who was injured in a workplace accident caused by an employer or its representative may only seek a remedy authorized under the WCA, and under the WCA such a employee is not legally entitled to recover damages under the uninsured motorist statute. *Vasquez v. American Cas. Co. of Reading*, 2017-NMSC-003.

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

Exclusivity provision applies to injuries incurred during horseplay. — Where worker was subjected to a mock arrest as a prank organized by worker’s supervisor to celebrate the end of worker’s probationary period, worker’s tort action of psychological injuries was barred by the exclusivity provisions of the Workers’ Compensation Act because worker alleged that the injuries were proximately caused by horseplay arising out of and in the cause of worker’s employment. *Fuerschback v. Sw. Airlines Co.*, 439 F. 3d 1197 (10th Circ. 2006), 44 A.L.R. 6th 723 (2006).

Human rights claim not barred. — The plaintiff's claim of sex discrimination under the New Mexico Human Rights Act (NMHRA), Chapter 28, Article 1 NMSA 1978, was not barred by the exclusivity provision in this section, even though her claim for worker's compensation and for violation of the NMHRA stemmed from the same set of facts. *Sabella v. Manor Care, Inc.*, 1996-NMSC-014, 121 N.M. 596, 915 P.2d 901.

A temporary employer was immune from a common law tort claim of a temporary employee since it met the test of special employer; it had contractually assured that the general employer would provide workers' compensation coverage, and the temporary employee had signed a contract agreeing to look to the general employer for his remedy for on-the-job injuries. *Vigil v. Digital Equip. Corp.*, 1996-NMCA-100, 122 N.M. 417, 925 P.2d 883, cert. denied, 122 N.M. 279, 923 P.2d 1164.

Employee not liable for injury or death of co-employee. — 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 co-employee. *Matkins v. Zero Refrigerated Lines, Inc.*, 1979-NMCA-095, 93 N.M. 511, 602 P.2d 195.

Loss of consortium claim barred. — Since workers' compensation was the exclusive remedy of a deceased employee's survivors, the claim of the employee's husband for loss of consortium was barred as a remedy at law under the exclusive remedy provisions of the Workers' Compensation Act. *Singhas v. N.M. State Hwy. Dep't*, 1995-NMCA-089, 120 N.M. 474, 902 P.2d 1077, *aff'd*, 1997-NMSC-054, 124 N.M. 42, 946 P.2d 645.

An action for loss of consortium by the spouse of an injured worker is barred by the exclusivity provisions of the Worker's Compensation Act. *Archer v. Roadrunner Trucking, Inc.*, 1997-NMSC-003, 122 N.M. 703, 930 P.2d 1155.

Because the Workers' Compensation Act bars "derivative" actions for loss of consortium by the spouse of an injured worker, an unmarried significant other's consortium claim is not viable because it is derived from the injuries to the plaintiff. *Paehl v. Lincoln Cnty. Care Ctr., Inc.*, 466 F.Supp.2d 1249 (D.N.M. 2004).

Actual intent test overruled. — The New Mexico Supreme Court expressly overrules all case law that has required allegation or proof of an employer's actual intent to injure a worker as a precondition to a worker's tort recovery. *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148.

Willful or intentional conduct outside of Workers' Compensation Act. — Willfulness renders a worker's injury non-accidental, and therefore outside the scope of the Workers' Compensation Act, when: (1) the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker; (2) the worker or employer expects the intentional act or omission to result in the injury, or has utterly disregarded the consequences; and (3) the intentional act or omission proximately causes the injury. *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148.

Delgado requirements. — The critical measure for *Delgado* claims is whether the employer has, in a specific dangerous circumstance, required the worker to perform a task where the employer is or should clearly be aware that there is a substantial likelihood the worker will suffer injury or death by performing the task. *Richey v. Hammond Conservancy Dist.*, 2015-NMCA-043.

Delgado requirements satisfied. — Where worker's allegations were that employer was notified that the specific equipment worker was required to use was dangerous and had nearly caused serious injuries to several employees, that employer required worker to use the equipment in spite of this knowledge and over worker's objections, and as a result, worker was severely injured using the equipment, worker satisfied the requirements of a claim under *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272; *Richey v. Hammond Conservancy Dist.*, 2015-NMCA-043.

Delgado requirements not satisfied. — Where employer operated a facility to receive pipeline inspection gauges or "pigs" that clean out deposits in the pipelines; the pipeline pig receiver had been modified to accept a longer "smart" pig that detected problems in the pipeline; worker was employed to retrieve the pig from the receiver; due to the modification of the receiver, worker was unable to determine if a pig was lodged in the receiver, to determine the pressure behind a pig, or to relieve pressure in the receiver; worker had to stand in front of the receiver opening to determine the location of a pig; worker was injured when a pig became dislodged and struck the worker; worker received training on operating the original receiver, but not the modified receiver; when

the receiver was modified, a concern was expressed that a pig could get stalled in the receiver with pressure behind it; to mitigate the risk, a barrel extension was added to the receiver and a person was assigned to relieve pressure if necessary; when the smart pig operation was completed, employer removed the barrel extension, but did not assign a person to relieve pressure in the receiver during pig retrieval; employer refused offers from employees to change the receiver back to its original configuration; there was no evidence that employer's decision to keep the receiver in its modified state was profit-motivated in disregard for safety; and when worker was injured, worker was performing a routine task that worker had performed at least ten times before, worker failed to satisfy the requirements of a claim under *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148; *May v. DCP Midstream, L.P.*, 2010-NMCA-087, 148 N.M. 595, 241 P.3d 193, cert. quashed, 2001-NMCERT-009, 269 P.3d 904.

Insufficient evidence to support *Delgado* claim. — Where plaintiff, an employee of a subcontractor hired to provide insulation, waterproofing, and fireproofing on a building construction project, made a *Delgado* claim, an assertion that an employer willfully injured its employee, thus subjecting it to general tort liability rather than the exclusivity provision of the Workers' Compensation Act, against his employer after a scaffolding on which plaintiff was working collapsed causing plaintiff to sustain a permanent traumatic brain injury that left him incapacitated, and where defendant filed a motion for summary judgment, arguing that its conduct did not exemplify a degree of egregiousness or conduct that approximated the employer's conduct in *Delgado*, the district court did not err in granting defendant's motion for summary judgment, because although the overloaded scaffolding presented a situation with an inherent probability of injury, the evidence that the scaffolding had been green tagged as safe to use and the lack of evidence that anyone raised concerns about the weight of material placed on the scaffolding demonstrated that defendant did not know the scaffold had been overloaded by another subcontractor's employees, and thus, defendant could not have the subjective intent required to prove willfulness. *Camarena v. Superior Contracting Corp*., 2023-NMCA-043, cert. denied, overruling *Threadgill v. 6001, Inc*. A-1-CA-34785, mem. op. (N.M. Ct. App. Jul. 2, 2018) (nonprecedential).

Psychological disability incurred outside provisions of Section 52-1-24 NMSA 1978. — Since a workers' compensation judge determined that the worker suffered a work related mental disability, but that the disability was not compensable since it fell outside the definition of primary mental impairment, the exclusive remedy provision of the Workers' Compensation Act did not bar the worker's prima facie tort claim against her employer and supervisor. *Beavers v. Johnson Controls World Servs., Inc.*, 1995-NMCA-070, 120 N.M. 343, 901 P.2d 761, cert. denied, 120 N.M. 68, 898 P.2d 120.

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 [Workers'] 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.*, 1950-NMSC-046, 55 N.M. 81, 227 P.2d 365 (decided under former law).

Employer is not subject to liability in addition to Workmen's [Workers'] Compensation Act even where the employer voluntarily enters into a contract which also seeks indemnity. *Gulf Oil Corp. v. Rota-Cone Field Operating Co.*, 1972-NMCA-167, 84 N.M. 483, 505 P.2d 78, writ quashed, 85 N.M. 636, 515 P.2d 640.

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.*, 1972-NMCA-167, 84 N.M. 483, 505 P.2d 78, 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 [Workers'] 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.*, 1956-NMSC-113, 62 N.M. 38, 304 P.2d 566.

Grants amnesty to employer where no indemnity contract. — The exclusive remedy provision of the Workmen's [Workers'] 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.*, 1960-NMSC-053, 67 N.M. 137, 353 P.2d 358.

Sexual harassment. — Plaintiff's injuries, resulting from sexual harassment in the workplace, were not barred by the exclusivity provisions of the Worker's Compensation Act. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999.

The words "accident" or "accidental injury" should be liberally construed. *Stevenson v. Lee Moor Contracting Co.*, 1941-NMSC-033, 45 N.M. 354, 115 P.2d 342.

Claimant has burden of proving compensable accident. *Romero v. S.S. Kresge Co.*, 1981-NMCA-001, 95 N.M. 484, 623 P.2d 998, cert. denied, 95 N.M. 593, 624 P.2d 535, *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743.

Applicability to intentional acts. — Exclusivity provisions of Workers' Compensation Law (Chapter 52, Article 1 NMSA 1978) apply to injury to claimant's hand caused by manager intentionally slamming locker door. *Martin-Martinez v. 6001, Inc.*, 1998-NMCA-179, 126 N.M. 319, 968 P.2d 1182, cert. denied, 126 N.M. 532, 972 P.2d 351.

Payment of compensation benefits by employer does not relieve claimant's burden of proving a compensable accident. *Romero v. S.S. Kresge Co.*, 1981-NMCA-001, 95 N.M. 484, 623 P.2d 998, cert. denied, 95 N.M. 593, 624 P.2d 535, *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743; *but see Perea v. Gorby*, 1980-NMCA-048, 94 N.M. 325, 610 P.2d 212; *Medrano v. Ray Willis Constr. Co.*, 1981-NMCA-096, 96 N.M. 643, 633 P.2d 1241.

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.*, 1981-NMCA-045, 96 N.M. 84, 628 P.2d 329, cert. denied, 96 N.M. 116, 628 P.2d 686, and 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 [workers'] 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*, 1980-NMCA-006, 94 N.M. 311, 610 P.2d 198, cert. denied, 94 N.M. 628, 614 P.2d 545.

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.*, 1979-NMCA-097, 93 N.M. 412, 600 P.2d 1202, cert. denied, 93 N.M. 683, 604 P.2d 821.

Injury subsequent to discharge. — Workers' Compensation Law (Chapter 52, Article 1 NMSA 1978) is not automatically terminated by the firing or quitting of an employee, but applies to injury occurring during a reasonable period while employee winds up affairs and leaves premises. *Martin-Martinez v. 6001, Inc.*, 1998-NMCA-179, 126 N.M. 319, 968 P.2d 1182, cert. denied, 126 N.M. 532, 972 P.2d 351.

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.*, 1981-NMCA-001, 95 N.M. 484, 623 P.2d 998, *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743.

Claim must be against employer. — Claims based on the Occupational Disease Disablement Act or Workers' Compensation Act can be raised only against an employer. *Garrity v. Overland Sheepskin Co.*, 1996-NMSC-032, 121 N.M. 710, 917 P.2d 1382.

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.*, 1983-NMSC-052, 100 N.M. 138, 667 P.2d 445.

Third-party indemnity claim from employer not barred. — The public policy expressed in the workmen's [workers'] 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*, 1980-NMCA-006, 94 N.M. 311, 610 P.2d 198, cert. denied, 94 N.M. 628, 614 P.2d 545.

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 [Workers'] Compensation Act. *DiMatteo v. County of Dona Ana*, 1985-NMCA-099, 104 N.M. 599, 725 P.2d 575.

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 [workers'] 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).

Worker's claim for intentional spoliation of evidence against his employer was not barred by the act's exclusive remedy provisions. *Coleman v. Eddy Potash, Inc.*, 1995-NMSC-063, 120 N.M. 645, 905 P.2d 185.

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 [workers'] 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 [workers'] 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.*, 1971-NMCA-079, 82 N.M. 650, 485 P.2d 984.

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. N.M. Publ'g Co.*, 1943-NMSC-032, 47 N.M. 279, 141 P.2d 333.

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. Am. Employers Ins. Co.*, 547 F.2d 544 (10th Cir. 1977).

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 [worker's] claim, but if he does, it provides the workman [worker] with a remedy. The remedy is the same whether the denial is made in good faith or bad faith. The act gives the workman [worker] 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. Am. 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.*, 1960-NMSC-053, 67 N.M. 137, 353 P.2d 358.

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.*, 1971-NMCA-079, 82 N.M. 650, 485 P.2d 984.

Stranger does not have contribution against employer where liable to employee. — Under New Mexico's Workmen's [Workers'] 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, Inc.*, 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 [Workers'] 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.*, 1956-NMSC-113, 62 N.M. 38, 304 P.2d 566.

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*, 1976-NMCA-090, 89 N.M. 525, 554 P.2d 986, cert. denied, 90 N.M. 8, 558 P.2d 620.

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 [Workers'] 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. 1937), cert. denied, 303 U.S. 644, 58 S. Ct. 644, 82 L. Ed. 1106 (1938).

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*, 1935-NMSC-030, 39 N.M. 173, 42 P.2d 1116.

Compensation not affected because workman [worker] more susceptible. — That a workman [worker] 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. N.M. Publ'g Co.*, 1943-NMSC-032, 47 N.M. 279, 141 P.2d 333.

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.*, 1943-NMSC-042, 47 N.M. 423, 144 P.2d 145.

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.*, 1987-NMSC-109, 106 N.M. 569, 746 P.2d 1101.

Where an employer did not substantially comply with the filing provisions of the Workers' Compensation Act, the exclusive remedy provisions of this section and Sections 52-1-6 and 52-1-8 NMSA 1978 did not apply to bar a wrongful death action against the employer. *Peterson v. Wells Fargo Armored Servs. Corp.*, 2000-NMCA-043, 129 N.M. 158, 3 P.3d 135, cert. denied, 129 N.M. 207, 4 P.3d 35.

Delay in filing does not remove limitation on employer's liability. — A delay in filing, pursuant to Section 52-1-4 NMSA 1978 does not necessarily remove the limitations on the employer's liability found in Sections 52-1-6 and 52-1-8 NMSA 1978 and this section. *Quintana v. Nolan Bros.*, 1969-NMCA-083, 80 N.M. 589, 458 P.2d 841.

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.*, 1969-NMCA-083, 80 N.M. 589, 458 P.2d 841.

Employer interpretation permitting action against co-employees. — 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 [workers'] 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*, 1961-NMSC-163, 69 N.M. 324, 366 P.2d 850, interpretation of the Workmen's [Workers']

Compensation Law permitting actions against co-employees. *Chavez v. Pino*, 1974-NMCA-071, 86 N.M. 464, 525 P.2d 391.

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.*, 1988-NMCA-078, 107 N.M. 808, 765 P.2d 1176, cert. denied, 107 N.M. 673, 763 P.2d 689.

A temporary employer was immune from a common law tort claim of a temporary employee since it met the test of special employer; it had contractually assured that the general employer would provide workers' compensation coverage, and the temporary employee had signed a contract agreeing to look to the general employer for his remedy for on-the-job injuries. *Vigil v. Digital Equip. Corp.*, 1996-NMCA-100, 122 N.M. 417, 925 P.2d 883, cert. denied, 122 N.M. 279, 923 P.2d 1164.

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. *Sw. 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 [Workers'] Compensation Act, the claimant has the burden of establishing that he is an employee. *Dibble v. Garcia*, 1982-NMCA-040, 98 N.M. 21, 644 P.2d 535, cert. denied, 98 N.M. 50, 644 P.2d 1039.

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. *Sw. 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. *Sw. 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. *Sw. 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.*, 1980-NMCA-113, 96 N.M. 376, 630 P.2d 1231; *Velkovitz v. Penasco Indep. Sch. Dist.*, 1981-NMSC-075, 96 N.M. 577, 633 P.2d 685; *Losinski v. Corcoran, Barkoff & Stagnone, P.A.*, 1981-NMCA-127, 97 N.M. 79, 636 P.2d 898, cert. denied, 97 N.M. 483, 641 P.2d 514.

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. Cont'l Cas. Co.*, 1982-NMCA-060, 97 N.M. 753, 643 P.2d 622, cert. denied, 98 N.M. 336, 648 P.2d 794.

A miner's injury, which was sustained after returning to a recently blasted work area when a large rock fell on his foot, arose out of his employment, despite the fact that the miner failed to use a scaling bar, as required by state and federal regulation, prior to his return to secure the work area. This determination was supported by the introduction of evidence that rock falls are one of the leading causes of mining accidents and occur even after the barring down of the blasted area. *Garcia v. Homestake Mining Co.*, 1992-NMCA-018, 113 N.M. 508, 828 P.2d 420, cert. denied, 113 N.M. 488, 827 P.2d 1302.

The principles "arising out of" and "in the course of employment" within the meaning of the Workmen's [Workers'] 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*, 1954-NMSC-027, 58 N.M. 183, 268 P.2d 579; *Wilson v. Richardson Ford Sales, Inc.*, 1981-NMSC-123, 97 N.M. 226, 638 P.2d 1071.

It is not enough that the injury arose in the course of employment. For an injury to be compensable within the Workmen's [Workers'] Compensation Act it must "arise out of" and in the course of employment and not be willfully suffered or intentionally inflicted. *Walker v. Woldridge*, 1954-NMSC-027, 58 N.M. 183, 268 P.2d 579.

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.*, 1982-NMCA-060, 97 N.M. 753, 643 P.2d 622, cert. denied, 98 N.M. 336, 648 P.2d 794.

Requirements for "arising out of" and "in the course of employment". — "Arising out of" and "in the course of employment" are two distinct requirements; in order for a claimant to be entitled to compensation, both of the requirements for "arising out of" and "in the course of employment" must be met. In determining whether an injury arose out

of the worker's employment, the cause of the accident must be determined; injuries "arising out of" employment typically include those occurring during acts the worker was specifically instructed to perform by the employer and acts incidental to the worker's assigned duties. "In the course of employment" relates to the time, place, and circumstances under which the accident takes place; injuries occurring during the "course of employment" take place within the period of employment, at a place where the employee may reasonably be, and while the employee is reasonably fulfilling the duties of employment or doing something incidental to it. *Begay v. Consumer Direct Personal Care*, 2015-NMCA-025, cert. denied, 2015-NMCERT-002.

Where worker's employment involved providing personal care services, through Medicaid, to her mentally disabled son, and where worker was abruptly attacked by her son causing injury to worker's arm, worker's employment duties overlapped significantly with the services she provided as a mother or natural support; evidence showed that worker was providing services that could have been provided in either of her two roles, but the fact that the injury occurred outside her scheduled work hours, the evidence was sufficient to support the worker's compensation judge's conclusion that worker's injury did not "arise from" or occur "in the course of employment." *Begay v. Consumer Direct Personal Care*, 2015-NMCA-025, cert. denied, 2015-NMCERT-002.

Off-duty police officers responding to emergency circumstances. — Emergency actions taken by off-duty police officers in response to emergency circumstances constitute actions arising out of and in the course of their employment as police officers if on-duty police officers would take the emergency actions in response to the emergency circumstances in the course of their employment. *Schultz v. Pojoaque Tribal Police Dep't*, 2014-NMCA-019.

Where a police officer, who was off-duty and voluntarily chaperoning a church youth group trip to a recreational area on the Rio Grande River, was drowned while rescuing a child who was under the officer's supervision and who had fallen into the river; the officer was not on-call or in uniform; and the incident occurred outside the officer's jurisdiction, the officer's death arose out of and in the course of the officer's employment because there was a sufficient nexus between the officer's actions in rescuing the child and the duties of the officer's employment as a police officer. *Schultz v. Pojoaque Tribal Police Dep't*, 2014-NMCA-019.

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.*, 1962-NMSC-051, 70 N.M. 99, 370 P.2d 816.

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.*, 1967-NMSC-022, 77 N.M. 470, 423 P.2d 991.

Compensation is not allowed if an injury occurs while the workman [worker] is on his way to assume the duties of his employment or after leaving such duties. *Romero v. S.S. Kresge Co.*, 1981-NMCA-001, 95 N.M. 484, 623 P.2d 998, cert. denied, 95 N.M. 593, 624 P.2d 535, *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743.

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. N.M. State Hwy. Dep't*, 1981-NMCA-077, 97 N.M. 98, 637 P.2d 48, cert. quashed, 97 N.M. 621, 642 P.2d 607, *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743.

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.*, 1967-NMSC-022, 77 N.M. 470, 423 P.2d 991.

Going to work where accident caused by negligent on-duty coworker. — Worker's compensation was the exclusive remedy for a worker who was injured on his way to work in a traffic accident that occurred half an hour before his shift began, two miles away from his employer's premises, as a direct result of an on-duty coworker's negligent driving of a vehicle owned by the common employer. *Espinosa v. Albuquerque Publ'g Co.*, 1997-NMCA-072, 123 N.M. 605, 943 P.2d 1058.

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.*, 1967-NMSC-022, 77 N.M. 470, 423 P.2d 991.

Intentional acts by employer. — Injury arising out of sexual harassment was not barred by the exclusivity provisions of this section, where there was evidence that the employer acted intentionally in subjecting employee to the harassment risk. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999.

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*, 1980-NMCA-030, 94 N.M. 278, 609 P.2d 725, cert. denied, 94 N.M. 674, 615 P.2d 991.

Injury caused by sexual harassment is not an accident arising out of and in the course of employment. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999.

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. Corcoran, Barkoff & Stagnone, P.A.*, 1981-NMCA-127, 97 N.M. 79, 636 P.2d 898, cert. denied, 97 N.M. 483, 641 P.2d 514.

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. Corcoran, Barkoff & Stagnone, P.A.*, 1981-NMCA-127, 97 N.M. 79, 636 P.2d 898, cert. denied, 97 N.M. 483, 641 P.2d 514.

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.*, 1981-NMCA-001, 95 N.M. 484, 623 P.2d 998, cert. denied, 95 N.M. 593, 624 P.2d 535, *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743.

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.*, 1982-NMCA-060, 97 N.M. 753, 643 P.2d 622, cert. denied, 98 N.M. 336, 648 P.2d 794.

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*, 1954-NMSC-027, 58 N.M. 183, 268 P.2d 579.

Exclusive remedy. — Generally, the Workers' Compensation Act makes workers' compensation benefits the worker's exclusive remedy for all accidental injuries. *Armenta v. A.S. Horner, Inc.*, 2015-NMCA-092, cert. granted, 2015-NMCERT-008.

Where plaintiff, the personal representative of decedent worker, brought a negligent entrustment suit against defendant employer, and employer argued that plaintiff's claims were barred because the Workers' Compensation Act provides the exclusive remedy for

plaintiff's claims, the district court erred in granting employer's motion for summary judgment where the evidence established that worker, on a work-related trip in Springer, New Mexico, had been allowed to drive employer's vehicle after work hours to pick up food and alcohol for an employees' dinner, but after dinner was told by his supervisor to drink moderately and to not leave the motel, that worker, despite the warning, left the motel in employer's vehicle and headed to Raton to continue partying. Worker was killed in an accident just north of Springer. Worker's blood alcohol concentration was .23 at the time of his death. The Workers' Compensation Act did not apply to plaintiff's claim, because the accident did not arise out of and in the course of worker's employment when worker's decision to take the vehicle for a ride could be considered foreseeable and reasonable conduct under the traveling-employee exception, but doing so under the significant influence of alcohol was not reasonable, and no benefit could have been conferred on employer by worker's drinking excessively and driving to Raton, where employer had no business interests. *Armenta v. A.S. Horner, Inc.*, 2015-NMCA-092, cert. granted, 2015-NMCERT-008.

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.*, 1962-NMSC-051, 70 N.M. 99, 370 P.2d 816.

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*, 1981-NMSC-081, 96 N.M. 579, 633 P.2d 687, *overruled on other grounds by United States Brewers Ass'n v. Director of N.M. Dep't of ABC*, 1983-NMSC-059, 100 N.M. 216, 668 P.2d 1093.

Unexplained fall was compensable. — Where worker appealed from the workers' compensation judge's (WCJ) compensation order denying him workers' compensation for an injury resulting from a trip-and-fall that occurred on the job, the WCJ erred in concluding that worker's accident did not arise out of and in the course of his employment, because worker's injury was the result of an unexplained fall, which constitutes a neutral risk, and gives rise to a rebuttable presumption that worker's injury arose out of his employment. Moreover, the facts demonstrated that Worker's fall and injury occurred while he was at work during the period of his employment, at a place where he was required to be, and while he was reasonably fulfilling the duties of his employment. *Griego v. Jones Lang LaSalle*, 2019-NMCA-007, cert. denied.

Disease contracted from pigeons roosting in warehouse arose out of course of employment. — Where worker was injured and died from psittacosis which worker contracted from exposure to pigeons and pigeon feces in the warehouse where worker was employed as a laborer, while worker was performing the duties that were assigned to worker by the employer, during work hours, worker's injury and death arose out of and in the course of worker's employment and fell within the exclusivity provisions of the Workers' Compensation Act, Section 52-1-1 NMSA 1978 et seq. *Castillo v. Caprock Pipe & Supply, Inc.*, 2012-NMCA-085, 285 P.3d 1072, cert. denied, 2012-NMCERT-007.

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*, 1983-NMCA-051, 100 N.M. 1, 664 P.2d 1014, cert. denied, 100 N.M. 192, 668 P.2d 308.

Determination of employee status. — Under New Mexico law a multi-factor analysis must be used to determine the level and nature of control exerted by a putative statutory employer over persons and entities doing work for it, to determine whether the relationship is best characterized as one of independent contractor or employer and employee. *Enriquez v. Cochran*, 1998-NMCA-157, 126 N.M. 196, 967 P.2d 1136, cert. denied, 126 N.M. 532, 972 P.2d 351.

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.*, 1959-NMSC-007, 65 N.M. 323, 337 P.2d 394.

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 [workers'] compensation for injuries on the job and may not sue the contractors in tort on negligence. *Shipman v. Macco Corp.*, 1964-NMSC-091, 74 N.M. 174, 392 P.2d 9.

Specific event necessary. — Claimant, who alleged that as a result of job harassment, which caused work stress, her husband shot himself in the head, could not recover compensation where no psychologically traumatic event had been alleged. *Holford v. Regents of Univ. of Cal.*, 1990-NMCA-066, 110 N.M. 366, 796 P.2d 259, cert. denied, 110 N.M. 330, 795 P.2d 1022.

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 [workers'] 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.*, 1984-NMCA-099, 101 N.M. 801, 689 P.2d 1272, cert. denied, 102 N.M. 7, 690 P.2d 450.

Act of reaching employee at home by telephone is not a "circumstance" of employment. *Hernandez v. Home Educ. Livelihood Program, Inc.*, 1982-NMCA-079, 98 N.M. 125, 645 P.2d 1381, cert. denied, 98 N.M. 336, 648 P.2d 794.

IV. ACCIDENT PROXIMATE CAUSE OF INJURY.

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*, 1962-NMSC-014, 69 N.M. 464, 368 P.2d 141.

Exclusivity. — The words "accidentally sustained," as used in Section 52-1-9 NMSA 1978, refer to injury or death arising from an unintended or unexpected event. An employee seeking to impose liability upon an employer outside the ambit of Section 52-1-9 NMSA 1978, must plead and prove an actual intent to injure the employee on the part of the employer. *Johnson Controls World Servs. v. Barnes*, 1993-NMCA-004, 115 N.M. 116, 847 P.2d 761, cert. denied 115 N.M. 79, 847 P.2d 313, *overruled by Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148.

There must still be causal relationship between accident and injury complained of. But such relationship need not be shown by uncontradicted, indisputable medical evidence. *White v. Valley Land Co.*, 1957-NMSC-100, 64 N.M. 9, 322 P.2d 707, *overruled on other grounds by Mascarenas v. Kennedy*, 1964-NMSC-179, 74 N.M. 665, 397 P.2d 312.

Relationship must be shown between accident relied on and injury suffered to justify an award of workmen's [workers'] compensation, as the award cannot rest on mere speculation. *Henderson v. Texas-N.M. Pipe Line Co.*, 1942-NMSC-060, 46 N.M. 458, 131 P.2d 269.

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.*, 1978-NMCA-128, 93 N.M. 9, 595 P.2d 1204, 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.*, 1979-NMCA-068, 93 N.M. 78, 596 P.2d 521, cert. denied, 93 N.M. 8, 595 P.2d 1203.

Disability must be "natural and direct" result of accident. — The requirement in Section 52-1-28 A(3) NMSA 1978 that the disability be a "natural and direct result" of the accident supplements the proximate-cause requirement of Subsection C of this section for worker's compensation claims. Under this test a worker is entitled to benefits for a disability arising immediately from a work-related accident and for a disability that develops later as a result of the normal activities of life, but not for subsequent injuries, such as a back injury stemming from severe trauma induced during a worker's repair of his transmission, that can be characterized as stemming from an independent, intervening cause. *Aragon v. State Corr. Dep't*, 1991-NMCA-109, 113 N.M. 176, 824 P.2d 316, cert. denied, 113 N.M. 23, 821 P.2d 1060.

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*, 1954-NMSC-027, 58 N.M. 183, 268 P.2d 579.

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.*, 1959-NMSC-057, 66 N.M. 126, 343 P.2d 697.

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.*, 1959-NMSC-057, 66 N.M. 126, 343 P.2d 697.

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.*, 1959-NMSC-057, 66 N.M. 126, 343 P.2d 697.

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. *White v. Valley Land Co.*, 1957-NMSC-100, 64 N.M. 9, 322 P.2d 707, *overruled on other grounds by Mascarenas v. Kennedy*, 1964-NMSC-179, 74 N.M. 665, 397 P.2d 312.

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. *White v. Valley Land Co.*, 1957-NMSC-100, 64 N.M. 9, 322 P.2d 707, *overruled on other grounds by Mascarenas v. Kennedy*, 1964-NMSC-179, 74 N.M. 665, 397 P.2d 312.

Special interrogatory should cover both requisites to right to compensation set forth in Section 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. *Sw. Portland Cement Co. v. Simpson*, 135 F.2d 584 (10th Cir. 1943).

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.*, 1972-NMCA-005, 83 N.M. 452, 493 P.2d 418.

Unnecessary that workman [worker] 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.*, 1972-NMCA-005, 83 N.M. 452, 493 P.2d 418.

It is not essential that injury occur momentarily to be "accidental" within meaning of the Workmen's [Workers'] Compensation Act and an unintentional result of an intended act by the person injured comes within the definition of an accident. *Henderson v. Texas-N.M. Pipe Line Co.*, 1942-NMSC-060, 46 N.M. 458, 131 P.2d 269.

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. N.M. Publ'g Co.*, 1943-NMSC-032, 47 N.M. 279, 141 P.2d 333.

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. N.M. Publ'g Co.*, 1943-NMSC-032, 47 N.M. 279, 141 P.2d 333.

Gradual hearing loss. — Worker’s gradual, noise-induced hearing loss was an accidental injury compensable under the Workers’ Compensation Act. *Cisneros v.*

Molycorp, Inc., 1988-NMCA-080, 107 N.M. 788, 765 P.2d 761, cert. denied, 107 N.M. 785, 765 P.2d 758.

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 [Workers'] 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.*, 1941-NMSC-033, 45 N.M. 354, 115 P.2d 342.

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. N.M. Publ'g Co.*, 1943-NMSC-032, 47 N.M. 279, 141 P.2d 333.

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.*, 1972-NMCA-005, 83 N.M. 452, 493 P.2d 418.

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.*, 1977-NMCA-114, 91 N.M. 112, 570 P.2d 943.

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.*, 1977-NMCA-114, 91 N.M. 112, 570 P.2d 943.

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 [workers'] compensation benefits and the complaint

should be dismissed with prejudice. *Martinez v. Driver Mechenbier, Inc.*, 1977-NMCA-031, 90 N.M. 282, 562 P.2d 843.

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.*, 1974-NMCA-048, 86 N.M. 538, 525 P.2d 898, cert. denied, 86 N.M. 528, 525 P.2d 888.

Self-inflicted injuries not compensable. — Absent evidence of mental derangement and causation, self-inflicted injuries are not compensable. *Holford v. Regents of Univ. of Cal.*, 1990-NMCA-066, 110 N.M. 366, 796 P.2d 259, cert. denied, 110 N.M. 330, 795 P.2d 1022.

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. *White v. Valley Land Co.*, 1957-NMSC-100, 64 N.M. 9, 322 P.2d 707, *overruled on other grounds by Mascarenas v. Kennedy*, 1964-NMSC-179, 74 N.M. 665, 397 P.2d 312.

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.*, 1963-NMSC-052, 72 N.M. 6, 380 P.2d 16.

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 [worker], 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 [worker] in performing his usual and ordinary duties, under usual and ordinary circumstances of his work, may be made the subject of a workmen's [workers'] compensation award. *Sanchez v. Board of Cnty. Comm'rs*, 1957-NMSC-051, 63 N.M. 85, 313 P.2d 1055.

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.*, 1972-NMCA-005, 83 N.M. 452, 493 P.2d 418; *Herndon v. Albuquerque Pub. Schs.*, 1978-NMCA-072, 92 N.M. 635, 593 P.2d 470, *rev'd on other grounds*, 1978-NMSC-090, 92 N.M. 287, 587 P.2d 434; *Marez v. Kerr-McGee Nuclear Corp.*, 1978-NMCA-128, 93 N.M. 9, 595 P.2d 1204, 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.*, 1980-NMCA-113, 96 N.M. 376, 630 P.2d 1231.

There need be no permanent physical alteration of body tissues in order to qualify for permanent disability. *Schober v. Mountain Bell Tel.*, 1980-NMCA-113, 96 N.M. 376, 630 P.2d 1231.

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.*, 1986-NMCA-016, 105 N.M. 167, 730 P.2d 470, cert. quashed, 105 N.M. 111, 729 P.2d 1365; *Lopez v. Smith's Mgmt. Corp.*, 1986-NMCA-054, 106 N.M. 416, 744 P.2d 544, cert. quashed, 106 N.M. 405, 744 P.2d 180 (1987).

Psychological injuries arising out of sexual harassment. — Emotional distress occurring over a period of time following incidents of sexual harassment are not compensable under the Worker's Compensation Act, since only "primary mental impairment" or "secondary mental impairment" are compensable under the WCA, not psychological injuries that occur over time. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999.

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.*, 1988-NMCA-006, 107 N.M. 26, 751 P.2d 710.

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 [worker] was accidental and otherwise compensable, and the injury produced a mental disability which rendered the subsequent act of suicide of the workman [worker] non-purposeful. *Schell v. Buell ECD Co.*, 1983-NMCA-093, 102 N.M. 44, 690 P.2d 1038, 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.*, 1978-NMCA-115, 93 N.M. 337, 600 P.2d 283, cert. denied, 92 N.M. 621, 593 P.2d 62 (1979); *Schober v. Mountain Bell Tel.*, 1980-NMCA-113, 96 N.M. 376, 630 P.2d 1231.

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. Schs.*, 1978-NMCA-072, 92 N.M. 635, 593 P.2d 470, *rev'd on other grounds*, 1978-NMSC-090, 92 N.M. 287, 587 P.2d 434; *Powers v. Riccobene Masonry Constr., Inc.*, 1980-NMCA-172, 97 N.M. 20, 636 P.2d 291, cert. denied, 99 N.M. 148, 655 P.2d 160.

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.*, 1980-NMCA-113, 96 N.M. 376, 630 P.2d 1231.

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 [Workers'] 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.*, 1979-NMCA-059, 92 N.M. 746, 594 P.2d 1202.

Hernia as compensable injury. — A workman's [worker'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.*, 1930-NMSC-003, 34 N.M. 483, 284 P. 115.

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.*, 1941-NMSC-033, 45 N.M. 354, 115 P.2d 342.

Employer liable where fall due to preexisting condition. — Where a workman [worker], 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*, 1938-NMSC-008, 42 N.M. 107, 76 P.2d 1.

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).

For annual survey of New Mexico insurance law, 19 N.M.L. Rev. 717 (1990).

For note, "The District Court Should Make the Initial Determination of Jurisdiction in Workers' Compensation Cases Involving Intentional Tort Claims - Eldridge v. Circle K Corp.," see 28 N.M.L. Rev. 665 (1998).

For note, "Workers' Compensation: Exclusivity, Common Law Remedies, and the Reconsideration of the Actual Intent Test - *Delgado v. Phelps Dodge Chino, Inc.*," see 32 N.M.L. Rev. 549 (2002).

For note, "Trends in New Mexico Law – 1994-95: Workers' Compensation Law – New Mexico Clarifies the Meaning of a Special Employer as Distinct from a Statutory Employer: Rivera v. Sagebrush Sales, Inc.," see 26 N.M. L. Rev. 655 (1996).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 31, 54.

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.

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.

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 co-employee 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.

What amounts to failure or refusal to submit to medical treatment sufficient to bar recovery of workers' compensation, 3 A.L.R.5th 907.

Right to workers' compensation for injuries suffered after termination of employment, 10 A.L.R.5th 245.

Eligibility for workers' compensation as affected by claimant's misrepresentation of health or physical condition at time of hiring, 12 A.L.R.5th 658.

Jurors as within coverage of workers' compensation acts, 13 A.L.R.5th 444.

Workers' compensation: coverage of employee's injury or death from exposure to the elements - modern cases, 20 A.L.R.5th 346.

Pre-emption by Workers' Compensation Statute of employee's remedy under state "Whistleblower" Statute, 20 A.L.R.5th 677.

Workers' compensation: Lyme disease, 22 A.L.R.5th 246.

Violation of employment rule barring claim for worker's compensation, 61 A.L.R.5th 375.

Employee's injuries sustained in use of employer's restroom as covered by workers' compensation, 80 A.L.R.5th 417.

99 C.J.S. Workmen's Compensation §§ 130 to 265; 101 C.J.S. Workmen's Compensation §§ 917 to 1045.

52-1-9.1. Uninsured employers' fund; workers' compensation administration; additional duties.

A. The "uninsured employers' fund" is created in the state treasury. The fund shall be administered by the workers' compensation administration as a separate account. The administration shall adopt rules to administer the fund pursuant to the provisions of this section.

B. The fund shall consist of thirty cents ($.30) per employee covered by the Workers' Compensation Act on the last working day of each quarter for the fee

assessed against employers pursuant to Section 52-5-19 NMSA 1978 and all income derived from investment of the fund. The fund shall also consist of any other money appropriated, distributed or otherwise allocated to the fund for the purpose of this section.

C. Money in the fund is appropriated to the workers' compensation administration to pay workers' compensation benefits to a person entitled to the benefits when that person's employer has failed to maintain workers' compensation coverage because of fraud, misconduct or other failure to insure or otherwise make compensation payments. For purposes of this subsection, a worker who has affirmatively elected not to accept the provisions of the Workers' Compensation Act shall not be eligible for payment of workers' compensation from the uninsured employers' fund. The director may pay reasonable costs of administering the uninsured employers' fund from the fund, but money in the fund shall not be used for administrative costs unrelated to the fund or any activity of the workers' compensation administration other than as provided in this section. The superintendent of insurance shall examine and audit the fund pursuant to the provisions of Chapter 59A, Article 4 NMSA 1978.

D. The director may authorize payments to a person from the uninsured employers' fund if the injury or cause of incapacity occurs in New Mexico and would be compensable under the Workers' Compensation Act.

E. The uninsured employers' fund, by subrogation, has all the rights, powers and benefits of the employee or the employee's dependents against the employer failing to make the compensation payments.

F. The uninsured employers' fund, subject to approval of the director, shall discharge its obligations by contracting with an independent adjusting company that is licensed and principally located in New Mexico as prescribed by Section 59A-13-11 NMSA 1978 or Chapter 59A, Article 12A NMSA 1978.

G. For the purpose of ensuring the health, safety and welfare of the public, the director or a workers' compensation judge shall:

(1) order the uninsured employer to reimburse the uninsured employers' fund for all benefits paid to or on behalf of an injured employee by the uninsured employers' fund along with interest, costs and attorney fees; and

(2) impose a penalty against the uninsured employer of not less than fifteen percent nor more than fifty percent of the value of the total award in connection with the claim that shall be paid into the uninsured employers' fund.

H. The liability of the state, the workers' compensation administration and the state treasurer, with respect to payment of any compensation benefits, expenses, fees or disbursement properly chargeable against the uninsured employers' fund, is limited to

the assets in the uninsured employers' fund, and they are not otherwise liable for any payment.

I. The uninsured employers' fund shall be considered a payor of last resort within the workers' compensation system. No other payor liable for payments under the Workers' Compensation Act shall have its liabilities affected or discharged by payments from the uninsured employers' fund. Any payments to workers paid by the uninsured employers' fund shall be subject to subrogation and apportionment to the same extent as payments to an injured worker from a third party tortfeasor.

J. In any claim against an employer by the uninsured employers' fund, or by or on behalf of the employee to whom or to whose dependents compensation and other benefits are paid or payable from the uninsured employers' fund, the burden of proof is on the employer or other party in interest objecting to the claim. The claim is presumed to be valid up to the full amount of workers' compensation benefits paid to the employee or the employee's dependents. This subsection applies whether the claim is filed in court or in an adjudicative proceeding under the authority of the workers' compensation administration.

K. Nothing in this section shall be construed to extend exclusive remedy protection pursuant to Section 52-1-6 or 52-1-9 NMSA 1978 to any employer whose injured worker is paid by the uninsured employers' fund.

L. Nothing in this section shall be construed to supersede Section 52-5-10 NMSA 1978.

History: Laws 2003, ch. 258, § 1; 2004, ch. 36, § 1.

ANNOTATIONS

The 2004 amendment, effective July 1, 2004, rewrote Subsection B to change the fee from percentage of money paid out during the quarter for benefits to thirty cents ($.30) per employee, deleted Subsection C and redesignated Subsections D through M as Subsections C through L.

Pre-judgment interest. — The uninsured employer’s fund is entitled to a pre-judgment interest award on advances paid on behalf of an injured employee. *Pipkin v. Daniel*, 2009-NMCA-006, 145 N.M. 398, 199 P.3d 301.

Section applies prospectively. — Because this section is substantive legislation that creates new duties, rights and obligations, this section is to be applied prospectively. *Wegner v. Hair Products of Texas*, 2005-NMCA-043, 137 N.M. 328, 110 P.3d 544.

This section has three purposes: (1) to provide injured workers with a new remedy; (2) to impose quasi-criminal sanctions on employers who fail to insure properly their workers; and, (3) to spread equitably the economic burden of fund maintenance among

all the payers of workers' compensation benefits. *Wegner v. Hair Products of Texas*, 2005-NMCA-043, 137 N.M. 328, 110 P.3d 544.

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 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.

ANNOTATIONS

Cross references. — For the Mining Safety Act, *see* 69-8-1 NMSA 1978 et seq.

For devices required by mining safety rules and regulations as "safety devices required by law," *see* 69-8-15 NMSA 1978.

I. GENERAL CONSIDERATION.

Effect of Laws 1953, ch. 96. *Clary v. Denman Drilling Co.*, 1954-NMSC-105, 58 N.M. 723, 276 P.2d 499.

This section must be liberally construed in favor of workman [worker], 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*, 1959-NMSC-076, 66 N.M. 165, 344 P.2d 475 (decided under former law).

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.*, 1989-NMCA-039, 108 N.M. 655, 777 P.2d 383, cert. denied, 108 N.M. 681, 777 P.2d 1325.

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*, 1967-NMSC-021, 77 N.M. 428, 423 P.2d 617.

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*, 1953-NMSC-048, 57 N.M. 315, 258 P.2d 711.

This section is not affected by provision limiting defenses of contributory negligence and assumed risk. *Pino v. Ozark Smelting & Mining Co.*, 1930-NMSC-057, 35 N.M. 87, 290 P. 409.

Not applicable to employers in mining industry. — The penalty provision of the Workmen's [Workers'] 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.*, 1949-NMSC-015, 53 N.M. 127, 202 P.2d 1080 (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. Sch. Dist.*, 1971-NMCA-029, 82 N.M. 462, 483 P.2d 936.

Compensable character of the injury is question preceding and independent of the other question, "who shall receive it?" *Sanchez v. Bernalillo Cnty.*, 1953-NMSC-038, 57 N.M. 217, 257 P.2d 909.

Recovery from employer and insurer. — Provision in Workmen's [Workers'] 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.*, 1943-NMSC-042, 47 N.M. 423, 144 P.2d 145.

Timeliness of claim where disability paid. — Claim for workmen's [workers'] 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*, 1951-NMSC-039, 55 N.M. 261, 231 P.2d 937.

Safety device defined. — A safety device is an instrumentality that will lessen danger or secure safety, something tangible, concrete, that can be seen, touched or felt as opposed to a rule or course of conduct. *Benavides v. Eastern N.M. Med. Ctr.*, 2014-NMSC-037, *rev'g* No. 32,450, mem. Op. (N.M. Ct. App. Mar. 25, 2013) (non-precedential).

Safety device contemplated by this section is something tangible and concrete, which can be seen, touched and described. *Montoya v. Kennecott Copper Corp.*, 1956-NMSC-062, 61 N.M. 268, 299 P.2d 84.

Wet floor sign is a safety device. — A wet floor sign, which is something tangible and concrete and warns of the specific danger of a slippery floor, is a safety device. *Benavides v. Eastern N.M. Med. Ctr.*, 2014-NMSC-037, *rev'g* No. 32,450, mem. Op. (N.M. Ct. App. Mar. 25, 2013) (non-precedential).

Employer's responsibility to create a safe workplace. — Where employee nurse slipped and fell on a wet hospital floor, supreme court held that employer hospital failed in its duty to create a safe work environment where it provided wet floor signs, as safety devices, to custodial staff, but failed to ensure that the wet floor signs were properly employed, and therefore employee nurse was entitled to penalty increase in benefits. *Benavides v. Eastern N.M. Med. Ctr.*, 2014-NMSC-037, *rev'g* No. 32,450, mem. Op. (N.M. Ct. App. Mar. 25, 2013) (non-precedential).

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, 1959-NMSC-076, 66 N.M. 165, 344 P.2d 475.

Requirement of "safe place to work" is not "safety device" within the meaning of this section. *Montoya v. Kennecott Copper Corp.*, 1956-NMSC-062, 61 N.M. 268, 299 P.2d 84.

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. Sch. Dist.*, 1971-NMCA-029, 82 N.M. 462, 483 P.2d 936.

This section requires that the injury or death of the workman [worker] 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.*, 1983-NMCA-052, 99 N.M. 723, 663 P.2d 382.

"Specific safety practice enjoined by law" not followed. *Montoya v. Kennecott Copper Corp.*, 1956-NMSC-062, 61 N.M. 268, 299 P.2d 84.

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*, 1951-NMSC-039, 55 N.M. 261, 231 P.2d 937.

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.*, 1948-NMSC-019, 52 N.M. 107, 192 P.2d 553.

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 [workers'] 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*, 1951-NMSC-039, 55 N.M. 261, 231 P.2d 937 (decided under former law).

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*, 1959-NMSC-076, 66 N.M. 165, 344 P.2d 475.

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.*, 1960-NMSC-036, 67 N.M. 23, 350 P.2d 1037.

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.*, 1949-NMSC-015, 53 N.M. 127, 202 P.2d 1080.

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*, 1953-NMSC-048, 57 N.M. 315, 258 P.2d 711.

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.*, 1957-NMSC-074, 63 N.M. 148, 315 P.2d 217.

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.*, 1957-NMSC-074, 63 N.M. 148, 315 P.2d 217.

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.*, 1957-NMSC-074, 63 N.M. 148, 315 P.2d 217.

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.*, 1962-NMSC-037, 70 N.M. 40, 369 P.2d 777.

"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.*, 1962-NMSC-037, 70 N.M. 40, 369 P.2d 777.

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*, 1958-NMSC-139, 65 N.M. 270, 335 P.2d 1067.

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.*, 1949-NMSC-015, 53 N.M. 127, 202 P.2d 1080.

Rearview mirror on particular construction vehicle found to be reasonable safety device. *Martinez v. Zia Co.*, 1983-NMCA-063, 100 N.M. 8, 664 P.2d 1021.

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. Sch. Dist.*, 1971-NMCA-029, 82 N.M. 462, 483 P.2d 936.

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.*, 1948-NMSC-019, 52 N.M. 107, 192 P.2d 553.

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.*, 1943-NMSC-010, 47 N.M. 100, 137 P.2d 312.

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*, 1951-NMSC-039, 55 N.M. 261, 231 P.2d 937.

II. EMPLOYEE FAILURE.

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.*, 1949-NMSC-015, 53 N.M. 127, 202 P.2d 1080.

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.*, 1930-NMSC-057, 35 N.M. 87, 290 P. 409.

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.*, 1982-NMCA-076, 98 N.M. 65, 644 P.2d 1054.

Pursuant to Rule 12(b), N.M.R. Civ. P. (now Rule 1-012B NMRA), 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*, 1983-NMCA-134, 102 N.M. 172, 692 P.2d 1321, cert. quashed, 102 N.M. 225, 693 P.2d 591 (1985).

Violation of company policies. — Subsection A does not provide for a reduction in benefits when an employee simply violates company policies in the absence of evidence that the violation caused the injury. *Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, 128 N.M. 601, 995 P.2d 1043.

Consumption of alcohol. — Reduction of an employee's benefits for consumption of alcohol was not warranted in the absence of evidence that such consumption caused his injuries. *Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, 128 N.M. 601, 995 P.2d 1043.

Speeding. — In light of findings that speeding was a contributing cause of the accident (and therefore the injuries), it was proper to reduce an employee's compensation award by 10%. *Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, 128 N.M. 601, 995 P.2d 1043.

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*, 1942-NMSC-065, 46 N.M. 468, 131 P.2d 276.

No contributory negligence in act except failure of workman [worker] to use device. — Contributory negligence has no place in the Workmen's [Workers'] Compensation Act unless it be in failure of workman [worker] 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*, 1951-NMSC-039, 55 N.M. 261, 231 P.2d 937.

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.*, 1988-NMCA-080, 107 N.M. 788, 765 P.2d 761, cert. denied, 107 N.M. 785, 765 P.2d 758 .

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 [Workers'] Compensation Act. *Jones v. International Minerals & Chem. Corp.*, 1949-NMSC-015, 53 N.M. 127, 202 P.2d 1080.

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. N.M. State Hwy. Dep't*, 1950-NMSC-016, 54 N.M. 126, 215 P.2d 602.

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*, 1968-NMSC-073, 79 N.M. 99, 440 P.2d 291.

Reduction of employees' benefits for failure to use seat belts was not warranted in the absence of evidence that such failure caused their injuries. *Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, 128 N.M. 601, 995 P.2d 1043.

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'g Co.*, 1951-NMSC-046, 55 N.M. 287, 232 P.2d 689.

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*, 1953-NMSC-068, 57 N.M. 454, 260 P.2d 366.

Duty on employer to ensure safety devices are properly employed. — Where the purpose and spirit of this act is for employers to create a safe work environment for their employees, and the final responsibility and duty is on employers to furnish adequate safety devices for their workers, employers must not only provide safety devices, but must also ensure that safety devices are properly employed. *Benavides v. Eastern N.M. Med. Ctr.*, 2014-NMSC-037, *rev'g* No. 32,450, mem. Op. (N.M. Ct. App. Mar. 25, 2013) (non-precedential).

Employer's responsibility to create a safe workplace. — Where employee nurse slipped and fell on a wet hospital floor, supreme court held that employer hospital failed in its duty to create a safe work environment where it provided wet floor signs, as safety devices, to custodial staff, but failed to ensure that the wet floor signs were properly employed, and therefore employee nurse was entitled to penalty increase in benefits. *Benavides v. Eastern N.M. Med. Ctr.*, 2014-NMSC-037, *rev'g* No. 32,450, mem. Op. (N.M. Ct. App. Mar. 25, 2013) (non-precedential).

General failure to provide safety devices is not enough. There must be causation between employer's negligent management in regard to safety precautions and an intentionally caused injury. The critical measure, as reflected in *Morales v. Reynolds*, 2004-NMCA-098, 136 N.M. 280, 97 P.3d 612 and Cordova v. Peavey Co., 273 F. Supp. 2d 1213, is whether the employer has, in a specific dangerous circumstance, required the employee to perform a task where the employer is or should clearly be aware that there is a substantial likelihood the employee will suffer injury or death by performing the task. The possibility that an accident might occur because of an unexpected careless act of a co-employee does not meet the Delgado v. Phelps Dodge Chino, Inc. 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148 standard. Dominguez v. Perovich, 2005-NMCA-050, 137 N.M. 401, 111 P.3d 721, cert. denied, 2005-NMSC-005, 137 N.M. 522, 113 P.3d 345.

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 [worker], 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*, 1967-NMSC-021, 77 N.M. 428, 423 P.2d 617.

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 [worker]. *Garza v. W.A. Jourdan, Inc.*, 1977-NMCA-136, 91 N.M. 268, 572 P.2d 1276, cert. denied, 91 N.M. 249, 572 P.2d 1257.

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*, 1959-NMSC-076, 66 N.M. 165, 344 P.2d 475.

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*, 1959-NMSC-076, 66 N.M. 165, 344 P.2d 475.

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.*, 1957-NMSC-074, 63 N.M. 148, 315 P.2d 217.

Negligence proscribed in this section is the failure to supply safety device, not the negligent disregard for the safety of employees. *Baca v. Gutierrez*, 1967-NMSC-021, 77 N.M. 428, 423 P.2d 617.

Statute of limitations not applicable. — Although the statute of limitations, Section 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.*, 1977-NMCA-136, 91 N.M. 268, 572 P.2d 1276, cert. denied, 91 N.M. 249, 572 P.2d 1257.

No penalty liability where co-employees 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 co-employees in using the safety device, the injured employee is not entitled to a penalty increase in benefits. *Jaramillo v. Anaconda Co.*, 1981-NMCA-030, 95 N.M. 728, 625 P.2d 1245.

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 [Workers'] 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.*, 1981-NMCA-045, 96 N.M. 84, 628 P.2d 329, cert. denied, 96 N.M. 116, 628 P.2d 686, and 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*, 1953-NMSC-048, 57 N.M. 315, 258 P.2d 711.

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*, 1965-NMSC-026, 75 N.M. 39, 400 P.2d 215.

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 [worker] 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 [worker]. *Sanchez v. Bernalillo Cnty.*, 1953-NMSC-038, 57 N.M. 217, 257 P.2d 909.

Where workman [worker] 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 [worker] 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*, 1953-NMSC-068, 57 N.M. 454, 260 P.2d 366.

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.*, 1960-NMSC-036, 67 N.M. 23, 350 P.2d 1037.

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.*, 1960-NMSC-036, 67 N.M. 23, 350 P.2d 1037.

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*, 1964-NMSC-179, 74 N.M. 665, 397 P.2d 312.

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*, 1948-NMSC-060, 52 N.M. 402, 200 P.2d 366.

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 [worker] had been injured or killed simply because the safety statute did not so provide. *Montoya v. Kennecott Copper Corp.*, 1956-NMSC-062, 61 N.M. 268, 299 P.2d 84 (decided under former law).

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 Op. Att'y Gen. No. 53-5796.

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).

For annual survey of New Mexico Workers' Compensation Law, see 20 N.M.L. Rev. 459 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 255, 408.

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.

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.

ANNOTATIONS

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

This section governs only the employer's right to reimbursement, and has no bearing on a case where the worker is claiming workers' compensation benefits. *Apodaca v. Formwork Specialists*, 1990-NMCA-102, 110 N.M. 778, 800 P.2d 212, cert. denied, 110 N.M. 749, 799 P.2d 1121, *overruled on other grounds by Montoya v. AKAL Sec., Inc.*, 1992-NMSC-056, 114 N.M. 354, 838 P.2d 971.

Proximate cause not found. — The appellate court affirmed the judge's rejection of the worker's requested findings that the employer's negligence was a proximate cause of the worker's injury and that the worker was not made financially whole by a recovery

in a products liability action against a third-party, since the employer could not have been liable under products liability theory. *Trujillo v. Sonic Drive-In/Merritt*, 1996-NMCA-106, 122 N.M. 359, 924 P.2d 1371.

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).

For note, "Workers' Compensation Law – Pursuing the 'Benevolent Purpose' of New Mexico's Workers' Compensation Statute as a Reimbursement Statute: Montoya v. AKAL Security, Inc.," see 24 N.M. L. Rev. 577 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation § 453.

Workmen's Compensation § 1010.

52-1-11. Injuries caused by the 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 in the event such injury was willfully suffered by the worker or intentionally inflicted by the worker.

History: Laws 1929, ch. 113, § 8; C.S. 1929, § 156-108; 1941 Comp., § 57-908; 1953 Comp., § 59-10-8; 1989, ch. 263, § 8; 2016, ch. 24, § 1.

ANNOTATIONS

The 2016 amendment, effective May 18, 2016, removed injuries caused by a worker's intoxication as noncompensable injuries and limited the section to injuries willfully suffered by the worker or intentionally inflicted by the worker; in the heading, after "injuries", deleted "due to intoxication" and added "caused by the", after "Compensation Act in", added "the", after "such injury was", deleted "occasioned by the intoxication of such worker or", after "suffered by", deleted "him" and added "the worker", and after "intentionally inflicted by", deleted "himself" and added "the worker".

Injury was not solely occasioned by worker's intoxication. — Section 52-1-11 NMSA 1978 is inapplicable to bar recovery where there is substantial evidence that supports a contributing cause to the worker's injury, in addition to the worker's intoxication. *Villa v. City of Las Cruces*, 2010-NMCA-099, 148 N.M. 668, 241 P.3d 1108, cert. denied, 2010-NMCERT-009, 149 N.M. 49, 243 P.3d 753.

Where worker was intoxicated when worker started work and at the time of the accident; worker had been driving a garbage truck for at least an hour before the accident and did not hit anything; worker walked around on the top of the truck without difficulty; a co-worker did not notice a problem with worker's demeanor; worker's supervisor and co-

worker observed worker climb up on the truck without noticing anything amiss; and worker was standing on a narrow ledge of the truck attempting to attach a chain to a dumpster when worker slipped and fell, worker's behavior and conduct did not raise to the level of willfulness. *Villa v. City of Las Cruces*, 2010-NMCA-099, 148 N.M. 668, 241 P.3d 1108, cert. denied, 2010-NMCERT-009, 149 N.M. 49, 243 P.3d 753.

Sufficient evidence to support finding that injury was not occasioned by intoxication. — Where worker stepped onto a forklift; the driver of the forklift began driving away and worker fell and was dragged across a parking lot, suffering serious injury; tests revealed that worker had a blood alcohol content level of .079 forty minutes after the accident, which by extrapolation was .092 at the time of accident; and worker was able to accomplish other tasks before the accident, there was substantial evidence to support the finding that the worker's injury was not occasioned by intoxication. *Nelson v. Homier Distrib. Co., Inc.*, 2009-NMCA-125, 147 N.M. 318, 222 P.3d 690.

Negligence on part of worker does not preclude relief under the Workers' Compensation Act. Morales v. Reynolds, 2004-NMCA-098, 136 N.M. 280, 97 P.3d 612, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Willful or intentional conduct outside of Workers' Compensation Act. — Willfulness renders a worker's injury non-accidental, and therefore outside the scope of the Workers' Compensation Act, when: (1) the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker; (2) the worker or employer expects the intentional act or omission to result in the injury, or has utterly disregarded the consequences; and (3) the intentional act or omission proximately causes the injury. *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148.

Burden of proof on insurance carrier where intoxication used as defense to claim. — 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. State Hwy. Dep't*, 1950-NMSC-016, 54 N.M. 126, 215 P.2d 602.

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*, 1983-NMCA-134, 102 N.M. 172, 692 P.2d 1321, cert. quashed, 102 N.M. 225, 693 P.2d 591 (1985).

Summary judgment appropriate. — In order to maintain the balance of interests embodied in the Workers' Compensation Act's bargain, it is appropriate for a district court to grant summary judgment to an employer when a worker who pursues a tort claim cannot demonstrate the objective expectation of injury, the subjective state of mind of the employer, and the casual relationship between the intent and the injury. *Morales v. Reynolds*, 2004-NMCA-098, 136 N.M. 280, 97 P.3d 612, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Expert testimony not required. — Section 52-1-28 NMSA 1978 (proof of compensable claims) does not require an employer seeking to establish that a worker's accident was caused by his or her intoxication pursuant to this section to prove such a causal connection through expert testimony. *Estate of Mitchum v. Triple S Trucking*, 1991-NMCA-118, 113 N.M. 85, 823 P.2d 327, cert. denied, 113 N.M. 16, 820 P.2d 1330.

Evidence sufficient to support intoxication defense. — Evidence was sufficient to support a finding that the worker was intoxicated at the time of his accident and that his intoxication contributed to his accident. *Estate of Mitchum v. Triple S Trucking*, 1991-NMCA-118, 113 N.M. 85, 823 P.2d 327, cert. denied, 113 N.M. 16, 820 P.2d 1330.

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*, 1954-NMSC-027, 58 N.M. 183, 268 P.2d 579.

Violation of safety regulation. — A miner's injury was not "willfully suffered" so as to bar the recovery of compensation for injuries suffered where he was injured in a recently blasted work area after failing to "bar down" the area, as required by federal and state regulations. The violation of an instruction on a regulation, without more, is not willful. *Garcia v. Homestake Mining Co.*, 1992-NMCA-018, 113 N.M. 508, 828 P.2d 420, cert. denied, 113 N.M. 488, 827 P.2d 1302.

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*, 1954-NMSC-027, 58 N.M. 183, 268 P.2d 579.

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 Res. Co.*, 1975-NMCA-020, 87 N.M. 278, 532 P.2d 207.

Refusing to heed advice of physician not willful misconduct. — Where a workman [worker] 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*, 1938-NMSC-008, 42 N.M. 107, 76 P.2d 1.

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*, 1988-NMCA-091, 108 N.M. 124, 767 P.2d 363, cert. denied, 109 N.M. 33, 781 P.2d 305.

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 note, "Workers' Compensation: Exclusivity, Common Law Remedies, and the Reconsideration of the Actual Intent Test - *Delgado v. Phelps Dodge Chino, Inc.*," see 32 N.M.L. Rev. 549 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 215, 256, 257.

Failure to use safety appliances as serious and willful misconduct, 4 A.L.R. 121, 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.

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. Repealed.

History: 1953 Comp., § 59-10-8.1, enacted by Laws 1971, ch. 55, § 1; 1989, ch. 263, § 9; repealed by Laws 2016, ch. 24, § 3.

ANNOTATIONS

Repeals. — Laws 2016, ch. 24, § 3 repealed 52-1-12 NMSA 1978, as enacted by Laws 1971, ch. 55, § 1, relating to compensation prohibited when worker under influence of certain drugs, effective May 18, 2016. For provisions of former section, *see* the 2015 NMSA 1978 on *NMOneSource.com*.

52-1-12.1. Reduction in compensation when alcohol or drugs contribute to injury or death; exceptions.

A. As used in this section, "intoxication" or "influence" means a temporary state or condition of impaired physical, mental or cognitive function by means of alcohol, a drug, a controlled substance or a combination of two or more substances at the time of injury or death. "Drug" or "controlled substance" pursuant to this section does not include medications prescribed to a worker by the worker's licensed health care provider and taken in accordance with directions of the prescribing health care provider or dispensing pharmacy, unless such medication is combined with alcohol or a non-prescribed drug or controlled substance to cause intoxication or influence.

B. Except as otherwise provided in this section, compensation benefits otherwise due and payable from an employer to the worker under the terms of the Workers' Compensation Act shall be reduced by the degree to which the intoxication or influence contributes to the worker's injury or death; provided that the reduction shall be a minimum of ten percent but no more than ninety percent.

C. Test results relied on as evidence of a worker's intoxication or influence shall not be considered in making a reduction in compensation determination unless the test and testing procedures conform with standard testing procedures generally accepted in the medical community and the test is performed by a laboratory certified to do the testing by an organization nationally recognized to do such certification. Testing may include testing methods for urine, breath or blood.

D. The director shall adopt rules regarding tests, testing and the cutoff levels for intoxication or influence.

E. If a post-accident test pursuant to Subsection C of this section is required of a worker and the worker refuses to submit to the test or to release the post-accident test results to the employer, no compensation otherwise payable from an employer under the terms of the Workers' Compensation Act shall be paid to the worker claiming compensation.

F. Testing shall be at the employer's expense and shall not be used as evidence in a criminal proceeding against the worker. Test samples shall be taken as a split sample. One part of the sample shall be held by the testing facility for twelve months from the date of the original test. Within this twelve-month period, the worker has the right to request a second test of the original sample at the worker's expense.

G. An employer shall be barred from claiming a reduction in compensation pursuant to this section if, before the accident, the employer has actual or constructive knowledge of the worker's intoxication or influence and a reasonable opportunity to take appropriate measures in response to the intoxication or influence but fails to take those measures.

H. An employer shall be barred from claiming a reduction in compensation pursuant to this section if the employer fails to implement a written policy that declares a drug- and alcohol-free workplace, which may include post-accident testing in accordance with this section, and that gives its employees notice that workers' compensation benefits may be reduced in the event intoxication or influence contributes to a workplace injury.

I. Reduction or denial of compensation benefits authorized under this section shall not affect payment of medical benefits provided for pursuant to Section 52-1-49 NMSA 1978.

J. Reduction or denial of compensation benefits authorized under this section shall not affect payments of benefits to the dependents of a deceased worker pursuant to Section 52-1-46 NMSA 1978.

History: 1978 Comp., § 52-1-12.1, enacted by Laws 2001, ch. 87, § 1; 2016, ch. 24, § 2.

ANNOTATIONS

The 2016 amendment, effective May 18, 2016, provided that workers' compensation benefits be reduced by the degree to which the influence of alcohol or drugs contributed to a worker's injury or death, and provided for exceptions; in the catchline, added "exceptions", deleted the former language of the section in its entirety and added new Subsections A through J.

Injury was not solely occasioned by worker's intoxication. — Section 52-1-12.1 NMSA 1978, not Section 52-1-11 NMSA 1978, is applicable where there is substantial evidence that supports a contributing cause to the worker's injury in addition to the worker's intoxication. *Villa v. City of Las Cruces*, 2010-NMCA-099, 148 N.M. 668, 241 P.3d 1108, cert. denied, 2010-NMCERT-009, 149 N.M. 49, 243 P.3d 753.

Where worker was intoxicated when worker started work and at the time of the accident; worker had been driving a garbage truck for at least an hour before the accident and did not hit anything; worker walked around on the top of the truck without difficulty; a co-

worker did not notice a problem with worker's demeanor; worker's supervisor and co-worker observed worker climb up on the truck without noticing anything amiss; and worker was standing on a narrow ledge of the truck attempting to attach a chain to a dumpster when worker slipped and fell, worker's intoxication was not the sole, but only a contributing, cause of the worker's injury and Section 52-1-12.1 NMSA 1978, not Section 52-1-11 NMSA 1978, applied. *Villa v. City of Las Cruces*, 2010-NMCA-099, 148 N.M. 668, 241 P.3d 1108, cert. denied, 2010-NMCERT-009, 149 N.M. 49, 243 P.3d 753.

Methamphetamine and amphetamine are included as stimulant drugs. — The legislature intended to include methamphetamine and amphetamine as stimulant drugs under Section 52-1-12.1 NMSA 1978 even though the legislature removed the definition of "depressant, stimulant or hallucinogenic" drugs in the 1972 amendment of Section 54-6-27 NMSA 1978 of the New Mexico Drug and Cosmetic Act. *Ortiz v. Overland Express*, 2010-NMSC-021, 148 N.M. 405, 237 P.3d 707, *rev'g* 2009-NMCA-041, 146 N.M. 170, 207 P.3d 1147.

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 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.

ANNOTATIONS

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*, 1988-NMCA-032, 107 N.M. 135, 753 P.2d 1323.

Law reviews. — For annual survey of New Mexico Workers' Compensation Law, see 20 N.M.L. Rev. 459 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 8, 16, 18.

99 C.J.S. Workmen's Compensation §§ 128, 129.

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

This act [Chapter 52, Article 1 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.

ANNOTATIONS

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*, 1929-NMSC-024, 34 N.M. 29, 276 P. 27.

Intrastate and interstate employees of bus lines. — Any of employees of Greyhound Lines engaged in strictly intrastate business should come under the Workmen's [Workers'] Compensation Act, and their interstate employees might well be affected by the law if there is no federal legislation including them. 1935 Op. Att'y Gen. No. 35-918.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 18, 38, 41 to 43.

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 [Workers'] 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, 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.

ANNOTATIONS

Cross references. — For employers who come within act, *see* 52-1-2 NMSA 1978.

For coverage by state agencies, *see* 52-1-3 NMSA 1978.

Release of one employer ineffective for second employer. — A worker may have two employers, both of whom are liable for workers' compensation benefits. Worker's claim was not barred against one employer because of the settlement agreement previously reached with another employer. *Johnson v. Aztec Well Servicing Co.*, 1994-NMCA-065, 117 N.M. 697, 875 P.2d 1128.

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.*, 1936-NMSC-023, 40 N.M. 183, 57 P.2d 283 (decided under former law).

It is not purpose of Workmen's [Workers'] 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 Section 52-1-2 NMSA 1978 and former 59-10-12 1953 Comp. *McWhorter v. Board of Educ.*, 1958-NMSC-015, 63 N.M. 421, 320 P.2d 1025 (decided under former law).

There is no express consent by state to be sued in workmen's [workers'] compensation proceeding involving the state penitentiary and the consent is not to rest on implication. *Day v. Penitentiary of N.M.*, 1954-NMSC-064, 58 N.M. 391, 271 P.2d 831 (decided under former law).

Compensation benefits are not based on physical injury itself but on the disability produced by the injury. *Lozano v. Archer*, 1962-NMSC-164, 71 N.M. 175, 376 P.2d 963 (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 [worker].

In order to be free from total disability, a workman [worker] must be physically able to do the work required of him in his regular employment. *Lucero v. Koontz*, 1962-NMSC-007, 69 N.M. 417, 367 P.2d 916 (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*, 1962-NMSC-164, 71 N.M. 175, 376 P.2d 963 (decided under former law).

Wage earning ability 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*, 1962-NMSC-164, 71 N.M. 175, 376 P.2d 963 (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 [worker] must be in a state of absolute helplessness, or unable to do work of any kind. It means the disablement of the workman [worker] 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*, 1962-NMSC-164, 71 N.M. 175, 376 P.2d 963 (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 [worker] 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*, 1962-NMSC-164, 71 N.M. 175, 376 P.2d 963 (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*, 1962-NMSC-164, 71 N.M. 175, 376 P.2d 963 (decided under former law).

When total disability exists. — Where employee sued under Workmen's [Workers'] 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., 1955-NMSC-034, 59 N.M. 262, 282 P.2d 1105 (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 [Workers'] Compensation Act. 1957 Op. Att'y Gen. No. 57-42 (opinion rendered 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 [Workers'] Compensation Act and must comply therewith. 1957 Op. Att'y Gen. No. 57-19 (opinion rendered under former law).

A college is under the provisions of the workmen's [workers'] compensation law. 1957 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 (rendered under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 116, 117, 138.

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, 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.

ANNOTATIONS

Cross references. — For work not casual employment, *see* 52-1-22 NMSA 1978.

I. GENERAL CONSIDERATION.

Basic purpose of the Workmen's [Workers'] 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*, 1976-NMCA-026, 89 N.M. 67, 547 P.2d 72.

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.*, 1962-NMSC-126, 70 N.M. 468, 374 P.2d 849 (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 [workers'] 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 Furniture Co.*, 1984-NMCA-090, 101 N.M. 785, 689 P.2d 934, cert. denied, 101 N.M. 686, 687 P.2d 743 and 102 N.M. 7, 690 P.2d 450.

Definition of "workman" [worker] 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 [Workers'] Compensation Act if the Act's statutory definition of a "workman" [worker] is not otherwise satisfied. *Trembath v. Riggs*, 1983-NMCA-152, 100 N.M. 615, 673 P.2d 1348, cert. denied, 101 N.M. 11, 677 P.2d 624, *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743.

The words "employer and employee" as used in the New Mexico Workmen's [Workers'] 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 Cnty. Comm'rs*, 1967-NMSC-056, 77 N.M. 543, 425 P.2d 308; *Dibble v. Garcia*, 1982-NMCA-040, 98 N.M. 21, 644 P.2d 535, cert. denied, 98 N.M. 50, 644 P.2d 1039.

Statutory definition of workman [worker] 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 [workers'] compensation. *Candelaria v. Board of Cnty. Comm'rs*, 1967-NMSC-037, 77 N.M. 458, 423 P.2d 982 (decided under former law).

Volunteer is not entitled to benefits of workmen's [workers'] compensation laws. *Jelso v. World Balloon Corp.*, 1981-NMCA-138, 97 N.M. 164, 637 P.2d 846.

Appellant must be employed by county in order to sue county under the Workmen's [Workers'] Compensation Act. *Perea v. Board of Torrance Cnty. Comm'rs*, 1967-NMSC-056, 77 N.M. 543, 425 P.2d 308.

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.*, 1969-NMSC-004, 79 N.M. 727, 449 P.2d 329.

It is for trier of facts to determine weight to be given to evidence and the credibility of witnesses. *Creley v. Western Constructors, Inc.*, 1969-NMSC-004, 79 N.M. 727, 449 P.2d 329.

Workmen's [Workers'] Compensation Act is based upon employer-employee relationship. *Perea v. Board of Torrance Cnty. Comm'rs*, 1967-NMSC-056, 77 N.M. 543, 425 P.2d 308.

Action against co-employee or person other than employer. — Prior to the 1971 amendment it was held that a co-employee was "a person other than the employer" against whom a negligence action for damages might be maintained. *Hockett v. Chapman*, 1961-NMSC-163, 69 N.M. 324, 366 P.2d 850.

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.*, 1959-NMSC-033, 65 N.M. 355, 337 P.2d 614 (decided under former law).

As working partner and, hence, occupying status of employer, plaintiff was not covered by the Workmen's [Workers'] Compensation Act of New Mexico. *Jernigan v. Clark & Day Exploration Co.*, 1959-NMSC-033, 65 N.M. 355, 337 P.2d 614 (decided under former law).

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.*, 1971-NMCA-079, 82 N.M. 650, 485 P.2d 984.

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.*, 1962-NMSC-126, 70 N.M. 468, 374 P.2d 849 (decided under former law).

II. EMPLOYMENT STATUS.

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 [Workers'] 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.*, 1971-NMCA-079, 82 N.M. 650, 485 P.2d 984.

Primary test to determine employment status is the right to control the details of the work. *Barger v. Ford Sales Co.*, 1976-NMCA-014, 89 N.M. 25, 546 P.2d 873, cert. denied, 89 N.M. 206, 549 P.2d 284.

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.*, 1981-NMCA-138, 97 N.M. 164, 637 P.2d 846.

The right to control is a test for determining an employer-employee relationship. *Dibble v. Garcia*, 1982-NMCA-040, 98 N.M. 21, 644 P.2d 535, cert. denied, 98 N.M. 50, 644 P.2d 1039.

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 Cnty. Comm'rs*, 1967-NMSC-056, 77 N.M. 543, 425 P.2d 308.

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*, 1982-NMCA-040, 98 N.M. 21, 644 P.2d 535, cert. denied, 98 N.M. 50, 644 P.2d 1039.

Professionals. — The control test is not helpful in determining the employment status of a professional, such as a doctor, lawyer, nurse, or accountant. A professional who gives full-time, exclusive services to a business should not be excluded from the definition of "employee" under the Workers' Compensation Act simply because no one in the business has the skills to oversee the details of the professional's work. *Whittenberg v. Graves Oil and Butane Co., Inc.*, 1991-NMCA-142, 113 N.M. 450, 827 P.2d 838, cert. denied, 113 N.M. 352, 826 P.2d 573 (1992).

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*, 1976-NMCA-026, 89 N.M. 67, 547 P.2d 72.

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 Cnty. Comm'rs*, 1967-NMSC-056, 77 N.M. 543, 425 P.2d 308.

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.*, 1976-NMCA-014, 89 N.M. 25, 546 P.2d 873, cert. denied, 89 N.M. 206, 549 P.2d 284.

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*, 1982-NMCA-040, 98 N.M. 21, 644 P.2d 535, cert. denied, 98 N.M. 50, 644 P.2d 1039.

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.*, 1981-NMCA-138, 97 N.M. 164, 637 P.2d 846.

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.*, 1981-NMCA-138, 97 N.M. 164, 637 P.2d 846.

"Relative nature of the work" test is another method for determining an employer-employee relationship. *Dibble v. Garcia*, 1982-NMCA-040, 98 N.M. 21, 644 P.2d 535, cert. denied, 98 N.M. 50, 644 P.2d 1039.

As to the factors which make up the "relative nature of the work" test, *see Dibble v. Garcia*, 1982-NMCA-040, 98 N.M. 21, 644 P.2d 535, cert. denied, 98 N.M. 50, 644 P.2d 1039.

Hope of future employment alone is insufficient evidence to show a contract for hire. *Jelso v. World Balloon Corp.*, 1981-NMCA-138, 97 N.M. 164, 637 P.2d 846.

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 [Workers'] Compensation Act. *Abbott v. Donathon*, 1974-NMCA-073, 86 N.M. 477, 525 P.2d 404.

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.*, 1954-NMSC-051, 58 N.M. 314, 270 P.2d 720 (decided under former law).

Principal factor to be considered in determining whether individual is employee or an independent contractor in workmen's [workers'] 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*, 1976-NMCA-026, 89 N.M. 67, 547 P.2d 72.

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.*, 1964-NMSC-091, 74 N.M. 174, 392 P.2d 9 (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 [workers'] compensation for death of loader's employee. *Nelson v. Eidal Trailer Co.*, 1954-NMSC-051, 58 N.M. 314, 270 P.2d 720 (decided under former law).

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. N.M. Military Inst.*, 1962-NMSC-066, 70 N.M. 158, 371 P.2d 995.

Messenger who delivered ballot boxes to county clerk was independent contractor, and the statutory definition of workman [worker] does not include an independent contractor. Messenger, therefore, was not an employee, and not entitled to workmen's [workers'] compensation. *Candelaria v. Board of Cnty. Comm'rs*, 1967-NMSC-037, 77 N.M. 458, 423 P.2d 982.

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 Cnty.*, 1942-NMSC-040, 46 N.M. 318, 128 P.2d 738.

Injured work-release program prisoner deemed "employee". — A prisoner who voluntarily participated in a work-release program and was injured while under the direction of a private business was an employee of that business and thus entitled to workers' compensation benefits. *Benavidez v. Sierra Blanca Motors*, 1995-NMCA-140, 120 N.M. 837, 907 P.2d 1018, *rev'd in part on other grounds*, 1996-NMSC-045, 122 N.M. 209, 922 P.2d 1205.

Claimant, an inmate in the custody of the New Mexico department of corrections, who was injured while participating in an inmate work-release program, qualified as an "employee" eligible for benefits from his employer under this article. *Benavidez v. Sierra Blanca Motors*, 1998-NMCA-070, 125 N.M. 235, 959 P.2d 569.

Inmate whose work-release assignment was comprised of six weeks of a regular, forty hour per week schedule was not a "purely casual" worker within the meaning of this section, and was not disqualified from workers' compensation benefits in the event of injury. *Benavidez v. Sierra Blanca Motors*, 1998-NMCA-070, 125 N.M. 235, 959 P.2d 569.

III. SPECIAL EMPLOYEE.

Controlling factor whether servant of employer can be special servant of another. — In the case of *Weese v. Stoddard*, 1956-NMSC-117, 63 N.M. 20, 312 P.2d 545, 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.*, 1963-NMSC-172, 73 N.M. 178, 386 P.2d 602 (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 [worker] 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.*, 1976-NMCA-014, 89 N.M. 25, 546 P.2d 873, cert. denied, 89 N.M. 206, 549 P.2d 284.

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.*, 1963-NMSC-172, 73 N.M. 178, 386 P.2d 602 (decided under former law).

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 [Workers'] Compensation Act. *Wuertz v. Howard*, 1966-NMSC-264, 77 N.M. 228, 421 P.2d 441.

Basis for determining whether one is special employee so that negligence action is barred by Workmen's [Workers'] 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*, 1966-NMSC-264, 77 N.M. 228, 421 P.2d 441.

Status of special employment is not dependent on the accident happening on the premises of the special employer. *Wuertz v. Howard*, 1966-NMSC-264, 77 N.M. 228, 421 P.2d 441.

Consent does not bar employee from becoming special employee of another. *Wuertz v. Howard*, 1966-NMSC-264, 77 N.M. 228, 421 P.2d 441.

Novice at a monastery was not a "worker" for purposes of workers' compensation. *Joyce v. Pecos Benedictine Monastery*, 1995-NMCA-054, 119 N.M. 764, 895 P.2d 286.

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.*, 1959-NMSC-007, 65 N.M. 323, 337 P.2d 394 (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*, 1974-NMCA-073, 86 N.M. 477, 525 P.2d 404.

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 Cnty. Comm'rs*, 1967-NMSC-056, 77 N.M. 543, 425 P.2d 308.

Deputy district court clerk not county employee. — In workmen's [workers'] 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 [Workers'] 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 Cnty. Comm'rs*, 1967-NMSC-056, 77 N.M. 543, 425 P.2d 308.

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 (rendered under former law).

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 [workers'] compensation coverage. Whether they are in fact covered by the workmen's [workers'] 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. 1960 Op. Att'y Gen. No. 60-239 (opinion rendered 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. — 82 Am. Jur. 2d Workers' Compensation § 116 et seq.

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.

Ownership interest in employer business as affecting status as employee for workers' compensation purposes, 78 A.L.R.4th 973.

Workers' compensation: compensability of injury during tryout, employment test, or similar activity designed to determine employability, 8 A.L.R.5th 798.

99 C.J.S. Workmen's Compensation §§ 59 to 119.

52-1-17. Dependents.

As used in the Workers' Compensation Act, 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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For definition of child, *see* 52-1-18 NMSA 1978.

Legislative intent of this section and Section 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 Cit*y, 1979-NMCA-066, 93 N.M. 75, 596 P.2d 518.

Relation of dependency simply means the character of the relationship that the family has to the deceased. *Shahan v. Beasley Hot Shot Serv., Inc.*, 1978-NMCA-014, 91 N.M. 462, 575 P.2d 1347, cert. denied, 91 N.M. 491, 576 P.2d 297.

"Legally entitled to support" means entitled to support according to law. *Kau v. Bennett*, 1977-NMCA-121, 91 N.M. 162, 571 P.2d 819.

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*, 1977-NMCA-121, 91 N.M. 162, 571 P.2d 819.

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*, 1980-NMSC-018, 94 N.M. 59, 607 P.2d 597.

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*, 1963-NMSC-215, 73 N.M. 371, 388 P.2d 382 (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*, 1941-NMSC-055, 45 N.M. 542, 119 P.2d 104 (decided under former law).

No reasonable expectation of support. — Where the deceased worker had not provided any support for the worker's children for the two year period after the worker was released from prison, the other parent and step-parent had provided all support for the children; and during a one day visit with the children, the worker promised to support the children, the children were not the worker's "dependants" under the Workers' Compensation Act because there was no reasonable probability that the worker's promise would be fulfilled. *Kosmicki v. Aspen Drilling Co.*, 1966-NMSC-081, 76 N.M. 234, 414 P.2d 214.

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.*, 1965-NMSC-030, 75 N.M. 60, 400 P.2d 476.

Legal liability to support. — Legal liability to support did not of itself prove dependency. *Merrill v. Penasco Lumber Co.*, 1922-NMSC-008, 27 N.M. 632, 204 P. 72 (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.*, 1936-NMSC-023, 40 N.M. 183, 57 P.2d 283 (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*, 1967-NMCA-002, 78 N.M. 27, 426 P.2d 789.

Existence of actual partial dependency is question of fact to be proved by the evidence. *Ferris v. Thomas Drilling Co.*, 1957-NMSC-029, 62 N.M. 283, 309 P.2d 225 (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.*, 1957-NMSC-029, 62 N.M. 283, 309 P.2d 225 (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*, 1963-NMSC-215, 73 N.M. 371, 388 P.2d 382 (decided under former law).

"Relative nature of the work" test is a better test than "right to control" test in determining whether workmen's [workers'] 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 [workers'] 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.*, 1976-NMCA-070, 89 N.M. 436, 553 P.2d 716, cert. denied, 90 N.M. 7, 558 P.2d 619.

Presumption of marriage. — In proceeding under Workmen's [Workers'] 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.*, 1928-NMSC-049, 33 N.M. 479, 270 P. 791 (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*, 1982-NMCA-045, 97 N.M. 665, 642 P.2d 1124.

Impermissible discrimination does not exist where natural children and stepchildren share equally in workmen's [workers'] compensation benefits. *Shahan v. Beasley Hot Shot Serv., Inc.*, 1978-NMCA-014, 91 N.M. 462, 575 P.2d 1347, cert. denied, 91 N.M. 491, 576 P.2d 297.

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.*, 1976-NMCA-095, 89 N.M. 579, 555 P.2d 700.

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.*, 1976-NMCA-095, 89 N.M. 579, 555 P.2d 700.

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.*, 1922-NMSC-008, 27 N.M. 632, 204 P. 72, superseded by statute, *Kau v. Bennett*, 1977-NMCA-121, 91 N.M. 162, 571 P.2d 819.

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*, 1941-NMSC-015, 45 N.M. 133, 112 P.2d 515 (decided under former law).

Widow's right to benefits ceases upon her remarriage under the Workmen's [Workers'] Compensation Act. *Sanchez v. Bernalillo Cnty.*, 1953-NMSC-038, 57 N.M. 217, 257 P.2d 909 (decided under former law).

Child of deceased workman [worker] under age of 18 years is actual dependent as a matter of law. Proof that the deceased workman [worker] left surviving a child under the age of 18 years sufficiently establishes its dependency; but the presumption of dependency is rebuttable. *Snarr v. Carroll*, 1958-NMSC-010, 63 N.M. 380, 320 P.2d 736 (decided under former law).

Dependency of older child. — After establishing that dependents were entitled to compensation, proof that deceased workman [worker] 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*, 1943-NMSC-051, 47 N.M. 440, 144 P.2d 156 (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*, 1984-NMCA-116, 102 N.M. 179, 692 P.2d 1328, cert. denied, 102 N.M. 225, 693 P.2d 591.

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*, 1967-NMCA-002, 78 N.M. 27, 426 P.2d 789.

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.*, 1924-NMSC-005, 29 N.M. 228, 222 P. 903 (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*, 1958-NMSC-010, 63 N.M. 380, 320 P.2d 736 (decided under former law).

Benefits never asked for child. — Where the child of the workman [worker] 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 [worker] are entitled to compensation if actually dependent upon the workman [worker]. *Snarr v. Carroll*, 1958-NMSC-010, 63 N.M. 380, 320 P.2d 736 (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.*, 1931-NMSC-046, 35 N.M. 591, 3 P.2d 1068 (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. — 82 Am. Jur. 2d Workers' Compensation §§ 51, 595, 607 to 609, 637, 682.

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, 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.

ANNOTATIONS

Cross references. — For meaning of dependents, *see* 52-1-17 NMSA 1978.

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 (worker's) wages not to exceed $18.00 per week. *Wilson v. Rowan Drilling Co.*, 1950-NMSC-046, 55 N.M. 81, 227 P.2d 365 (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.*, 1943-NMSC-010, 47 N.M. 100, 137 P.2d 312 (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 (Workers') Compensation Act. *Hahn v. Sorgen*, 1946-NMSC-015, 50 N.M. 83, 171 P.2d 308 (decided under former law).

Stepchildren and natural children treated equally. — 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*, 1982-NMCA-045, 97 N.M. 665, 642 P.2d 1124.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 190, 200, 207, 373, 682.

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, 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.

ANNOTATIONS

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.

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.

I. GENERAL CONSIDERATION.

Traveling employee exception. — A traveling employee is defined as an employee who is taken away from home by his or her employment and who of necessity must eat and sleep away from home in order to further the employer’s business and who may be considered to be in the continuous employment of the employer, day and night. *Begay v. Consumer Direct Personal Care*, 2015-NMCA-025, cert. denied, 2015-NMCERT-002.

Where worker’s employment involved providing personal care services, through medicaid, to her mentally disabled son, worker’s employment did not require her to be away from home as part of her employment, and work-related travel actually ran contrary to the individual plan of care which she developed for her son, which allowed for incidental travel, but specified that services should be provided in the patient’s residence; the traveling employee exception to the going and coming rule was inapplicable. *Begay v. Consumer Direct Personal Care*, 2015-NMCA-025, cert. denied, 2015-NMCERT-002.

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 (Workers') 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 Section 52-1-9 NMSA 1978 were present. *Wilson v. Rowan Drilling Co.*, 1950-NMSC-046, 55 N.M. 81, 227 P.2d 365 (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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65.

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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65.

Going to work where accident caused by negligent on-duty coworker. — Worker's compensation was the exclusive remedy for a worker who was injured on his way to work in a traffic accident that occurred half an hour before his shift began, two miles away from his employer's premises, as a direct result of an on-duty coworker's negligent driving of a vehicle owned by the common employer. *Espinosa v. Albuquerque Publ'g Co.*, 1997-NMCA-072, 123 N.M. 605, 943 P.2d 1058.

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 (workers') 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*, 1982-NMCA-098, 98 N.M. 302, 648 P.2d 341, cert. denied, 98 N.M. 336, 648 P.2d 794.

Assault upon employee. — A workman (worker) cannot file an independent common-law tort claim against an employer and is restricted to an action under the Workmen's (Workers') 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*, 1978-NMSC-057, 91 N.M. 788, 581 P.2d 1283.

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*, 1965-NMSC-045, 75 N.M. 371, 404 P.2d 853 (decided under former law).

Where workman (worker) 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 (Workers') Compensation Act and did not preclude a common-law action based on employer's negligence. *Olguin v. Thygesen*, 1943-NMSC-034, 47 N.M. 377, 143 P.2d 585 (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. Sch. Dist.*, 1949-NMSC-027, 53 N.M. 249, 205 P.2d 834 (decided under former law).

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.*, 1960-NMSC-056, 67 N.M. 230, 354 P.2d 526 (decided under former law).

Plaintiff's claim fell within the exclusive jurisdiction of the Workers' Compensation Act. — Where plaintiff was in a motor vehicle accident on her way to work, and where she and the other driver involved in the accident were both employees of Los Alamos National Security (LANS), and where the other driver was operating a vehicle owned by LANS, and where plaintiff filed a complaint in the district court alleging negligence by both the other driver and LANS, the district court did not err in granting defendants' motion for summary judgment, because plaintiff's claim arose in the course and scope of her employment by LANS, thus triggering the exclusivity provision of the Workers' Compensation Act (WCA). The WCA is therefore plaintiff's exclusive remedy

and the tort claims brought in the district court were barred. *Finn v. Tullock*, 2023-NMCA-002, *cert granted*.

II. ACCIDENTAL INJURY.

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.*, 1962-NMSC-136, 71 N.M. 11, 375 P.2d 327, *overruled on other grounds by Mascarenas v. Kennedy*, 1964-NMSC-179, 74 N.M. 665, 397 P.2d 312.

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.*, 1962-NMSC-136, 71 N.M. 11, 375 P.2d 327, *overruled on other grounds by Mascarenas v. Kennedy*, 1964-NMSC-179, 74 N.M. 665, 397 P.2d 312.

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.*, 1963-NMSC-012, 71 N.M. 294, 378 P.2d 119.

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.*, 1962-NMSC-136, 71 N.M. 11, 375 P.2d 327, *overruled on other grounds by Mascarenas v. Kennedy*, 1964-NMSC-179, 74 N.M. 665, 397 P.2d 312.

Intentional torts that are accidental. — When a co-worker commits an intentional tort against another worker, such an incident will be considered accidental and within the scope of the Workers' Compensation Act, where the employer did not intentionally or willfully engage in conduct leading to the incident resulting in the worker's injury or where the co-worker's intentional conduct cannot be imputed to the employer under an alter ego theory. *Griego v. Patriot Erectors, Inc.*, 2007-NMCA-080, 141 N.M. 844, 161 P.3d 889, cert. denied, 2007-NMCERT-004, 141 N.M. 569, 158 P.3d 459.

Intentional act of co-worker does not preclude recovery. — Where the worker's supervisor intentionally slugged the worker while the worker was complaining about the supervisor to their mutual construction superintendent, the worker's injury was accidental and the worker may recover worker's compensation benefits. *Griego v. Patriot Erectors, Inc.*, 2007-NMCA-080, 141 N.M. 844, 161 P.3d 889, cert. denied, 2007-NMCERT-004, 141 N.M. 569, 158 P.3d 459.

Non-participant in a workplace accident. — Where worker suffered an injury while on break at worker's workplace when a co-worker grabbed worker by the shoulders in the area of the worker's neck and lifted the worker off the ground; and the worker was a non-participating victim of the incident and the horseplay was one-sided on the part of the co-worker, the worker's injury was an accidental result of an incident that the worker neither expected nor designed and was compensable under the Workers' Compensation Act. *Esckelson v. Miners' Colfax Med. Ctr.*, 2014-NMCA-052.

Heart attack caused by employment is accidental injury within this article. *Segura v. Kaiser Steel Corp.*, 1984-NMCA-046, 102 N.M. 535, 697 P.2d 954, cert. quashed, 102 N.M. 412, 696 P.2d 1005 (1985).

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.*, 1985-NMCA-086, 103 N.M. 544, 710 P.2d 738, cert. quashed, 104 N.M. 632, 725 P.2d 832.

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*, 1981-NMCA-092, 96 N.M. 571, 632 P.2d 1209.

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*, 1956-NMSC-023, 61 N.M. 6, 293 P.2d 654 (decided under former law).

III. 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.*, 1981-NMCA-001, 95 N.M. 484, 623 P.2d 998, cert. denied, 95 N.M. 593, 624 P.2d 535, *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743.

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. *Sw. 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. *Sw. 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. *Sw. Portland Cement Co. v. Simpson*, 135 F.2d 584 (10th Cir. 1943).

Course of employment 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. *Sw. 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.*, 1950-NMSC-046, 55 N.M. 81, 227 P.2d 365.

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.*, 1968-NMSC-183, 79 N.M. 634, 447 P.2d 514.

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.*, 1969-NMCA-122, 81 N.M. 42, 462 P.2d 627.

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*, 1955-NMSC-080, 60 N.M. 87, 287 P.2d 615.

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.*, 1950-NMSC-046, 55 N.M. 81, 227 P.2d 365.

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 (Workers') Compensation Act. *Feldhut v. Latham*, 1955-NMSC-080, 60 N.M. 87, 287 P.2d 615.

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.*, 1962-NMSC-047, 70 N.M. 65, 370 P.2d 502.

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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65.

Injury is said to arise in course of employment. — 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*, 1944-NMSC-017, 48 N.M. 149, 146 P.2d 867 (decided under former law).

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*, 1982-NMCA-098, 98 N.M. 302, 648 P.2d 341, cert. denied, 98 N.M. 336, 648 P.2d 794.

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*, 1986-NMCA-113, 105 N.M. 125, 729 P.2d 1379.

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*, 1986-NMCA-113, 105 N.M. 125, 729 P.2d 1379.

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*, 1946-NMSC-046, 51 N.M. 386, 185 P.2d 508 (decided under former law).

IV. EMPLOYER'S PREMISES.

Employer's parking lot did not constitute premises. — Mere employee "use" of a parking lot is insufficient to consider the lot part of the employer's "premises." *Constantineau v. First Nat'l Bank*, 1991-NMCA-040, 112 N.M. 38, 810 P.2d 1258, cert. denied, 112 N.M. 21, 810 P.2d 1241.

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.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743.

Railroad crossing which was the sole means of ingress and egress to employer's plant constituted a part of employer's premises for purposes of recovery of benefits under the premises exception to the going and coming rule. *Garcia v. Mt. Taylor Millwork, Inc.*, 1989-NMCA-100, 111 N.M. 17, 801 P.2d 87, cert. denied, 110 N.M. 282, 795 P.2d 87.

V. GOING AND COMING RULE.

The traveling-employee exception to the going and coming rule. — Under the traveling-employee exception to the going and coming rule, an employee whose work entails travel away from the employer's premises is, in most circumstances, under continuous workers' compensation coverage from the time he leaves home until he returns. The exception applies during the entire time the employee is traveling, and therefore necessarily encompasses injuries incurred while the employee is not actually working, such as when the employee is engaged in leisure or recreational activities. One seeking compensation for an injury must still demonstrate that the injury arose out of and in the course of employment. The requirement is met if the traveling employee was injured while engaging in an activity that was both reasonable and foreseeable, and if that activity is not conducted in an unreasonable or unforeseeable manner. Finally, the activity must confer some benefit on the employer. *Armenta v. A.S. Horner, Inc.*, 2015-NMCA-092, cert. granted, 2015-NMCERT-008.

Where worker, on a work-related trip in Springer, New Mexico, had been allowed to drive employer's vehicle after work hours to pick up food and alcohol for an employees' dinner, but after dinner was told by his supervisor to drink moderately and to not leave the motel, worker, despite the warning, left the motel in employer's vehicle and headed to Raton to continue partying. Worker was killed in an accident just north of Springer. Worker's blood alcohol concentration was .23 at the time of his death. The accident did not arise out of and in the course of employment because worker's decision to take the vehicle for a ride could be considered foreseeable and reasonable conduct under the traveling-employee exception, but doing so under the significant influence of alcohol was not reasonable, and no benefit could have been conferred on employer by worker's drinking excessively and driving to Raton, where employer had no business interests. *Armenta v. A.S. Horner, Inc.*, 2015-NMCA-092, cert. granted, 2015-NMCERT-008.

Traveling employee exception not applicable. — Where oil field workers were killed or injured while traveling home after working hours and away from their drilling rig work site which was located 37 miles from their home town; the workers were sharing a ride in the private vehicle of one of the workers; the workers were paid an hourly wage beginning when they arrived at work and ending when the left; the workers were responsible for their own transportation to the rig site; and the workers were not paid for travel time or mileage, the workers were not traveling employees and compensation for their deaths or injuries was precluded by the going and coming rule. *Flores v. McKay Oil Corp.*, 2008-NMCA-123, 144 N.M. 782, 192 P.3d 777, cert. quashed, 2009-NMCERT-003, 146 N.M. 604, 213 P.3d 508.

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.*, 1950-NMSC-046, 55 N.M. 81, 227 P.2d 365.

Application of the going and coming rule was limited by the context. — Where plaintiff was employed by the department of public safety; plaintiff used a private bus service that provided transportation to the public to commute to work; the bus service picked passengers up at a department of transportation parking lot; while walking

through the parking lot to board the bus, plaintiff fell into an unlit hole that was not clearly marked, barricaded nor cordoned off; the department of transportation's obligations and duties as the owner and operator of the parking lot were separate and distinct from the department of public safety's status as plaintiff's employer; the department of transportation held itself open to the public and had a duty to make a reasonable inspection of the parking lot and warn visitors of any dangerous conditions; the parking lot was not provided exclusively for state employees; plaintiff's use of the parking lot was unrelated to plaintiff's duties with the department of public safety; and plaintiff's status as a department of public safety employee was separate and distinct from plaintiff's status as a commuter using public transportation, the Workers' Compensation Act did not apply to plaintiff's claim and did not preclude plaintiff's claim of premises negligence against the department of transportation. *Quintero v. N.M. Dep't of Transp.*, 2010-NMCA-081, 148 N.M. 903, 242 P.3d 470, cert. quashed, 2011-NMCERT-009, 269 P.3d 904.

Traveling employee exception. — Where workers, who were members of an oil well drilling crew that worked on the employer's mobile drilling rigs, were injured while traveling to a rig site; the employer moved its drilling rigs every seven to eight days to a new location after the drilling of a well was completed; drilling sites were located in rural areas where lodging was not available, making daily travel necessary; workers resided in the same municipality and traveled to different drilling sites without having to change their residences; the employer required the driller to have a full crew present at the drilling site at the beginning of the driller's shift; the driller transported the drilling crew to the rig site; the employer required its drillers to maintain a valid driver's license and automobile insurance and compensated its drillers for each mile traveled to the rig site; crew members were not compensated for travel time; and the employer did not dictate the route or the mode of transportation, the injuries suffered by workers arose out of and in the course of their employment because the travel was mutually beneficial to both workers and the employer and workers encountered special hazards unique to their employment while traveling. Rodriguez v. Permian Drilling Corp., 2011-NMSC-032, 150 N.M. 164, 258 P.3d 443.

One whose work not only requires him to travel, but for whom travel is an integral part of his employment, is within the scope of employment continuously while traveling. Therefore such an employee may be eligible for workers' compensation benefits as a traveling employee for injuries he sustains while away from home. *Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, 128 N.M. 601, 995 P.2d 1043.

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*, 1956-NMSC-023, 61 N.M. 6, 293 P.2d 654 (decided under former law).

In two cases consolidated on appeal, a truck driver who pulled a muscle while moving a piece of furniture in his motel room, and a truck driver who was killed when taking a walk while waiting for his truck to arrive had compensable claims under the traveling employee rule; there were no facts in either case suggesting a distinct deviation from the business purpose of the trip, and in both cases the activities leading to the injuries were reasonable and of some benefit to the employer. *Chavez v. ABF Freight Sys.*, 2001-NMCA-039, 130 N.M. 524, 27 P.3d 1011.

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.*, 1947-NMSC-030, 51 N.M. 172, 181 P.2d 166 (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.*, 1947-NMSC-030, 51 N.M. 172, 181 P.2d 166 (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*, 1983-NMCA-134, 102 N.M. 172, 692 P.2d 1321, cert. quashed, 102 N.M. 225, 693 P.2d 591 (1985).

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*, 1982-NMCA-186, 99 N.M. 374, 658 P.2d 449, cert. denied, 99 N.M. 358, 658 P.2d 433.

Worker's claim was barred by the going and coming rule. — Claimant, who was injured while walking from a city-owned parking facility to her employer's premises, did not suffer an accidental injury arising out of and in the course of her employment pursuant to the "going-and-coming rule", where her employer did not require its employees to use the parking facility and some employees in fact did use other parking facilities. *Constantineau v. First Nat'l Bank*, 1991-NMCA-040, 112 N.M. 38, 810 P.2d 1258, cert. denied, 112 N.M. 21, 810 P.2d 1241.

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.*, 1989-NMCA-083, 109 N.M. 138, 782 P.2d 391.

Requirement or custom estalbished by employer. — 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. *Cuellar v. American Employers' Ins. Co.*, 1932-NMSC-018, 36 N.M. 141, 9 P.2d 685 (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, 1979-NMSC-027, 92 N.M. 618, 593 P.2d 59.

Where employer is negligent dependents recover compensation. — Where a workman (worker) 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.*, 1932-NMSC-018, 36 N.M. 141, 9 P.2d 685 (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. N.M. State Hwy. Dep't*, 1950-NMSC-016, 54 N.M. 126, 215 P.2d 602 (decided under former law).

VI. SPECIAL ERRAND RULE.

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 (Workers') Compensation Act. *McKinney v. Dorlac*, 1944-NMSC-017, 48 N.M. 149, 146 P.2d 867 (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 (Workers') Compensation Act where the fatal injury in automobile accident took place after he resumed his journey. *McKinney v. Dorlac*, 1944-NMSC-017, 48 N.M. 149, 146 P.2d 867 (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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65.

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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65.

Special errand exception inapplicable. — Where worker’s employment involved providing personal care services, through medicaid, to her mentally disabled son, worker provided no evidence that a trip to perform laundry services in a neighboring city was required by her employer or was incident to her employer’s business, as opposed to being incident to her natural care-taking role; special errand exception to the going and coming rule was inapplicable. *Begay v. Consumer Direct Personal Care*, 2015-NMCA-025, cert. denied, 2015-NMCERT-002.

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.*, 1960-NMSC-013, 66 N.M. 404, 349 P.2d 123 (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*., 1977-NMCA-079, 90 N.M. 707, 568 P.2d 233.

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).

For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

For note, "Workers' Compensation Law – The Sexual Harassment Claim Quandry: Workers' Compensation as an Inadequate and Unavailable Remedy: Cox v. Chino Mines/Phelps Dodge," see 24 N.M.L. Rev. 565 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 246 to 250, 263 et seq.

Injury to employee crossing or walking along railroad tracks going to or from work, 50 A.L.R.2d 363.

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.

Workers' Compensation: Compensability of injuries incurred traveling to or from medical treatment of earlier compensable injury, 83 A.L.R.4th 110.

Workers' compensation: Law enforcement officer's recovery for injury sustained during exercise of physical recreation activities, 44 A.L.R.5th 569.

Right to workers' compensation for emotional distress or like injury suffered as result of sudden stimuli involving nonpersonnel action, 83 A.L.R.5th 103.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of sudden stimuli involving nonpersonnel action - compensability under particular circumstances, 84 A.L.R.5th 249.

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, 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. "average weekly wage" means the weekly wage earned by the worker at the time of the worker's injury, including overtime pay and gratuities but excluding all fringe or other employment benefits and bonuses. The term "average weekly wage" shall include the reasonable value of board, rent, housing or lodging received from the employer, which shall be fixed and determined from the facts in each particular case. The term "average weekly wage" shall include those gratuities reported to the federal internal revenue service by or for the worker for the purpose of filing federal income tax returns;

B. the average weekly wage shall be determined by computing the total wages paid to the worker during the twenty-six weeks immediately preceding the date of injury and dividing by twenty-six, provided that:

(1) if the worker worked less than twenty-six weeks in the employment in which the worker was injured, the average weekly wage shall be based upon the total wage earned by the worker in the employment in which the worker was injured, divided by the total number of weeks actually worked in that employment;

(2) if a worker sustains a compensable injury before completing his first work week, the average weekly wage shall be calculated as follows:

(a) if the contract was based on hours worked, by determining the number of hours for each week contracted for by the worker multiplied by the worker's hourly rate;

(b) if the contract was based on a weekly wage, by determining the weekly salary contracted for by the worker; or

(c) if the contract was based on a monthly salary, by multiplying the monthly salary by twelve and dividing that figure by fifty-two; and

(3) if the hourly rate of earnings of the worker cannot be ascertained, or if the pay has not been designated for the work required, the average weekly wage, for the purpose of calculating compensation, shall be taken to be the average weekly wage for similar services performed by other workers in like employment for the past twenty-six weeks;

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 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 in such other manner and by such other method as will be based upon the facts presented 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 worker was performing at the time of the injury. In any event, the weekly compensation allowed shall not exceed the maximum or 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; 1990 (2nd S.S.), ch. 2, § 6.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, rewrote Subsections A and B, deleted "not worked a sufficient length of time to enable his earnings to be fairly computed thereunder or has" following "has" in Subsection C, and substituted "or" for "nor" in the last sentence in Subsection D.

Seasonal employment. — Seasonal employment does not include activities which can be carried on essentially year round, even if the work may be occasionally interrupted by producers, market fluctuations, or other outside agents. Logging is not seasonal employment for purposes of the New Mexico Workers' Compensation Act. *Murillo v. Payroll Express*, 1995-NMCA-062, 120 N.M. 333, 901 P.2d 751.

Calculation of wage based on wage for one day of employment. — Where worker was injured on the first day of employment and was not expected to be employed for more than one day; worker was employed to drive a truck from Farmington to Santa Fe and back at the rate of fifty cents per mile; and the workers' compensation judge calculated that worker would have earned $210 had worker driven from Farmington to Santa Fe and back, it was reasonable for the judge to use the $210 figure to arrive at worker's average weekly wage. *Nelson v. Homier Distrib. Co., Inc.*, 2009-NMCA-125, 147 N.M. 318, 222 P.3d 690.

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.*, 1962-NMSC-127, 71 N.M. 113, 376 P.2d 176 (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*, 1973-NMCA-048, 85 N.M. 35, 508 P.2d 1332.

"Average weekly wage" means the money rate at which services are recompensed at the time of the accident. *Gilliland v. Hanging Tree, Inc.*, 1978-NMCA-061, 92 N.M. 23, 582 P.2d 400, cert. denied, 92 N.M. 180, 585 P.2d 324 (decided under prior law).

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. Schs.*, 1986-NMCA-115, 105 N.M. 297, 731 P.2d 1341, cert. denied, 105 N.M. 290, 731 P.2d 1334 (1987).

Computation of weekly wage. — Only claimant's real economic gain should be considered in computing the average weekly wage, as opposed to sheer gross amounts. In this regard, such portions of the combined payment which represent claimant's salary, if so denominated, would clearly be included as real economic gain. Subsection A excludes from wages costs such as materials and supplies. Other items such as group insurance and retirement benefits have also been found to be deductible. The rationale is that employers would be expected to bear these expenses and not pass them onto an employee. On the other hand, rent, lodging, and similar expenses constitute wages because a person has to spend those regardless. *Apodaca v. Payroll Express, Inc.*, 1993-NMCA-141, 116 N.M. 816, 867 P.2d 1198.

Identifying representative week. — The term "average weekly wage" indicates a legislative expectation the fact finder will identify a representative week. In identifying a representative week, the fact finder may adopt any method that fairly calculate the worker's usual earnings. *Griego v. Bag 'N Save Food Emporium*, 1989-NMCA-097, 109 N.M. 287, 784 P.2d 1030, cert. denied, 109 N.M. 262, 784 P.2d 1005.

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 Sw. Coal Co.*, 1937-NMSC-007, 41 N.M. 161, 66 P.2d 426 (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 (worker) 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.*, 1962-NMSC-127, 71 N.M. 113, 376 P.2d 176 (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*, 1987-NMSC-095, 106 N.M. 346, 742 P.2d 1051.

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*, 1985-NMSC-097, 103 N.M. 422, 708 P.2d 334.

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.*, 1962-NMSC-127, 71 N.M. 113, 376 P.2d 176 (decided under former law).

Prior earnings not sole basis of determining average weekly wage. — *Kendrick v. Gackle Drilling Co.*, 1962-NMSC-127, 71 N.M. 113, 376 P.2d 176, 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 (workers') 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*, 1964-NMSC-179, 74 N.M. 665, 397 P.2d 312 (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.*, 1978-NMCA-083, 92 N.M. 132, 584 P.2d 179, cert. denied, 92 N.M. 180, 585 P.2d 324.

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.*, 1978-NMCA-061, 92 N.M. 23, 582 P.2d 400, cert. denied, 92 N.M. 180, 585 P.2d 324.

Group insurance and retirement benefits not "wages". — State employee's group insurance and retirement benefits were not within the definition of "wages" in this section, where he was not entitled to receive money in place of the benefits. *Antillon v. N.M. State Hwy. Dep't*, 1991-NMCA-093, 113 N.M. 2, 820 P.2d 436.

Per diem for travel expenses not "wages". — State employee's per diem for travel expenses was not part of his "wages" for the purpose of calculating workers' compensation benefits where there was no showing that the per diem he received was in excess of his actual expenses and thus constituted a real economic gain rather than

reimbursement for actual expenses. *Antillon v. N.M. State Hwy. Dep't*, 1991-NMCA-093, 113 N.M. 2, 820 P.2d 436.

Seasonal employment and weekly wage. — Where worker, who was a school bus driver, injured worker's back and shoulder in October; worker's employment contract provided that worker was hired to drive a school bus for forty weeks between August and May with worker's pay distributed over fifty-two weeks; if worker had been hired to drive in June and July, the parties would have entered into a separate contract; and worker had received wages for the twenty-six weeks preceding worker's injury, the workers' compensation judge correctly calculated worker's average weekly wage, as provided in Subsection B of Section 52-1-20 NMSA 1978, by dividing the sum of the wages paid to worker from April to October by twenty-six. *Ruiz v. Los Lunas Pub. Sch.*, 2013-NMCA-085.

The judge must look to the seasonal aspect of the employment and reduce the average weekly wage accordingly. The ultimate wage would then be projected over the entire calendar year instead of only the weeks that the employee actually worked. *Apodaca v. Payroll Express, Inc.*, 1993-NMCA-141, 116 N.M. 816, 867 P.2d 1198.

Since the worker was employed temporarily on a seasonal basis, the evidence supported the judge's use of Subsection C to calculate her average weekly wage for the purpose of the number of weeks, but not for purpose of the hourly rate. *Villanueva v. Sunday Sch. Bd. of S. Baptist Convention*, 1995-NMCA-135, 121 N.M. 98, 908 P.2d 791.

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.*, 1962-NMSC-127, 71 N.M. 113, 376 P.2d 176 (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.*, 1962-NMSC-127, 71 N.M. 113, 376 P.2d 176 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*, 1964-NMSC-179, 74 N.M. 665, 397 P.2d 312 (decided under former law).

Determining average weekly wage from multiple jobs. — Subsection C of Section 52-1-20 NMSA 1978 is designed to permit the fair computation of average weekly wages in multiple employment cases, primarily by any means provided in the statute, or secondarily, by any other means that might be needed and fairly employed to effectuate the purpose of Section 52-1-20 NMSA 1978. If the methods of Subsection B can fairly

produce an aggregate average for concurrent employment situations, Subsection C does not authorize a departure, and Subsection B will be used to calculate an average weekly wage from each employment that will then be used to calculate an aggregate average. Paragraph 1 of Subsection B should be employed using the entire time of employment if the period is fewer than twenty-six weeks for any concurrent employer. Subsection B should be applied separately to each job, not limited to the shortest job, with an aggregate average weekly wage for all concurrent employers being computed. *Vinyard v. Palo Alto, Inc.*, 2013-NMCA-001, 293 P.3d 191.

Where the worker concurrently held one job as a delivery driver for 9.429 weeks before the worker was injured and another job as a horse trainer for fourteen weeks, the workers' compensation judge should have applied Paragraph (1) of Subsection B of Section 52-1-20 NMSA 1978 and calculated the average weekly wage by dividing wages from the delivery driver employment by 9.428 and wages from the concurrent horse training employment by fourteen weeks. *Vinyard v. Palo Alto, Inc.*, 2013-NMCA-001, 293 P.3d 191.

Earnings from multiple jobs considered. — Subsection B does not apply to situations in which a worker is employed at more than one job. The applicable statutory provision in multiple-job situations is Subsection C. Under Subsection C, the earnings from multiple jobs should be considered in determining a worker's average weekly wage if the worker's injury prevents her from performing all of her jobs. *Shaw v. Wal-Mart Stores, Inc.*, 1994-NMCA-016, 117 N.M. 118, 869 P.2d 306, cert. denied, 117 N.M. 215, 870 P.2d 753.

Reliance on other evidence to determine "usual earnings". — If there is no evidence of a worker in a position similar to claimant's, the hearing officer may rely on other evidence to determine "the usual earnings." He may, for example, be able to determine what claimant herself would have earned under normal circumstances. *Griego v. Bag 'N Save Food Emporium*, 1989-NMCA-097, 109 N.M. 287, 784 P.2d 1030, cert. denied, 109 N.M. 262, 784 P.2d 1005 (1990).

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.*, 1962-NMSC-127, 71 N.M. 113, 376 P.2d 176 (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.*, 1934-NMSC-023, 38 N.M. 254, 31 P.2d 263 (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*, 1943-NMSC-031, 47 N.M. 260, 141 P.2d 321 (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*, 1973-NMCA-048, 85 N.M. 35, 508 P.2d 1332.

When Subsection B is controlling. — Subsection B offers the usual rule for computation of average weekly wage using the claimant's own monthly, weekly, daily, or hourly wage. Where wages can be calculated by the precise methods outlined in Subsection B to fairly compute the worker's average weekly salary, Subsection B controls. *Griego v. Bag 'N Save Food Emporium*, 1989-NMCA-097, 109 N.M. 287, 784 P.2d 1030, cert. denied, 109 N.M. 262, 784 P.2d 1005 (1990).

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.*, 1985-NMSC-002, 102 N.M. 217, 693 P.2d 583.

"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.*, 1983-NMCA-097, 102 N.M. 344, 695 P.2d 494, *rev'd on other grounds*, 1985-NMSC-002, 102 N.M. 217, 693 P.2d 583.

Insufficient proof for determination under Subsection D. — If employer fails to prove sufficient facts to support a determination under Subsection D, the hearing officer must make a determination under Subsection B or Subsection C. *Griego v. Bag 'N Save Food Emporium*, 1989-NMCA-097, 109 N.M. 287, 784 P.2d 1030.

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*, 1959-NMSC-071, 66 N.M. 162, 344 P.2d 173 (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 (Workers') 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.*, 1980-NMCA-109, 94 N.M. 723, 616 P.2d 436.

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

For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 418, 419.

Workers' compensation: Tips or gratuities as factor in determining amount of compensation, 16 A.L.R.5th 191.

99 C.J.S. Workmen's Compensation §§ 292 to 294; 100 C.J.S. Workmen's Compensation § 568.

52-1-21. Repealed.

ANNOTATIONS

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.

52-1-22. Work not casual employment.

As used in the Workers' Compensation Act, 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.

ANNOTATIONS

Special employer and statutory employer distinguished. — The special employer doctrine applies to situations where an employee of one employer, the general employer, works temporarily for another employer, the special employer and typically arises where a labor contractor or a labor service provides temporary workers to other employers. The statutory employer doctrine applies to situations where an employer must procure work to be done by a contractor other than an independent contractor and

the work must be a part of the trade or business of the employer and typically arises where an employer procures work to be done for him by a contractor. The conclusion that the statutory test is not met does not foreclose the court from considering whether the special employer test is applicable. *Hamberg v. Sandia Corp.*, 2007-NMCA-078, 142 N.M. 72, 162 P.3d 909, *aff'd*, 2008-NMSC-015, 143 N.M. 601, 179 P.3d 1209.

Analysis of special employer and statutory employer distinction. — Cases involving statutory employers must be analyzed in terms of the dual test of Section 52-1-22 NMSA 1978 from the perspective of the relationship between the contracting employer and the employer of the worker as well as from the perspective of the type of work being done. When analyzing the relationship between the contracting employer and the worker, the issue will generally not be whether the contracting employer is a statutory employer, but rather whether the contracting employer is a special employer, borrowing employer, or regular employer. *Rivera v. Sagebrush Sales, Inc.*, 1994-NMCA-119, 118 N.M. 676, 884 P.2d 832, cert. denied, 118 N.M. 585, 883 P.2d 1282.

Purpose of section. — The primary purpose of the statutory-employer provision is to make the general or prime contractor liable for compensation benefits to employees of its subcontractor; the second function is to allow a general or prime contractor who qualifies as a statutory employer to take refuge under the Workers' Compensation Act's exclusivity provision, which makes it immune from a tort action. *Romero v. Shumate Constructors*, 1994-NMCA-137, 119 N.M. 58, 888 P.2d 940, *rev'd in part on other grounds sub nom. Harger v. Structural Servs.*, 1996-NMSC-018, 121 N.M. 657, 916 P.2d 1324.

The purpose of the provision on casual employment is to make clear that, once the two key requirements of statutory employment are met, i.e., that (1) the subcontractor in question is not an independent contractor and (2) the subcontractor's work is "part or process in the trade or business or undertaking" of the general contractor, such work will not be deemed casual employment as to the general contractor. *Romero v. Shumate Constructors*, 1994-NMCA-137, 119 N.M. 58, 888 P.2d 940, *rev'd in part on other grounds sub nom. Harger v. Structural Servs.*, 1996-NMSC-018, 121 N.M. 657, 916 P.2d 1324.

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 (Workers') 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.*, 1971-NMCA-079, 82 N.M. 650, 485 P.2d 984.

Qualification as statutory employer. — To qualify as a statutory employer under this section, a contractor must meet two express conditions. First, the general contractor must procure work, wholly or in part, to be done by a contractor other than an independent contractor. Second, the work to be done must be a part or process in the trade, business, or undertaking of the general contractor. *Quintana v. University of Cal.*,

1991-NMCA-016, 111 N.M. 679, 808 P.2d 964, cert. denied, 111 N.M. 678, 808 P.2d 963.

In enacting this section, the legislature expressed its intent to afford immunity under the Workers' Compensation Act to statutory employers. Meeting the statute's requirements, however, is a prerequisite to being considered a statutory employer. *Quintana v. University of Cal.*, 1991-NMCA-016, 111 N.M. 679, 808 P.2d 964, cert. denied, 111 N.M. 678, 808 P.2d 963.

It is the relationship between the general contractor and the employer of the claimant that is dispositive of whether the general contractor is a statutory employer, not the relationship between the general contractor and the claimant. *Romero v. Shumate Constructors*, 1994-NMCA-137, 119 N.M. 58, 888 P.2d 940, *rev'd in part on other grounds sub nom. Harger v. Structural Servs.*, 1996-NMSC-018, 121 N.M. 657, 916 P.2d 1324.

Casual employment ordinarily deals with the relationship between the claimant's alleged immediate employer and the claimant. *Romero v. Shumate Constructors, Inc.*, 1994-NMCA-137, 119 N.M. 58, 888 P.2d 940, *rev'd in part on other grounds sub nom. Harger v. Structural Servs.*, 1996-NMSC-018, 121 N.M. 657, 916 P.2d 1324.

A general contractor seeking to qualify as an employer of a subcontractor's employees under this section, and thus qualify for immunity from tort, must show that the subcontractor is not an independent contractor and that the work so procured to be done is a part or process in the trade or business or undertaking of the general contractor; a general contractor seeking immunity as an employer under this section may not rely solely on the fact that it has provided workers' compensation coverage to its subcontractor's employees by paying the cost of that coverage. *Chavez v. Sundt Corp.*, 1996-NMSC-046, 122 N.M. 78, 920 P.2d 1032.

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*, 1974-NMCA-073, 86 N.M. 477, 525 P.2d 404.

New Mexico is unique in having added the words "or undertaking" to the commonly used phrase "part of the trade or business"; even if a given kind of work is not "part or process of the trade or business" of the contractor, it meets the second requirement of this section if it is part of the contractor's "undertaking." *Romero v. Shumate Constructors, Inc.*, 1994-NMCA-137, 119 N.M. 58, 888 P.2d 940, *rev'd in part on other grounds sub nom. Harger v. Structural Servs.*, 1996-NMSC-018, 121 N.M. 657, 916 P.2d 1324.

Test for independent contractor. — In keeping with the purpose of the Workers' Compensation Act and the particular purpose of the statutory-employer provision, both the right-to-control test and the relative-nature test must point to independence before a

contractor will be deemed an independent contractor. *Romero v. Shumate Constructors, Inc.*, 1994-NMCA-137, 119 N.M. 58, 888 P.2d 940, *rev'd in part on other grounds sub nom. Harger v. Structural Servs.*, 1996-NMSC-018, 121 N.M. 657, 916 P.2d 1324.

The term "independent contractor" in this section should be construed as a common law term; in determining whether a person is or is not an independent contractor, the principal consideration is the right to control. It is the character of the control that is the distinction between employees and independent contractors; the employer may control the result the independent contractor achieves, but when the control descends to the details or to the means and methods of performance, then the independent contractor becomes a servant or employee. *Harger v. Structural Servs., Inc.*, 1996-NMSC-018, 121 N.M. 657, 916 P.2d 1324.

"Relative nature of work" test is a better test than "right to control" test in determining whether workmen's (workers') 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 (workers') 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.*, 1976-NMCA-070, 89 N.M. 436, 553 P.2d 716, cert. denied, 90 N.M. 7, 558 P.2d 619.

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*, 1959-NMSC-071, 66 N.M. 162, 344 P.2d 173 (decided under former law).

Trade or business not separate concepts. — In considering whether a workman (worker) 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*, 1974-NMCA-073, 86 N.M. 477, 525 P.2d 404.

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 Section 52-1-16 NMSA 1978. *Abbott v. Donathon*, 1974-NMCA-073, 86 N.M. 477, 525 P.2d 404.

Injured work-release program prisoner deemed "employee". — A prisoner who voluntarily participated in a work-release program and was injured while under the

direction of a private business was an employee of that business and thus entitled to workers' compensation benefits. *Benavidez v. Sierra Blanca Motors*, 1995-NMCA-140, 120 N.M. 837, 907 P.2d 1018, *rev'd in part on other grounds*, 1996-NMSC-045, 122 N.M. 209, 922 P.2d 1205.

Applicability of exclusive remedy provisions. — An employer responsible for paying workers' compensation benefits under this section may claim the immunity conferred by the exclusive remedy provisions of Sections 52-1-6, 52-1-8 and 52-1-9 NMSA 1978, provided the employer has complied with the insurance provisions; if an employer has failed to comply with the insurance provisions, the injured employee may sue under this chapter or, in the alternative, sue in tort. *Harger v. Structural Servs., Inc.*, 1996-NMSC-018, 121 N.M. 657, 916 P.2d 1324.

Law reviews. — For note, "Trends in New Mexico Law: 1994-95: Workers' Compensation Law – New Mexico Clarifies the Meaning of a Special Employer as Distinct from a Statutory Employer: Rivera v. Sagebrush Sales, Inc.," see 26 N.M. L. Rev. 655 (1996).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 121 to 125, 133, 207.

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, 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.

ANNOTATIONS

In determining workman's (worker'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*, 1959-NMSC-071, 66 N.M. 162, 344 P.2d 173 (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.*, 1964-NMSC-091, 74 N.M. 174, 392 P.2d 9 (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*, 1965-NMSC-026, 75 N.M. 39, 400 P.2d 215.

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*, 1965-NMSC-026, 75 N.M. 39, 400 P.2d 215.

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*, 1965-NMSC-026, 75 N.M. 39, 400 P.2d 215.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 71, 121 to 125, 133, 167, 207, 490.

99 C.J.S. Workmen's Compensation §§ 69, 70, 90 to 111.

52-1-24. Impairment; definition.

As used in the Workers' Compensation Act:

A. "impairment" means an anatomical or functional abnormality existing after the date of maximum medical improvement as determined by a medically or scientifically demonstrable finding and based upon the most recent edition of the American medical association's guide to the evaluation of permanent impairment or comparable publications of the American medical association. 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; 1990 (2nd S.S.), ch. 2, § 7.

ANNOTATIONS

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 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.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, added the first sentence in Subsection A.

Constitutionality. — The limitations on proof of primary mental impairment in Subsection B are not arbitrary and unreasonable, but are rationally related to a legitimate legislative purpose. Therefore, the statute is constitutional. *Holford v. Regents of Univ. of Cal.*, 1990-NMCA-066, 110 N.M. 366, 796 P.2d 259, cert. denied, 110 N.M. 330, 795 P.2d 1022.

The provision requiring use of the American medical association's guide to evaluate impairment in Subsection A does not represent an unconstitutional delegation of legislative authority to a nongovernmental entity; additionally, the provision does not violate due process or equal protection rights. *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, 122 N.M. 524, 928 P.2d 250.

Equal protection. – The statute does not violate equal protection even though it makes a classification based on mental disability and imposes a proof requirement on workers with mental disabilities that is not imposed on workers with physical disabilities. *Romero v. City of Santa Fe*, 2006-NMCA-055, 139 N.M. 440, 134 P.3d 131.

Medical evidence of impairment rating was not controverted. — Where worker suffered an injury while on break at worker’s workplace when a co-worker grabbed worker by the shoulders in the area of the worker’s neck and lifted the worker off the ground; the doctor who performed an independent medical examination on the worker testified that the worker had a pre-existing, but asymptomatic spinal condition, spinal stenosis, that became symptomatic upon being lifted off the ground and a central nervous system condition, myelopathy, that resulted from the accident and that surgery was required to prevent worsening of significant symptoms; the doctor assigned the

worker a combined whole person impairment rating of twenty-six percent based on eight percent impairment from the spinal stenosis and the results of a cervical fusion and twenty percent from myelopathy; and the doctor's testimony was uncontradicted, the workers' compensation judge's finding of twenty-six percent whole-body impairment for the worker was supported by substantial evidence. *Esckelson v. Miners' Colfax Med. Ctr.*, 2014-NMCA-052.

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.*, 1962-NMSC-063, 70 N.M. 131, 371 P.2d 605.

Worker's knowledge of impairment for purposes of statute of limitations. — The fact that a worker is restricted to proving his claim by the testimony of a health care provider agreed upon by the parties or approved by the workers' compensation judge, and that the provider is directed to use American medical association publications in establishing the degree of disability, does not limit the running of the statute of limitations to only those situations when a health care provider has actually informed the worker that he has sustained a permanent impairment; thus, resolution of when a worker was deemed to have sustained impairment for purposes of running of the limitations period constituted a factual issue unsuitable for resolution by summary judgment. *Montoya v. Kirk-Mayer, Inc.*, 1995-NMCA-104, 120 N.M. 550, 903 P.2d 861.

Capacity to perform work. — The primary test of disability is capacity to perform work. The word "capacity" connotes qualities inherent in the individual. "Capacity to perform work" is the product of the individual's physical and mental power and dexterity, as augmented by education, training, and experience. *Barnett & Casbarian, Inc. v. Ortiz*, 1992-NMCA-071, 114 N.M. 322, 838 P.2d 476.

Whether an individual's skills constitute a capacity to perform work depends upon what work is being performed by members of society; thus, in measuring one's capacity to work, it is necessary to look at the job market. *Barnett & Casbarian, Inc. v. Ortiz*, 1992-NMCA-071, 114 N.M. 322, 838 P.2d 476.

Proof of impairment not essential. — Proof of an impairment, as defined in Subsection A, is not essential for recovery under 52-1-43 NMSA 1978. *Lucero v. Smith's Food & Drug Ctrs.*, 1994-NMCA-076, 118 N.M. 35, 878 P.2d 353, cert. denied, 118 N.M. 90, 879 P.2d 91.

"Job market" defined. — The job market by which disability is to be measured should be the general market in which workers are being employed. *Barnett & Casbarian, Inc. v. Ortiz*, 1992-NMCA-071, 114 N.M. 322, 838 P.2d 476.

Assignment of rating by workers' compensation judge. — Even though only one doctor testified on the issue of the worker's physical impairment, since there was evidence that cast doubt on the worker's reports of pain to the doctor, the worker's compensation judge was entitled to discount the doctor's establishment of a 5% impairment rating and to find that the worker had no physical impairment. *Peterson v. N. Home Care*, 1996-NMCA-030, 121 N.M. 439, 912 P.2d 831.

Workers' compensation judge should not have assigned an impairment rating where there was no testimony on impairment from a pulmonologist and where the worker had asthma and bronchopulmonary aspergillosis prior to her chemical exposure. *Yeager v. St. Vincent Hosp.*, 1999-NMCA-020, 126 N.M. 598, 973 P.2d 850, cert. denied, 127 N.M. 391, 981 P.2d 1209.

Specific findings required. — Although worker's compensation judge has discretion to reduce or suspend benefits, the judge is required to make findings as to impairment and, if applicable, injurious practices by claimant, and failure to do so warrants a remand with instructions to make specific findings thereon. *Chavarria v. Basin Moving & Storage*, 1999-NMCA-032, 127 N.M. 67, 976 P.2d 1019.

"Primary mental impairment". — Subsection B reflects a legislative intent to limit primary impairment to sudden, emotion-provoking events of a catastrophic nature, as opposed to gradual, progressive stress-producing causes. *Jensen v. N.M. State Police*, 1990-NMCA-007, 109 N.M. 626, 788 P.2d 382, cert. denied, 109 N.M. 563, 787 P.2d 1246.

In order for there to be a primary mental impairment, first there must be a "psychologically traumatic event." That is the threshold criterion. Additionally, the psychologically traumatic event must be one that is generally outside the worker's usual experience and one that would evoke significant symptoms of distress in a worker in similar circumstances. *Jensen v. N.M. State Police*, 1990-NMCA-007, 109 N.M. 626, 788 P.2d 382, cert. denied, 109 N.M. 563, 787 P.2d 1246.

Under Subsection B, in order for there to be a primary mental impairment, there first must be a psychologically traumatic event. *Holford v. Regents of Univ. of Cal.*, 1990-NMCA-066, 110 N.M. 366, 796 P.2d 259, cert. denied, 110 N.M. 330, 795 P.2d 1022.

Claimant, who alleged that as a result of job harassment, which caused work stress, her husband shot himself in the head, could not recover compensation where no psychologically traumatic event had been alleged. *Holford v. Regents of Univ. of Cal.*, 1990-NMCA-066, 110 N.M. 366, 796 P.2d 259, cert. denied, 110 N.M. 330, 795 P.2d 1022.

To determine whether the worker seeking benefits suffered "a psychologically traumatic event that is generally outside of a worker's usual experience," a comparison must be made between that worker's psychologically traumatic event and the usual experiences generally encountered by workers in the same or similar jobs as the worker seeking

benefits, regardless of whether they work for the same employer. *Collado v. City of Albuquerque*, 1995-NMCA-117, 120 N.M. 608, 904 P.2d 57.

It was not the intent of the legislature to exclude any occupational group from seeking compensation under Subsection B; thus, it was error for the court to construe the subsection to exclude any emergency-type workers, such as paramedics, from compensation for primary mental impairment. *Collado v. City of Albuquerque*, 1995-NMCA-117, 120 N.M. 608, 904 P.2d 57.

A claim of primary mental impairment requires that 1) the worker must establish a work-related accident; 2) the accident must be a traumatic event; and 3) the traumatic event must cause a mental injury that involves no physical injury. *Chavez v. Mountain States Constructors*, 1996-NMSC-070, 122 N.M. 579, 929 P.2d 971.

Primary mental impairment is a mental disability that satisfies all of the criteria of Subsection B and occurs as a result of a traumatic event, regardless of the presence of any physical injury; thus, the fact that a claimant received personal injuries in an accident did not bar him from compensation for primary mental impairment, since the mental impairment was not caused by the injuries. *Chavez v. Mountain States Constructors*, 1996-NMSC-070, 122 N.M. 579, 929 P.2d 971.

Secondary mental impairment. — A worker is not required to have a current physical impairment in order to have a secondary mental impairment; thus, when a worker was paid total temporary disability benefits for 89 weeks, after which a judge found she no longer had any physical impairment, she was entitled to benefits for secondary mental impairment for 11 weeks under Section 52-1-42B NMSA 1978. *Peterson v. N. Home Care*, 1996-NMCA-030, 121 N.M. 439, 912 P.2d 831.

Traumatic event. — A worker driving a loaded dump truck suffered a traumatic event "outside of a worker's usual experience" when the truck's brakes failed on a downgrade, and the accident was one which "would evoke significant symptoms of distress in a worker in similar circumstances." *Chavez v. Mountain States Constructors*, 1996-NMSC-070, 122 N.M. 579, 929 P.2d 971.

Uncontroverted medical evidence rule applies to issues of causation and the question whether a worker experienced a traumatic event is not a causation issue. The term "traumatic event" is a term of art within the meaning of the statute and a question of law that is not subject to conclusive proof by expert testimony. *Romero v. City of Santa Fe*, 2006-NMCA-055, 139 N.M. 440, 134 P.3d 131.

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*, 1968-NMSC-073, 79 N.M. 99, 440 P.2d 291.

Alleged stress of understaffing in a state police radio dispatchers' office did not meet the definition of a "psychologically traumatic event", and a dispatcher was therefore not entitled to compensation. *Jensen v. N.M. State Police*, 1990-NMCA-007, 109 N.M. 626, 788 P.2d 382, cert. denied, 109 N.M. 563, 787 P.2d 1246.

Work-related, stress-caused neurochemical depression is a "mental impairment", not a "physical impairment", and does not constitute a compensable "primary mental impairment" under Subsection B because no single psychologically traumatic event triggers such an injury. Examination of the provisions of this section, and the Workers' Compensation Act as a whole, indicates the legislature's intent to make gradual, stress-caused mental injuries noncompensable. *Douglass v. State, Regulation & Licensing Dep't*, 1991-NMCA-041, 112 N.M. 183, 812 P.2d 1331, cert. denied, 112 N.M. 77, 811 P.2d 575.

Illness caused by ongoing stress. — Where worker, who worked as a swimming pool manager, was required to remove pigeon feces, carcasses and feathers, which created foul odors, from pool, areas surrounding the pool and the roof of the pool and experienced nausea and mild headaches after dealing with pigeon matter, worker did not suffer psychologically traumatic event. *Romero v. City of Santa Fe*, 2006-NMCA-055, 139 N.M. 440, 134 P.3d 131.

Liability for mental injury. — Whenever physical injury from a work-related accident is accompanied by mental injury arising out of the same accident, the worker's sole remedy is workers' compensation, whether or not the particular injury may be compensated by a monetary award under the act. *Maestas v. El Paso Natural Gas Co.*, 1990-NMCA-092, 110 N.M. 609, 798 P.2d 210, cert. denied, 110 N.M. 653, 798 P.2d 1039.

Injury not work-related. — Anonymous bomb threats made by a co-employee to a worker's employer, demanding that either the worker be fired or the school where the worker was employed would be bombed, did not provide a legal basis for recovery under this section for alleged psychological injury because the incident arose out of personal animosity by the co-employee toward the worker involving matters unrelated to her employment. *Bader-Rondeau v. Truth or Consequences Mun. Sch.*, 1991-NMCA-150, 113 N.M. 218, 824 P.2d 358.

Psychological disability incurred outside provisions of this section. — Since a workers' compensation judge determined that the worker suffered a work related mental disability, but that the disability was not compensable since it fell outside the definition of primary mental impairment, the exclusive remedy provision of the Workers' Compensation Act did not bar the worker's prima facie tort claim against her employer and supervisor. *Beavers v. Johnson Controls World Servs., Inc.*, 1995-NMCA-070, 120 N.M. 343, 901 P.2d 761, cert. denied, 120 N.M. 68, 898 P.2d 120.

Effect on Section 52-1-49 NMSA 1978. — In order for medical benefits to be payable as a result of an "injury" sustained by the worker within the contemplation of Section 52-

1-49 NMSA 1978, the injury must be of such nature that any "impairment" which may result therefrom would be compensable under this section. *Douglass v. State, Regulation & Licensing Dep't*, 1991-NMCA-041, 112 N.M. 183, 812 P.2d 1331, cert. denied, 112 N.M. 77, 811 P.2d 575.

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).

For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Workmen's Compensation §§ 301, 302.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of nonsudden stimuli - Right to compensation under particular statutory provisions, 97 A.L.R.5th 1.

99 C.J.S. Workmen's Compensation § 201.

52-1-24.1. Date of maximum medical improvement.

As used in the Workers' Compensation Act, "date of maximum medical improvement" means the date after which further recovery from or lasting improvement to an injury can no longer be reasonably anticipated based upon reasonable medical probability as determined by a health care provider defined in Subsection C, E or G of Section 52-4-1 NMSA 1978.

History: 1978 Comp., § 52-1-24.1, enacted by Laws 1990 (2nd S.S.), ch. 2, § 8.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 8 effective January 1, 1991.

Further medical treatment. — The fact that worker would need future medical care for his continuing disability was not inconsistent with a determination that he had achieved his physical maximum medical improvement (MMI). *Smith v. Cutler Repaving*, 1999-NMCA-030, 126 N.M. 725, 974 P.2d 1182, cert. denied, 126 N.M. 532, 972 P.2d 351.

Upon refusing surgery, maximum medical improvement reached. — A doctor's report indicating that, in the absence of surgery, a worker had reached maximum medical improvement (MMI), provided a sufficient basis for a worker's compensation judge's conclusion that the worker had reached MMI as of that date. That conclusion was not affected by the doctor's testimony that a physical conditioning program could

likely decrease the worker's physical impairment from 18% to 14%, since the worker would still probably only be able to engage in the same type of medium-duty employment for which the doctor previously provided a release. *Rael v. Wal-Mart Stores, Inc.*, 1994-NMCA-017, 117 N.M. 237, 871 P.2d 1, cert. denied, 117 N.M. 215, 870 P.2d 753.

Worker not penalized for declining surgery. — A worker cannot postpone indefinitely a determination of maximum medical improvement (MMI) by declining surgery. Once a physician has made a determination of MMI, discontinuing temporary total disability and calculating a permanent partial disability does not subject the worker to a Hobson's choice ("Have surgery or starve") or penalize him for declining surgery. It is merely a determination that a worker has reached a plateau of medical stability for the foreseeable future. *Rael v. Wal-Mart Stores, Inc.*, 1994-NMCA-017, 117 N.M. 237, 871 P.2d 1, cert. denied, 117 N.M. 215, 870 P.2d 753.

Evidence insufficient to find maximum medical improvement. — Finding that worker had reached maximum medical improvement (MMI) for his secondary mental impairment based on doctor's report that worker would reach MMI within six months of the conclusion of the litigation was unreasonable in view of internal inconsistencies in the report and other evidence. *Smith v. Cutler Repaving*, 1999-NMCA-030, 126 N.M. 725, 974 P.2d 1182, cert. denied, 126 N.M. 532, 972 P.2d 351.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-1-25. Permanent total disability.

A. As used in the Workers' Compensation Act, "permanent total disability" means:

(1) the permanent and total loss or loss of use of both hands or both arms or both feet or both legs or both eyes or any two of them; or

(2) a brain injury resulting from a single traumatic work-related injury that causes, exclusive of the contribution to the impairment rating arising from any other impairment to any other body part, or any preexisting impairments of any kind, a permanent impairment of thirty percent or more as determined by the current American medical association guide to the evaluation of permanent impairment.

B. In considering a claim for total disability, a workers' compensation judge shall not receive or consider the testimony of a vocational rehabilitation provider offered for the purpose of determining the existence or extent of disability.

History: 1978 Comp., § 52-1-25, enacted by Laws 1987, ch. 235, § 11; 1990 (2nd S.S.), ch. 2, § 9; 2003, ch. 265, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1987, ch. 235, § 11 repealed former 52-1-25 NMSA 1978, as reenacted by Laws 1986, ch. 22, § 5, relating to partial disability, and enacted a new section, effective June 19, 1987. 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.

The 2003 amendment, effective June 20, 2003, inserted the Paragraph A(1) designation and added present Paragraph A(2).

The 1990 (2nd S.S.) amendment, effective January 1, 1991, added "Permanent" to the catchline, rewrote and combined former Subsections A and B to form Subsection A, and added Subsection B.

I. GENERAL CONSIDERATION.

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*, 1945-NMSC-002, 49 N.M. 4, 154 P.2d 1000.

The extent of an injured employee's compensation is not confined to loss under specific schedule in the Workmen's (Workers') Compensation Act where the jury finds that employee suffered a total and permanent disability directly resulting from the injury. *Lipe v. Bradbury*, 1945-NMSC-002, 49 N.M. 4, 154 P.2d 1000.

Section constitutional. — This section does not violate equal protection provisions under the federal and state constitutions. *Valdez v. Wal-Mart Stores, Inc.*, 1998-NMCA-030, 124 N.M. 655, 954 P.2d 87, cert. denied, 124 N.M. 589, 953 P.2d 1087.

Employer and workman (worker) 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*, 1980-NMCA-182, 95 N.M. 306, 621 P.2d 523, *overruled on other grounds by Varos v. Union Oil Co. of Cal.*, 1984-NMCA-091, 101 N.M. 713, 688 P.2d 31.

Compensation benefits are not based on physical injury itself but on disability produced by the injury and a claim for workmen's (workers') 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*, 1968-NMSC-170, 79 N.M. 590, 446 P.2d 642; *Anaya v. N.M. Steel Erectors, Inc.*, 1980-NMSC-057, 94 N.M. 370, 610 P.2d 1199; *Cardenas v. United Nuclear Homestake Partners*, 1981-NMCA-117, 97 N.M. 46, 636 P.2d 317.

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*, 1968-NMSC-073, 79 N.M. 99, 440 P.2d 291.

Evidence of other disability awards. — Evidence of disability awards received by a claimant under other statutory laws are generally inadmissible to establish the extent and degree of disability of the claimant in a workers' compensation action. *Trujillo v. City of Albuquerque*, 1993-NMCA-114, 116 N.M. 640, 866 P.2d 368, cert. denied, 116 N.M. 364, 862 P.2d 1223.

"Disability" means disablement resulting from an accidental injury; it is not synonymous with productivity. *Medina v. Wicked Wick Candle Co.*, 1977-NMCA-118, 91 N.M. 522, 577 P.2d 420.

Total disability does not mean that a workman (worker) must be a helpless invalid. *Aranda v. Mississippi Chem. Corp.*, 1979-NMCA-097, 93 N.M. 412, 600 P.2d 1202, cert. denied, 93 N.M. 683, 604 P.2d 821.

Capacity to perform work. — The primary test of disability is capacity to perform work. The word "capacity" connotes qualities inherent in the individual; "capacity to perform work" is the product of the individual's physical and mental power and dexterity, as augmented by education, training, and experience. *Barnett & Casbarian, Inc. v. Ortiz*, 1992-NMCA-071, 114 N.M. 322, 838 P.2d 476.

Whether an individual's skills constitute a capacity to perform work depends upon what work is being performed by members of society; thus, in measuring one's capacity to work, it is necessary to look at the job market. *Barnett & Casbarian, Inc. v. Ortiz*, 1992-NMCA-071, 114 N.M. 322, 838 P.2d 476.

"Job market" defined. — The job market by which disability is to be measured should be the general market in which workers are being employed. *Barnett & Casbarian, Inc. v. Ortiz*, 1992-NMCA-071, 114 N.M. 322, 838 P.2d 476.

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 Broad. Co.,* 1980-NMCA-154, 95 N.M. 267, 620 P.2d 1292, cert. denied, 95 N.M. 299, 621 P.2d 516, *overruled on other grounds by Chapman v. Jesco*, Inc., 1982-NMCA-144, 98 N.M. 707, 652 P.2d 257.

Mere unemployment not sufficient. — The claimant's unemployment in itself does not trigger his entitlement to disability benefits. *Barela v. ABF Freight Sys.*, 1993-NMCA-137, 116 N.M. 574, 865 P.2d 1218.

Partial and total two segments of disability continuum. — This section and Section 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.*, 1974-NMCA-061, 86 N.M. 393, 524 P.2d 1009.

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*, 1968-NMSC-073, 79 N.M. 99, 440 P.2d 291.

A certain percentage of functional disability is not necessarily the same percentage of disability attributable to an injury under the Workmen's (Workers') Compensation Act. *Hales v. Van Cleave*, 1967-NMCA-006, 78 N.M. 181, 429 P.2d 379, cert. denied, 78 N.M. 198, 429 P.2d 657.

Entitled to disability where specific scheduled body member injured. — Workman (Worker) 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 Section 52-1-43 NMSA 1978, since that scheduled injury section was not exclusive. *American Tank & Steel Corp. v. Thompson*, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

Where injury is limited to scheduled member, the compensation is limited to temporary total disability during the healing period in which the workman (worker) is total disabled and thereafter to the percentage of disability to the scheduled member as provided by the statute. *Rhodes v. Cottle Constr. Co.*, 1960-NMSC-130, 68 N.M. 18, 357 P.2d 672 (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 Cmty. Health Servs.*, 1986-NMCA-066, 104 N.M. 608, 725 P.2d 584, cert. denied, 104 N.M. 632, 725 P.2d 832.

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 Cmty. Health Servs.*, 1986-NMCA-066, 104 N.M. 608, 725 P.2d 584, cert. denied, 104 N.M. 632, 725 P.2d 832.

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., 1982-NMCA-059, 97 N.M. 734, 643 P.2d 298.

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.*, 1982-NMCA-172, 99 N.M. 80, 653 P.2d 1226.

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 (workers') compensation total disability benefits pending a showing that the disability has diminished or no longer exists. Amos v. *Gilbert W. Corp.*, 1985-NMCA-106, 103 N.M. 631, 711 P.2d 908.

II. PROCEDURAL MATTERS.

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*, 1945-NMSC-002, 49 N.M. 4, 154 P.2d 1000.

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*, 1945-NMSC-002, 49 N.M. 4, 154 P.2d 1000.

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.*, 1985-NMSC-002, 102 N.M. 217, 693 P.2d 583.

Rate of compensation in effect on date of disability applies, not the date of the accident. *Purcella v. Navajo Freight Lines*, 1980-NMCA-182, 95 N.M. 306, 621 P.2d 523, *overruled by Varos v. Union Oil Co. of Cal.*, 1984-NMCA-091, 101 N.M. 713, 688 P.2d 31.

Date of disability where employer voluntarily pays, then reduces, benefits. — Where a workman (worker) 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 (worker) 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.*, 1982-NMCA-059, 97 N.M. 734, 643 P.2d 298.

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, 1981-NMCA-117, 97 N.M. 46, 636 P.2d 317.

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.*, 1978-NMCA-128, 93 N.M. 9, 595 P.2d 1204, cert. denied, 92 N.M. 532, 591 P.2d 286.

Opinion as to medical disability does not resolve question of disability under Workmen's (Workers') 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.*, 1969-NMCA-012, 80 N.M. 59, 451 P.2d 308.

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.*, 1988-NMCA-049, 107 N.M. 500, 760 P.2d 793, cert. denied, 107 N.M. 413, 759 P.2d 200.

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*, 1968-NMSC-073, 79 N.M. 99, 440 P.2d 291.

Factors supporting total disability. — Total disability benefits were not available to a worker based on factors applicable to to the determination of partial disability. *Valdez v. Wal-Mart Stores, Inc.*, 1998-NMCA-030, 124 N.M. 655, 954 P.2d 87, cert. denied, 124 N.M. 589, 953 P.2d 1087.

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.*, 1970-NMCA-114, 82 N.M. 72, 475 P.2d 466.

Determination of degree of disability in workmen's (workers') 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.*, 1978-NMCA-128, 93 N.M. 9, 595 P.2d 1204, cert. denied, 92 N.M. 532, 591 P.2d 286.

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*, 1961-NMSC-112, 69 N.M. 75, 364 P.2d 136 (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*, 1961-NMSC-112, 69 N.M. 75, 364 P.2d 136 (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*, 1981-NMCA-117, 97 N.M. 46, 636 P.2d 317.

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.*, 1979-NMCA-100, 93 N.M. 417, 600 P.2d 1207, cert. denied, 93 N.M. 205, 598 P.2d 1165.

III. ILLUSTRATIVE CASES.

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.*, 1975-NMCA-039, 87 N.M. 404, 534 P.2d 1116).

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.*, 1975-NMCA-039, 87 N.M. 404, 534 P.2d 1116.

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 Section 52-1-43 NMSA 1978. *American Tank & Steel Corp. v. Thompson*, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

Disability result of first of two accidents. — There was sufficient evidence to support the finding that the disability to a worker's arm was the result of the first of two accidents, since surgery was planned before the second accident, and since a number of maladies, including numbness and tingling, preexisted the second accident. *Rodriguez v. McAnally Enters.*, 1994-NMCA-025, 117 N.M. 250, 871 P.2d 14.

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).

For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 263 to 294, 381, 382.

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.

52-1-25.1. Temporary total disability; return to work.

A. As used in the Workers' Compensation Act, "temporary total disability" means the inability of a worker, by reason of accidental injury arising out of and in the course of the worker's employment, to perform the duties of that employment prior to the date of the worker's maximum medical improvement.

B. If, prior to the date of maximum medical improvement, an injured worker's health care provider releases the worker to return to work and the employer does not make a reasonable work offer at the worker's pre-injury wage, the worker shall receive temporary total disability compensation benefits equal to two-thirds of the worker's pre-injury wage.

C. If, prior to the date of maximum medical improvement, an injured worker's health care provider releases the worker to return to work and the worker returns to work at less than the worker's pre-injury wage, the worker shall receive temporary total disability compensation benefits equal to two-thirds of the difference between the worker's pre-injury wage and the worker's post-injury wage.

D. A worker is not entitled to temporary total disability benefits as set forth in Subsection B or C of this section if:

(1) the employer makes a reasonable work offer at or above the worker's pre-injury wage, within medical restrictions, if any, as stated by the health care provider pursuant to Section 52-1-49 NMSA 1978, and the worker rejects the offered employment;

(2) the worker accepts employment with another employer at or above the worker's pre-injury wage; or

(3) the worker is terminated for misconduct connected with the employment that is unrelated to the workplace injury; if the workers' compensation judge finds that an employer terminated the worker for pretextual reasons as a way of attempting to avoid payment of benefits to the worker or as retaliation against the worker for seeking benefits, the worker shall be entitled to temporary total disability benefits and the employer shall be subject to penalties as set forth in Sections 52-1-28.1 and 52-1-28.2 NMSA 1978.

E. Upon a finding that an employer has terminated a worker for pretextual reasons, the workers' compensation judge at the judge's discretion may also impose an additional fine, not to exceed ten thousand dollars ($10,000), on the employer, to be paid to the worker.

F. Notwithstanding the provisions of this section, the employer shall continue to provide reasonable and necessary medical care pursuant to Section 52-1-49 NMSA 1978.

G. If there is a dispute between the parties regarding the reasonableness of the employer's work offer or the worker's refusal to return to work, the workers' compensation judge shall decide if the work offer or the worker's refusal to return to work is reasonable based on all of the circumstances.

History: 1978 Comp., § 52-1-25.1, enacted by Laws 1990 (2nd S.S.), ch. 2, § 10; 2005, ch. 151, § 1; 2017, ch. 32, § 1.

ANNOTATIONS

The 2017 amendment, effective June 16, 2017, changed certain benefit entitlements after injured workers return to work; in Subsection B, in the introductory clause, after "return to work", deleted "the worker is not entitled to temporary total disability benefits if", and deleted Paragraphs B(1) and B(2), which provided conditions under which an injured worker is not entitled to temporary total disability benefits after the worker returns to work, and added "and the employer does not make a reasonable work offer at the worker’s pre-injury wage, the worker shall receive temporary total disability compensation benefits equal to two-thirds of the worker’s pre-injury wage"; in Subsection C, after "return to work and the", deleted "employer offers" and added "worker returns to", and after "pre-injury wage, the worker", deleted "is disabled and"; in Subsection D, in the introductory clause, deleted "If the worker returns to work pursuant to the provisions of Subsection B of this section" added the remainder of the introductory clause; added Paragraphs D(1) through D(3); added Subsection E; added subsection designation "F", and in Subsection F, added "Notwithstanding the provisions of this section"; and added Subsection G.

The 2005 amendment, effective July 1, 2005, provided in Subsection A that temporary total disability means the inability to perform the duties of the worker’s employment prior to the date of maximum medical improvement; provided in Subsection B that if prior to

the date of maximum medical improvement, the worker's health care provider releases the worker, the worker is not entitled to temporary total disability benefits if the employer offers work at the worker's pre-injury wage or the worker accepts employment with another employer at the worker's pre-injury wage; and provided in Subsection C that the temporary total disability compensation benefit shall equal two-thirds of the difference between the pre-injury wage and the post-injury wage.

Disabled worker to seek work within capabilities. — A disabled workman (worker), 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. *Ulibarri v. Homestake Mining Co.*, 1982-NMCA-059, 97 N.M. 734, 643 P.2d 298 (decided under former law).

Temporary total disability means that which lasts for a limited time only while the workman (worker) is undergoing treatment. *Sena v. Gardner Bridge Co.*, 1979-NMCA-042, 93 N.M. 358, 600 P.2d 304 , cert. denied, 92 N.M. 675, 593 P.2d 1078.

Temporary total disability. — Temporary disability is that which lasts for a limited time only while the workman (worker) 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.*, 1981-NMCA-041, 96 N.M. 79, 628 P.2d 324, cert. denied, 96 N.M. 116, 628 P.2d 686.

"Temporary total disability," under former Section 52-1-26 NMSA 1978 (the Interim Act), means the inability of the worker to perform his duties prior to the date of his maximum medical improvement, referring to the duties incidental to the work he was performing when injured. A worker need not prove that he is also unable to perform other work for which he is fitted. *Cass v. Timberman Corp.*, 1990-NMCA-061, 110 N.M. 158, 793 P.2d 288, *rev'd on other grounds*, 1990-NMSC-112, 111 N.M. 184, 803 P.2d 669.

Exception to entitlement of full temporary total disability benefits was inapplicable. — Where, in January 2013, worker suffered numerous injuries while being trained as a residential garbage collector for employer and was awarded temporary total disability benefits (TTD benefits), and where worker returned to work in April 2013 and remained employed with employer until he was terminated in July 2013, and where, after his termination, worker obtained employment with other companies where he earned less than his preinjury wage, during which time employer issued partial TTD benefits, taking credit for wages worker earned from his subsequent employers and claiming that the offset provision in § 52-1-25.1(C) NMSA 1978 applied to those earnings, and where the workers' compensation judge (WCJ) reduced worker's TTD benefits, finding that an award of full TTD benefits would be unfair to employer, the WCJ erred in limiting worker's TTD benefits, because under the plain language of this section, Subsection C applies only when the at-injury employer offers work at less than the worker's preinjury wage and does not apply if the at-injury employer makes no such offer of work but the worker accepts employment with another employer. *Taylor v.*

Waste Mgmt. of N.M., 2021-NMCA-026 (decided under 2005 version of § 52-1-25.1 NMSA 1978).

Inability to work. — Although a claimant had taken voluntary retirement, she was totally disabled because she was unable to perform any work due to an accidental injury. Her ability to work had nothing to do with the fact that she had retired. *Feese v. U.S. W. Serv. Link, Inc.*, 1991-NMCA-121, 113 N.M. 92, 823 P.2d 334, cert. withdrawn, 113 N.M. 23, 821 P.2d 1060 (decided under prior law).

Refusal of worker to accept job offers. — Where worker, who was employed as a school bus driver and who injured worker's back and shoulder, was released to return to work under a light level of duty; employer offered worker worker's former school bus driver position, which worker refused due to worker's concern about driving a school bus while on prescribed medication; employer then offered worker a crossing guard position, which worker refused because of pain in worker's shoulder; and worker's physician subsequently discovered that worker had a torn rotator cuff and put worker off work, worker did not unreasonably reject employers' job offers because worker's release to return to work was premature and worker was unable to perform either the bus driver position or the crossing guard position, and worker remained eligible for temporary total disability benefits. *Ruiz v. Los Lunas Pub. Sch.*, 2013-NMCA-085.

Effect of Section 52-1-50.1B NMSA 1978 on job "offer". — The final sentence of Section 52-1-50.1B NMSA 1978 adjusts compensation benefits prior to maximum medical improvement for a worker who has been "rehired." The explicit terms of the sentence apply only when the worker is actually employed by the employer. Yet, this section applies so long as the worker is offered the position, even if the worker does not accept and become rehired. The final sentence of Section 52-1-50.1B NMSA 1978 was not intended to repeal or limit this section. *Jeffrey v. Hays Plumbing & Heating*, 1994-NMCA-071, 118 N.M. 60, 878 P.2d 1009.

Worker must be capable of performing work. — It is implicit in the language of Section 52-1-26 NMSA 1978 that the legislature intended that when a worker is given a release to return to work, the release anticipates that the worker return to the type of work he was doing prior to the accident or work which he or she is otherwise physically capable of performing. If the work involves duties which are more strenuous than those involved in his prior work assignment, and the worker remains injured, the new duties must involve work he is capable of performing. The employer cannot offer any work that has the same pre-injury wage, and thereby make the worker ineligible to receive disability benefits, even though the worker is unable to perform the work. *Garcia v. Borden, Inc.*, 1993-NMCA-047, 115 N.M. 486, 853 P.2d 737, cert. denied, 115 N.M. 409, 852 P.2d 682.

Termination from post-injury employment. — A worker's termination from post-injury employment does not disqualify the worker from receiving full temporary total disability benefits after the worker's termination, whether or not the termination was for cause. *Hawkins v. McDonald's*, 2014-NMCA-048, cert. denied, 2014-NMCERT-002.

Where worker, who suffered a job-related accident, was released to return to work; employer provided worker a job as a shift manager; employer required its shift managers to report all incidents of sexual harassment that the managers became aware of; at a dinner at worker's home another employee reported that the store manager had sent the employee a sexually inappropriate message; worker did not report the allegation to employer; and employer terminated worker for cause for violating the employer's policy, the worker's termination did not disqualify worker from receiving full temporary total disability benefits prior to reaching maximum medical improvement. *Hawkins v. McDonald's*, 2014-NMCA-048, cert. denied, 2014-NMCERT-002.

Subsequent firing does not reduce employer's liability. — Where employee was injured on the job, was released by his doctor for limited work and offered a job by employer at a lower wage, was fired for reasons unrelated to the injury, and was later taken off work entirely by his doctor, employer was liable for the amount of the wage reduction for the period prior to employee being taken off work by his doctor, and was liable for temporary total disability benefits thereafter for the period prescribed in Subsection C. *Lackey v. Darrell Julian Constr.*, 1998-NMCA-121, 125 N.M. 592, 964 P.2d 153.

Full benefits for terminated worker. — The worker was entitled to full benefits for the period between the date of the injury and the date on which she reached maximum medical improvement, even though the reason she was incapable of returning to work prior to maximum medical improvement was because she was terminated for misconduct. *Ortiz v. BTU Block & Concrete Co.*, 1996-NMCA-09, 122 N.M. 381, 925 P.2d 1.

Overtime pay. — Because overtime pay is compensable under Section 52-1-20 NMSA 1978, an injured worker is entitled to reduced temporary total disability benefits if an employer offers reduced overtime hours after the worker returns to work. The worker need not prove that the reduction in overtime hours was caused by the worker's disability. *Baca v. Los Lunas Cmty. Programs*, 2011-NMCA-008, 149 N.M. 198, 246 P.3d 1070.

Where worker was employed at a housing and treatment center for mentally and physically disabled persons; worker was sexually assaulted by a patient; prior to the assault, worker earned an average weekly wage of $884.31, which included $455.36 in regular hourly wages and $428.95 in overtime pay; after the assault, worker was reassigned to a different facility where worker received less overtime pay; the workers' compensation judge determined that worker was entitled to temporary total disability benefits for the period worker was unable to work, but excluded overtime pay from the amount awarded, and denied worker's claim for temporary total disability benefits after worker returned to work, the workers' compensation judge erred in excluding overtime pay, worker was entitled to full temporary total disability benefits in the amount of worker's average weekly wage of $884.31 during the time worker was unable to work, and because the employer offered worker significantly less overtime hours after worker returned to work, worker was entitled to reduced temporary total disability benefits in the

amount of two-thirds the difference between worker's pre-injury average weekly wage and worker's post-injury wage until worker reached maximum medical improvement. *Baca v. Los Lunas Cmty. Programs*, 2011-NMCA-008, 149 N.M. 198, 246 P.3d 1070.

Eligibility after rehire by different employer. — The term "employer" as used in this section refers to the employer at the time of injury; therefore, in the absence of an offer of work from the prior employer, acceptance of work at a subsequent employer does not trigger the termination or reduction in TTD benefits under Subsections B or C. *Grubelnik v. Four-Four, Inc.*, 2001-NMCA-056, 130 N.M. 633, 29 P.3d 533, cert. denied, 130 N.M. 558, 28 P.3d 1099.

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.*, 1960-NMSC-130, 68 N.M. 18, 357 P.2d 672 (decided under former law).

Credits for payments after offers of employment. — Since evidence bearing on a worker's ability to return to work contradicted her testimony that she was unable to carry out jobs offered by her employer, the employer was entitled to credits for payments made after its offers of suitable employment. *Villanueva v. Sunday Sch. Bd. of S. Baptist Convention*, 1995-NMCA-135, 121 N.M. 98, 908 P.2d 791.

Denial of benefits not supported by evidence. — Findings made in support of the determination to deny benefits for temporary total disability were not supported by substantial evidence where the medical evidence only supported a determination that claimant could have returned to light duty work but there was no evidence that light duty work was available to claimant on terms with which he was able to comply. *Sanchez v. Molycorp, Inc.*, 1992-NMCA-007, 113 N.M. 375, 826 P.2d 971 (decided under prior law).

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-1-26. Permanent 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 permanent 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, "partial disability" means a condition whereby a worker, by reason of injury arising out of and in the course of employment, suffers a permanent impairment.

C. Permanent partial disability shall be determined by calculating the worker's impairment as modified by the worker's age, education and physical capacity, pursuant to Sections 52-1-26.1 through 52-1-26.4 NMSA 1978; provided that, regardless of the actual calculation of impairment as modified by the worker's age, education and physical capacity, the percentage of disability awarded shall not exceed ninety-nine percent.

D. On or after the date of maximum medical improvement, the worker's permanent partial disability rating shall be equal to the worker's impairment and shall not be subject to the modifications calculated pursuant to Sections 52-1-26.1 through 52-1-26.4 NMSA 1978 if:

(1) the worker returns to work at a wage at or above the worker's pre-injury wage;

(2) the worker accepts employment with another employer at or above the worker's pre-injury wage;

(3) the employer makes a reasonable work offer, at or above the worker's pre-injury wage, within medical restrictions, if any, as stated by the health care provider pursuant to Section 52-1-49 NMSA 1978, and the worker rejects the offered employment; or

(4) the worker is terminated for misconduct connected with the employment that is unrelated to the workplace accident; if the workers' compensation judge finds that an employer terminates the worker for pretextual reasons to avoid payment of benefits to the worker or as retaliation against the worker for seeking benefits, the worker shall be entitled to modifier benefits and the employer shall be subject to penalties as set forth in Sections 52-1-28.1 and 52-1-28.2 NMSA 1978.

E. Upon a finding that an employer has terminated a worker for pretextual reasons, the workers' compensation judge at the judge's discretion may also impose an additional fine, not to exceed ten thousand dollars ($10,000), on the employer, to be paid to the worker.

F. In considering a claim for permanent partial disability, a workers' compensation judge shall not receive or consider the testimony of a vocational rehabilitation provider offered for the purpose of determining the existence or extent of disability.

G. If there is a dispute between the parties regarding the reasonableness of the employer's work offer or the worker's refusal to return to work, the workers' compensation judge shall decide if the work offer or the worker's refusal to return to work is reasonable based on all of the circumstances.

History: 1978 Comp., § 52-1-26, enacted by Laws 1987, ch. 235, § 12; 1989, ch. 263, § 18; 1990 (2nd S.S.), ch. 2, § 11; 2017, ch. 32, § 2.

ANNOTATIONS

Repeals and reenactments. — Laws 1987, ch. 235, § 12 repealed former 52-1-26 NMSA 1978, relating to temporary total disability and enacted a new 52-1-26 NMSA, effective June 19, 1987. 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.

The 2017 amendment, effective June 16, 2017, clarified the determination of an injured worker’s permanent partial disability rating, provided the workers’ compensation judge with the authority to impose certain fines and with the responsibility of settling certain disputes between the parties regarding return to work; in Subsection C, after "modified by", deleted "his" and added "the worker’s"; in Subsection D, deleted "If", after "maximum medical improvement", deleted "an injured worker returns to work at a wage equal to or greater than the worker’s pre-injury wage", and after "NMSA 1978", added "if"; added Paragraphs F(1) through F(4); added a new Subsection E and redesignated former Subsection E as Subsection F; and added Subsection G.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, added "permanent" in the catchline and in Subsection B; deleted "and is unable to some percentage extent to perform any work for which he is fitted by age, education, and training" following "impairment" in Subsection B; rewrote Subsection C; and added Subsections D and E.

I. GENERAL CONSIDERATION.

Status as undocumented worker as a defense to payment of modifier benefits. — Employers who cannot demonstrate good faith compliance with federal law in the hiring process cannot use their workers’ undocumented status as a defense to continued payment of modifier benefits under the Workers’ Compensation Act. *Gonzalez v. Performance Painting, Inc.*, 2013-NMSC-021, *rev’g* 2011-NMCA-025, 150 N.M. 306, 258 P.3d 1098.

Status as undocumented worker was not a defense to payment of modifier benefits. — Where, when worker, who was an undocumented immigrant, was initially hired by employer as a painter's helper, employer failed to follow appropriate hiring procedures as required by federal law, and failed to fill out an I-9 form and keep it on file for the requisite time; worker was permanently partially disabled when worker fell off a ladder; employer offered worker a job with modified duty that took into account worker's injury-related restrictions; and worker was unable to complete a new job application, which included verification of worker's eligibility for employment, because worker could not produce a social security card, employer could not use worker's undocumented status as a defense to continued payment of modifier benefits. *Gonzalez v. Performance Painting, Inc.*, 2013-NMSC-021, *rev'g* 2011-NMCA-025, 150 N.M. 306, 258 P.3d 1098.

Application to undocumented, illegal immigrants. — Subsections C and D of Section 52-1-26 NMSA 1978 do not apply to cases involving workers with undocumented, illegal immigration status. *Gonzalez v. Performance Painting, Inc.*, 2011-NMCA-025, 150 N.M. 306, 258 P.3d 1098, *rev'd*, 2013-NMSC-021.

Where worker was an undocumented worker who provided a false social security number on an employment application with employer; employer did not ask worker to produce a social security card, investigate the worker's status, or complete an employment verification form; employer had no reason to believe worker was an undocumented worker during the time worker worked for employer; and the workers' compensation judge awarded worker partial disability benefits, worker was not entitled to modifier benefits because employer was legally forbidden by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324, to rehire worker because worker was an undocumented, illegal immigrant. *Gonzalez v. Performance Painting, Inc.*, 2011-NMCA-025, 150 N.M. 306, 258 P.3d 1098, *rev'd*, 2013-NMSC-021.

Workers' compensation judge properly denied modifier benefits where worker knowingly provided false identification documents. — Where worker filed for workers' compensation benefits following a work-related accident while employed with defendant's construction company, the district court did not err in denying worker's modifier benefits when worker knowingly presented false identification documentation while filling out his employment eligibility verification forms, because employer reasonably relied upon worker's representations and there was no reasonable basis for employer to have known worker was undocumented. *Melendez v. Salls Bros. Constr., Inc.*, 2018-NMCA-028.

Employer and workman (worker) 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*, 1980-NMCA-182, 95 N.M. 306, 621 P.2d 523, *overruled on other grounds by Varos v. Union Oil Co. of Cal.*, 1984-NMCA-091, 101 N.M. 713, 688 P.2d 31.

Compensation benefits are not based on physical injury itself but on disability produced by the injury and a claim for workmen's (workers') 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*, 1968-NMSC-170, 79 N.M. 590, 446 P.2d 642; Anaya v. N.M. Steel Erectors, Inc., 1980-NMSC-057, 94 N.M. 370, 610 P.2d 1199; *Cardenas v. United Nuclear Homestake Partners*, 1981-NMCA-117, 97 N.M. 46, 636 P.2d 317.

Disability necessary for compensation. — To entitle an injured workman (worker) to compensation, impairment is not enough; there must be disability. *Pacheco v. Springer Corp.*, 1972-NMCA-044, 83 N.M. 622, 495 P.2d 800.

In order to be entitled to an award of compensation benefits a workman (worker) must not only suffer a physical impairment, but also be unable to perform work. *Cardenas v. United Nuclear Homestake Partners*, 1981-NMCA-117, 97 N.M. 46, 636 P.2d 317.

Disability is defined in terms of inability to perform usual tasks of his employment or work for which the workman (worker) is fitted. *Anaya v. Big Three Indus., Inc.*, 1974-NMCA-027, 86 N.M. 168, 521 P.2d 130.

The primary test for disability is the capacity to perform work. *Medina v. Zia Co.*, 1975-NMCA-137, 88 N.M. 615, 544 P.2d 1180, cert. denied, 89 N.M. 6, 546 P.2d 71 (1976); *Klindera v. Worley Mills, Inc.*, 1981-NMCA-104, 96 N.M. 743, 634 P.2d 1295, cert. denied, 97 N.M. 140, 637 P.2d 571.

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.*, 1975-NMCA-137, 88 N.M. 615, 544 P.2d 1180, cert. denied, 89 N.M. 6, 546 P.2d 71 (1976); *Smith v. Trailways Bus Sys.*, 1981-NMCA-041, 96 N.M. 79, 628 P.2d 324 (decided under former law).

Two tests in definition of disability. — The definition of total and partial disability under Section 52-1-24 NMSA 1978 (now Section 52-1-25 NMSA 1978)and this section contain two tests: (1) the workman (worker) 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.*, 1975-NMCA-137, 88 N.M. 615, 544 P.2d 1180, cert. denied, 89 N.M. 6, 546 P.2d 71 (1976); *Aranda v. Miss. Chem. Corp.*, 1979-NMCA-097, 93 N.M. 412, 600 P.2d 1202, cert. denied, 93 N.M. 683, 604 P.2d 821; *Schober v. Mountain Bell Tel.*, 1980-NMCA-113, 96 N.M. 376, 630 P.2d 1231; *Smith v. City of Albuquerque*, 1986-NMCA-113, 105 N.M. 125, 729 P.2d 1379.

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 (worker) was performing when injured and (2) an inability, to some percentage extent, to perform

any work for which the workman (worker) is fitted. *Cordova v. Union Baking Co.*, 1969-NMCA-037, 80 N.M. 241, 453 P.2d 761.

Partial disability is measured by the extent to which the worker is unable to perform work for which he or she was fitted before the injury; if the jobs for which a worker is fitted are reduced in number, then the worker's percentage of disability is increased. *Barnett & Casbarian, Inc. v. Ortiz*, 1992-NMCA-071, 114 N.M. 322, 838 P.2d 476.

Qualifications to be "fitted" for job. — The workers' compensation judge could properly find that employee who had entered post-injury job was fitted for the job if he possessed strong qualifications in some areas and was passable in other areas in which he could improve with experience and training. *Barnett & Casbarian, Inc. v. Ortiz*, 1992-NMCA-071, 114 N.M. 322, 838 P.2d 476.

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.*, 1982-NMCA-069, 98 N.M. 52, 644 P.2d 1041, cert. denied, 98 N.M. 336, 648 P.2d 794.

If a workman (worker) 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 (worker) is not entitled to compensation. *Medina v. Zia Co.*, 1975-NMCA-137, 88 N.M. 615, 544 P.2d 1180, cert. denied, 89 N.M. 6, 546 P.2d 71 (1976).

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.*, 1981-NMCA-104, 96 N.M. 743, 634 P.2d 1295, cert. denied, 97 N.M. 140, 637 P.2d 571.

Evidence of other disability awards. — Evidence of disability awards received by a claimant under other statutory laws are generally inadmissible to establish the extent and degree of disability of the claimant in a workers' compensation action. *Trujillo v. City of Albuquerque*, 1993-NMCA-114, 116 N.M. 640, 866 P.2d 368, cert. denied, 116 N.M. 364, 862 P.2d 1223.

Not entitled to compensation where totally able to perform fitted work. — If a workman (worker) 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 (worker) is not entitled to

compensation. *Medina v. Zia Co.*, 1975-NMCA-137, 88 N.M. 615, 544 P.2d 1180, cert. denied, 89 N.M. 6, 546 P.2d 71 (1976).

Worker must be capable of performing work. — It is implicit in the language of this section that the legislature intended that where a worker is given a release to return to work, the release anticipates that the worker return to the type of work he was doing prior to the accident or work which he or she is otherwise physically capable of performing. If the work involves duties which are more strenuous than those involved in his prior work assignment, and the worker remains injured, the new duties must involve work he is capable of performing. The employer cannot offer any work that has the same pre-injury wage, and thereby make the worker ineligible to receive disability benefits, even though the worker is unable to perform the work. *Garcia v. Borden, Inc.*, 1993-NMCA-047, 115 N.M. 486, 853 P.2d 737, cert. denied, 115 N.M. 409, 852 P.2d 682.

Where workman (worker) unable to obtain only kind of work ever known. — If a workman (worker), 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*, 1959-NMSC-101, 66 N.M. 325, 347 P.2d 752.

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 Broad. Co.*, 1980-NMCA-154, 95 N.M. 267, 620 P.2d 1292, cert. denied, 95 N.M. 299, 621 P.2d 516, *overruled on other grounds by Chapman v. Jesco*, Inc., 1982-NMCA-144, 98 N.M. 707, 652 P.2d 257.

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.*, 1979-NMCA-097, 93 N.M. 412, 600 P.2d 1202, cert. denied, 93 N.M. 683, 604 P.2d 821.

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*, 1959-NMSC-101, 66 N.M. 325, 347 P.2d 752 (decided under former law).

Permanent partial disability calculated pursuant to statutory formula. — Even if a worker can still perform the duties of his or her job, the worker may still be entitled to compensation for a "permanent impairment". Permanent partial disability is calculated pursuant to the statutory formula of Subsection C of this section, and not in accordance with the worker’s ability or inability to function at work. *Smith v. Arizona Pub. Serv. Co.*, 2003-NMCA-097, 134 N.M. 202, 75 P.3d 418, cert. denied, 2003-NMCERT–008, 134 N.M. 71, 74 P.3d 600.

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.*, 1972-NMCA-044, 83 N.M. 622, 495 P.2d 800.

Certain percentage of functional disability is not necessarily the same percentage of disability attributable to an injury under the Workmen's (Workers') Compensation Act. *Hales v. Van Cleave*, 1967-NMCA-006, 78 N.M. 181, 429 P.2d 379, cert. denied, 78 N.M. 198, 429 P.2d 657.

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.*, 1972-NMCA-044, 83 N.M. 622, 495 P.2d 800.

Preexisting physical impairment. — The legislature, in enacting Sections 52-1-26 to 52-1-26.4 NMSA 1978, intended that when a worker suffers from a preexisting physical impairment, which combines with the impairment attributable to the work-related injury to produce disability, this impairment must be included in the determination of the impairment rating to be used to determine a worker's permanent partial disability. *Leo v. Cornucopia Restaurant*, 1994-NMCA-099, 118 N.M. 354, 881 P.2d 714, cert. denied, 118 N.M. 430, 882 P.2d 21.

Nondisabling pain does not constitute compensable injury under the New Mexico Workmen's (Workers') Compensation Act. *Gomez v. Hausman Corp.*, 1971-NMCA-173, 83 N.M. 400, 492 P.2d 1263, cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972).

Employee unable to "double over" consecutive shifts is partially disabled. — If a workman (worker) 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.*, 1981-NMCA-022, 95 N.M. 628, 624 P.2d 1025, cert. denied, 95 N.M. 669, 625 P.2d 1186.

Total and partial two segments of disability continuum. — Section 52-1-24 NMSA 1978 (now Section 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.*, 1974-NMCA-061, 86 N.M. 393, 524 P.2d 1009.

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

(Section 52-1-25 NMSA 1978 and this section) does not justify a differing measure of proof. *Roybal v. County of Santa Fe*, 1968-NMSC-073, 79 N.M. 99, 440 P.2d 291.

Termination from post-injury employment. — A worker's termination from post-injury employment does not disqualify the worker from receiving permanent partial disability benefits and statutory-based modifier benefits after the worker's termination for cause. *Hawkins v. McDonald's*, 2014-NMCA-048, cert. denied, 2014-NMCERT-002.

Where worker, who suffered a job-related accident while working at a fast food restaurant, was released to return to work with a twenty-pound weight lifting limitation; employer provided worker a job as a shift manager; employer required its shift managers to report all incidents of sexual harassment that the managers became aware of; at a dinner at worker's home another employee told worker that the restaurant manager had sent the employee a sexually inappropriate message; worker did not report the allegation to employer; employer terminated worker for cause for violating the employer's policy; there were no permanent jobs at a fast food restaurant that could be done with worker's weight lifting limitation; after worker reached maximum medical improvement employer did not make any employment offer, worker was unemployed, and worker took classes to get an education so that worker could get a job, worker was not voluntarily unemployed and worker's termination did not disqualify worker from receiving permanent partial disability benefits along with the statutory-based modifier benefits. *Hawkins v. McDonald's*, 2014-NMCA-048, cert. denied, 2014-NMCERT-002.

Effect of post-injury employment. — The existence of post-injury employment does not necessarily disqualify the workman (worker) from disability benefits. *Schober v. Mountain Bell Tel.*, 1980-NMCA-113, 96 N.M. 376, 630 P.2d 1231; *Bower v. Western Fleet Maintenance*, 1986-NMCA-091, 104 N.M. 731, 726 P.2d 885.

Post-injury employment is evidence going to the question of whether a disability exists, but compensation for disability depends on the inability to perform some of the work for which the workman (worker) is fitted, not on whether or not the workman (worker) is employed. *Schober v. Mountain Bell Tel.*, 1980-NMCA-113, 96 N.M. 376, 630 P.2d 1231.

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.*, 1985-NMSC-089, 103 N.M. 400, 708 P.2d 312.

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.*, 1986-NMCA-056, 104 N.M. 321, 720 P.2d 1262.

Temporary disability is that which lasts for a limited time only while the workman (worker) 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.*, 1981-NMCA-041, 96 N.M. 79, 628 P.2d 324, cert. denied, 96 N.M. 116, 628 P.2d 686.

Employer cannot have failed or refused to pay compensation until such time as the injured workman (worker) "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.*, 1971-NMCA-173, 83 N.M. 400, 492 P.2d 1263, 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*, 1986-NMCA-091, 104 N.M. 731, 726 P.2d 885.

Voluntary unemployment or underemployment. — If a worker returns to work on or after the date of maximum medical improvement and earns a wage at least as great as the worker's pre-injury wage, then the age, education, and physical capacity modifications are not considered in computing the percentage of partial disability. A worker can not evade this provision by voluntary unemployment or underemployment. *Jeffrey v. Hays Plumbing & Heating*, 1994-NMCA-071, 118 N.M. 60, 878 P.2d 1009.

A worker may take reasonable action that precludes an employer from making a return-to-work offer and remain eligible for modifier-based permanent partial disability benefits. *Cordova v. KSL-Union*, 2012-NMCA-083, 285 P.3d 686, cert. denied, 2012-NMCERT-007.

Voluntary retirement was reasonable. — Where worker was temporarily, totally disabled; employer gave worker a modified-duty job at worker’s pre-injury wage from the date of workers’ accident to the date of worker’s voluntarily retirement; worker retired when worker became eligible for maximum union retirement benefits, before worker reached maximum medical improvement; in order to remain entitled to receive a union retirement pension, worker was required to terminate employment with employer effective as of the date worker retired and worker was prohibited from working as a union member at any time thereafter; worker was unable to perform the type of heavy duty work for which worker was qualified due to worker’s injuries; and worker’s injuries impeded worker’s ability to return to work at a non-union job after worker’s retirement, worker’s decision to retire was reasonable and worker was not precluded from receiving modifier-based permanent partial disability benefits because worker decided to retire. *Cordova v. KSL-Union*, 2012-NMCA-083, 285 P.3d 686, cert. denied, 2012-NMCERT-007.

While incarcerated, an employee is entitled to continue to receive permanent partial disability benefits in accordance with his impairment rating but is not entitled to receive benefits based on the statutory modification of that rating. *Connick v. County of Bernalillo*, 1998-NMCA-060, 125 N.M. 119, 957 P.2d 1153.

Refusal of worker to accept job offers. — Where worker, who was employed as a school bus driver and who injured worker's back and shoulder, was released to return to work under a light level of duty; employer offered worker worker's former school bus driver position, which worker refused due to worker's concern about driving a school bus while on prescribed medication; employer then offered worker a crossing guard position, which worker refused because of pain in worker's shoulder; and worker's physician subsequently discovered that worker had a torn rotator cuff and put worker off work, worker did not unreasonably reject employers' job offers because worker's release to return to work was premature and worker was unable to perform either the bus driver position or the crossing guard position, and worker remained eligible for modifier benefits. *Ruiz v. Los Lunas Pub. Sch.*, 2013-NMCA-085.

It does not follow that the provisions of Section 52-1-26D NMSA 1978 are triggered whenever the employer offers a job at a wage equal to or greater than the worker's pre-injury wage. Rejection of the employer's offer does not necessarily mean that the worker is voluntarily unemployed or underemployed. An offer rejected by the employee triggers the adjustment provided by Section 52-1-26D NMSA 1978 only if the rejection was unreasonable. *Jeffrey v. Hays Plumbing & Heating*, 1994-NMCA-071, 118 N.M. 60, 878 P.2d 1009.

II. PROCEDURAL MATTERS.

Rate of compensation in effect on date of disability applies, not the date of the accident. *Purcella v. Navajo Freight Lines*, 1980-NMCA-182, 95 N.M. 306, 621 P.2d 523, *overruled by Varos v. Union Oil Co. of Cal.*, 1984-NMCA-091, 101 N.M. 713, 688 P.2d 31.

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.*, 1975-NMCA-137, 88 N.M. 615, 544 P.2d 1180, 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*, 1968-NMSC-073, 79 N.M. 99, 440 P.2d 291.

An opinion as to medical disability does not resolve question of disability under Workmen's (Workers') 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.*, 1969-NMCA-012, 80 N.M. 59, 451 P.2d 308.

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. N.M. Youth Diagnostic & Dev. Ctr.*, 1986-NMCA-047, 104 N.M. 576, 725 P.2d 255, cert. denied, 104 N.M. 460, 722 P.2d 1182.

Evidence of impairment to nonscheduled member required. — Even though there was evidence that the employee suffered an injury to a nonscheduled member in the form of disabling pain to her neck, since there was no evidence establishing an impairment, there was no evidence to support an award for permanent partial disability. *Jurado v. Levi Strauss & Co.*, 1996-NMCA-112, 122 N.M. 519, 927 P.2d 1057.

Determination of degree of disability in workmen's (workers') 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.*, 1978-NMCA-128, 93 N.M. 9, 595 P.2d 1204, cert. denied, 92 N.M. 1532, 591 P.2d 286 (1979).

Determination of degree of disability. — 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.*, 1981-NMCA-052, 96 N.M. 422, 631 P.2d 328.

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*, 1961-NMSC-112, 69 N.M. 75, 364 P.2d 136 (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.*, 1969-NMCA-037, 80 N.M. 241, 453 P.2d 761.

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*, 1986-NMCA-091, 104 N.M. 731, 726 P.2d 885.

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. N.M. State Hwy. Dep't,* 1966-NMSC-250, 77 N.M. 185, 420 P.2d 771.

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.*, 1980-NMCA-113, 96 N.M. 376, 630 P.2d 1231.

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.*, 1971-NMCA-173, 83 N.M. 400, 492 P.2d 1263, 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. N.M. State Hwy. Dep't*, 1966-NMSC-250, 77 N.M. 185, 420 P.2d 771.

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.*, 1976-NMCA-014, 89 N.M. 25, 546 P.2d 873, cert. denied, 89 N.M. 206, 549 P.2d 284.

A finding of 25% partial disability. — Substantial evidence supported the judge's finding of twenty-five percent permanent partial disability, assuming the judge on remand decided that determination could be made prior to completion of vocational rehabilitation. Moveover, the judge could allow credit for overpayment if he decided that the determination of permanent partial disability was appropriate at that time and before completion of vocational rehabilitation. *Easterling v. Woodward Lumber Co.*, 1991-NMCA-036, 112 N.M. 32, 810 P.2d 1252.

Disability result of first of two accidents. — There was sufficient evidence to support the finding that the disability to a worker's arm was the result of the first of two accidents, since surgery was planned before the second accident, and since a number of maladies, including numbness and tingling, preexisted the second accident. *Rodriguez v. McAnally Enters.*, 1994-NMCA-025, 117 N.M. 250, 871 P.2d 14.

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).

For annual survey of New Mexico Workers' Compensation Law, see 20 N.M.L. Rev. 459 (1990).

For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 263 to 294, 381, 382.

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.

52-1-26.1. Partial disability determination; calculation of modifications.

A. For the purpose of determining the percentage of disability pursuant to Section 52-1-26 NMSA 1978, impairment shall constitute the base value.

B. The appropriate values for the age modification, as determined in Section 52-1-26.2 NMSA 1978, and the education modification, as determined by Section 52-1-26.3 NMSA 1978, shall be added together. If this sum is less than zero, the sum shall be deemed to be zero for the purposes of this calculation. This sum shall be multiplied by the appropriate value of the physical capacity modification, determined in Section 52-1-26.4 NMSA 1978.

C. The product calculated in Subsection B of this section shall be added to the base value. This sum represents the percentage of unscheduled partial disability to be awarded.

History: 1978 Comp., § 52-1-26.1, enacted by Laws 1990 (2nd S.S.), ch. 2, § 12.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 12 effective January 1, 1991.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-1-26.2. Partial disability determination; age modification.

A. The range of the age modification is one to five. The modification is based upon the worker's age at the time of the disability rating.

B. For a worker who is:

(1) forty-four years old or younger, one point shall be awarded;

(2) forty-five to forty-nine years old, two points shall be awarded;

(3) fifty to fifty-four years old, three points shall be awarded;

(4) fifty-five to fifty-nine years old, four points shall be awarded; and

(5) sixty years old or older, five points shall be awarded.

History: 1978 Comp., § 52-1-26.2, enacted by Laws 1990 (2nd S.S.), ch. 2, § 13; 2001, ch. 87, § 2.

ANNOTATIONS

The 2001 amendment, effective July 1, 2001, changed the range of age modification from "zero to four" to "one to five" in Subsection A and increased the point values by one throughout Subsection B.

Time for determination of age modification points. — Age modification points were properly assigned on the basis of the worker's age at the time of the disability rating by the worker's compensation judge, not on the date she reached "maximum medical improvement." *Levario v. Ysidro Villareal Labor Agency*, 1995-NMCA-133, 120 N.M. 734, 906 P.2d 266.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-1-26.3. Partial disability determination; education modification.

A. The range of the education modification is one to eight. The modification shall be based upon the worker's formal education, skills and training at the time of the disability rating.

B. A worker shall be awarded points based on the formal education that the worker has received. A worker who:

(1) has completed no higher than the fifth grade shall be awarded three points;

(2) has completed the sixth grade but has completed no higher than the eleventh grade shall be awarded two points;

(3) has completed the twelfth grade or has obtained a high school equivalency credential but has not completed a college degree shall be awarded one point; and

(4) has completed a college degree or more shall receive zero points.

C. A worker shall be awarded points based upon the worker's skills. Skills shall be measured by reviewing the jobs that the worker has successfully performed during the ten years preceding the date of disability determination. For the purposes of this section, "successfully performed" means having remained on the job the length of time necessary to meet the specific vocational preparation (SVP) time requirement for that job as established in the dictionary of occupational titles published by the United States department of labor. The appropriate award of points shall be based upon the highest SVP level demonstrated by the worker in the performance of the jobs that the worker has successfully performed in the ten-year period preceding the date of disability determination, as follows:

(1) a worker with an SVP of one to two shall be awarded four points;

(2) a worker with an SVP of three to four shall be awarded three points;

(3) a worker with an SVP of five to six shall be awarded two points; and

(4) a worker with an SVP of seven to nine shall be awarded one point.

D. A worker shall be awarded points based upon the training that the worker has received. A worker who cannot competently perform a specific vocational pursuit shall be awarded one point. A worker who can perform a specific vocational pursuit shall not receive any points.

E. The sum of the points awarded the worker in Subsections B, C and D of this section shall constitute the education modification.

History: 1978 Comp., § 52-1-26.3, enacted by Laws 1990 (2nd S.S.), ch. 2, § 14; 2001, ch. 87, § 3; 2015, ch. 122, § 20.

ANNOTATIONS

The 2015 amendment, effective July 1, 2015, replaced "GED certificate" with "high school equivalency credential" relating to worker's compensation benefits; in the introductory sentence of Subsection B, after "formal education", deleted "he" and added "that the worker"; in Paragraph (3) of Subsection B, after "obtained a", deleted "GED certificate" and added "high school equivalency credential"; in the introductory paragraph of Subsection C, after "awarded points based upon", deleted "his" and added "the worker's", after "reviewing the jobs", deleted "he" and added "that the worker", and after "performance of the jobs", deleted "he" and added "that the worker"; and in Subsection D, after "upon the training", deleted "he" and added "that the worker".

The 2001 amendment, effective July 1, 2001, changed the range of the education modification from "zero to seven" to "one to eight" in Subsection A and increased the point values by one throughout Subsection B.

Construction with Section 52-1-56 NMSA 1978. — The term "disability," as used in Section 52-1-56 NMSA 1978 for purposes of modification of a compensation order, refers to a worker's physical condition and does not include the education modifier used pursuant to this section to determine disability rating. *Herrera v. Quality Imports*, 1999-NMCA-140, 128 N.M. 300, 992 P.2d 313.

Worker could not "competently perform". — Since the worker's residual physical capacity had been classified as "light," he could not "competently perform" any of his previous vocations, and there was insufficient evidence in the record to support the workers' compensation judge's finding that the worker could perform a specific vocational pursuit. The worker should have been awarded one point under subsection D. *Medina v. Berg Constr., Inc.*, 1996-NMCA-087, 122 N.M. 350, 924 P.2d 1362.

Diminished physical abilities. — Where there was ample evidence that the worker could not perform heavy labor, including the employer's admission that the worker's physical capacity was medium and restrictions placed by physicians, and his previous occupations as carpenter and farm worker involved heavy labor, he was entitled to a vocational pursuit point because he could not perform any of his previous work. *Rodriguez v. La Mesilla Constr. Co.*, 1997-NMCA-062, 123 N.M. 489, 943 P.2d 136.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-1-26.4. Partial disability determination; physical capacity modification.

A. The range of the physical capacity modification is one to eight.

B. The award of points to a worker shall be based upon the difference between the physical capacity necessary to perform the worker's usual and customary work and the worker's residual physical capacity. The award of points shall be based upon the following table:

RESIDUAL PHYSICAL CAPACITY

		S	L	M	H
PRE-INJURY	S	1	1	1	1
PHYSICAL CAPACITY	L	3	1	1	1
(USUAL AND	M	5	3	1	1
CUSTOMARY WORK)	H	8	5	3	1.

C. For the purposes of this section:

(1) "H" or "heavy" means the ability to lift over fifty pounds occasionally or up to fifty pounds frequently;

(2) "M" or "medium" means the ability to lift up to fifty pounds occasionally or up to twenty-five pounds frequently;

(3) "L" or "light" means the ability to lift up to twenty pounds occasionally or up to ten pounds frequently. Even though the weight lifted may be only a negligible amount, a job is in this category when it requires walking or standing to a significant degree or when it involves sitting most of the time with a degree of pushing and pulling of arm or leg controls or both; and

(4) "S" or "sedentary" means the ability to lift up to ten pounds occasionally or up to five pounds frequently. Although a sedentary job is defined as one that involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required only occasionally and other sedentary criteria are met.

D. The determination of a worker's residual physical capacity shall be made by a health care provider defined in Subsection C, E or G of Section 52-4-1 NMSA 1978. If the worker or employer disagrees on who shall make this determination, the dispute shall be resolved in accordance with the provisions set forth in Section 52-1-51 NMSA 1978.

History: 1978 Comp., § 52-1-26.4, enacted by Laws 1990 (2nd S.S.), ch. 2, § 15; 2003, ch. 265, § 2.

ANNOTATIONS

The 2003 amendment, effective June 20, 2003, in the section heading added "Partial" at the beginning and deleted "calculation" near the middle; and made several changes in the "Residual Physical Capacity" table in Subsection B.

Job description. — Where the worker’s job description as a correctional officer required the worker to have the capacity to lift more than fifty pounds, the worker’s work

required "heavy" physical capacity. *Moya v. City of Albuquerque*, 2008-NMSC-004, 143 N.M. 258, 175 P.3d 926.

Correctional officer. — The workers' compensation judge correctly classified the level of physical capacity that was necessary in the usual and customary course of a correctional officer's job as medium where the job description stated that a correctional officer was required to lift up to thirty-five pounds frequently and more than thirty-five pounds rarely. *Moya v. City of Albuquerque*, 2007-NMCA-057, 141 N.M. 617, 159 P.3d 266, cert. granted, 2007-NMCERT-005, rev'd, 2008-NMSC-004, 143 N.M. 258, 175 P.3d 926.

Requirements mandatory for classification at certain level. — Reading the provisions of this section, together with the provisions of the other statutory modifiers, the legislature intended that a worker must be able to meet all the lifting requirements for each level in order to be classified at that level. *Medina v. Berg Constr., Inc.*, 1996-NMCA-087, 122 N.M. 350, 924 P.2d 1362.

Light duty classification was supported by sufficient evidence. — Where worker, who was employed as a school bus driver and who injured worker's back and shoulder, had been released to work twice in a light duty capacity by worker's treating physicians; and two independent medical examiners agreed that worker's abilities were consistent with a light duty designation, there was sufficient evidence to support the workers' compensation judge's determination that worker's residual physical capacity was light duty. *Ruiz v. Los Lunas Pub. Sch.*, 2013-NMCA-085.

"Usual and customary" work is not limited to the job held by the worker at the time of injury, or to the worker's job within a specific time frame. *Levario v. Ysidro Villareal Labor Agency*, 1995-NMCA-133, 120 N.M. 734, 906 P.2d 266.

Consideration of evidence of health care provider. — Even though evidence must be presented by a qualified health provider on the issue of a worker's residual physical capacity, a worker's compensation judge is free to consider this evidence in the same manner, and to the same degree, as any other expert testimony. *Slygh v. RMCI, Inc.*, 1995-NMCA-081, 120 N.M. 358, 901 P.2d 776.

Worker unable to "competently perform". — Since the worker's residual physical capacity had been classified as "light," he could not "competently perform" any of his previous vocations, and there was insufficient evidence in the record to support the workers' compensation judge's finding that the worker could perform a specific vocational pursuit. *Medina v. Berg Constr., Inc.*, 1996-NMCA-087, 122 N.M. 350, 924 P.2d 1362.

Inability to perform heavy labor. — Where there was ample evidence that the worker could not perform heavy labor, including the employer's admission that the worker's physical capacity was medium and restrictions placed by physicians, and his previous occupations as carpenter and farm worker involved heavy labor, he was entitled to at

least four points for physical capacity modification. *Rodriguez v. La Mesilla Constr. Co.*, 1997-NMCA-062, 123 N.M. 489, 943 P.2d 136.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-1-27. Repealed.

ANNOTATIONS

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 repealed 52-1-27 NMSA 1978, effective June 19, 1987.

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.

ANNOTATIONS

I. GENERAL CONSIDERATIONS.

Seasonal employment. — Seasonal employment does not include activities which can be carried on essentially year round, even if the work may be occasionally interrupted by producers, market fluctuations, or other outside agents. Logging is not seasonal employment for purposes of the New Mexico Workers' Compensation Act. *Murillo v. Payroll Express*, 1995-NMCA-062, 120 N.M. 333, 901 P.2d 751.

Health care provider defined. — The phrase "health care provider" as used by the legislature is a shorthand expression referring to licensed occupations listed in Section 52-4-1 NMSA 1978 without reference to the requirement of licensure in New Mexico. The purpose of the 1987 amendment was to expand the admissibility of expert testimony regarding causation, not restrict it. The reference in this section to Section 52-4-1 NMSA 1978 can best be explained as the use of a handy list of health care professionals who treat workers and therefore would be competent to render an opinion on causation. *Coslett v. Third St. Grocery*, 1994-NMCA-046, 117 N.M. 727, 876 P.2d 656, cert. denied, 117 N.M. 802, 877 P.2d 1105.

For there to be workmen's (workers') compensation award, there must be disability and the compensation payable is measured in terms of disability. *McCleskey v. N.C. Ribble Co.*, 1969-NMCA-042, 80 N.M. 345, 455 P.2d 849, cert. denied, 80 N.M. 317, 454 P.2d 974.

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 (workers') compensation law favors recovery rather than denial of compensation. *Ensley v. Grace*, 1966-NMSC-181, 76 N.M. 691, 417 P.2d 885.

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.*, 1962-NMSC-161, 71 N.M. 157, 376 P.2d 576.

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.*, 1970-NMCA-132, 82 N.M. 424, 483 P.2d 305.

Order denying objection to change not appealable. — A judge's order denying a request, or an objection, to change health care provider is not final and appealable when a claim for benefits is pending before the workers compensation administration. *Kellewood v. BHP Minerals Int'l*, 1993-NMCA-148, 116 N.M. 678, 866 P.2d 406.

Elements to prove claim. — This section sets forth the elements necessary to prove a compensable claim. *Murphy v. Strata Prod. Co.*, 2006-NMCA-008, 138 N.M. 809, 126 P.3d 1173.

Test for recovery under workmen's (workers') compensation statute relates to the workman's (worker'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.*, 1963-NMSC-075, 72 N.M. 94, 380 P.2d 836.

Primary test for disability is capacity to perform work. *Adams v. Loffland Bros. Drilling Co.*, 1970-NMCA-114, 82 N.M. 72, 475 P.2d 466; *Bufalino v. Safeway Stores, Inc.*, 1982-NMCA-127, 98 N.M. 560, 650 P.2d 844.

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 (workers') compensation act. *DiMatteo v. County of Dona Ana*, 1985-NMCA-099, 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.*, 1970-NMCA-114, 82 N.M. 72, 475 P.2d 466.

Measure of disability under workmen's (workers') compensation statute is the relationship between the workman's (worker's) ability to do work prior to the injury, and such ability following the injury. *Gurule v. Albuquerque-Bernalillo Cnty. Economic Opportunity Bd.*, 1972-NMCA-094, 84 N.M. 196, 500 P.2d 1319, cert. denied, 84 N.M. 180, 500 P.2d 1303.

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*, 1968-NMSC-073, 79 N.M. 99, 440 P.2d 291.

"Permanent damage to the heart" is not a "disability" unless it adversely affects a workman's (worker's) capacity to work. If it does, then a workman (worker) suffers a permanent disability, whether the damage is large or small. *Bufalino v. Safeway Stores, Inc.*, 1982-NMCA-127, 98 N.M. 560, 650 P.2d 844.

Latent injuries are recognized under this section. *Chaffins v. Jelco, Inc.*, 1971-NMCA-071, 82 N.M. 666, 486 P.2d 75, cert. quashed, 83 N.M. 22, 487 P.2d 1092.

Worker's knowledge of impairment for purposes of statute of limitations. — The fact that a worker is restricted to proving his claim by the testimony of a health care provider agreed upon by the parties or approved by the workers' compensation judge, and that the provider is directed to use American medical association publications in establishing the degree of disability, does not limit the running of the statute of limitations to only those situations when a health care provider has actually informed the worker that he has sustained a permanent impairment; thus, resolution of when a

worker was deemed to have sustained impairment for purposes of running of the limitations period constituted a factual issue unsuitable for resolution by summary judgment. *Montoya v. Kirk-Mayer, Inc.*, 1995-NMCA-104, 120 N.M. 550, 903 P.2d 861.

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.*, 1964-NMSC-201, 74 N.M. 712, 397 P.2d 953.

If a veterans administration payment is a pension, it cannot be considered to reduce the amount of workmen's (workers') compensation. *Snead v. Adams Constr. Co.*, 1963-NMSC-075, 72 N.M. 94, 380 P.2d 836.

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.*, 1965-NMSC-030, 75 N.M. 60, 400 P.2d 476.

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.*, 1965-NMSC-030, 75 N.M. 60, 400 P.2d 476.

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.*, 1971-NMCA-160, 83 N.M. 283, 491 P.2d 171.

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.*, 1970-NMCA-130, 82 N.M. 253, 479 P.2d 533.

Trial court can properly consider deposition testimony of treating physician. *Martinez v. Universal Constructors, Inc.*, 1971-NMCA-160, 83 N.M. 283, 491 P.2d 171.

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*, 1968-NMCA-102, 79 N.M. 759, 449 P.2d 667.

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.*, 1970-NMCA-077, 81 N.M. 616, 471 P.2d 186.

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.*, 1971-NMSC-011, 82 N.M. 271, 480 P.2d 161.

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.*, 1977-NMCA-017, 90 N.M. 220, 561 P.2d 493, cert. denied, 90 N.M. 254, 561 P.2d 1347.

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.*, 1971-NMSC-011, 82 N.M. 271, 480 P.2d 161.

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.*, 1971-NMCA-071, 82 N.M. 666, 486 P.2d 75, cert. quashed, 83 N.M. 22, 487 P.2d 1092.

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.*, 1966-NMSC-075, 76 N.M. 213, 413 P.2d 693.

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.*, 1965-NMSC-067, 75 N.M. 235, 403 P.2d 681; *Perea v. Gorby*, 1980-NMCA-048, 94 N.M. 325, 610 P.2d 212.

The mere production of one or more experts who testify to the causal connection does not satisfy the burden imposed upon the workman (worker) 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*, 1968-NMSC-170, 79 N.M. 590, 446 P.2d 642.

Compensation not payable until and unless a work-related accident produces an injury which becomes disabling. *Casias v. Zia Co.*, 1979-NMCA-068, 93 N.M. 78, 596 P.2d 521, cert. denied, 93 N.M. 8, 595 P.2d 1203 .

Determination of amount of compensation. — If the court finds that a workman's (workman's) injury resulted in a prejudgment terminated disability, he is paid "the amount then due." If a workman's (worker'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.*, 1979-NMCA-042, 93 N.M. 358, 600 P.2d 304, cert. denied, 92 N.M. 675, 593 P.2d 1078.

Voluntary payment of benefits as evidence. — Admission by an employer that it voluntarily paid an employee workmen's (workers') 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.*, 1981-NMCA-096, 96 N.M. 643, 633 P.2d 1241.

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.*, 1982-NMCA-060, 97 N.M. 753, 643 P.2d 622, cert. denied, 98 N.M. 336, 648 P.2d 794.

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. N.M. State Hwy. Dep't*, 1982-NMCA-097, 98 N.M. 256, 648 P.2d 8, cert. denied, 98 N.M. 336, 648 P.2d 794 (decided under prior law).

Expert medical testimony. — A psychologist cannot render "expert medical testimony" under Subsection B of this statute. *Fierro v. Stanley's Hardware*, 1985-NMCA-085, 104 N.M. 401, 722 P.2d 652, *rev'd on other grounds*, 1986-NMSC-022, 104 N.M. 50, 716 P.2d 241.

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.*, 1987-NMSC-022, 105 N.M. 715, 737 P.2d 74.

Licensed psychologist was qualified to provide expert medical testimony of causation of plaintiff's claimed mental condition. *Madrid v. University of Cal.*, 1987-NMSC-022, 105 N.M. 715, 737 P.2d 74.

A chiropractor may offer expert medical testimony regarding causation. *Vallejos v. KNC, Inc.*, 1987-NMSC-030, 105 N.M. 613, 735 P.2d 530.

Standard for admitting expert testimony established by *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as adopted in New Mexico by *State v. Alberico*, 1993-NMSC-047, 116 N.M. 156, 861 P.2d 192, does not apply to the testimony of a health care provider pursuant to Subsection B of this section or Section 52-3-32 NMSA 1978. *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014.

The "expert" testimony required by Subsection B of this section refers to testimony based on the treating health care provider’s training, experience and familiarity. *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014.

Section 11.4.4.12(O) NMAC (now 11.4.4.12 P), when read together with Subsection B of this section, necessarily implies a different evidentiary principle than that of *Daubert/Alberico*. *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014.

A doctor's opinion testimony was substantial evidence for finding of 80% partial permanent disability. *Roybal v. County of Santa Fe*, 1968-NMSC-073, 79 N.M. 99, 440 P.2d 291.

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.*, 1971-NMCA-160, 83 N.M. 283, 491 P.2d 171.

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*, 1975-NMCA-059, 88 N.M. 48, 536 P.2d 1104, cert. denied, 88 N.M. 29, 536 P.2d 1085.

Medical expert may properly express his opinion in percentages as to the impairment of the physical functions of a claimant. *Hales v. Van Cleave*, 1967-NMCA-006, 78 N.M. 181, 429 P.2d 379, cert. denied, 78 N.M. 198, 429 P.2d 657.

Expert medical testimony not required for intoxication defense by employer. — This section (proof of compensable claims) does not require an employer seeking to establish that a worker's accident was caused by his or her intoxication pursuant to 52-1-11 NMSA 1978 to prove such a causal connection through expert testimony. *Estate of Mitchum v. Triple S Trucking*, 1991-NMCA-118, 113 N.M. 85, 823 P.2d 327, cert. denied, 113 N.M. 16, 820 P.2d 1330.

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.*, 1968-NMSC-037, 79 N.M. 109, 440 P.2d 301, *overruled on other grounds by American Tank & Steel Corp. v. Thompson*, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

Work-related stress. — The burden was on worker to provide medical evidence showing that his heart attack and death was a medically probable result of work-related stress. *Grine v. Peabody Nat. Res.*, 2005-NMCA-075, 137 N.M. 649, 114 P.3d 329, *rev'd on other grounds*, 2006-NMSC-031, 140 N.M. 30, 139 P.3d 190.

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*, 1968-NMSC-073, 79 N.M. 99, 440 P.2d 291.

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.*, 1966-NMSC-099, 76 N.M. 321, 414 P.2d 679.

Finding of disability as ultimate fact. — A finding that a workman (worker), to a stated percentage extent, is partially and permanently disabled is a finding of an ultimate fact. *McClesky v. N.C. Ribble Co.*, 1969-NMCA-042, 80 N.M. 345, 455 P.2d 849, cert. denied, 80 N.M. 317, 454 P.2d 974.

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*, 1989-NMCA-002, 108 N.M. 326, 772 P.2d 360, cert. denied, 108 N.M. 197, 769 P.2d 731.

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*, 1968-NMSC-006, 78 N.M. 641, 436 P.2d 501.

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.*, 1964-NMSC-104, 74 N.M. 211, 392 P.2d 407.

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.*, 1969-NMCA-042, 80 N.M. 345, 455 P.2d 849, cert. denied, 80 N.M. 317, 454 P.2d 974.

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., Inc.*, 1966-NMSC-189, 77 N.M. 50, 419 P.2d 250.

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.*, 1981-NMCA-041, 96 N.M. 79, 628 P.2d 324, cert. denied, 96 N.M. 116, 628 P.2d 686.

The appellate court, on appeal, in reviewing workmen's (workers') 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. N.M. State Hwy. Dep't*, 1982-NMCA-097, 98 N.M. 256, 648 P.2d 8, cert. denied, 98 N.M. 336, 648 P.2d 794.

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.*, 1982-NMCA-127, 98 N.M. 560, 650 P.2d 844.

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*, 1986-NMCA-013, 104 N.M. 14, 715 P.2d 462.

II. ACCIDENT IN COURSE OF EMPLOYMENT.

A. IN GENERAL.

Claimant seeking recovery under workmen's (workers') 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.*, 1967-NMSC-025, 77 N.M. 408, 423 P.2d 603.

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.*, 1955-NMSC-056, 59 N.M. 385, 285 P.2d 497 (decided under former law).

To recover workmen's (workers') 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.*, 1970-NMCA-077, 81 N.M. 616, 471 P.2d 186.

Under Workmen's (Workers') Compensation Act, recovery is allowed only "when the workman (worker) 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*, 1968-NMSC-006, 78 N.M. 641, 436 P.2d 501.

Claims under the Workmen's (Workers') Compensation Act are allowed only when they involve job-related injuries. *Holliday v. Talk of Town, Inc.*, 1982-NMCA-103, 98 N.M. 354, 648 P.2d 812, cert. denied, 98 N.M. 336, 648 P.2d 794.

Controlling factor whether general servant of employer or special servant of another. — In the case of *Weese v. Stoddard*, 1956-NMSC-117, 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.*, 1963-NMSC-172, 73 N.M. 178, 386 P.2d 602.

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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65; *Losinski v. Corcoran, Barkoff & Stagnone, P.A.*, 1981-NMCA-127, 97 N.M. 79, 636 P.2d 898, cert. denied, 97 N.M. 483, 641 P.2d 514; *Lujan v. Payroll Express, Inc.*, 1992-NMCA-063, 114 N.M. 257, 837 P.2d 451, cert. denied, 114 N.M. 62, 834 P.2d 939.

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.*, 1963-NMSC-172, 73 N.M. 178, 386 P.2d 602.

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*, 1984-NMCA-136, 102 N.M. 312, 694 P.2d 1377, cert. denied, 102 N.M. 293, 694 P.2d 1358 (1985).

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*, 1980-NMCA-048, 94 N.M. 325, 610 P.2d 212.

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*, 1980-NMCA-048, 94 N.M. 325, 610 P.2d 212.

Employer's voluntary payment of employee's benefits admission of accident. — By voluntarily paying an injured employee workmen's (workers') 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*, 1980-NMCA-048, 94 N.M. 325, 610 P.2d 212, *but see Romero v. S.S. Kresge Co.*, 1981-NMCA-001, 95 N.M. 484, 623 P.2d 998, cert. denied, 95 N.M. 593, 624 P.2d 535, *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743; *Medrano v. Ray Willis Constr. Co.*, 1981-NMCA-096, 96 N.M. 643, 633 P.2d 1241.

Voluntary payment of compensation benefits is merely competent evidence as to any issue in a workmen's (workers') compensation suit and does not create any presumptions or shifts in the original burden. *Romero v. S.S. Kresge Co.*, 1981-NMCA-001, 95 N.M. 484, 623 P.2d 998, cert. denied, 95 N.M. 593, 624 P.2d 535, *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743, *see Medrano v. Ray Willis Constr. Co.*, 1981-NMCA-096, 96 N.M. 643, 633 P.2d 1241.

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.*, 1965-NMSC-028, 75 N.M. 50, 400 P.2d 470.

Self-directed physical fitness. — A worker did not sustain an injury arising in the course of his employment when he suffered a heart attack while engaged in a self-directed fitness program, although physical fitness was a prerequisite to attending the

law enforcement academy. *Meeks v. Eddy Cnty. Sheriff's Dep't*, 1994-NMCA-134, 118 N.M. 643, 884 P.2d 534, cert. denied, 118 N.M. 731, 885 P.2d 1325.

B. ACCIDENTAL INJURY.

"Accidental injury" or "accident" is an unlooked for mishap, or untoward event which is not expected or designed. *Lyon v. Catron Cnty. Comm'rs*, 1969-NMCA-108, 81 N.M. 120, 464 P.2d 410, cert. denied, 81 N.M. 140, 464 P.2d 559 (1970); *Herndon v. Albuquerque Pub. Schs.*, 1978-NMCA-072, 92 N.M. 635, 593 P.2d 470, *rev'd on other grounds*, 1978-NMSC-090, 92 N.M. 287, 587 P.2d 434; *Hernandez v. Home Educ. Livelihood Program, Inc.*, 1982-NMCA-079, 98 N.M. 125, 645 P.2d 1381, cert. denied, 98 N.M. 336, 648 P.2d 794 (specially concurring opinion); *Bufalino v. Safeway Stores, Inc.*, 1982-NMCA-127, 98 N.M. 560, 650 P.2d 844.

Unnecessary that workman (worker) 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 Cnty. Comm'rs*, 1969-NMCA-108, 81 N.M. 120, 464 P.2d 410, cert. denied, 81 N.M. 140, 464 P.2d 559 (1970).

If strain of claimant's usual exertions causes collapse from back weakness, injury is accidental. *Lyon v. Catron Cnty. Comm'rs*, 1969-NMCA-108, 81 N.M. 120, 464 P.2d 410, 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 Cnty. Comm'rs*, 1969-NMCA-108, 81 N.M. 120, 464 P.2d 410, cert. denied, 81 N.M. 140, 464 P.2d 559 (1970); *Herndon v. Albuquerque Pub. Schs.*, 1978-NMCA-072, 92 N.M. 635, 593 P.2d 470, *rev'd on other grounds*, 1978-NMSC-090, 92 N.M. 287, 587 P.2d 434, *Tom Growney Equip. Co. v. Jonett*, 2005-NMSC-015, 137 N.M. 497, 113 P.3d 320.

An internal malfunction of the body caused by on-the-job activity is a compensable injury under the Workmen's (Workers') Compensation Act. *Powers v. Riccobene Masonry Constr., Inc.*, 1980-NMCA-172, 97 N.M. 20, 636 P.2d 291, cert. denied, 99 N.M. 148, 655 P.2d 160.

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*, 1987-NMSC-096, 106 N.M. 350, 742 P.2d 1055.

Physicians' testimony supported a finding that claimant's death was causally connected to employment-related stress, where claimant, a hospital nurse, had died as a result of

a heart attack suffered at work. *Herman v. Miners' Hosp.*, 1991-NMSC-021, 111 N.M. 550, 807 P.2d 734.

The physician's testimony was sufficient to establish that the decedent's death was caused by a myocardial infarction related to his work. *Mieras v. Dyncorp*, 1996-NMCA-095, 122 N.M. 401, 925 P.2d 518, cert. denied, 122 N.M. 279, 923 P.2d 1164.

Opinion of worker's treating physician, who treated over 10,000 heart patients in his 30-year career; who treated worker for several months; who was aware of worker's pre-existing conditions, his work schedule, mandatory overtime and confrontation with supervisor; and who believed that worker, who did not report any stress from his family situation, had a happy marriage, a supportive wife and a good family and whose testimony was uncontradicted, that worker's work-related stress contributed to his heart attack was substantial evidence of a causal connection between the worker's heart attack and his work-related stress. *Grine v. Peabody Natural Res.*, 2006-NMSC-031, 140 N.M. 30, 139 P.3d 90.

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. Schs.*, 1978-NMCA-072, 92 N.M. 635, 593 P.2d 470, *rev'd on other grounds*, 1978-NMSC-090, 92 N.M. 287, 587 P.2d 434; *Powers v. Riccobene Masonry Constr., Inc.*, 1980-NMCA-172, 97 N.M. 20, 636 P.2d 291, cert. denied, 99 N.M. 148, 655 P.2d 160.

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 (workers') 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.*, 1984-NMCA-099, 101 N.M. 801, 689 P.2d 1272, cert. denied, 102 N.M. 7, 690 P.2d 450.

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.*, 1986-NMCA-016, 105 N.M. 167, 730 P.2d 470, cert. quashed, 105 N.M. 111, 729 P.2d 1365; *Lopez v. Smith's Mgmt. Corp.*, 1986-NMCA-054, 106 N.M. 416, 744 P.2d 544, cert. quashed, 106 N.M. 405, 744 P.2d 180 (1987).

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.*,

1986-NMCA-071, 105 N.M. 112, 729 P.2d 1366, cert. denied, 105 N.M. 111, 729 P.2d 1365.

A gradual, noise-induced hearing loss is an accidental injury compensable under this section and is not an occupational disease. *Cisneros v. Molycorp, Inc.*, 1988-NMCA-080, 107 N.M. 788, 765 P.2d 761, cert. denied, 107 N.M. 785, 765 P.2d 758.

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.*, 1987-NMCA-103, 105 N.M. 359, 732 P.2d 1382, cert. denied, 105 N.M. 358, 732 P.2d 1381.

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*, 1976-NMCA-049, 89 N.M. 299, 551 P.2d 989, cert. denied, 90 N.M. 7, 558 P.2d 619.

C. COURSE OF EMPLOYMENT.

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. Schs.*, 1978-NMCA-081, 92 N.M. 112, 583 P.2d 476.

"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*, 1976-NMCA-049, 89 N.M. 299, 551 P.2d 989, cert. denied, 90 N.M. 7, 558 P.2d 619.

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.*, 1982-NMCA-060, 97 N.M. 753, 643 P.2d 622, cert. denied, 98 N.M. 336, 648 P.2d 794; *Barton v. Las Cositas*, 1984-NMCA-136, 102 N.M. 312, 694 P.2d 1377, cert. denied, 102 N.M. 293, 694 P.2d 1358 (1985).

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*, 1964-NMSC-156, 74 N.M. 320, 393 P.2d 438.

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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65.

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.*, 1966-NMSC-117, 76 N.M. 420, 415 P.2d 546.

In workman's (worker'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 (worker) arose out of and in the course of his employment. *Brundage v. K.L. House Constr. Co.*, 1964-NMSC-243, 74 N.M. 613, 396 P.2d 731.

Conclusion of law freely reviewable. — The conclusion of law that the accident arose out of the course of employment is freely reviewable. *Losinski v. Corcoran, Barkoff & Stagnone, P.A.*, 1981-NMCA-127, 97 N.M. 79, 636 P.2d 898, cert. denied, 97 N.M. 483, 641 P.2d 514.

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 co-employee 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*, 1966-NMSC-181, 76 N.M. 691, 417 P.2d 885.

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*, 1976-NMCA-049, 89 N.M. 299, 551 P.2d 989, cert. denied, 90 N.M. 7, 558 P.2d 619.

Automotive mechanic's injury, sustained while working on his own vehicle after hours in his employer's garage was in the course of his employment, where there was sufficient evidence to find that his employer benefitted from his presence on the premises. *Evans v. Valley Diesel*, 1991-NMSC-027, 111 N.M. 556, 807 P.2d 740.

Injury to employee living at job site. — The bunkhouse rule states that if an employee is required to live on the employer's premises, an injury suffered by the employee while reasonably using the premises is considered as occurring in the course of employment, even if the injury occurs during an employee's leisure time. *Lujan v. Payroll Express, Inc.*, 1992-NMCA-063, 114 N.M. 257, 837 P.2d 451, cert. denied, 114 N.M. 62, 834 P.2d 939.

Claimant was not performing service for employer where she intended to give her supervisor a ride home. *McDonald v. Artesia Gen. Hosp.*, 1963-NMSC-199, 73 N.M. 188, 386 P.2d 708, *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743.

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. Schs.*, 1978-NMCA-081, 92 N.M. 112, 583 P.2d 476.

Trip to or from doctor's office. — Normally, a trip to or from a doctor's office is only compensable under the Workmen's (Workers') Compensation Act if the injury to be treated was work-related and compensable under the act. *Barton v. Las Cositas*, 1984-NMCA-136, 102 N.M. 312, 694 P.2d 1377, cert. denied, 102 N.M. 293, 694 P.2d 1358 (1985).

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*, 1983-NMCA-051, 100 N.M. 1, 664 P.2d 1014, cert. denied, 100 N.M. 192, 668 P.2d 308.

D. ARISING OUT OF EMPLOYMENT.

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*, 1966-NMSC-213, 77 N.M. 286, 421 P.2d 804; *Gutierrez v. Artesia Pub. Schs.*, 1978-NMCA-081, 92 N.M. 112, 583 P.2d 476; *Losinski v. Corcoran, Barkoff & Stagnone, P.A.*, 1981-NMCA-127, 97 N.M. 79, 636 P.2d 898, cert. denied, 97 N.M. 483, 641 P.2d 514.

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*, 1984-NMCA-136, 102 N.M. 312, 694 P.2d 1377, cert. denied, 102 N.M. 293, 694 P.2d 1358 (1985).

Injuries stemming from sexual harassment. — Plaintiff's claim that the injuries she suffered due to sexual harassment in the workplace was an injury "arising out of" employment failed because sexual harassment was not a regular incident of the

employment and the employer had specific policies in place prohibiting sexual harassment. *Cox v. Chino Mines/Phelps Dodge*, 1993-NMCA-036, 115 N.M. 335, 850 P.2d 1038.

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. Sch. Dist.*, 1980-NMCA-066, 96 N.M. 587, 633 P.2d 695, *rev'd on other grounds*, 1981-NMSC-075, 96 N.M. 577, 633 P.2d 685.

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.*, 1964-NMSC-243, 74 N.M. 613, 396 P.2d 731.

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. Sch.*, 1978-NMCA-081, 92 N.M. 112, 583 P.2d 476.

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.*, 1982-NMCA-060, 97 N.M. 753, 643 P.2d 622, cert. denied, 98 N.M. 336, 648 P.2d 794.

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*, 1982-NMCA-164, 99 N.M. 54, 653 P.2d 885.

Establishing causation. — The fact that the decedent died while at work is insufficient, without other evidence, to establish that the injury arose out of the employment; similarly, where the evidence bearing upon the issue of causation is conflicting, the fact that there was evidence which, if effected by the factfinder, would have permitted it to reach a different result, does not constitute a basis for reversal. *Wilson v. Yellow Freight Sys.*, 1992-NMCA-093, 114 N.M. 407, 839 P.2d 151.

Reasonable inferences drawn from proven facts. — Where decedent met her death by reason of an unexplained assault on her by her co-employee 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*, 1966-NMSC-181, 76 N.M. 691, 417 P.2d 885.

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*, 1966-NMSC-181, 76 N.M. 691, 417 P.2d 885.

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. *Sw. Portland Cement Co. v. Simpson*, 135 F.2d 584 (10th Cir. 1943); *Campbell v. Schwers-Campbell, Inc.*, 1955-NMSC-056, 59 N.M. 385, 285 P.2d 497 (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*, 1989-NMSC-014, 108 N.M. 240, 771 P.2d 173.

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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65.

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 (workers') compensation. *Valdez v. Glover Packing Co.*, 1972-NMCA-032, 83 N.M. 570, 494 P.2d 983.

Horseplay. — A participant in horseplay may recover workers' compensation benefits if he or she can establish that the activity in which the injury occurred had become a regular incident of the employment, rather than an isolated act. *Woods v. Asplundh Tree Expert Co.*, 1992-NMCA-046, 114 N.M. 162, 836 P.2d 81, cert. denied, 113 N.M. 744, 832 P.2d 1223.

In using the course of employment test to determine whether an employee injured during horseplay should recover, the fact-finder should consider: (1) the extent and

seriousness of the deviation, (2) the completeness of the deviation, (3) the extent to which the practice of horseplay had become an accepted part of the employment, and (4) the extent to which the nature of the employment may be expected to include some such horseplay. *Woods v. Asplundh Tree Expert Co.*, 1992-NMCA-046, 114 N.M. 162, 836 P.2d 81, cert. denied, 113 N.M. 744, 832 P.2d 1223.

Injuries sustained while engaged in horseplay were compensable when the activity giving rise to the injuries constituted a regular incident of employment. — Where worker sustained injuries while engaged in horseplay on employer's premises, the workers' compensation judge did not err in concluding worker's injuries were compensable, because the injury took place during normal work hours and on employer's premises, worker and other co-workers had engaged in horseplay on previous occasions, employer had not counseled worker concerning horseplay any time prior to the incident, and employer had done nothing else to curtail repeated horseplay at the detention center. The evidence supports a determination that the activity giving rise to the injury constituted a regular incident of employment, as opposed to an isolated act, and any deviation from employment was narrow in scope and neither grave nor complete. *Motes v. Curry Cty. Adult Det. Ctr*., 2019-NMCA-022, cert. denied.

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*, 1987-NMCA-140, 106 N.M. 594, 746 P.2d 1126.

Injury in employee's own vehicle at job site. — Employee who died of carbon monoxide poisoning while sleeping in a van he had purchased for purposes of camping at the employer's job site sustained an accidental injury arising out of and in the course of his employment within the meaning of this section. *Lujan v. Payroll Express, Inc.*, 1992-NMCA-063, 114 N.M. 257, 837 P.2d 451, cert. denied, 114 N.M. 62, 834 P.2d 939 (decided under former law).

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.*, 1970-NMCA-100, 81 N.M. 788, 474 P.2d 80.

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*, 1966-NMSC-213, 77 N.M. 286, 421 P.2d 804.

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 (workers') compensation law. *Roskell v. Prudential Ins. Co. of Am.*, 529 F.2d 1 (10th Cir. 1976).

Injury while loading car not incident to employment. — Where workman (worker) 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.*, 1966-NMSC-124, 76 N.M. 463, 415 P.2d 847.

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. Schs.*, 1978-NMCA-081, 92 N.M. 112, 583 P.2d 476.

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.*, 1980-NMCA-172, 97 N.M. 20, 636 P.2d 291, cert. denied, 99 N.M. 148, 655 P.2d 160.

E. SPECIAL ERRAND RULE.

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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65.

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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65.

Workman (Worker) 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*, 1977-NMCA-048, 90 N.M. 477, 565 P.2d 348, cert. denied, 90 N.M. 636, 567 P.2d 485.

"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*, 1984-NMCA-136, 102 N.M. 312, 694 P.2d 1377, cert. denied, 102 N.M. 293, 694 P.2d 1358 (1985).

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*, 1984-NMCA-136, 102 N.M. 312, 694 P.2d 1377, cert. denied, 102 N.M. 293, 694 P.2d 1358 (1985).

F. GOING AND COMING RULE.

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*, 1964-NMSC-156, 74 N.M. 320, 393 P.2d 438.

Application of "going and coming" rule. — Under the "going and coming rule" worker was not entitled to compensation for injuries suffered during a nonroutine or unusual trip from the job site at a time when he was not being paid for travel time, and when he was not performing a job duty for the employer. *Arias v. AAA Landscaping*, 1993-NMCA-018, 115 N.M. 239, 849 P.2d 382.

The traveling-employee exception to the going and coming rule. — Under the traveling-employee exception to the going and coming rule, an employee whose work entails travel away from the employer's premises is, in most circumstances, under continuous workers' compensation coverage from the time he leaves home until he returns. The exception applies during the entire time the employee is traveling, and therefore necessarily encompasses injuries incurred while the employee is not actually working, such as when the employee is engaged in leisure or recreational activities. One seeking compensation for an injury must still demonstrate that the injury arose out of and in the course of employment. The requirement is met if the traveling employee was injured while engaging in an activity that was both reasonable and foreseeable, and if that activity is not conducted in an unreasonable or unforeseeable manner. Finally, the activity must confer some benefit on the employer. *Armenta v. A.S. Horner, Inc.*, 2015-NMCA-092, cert. granted, 2015-NMCERT-008.

Where worker, on a work-related trip in Springer, New Mexico, had been allowed to drive employer's vehicle after work hours to pick up food and alcohol for an employees' dinner, but after dinner was told by his supervisor to drink moderately and to not leave the motel, worker, despite the warning, left the motel in employer's vehicle and headed to Raton to continue partying. Worker was killed in an accident just north of Springer. Worker's blood alcohol concentration was .23 at the time of his death. The accident did not arise out of and in the course of worker's employment because worker's decision to take the vehicle for a ride could be considered foreseeable and reasonable conduct under the traveling-employee exception, but doing so under the significant influence of alcohol was not reasonable, and no benefit could have been conferred on employer by worker's drinking excessively and driving to Raton, where employer had no business interests. *Armenta v. A.S. Horner, Inc.*, 2015-NMCA-092, cert. granted, 2015-NMCERT-008.

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*, 1984-NMCA-136, 102 N.M. 312, 694 P.2d 1377, cert. denied, 102 N.M. 293, 694 P.2d 1358 (1985).

III. DISABILITY AS RESULT OF ACCIDENT.

A. IN GENERAL.

Liability for mental injury. — Whenever physical injury from a work-related accident is accompanied by mental injury arising out of the same accident, the worker's sole remedy is workers' compensation, whether or not the particular injury may be compensated by a monetary award under the act. *Maestas v. El Paso Natural Gas Co.*, 1990-NMCA-092, 110 N.M. 609, 798 P.2d 210, cert. denied, 110 N.M. 653, 798 P.2d 1039.

Disability resulting from mental delusion. — Subsection A evinces a legislative intent to restrict coverage to disability caused by real events, real occurrences at work. Not

only must the accidental injury arise out of and be in the course of the worker's employment, but the accident must also be "reasonably incident" to the work and the disability must be a "natural and direct result" of the accident. There is no room in the statutory language for a disability that may have been caused by something that is only imagined. *Green v. City of Albuquerque*, 1991-NMCA-104, 112 N.M. 784, 819 P.2d 1342, cert. denied, 112 N.M. 737, 819 P.2d 687.

Worker's claim for mental disablity due to perceived job harassment was not compensable, where his delusory perception of harassment was not caused by anything that happened at work and his mental condition was such that he would perceive harassment regardless of what actually happened. *Green v. City of Albuquerque*, 1991-NMCA-104, 112 N.M. 784, 819 P.2d 1342, cert. denied, 112 N.M. 737, 819 P.2d 687.

Disability must be "natural and direct" result of accident. — The requirement set forth in Subsection A(3) of this section that the disability be a "natural and direct result" of the accident supplements the proximate-cause requirement of Subsection C of Section 52-1-9 NMSA 1978 for worker's compensation claims. Under this test a worker is entitled to benefits for a disability arising immediately from a work-related accident and for a disability that develops later as a result of the normal activities of life, but not for subsequent injuries, such as a back injury during a worker's repair of his transmission, that can be characterized as stemming from an independent, intervening cause. *Aragon v. State Cors. Dep't*, 1991-NMCA-109, 113 N.M. 176, 824 P.2d 316, cert. denied, 113 N.M. 23, 821 P.2d 1060.

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.*, 1966-NMSC-235, 77 N.M. 220, 421 P.2d 435; *Stuckey v. Furr Food Cafeteria*, 1963-NMSC-064, 72 N.M. 15, 380 P.2d 172.

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 (workers') compensation. *Torres v. Kennecott Copper Corp.*, 1966-NMSC-160, 76 N.M. 623, 417 P.2d 435.

Not having established the causal connection required by Subsection B of this section, plaintiff cannot recover. *Romero v. Zia Co.*, 1966-NMSC-178, 76 N.M. 686, 417 P.2d 881.

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.*, 1965-NMSC-067, 75 N.M. 235, 403 P.2d 681.

"Accident" is required. — A causal connection between work done and an injury is insufficient; an accident is required. *Gonzales v. Stanke-Brown & Assocs.*, 1982-NMCA-109, 98 N.M. 379, 648 P.2d 1192.

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.*, 1979-NMCA-111, 93 N.M. 495, 601 P.2d 728, cert. denied, 93 N.M. 683, 604 P.2d 821.

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.*, 1979-NMCA-111, 93 N.M. 495, 601 P.2d 728, cert. denied, 93 N.M. 683, 604 P.2d 821.

B. BURDEN OF PROOF.

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*, 1970-NMCA-095, 81 N.M. 755, 473 P.2d 369.

Where defendants deny that plaintiff's alleged disability was natural and direct result of an accident, the workman (worker) 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*, 1968-NMSC-170, 79 N.M. 590, 446 P.2d 642, *Tom Growney Equip. Co.*, 2005-NMSC-015, 137 N.M. 497, 113 P.3d 320.

Denial that a disability is a natural and direct result of an accident is a condition precedent to the duty of a workman (worker) to establish the medical probability of a causal connection. *Medrano v. Ray Willis Constr. Co.*, 1981-NMCA-096, 96 N.M. 643, 633 P.2d 1241.

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.*, 1982-NMCA-109, 98 N.M. 379, 648 P.2d 1192.

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.*, 1970-NMCA-032, 81 N.M. 313, 466 P.2d 879.

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.*, 1970-NMCA-032, 81 N.M. 313, 466 P.2d 879.

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.*, 1966-NMSC-160, 76 N.M. 623, 417 P.2d 435; *Perea v. Gorby*, 1980-NMCA-048, 94 N.M. 325, 610 P.2d 212.

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 Mgmt. Corp.*, 1986-NMCA-054, 106 N.M. 416, 744 P.2d 544, cert. quashed, 106 N.M. 405, 744 P.2d 180 (1987).

It is incumbent 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., Inc.*, 1965-NMSC-067, 75 N.M. 235, 403 P.2d 681.

Where causation is denied the workman (worker) must establish that causal connection is a medical probability by expert medical testimony. *Chaffins v. Jelco, Inc.*, 1971-NMCA-071, 82 N.M. 666, 486 P.2d 75, cert. quashed, 83 N.M. 22, 487 P.2d 1092.

Where causal connection is denied by an employer, in order to prevail, it is incumbent 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.*, 1969-NMCA-051, 80 N.M. 418, 456 P.2d 892, cert. denied, 80 N.M. 388, 456 P.2d 221; *Yates v. Matthews*, 1963-NMSC-038, 71 N.M. 451, 379 P.2d 441; *Weston v. Carper Drilling Co.*, 1966-NMSC-235, 77 N.M. 220, 421 P.2d 435; *Anderson v. Mackey*, 1979-NMSC-041, 93 N.M. 40, 596 P.2d 253.

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*, 1970-NMCA-095, 81 N.M. 755, 473 P.2d 369.

C. PROOF OF CAUSATION.

Lay testimony may establish cause of accident. — Subsection B indicates that proof of causation by a health care provider is required to establish a connection between a worker's injury and disability if the employer denies that the disability resulted from a worker's accident; it does not, however, require expert testimony to establish the cause of the worker's accident. This aspect of proof may be established by either expert or lay testimony. *Garcia v. Borden, Inc.*, 1993-NMCA-047, 115 N.M. 486, 853 P.2d 737, cert. denied, 115 N.M. 409, 852 P.2d 682.

Testimony by the claimant about his reaction from the use of chlorine to clean equipment, stating that the chlorine caused him to become dizzy, that this dizziness continued, causing his fall a few minutes later in the locker room, was sufficient to explain the cause of his fall and the judge reasonably determined from this evidence that the worker's fall arose from a risk related to his employment. Although the effect of chlorine upon an individual is a matter that may properly be presented by expert testimony, the judge did not err in permitting the worker to testify concerning his own personal reaction following his use of chlorine during his work. *Garcia v. Borden, Inc.*, 1993-NMCA-047, 115 N.M. 486, 853 P.2d 737, cert. denied, 115 N.M. 409, 852 P.2d 682.

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.*, 1986-NMCA-092, 104 N.M. 769, 727 P.2d 77.

Evidence sufficient to support causal connection. — Evidence was sufficient to support a causal connection between an accidental injury sustained in the workplace and the disability that subsequently arose. *Feese v. U.S. W. Serv. Link, Inc.*, 1991-NMCA-121, 113 N.M. 92, 823 P.2d 334, cert. withdrawn, 113 N.M. 23, 821 P.2d 1060.

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.*, 1969-NMCA-051, 80 N.M. 418, 456 P.2d 892, cert. denied, 80 N.M. 388, 456 P.2d 221.

Expert medical testimony must establish causation. — Except in the most obvious cases, causation must be established by expert medical testimony. *Chavez v. Lectrosonics, Inc.*, 1979-NMCA-111, 93 N.M. 495, 601 P.2d 728, cert. denied, 93 N.M. 683, 604 P.2d 821.

Insufficient evidence to support worker’s compensation judge’s ruling as to causation. — Where worker, employed as a laborer and labor foreman, was carrying a twenty-five pound chipping hammer down from a scaffolding platform, stepped on an oily or slick spot on the scaffolding, and landed on his back causing injuries to his back,

neck and upper extremities, substantial evidence did not support the workers' compensation judge's determination that worker failed to prove causation between the accident and injuries to a reasonable degree of medical probability when one medical expert provided clear evidence of causation to a reasonable degree of medical probability between worker's accident and the diagnosed injuries and when there was no other medical testimony to the contrary. *Trujillo v. Los Alamos Nat'l Lab.*, 2016-NMCA-041, cert. denied.

It is incumbent upon claimant to present one or more medical experts. — 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.*, 1982-NMCA-069, 98 N.M. 52, 644 P.2d 1041, cert. denied, 98 N.M. 336, 648 P.2d 794.

Expert testimony 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.*, 1965-NMSC-015, 74 N.M. 789, 399 P.2d 279; *Trujillo v. Beaty Elec. Co.*, 1978-NMCA-021, 91 N.M. 533, 577 P.2d 431; *Levario v. Ysidro Villareal Labor Agency*, 1995-NMCA-133, 120 N.M. 734, 906 P.2d 266.

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.*, 1969-NMCA-051, 80 N.M. 418, 456 P.2d 892, cert. denied, 80 N.M. 388, 456 P.2d 221.

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*, 1970-NMCA-095, 81 N.M. 755, 473 P.2d 369.

"Medical probability" and "medical possibility" of causation distinguished. — A logical distinction can be made between "medical probability" and "medical possibility" in a workmen's (workers') 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.*, 1982-NMCA-127, 98 N.M. 560, 650 P.2d 844.

Licensed osteopathic physicians and surgeons may give expert medical testimony as to causation. *Medina v. Original Hamburger Stand*, 1986-NMCA-107, 105 N.M. 78, 728 P.2d 488.

Testimony of four doctors who treated claimant for a back injury was sufficient to prove a causal connection between her lifting forty-pound batteries at work and her disability. *Sanchez v. Siemens Transmission Sys.*, 1991-NMCA-028, 112 N.M. 236, 814 P.2d 104, *rev'd on other grounds*, 1991-NMSC-093, 112 N.M. 533, 817 P.2d 726.

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*, 1979-NMSC-041, 93 N.M. 40, 596 P.2d 253.

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 Cmty. Health Servs.*, 1986-NMCA-066, 104 N.M. 608, 725 P.2d 584, cert. denied, 104 N.M. 632, 725 P.2d 832.

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.*, 1977-NMCA-007, 90 N.M. 124, 560 P.2d 545, cert. denied, 90 N.M. 254, 561 P.2d 1347; *Marez v. Kerr-McGee Nuclear Corp.*, 1978-NMCA-128, 93 N.M. 9, 595 P.2d 1204, cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

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., Inc.*, 1965-NMSC-067, 75 N.M. 235, 403 P.2d 681.

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*, 1970-NMCA-095, 81 N.M. 755, 473 P.2d 369.

D. STANDARD OF PROOF.

It is incumbent upon claimant to present one or more medical experts. — 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*, 1963-NMSC-064, 72 N.M. 15, 380 P.2d 172.

This section provides that compensation shall be allowed only when the workman (worker) 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.*, 1965-NMSC-015, 74 N.M. 789, 399 P.2d 279.

The 1959 statute requires the workman (worker) 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*, 1963-NMSC-064, 72 N.M. 15, 380 P.2d 172.

"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 (worker'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 (workers') disability was caused by the accident. *Bufalino v. Safeway Stores, Inc.*, 1982-NMCA-127, 98 N.M. 560, 650 P.2d 844.

Medical testimony on causation does not require proof to absolute certainty. *Chavez v. Lectrosonics, Inc.*, 1979-NMCA-111, 93 N.M. 495, 601 P.2d 728, cert. denied, 93 N.M. 683, 604 P.2d 821.

E. MEDICAL EVIDENCE RULE.

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.*, 1977-NMCA-063, 90 N.M. 558, 566 P.2d 107, cert. denied, 90 N.M. 636, 567 P.2d 485.

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.*, 1966-NMSC-099, 76 N.M. 321, 414 P.2d 679.

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*, 1968-NMCA-102, 79 N.M. 759, 449 P.2d 667.

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 Ctr.*, 1988-NMCA-043, 107 N.M. 273, 756 P.2d 1.

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 Ctr.*, 1988-NMCA-043, 107 N.M. 273, 756 P.2d 1.

Trier of fact may weigh testimony. — The testimony of a doctor concerning whether a workman's (worker'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*, 1962-NMSC-095, 70 N.M. 332, 373 P.2d 824.

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.*, 1966-NMSC-235, 77 N.M. 220, 421 P.2d 435.

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.*, 1986-NMCA-020, 104 N.M. 67, 716 P.2d 645, *Banks v. IMC Kalium Carlsbad Potash Co.*, 2002-NMCA-016, 133 N.M. 199, 62 P.3d 290, *aff'd*, 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014.

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.*, 1986-NMCA-020, 104 N.M. 67, 716 P.2d 645.

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*, 1986-NMCA-020, Inc., 104 N.M. 67, 716 P.2d 645.

F. PREEXISTING CONDITION.

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.*, 1977-NMCA-017, 90 N.M. 220, 561 P.2d 493, cert. denied, 90 N.M. 254, 561 P.2d 1347.

Preexisting condition does not diminish right to benefits. — It does not diminish a worker's entitlement to benefits that a preexisting condition may make the worker more susceptible to injury, nor does it matter that without the preexisting condition the work-related injury might have been less disabling or perhaps not disabling at all. *Edmiston v. City of Hobbs*, 1997-NMCA-085, 123 N.M. 654, 944 P.2d 883, cert. denied, 123 N.M. 626, 944 P.2d 274.

Work-related injury caused by aggravation of preexisting condition is compensable. — Where worker appealed a workers' compensation judge's (WCJ) decision denying worker's claim for permanent partial disability and medical benefits based on a finding that worker's disability was not caused by his work-related accident, the WCJ erred in denying worker's claim, because although the work-related accident did not cause worker's disability, worker met his burden of proving that his work-related accident caused an aggravation of his preexisting condition resulting in his disability and his inability to work. *Molinar v. Larry Reetz Constr., Ltd.*, 2018-NMCA-011, cert. denied.

Appointment of injury to work-related and preexisting causes. — When a preexisting condition combines with a work-related injury to cause a disability, an employee is entitled to benefits commensurate with the total disability sustained; benefits are not apportioned according to different causal factors as long as the disability is a natural and direct result of the accident. *Edmiston v. City of Hobbs*, 1997-NMCA-085, 123 N.M. 654, 944 P.2d 883, cert. denied, 123 N.M. 626, 944 P.2d 274.

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.*, 1970-NMCA-032, 81 N.M. 313, 466 P.2d 879.

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.*, 1974-NMCA-061, 86 N.M. 393, 524 P.2d 1009.

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*, 1963-NMSC-013, 71 N.M. 305, 378 P.2d 126.

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.*, 1982-NMCA-109, 98 N.M. 379, 648 P.2d 1192.

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.*, 1970-NMCA-032, 81 N.M. 313, 466 P.2d 879.

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. Univ. of Cal., 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 Workers' Compensation §§ 242 to 258, 564 to 601.

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.

Liability for injury or death on or near golf course, 82 A.L.R.2d 1183, 53 A.L.R.4th 282.

Suicide as compensable under Workmen's Compensation Act, 15 A.L.R.3d 616.

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.

Workers' Compensation: Compensability of injuries incurred traveling to or from medical treatment of earlier compensable injury, 83 A.L.R.4th 110.

Workers' compensation: coverage of injury occurring in parking lot provided by employer, while employee was going to or coming from work, 4 A.L.R.5th 443.

Workers' compensation: coverage of injury occurring between workplace and parking lot provided by employer, while employee is going to or coming from work, 4 A.L.R.5th 585.

Eligibility for workers' compensation as affected by claimant's misrepresentation of health or physical condition at time of hiring, 12 A.L.R.5th 658.

Workers' compensation: coverage of employee's injury or death from exposure to the elements - modern cases, 20 A.L.R.5th 346.

Workers' compensation: Law enforcement officer's recovery for injury sustained during exercise of physical recreation activities, 44 A.L.R.5th 569.

Presumption or inference that accidental death of employee engaged in occupation of manufacturing or processing arose out of and in course of employment, 47 A.L.R.5th 801.

Employee's injuries sustained in use of employer's restroom as covered by workers' compensation, 80 A.L.R.5th 417.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of nonsudden stimuli - Right to compensation under particular statutory provisions, 97 A.L.R.5th 1.

Right to workers’ compensation for physical injury or illness suffered by claimant as result of nonsudden mental stimuli – compensability under particular circumstances, 107 A.L.R.5th 441, 112 A.L.R.5th 509.

99 C.J.S. Workmen's Compensation §§ 152 to 257; 100 C.J.S. Workmen's Compensation § 461.

52-1-28.1. Unfair claim-processing practices; bad faith.

A. Claims may be filed under the Workers' Compensation Act alleging unfair claim-processing practices or bad faith by an employer, insurer or claim-processing representative relating to any aspect of the Workers' Compensation Act. The director may also investigate allegations of unfair claim processing or bad faith on his own initiative.

B. If unfair claim processing or bad faith has occurred in the handling of a particular claim, the claimant shall be awarded, in addition to any benefits due and owing, a

benefit penalty not to exceed twenty-five percent of the benefit amount ordered to be paid.

C. If an employer, insurer or claim-processing representative has a history or pattern of repeated unfair claim-processing practices or bad faith, the director or a workers' compensation judge may impose a civil penalty of up to one thousand dollars ($1,000) for each violation. The civil penalty shall be deposited in the workers' compensation administration fund.

D. Any person aggrieved by an order under this section may request a hearing pursuant to the Workers' Compensation Act.

E. The director shall adopt by regulation definitions of unfair claim-processing practices and bad faith.

F. This section shall not be construed as limiting or interfering with the authority of the superintendent of insurance as provided by law to regulate any insurer, including his jurisdiction over unfair claim settlement practices.

History: Laws 1990 (2nd S.S.), ch. 2, § 29.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 Laws 1990 (2nd S.S.), ch. 2, § 29 effective January 1, 1991.

Jurisdiction to order Indian employer to rehire a worker. — Where the worker filed a claim for an occupational injury against a casino that was owned and operated by a tribal corporation; the tribal corporation waived sovereign immunity; the workers' compensation judge filed an opinion which awarded benefits to the worker; after the opinion of the workers' compensation judge was filed, a separate tribal commission revoked the gaming license that the worker was required to possess to perform the worker’s employment duties; the tribal commission was unwilling to reissue the gaming license resulting in the termination of the worker’s employment with the casino; the tribal commission did not waive sovereign immunity; and the workers' compensation judge determined that the worker had been wrongfully terminated in retaliation for filing the occupational injury claim, the workers' compensation judge had authority to order the tribal corporation to rehire the worker at a position of employment that was substantially equivalent to the position the worker formerly held in terms of pay and benefits. *Martinez v. Cities of Gold Casino*, 2009-NMCA-087, 146 N.M. 735, 215 P.3d 44, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

Section does not create new duty or right. — This section is not substantive in nature; it does not create a new duty, right, or obligation under the law. Instead, it proscribes a method of obtaining redress and is procedural or remedial; it should be

applied retroactively to accrued cases not filed and pending at the time of enactment. *Cruz v. Liberty Mut. Ins. Co.*, 1995-NMSC-006, 119 N.M. 301, 889 P.2d 1223.

Exclusivity of remedy. — This section's remedy for bad faith in processing a workers' compensation claim is exclusive. *Martin-Martinez v. 6001, Inc.*, 1998-NMCA-179, 126 N.M. 319, 968 P.2d 1182, cert. denied, 126 N.M. 532, 972 P.2d 351.

Section provides adequate remedy. — This section provides an adequate remedy; although the penalty may not be a great amount when the amount of the claim is small, it provides sufficient deterrence to prevent an insurer from denying benefits in bad faith and enforces the public policy against the bad-faith handling of workers' compensation claims. *Cruz v. Liberty Mut. Ins. Co.*, 1995-NMSC-006, 119 N.M. 301, 889 P.2d 1223.

Exclusive and adequate remedy. — By enacting 52-1-28.1 NMSA 1978, the legislature brought all workers' bad faith claims under the Workers' Compensation Act's exclusivity provision and abrogated workers' rights to file bad faith actions in district court, and the twenty-five percent penalty amount provides sufficient deterrence to prevent an insurer from denying benefits in bad faith and enforces the public policy against the bad faith handling of workers' compensation claims. Worker's claims were properly denied where he argued that he should be allowed a private right of action for bad faith in district court, that the benefit penalty allowed by this section is insufficient to deter bad faith, and that the cost of successfully pursuing such claims exceeds the available benefit penalty. *Romero v. Laidlaw Transit Servs., Inc.*, 2015-NMCA-107, cert. granted, 2015-NMCERT-009.

The term "benefit amount" in Subsection B does not include the value of future medical benefits nor attorney fees. *Meyers v. W. Auto*, 2002-NMCA-089, 132 N.M. 675, 54 P.3d 79, cert. denied, 132 N.M. 551, 52 P.3d 411.

Claim for rehire. — There is no difference between a claim for benefits and a claim for rehire. Both are claims under the Workers' Compensation Act and both can be improperly handled, leading to a claim of unfair claims processing. *Lucero v. City of Albuquerque*, 2002-NMCA-034, 132 N.M. 1, 43 P.3d 352, cert. quashed, 133 N.M. 30, 59 P.3d 1262.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-1-28.2. Retaliation against employee seeking benefits; civil penalty.

A. An employer shall not discharge, threaten to discharge or otherwise retaliate in the terms or conditions of employment against a worker who seeks workers' compensation benefits for the sole reason that that employee seeks workers' compensation benefits.

B. Any person who discharges a worker in violation of Subsection A of this section shall rehire that worker pursuant to the provisions of the Workers' Compensation Act and the New Mexico Occupational Disease Disablement Law, provided the worker agrees to be rehired.

C. The director or a workers' compensation judge shall impose a civil penalty of up to five thousand dollars ($5,000) for each violation of the provisions of Subsection A or B of this section.

D. The civil penalty shall be deposited in the workers' compensation administration fund.

History: Laws 1990 (2nd S.S.), ch. 2, § 32.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 Laws 1990 (2nd S.S.), ch. 2, § 32 effective January 1, 1991.

Cross references. — For the New Mexico Occupational Disease Disablement Law, *see* 52-3-1 NMSA 1978 and compiler's notes thereto.

Rehiring is mandatory. — Where the worker was fired from a tribal casino in retaliation for filing a worker's compensation claim, Subsection B of Section 52-1-28.2 NMSA 1978 mandated that the district court order the employer to rehire the worker. *Martinez v. Pojoaque Gaming, Inc.*, 2011-NMCA-103, 150 N.M. 629, 264 P.3d 725, cert. denied, 2011-NMCERT-009, 269 P.3d 903.

Where the worker was fired from a tribal casino in retaliation for filing a worker's compensation claim; an independent tribal gaming commission, which was responsible for issuing gaming licenses that certain employees were required to possess pursuant to the gaming compact with the state, had revoked the worker's gaming license; the employer refused to rehire worker, because there were no jobs at the casino that did not require a gaming license and worker did not have a gaming license; and because the district court determined that it did not have jurisdiction to require the tribal gaming commission to issue a gaming license to worker, and the district court did not order the tribal commission to rehire worker, Subsection B of Section 52-1-28.2 NMSA 1978 does not recognize that an employer may have legitimate business reasons for not rehiring an employee or allow consideration of any other remedies as a substitution for rehiring and the district court was required under Subsection B of Section 52-1-28.2 NMSA 1978 to order the tribal casino to rehire worker. *Martinez v. Pojoaque Gaming, Inc.*, 2011-NMCA-103, 150 N.M. 629, 264 P.3d 725, cert. denied, 2011-NMCERT-009, 269 P.3d 903.

Pre-judgment interest. — Where worker was awarded damages for bad faith and wrongful termination under the Workers' Compensation Act and the employer did not

cause any unreasonable delay in the workers' compensation proceedings or make any unreasonable settlement offers prior to trial, the trial court did not abuse its discretion in denying worker's request for pre-judgment interest. *Martinez v. Pojoaque Gaming, Inc.*, 2011-NMCA-103, 150 N.M. 629, 264 P.3d 725, cert. denied, 2011-NMCERT-009, 269 P.3d 903.

Post-judgment interest. — Where worker was awarded damages because the employer intentionally retaliated against worker for filing a workers' compensation claim, the actions of the employer constituted bad faith, and the employer's actions amounted to fraud, malice, oppression or willful, wanton or reckless disregard of the rights of worker, the district court was required to award worker post-judgment interest at the highest rate specified in Section 56-8-4 NMSA 1978 of fifteen percent. *Martinez v. Pojoaque Gaming, Inc.*, 2011-NMCA-103, 150 N.M. 629, 264 P.3d 725, cert. denied, 2011-NMCERT-009, 269 P.3d 903.

Independent retaliatory discharge action allowed. — An employee who alleges that he or she was wrongfully discharged in retaliation for filing a workers' compensation action has a cause of action for damages independent from that set out in this section. *Michaels v. Anglo Am. Auto Auctions, Inc.*, 1994-NMSC-015, 117 N.M. 91, 869 P.2d 279.

New Mexico recognizes claims for retaliatory discharge. — An employee who suffers a wrongful discharge in retaliation for filing a workers' compensation claim has a cause of action independent from the relief provided in the *Workers' Compensation Act. Hartwell v. Southwest Cheese Co*., 276 F.Supp.3d 1188 (D.N.M. 2016).

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-1-28.3. False statements or representations with regard to physical condition; forfeiture.

A. When an employer asks by written questionnaire for the disclosure of a worker's medical condition, no compensation is payable from that employer for an injury to that worker under the provisions of the Workers' Compensation Act if:

(1) the worker knowingly and willfully concealed information or made a false representation of his medical condition;

(2) the employer:

(a) was not aware of the concealed information that, if known, would have been a substantial factor in the initial or continued employment of the worker; or

(b) relied upon the false representation, and this reliance was a substantial factor in the initial or continued employment of the worker; and

(3) a medical condition that was concealed or falsely represented substantially contributed to the injury or disability.

B. The provisions of this section do not apply unless, in the written questionnaire, the employer clearly and conspicuously discloses that the worker shall be entitled to no future compensation benefits if he knowingly and willfully conceals or makes a false representation about the information requested.

C. Nothing in this section shall be construed to deny or limit compensation benefits paid or being paid for prior injuries.

D. This section shall apply only prospectively. It shall not alter, as to prior reports, the law governing questionnaires and information reported that was in effect prior to the effective date of this section.

History: Laws 1990 (2nd S.S.), ch. 2, § 31.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 Laws 1990 (2nd S.S.), ch. 2, § 31 effective January 1, 1991.

Adequacy of application question. — To bar a worker from receiving benefits based on a knowing and willful false representation defense, the question the worker answers must be one which the worker knows, expects, or foresees, or that a reasonable person in the worker's position would expect or foresee employer would rely upon. To establish foreseeability, employer must show: worker understood the duties required with the job applied for; the employer asked a question which a reasonable person would have understood required disclosure of relevant medical history: and worker had a medical history which a reasonable person would have viewed as relevant and within the scope of the question asked. *Lamay v. Roswell Indep. Sch. Dist.*, 1994-NMCA-109, 118 N.M. 518, 882 P.2d 559.

Application question which read: "Do you have any condition which might limit you in job assignment or ability to work in the position for which you are applying" is neither overly broad or vague and an employer has a right to rely on the response. *Lamay v. Roswell Indep. Sch. Dist.*, 1994-NMCA-109, 118 N.M. 518, 882 P.2d 559.

Notice requirements. — Denial of an employer's false application defense was not error since the employer failed to comply with the notice of requirements of Subsection B. *Pena v. Mines*, 1995-NMCA-035, 119 N.M. 735, 895 P.2d 257.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-1-29. Notice of accident to employer; employer to post clear notice of requirement.

A. Any worker claiming to be entitled to compensation from any employer shall give notice in writing to his employer of the accident within fifteen days after the worker knew, or should have known, of its 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. 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.

B. Each employer shall post, and keep posted in conspicuous places upon his premises where notices to employees and applicants for employment are customarily posted, a notice that advises workers of the requirement specified in Subsection A of this section to give the employer notice in writing of an accident within fifteen days of its occurrence. The notice shall be prepared or approved by the director. The failure of an employer to post the notice required in this subsection shall toll the time a worker has to give the notice in writing specified in Subsection A of this section up to but no longer than the maximum sixty-day period.

C. The notice required in Subsection B of this section shall include as an attachment to it a preprinted form, which shall be approved by the director, that allows the worker to note and briefly describe the accident and sign his name. The employer, any superintendent or foreman, or any agent of the employer in charge of the work where the accident occurred shall also sign the preprinted form that describes the accident. That signature shall not be a concession by the employer of any rights or defenses. It merely acknowledges receipt by the employer or his agent of the form signed by the worker. The preprinted form shall be prepared in duplicate so that both the worker and the employer can retain copies.

History: 1953 Comp., § 59-10-13.4, enacted by Laws 1959, ch. 67, § 8; 1989, ch. 263, § 19; 1990 (2nd S.S.), ch. 2, § 16.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, rewrote the catchline; substituted "of the accident within fifteen days after the worker knew, or should have known, of its occurrence" for "of the accident and of the injury within thirty days after their occurrence" in the first sentence in Subsection A; and added Subsections B and C.

I. GENERAL CONSIDERATION.

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.*, 1959-NMSC-057, 66 N.M. 126, 343 P.2d 697.

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*, 1940-NMSC-062, 44 N.M. 567, 106 P.2d 302, *overruled on other grounds by Yardman v. Cooper*, 1959-NMSC-043, 65 N.M. 450, 339 P.2d 473; *Montell v. Orndorff*, 1960-NMSC-063, 67 N.M. 156, 353 P.2d 680; *Herndon v. Albuquerque Pub. Schs.*, 1978-NMCA-072, 92 N.M. 635, 593 P.2d 470, *rev'd on other grounds*, 1978-NMSC-090, 92 N.M. 287, 587 P.2d 434.

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.*, 1965-NMSC-053, 75 N.M. 174, 402 P.2d 156.

Finding of compliance is necessary in order to support judgment for the workman (worker), particularly where a request for a contrary finding has been made. *Geeslin v. Goodno, Inc.*, 1965-NMSC-053, 75 N.M. 174, 402 P.2d 156.

Proof of notice not essential for liability. — Proof of notice in a workmen's (workers') 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.*, 1981-NMCA-102, 96 N.M. 674, 634 P.2d 696.

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. Schs.*, 1978-NMCA-072, 92 N.M. 635, 593 P.2d 470, *rev'd on other grounds*, 1978-NMSC-090, 92 N.M. 287, 587 P.2d 434.

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*, 1988-NMCA-097, 107 N.M. 716, 764 P.2d 143.

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*, 1960-NMSC-063, 67 N.M. 156, 353 P.2d 680.

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 (now 14) days have elapsed from such failure or refusal to pay. *Swallows v. City of Albuquerque*, 1955-NMSC-042, 59 N.M. 328, 284 P.2d 216, *aff'd*, 1956-NMSC-063, 61 N.M. 265, 298 P.2d 945 (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*, 1955-NMSC-042, 59 N.M. 328, 284 P.2d 216, *aff'd*, 1956-NMSC-063, 61 N.M. 265, 298 P.2d 945 (decided under former law).

Statute of limitations is not tolled for minor dependent, nor where it has run on the workman (worker) may it be revived in favor of the children at the workman's (worker'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*, 1963-NMSC-215, 73 N.M. 371, 388 P.2d 382.

It is trial court that resolves conflicts, even where evidence on question of latent injury is conflicting. *Hammond v. Kersey*, 1972-NMCA-003, 83 N.M. 430, 492 P.2d 1293.

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.*, 1961-NMSC-179, 69 N.M. 365, 367 P.2d 539.

Finding of fact regarding notice intermingled with conclusion of law. — In workmen's (workers') 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.*, 1971-NMCA-091, 82 N.M. 720, 487 P.2d 148.

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.*, 1966-NMSC-270, 77 N.M. 297, 422 P.2d 34.

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*, 1955-NMSC-042, 59 N.M. 328, 284 P.2d 216, *aff'd*, 1956-NMSC-063, 61 N.M. 265, 298 P.2d 945 (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*, 1967-NMSC-131, 78 N.M. 69, 428 P.2d 471.

Supreme court may increase award of attorney's fees. — In a workmen's (workers') 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.*, 1966-NMSC-270, 77 N.M. 297, 422 P.2d 34.

Because contribution claim is third-party action brought by employer against other employers that may be deemed liable for contribution, the general statute of limitations for contribution actions shall apply. *Jouett v. Tom Growney Equip. Co.*, 2004-NMCA-023, 135 N.M. 136, 85 P.3d 260, cert. granted, 2004-NMCERT-002, 135 N.M. 169, 86 P.3d 48, *rev'd*, 2005-NMSC-015, 137 N.M. 497, 113 P.3d 320.

II. NOTICE OF ACCIDENT AND INJURY.

Notice is condition to right of workman (worker) to recover compensation. *Geeslin v. Goodno, Inc.*, 1965-NMSC-053, 75 N.M. 174, 402 P.2d 156.

Once notice becomes an issue, the plaintiff has to prove notice in order to obtain a judgment for compensation. *Aguilar v. Penasco Indep. Sch. Dist. No. 6*, 1984-NMSC-004, 100 N.M. 625, 674 P.2d 515.

Once notice is put in issue, the worker must prove compliance with the statutory requirement. *Nunez v. Smith's Mgmt. Corp.*, 1988-NMCA-109, 108 N.M. 186, 769 P.2d 99.

Notice as required by statute is condition precedent to the right to plaintiff to recover compensation. *Sanchez v. Azotea Contractors*, 1973-NMCA-039, 84 N.M. 764, 508 P.2d 34.

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.*, 1964-NMSC-063, 74 N.M. 112, 391 P.2d 336.

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 Section 52-1-31 NMSA 1978. *Roberson v. Powell*, 1967-NMSC-131, 78 N.M. 69, 428 P.2d 471.

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*, 1962-NMSC-134, 70 N.M. 475, 375 P.2d 118.

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*, 1966-NMSC-079, 76 N.M. 225, 413 P.2d 888.

Reason for 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*, 1962-NMSC-164, 71 N.M. 175, 376 P.2d 963.

Purpose of the notice requirement. — The 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.*, 1972-NMCA-168, 84 N.M. 565, 505 P.2d 1241, 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.*, 1971-NMCA-091, 82 N.M. 720, 487 P.2d 148.

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.*, 1967-NMSC-019, 77 N.M. 380, 423 P.2d 418.

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.*, 1989-NMSC-069, 109 N.M. 146, 782 P.2d 904.

Primary purpose of requiring employee to give 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.*, 1966-NMSC-270, 77 N.M. 297, 422 P.2d 34.

Aspect of notice to employer involved is notice of accident. *Ortiz v. Ortiz & Torres Dri-Wall Co.*, 1972-NMCA-005, 83 N.M. 452, 493 P.2d 418.

This section requires notice of accident as well as notice of injury. *Bell v. Kenneth P. Thompson Co.*, 1966-NMSC-117, 76 N.M. 420, 415 P.2d 546.

Notice of accident, not notice of compensable injury. — In workmen's (workers') 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.*, 1971-NMCA-091, 82 N.M. 720, 487 P.2d 148.

Applicability of provision for written notice. — The provision for written notice in Subsection A of this section also applies to the substitute provision for actual knowledge in Subsection B (now also in Subsection A). *Herndon v. Albuquerque Pub. Schs.*, 1978-NMCA-072, 92 N.M. 635, 593 P.2d 470, *rev'd on other grounds*, 1978-NMSC-090, 92 N.M. 287, 587 P.2d 434.

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 after its occurrence pursuant to this section. *Herndon v. Albuquerque Pub. Schs.*, 1978-NMCA-072, 92 N.M. 635, 593 P.2d 470, *rev'd on other grounds*, 1978-NMSC-090, 92 N.M. 287, 587 P.2d 434.

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.*, 1980-NMCA-172, 97 N.M. 20, 636 P.2d 291, cert. denied, 99 N.M. 148, 655 P.2d 160, *overruled on other grounds by Gonzales v. Stanke-Brown & Assocs.*, 1982-NMCA-109, 98 N.M. 379, 648 P.2d 1192.

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*, 1967-NMSC-131, 78 N.M. 69, 428 P.2d 471.

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.*, 1974-NMCA-027, 86 N.M. 168, 521 P.2d 130.

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 (worker). *Geeslin v. Goodno, Inc.*, 1965-NMSC-053, 75 N.M. 174, 402 P.2d 156.

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*, 1960-NMSC-063, 67 N.M. 156, 353 P.2d 680.

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.*, 1986-NMCA-071, 105 N.M. 112, 729 P.2d 1366, cert. denied, 105 N.M. 111, 729 P.2d 1365.

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.*, 1989-NMSC-069, 109 N.M. 146, 782 P.2d 904.

In case of latent injury workman (worker) 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.*, 1970-NMCA-132, 82 N.M. 424, 483 P.2d 305; *Powers v. Riccobene Masonry Constr., Inc.*, 1980-NMCA-172, 97 N.M. 20, 636 P.2d 291, cert. denied, 99 N.M. 148, 655 P.2d 160, *overruled on other grounds by Gonzales v. Stanke-Brown & Assocs.*, 1982-NMCA-109, 98 N.M. 379, 648 P.2d 1192.

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.*, 1980-NMCA-172, 97 N.M. 20, 636 P.2d 291, cert. denied, 99 N.M. 148, 655 P.2d 160, *overruled on other grounds by Gonzales v. Stanke-Brown & Assocs.*, 1982-NMCA-109, 98 N.M. 379, 648 P.2d 1192.

The provision of Subsection A, as amended effective January 1, 1991, allows notice of all latent injuries within fifteen days after the worker knew or should have known, by the exercise of reasonable diligence, that he had a compensable injury. *Garnsey v.*

Concrete Inc., 1996-NMCA-081, 122 N.M. 195, 922 P.2d 577, cert. denied, 122 N.M. 112, 921 P.2d 308.

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*, 1972-NMCA-003, 83 N.M. 430, 492 P.2d 1293.

Post-traumatic stress disorder is latent injury. — Where worker was employed at a housing and treatment center for mentally and physically disabled persons; worker was sexually assaulted by a patient who threatened to hurt worker if worker reported the assault; because of fear and shame, worker did not report the assault until nineteen days after the assault; and undisputed medical evidence established that worker's fear, shame and trauma prevented worker from reporting the assault, there was sufficient evidence to support a finding that worker's post-traumatic stress disorder prevented worker from reporting the assault within the statutory time period. *Baca v. Los Lunas Cmty. Programs*, 2011-NMCA-008, 149 N.M. 198, 246 P.3d 1070.

The time period in which notice of a claim must be given begins when the worker recognizes or should recognize the "nature, seriousness, and probable compensable character of the injury." Therefore, in the case of a latent injury, the worker must give notice only after he knows or should know, by exercise of reasonable diligence, that he incurred a compensable injury. Substantial evidence does not support the judge's decision that claimant knew or should have known he had a compensable injury prior to the time he was first diagnosed with post-traumatic stress disorder. *Flint v. Town of Bernalillo*, 1994-NMCA-078, 118 N.M. 65, 878 P.2d 1014, cert. denied, 118 N.M. 178, 879 P.2d 1197.

Law in effect at time latent injury discovered controls. — Because claimant was first apprised that he suffered from post-traumatic stress disorder following the diagnosis made in 1991, even though the event that triggered it happened in 1986, the 1991 statutory notice provisions govern claimant's obligation to give notice in the instant case. *Flint v. Town of Bernalillo*, 1994-NMCA-078, 118 N.M. 65, 878 P.2d 1014, cert. denied, 118 N.M. 178, 879 P.2d 1197.

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 (workers') compensation. *Letteau v. Reynolds Elec. & Eng'g Co.*, 1955-NMSC-103, 60 N.M. 234, 290 P.2d 1072 (decided under former law).

Notice in casual conversation is insufficient. *Bolton v. Murdock*, 1957-NMSC-019, 62 N.M. 211, 307 P.2d 794 (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.*, 1966-NMSC-220, 77 N.M. 100, 419 P.2d 756.

Where there was failure to make finding on notice issue, cause must be remanded to the trial court. *Geeslin v. Goodno, Inc.*, 1965-NMSC-053, 75 N.M. 174, 402 P.2d 156.

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*, 1960-NMSC-063, 67 N.M. 156, 353 P.2d 680.

Time for notice. — 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.*, 1966-NMSC-117, 76 N.M. 420, 415 P.2d 546; *Powers v. Riccobene Masonry Constr., Inc.*, 1980-NMCA-172, 97 N.M. 20, 636 P.2d 291, cert. denied, 99 N.M. 148, 655 P.2d 160, *overruled on other grounds by Gonzales v. Stanke-Brown & Assocs.*, 1982-NMCA-109, 98 N.M. 379, 648 P.2d 1192; *Martinez v. Darby Constr. Co.*, 1989-NMSC-069, 109 N.M. 146, 782 P.2d 904.

Where a claimant returned to work two days after an accident and worked for nearly a month and a half before pain prevented him from returning to work on a regular basis, it was at this later date that the claimant realized for the first time he had suffered a compensable injury; the claimant's belief in this regard is within the bounds of reason. *Gomez v. B.E. Harvey Gin Corp.*, 1990-NMSC-057, 110 N.M. 100, 792 P.2d 1143.

Period limited for this notice begins to run from the time the workman (worker) 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.*, 1974-NMCA-027, 86 N.M. 168, 521 P.2d 130; *Langley v. Navajo Freight Lines*, 1962-NMSC-018, 70 N.M. 34, 369 P.2d 774.

Period for written notice does not begin to run until plaintiff is charged with knowledge of his compensable injury. *Rohrer v. Eidal Int'l*, 1968-NMCA-089, 79 N.M. 711, 449 P.2d 81.

Period begins to run. — The period for giving notice for workmen's (workers') compensation begins to run when the claimant knows of his injury. *Sanchez v. James H. Rhodes & Co.*, 1964-NMSC-063, 74 N.M. 112, 391 P.2d 336.

Successive injury. — Where worker initially sustained a non-disabling injury and aggravated the injury through successive employment, the date the worker became disabled was the date of the worker's accidental injury, and the worker was required to give notice of the injury to the successive employer within fifteen days after the worker became disabled from working. *Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, 137 N.M. 497, 113 P.3d 320.

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.*, 1964-NMSC-104, 74 N.M. 211, 392 P.2d 407.

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.*, 1966-NMSC-117, 76 N.M. 420, 415 P.2d 546.

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.*, 1970-NMCA-132, 82 N.M. 424, 483 P.2d 305.

Written notice to defendants' insurance carrier by plaintiff's doctor was sufficient compliance with the statutory notice requirements. *Moorhead v. Gray Ranch Co.*, 1977-NMCA-017, 90 N.M. 220, 561 P.2d 493, cert. denied, 90 N.M. 254, 561 P.2d 1347.

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*, 1973-NMCA-039, 84 N.M. 764, 508 P.2d 34.

Hospital not estopped from claiming lack of notice in treating own employee's injury. — In action by cook at state hospital for workmen's (workers') 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.*, 1964-NMSC-034, 73 N.M. 502, 389 P.2d 616.

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*, 1962-NMSC-018, 70 N.M. 34, 369 P.2d 774.

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*, 1972-NMCA-003, 83 N.M. 430, 492 P.2d 1293.

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.*, 1974-NMCA-027, 86 N.M. 168, 521 P.2d 130.

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.*, 1964-NMSC-104, 74 N.M. 211, 392 P.2d 407.

Actual knowledge of accident as contemplated by the act means actual knowledge of a compensable injury. In latent injury cases the workman (worker) 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*, 1955-NMSC-042, 59 N.M. 328, 284 P.2d 216, *aff'd*, 1956-NMSC-063, 61 N.M. 265, 298 P.2d 945 (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.*, 1967-NMSC-019, 77 N.M. 380, 423 P.2d 418.

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*, 1968-NMCA-013, 79 N.M. 25, 439 P.2d 242.

"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. Gen. Equip. Co.*, 1964-NMSC-056, 74 N.M. 73, 390 P.2d 660.

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.*, 1972-NMCA-168, 84 N.M. 565, 505 P.2d 1241, cert. denied, 84 N.M. 560, 505 P.2d 1236.

Knowledge which employer must have to excuse formal notice is of compensable injury. *Roberson v. Powell*, 1967-NMSC-131, 78 N.M. 69, 428 P.2d 471.

Knowledge which will excuse written notice, under this section, must be of an accident and compensable injury. *Lyon v. Catron Cnty. Comm'rs*, 1969-NMCA-108, 81 N.M. 120, 464 P.2d 410, cert. denied, 81 N.M. 140, 464 P.2d 559 (1970).

Employer's knowledge of worker's heart attack and his hospitalization alone are insufficient to excuse written notice of the worker's work-related injury. To establish that employer or its agents had actual knowledge of worker's work-related injury, worker must show that his employer or its agents had actual knowledge of the worker's employment-related stress which was the accident that caused the worker's heart attack. *Grine v. Peabody Natural Res.*, 2006-NMSC-031, 140 N.M. 30, 139 P.3d 90.

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*, 1964-NMSC-032, 73 N.M. 470, 389 P.2d 594.

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*, 1973-NMCA-039, 84 N.M. 764, 508 P.2d 34.

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.*, 1973-NMCA-010, 84 N.M. 587, 506 P.2d 93.

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.*, 1977-NMCA-017, 90 N.M. 220, 561 P.2d 493, cert. denied, 90 N.M. 254, 561 P.2d 1347.

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.*, 1972-NMCA-168, 84 N.M. 565, 505 P.2d 1241, cert. denied, 84 N.M. 560, 505 P.2d 1236 (1973).

The employer has actual notice of a job-related accident when he has knowledge of the injury and some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim. *Herman v. Miners' Hosp.*, 1991-NMSC-021, 111 N.M. 550, 807 P.2d 734.

Injury to chief executive officer. — When a worker is determined to have actually sustained a work-related injury, and the worker is the president, chief executive officer, and sole stockholder of the employer corporation, the corporation is deemed to have actual knowledge of the accident. *Moreno v. Las Cruces Glass & Mirror Co.*, 1991-NMCA-074, 112 N.M. 693, 818 P.2d 1217.

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.*, 1977-NMCA-017, 90 N.M. 220, 561 P.2d 493, cert. denied, 90 N.M. 254, 561 P.2d 1347.

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.*, 1966-NMSC-270, 77 N.M. 297, 422 P.2d 34.

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.*, 1968-NMCA-086, 79 N.M. 676, 448 P.2d 477.

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*, 1968-NMCA-089, 79 N.M. 711, 449 P.2d 81.

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*, 1968-NMCA-089, 79 N.M. 711, 449 P.2d 81.

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*, 1962-NMSC-164, 71 N.M. 175, 376 P.2d 963; *Marez v. Kerr-McGee Nuclear Corp.*, 1978-NMCA-128, 93 N.M. 9, 595 P.2d 1204, 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 (now included in Subsection A). *Mosher v. Bituminous Ins. Co.*, 1981-NMCA-102, 96 N.M. 674, 634 P.2d 696.

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.*, 1988-NMCA-080, 107 N.M. 788, 765 P.2d 761, cert. denied, 107 N.M. 785, 765 P.2d 758 (decided under pre-1987 version of Section 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*, 1968-NMCA-089, 79 N.M. 711, 449 P.2d 81.

The actual knowledge in Subsection B (now included in Subsection A) which excuses written notice must have been acquired within the time allotted for the written notice. *Norris v. Amax Chem. Corp.*, 1973-NMCA-010, 84 N.M. 587, 506 P.2d 93.

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*, 1968-NMCA-089, 79 N.M. 711, 449 P.2d 81; *Herndon v. Albuquerque Pub. Schs.*, 1978-NMCA-072, 92 N.M. 635, 593 P.2d 470, *rev'd on other grounds*, 1978-NMSC-090, 92 N.M. 287, 587 P.2d 434; *Urioste v. Sideris*, 1988-NMCA-096, 107 N.M. 733, 764 P.2d 504.

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. Schs.*, 1978-NMCA-072, 92 N.M. 635, 593 P.2d 470, *rev'd on other grounds*, 1978-NMSC-090, 92 N.M. 287, 587 P.2d 434.

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. Schs., 1978-NMCA-072, 92 N.M. 635, 593 P.2d 470, *rev'd on other grounds*, 1978-NMSC-090, 92 N.M. 287, 587 P.2d 434.

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*, 1968-NMCA-013, 79 N.M. 25, 439 P.2d 242.

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.*, 1964-NMSC-063, 74 N.M. 112, 391 P.2d 336.

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.*, 1963-NMSC-208, 73 N.M. 232, 387 P.2d 336.

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*, 1957-NMSC-019, 62 N.M. 211, 307 P.2d 794 (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 Cnty. Comm'rs*, 1969-NMCA-108, 81 N.M. 120, 464 P.2d 410, 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*, 1957-NMSC-019, 62 N.M. 211, 307 P.2d 794 (decided under former law).

Knowledge that workman (worker) 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 (worker) became sick while at work, and such knowledge was insufficient to excuse written notice. *Wilson v. Navajo Freight Lines*, 1964-NMSC-032, 73 N.M. 470, 389 P.2d 594.

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.*, 1967-NMSC-025, 77 N.M. 408, 423 P.2d 603.

Actual knowledge where employer notified insurance company of employee's disappearance. — When the employer in workmen's (workers') 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.*, 1967-NMSC-019, 77 N.M. 380, 423 P.2d 418.

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.*, 1964-NMSC-141, 74 N.M. 336, 393 P.2d 449.

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.*, 1963-NMSC-208, 73 N.M. 232, 387 P.2d 336.

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*, 1940-NMSC-028, 44 N.M. 275, 101 P.2d 398, are applicable here on the question of actual knowledge of the alleged accident. *Ortiz v. Ortiz & Torres Dri-Wall Co.*, 1972-NMCA-005, 83 N.M. 452, 493 P.2d 418.

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.*, 1972-NMCA-005, 83 N.M. 452, 493 P.2d 418.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 488 to 503.

When limitations period begins to run as to claim for disability benefits for contracting of disease under Workers' Compensation or Occupational Diseases Act, 86 A.L.R.5th 295.

100 C.J.S. Workmen's Compensation §§ 445 to 457.

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 fourteen days after the worker has missed seven days of lost time from work, whether or not the days are consecutive. Remaining installments shall be paid twice a month at intervals not more than sixteen days apart in sums as nearly equal as possible, except as provided in Section 52-5-12 NMSA 1978.

History: 1978 Comp., § 52-1-30, enacted by Laws 1987, ch. 235, § 14; 1993, ch. 193, § 3; 2003, ch. 259, § 4.

ANNOTATIONS

Cross references. — For payment of benefits in installments, occupational disease, *see* 52-3-20 NMSA 1978.

The 2003 amendment, effective June 20, 2003, substituted "the worker has missed seven days of lost time from work, whether or not the days are consecutive" for "the filing of the report required in Section 52-1-58 NMSA 1978" at the end of the second sentence, and added "except as provided in Section 52-5-12 NMSA 1978" at the end of the section.

The 1993 amendment, effective June 18, 1993, in the second sentence, substituted "fourteen" for "thirty-one" and "filing of the report required in Section 52-1-58 NMSA 1978" for "date of the occurrence of the disability".

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 (worker) 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. Wholesale Produce Co.*, 1961-NMSC-177, 69 N.M. 375, 367 P.2d 545 (decided prior to 1993 amendment).

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 (worker) as provided in the act before he is entitled to file a claim. *Fresquez v. Farnsworth & Chambers Co.*, 1955-NMSC-112, 60 N.M. 384, 291 P.2d 1102 (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 (Workers') Compensation Act. *Moody v. Hastings*, 1963-NMSC-083, 72 N.M. 132, 381 P.2d 207.

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*, 1988-NMSC-083, 107 N.M. 668, 763 P.2d 684.

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.*, 1955-NMSC-112, 60 N.M. 384, 291 P.2d 1102 (decided under former law).

This section bars filing of suit until 31 days (now 14) have elapsed from such failure or refusal to pay. *Swallows v. City of Albuquerque*, 1955-NMSC-042, 59 N.M. 328, 284 P.2d 216, *aff'd*, 1956-NMSC-063, 61 N.M. 265, 298 P.2d 945 (decided under former law).

Payment of accrued compensation after thirty-first (now 14th) 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 (now 14th) day by reason of the 16-day statute. *Fresquez v. Farnsworth & Chambers Co.*, 1955-NMSC-112, 60 N.M. 384, 291 P.2d 1102 (decided under former law).

Claim filed less than 31 (now 14) days after injury is prematurely filed as to installment compensation benefits and must be dismissed. *Moody v. Hastings*, 1963-NMSC-083, 72 N.M. 132, 381 P.2d 207 (decided prior to 1993 amendment).

Limitations period of two years and 31 (now 14) days. — The time periods of this section and Subsection A of Section 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

(now 14) days from the date of the occurrence of the disability. *Cole v. J.A. Drake Well Serv.*, 1987-NMCA-132, 106 N.M. 484, 745 P.2d 392 (decided prior to 1993 amendment).

Limitations began to run where injury became apparent. — Where, following blows to head, workman (worker) 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 (worker'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.*, 1969-NMCA-065, 80 N.M. 475, 457 P.2d 994.

Actual knowledge of accident as contemplated by Workmen's (Workers') Compensation Act means actual knowledge of a compensable injury. In latent injury cases the workman (worker) 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*, 1955-NMSC-042, 59 N.M. 328, 284 P.2d 216, *aff'd*, 1956-NMSC-063, 61 N.M. 265, 298 P.2d 945 (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.*, 1955-NMSC-112, 60 N.M. 384, 291 P.2d 1102 (decided under former law).

Petition is not prematurely filed when workman (worker) contends that he is totally and permanently disabled. *Briscoe v. Hydro Conduit Corp.*, 1975-NMCA-147, 88 N.M. 568, 544 P.2d 283 (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 Section 52-1-49 NMSA 1978 subject to the limitations of this section. *Valdez v. McKee*, 1966-NMSC-102, 76 N.M. 340, 414 P.2d 852.

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 (worker) 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. Wholesale Produce Co.*, 1961-NMSC-177, 69 N.M. 375, 367 P.2d 545 (decided prior to 1993 amendment).

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.*, 1976-NMCA-044, 89 N.M. 213, 549 P.2d 628.

It was error to award a claimant lump-sum benefits, when such a payment would create an undue risk that the worker would end up on the welfare rolls well before the periodic payments would have terminated. *Riesenecker v. Arkansas Best Freight Sys.*, 1990-NMCA-059, 110 N.M. 654, 798 P.2d 1040, *vacated on other grounds*, 110 N.M. 451, 796 P.2d 1147 (decided under prior law).

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 (Workers') 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.*, 1972-NMCA-063, 83 N.M. 766, 497 P.2d 977.

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 (workers') compensation claim based on this default was moot because liability for those installments was extinguished by the payment. *Montoya v. Zia Co.*, 1971-NMCA-105, 82 N.M. 774, 487 P.2d 202.

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*, 1963-NMSC-083, 72 N.M. 132, 381 P.2d 207.

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*, 1966-NMSC-079, 76 N.M. 225, 413 P.2d 888.

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.*, 1975-NMCA-147, 88 N.M. 568, 544 P.2d 283.

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.*, 1955-NMSC-112, 60 N.M. 384, 291 P.2d 1102 (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*, 1955-NMSC-042, 59 N.M. 328, 284 P.2d 216, *aff'd*, 1956-NMSC-063, 61 N.M. 265, 298 P.2d 945 (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 674 to 684, 730, 731.

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, 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.

ANNOTATIONS

Cross references. — For effect of failure of worker to file claim or bring suit by reason of conduct of employer, *see* 52-1-36 NMSA 1978.

I. GENERAL CONSIDERATION.

This section and Section 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*, 1984-NMCA-010, 101 N.M. 22, 677 P.2d 635, cert. denied, 101 N.M. 11, 677 P.2d 624.

Applicability to Subsequent Injury Act. — The one-year period of limitations in the Workers' Compensation Act was not applicable by operation of former Section 52-2-12 NMSA 1978, to a claim for reimbursement against the Subsequent Injury Fund. *Hernandez v. Levi Strauss, Inc.*, 1988-NMCA-075, 107 N.M. 644, 763 P.2d 78, cert. denied sub nom. *Chavez v. Levi Strauss, Inc.*, 107 N.M. 673, 763 P.2d 689 (decided under law existing prior to 1988 enactment of Section 52-2-14 NMSA 1978).

Minor not deprived of due process by application of limitation period. *Howie v. Stevens*, 1984-NMCA-052, 102 N.M. 300, 694 P.2d 1365, cert. quashed, 102 N.M. 293, 694 P.2d 1358 (1985).

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 (Workers') Compensation Act does not apply. *Jernigan v. New Amsterdam Cas. Co.*, 1964-NMSC-044, 74 N.M. 37, 390 P.2d 278.

Vocational rehabilitation benefits not subject to section. — Like medical benefits, vocational rehabilitation benefits are not subject to the statute of limitations contained in Subsection A. The limitations imposed on the receipt of vocational rehabilitation benefits are only those contained in former Section 52-1-50 NMSA 1978 (now Section 52-1-50.1 NMSA 1978). *Benavidez v. Bloomfield Mun. Sch.*, 1994-NMCA-023, 117 N.M. 245, 871 P.2d 9.

Burden of proof of defense of accord and satisfaction in workmen's (workers') 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., Inc.*, 1968-NMSC-007, 78 N.M. 642, 436 P.2d 502.

Rule of civil procedure applicable. — Rule 6, N.M.R. Civ. P. (now Rule 1-006 NMRA), providing the method of computation of time, should be applicable generally to the Workmen's (Workers') Compensation Law. *Keilman v. Dar Tile Co.*, 1964-NMSC-138, 74 N.M. 305, 393 P.2d 332.

Late filing has no affect upon plaintiff's medical expenses since the limitation provision of Subsection A does not apply to them. *Lasater v. Home Oil Co.*, 1972-NMCA-031, 83 N.M. 567, 494 P.2d 980, *overruled on other grounds by Schiller v. Sw. Air Rangers, Inc.*, 1975-NMSC-018, 87 N.M. 476, 535 P.2d 1327.

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.*, 1986-NMCA-124, 105 N.M. 277, 731 P.2d 973, cert. denied, sub nom. Jasso v. Duran, 105 N.M. 290, 731 P.2d 1334.

Limitation does not apply to modification of benefits. — This section applies to initial claims for benefits, not to later claims for increased benefits based on a change in the worker's physical condition. *Henington v. Technical-Vocational Inst.*, 2002-NMCA-025, 131 N.M. 655, 41 P.3d 923, cert. denied, 131 N.M. 737, 42 P.3d 842.

Trial by jury on workmen's (workers') compensation issue. — Where the court was alerted to the fact that the claimant wished to present a workmen's (workers') 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.*, 1960-NMSC-122, 67 N.M. 470, 357 P.2d 57.

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., Inc.*, 1966-NMSC-189, 77 N.M. 50, 419 P.2d 250.

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.*, 1965-NMSC-049, 75 N.M. 211, 402 P.2d 948.

Statute of limitations 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 (Section 52-1-10 NMSA 1978). *Garza v. W.A. Jourdan, Inc.*, 1977-NMCA-136, 91 N.M. 268, 572 P.2d 1276, cert. denied, 91 N.M. 249, 572 P.2d 1257.

Subsection B does not authorize recovery for predeath disability benefits. *Holliday v. Talk of Town, Inc.*, 1985-NMCA-024, 102 N.M. 540, 697 P.2d 959.

Employer's obligation to pay compensation depends on whether plaintiff had disability as defined in Sections 52-1-24 and 52-1-25 NMSA 1978 (now Sections 52-1-25 and 52-1-26 NMSA 1978) . *Cordova v. Union Baking Co.*, 1969-NMCA-037, 80 N.M. 241, 453 P.2d 761.

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.*, 1987-NMCA-002, 105 N.M. 370, 733 P.2d 1.

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.

II. CLAIMS FOR BENEFITS.

Statute of limitations jurisdictional. — The statute of limitations in workmen's (workers') 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.*, 1960-NMSC-122, 67 N.M. 470, 357 P.2d 57.

The limitations statute, as to workmen's (workers') 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., Inc.*, 1966-NMSC-189, 77 N.M. 50, 419 P.2d 250; *Linton v. Mauer-Neuer Meat Packers*, 1963-NMSC-013, 71 N.M. 305, 378 P.2d 126.

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.*, 1977-NMCA-136, 91 N.M. 268, 572 P.2d 1276, cert. denied, 91 N.M. 249, 572 P.2d 1257.

Statute of limitations, underpayment. — This section is unquestionably a statute of limitations for disability benefit claims. Nothing in the statute suggests the applicability of the limitations period depends upon the legal theory forming the claim's basis. Additionally, although an employer or insurer "fails" to pay an installment of compensation if the amount paid "falls short" of the amount due, the worker cannot wait until other claims ripen before filing a claim for this deficiency. *Coslett v. Third St. Grocery*, 1994-NMCA-046, 117 N.M. 727, 876 P.2d 656, cert. denied, 117 N.M. 802, 877 P.2d 1105.

Claim for death benefits in the case of a hospital nurse who died of a heart attack was not time barred, where the hospital had actual notice of the compensable injury, yet failed to file a written report as required. *Herman v. Miners' Hosp.*, 1991-NMSC-021, 111 N.M. 550, 807 P.2d 734.

Claim for death benefits by employer. — An employer had standing to initiate a worker's compensation action for death benefits on behalf of its employee. *Eldridge v.*

Circle K Corp., 1997-NMCA-022, 123 N.M. 145, 934 P.2d 1074, cert. denied, 122 N.M. 808, 932 P.2d 498.

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*, 1963-NMSC-013, 71 N.M. 305, 378 P.2d 126.

Timely filing of claim. — Worker's claim was effectively filed for purposes of statute of limitations on the day he initially filed his claim pro se with the clerk's office, even though the clerk voided that filed claim on the grounds that the claimant had an attorney representing him in another pending action before the division. The subsequent filing by claimant's counsel as a result of the clerk's action did not become the date of filing for statute of limitations purposes. *Castillo v. Northwest Transp. Serv.*, 1991-NMCA-077, 113 N.M. 119, 823 P.2d 919.

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.*, 1960-NMSC-122, 67 N.M. 470, 357 P.2d 57; *Pena v. N.M. Hwy. Dep't*, 1983-NMCA-111, 100 N.M. 408, 671 P.2d 656.

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'g Corp.*, 1964-NMSC-042, 74 N.M. 45, 390 P.2d 283, *aff'd*, 1966-NMSC-183, 76 N.M. 760, 418 P.2d 537.

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. *Lasater v. Home Oil Co.*, 1972-NMCA-031, 83 N.M. 567, 494 P.2d 980, *overruled on other grounds by Schiller v. Sw. Air Rangers, Inc.*, 1975-NMSC-018, 87 N.M. 476, 535 P.2d 1327.

If employer led employee to believe that he was considered in "employment" for workmen's (workers') 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.*, 1976-NMCA-108, 89 N.M. 683, 556 P.2d 839.

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'g Corp.*, 1966-NMSC-183, 76 N.M. 760, 418 P.2d 537.

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 (workers') compensation benefits are owed, the employer, by not doing anything, fails to make payment. *ABF Freight Sys. v. Montano*, 1982-NMSC-149, 99 N.M. 259, 657 P.2d 115.

Workman (Worker) on notice when suffered partial loss of use of member. — Whether or not he can continue in his prior employment, a workman (worker) 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 Furniture Co.*, 1974-NMCA-097, 86 N.M. 661, 526 P.2d 803, cert. denied, 86 N.M. 657, 526 P.2d 799.

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*, 1954-NMSC-122, 59 N.M. 1, 277 P.2d 548 (decided under former law).

Worker suffering from pain knows of disability. — Although a worker did not request assistance with her duties, she suffered from pain, took medication, was under a doctor's care, and was referred to an orthopedic surgeon on February 27, 1989, for a continuing problem with her right shoulder. Although the worker did not testify that she requested a transfer on February 13, 1989, to a smaller work area because of her shoulder pain, it was reasonable for the judge to infer that her pain was a factor in the request. These facts were substantial evidence to support the judge's decision that the worker knew or reasonably should have known she had a disability on or before February 27, 1989. *Benavidez v. Bloomfield Mun. Sch.*, 1994-NMCA-023, 117 N.M. 245, 871 P.2d 9.

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 (worker) 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 (worker) 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.*, 1968-NMCA-068, 79 N.M. 444, 444 P.2d 771.

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.*, 1988-NMCA-080, 107 N.M. 788, 765 P.2d 761, cert. denied, 107 N.M. 785, 765 P.2d 758 (decided under pre-1987 version of Section 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 Section 52-1-29 NMSA 1978 and barred recovery under this section. *Roberson v. Powell*, 1967-NMSC-131, 78 N.M. 69, 428 P.2d 471.

If plaintiff gave no notice as required by Section 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*, 1962-NMSC-134, 70 N.M. 475, 375 P.2d 118.

Notice 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 Cnty.*, 1953-NMSC-038, 57 N.M. 217, 257 P.2d 909 (decided under former law).

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*, 1963-NMSC-013, 71 N.M. 305, 378 P.2d 126.

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.*, 1986-NMCA-048, 104 N.M. 652, 725 P.2d 1220, cert. denied, 104 N.M. 632, 725 P.2d 832.

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 (worker) 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.*, 1986-NMCA-048, 104 N.M. 652, 725 P.2d 1220, cert. denied, 104 N.M. 632, 725 P.2d 832.

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.*, 1971-NMCA-173, 83 N.M. 400, 492 P.2d 1263, cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972).

Workman (Worker) 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 (worker) 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 (worker) 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.*, 1964-NMSC-201, 74 N.M. 712, 397 P.2d 953.

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.*, 1976-NMCA-108, 89 N.M. 683, 556 P.2d 839.

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. N.M. State Police*, 1953-NMSC-108, 57 N.M. 747, 263 P.2d 690 (decided under former law).

III. STATUTE OF LIMITATIONS.

One-year limitation applicable in probate situation. — Workmen's (Workers') compensation one-year statute of limitations, not Probate Code's four-month limitation, applied to workmen's (workers') compensation action filed against employer, a sole proprietorship being run by personal representative after death of sole proprietor. *Lucero v. Northrip Logging Co.*, 1984-NMCA-061, 101 N.M. 420, 683 P.2d 1342, cert. denied, 101 N.M. 419, 683 P.2d 1341.

No provision for extension of time limit for filing claim. — Section 37-1-17 NMSA 1978 prohibits Section 37-1-14 NMSA 1978 from applying in workmen's (workers') compensation and occupational disablement cases, since both the Workmen's (Workers') Compensation Act and the Occupational Disablement Law contain specific statutes of limitations in this section and Section 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*, 1979-NMCA-130, 93 N.M. 584, 603 P.2d 323, *overruled on other grounds by Bracken v. Yates Petroleum Corp.*, 1988-NMSC-072, 107 N.M. 463, 760 P.2d 155.

Section 37-1-10 NMSA 1978 inapplicable to workmen's (workers') 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 (workers') compensation actions. *Howie v. Stevens*, 1984-NMCA-052, 102 N.M. 300, 694 P.2d 1365, cert. quashed, 102 N.M. 293, 694 P.2d 1358.

Worker's knowledge of impairment for purposes of statute of limitations. — The fact that a worker is restricted to proving his claim by the testimony of a health care provider agreed upon by the parties or approved by the workers' compensation judge, and that the provider is directed to use American medical association publications in establishing the degree of disability, does not limit the running of the statute of limitations to only those situations when a health care provider has actually informed the worker that he has sustained a permanent impairment; thus, resolution of when a worker was deemed to have sustained impairment for purposes of running of the limitations period constituted a factual issue unsuitable for resolution by summary judgment. *Montoya v. Kirk-Mayer, Inc.*, 1995-NMCA-104, 120 N.M. 550, 903 P.2d 861.

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 (workers') 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 (workers') compensation is based, as the public policy of this state, militates against such a contention. *De La Torre v. Kennecott Copper Corp.*, 1976-NMCA-108, 89 N.M. 683, 556 P.2d 839.

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.*, 1964-NMSC-138, 74 N.M. 305, 393 P.2d 332.

Statute is neither a tolling nor an equitable estoppel statute. — Where, from the time of the worker's death, the employer assured the worker's spouse that the employer would take care of everything for the spouse; the employer filed a claim for federal death benefits for the spouse; when the employer and the employee became aware that the worker might be entitled to workers' compensation benefits, the employer told the spouse that the employer would prepare a claim for workers' compensation benefits and subsequently reassured the spouse that the employer would pursue a claim for the spouse; and when the spouse became aware that the employer was not going to file a claim, the spouse filed a complaint on the same day, forty-five days after the one-year statute of limitations had run, the spouse's complaint was timely because, within the meaning of Section 52-1-36 NMSA 1978, the spouse could reasonably rely on the representations of the employer that a worker's compensation claim would be filed and that benefits would be paid and because the spouse's complaint was filed within a reasonable time after the spouse learned that the employer had not filed a complaint. *Schultz v. Pojoaque Tribal Police Dep't*, 2013-NMSC-013, *rev'g* 2012-NMCA-015, 269 P.3d 14.

Method of computing time. — Where worker's death occurred on August 17, 2002; on June 28, 2003, employer told plaintiff that employer would take care of the worker's compensation claim; on October 1, 2003, plaintiff learned that employer had not filed a claim on plaintiff's behalf; plaintiff filed a pro se complaint for benefits on October 1, 2003; on October 27, 2003, employer filed a written accident report; on December 19, 2003, a mediator recommended that the complaint be dismissed without prejudice to permit plaintiff to obtain legal representation, with leave to file an amended complaint; plaintiff filed an amended complaint on June 18, 2004; the one-year limitation was tolled during the time plaintiff believed employer would take care of the worker's compensation claim from July 1 2003 to October 1, 2003 and during the pendency of the first complaint from October 1, 2003 to December 19, 2003; and pursuant to Section 52-1-59 NMSA 1978, plaintiff had thirty days after the employer filed a written accident report, or until November 26, 2003, to file a complaint, plaintiff's claim was barred by the one-year limitation period. *Schultz v. Pojoaque Tribal Police Dep't*, 2012-NMCA-015, 269 P.3d 14, cert. granted, 2012-NMCERT-001.

Method utilized in computing time. — Whether the case was timely filed under Rule 6(a), N.M.R. Civ. P. (now Rule 1-006A NMRA) or under Section 12-2-2 NMSA 1978 (now Section 12-2A-7 NMSA 1978) is irrelevant since 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.*, 1964-NMSC-138, 74 N.M. 305, 393 P.2d 332.

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.*, 1973-NMCA-008, 84 N.M. 713, 507 P.2d 460, cert. denied, 84 N.M. 696, 507 P.2d 443.

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.*, 1955-NMSC-104, 60 N.M. 266, 291 P.2d 308 (decided under former law).

Section begins to run when compensable injury reasonably apparent. — As soon as it becomes reasonably apparent, or should become reasonably apparent to a workman (worker) 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.*, 1969-NMCA-037, 80 N.M. 241, 453 P.2d 761; *Lent v. Employment Sec. Comm'n*, 1982-NMCA-147, 99 N.M. 407, 658 P.2d 1134, cert. quashed, 99 N.M. 226, 656 P.2d 889 (1983).

Period of limitation does not commence to run until it becomes reasonably apparent, or should become reasonably apparent, to the workman (worker) that he has an injury for which he is entitled to compensation. *Gomez v. Hausman Corp.*, 1971-NMCA-173, 83 N.M. 400, 492 P.2d 1263, 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*, 1963-NMSC-013, 71 N.M. 305, 378 P.2d 126.

The statute of limitations begins to run in workmen's (workers') compensation cases as soon as it becomes reasonably apparent, or should become reasonably apparent, to a workman (worker) 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 Furniture Co.*, 1974-NMCA-097, 86 N.M. 661, 526 P.2d 803, cert. denied, 86 N.M. 657, 526 P.2d 799; *ABF Freight Sys. v. Montano*, 1982-NMSC-149, 99 N.M. 259, 657 P.2d 115.

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.*, 1984-NMSC-091, 102 N.M. 102, 692 P.2d 27.

In workmen's (workers') 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.*, 1971-NMSC-083, 83 N.M. 38, 487 P.2d 1343.

Statute begins to run when worker knows or should know of disability. — The statute of limitations cannot begin to run until such time as the worker is entitled to benefits, and the worker knows or should know of the disability. *Torres v. Plastech Corp.*, 1997-NMSC-053, 124 N.M. 197, 947 P.2d 154.

Where the workers' compensation judge did not determine a date of initial disability or scheduled injury, there was not substantial evidence to support a ruling that the worker's claim was barred by the statute of limitations. *Torres v. Plastech Corp.*, 1997-NMSC-053, 124 N.M. 197, 947 P.2d 154.

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 (worker) 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.*, 1976-NMCA-108, 89 N.M. 683, 556 P.2d 839; *Casias v. Zia Co.*, 1979-NMCA-068, 93 N.M. 78, 596 P.2d 521, cert. denied, 93 N.M. 8, 595 P.2d 1203.

The statute of limitations does not commence to run until the wage earning ability of the injured workman (worker) has been decreased as a result of the accidental injury. *Salazar v. Lavaland Heights Block Co.*, 1965-NMSC-049, 75 N.M. 211, 402 P.2d 948.

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.*, 1968-NMCA-068, 79 N.M. 444, 444 P.2d 771.

Where a worker fell and broke her hip in the course of her employment, the statute of limitations period for all disability benefits arising out of the accident began to run on the day she returned to work on crutches. She was not entitled to file a claim for disability benefits several years later when, after she had abandoned her crutches, she developed aseptic necrosis and underwent hip replacement surgery. One suffering a temporary disability cannot wait until the disability becomes permanent before filing a claim. *Whittenberg v. Graves Oil & Butane Co.*, 1991-NMCA-142, 113 N.M. 450, 827 P.2d 838, cert, denied, 113 N.M. 352, 826 P.2d 573 (1992), *overruling Zengerle v. City of Socorro*, 1986-NMCA-099, 105 N.M. 797, 737 P.2d 1174.

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.*, 1988-NMCA-046, 107 N.M. 428, 759 P.2d 1010, cert. denied, 107 N.M. 413, 759 P.2d 200.

Limitations period of two years and 31 (now 14) days. — The time periods of Section 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 (now 14) days from the date of the occurrence of the disability. *Cole v. J.A. Drake Well Serv.*, 1987-NMCA-132, 106 N.M. 484, 745 P.2d 392.

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.*, 1933-NMSC-026, 37 N.M. 203, 20 P.2d 924; *Sanchez v. Bernalillo Cnty.*, 1953-NMSC-038, 57 N.M. 217, 257 P.2d 909 (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.*, 1968-NMCA-068, 79 N.M. 444, 444 P.2d 771.

Circumstances not suspicious so as to run limitation statute. — Where claimant under Workmen's (Workers') 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.*, 1965-NMSC-049, 75 N.M. 211, 402 P.2d 948.

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 (worker) must file his claim for permanent total disability within one year and 31 (now 14) 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.*, 1960-NMSC-059, 67 N.M. 130, 353 P.2d 353.

De minimis principle applicable. — Even though the worker failed to file temporary disability claims for five and one-half days of benefits within the period of limitations, under the de minimis principle, the employer's failure to pay benefits did not trigger the statute of limitations so as to bar the worker's subsequent claim for permanent disability. *Fuentes v. Santa Fe Pub. Schs.*, 1995-NMCA-050, 119 N.M. 814, 896 P.2d 494.

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.*, 1961-NMSC-178, 69 N.M. 412, 367 P.2d 913.

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*, 1986-NMCA-099, 105 N.M. 797, 737 P.2d 1174, *overruled on other grounds by Whittenberg v. Graves Oil & Butane Co.*, 1991-NMCA-142, 113 N.M. 450, 827 P.2d 838, cert. denied, 113 N.M. 352, 826 P.2d 573 (1992).

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.*, 1988-NMCA-051, 107 N.M. 358, 758 P.2d 308.

Application of statute of limitations to lump-sum credit. — Worker's compensation judge did not abuse her discretion in applying a credit for lump-sum payments previously made to claimant to a period of time during which employer had failed to pay benefits, even though the employer had initially stopped paying benefits more than one year prior to claimant's action. *West v. Home Care Res.*, 1999-NMCA-037, 127 N.M. 78, 976 P.2d 1030.

Rights of dependents not saved from running of limitations. — There is no provision in the Workmen's (Workers') 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 Cnty.*, 1953-NMSC-038, 57 N.M. 217, 257 P.2d 909 (decided under former law).

IV. TOLLING.

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.*, 1984-NMCA-046, 102 N.M. 535, 697 P.2d 954, cert. quashed, 102 N.M. 412, 696 P.2d 1005 (1985).

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.*, 1959-NMSC-068, 66 N.M. 149, 343 P.2d 1038.

Offers to settle do not toll the statute of limitations unless the offers are coupled by conduct that reasonably leads the workman (worker) to believe compensation will be paid. *Knippel v. Northern Commc'ns, Inc.*, 1982-NMCA-009, 97 N.M. 401, 640 P.2d 507.

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 Commc'ns, Inc.*, 1982-NMCA-009, 97 N.M. 401, 640 P.2d 507.

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 (workers') compensation. *Howie v. Stevens*, 1984-NMCA-052, 102 N.M. 300, 694 P.2d 1365, cert. quashed, 102 N.M. 293, 694 P.2d 1358 (1985).

The sole tolling period permitted by this section for the filing of worker's compensation claims is a one-year period during which the worker remains employed by the employer regardless of whether the worker recovers from partial disability during that one-year period. *Whittenberg v. Graves Oil & Butane Co.*, 1991-NMCA-142, 113 N.M. 450, 827 P.2d 838, cert. denied, 113 N.M. 352, 826 P.2d 573 (1992).

Insurance agent misinforming claimant did not toll statute. — Claimant's claim to workmen's (workers') 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*, 1967-NMSC-005, 77 N.M. 436, 423 P.2d 869.

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*, 1962-NMSC-148, 71 N.M. 491, 379 P.2d 781.

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. — 82 Am. Jur. 2d Workers' Compensation §§ 113, 487, 528, 530 to 551.

Limitation of time for filing claim under act is jurisdictional, 78 A.L.R. 1294.

When time period commences as to claim under workers' compensation or occupational diseases act for death of worker due to contraction of disease, 100 A.L.R.5th 567.

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.

ANNOTATIONS

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 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*, 1986-NMSC-075, 104 N.M. 751, 726 P.2d 1381.

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 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.

ANNOTATIONS

Cross references. — For effect of failure to give required notice or to file claim within time allowed, *see* 52-1-31 NMSA 1978.

Statute is neither a tolling nor an equitable estoppel statute. — Section 52-1-36 NMSA 1978 is neither a tolling nor an equitable estoppel statute. If an employee entitled to workers' compensation benefits fails to file a complaint or a claim within the limitation period because the conduct of the employer or insurer reasonably led the employee to believe compensation would be paid, then the employee has a reasonable time thereafter within which to file. *Schultz v. Pojoaque Tribal Police Dep't*, 2013-NMSC-013, *rev'g* 2012-NMCA-015, 269 P.3d 14.

Where, from the time of the worker's death, the employer assured the worker's spouse that the employer would take care of everything for the spouse; the employer filed a claim for federal death benefits for the spouse; when the employer and the employee became aware that the worker might be entitled to workers' compensation benefits, the employer told the spouse that the employer would prepare a claim for workers' compensation benefits and subsequently reassured the spouse that the employer would pursue a claim for the spouse; and when the spouse became aware that the employer was not going to file a claim, the spouse filed a complaint on the same day, forty-five days after the one-year statute of limitations had run, the spouse's complaint was timely because, within the meaning of Section 52-1-36 NMSA 1978, the spouse could reasonably rely on the representations of the employer that a worker's compensation claim would be filed and that benefits would be paid and because the spouse's complaint was filed within a reasonable time after the spouse learned that the employer had not filed a complaint. *Schultz v. Pojoaque Tribal Police Dep't*, 2013-NMSC-013, *rev'g* 2012-NMCA-015, 269 P.3d 14.

Misrepresentation that employee will receive benefits is only reason workmen's (workers') compensation limitation period is tolled. *Howie v. Stevens*, 1984-NMCA-052, 102 N.M. 300, 694 P.2d 1365, cert. quashed, 102 N.M. 293, 694 P.2d 1358 (1985).

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'g Corp.*, 1966-NMSC-183, 76 N.M. 760, 418 P.2d 537.

Insurance agent's misinformation did not toll statute. — Claimant's claim to workmen's (workers') 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*, 1967-NMSC-005, 77 N.M. 436, 423 P.2d 869.

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. *Lasater v. Home Oil Co.*, 1972-NMCA-031, 83 N.M. 567, 494 P.2d 980, *overruled on other grounds by Schiller v. Sw. Air Rangers, Inc.*, 1975-NMSC-018, 87 N.M. 476, 535 P.2d 1327.

Where compensation insurer's adjuster advised injured workman (worker) that he had a legitimate claim which would be acted upon as soon as investigation was completed, the workman's (worker's) failure to sue within the time prescribed by the act was excused. *Elsea v. Broome Furniture Co.*, 1943-NMSC-036, 47 N.M. 356, 143 P.2d 572.

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.*, 1988-NMCA-051, 107 N.M. 358, 758 P.2d 308.

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 Furniture Co.*, 1943-NMSC-036, 47 N.M. 356, 143 P.2d 572.

Compensation insurer's conduct. — Where the conduct of an insurer, in a workmen's (workers') 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*, 1980-NMCA-149, 95 N.M. 176, 619 P.2d 852.

Conduct did not mislead claimant. — Where on two occasions employer expressly informed claimant that he would not receive any more workmen's (workers') 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 (workers')

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 (workers') 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. *Lasater v. Home Oil Co.*, 1972-NMCA-031, 83 N.M. 567, 494 P.2d 980, *overruled on other grounds by Schiller v. Sw. Air Rangers, Inc.*, 1975-NMSC-018, 87 N.M. 476, 535 P.2d 1327.

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'g Corp.*, 1964-NMSC-042, 74 N.M. 45, 390 P.2d 283, *aff'd*, 1966-NMSC-183, 76 N.M. 760, 418 P.2d 537.

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 Furniture Co.*, 1943-NMSC-036, 47 N.M. 356, 143 P.2d 572.

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. N. Commc'ns, Inc.*, 1982-NMCA-009, 97 N.M. 401, 640 P.2d 507.

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.*, 1955-NMSC-104, 60 N.M. 266, 291 P.2d 308.

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.*, 1959-NMSC-068, 66 N.M. 149, 343 P.2d 1038.

Employee though on sick leave layoff status. — Where the plaintiff ceased actual work with his employer and went on sick leave layoff 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.*, 1976-NMCA-108, 89 N.M. 683, 556 P.2d 839.

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 Furniture Co.*, 1943-NMSC-036, 47 N.M. 356, 143 P.2d 572.

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 Furniture Co.*, 1943-NMSC-036, 47 N.M. 356, 143 P.2d 572.

Tolling of period to sue under Section 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 Section 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*, 1983-NMCA-043, 100 N.M. 15, 665 P.2d 277, cert. denied, 100 N.M. 53, 665 P.2d 809.

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*, 1955-NMSC-042, 59 N.M. 328, 284 P.2d 216, *aff'd*, 61 N.M. 265, 298 P.2d 945.

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 Furniture Co.*, 1943-NMSC-036, 47 N.M. 356, 143 P.2d 572.

Reference in testimony 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 Furniture Co.*, 1943-NMSC-036, 47 N.M. 356, 143 P.2d 572.

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.

ANNOTATIONS

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 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 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.

ANNOTATIONS

Cross references. — For executions and foreclosures, *see* 39-4-1 NMSA 1978 et seq.

For judgments, *see* Rules 1-054 to 1-063 NMRA.

Right to benefits in reaching jurisdictional minimum for removal. — A possibility that payments of workmen's (workers') 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 (workers') compensation case, appellant must be granted all compensation to which he is entitled. *Stolworthy v. Morrison-Kaiser F & S*, 1963-NMSC-053, 72 N.M. 1, 380 P.2d 13.

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 (Workers') Compensation Act. *Cavins v. Armstrong & Armstrong*, 1933-NMSC-023, 37 N.M. 141, 19 P.2d 747; *Moore v. Phillips Petroleum Co.*, 1932-NMSC-025, 36 N.M. 153, 9 P.2d 692 (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*, 1968-NMCA-089, 79 N.M. 711, 449 P.2d 81.

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*, 1968-NMCA-089, 79 N.M. 711, 449 P.2d 81.

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.*, 1979-NMCA-042, 93 N.M. 358, 600 P.2d 304, cert. denied, 92 N.M. 675, 593 P.2d 1078.

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.*, 1978-NMCA-021, 91 N.M. 533, 577 P.2d 431.

There is nothing which indicates that Section 56-8-4A NMSA 1978, providing a basis for computing interest on judgments, should not apply in workmen's (workers') compensation cases. *Candelaria v. General Elec. Co.*, 1986-NMCA-016, 105 N.M. 167, 730 P.2d 470, cert. quashed, 105 N.M. 111, 729 P.2d 1365.

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 (worker). 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 Cnty. Sheriff's Dep't*, 1988-NMCA-003, 106 N.M. 744, 749 P.2d 1123.

Payment of maximum weeks until condition subsequent. — Under the Workmen's (Workers') Compensation Act the court requires the person liable to continue to pay the amount due the workman (worker) 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 (worker) in obtaining such increase except under procedures permissible under statute or general law. *Hudson v. Herschbach Drilling Co.*, 1942-NMSC-041, 46 N.M. 330, 128 P.2d 1044.

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.*, 1939-NMSC-038, 43 N.M. 357, 94 P.2d 99.

Judgments in workmen's (workers') compensation cases must be drawn to carry out purposes of the Workmen's (Workers') Compensation Act. *Johnson v. C & H Constr. Co.*, 1967-NMCA-013, 78 N.M. 423, 432 P.2d 267, *overruled on other grounds by Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, 113 N.M. 231, 824 P.2d 1033.

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*, 1943-NMSC-031, 47 N.M. 260, 141 P.2d 321.

More than one judgment or order. — Under the provisions of the Workmen's (Workers') Compensation Act, there may be more than one judgment or order on issues under the act. *Johnson v. C & H Constr. Co.*, 1967-NMCA-013, 78 N.M. 423, 432 P.2d 267, *overruled on other grounds by Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, 113 N.M. 231, 824 P.2d 1033.

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. Nev. Consol. Copper Corp.*, 1940-NMSC-036, 44 N.M. 390, 103 P.2d 118.

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.*, 1978-NMCA-057, 91 N.M. 730, 580 P.2d 498.

Findings of trial court conclusive. — In compensation proceedings for the death of a workman (worker) 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*, 1938-NMSC-008, 42 N.M. 107, 76 P.2d 1.

Subsection A plainly mandates that a quantifiable sum be specified for medical expenses proved at trial. *DiMatteo v. County of Dona Ana*, 1985-NMCA-099, 104 N.M. 599, 725 P.2d 575.

Jurisdiction to reopen award. — Under Workmen's (Workers') 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.*, 1947-NMSC-049, 51 N.M. 441, 188 P.2d 160.

Mandamus would not lie to review granting of new trial in workmen's (workers') compensation case even though grounded on lack of jurisdiction. *State ex rel. Gallegos v. MacPherson*, 1957-NMSC-068, 63 N.M. 133, 314 P.2d 891.

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.*, 1974-NMCA-063, 86 N.M. 466, 525 P.2d 393.

Appellate court cannot weigh testimony on appeal. *Robinson v. Mittry Bros.*, 1939-NMSC-038, 43 N.M. 357, 94 P.2d 99.

Appellate court will not substitute its judgment for that of trial court as to the credibility of the witnesses. *Rohrer v. Eidal Int'l*, 1968-NMCA-089, 79 N.M. 711, 449 P.2d 81.

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 Workers' Compensation §§ 634 to 673.

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, 62 A.L.R. 160, 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.

ANNOTATIONS

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 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 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.

ANNOTATIONS

Limitation begins to run where injury reasonably apparent. — Where, following blows to head, workman (worker) 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 (worker'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.*, 1969-NMCA-065, 80 N.M. 475, 457 P.2d 994.

As soon as it becomes reasonably apparent, or should become reasonably apparent to a workman (worker) 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*, 1969-NMCA-065, Inc., 80 N.M. 475, 457 P.2d 994.

The limitation statute does not provide that a workman (worker) lose seven consecutive days of work before the limitation period begins to run. *Bowers v. Wayne Lovelady Dodge, Inc.*, 1969-NMCA-065, 80 N.M. 475, 457 P.2d 994.

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.*, 1955-NMSC-112, 60 N.M. 384, 291 P.2d 1102 (decided under former law).

Award of one day's benefits is not contemplated by the Workmen's (Workers') Compensation Act. *Grudzina v. N.M. Youth Diagnostic & Dev. Ctr.*, 1986-NMCA-047, 104 N.M. 576, 725 P.2d 255.

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.*, 1955-NMSC-112, 60 N.M. 384, 291 P.2d 1102 (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation § 433.

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 the worker's average weekly wage, 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 through December 31, 1999, and thereafter not to exceed a maximum compensation of one hundred percent of the average weekly wage in the state, a week; and to be not less than a minimum compensation of thirty-six dollars ($36.00) a week.

B. For permanent total disability as set forth in Section 52-1-25 NMSA 1978, the worker shall receive compensation benefits for the remainder of the worker's life. For temporary disability as set forth in Section 52-1-25.1 NMSA 1978, the maximum period of compensation is subject to the maximum duration and limitation on compensation benefits set forth in Section 52-1-47 NMSA 1978.

C. For disability resulting from primary mental impairment, the maximum period of compensation is the maximum period allowable for a physical injury, as set forth in Sections 52-1-26 and 52-1-42 NMSA 1978, and subject to the maximum duration and limitations on compensation benefits set forth in Section 52-1-47 NMSA 1978. For disability resulting in secondary mental impairment, the maximum period of compensation is the maximum period allowable for the disability produced by the physical impairment, as set forth in Section 52-1-26 or 52-1-43 NMSA 1978 and Section 52-1-42 NMSA 1978, and subject to the maximum duration and limitations on compensation benefits set forth in Section 52-1-47 NMSA 1978.

D. For the purpose of paying compensation benefits for death, pursuant to Section 52-1-46 NMSA 1978, the worker's maximum disability recovery shall be deemed to be seven hundred weeks.

E. Where the worker's average weekly wage is less than thirty-six dollars ($36.00) a week, the compensation to be paid the worker shall be the worker's full weekly wage.

F. For the purpose of the Workers' Compensation Act, the average weekly wage in the state shall be determined by the workforce solutions department on or before June 30 of each year and shall be computed from all wages reported to the workforce solutions department from employing units, including reimbursable employers, in

accordance with the rules of the department for the preceding calendar year, divided by the total number of covered employees divided by fifty-two.

G. The average weekly wage in the state, determined as provided in Subsection F 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.

H. Unless the computation provided for in Subsection F 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; 1990 (2nd S.S.), ch. 2, § 17; 1993, ch. 193, § 4; 1999, ch. 172, § 1; 2015, ch. 70, § 1.

ANNOTATIONS

Cross references. — For total disability, *see* 52-1-25 NMSA 1978.

The 2015 amendment, effective June 19, 2015, amended the Workers' Compensation Act to change temporary disability benefits; in Subsection A, after "two-thirds percent of", deleted "his" and added "the worker's", and after "($36.00) a week", deleted the remainder of the subsection; rewrote Subsection B and designated the language from former Subsection B as new Subsection C; in new Subsection C, after "period of compensation is", deleted "one hundred weeks", and added "the maximum period allowable for a physical injury, as set forth in Sections 52-1-26 and 52-1-42 NMSA 1978, and subject to the maximum duration and limitations on compensation benefits set forth in Section 52-1-47 NMSA 1978", and after "physical impairment", deleted "or one hundred weeks, whichever is greater"; deleted the designation from former Subsection C and added "as set forth in Section 52-1-26 or 52-1-43 NMSA 1978 and Section 52-1-42 NMSA 1978, and subject to the maximum duration and limitations on compensation benefits set forth in Section 52-1-47 NMSA 1978" to the end of new Subsection C; designated the language in former Subsection C as Subsection D; redesignated former Subsections D, E, F and G as Subsections E, F, G and H, respectively; in Subsection E, after "worker shall be", deleted "his" and added "the worker's"; in Subsection F, after "determined by the", deleted "employment security division of the labor" and added "workforce solutions", after "reported to the", deleted "employment security division" and added "workforce solutions department", after "accordance with the", deleted "regulations" and added "rules", and after "of the", deleted "division" and added "department"; in Subsection G, after "Subsection", deleted "E" and added "F"; in Subsection H, after "Subsection", deleted "E" and added "F".

The 1999 amendment, effective June 18, 1999, substituted the language beginning "through" and ending "a week" for the language relating to the maximum compensation for certain effective dates in the first sentence of Subsection A.

The 1993 amendment, effective June 18, 1993, made a minor stylistic change in Subsection A; deleted "total" preceding the first two occurrences of "disability" in Subsection B; and made minor stylistic changes in Subsection D.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, divided former Subsection A to form Subsections A and B, rewriting some of the provisions therein; added Subsection C and redesignated former Subsections B through E as Subsections D through G; and deleted the former last sentence of Subsection E regarding the timing of the initial determination by the employment security division of the average weekly wage.

Limitation on benefits does not violate due process. — In view of the overall economic benefits of the Workmen's (Workers') 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.*, 1981-NMCA-045, 96 N.M. 84, 628 P.2d 329, cert. denied, 96 N.M. 116, 628 P.2d 686, and appeal dismissed, 454 U.S. 934, 102 S. Ct. 467, 70 L. Ed. 2d 242 (1981).

This section violates equal protection guarantees of the New Mexico Constitution by treating mentally disabled workers differently than physically disabled workers. *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, 138 N.M. 331, 120 P.3d 413.

The Workers' Compensation Act's disparate limits imposed on the duration of disability benefits for secondary mental impairments and secondary physical impairments violates equal protection guarantees. — Where worker appealed from a workers' compensation judge's order limiting the duration of worker's disability benefits for a secondary mental impairment to 150 weeks for compensation for the primary scheduled injury to worker's knee, claiming that capping the duration of benefits for a secondary mental impairment resulting from a scheduled physical injury, when a secondary physical impairment resulting from a scheduled physical injury is not similarly capped, violates the New Mexico constitution's equal protection guarantee, the provisions set forth in § 52-1-41(C) NMSA 1978 and § 52-1-42(A)(4) NMSA 1978 of the Workers' Compensation Act violate the equal protection clause of the New Mexico constitution, because workers with secondary mental impairments are similarly situated to workers with secondary physical impairments, the act's limits on the duration of benefits are different for workers with secondary mental impairments than they are for similarly situated workers with secondary physical impairments, and employer has not carried its burden of showing that the act's disparate treatment of mentally impaired workers, a sensitive class, is substantially related to an important government interest. *Cardenas v. Aztec Mun. Schs.*, 2022-NMCA-038, cert. granted.

This section limits basic benefits for persons with mental disabilities. *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, 138 N.M. 331, 120 P.3d 413.

This section provided for total disability and clarified the statutes theretofore existing. *Boggs v. D & L Constr. Co.*, 1963-NMSC-044, 71 N.M. 502, 379 P.2d 788, *overruled on other grounds by American Tank & Steel Corp. v. Thompson*, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

Sections to be read together. — All of the three sections, Sections 52-1-41, 52-1-42, and 52-1-43 NMSA 1978, 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.*, 1972-NMCA-145, 84 N.M. 369, 503 P.2d 652, 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.*, 1971-NMCA-126, 83 N.M. 73, 488 P.2d 123.

Where in fact there is a total disability, compensation under the workmen's (workers') compensation statute is to be paid for the disability without regard to whether the workman (worker) has a bodily impairment distinct from scheduled injuries. *Witcher v. Capitan Drilling Co.*, 1972-NMCA-145, 84 N.M. 369, 503 P.2d 652, cert. quashed, 85 N.M. 380, 512 P.2d 953 (1973).

Impairment and disability contrasted. — If a workman (worker) 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 (worker) is physically impaired, but not functionally disabled, because the act is not concerned with a workman's (worker'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. Int'l Minerals & Chem. Corp.*, 1981-NMCA-022, 95 N.M. 628, 624 P.2d 1025, cert. denied, 95 N.M. 669, 625 P.2d 1186.

Impairment does not automatically equate with disability. *Gonzales v. Stanke-Brown & Assocs.*, 1982-NMCA-109, 98 N.M. 379, 648 P.2d 1192.

When impairment equates with disability. — If a member or limb of a body is defective or infirm and creates a condition whereby a workman (worker) 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., 1981-NMCA-022, 95 N.M. 628, 624 P.2d 1025, cert. denied, 95 N.M. 669, 625 P.2d 1186.

Section invoked when impairment amounts to disability. — If one suffers a scheduled injury which causes a physical impairment but does not create disability, Section 52-1-43 NMSA 1978 will apply. When the impairment amounts to a disability, this section and Section 52-1-42 NMSA 1978 are properly invoked. *American Tank & Steel Corp. v. Thompson*, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

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 Section 52-1-43 NMSA 1978. *Hise Constr. v. Candelaria*, 1982-NMSC-109, 98 N.M. 759, 652 P.2d 1210.

"Average weekly wage", as used in this section, has statutory meaning. *Gilliland v. Hanging Tree, Inc.*, 1978-NMCA-061, 92 N.M. 23, 582 P.2d 400, cert. denied, 92 N.M. 180, 585 P.2d 324.

Subsection A means that a workman (worker) cannot be totally disabled doubly. To construe it otherwise would grant a workman (worker) a "windfall," fundamentally inconsistent with the nature of the Workmen's (Workers') Compensation Act. *Rollins v. Albuquerque Pub. Schs.*, 1979-NMCA-039, 92 N.M. 795, 595 P.2d 765, cert. denied, 92 N.M. 675, 593 P.2d 1078.

Total disability may be temporary. — The language of this section contemplates that total disability may be temporary. *Pacheco v. Alamo Sheet Metal Works, Inc.*, 1978-NMCA-057, 91 N.M. 730, 580 P.2d 498.

Pain as disability. — A severe pain which does disable a workman (worker) is a compensable injury. A workman (worker) 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.*, 1981-NMCA-022, 95 N.M. 628, 624 P.2d 1025, cert. denied, 95 N.M. 669, 625 P.2d 1186.

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*, 1973-NMCA-048, 85 N.M. 35, 508 P.2d 1332.

Medical payments as compensation. — Medical payments have been ruled to be compensation for the purpose of allowing attorney fees under Section 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.*, 1975-NMCA-147, 88 N.M. 568, 544 P.2d 283.

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.*, 1977-NMCA-017, 90 N.M. 220, 561 P.2d 493, cert. denied, 90 N.M. 254, 561 P.2d 1347.

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. N.M. Military Inst.*, 1979-NMCA-047, 92 N.M. 804, 595 P.2d 774, cert. denied, 92 N.M. 675, 593 P.2d 1078.

Date of disability is the date the workman (worker) knows or should know he has suffered a compensable injury. *Turner v. Shop-Rite Foods, Inc.*, 1982-NMCA-165, 99 N.M. 56, 653 P.2d 887.

Benefits are based upon the rate in effect when the workman (worker) becomes disabled. After a workman (worker) is disabled the rate does not escalate each time he returns to work. *Turner v. Shop-Rite Foods, Inc.*, 1982-NMCA-165, 99 N.M. 56, 653 P.2d 887.

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.*, 1978-NMCA-106, 92 N.M. 295, 587 P.2d 442, cert. denied, 92 N.M. 260, 586 P.2d 1089, *overruled on other grounds by Maitlen v. Getty Oil Co.*, 1987-NMCA-002, 105 N.M. 370, 733 P.2d 1 and *Raines v. W.A. Klinger & Sons*, 1988-NMSC-083, 107 N.M. 668, 763 P.2d 684.

Maximum compensation benefits for total disability cannot exceed that provided for in this section. *Rollins v. Albuquerque Pub. Schs.*, 1979-NMCA-039, 92 N.M. 795, 595 P.2d 765, cert. denied, 92 N.M. 675, 593 P.2d 1078.

Where a hearing officer concluded that a claimant was entitled to compensation benefits "until further order of the Workers' Compensation Division," but did not limit benefits to the statutory limit, the order granting benefits was not overbroad. *Cass v. Timberman Corp.*, 1990-NMCA-061, 110 N.M. 158, 793 P.2d 288, *rev'd on other grounds*, 1990-NMSC-112, 111 N.M. 184, 803 P.2d 669.

No time limits on payment of temporary total disability benefits. — Temporary total disability benefits are payable during any period of total disability for the remainder of a worker’s life. The payment of temporary total disability benefits to a worker is not subject to any of the duration limits found in 52-1-42 NMSA 1978 for permanent partial disability or 52-1-47 NMSA 1978 for combinations of disabilities. *Fowler v. Vista Care*, 2014-NMSC-019, *rev'g* 2013-NMCA-036, 298 P.3d 491.

Where worker, who suffered a back injury in 2003, began receiving temporary total disability benefits, and underwent back surgery; in 2006, worker's physician determined that worker had reached maximum medical improvement, worker's temporary total disability benefits were terminated, and worker received a lump sum payment of permanent partial disability benefits; and in 2007, worker's physician determined that worker's condition had deteriorated and recommended another surgery, worker was entitled to reinstatement of temporary total disability benefits as of 2007 when worker's physician determined that worker was no longer at maximum medical improvement. *Fowler v. Vista Care*, 2014-NMSC-019, *rev'g* 2013-NMCA-036, 298 P.3d 491.

Durational limits of temporary total disability benefits. — Temporary total disability benefits are subject to the 700-week durational limit in 52-1-57A NMSA 1978. *Fowler v. Vista Care*, 2013-NMCA-036, 298 P.3d 491, *rev'd*, 2014-NMSC-019.

Where worker suffered a back injury in 2003 and underwent a spinal fusion in 2006; the workers' compensation judge determined that worker had reached maximum medical improvement in 2006 and awarded worker a lump sum payment of permanent partial disability benefits; in 2007, worker's physician discovered that worker had a new injury that related to the original injury; worker underwent surgery in 2010; and in a 2010 compensation order, the workers' compensation judge concluded that worker was not at maximum medical improvement as of 2007 and awarded worker temporary total disability benefits for an indefinite period of time until the date worker reached maximum medical improvement from the 2010 surgery, worker's temporary total disability benefits were subject to the 700-week durational limit in 52-1-57A NMSA 1978. *Fowler v. Vista Care*, 2013-NMCA-036, 298 P.3d 491, *rev'd*, 2014-NMSC-019.

Maximum compensation for secondary mental impairment. — Subsection A(2) (now Subsections A and B) of this section allows compensation payments for as long as the physical disability is present; if the physical disability lasts less than 100 weeks, then a person who is totally disabled by secondary mental impairment can receive compensation payments for the balance of the 100 weeks but no more. *Fitzgerald v. Open Hands*, 1993-NMCA-026, 115 N.M. 210, 848 P.2d 1137 (decided under version prior to 1991 amendment).

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. Schs.*, 1979-NMCA-039, 92 N.M. 795, 595 P.2d 765, cert. denied, 92 N.M. 675, 593 P.2d 1078.

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.*, 1980-NMCA-109, 94 N.M. 723, 616 P.2d 436.

Rate of compensation in effect on date of disability applies, not the date of the accident. *Purcella v. Navajo Freight Lines*, 1980-NMCA-182, 95 N.M. 306, 621 P.2d 523, *overruled by Varos v. Union Oil Co. of Cal.*, 1984-NMCA-091, 101 N.M. 713, 688 P.2d 31.

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.*, 1982-NMCA-109, 98 N.M. 379, 648 P.2d 1192.

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 (Workers') 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.*, 1980-NMCA-109, 94 N.M. 723, 616 P.2d 436.

Award of one day's benefits is not contemplated by the Workmen's (Workers') Compensation Act. *Grudzina v. N.M. Youth Diagnostic & Dev. Ctr.*, 1986-NMCA-047, 104 N.M. 576, 725 P.2d 255.

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 survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers's Compensation §§ 380 to 384, 406, 413.

99 C.J.S. Workmen's Compensation §§ 289 to 301; 101 C.J.S. Workmen's Compensation § 896.

52-1-42. Compensation benefits; permanent partial disability; maximum duration of benefits.

A. For permanent partial disability, the workers' compensation benefits not specifically provided for in Section 52-1-43 NMSA 1978 shall be a percentage of the weekly benefit payable for total disability as provided in Section 52-1-41 NMSA 1978. The percentage of permanent partial disability shall be determined pursuant to the provisions of Sections 52-1-26 through 52-1-26.4 NMSA 1978. The duration of partial disability benefits shall depend upon the extent and nature of the partial disability, subject to the following:

(1) where the worker's percentage of disability is equal to or greater than eighty, the maximum period is seven hundred weeks;

(2) where the worker's percentage of disability is less than eighty, the maximum period is five hundred weeks;

(3) where the partial disability results from a primary mental impairment, the maximum period is the maximum period allowable for a physical injury, as set forth in Section 52-1-26 NMSA 1978, and subject to the maximum duration and limitations on compensation benefits set forth in Section 52-1-47 NMSA 1978; and

(4) where the partial disability results from a secondary mental impairment, the maximum period is the maximum period allowable for the disability produced by the physical impairment, as set forth in Section 52-1-26 or 52-1-43 NMSA 1978, and subject to the maximum duration and limitations on compensation benefits set forth in Section 52-1-47 NMSA 1978.

B. If an injured worker receives temporary disability benefits prior to an award of permanent partial disability benefits, the maximum period for permanent partial disability benefits shall be reduced by the number of weeks the worker actually receives temporary disability benefits.

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; 1990 (2nd S.S.), ch. 2, § 18; 2015, ch. 70, § 2.

ANNOTATIONS

Cross references. — For partial disability, *see* 52-1-26 NMSA 1978.

The 2015 amendment, effective June 19, 2015, amended the Workers' Compensation Act to change the maximum period of benefits; in Subsection A, Paragraph (3), after "the maximum period is", deleted "one hundred weeks" and added "the maximum period allowable for a physical injury, as set forth in Section 52-1-26 NMSA 1978, and subject to the maximum duration and limitations on compensation benefits set forth in Section 52-1-47 NMSA 1978"; in Subsection A, Paragraph (4), after "physical impairment", deleted "or one hundred weeks, whichever is greater" and added "as set forth in Section 52-1-26 or 52-1-43 NMSA 1978, and subject to the maximum duration and limitations on compensation benefits set forth in Section 52-1-47 NMSA 1978"; and in Subsection B, after "an award of", added "permanent", after "maximum period for", added "permanent", and after the second occurrence of "temporary", deleted "total".

The 1990 (2nd S.S.) amendment, effective January 1, 1991, inserted "permanent" in the catchline and rewrote the section to such an extent that a detailed comparison would be impracticable, adding the Subsection A designation and Subsection B.

Combining benefit periods to exceed 500 weeks. — Where worker suffers a scheduled and a non-scheduled injury at the same time, the benefit period for the scheduled member can be added to the benefits period for the non-scheduled injury. *Gutierrez v. Intel Corp.*, 2009-NMCA-106, 147 N.M. 267, 219 P.3d 524.

Where worker fell off of a ladder and injured worker's left foot and back, the workers' compensation judge properly added the allocation of 500 weeks for the back injury and the allocation of 113 weeks for the foot injury, for a total award of 615 weeks of benefits. *Gutierrez v. Intel Corp.*, 2009-NMCA-106, 147 N.M. 267, 219 P.3d 524.

Commencement of benefits period. — Where worker fell off of a ladder and injured worker's left foot and back; worker continued to be consistently symptomatic from the time of the accident until back surgery eight years after the accident; and the back surgery was performed to address a progressive deterioration, the workers' compensation judge properly used the date of the accident, rather than the date of the back surgery, to begin the benefits for the worker's back injury. *Gutierrez v. Intel Corp.*, 2009-NMCA-106, 147 N.M. 267, 219 P.3d 524.

This section violates equal protection guarantees of the New Mexico Constitution by treating mentally disabled workers differently than physically disabled workers. *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, 138 N.M. 331, 120 P.3d 413.

The Workers' Compensation Act's disparate limits imposed on the duration of disability benefits for secondary mental impairments and secondary physical impairments violates equal protection guarantees. — Where worker appealed from a workers' compensation judge's order limiting the duration of worker's disability benefits for a secondary mental impairment to 150 weeks for compensation for the primary scheduled injury to worker's knee, claiming that capping the duration of benefits for a secondary mental impairment resulting from a scheduled physical injury, when a secondary physical impairment resulting from a scheduled physical injury is not similarly capped, violates the New Mexico constitution's equal protection guarantee, the provisions set forth in § 52-1-41(C) NMSA 1978 and § 52-1-42(A)(4) NMSA 1978 of the Workers' Compensation Act violate the equal protection clause of the New Mexico constitution, because workers with secondary mental impairments are similarly situated to workers with secondary physical impairments, the act's limits on the duration of benefits are different for workers with secondary mental impairments than they are for similarly situated workers with secondary physical impairments, and employer has not carried its burden of showing that the act's disparate treatment of mentally impaired workers, a sensitive class, is substantially related to an important government interest. *Cardenas v. Aztec Mun. Schs.*, 2022-NMCA-038, cert. granted.

Credit for temporary total disability benefits. — An employer is entitled to credit for payment of partial temporary total disability benefits equal to a reduction of one week of permanent partial disability benefits for each week of partial temporary total disability benefits, regardless of the percentage of partial temporary total disability benefits

actually paid. *Gurule v. Dicaperl Minerals Corp.*, 2006-NMCA-054, 139 N.M. 521, 134 P.3d 808.

This section limits basic benefits for persons with mental disabilities. *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, 138 N.M. 331, 120 P.3d 413.

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.*, 1983-NMCA-119, 100 N.M. 455, 672 P.2d 284, cert. denied, 100 N.M. 439, 671 P.2d 1150.

For there to be workmen's (workers') compensation award, there must be disability and the compensation payable is measured in terms of disability. *McCleskey v. N.C. Ribble Co.*, 1969-NMCA-042, 80 N.M. 345, 455 P.2d 849, cert. denied, 80 N.M. 317, 454 P.2d 974.

Compensation based on decreased earning ability. — The Workmen's (Workers') 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 Cnty. Livestock Co.*, 1966-NMSC-060, 76 N.M. 137, 412 P.2d 562.

This section provided for partial disability and clarified the statutes theretofore existing. *Boggs v. D & L Constr. Co.*, 1963-NMSC-044, 71 N.M. 502, 379 P.2d 788, *overruled on other grounds by American Tank & Steel Corp. v. Thompson*, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

Definition of "disability" is the disablement of the workman (worker) 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 Cnty. Livestock Co.*, 1966-NMSC-060, 76 N.M. 137, 412 P.2d 562.

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,* 1962-NMSC-105, 70 N.M. 364, 374 P.2d 124 (decided under former law).

Construed in pari materia. — All of the three sections, Sections 52-1-41, 52-1-42, and 52-1-43, 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.*, 1972-NMCA-145, 84 N.M. 369, 503 P.2d 652, 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. N.M. Military Inst.*, 1979-NMCA-047, 92 N.M. 804, 595 P.2d 774, cert. denied, 92 N.M. 675, 593 P.2d

1078; *Purcella v. Navajo Freight Lines*, 1980-NMCA-182, 95 N.M. 306, 621 P.2d 523, *overruled by Varos v. Union Oil Co. of Cal.*, 1984-NMCA-091, 101 N.M. 713, 688 P.2d 31.

When one invokes section, one also invokes the limitation on partial disability benefits stated in this section. *Newhoff v. Good Housekeeping, Inc.*, 1980-NMCA-090, 94 N.M. 621, 614 P.2d 33, cert. denied, 94 N.M. 674, 615 P.2d 991, *overruled on other grounds by Candelaria v. Hise Constr.*, 1981-NMCA-145, 98 N.M. 763, 652 P.2d 1214.

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.*, 1971-NMCA-126, 83 N.M. 73, 488 P.2d 123.

Section invoked when impairment amounts to disability. — If one suffers a scheduled injury which causes a physical impairment but does not create disability, Section 52-1-43 NMSA 1978 will apply. When the impairment amounts to a disability, Section 52-1-41 NMSA 1978 and this section are properly invoked. *Ameriican Tank & Steel Corp. v. Thompson*, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

Impairment does not automatically equate with disability. *Gonzales v. Stanke-Brown & Assocs.*, 1982-NMCA-109, 98 N.M. 379, 648 P.2d 1192.

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.*, 1984-NMCA-100, 101 N.M. 803, 689 P.2d 1274.

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 Ctr., 1988-NMCA-043, 107 N.M. 273, 756 P.2d 1.

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 Ctr.*, 1988-NMCA-043, 107 N.M. 273, 756 P.2d 1.

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 Section 52-1-43 NMSA 1978

(specific body members). *Harrison v. Animas Valley Auto & Truck Repair*, 1988-NMSC-055, 107 N.M. 373, 758 P.2d 787.

For a worker to receive permanent partial disability benefits under this section, rather than scheduled injury benefits under Section 52-1-43 NMSA 1978, she must show that: (1) she is totally disabled; or (2) she has suffered a separate and distinct impairment to a nonscheduled body part. *Jurado v. Levi Strauss & Co.*, 1995-NMCA-129, 120 N.M. 801, 907 P.2d 205, cert. denied, 120 N.M. 715, 905 P.2d 1119.

Secondary mental impairment. — A worker is not required to have a current physical impairment in order to have a secondary mental impairment; thus, when a worker was paid total temporary disability benefits for 89 weeks, after which a judge found she no longer had any physical impairment, she was entitled to benefits for secondary mental impairment for 11 weeks under Subsection B. *Peterson v. N. Home Care*, 1996-NMCA-030, 121 N.M. 439, 912 P.2d 831.

Intermediary secondary mental impairment. — Substantial evidence supported the determination that the claimant's chronic pain disability was the result of both physical and mental impairment and that the benefits cap in Paragraph A(4) did not apply, since physical strain always remained in the diagnosis and since even the company physician gave the claimant an impairment rating based in part on a positive x-ray finding. *Crespin v. Consol. Constructors, Inc.*, 1993-NMCA-109, 116 N.M. 334, 862 P.2d 442, cert. denied, 116 N.M. 364, 862 P.2d 1223.

Wages earned after injury are not necessarily determinative of the question of post-injury earning ability. *Batte v. Stanley's*, 1962-NMSC-105, 70 N.M. 364, 374 P.2d 124.

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*, 1973-NMCA-048, 85 N.M. 35, 508 P.2d 1332.

Finding of disability as ultimate fact. — A finding that a workman (worker), to a stated percentage extent, is partially and permanently disabled is a finding of an ultimate fact. *McClesky v. N.C. Ribble Co.*, 1969-NMCA-042, 80 N.M. 345, 455 P.2d 849, cert. denied, 80 N.M. 317, 454 P.2d 974.

Failure to make findings not error where ultimate findings support judgment. — In a workman's (worker'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 1-052A), and such ultimate findings amply sustained the judgment under the provisions of this section. *Scott v. Homestake-Sapin*, 1963-NMSC-122, 72 N.M. 268, 383 P.2d 239.

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.*, 1971-NMCA-126, 83 N.M. 73, 488 P.2d 123.

Although payment of full wages following injury is not conclusive on the question of earning ability, it may be indicative. *Brownlee v. Lincoln Cnty. Livestock Co.*, 1966-NMSC-060, 76 N.M. 137, 412 P.2d 562.

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, Inc.*, 1955-NMSC-074, 59 N.M. 492, 287 P.2d 61 (decided under former law).

No deduction of non-schedule benefits from disability received for scheduled injury. — The number of weeks an injured worker received benefits for the disabilities caused by injuries to a scheduled body part, his knees, could not be deducted from the number of weeks he was entitled to receive benefits for the subsequent injury to his shoulder, a non-scheduled part, which was caused by his original knee injury. *Baca v. Complete Drywall Co.*, 2002-NMCA-002, 131 N.M. 413, 38 P.3d 181, cert. denied, 131 N.M. 564, 40 P.3d 1008.

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 Cnty. Livestock Co.*, 1966-NMSC-060, 76 N.M. 137, 412 P.2d 562.

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 Cnty. Livestock Co.*, 1966-NMSC-060, 76 N.M. 137, 412 P.2d 562.

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.*, 1969-NMCA-042, 80 N.M. 345, 455 P.2d 849, cert. denied, 80 N.M. 317, 454 P.2d 974.

Finding of reduction in earning capacity does not follow from a finding of impairment of body function. *Batte v. Stanley's*, 1962-NMSC-105, 70 N.M. 364, 374 P.2d 124.

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.*, 1962-NMSC-104, 70 N.M. 361, 374 P.2d 122.

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*, 1965-NMSC-043, 75 N.M. 137, 401 P.2d 583.

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*, 1962-NMSC-148, 71 N.M. 491, 379 P.2d 781.

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.*, 1960-NMSC-003, 66 N.M. 351, 348 P.2d 271.

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 Section 52-1-43 NMSA 1978. *Maschio v. Kaiser Steel Corp.*, 1983-NMCA-119, 100 N.M. 455, 672 P.2d 284, cert. denied, 100 N.M. 439, 671 P.2d 1150.

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.*, 1984-NMCA-100, 101 N.M. 803, 689 P.2d 1274.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 380 to 384, 431, to 434.

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:

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 palm remain 70 weeks

(29) one leg at or near hip joint, so as to preclude the use of an artificial limb 200 weeks

(30) one leg at or above the knee, where stump remains sufficient to permit the use of an artificial limb 150 weeks

(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 metatarsal bone thereof 14 weeks

(37) one toe other than the great toe at the proximal joint 10 weeks

(38) one toe other than the great toe at second or distal joint 8 weeks

(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 those provided in Subsection A of this section 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 schedule in Subsection A of this section. The additional compensation period may not in any event exceed twice the time specified in the schedule in Subsection A of this section 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; 2003, ch. 259, § 5.

ANNOTATIONS

Repeals and reenactments. — Laws 1987, ch. 235, § 18 repealed 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.

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.

The 2003 amendment, effective June 20, 2003, in Subsection C substituted "of those provided in Subsection A of this section" for "of the period hereinafter stated" following "benefits in excess" near the middle of the first sentence, inserted "in Subsection A of this section" at the end of the first sentence, and inserted "in Subsection A of this section" near the end of the second sentence.

I. GENERAL CONSIDERATION.

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.*, 1983-NMCA-119, 100 N.M. 455, 672 P.2d 284, cert. denied, 100 N.M. 439, 671 P.2d 1150.

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.*, 1972-NMCA-145, 84 N.M. 369, 503 P.2d 652, cert. quashed, 85 N.M. 380, 512 P.2d 953 (1973).

Section does not limit modification. — This section does not limit the amount of time in which the worker could file a claim for increased benefits under Section 52-1-56 NMSA 1978. *Henington v. Technical-Vocational Inst.*, 2002-NMCA-025, 131 N.M. 655, 41 P.3d 923, cert. denied, 131 N.M. 737, 42 P.3d 842.

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.*, 1972-NMCA-145, 84 N.M. 369, 503 P.2d 652, cert. quashed, 85 N.M. 380, 512 P.2d 953 (1973).

Proof of impairment not essential. — Proof of an impairment, as defined in Section 52-1-24A NMSA 1978, is not essential for recovery under Section 52-1-43 NMSA 1978. *Lucero v. Smith's Food & Drug Ctrs.*, 1994-NMCA-076, 118 N.M. 35, 878 P.2d 353, cert. denied, 118 N.M. 90, 879 P.2d 91.

New Mexico license not required. — The words "health care provider, as defined in Section 52-4-1 NMSA 1978" should be construed to mean those persons licensed (not necessarily in New Mexico) in one of the occupations listed in Section 52-4-1 NMSA 1978. If the result were otherwise, the person providing health care to a worker residing out of state would not necessarily be licensed in New Mexico, and thus would never be able to release the worker from "his primary treating health care provider, as defined in Section 52-4-1 NMSA 1978" because the worker would have no such treating health care provider. *Coslett v. Third St. Grocery*, 1994-NMCA-046, 117 N.M. 727, 876 P.2d 656, cert. denied, 117 N.M. 802, 877 P.2d 1105.

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*, 1955-NMSC-074, 59 N.M. 492, 287 P.2d 61 (decided under former law).

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*, 1970-NMCA-117, 82 N.M. 140, 477 P.2d 316.

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*, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

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*, 1982-NMSC-109, 98 N.M. 759, 652 P.2d 1210.

Shoulder injury is a non-scheduled injury. *Carter v. Mountain Bell*, 1986-NMCA-103, 105 N.M. 17, 727 P.2d 956.

II. DISABILITY.

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.*, 1971-NMCA-126, 83 N.M. 73, 488 P.2d 123.

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 Ctr.*, 1988-NMCA-043, 107 N.M. 273, 756 P.2d 1.

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 Ctr.*, 1988-NMCA-043, 107 N.M. 273, 756 P.2d 1.

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 Section 52-1-42 NMSA 1978, and not just to benefits under this section (specific body members). *Harrison v. Animas Valley Auto & Truck Repair*, 1988-NMSC-055, 107 N.M. 373, 758 P.2d 787.

For a worker to receive permanent partial disability benefits under Section 52-1-42 NMSA 1978, rather than scheduled injury benefits under this section, a worker must show that: (1) she is totally disabled; or (2) she has suffered a separate and distinct impairment to a nonscheduled body part. *Jurado v. Levi Strauss & Co.*, 1995-NMCA-129, 120 N.M. 801, 907 P.2d 205, cert. denied, 120 N.M. 715, 905 P.2d 1119.

Impairment and disability contrasted. — If a workman (worker) 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 (worker) is physically impaired, but not functionally disabled, because the act is not concerned with a workman's (worker'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.*, 1981-NMCA-022, 95 N.M. 628, 624 P.2d 1025, cert. denied, 95 N.M. 669, 625 P.2d 1186.

When impairment equates with disability. — If a member or limb of a body is defective or infirm and creates a condition whereby a workman (worker) 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.*, 1981-NMCA-022, 95 N.M. 628, 624 P.2d 1025, cert. denied, 95 N.M. 669, 625 P.2d 1186.

"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.*, 1981-NMCA-145, 98 N.M. 763, 652 P.2d 1214, *aff'd in part, rev'd in part*, 1982-NMSC-109, 98 N.M. 759, 652 P.2d 1210, *overruled on other grounds by Garcia v. Schneider, Inc.*, 1986-NMCA-127, 105 N.M. 234, 731 P.2d 377.

Total disability covered by Section 52-1-41 NMSA 1978. — If a worker is totally disabled due to an injury, then he or she is entitled to disability under Section 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*, 1982-NMSC-109, 98 N.M. 759, 652 P.2d 1210.

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 Cmty. Health Servs.*, 1986-NMCA-066, 104 N.M. 608, 725 P.2d 584, cert. denied, 104 N.M. 632, 725 P.2d 832.

No deduction of non-schedule benefits from disability received for scheduled injury. — The number of weeks an injured worker received benefits for the disabilities caused by injuries to a scheduled body part, his knees, could not be deducted from the number of weeks he was entitled to receive benefits for the subsequent injury to his shoulder, a non-scheduled part, which was caused by his original knee injury. *Baca v. Complete Drywall Co.*, 2002-NMCA-002, 131 N.M. 413, 38 P.3d 181, cert. denied, 131 N.M. 564, 40 P.3d 1008.

Primary test for disability is the capacity to perform work. *Adams v. Loffland Bros. Drilling Co.*, 1970-NMCA-114, 82 N.M. 72, 475 P.2d 466.

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.*, 1970-NMCA-114, 82 N.M. 72, 475 P.2d 466.

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*, 1973-NMCA-048, 85 N.M. 35, 508 P.2d 1332.

More compensation if disability transcends scheduled injury. — Disability compensation was more than that allowed for a scheduled injury to the left elbow since there was substantial evidence to support the compensation order to the extent it relied on the fact that the worker's disability was not limited to a scheduled member or function. *Rodriguez v. McAnally Enters.*, 1994-NMCA-025, 117 N.M. 250, 871 P.2d 14.

Impairment distinct from schedule immaterial where total disability. — Where in fact there is a total disability, compensation under the workmen's (workers') compensation statute is to be paid for the disability without regard to whether the workman (worker) has a bodily impairment distinct from scheduled injuries. *Witcher v. Capitan Drilling Co.*, 1972-NMCA-145, 84 N.M. 369, 503 P.2d 652, cert. quashed, 85 N.M. 380, 512 P.2d 953 (1973).

Accidental injuries to the nervous system are compensable when resulting in disability. *Webb v. Hamilton*, 1968-NMSC-008, 78 N.M. 647, *436 P.2d 507, overruled on other grounds by* American Tank & Steel Corp. v. Thompson, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

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 Section 52-1-24 NMSA 1978 (now Section 52-1-25 NMSA 1978) or an award for a scheduled injury under this section. *American Tank & Steel Corp. v. Thompson*, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

Pain as compensable injury. — A severe pain which does disable a workman (worker) is a compensable injury. A workman (worker) 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.*, 1981-NMCA-022, 95 N.M. 628, 624 P.2d 1025, cert. denied, 95 N.M. 669, 625 P.2d 1186.

Disability benefits for phantom pain and secondary depression. — Since the record supported the determination of the worker's compensation judge that claimant's pain and secondary depression were injuries separate and distinct from an amputation of finger and thumb, claimant was entitled to partial disability benefits on these claims. *Gordon v. Dennisson Doors, Inc.*, 1992-NMCA-136, 114 N.M. 767, 845 P.2d 861.

III. SCHEDULED INJURY.

Subsection B's relation to Subsection A. — The most sensible construction of this section is that Subsection A sets forth the benefits for total loss or total loss of use of a member or function and Subsection B sets forth the benefits for partial loss of use of a member or function. *Twin Mt. Rock v. Ramirez*, 1994-NMCA-020, 117 N.M. 367, 871 P.2d 1373, cert. denied, 117 N.M. 802, 877 P.2d 1105.

The "number of weeks" referred to in Subsection B is the number of weeks set forth in the various paragraphs in Subsection A. It is significant that Subsection B refers to those numbers as the "number of weeks applicable to total loss or loss of use," thereby indicating that the provisions in Subsection A relate solely to total loss or loss of use of a body member or physical function. *Twin Mt. Rock v. Ramirez*, 1994-NMCA-020, 117 N.M. 367, 871 P.2d 1373, cert. denied, 117 N.M. 802, 877 P.2d 1105.

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, Sections 52-1-41 NMSA 1978 and 52-1-42 NMSA 1978 are properly invoked. *American Tank & Steel Corp. v. Thompson*, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

Work-related injury and preexisting impairment. — Where worker sustained a work-related injury to the left knee; worker had a preexisting impairment in the right knee which was not a consequence of the work-related accident; and there was no evidence that worker's preexisting right knee impairment became worse as a result of the accident, the workers' compensation judge did not err in finding that the preexisting right knee injury did not combine with the left knee injury to result in additional disability. *Jojola v. Fresenius Med. Clinic*, 2010-NMCA-101, 149 N.M. 51, 243 P.3d 755.

Enhanced disability concept (preexiting injury rule), under which the present extent of impairment covered as a scheduled injury is to be compensated without factoring out previous causes of impairment, is an integral part of the Workers' Compensation Act and applies to the scheduled injuries section under the Act where there is no temporary or permanent disability. *Smith v. Arizona Pub. Serv. Co.*, 2003-NMCA-097, 134 N.M. 202, 75 P.3d 418, cert. denied, 2003-NMCERT-008, 134 N.M. 171, 74 P.3d 600.

Where a worker suffered a 59% loss of hearing, which was the result of a work-related injury combined with the worker's preexisting condition, the worker was entitled to compensation for his total impairment, notwithstanding the employer's argument that only 5% of the loss was due to the work-related injury. *Smith v. Arizona Pub. Serv. Co.*, 2003-NMCA-097, 134 N.M. 202, 75 P.3d 418, cert. denied, 2003-NMCERT-008, 134 N.M. 171, 74 P.3d 600.

Benefits are allowed for total disability when the total disability results from the loss of, or injury to, a scheduled member. *Mendez v. Southwest Cmty. Health Servs.*, 1986-NMCA-066, 104 N.M. 608, 725 P.2d 584, cert. denied, 104 N.M. 632, 725 P.2d 832.

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.*, 1986-NMCA-092, 104 N.M. 769, 727 P.2d 77.

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.*, 1987-NMCA-024, 105 N.M. 493, 734 P.2d 273.

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.*, 1983-NMCA-119, 100 N.M. 455, 672 P.2d 284, cert. denied, 100 N.M. 439, 671 P.2d 1150.

Term "one foot at the ankle" construed. — Where worker appealed from an order of a workers' compensation judge (WCJ) awarding her 115 weeks of benefits for a scheduled injury to "one foot at the ankle," pursuant to NMSA 1978, § 52-1-43(A)(32), and where worker claimed that an injury to the upper part of the ankle is not an injury to "one foot at the ankle," but should be considered an injury to her "leg between knee and the ankle" that the plain language of the Workers' Compensation Act supported her claim that the legislature used the phrase "at the joint" in the list of scheduled injuries to include only injuries to the body member named *up to* the named joint, and not injuries to the joint itself, and that she was therefore entitled to compensation for 130 weeks for an injury to her leg between the knee and the ankle and an additional 115 weeks of compensation for a separate injury to her foot, the WCJ did not err in determining that an ankle injury is a scheduled injury to the "foot at the ankle," compensable under 52-1-43(A)(32) NMSA 1978. Separating an injury to a single ankle into two injuries, one to the foot and the other to the leg as worker suggests, is not consistent with the obvious purpose of the scheduled injury section and would lead to an absurd result. *Jaramillo v. N.M. Tax'n & Revenue Dep't*, 2024-NMCA-028, cert. denied.

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 Cnty.*, 1983-NMCA-133, 100 N.M. 600, 673 P.2d 1333, cert. denied, 100 N.M. 689, 675 P.2d 421.

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.*, 1984-NMCA-100, 101 N.M. 803, 689 P.2d 1274.

Loss of use of injured eye judged on basis of uncorrected vision. *Ranville v. J.T.S. Enters.*, Inc., 1984-NMCA-100, 101 N.M. 803, 689 P.2d 1274.

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 Hardware*, 1985-NMCA-085, 104 N.M. 401, 722 P.2d 652, *rev'd on other grounds*, 1986-NMSC-022, 104 N.M. 50, 716 P.2d 241.

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.*, 1964-NMSC-225, 74 N.M. 550, 395 P.2d 824.

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.*, 1961-NMSC-029, 68 N.M. 187, 360 P.2d 380.

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.*, 1984-NMCA-097, 101 N.M. 773, 689 P.2d 289.

Evidence. — Although evidence based on American Medical Association (AMA) guides or publications would be helpful to an understanding of the percentage loss of use of a specific member, evidence of that character is not required under this section as it currently exists. *Lucero v. Smith's Food & Drug Ctrs.*, 1994-NMCA-076, 118 N.M. 35, 878 P.2d 353, cert. denied, 118 N.M. 90, 879 P.2d 91.

Judge's award of scheduled injury benefits based on both the AMA Guides and reliance on the worker's and doctors' testimonies was supported by substantial evidence. *Valdez v. Wal-Mart Stores, Inc.*, 1998-NMCA-030, 124 N.M. 655, 954 P.2d 87, cert. denied, 124 N.M. 589, 953 P.2d 1087.

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, Inc.*, 1985-NMCA-020, 102 N.M. 428, 696 P.2d 1021.

Finding of injury to arm not supported by evidence. — Although the medical expert testified that, in his opinion, the purpose an arm serves is to position a hand in space and give the hand strength to do things and without a functioning hand the arm

becomes useless, nothing more than a "paperweight," the record did not reveal any evidence to support the opinion that worker's left arm was useless. Because the medical expert's opinion would essentially render meaningless those portions of the scheduled injury section dealing with hand injuries and an interpretation of the scheduled injury section that renders part of it meaningless cannot be condoned, the trial judge erred in finding a scheduled injury to worker's left arm instead of her left hand. *Murphy v. Duke City Pizza, Inc.*, 1994-NMCA-085, 118 N.M. 346, 881 P.2d 706, cert. denied, 118 N.M. 430, 882 P.2d 21.

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 Workers' Compensation §§ 380, 385, 386, 400 to 405, 434.

Workers' compensation: recovery for carpal tunnel syndrome, 14 A.L.R.5th 1.

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, 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.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers's Compensation § 635.

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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

"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*, 1960-NMSC-063, 67 N.M. 156, 353 P.2d 680.

If employer does not show that he caused workman (worker) 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 (workers') compensation cases set out in Section 52-1-28 NMSA 1978. *Michael v. Bauman*, 1966-NMSC-079, 76 N.M. 225, 413 P.2d 888.

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.*, 1964-NMSC-141, 74 N.M. 336, 393 P.2d 449.

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.*, 1964-NMSC-141, 74 N.M. 336, 393 P.2d 449.

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*, 1966-NMSC-079, 76 N.M. 225, 413 P.2d 888.

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*, 1960-NMSC-063, 67 N.M. 156, 353 P.2d 680.

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.*, 1964-NMSC-141, 74 N.M. 336, 393 P.2d 449.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers's Compensation § 443.

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 the worker's death within the period of two years following the worker's 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 seven thousand five hundred dollars ($7,500), and the expenses provided for medical and hospital services for the deceased, together with all other sums that the deceased should have been paid for compensation benefits up to the time of the worker's death;

B. if there are eligible dependents at the time of the worker's death, payment shall consist of a sum not to exceed seven thousand five hundred dollars ($7,500) 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 the worker's 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) if there is no widow or widower entitled to compensation, sixty-six and two-thirds percent of the average weekly wage of the deceased to the child or children;

(2) if there are no children, sixty-six and two-thirds percent of the average weekly wage of the deceased to the widow or widower, until remarriage; or

(3) if there is a widow or widower and children:

(a) if all the children are living with the widow or widower, forty-five percent of the weekly compensation benefits as provided in Sections 52-1-41 through 52-1-43 and 52-1-47 NMSA 1978 to the widow or widower and fifty-five percent divided equally to the children; or

(b) if no child is living with a widow or widower, forty percent of the weekly compensation benefits as provided in Sections 52-1-41 through 52-1-43 and 52-1-47 NMSA 1978 to the widow or widower and sixty percent divided equally to the children; 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, 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; 1999, ch. 172, § 2; 2013, ch. 134, § 3.

ANNOTATIONS

Cross references. — For dependents, *see* 52-1-17 NMSA 1978.

For child, *see* 52-1-18 NMSA 1978.

The 2013 amendment, effective July 1, 2013, provided for payment of compensation if there is a widow or widower and children; and in Subparagraph C, deleted former Paragraph (3), which provided for payment of compensation to widows and widowers if there are or are not children living with the widow or widower; and added Paragraph (3).

The 1999 amendment, effective June 18, 1999, substituted "seven thousand five hundred dollars ($7,500)" for "three thousand dollars ($3,000)" in Subsections A and B.

Greater benefits for dependents not violative of equal protection. — This section setting greater benefits for dependent survivors of a deceased workman (worker) than for nondependent survivors is well within legislative prerogatives and is not violative of equal protection. *Sanchez v. M.M. Sundt Constr. Co.*, 1985-NMCA-087, 103 N.M. 294, 706 P.2d 158.

This section and Section 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*, 1984-NMCA-010, 101 N.M. 22, 677 P.2d 635, cert. denied, 101 N.M. 11, 677 P.2d 624.

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.*, 1985-NMCA-024, 102 N.M. 540, 697 P.2d 959.

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.*, 1982-NMCA-052, 97 N.M. 717, 643 P.2d 281.

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*, 1984-NMCA-038, 101 N.M. 315, 681 P.2d 741.

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*, 1982-NMCA-045, 97 N.M. 665, 642 P.2d 1124.

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*, 1979-NMCA-066, 93 N.M. 75, 596 P.2d 518.

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*, 1963-NMSC-215, 73 N.M. 371, 388 P.2d 382.

Legislature's policy favoring periodic over lump sum payments in Subsection A of Section 52-5-12 NMSA 1978 also applies to compensation due a deceased worker's dependents under this section. *Paradiso v. Tipps Equip.*, 2004-NMCA-009, 134 N.M. 814, 82 P.3d 985, cert. denied, 2004-NMCERT-001, 135 N.M. 160, 85 P.3d 802.

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*, 1963-NMSC-215, 73 N.M. 371, 388 P.2d 382.

Beginning of two-year period. — The two-year time limit for bringing claims for death benefits begins to accrue from the date the worker knew or should have known that he suffered a compensable injury, rather than from the date of the accident. *Gambrel v. Marriott Hotel*, 1991-NMCA-100, 112 N.M. 668, 818 P.2d 869.

Claim for death benefits was timely. — Where worker sought and obtained an award of workers' compensation disability benefits after she contracted allergic bronchopulmonary aspergillosis (ABPA) as a result of exposure to aspergillus mold while employed with the Albuquerque public schools, and where worker died from pneumonia and chronic pneumonitis which was likely caused by the ABPA, the district court did not err in determining that claimant's claim for death benefits was within the two-year limitations period, because although worker's respiratory problems began shortly after her exposure to aspergillus mold in August of 2011 and died in November of 2014, the limitation period does not begin to run until the disability occurs and thereby entitles the worker to benefits under the act, even if the worker is aware that an injury was suffered earlier. Petitioner filed a claim for death benefits in January of 2015, less than two years after worker knew or should have known that she suffered a compensable injury. *Lewis v. Albuquerque Public Schools*, 2019-NMSC-022, *aff'g in part and rev'g in part* 2018-NMCA-049, 424 P.3d 643.

Expert testimony regarding the cause of death. — In a contested death benefits workers' compensation case, the parties can agree upon an independent medical examination (IME) examiner to perform an IME, the purpose of which is to determine the causal connection, if any, between the worker's injury and the worker's death, and the workers' compensation judge has the authority to order an IME for this purpose on the motion of a party or on its own motion. *Lewis v. Albuquerque Public Schools*, 2019-NMSC-022, *aff'g in part and rev'g in part* 2018-NMCA-049, 424 P.3d 643.

Two-year limitations period. — Where worker sought and obtained an award of workers' compensation disability benefits after she contracted allergic bronchopulmonary aspergillosis (ABPA) as a result of exposure to aspergillus mold while employed with the Albuquerque public schools, and where worker died from pneumonia and chronic pneumonitis which was likely caused by the ABPA, the district court did not err in determining that claimant's claim for death benefits was within the two-year limitations period, because worker knew or should have known that she had an injury and was entitled to compensation for that injury on April 1, 2013, which was within two years of worker's death on November 12, 2014. *Lewis v. Albuquerque Pub. Schs.*, 2018-NMCA-049, cert. granted.

Testimony about the cause of death. — Where worker sought and obtained an award of workers' compensation disability benefits after she contracted allergic bronchopulmonary aspergillosis (ABPA) as a result of exposure to aspergillus mold while employed with the Albuquerque public schools, and where claimant, worker's widower, sought workers' compensation death benefits following worker's death, the workers' compensation judge (WCJ) erred in determining that 52-1-51(C) NMSA 1978 barred admission and consideration of cancer treatment records and the testimony of worker's oncologist in determining the cause of worker's death, because 52-1-51(C) NMSA 1978 does not apply to a WCJ's cause of death determination pursuant to 52-1-46 NMSA 1978, and therefore does not limit expert testimony regarding the circumstances and cause of a worker's death in connection with a claim for death benefits. *Lewis v. Albuquerque Pub. Schs.*, 2018-NMCA-049, cert. granted.

Amount of death benefits. — Where worker sought and obtained an award of workers' compensation disability benefits after she contracted allergic bronchopulmonary aspergillosis (ABPA) as a result of exposure to aspergillus mold while employed with the Albuquerque public schools, and where claimant, worker's widower, sought workers' compensation death benefits following worker's death, the workers' compensation judge (WCJ) erred in determining that the amount of death benefits should equal the amount of worker's permanent partial disability benefits. Section 52-1-46(C)(2) NMSA 1978 provides without qualification for a weekly death benefit to a widow or widower in the amount of sixty-six and two-thirds percent of the worker's average weekly wage. *Lewis v. Albuquerque Pub. Schs.*, 2018-NMCA-049, cert. granted.

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 (workers') compensation claim is jurisdictional and that failure to file the same within the statutory period requires a dismissal of the action. *Selgado v. N.M. State Hwy. Dep't*, 1960-NMSC-010, 66 N.M. 369, 348 P.2d 487.

Dependent compensation only where workman (worker) entitled. — Considering the Workmen's (Workers') 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 (worker) to compensation if death had not ensued. The basis of every claim, whether by the workman (worker) 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 Cnty.*, 1953-NMSC-038, 57 N.M. 217, 257 P.2d 909 (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.*, 1957-NMSC-029, 62 N.M. 283, 309 P.2d 225 (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.*, 1957-NMSC-029, 62 N.M. 283, 309 P.2d 225 (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.*, 1982-NMCA-052, 97 N.M. 717, 643 P.2d 281.

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.*, 1968-NMCA-064, 79 N.M. 485, 444 P.2d 996, cert. denied, 79 N.M. 448, 444 P.2d 775.

Determination of dependency turns upon whether the deceased workman (worker) 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.*, 1982-NMCA-052, 97 N.M. 717, 643 P.2d 281.

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*, 1963-NMSC-215, 73 N.M. 371, 388 P.2d 382.

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*, 1963-NMSC-215, 73 N.M. 371, 388 P.2d 382.

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 (Workers') Compensation Act, then plaintiffs must fail on appeal. *Lopez v. Schultz & Lindsay*

Constr. Co., 1968-NMCA-064, 79 N.M. 485, 444 P.2d 996, cert. denied, 79 N.M. 448, 444 P.2d 775.

Where employee died from causes other than injury, the dependents of a deceased workman (worker) may not recover that portion of a compensation award which was payable after the death of the workman (worker). *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 Section 52-1-56 NMSA 1978 provide for a continuing jurisdiction of the court over a compensation award. *Clauss v. Elec. City*, 1979-NMCA-066, 93 N.M. 75, 596 P.2d 518.

Subsection F provision for continued payment of compensation benefits to surviving eligible children of a deceased workman (worker) 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*, 1984-NMCA-038, 101 N.M. 315, 681 P.2d 741.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 65, 251, 252, 591, 707.

Competency of witness in wrongful death action as affected by dead man statute, 77 A.L.R.2d 680.

When time period commences as to claim under workers' compensation or occupational diseases act for death of worker due to contraction of disease, 100 A.L.R.5th 567.

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 and except for provision of lifetime benefits for permanent total disability awarded pursuant to Section 52-1-41 NMSA 1978:

A. compensation benefits for any combination of disabilities, whether temporary or permanent, 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 that may be awarded under Sections 52-1-10, 52-1-28.1 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 the 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; 1990 (2nd S.S.), ch. 2, § 19; 2015, ch. 70, § 3.

ANNOTATIONS

The 2015 amendment, effective June 19, 2015, specified that the limitation on compensation benefits for any combination of disabilities is seven hundred weeks whether the combination of disabilities is temporary or permanent, with certain exceptions; in Subsection A, after "disabilities", added "whether temporary or permanent"; in Subsection B, after "Sections 52-1-10" added "52-1-28.1"; and in Subsection D, after "payable on account of", deleted "such" and added "the".

The 1990 (2nd S.S.) amendment, effective January 1, 1991, added "and except for provision of lifetime benefits for total disability awarded pursuant to Section 52-1-41 NMSA 1978" in the opening paragraph and substituted "that" for "which" in Subsection B.

I. GENERAL CONSIDERATION.

Allocation of medical expenses. — Where worker suffered two injuries, each while working for different employers, the worker's compensation judge had authority to apportion the worker's non-surgical medical expenses evenly between the two employers and to apportion all surgical expenses to the second employer. *Leonard v. Payday Prof'l*, 2007-NMCA-128, 142 N.M. 605, 168 P.3d 177.

Legislative intent. — This statute expresses a legislative intent to excuse an insurer from the obligation to pay benefits from a deceased worker's estate when as a matter of law there exist no benefits payable to the worker. *Jackson v. K & M Constr.*, 2004-NMCA-082, 136 N.M. 94, 94 P.3d 837, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

The legislature intended unaccrued workers' compensation benefits to be unavailable for any purpose including accumulated debts. *Jackson v. K & M Constr.*, 2004-NMCA-

082, 136 N.M. 94, 94 P.3d 837, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

In enacting Subsection C of this section, the legislature presumably intended this section to preclude the deceased worker's estate from obtaining benefits that would only accrue if the worker had lived. *Jackson v. K & M Constr.*, 2004-NMCA-082, 136 N.M. 94, 94 P.3d 837, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

Subsection C of this section proscribes the payment of compensation benefits under the death of an injured worker and this proscription includes any lump-sum payments. *Jackson v. K & M Constr.*, 2004-NMCA-082, 136 N.M. 94, 94 P.3d 837, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

Compensation is indemnification for injury sustained. This has nothing to do with the salary. *Roybal v. County of Santa Fe*, 1968-NMSC-073, 79 N.M. 99, 440 P.2d 291.

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.*, 1974-NMCA-061, 86 N.M. 393, 524 P.2d 1009.

Preexisting condition. — The plain language of this section does not preclude a recovery based on the total impairment resulting from a work-related injury in combination with a preexisting condition. *Smith v. Arizona Pub. Serv. Co.*, 2003-NMCA-097, 134 N.M. 202, 75 P.3d 418, cert. denied, 2003-NMCERT-008, 134 N.M. 171, 74 P.3d 600.

Where a worker suffered a 59% loss of hearing, which was the result of a work-related injury combined with the worker's preexisting condition, the worker was entitled to compensation for his total impairment, notwithstanding the employer's argument that only 5% of the loss was due to the work-related injury. *Smith v. Ariz. Pub. Serv. Co.*, 2003-NMCA-097, 134 N.M. 202, 75 P.3d 418, cert. denied, 2003-NMCERT-008, 134 N.M. 171, 74 P.3d 600.

Contribution not authorized. — Contributions outside Workers' Compensation Act from subsequent employers to initial employers is not authorized by statute. *Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, 137 N.M. 497, 113 P.3d 320.

The absence of a prior determination of disability does not preclude the application of the statute. *Garcia v. Mora Painting & Decorating*, 1991-NMCA-065, 112 N.M. 596, 817 P.2d 1238.

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.*, 1974-NMCA-061, 86 N.M. 393, 524 P.2d 1009.

Subsequent Injury Act. — Under the Subsequent Injury Act (Sections 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 Cnty. Sheriff's Dep't*, 1988-NMCA-003, 106 N.M. 744, 749 P.2d 1123.

No conflict with Section 52-1-56 NMSA 1978 providing for alteration of benefits. — This section simply sets general limitations on compensation benefits and does not conflict with or alter Section 52-1-56 NMSA 1978, relating to increasing, reducing or terminating a compensation award. *Jaramillo v. Kaufman Plumbing & Heating Co.*, 1985-NMSC-089, 103 N.M. 400, 708 P.2d 312.

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*, 1967-NMCA-006, 78 N.M. 181, 429 P.2d 379, cert. denied, 78 N.M. 198, 429 P.2d 657.

Entitled to compensation though receiving unemployment compensation. — Claimant is entitled to claim workmen's (workers') 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.*, 1962-NMSC-076, 70 N.M. 187, 372 P.2d 381.

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 Cmty. Health Servs.*, 1986-NMCA-066, 104 N.M. 608, 725 P.2d 584, cert. denied, 104 N.M. 632, 725 P.2d 832.

Set-off for medical expenses. — "Compensation benefits" as used in this section include medical expenses. *Brewster v. Cooley & Assocs.*, 1993-NMCA-154, 116 N.M. 681, 866 P.2d 409.

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.*, 1980-NMCA-109, 94 N.M. 723, 616 P.2d 436.

Unaccrued benefits cease upon death. —Under a plain reading of Subsection C of this section, unless the exceptions stated in the statute apply, unaccrued compensation

benefits to which a worker would be entitled, when alive, cease upon the death of the worker. *Jackson v. K & M Constr.*, 2004-NMCA-082, 136 N.M. 94, 94 P.3d 837, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

Awarded but unaccrued benefits for disability terminate upon death. *Holliday v. Talk of Town, Inc.*, 1985-NMCA-024, 102 N.M. 540, 697 P.2d 959.

Petition for award for debts denied upon death. — Although Subsection C of this section does not expressly or automatically resolve whether a pending petition for a lump sum award for existing debts necessarily should be denied because the worker dies, the statute is construed to require such a result. *Jackson v. K & M Constr.*, 2004-NMCA-082, 136 N.M. 94, 94 P.3d 837, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

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'g Corp.*, 1966-NMSC-183, 76 N.M. 760, 418 P.2d 537.

"Temporary total disability" ordinarily refers to a limited time during which the worker is undergoing treatment. *Garcia v. Mora Painting & Decorating*, 1991-NMCA-065, 112 N.M. 596, 817 P.2d 1238.

Award of future medical benefits. — Future medical benefits cannot be denied based solely on a prediction regarding future medical needs; a trial court is without authority to limit or restrict in advance future medical benefits once a compensable injury is established. *McMains v. Aztec Well Serv.*, 1994-NMCA-126, 119 N.M. 22, 888 P.2d 468.

II. SUCCESSIVE INJURIES.

Liability of initial employer for disability caused by aggravation of injury. — An initial employer is not liable for the period of temporary total disability caused by aggravation of an initial non-disabling injury if subsequent work-related activities with another employer aggravates the initial injury and results in a disability. *Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, 137 N.M. 497, 113 P.3d 320.

A worker who has a non-disabling injury and subsequent work-related activities contribute to the worker's subsequent disability, the employer and insurer at the time of disability are responsible for payment of disability benefits. *Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, 137 N.M. 497, 113 P.3d 320.

Previous employer's liability for subsequent injury. — Where the healing period for the first accidental injury had long since expired when the worker suffered his second

injury, the previous employer could not be liable for total disability for a healing period following the second injury, since the medical evidence was not sufficient to support a finding of causal connection between the first accident and the period of total disability for which benefits were awarded. *Garcia v. Mora Painting & Decorating*, 1991-NMCA-065, 112 N.M. 596, 817 P.2d 1238.

The worker compensation judge erred in ordering the second employer to pay for all future medical care required as a result of the worker's relapse of lower back work injuries without any contribution from the first employer. *McMains v. Aztec Well Serv.*, 1994-NMCA-126, 119 N.M. 22, 888 P.2d 468.

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.*, 1982-NMCA-109, 98 N.M. 379, 648 P.2d 1192.

III. REDUCTION OF BENEFITS.

Section allocation of burden in successive injuries situation. — 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 Cnty. *Good Samaritan Vill. v. Wojcik*, 1988-NMCA-102, 108 N.M. 76, 766 P.2d 920.

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 Cnty. Good Samaritan Vill. v. Wojcik*, 1988-NMCA-102, 108 N.M. 76, 766 P.2d 920.

Employer has the burden of persuasion on the issue of whether an offset or deduction under Subsection D is appropriate, including the burden of presenting evidence of (1) the extent and nature of the worker's prior disability or disabilities; (2) the amounts of any previous awards and the amounts designated as compensation benefits; (3) the number of weeks of compensation benefits which were payable under prior awards or settlements; and (4) the extent to which payments for the last injury will duplicate payments previously made to the worker for the same bodily member of function. *Munoz v. Deming Truck Terminal*, 1990-NMCA-084, 110 N.M. 537, 797 P.2d 987.

To obtain credit, subsequent employer must make a sufficient showing that there is an overlap between any sums for which subsequent employer is liable and any sums for which previous employer is liable. On this issue, subsequent employer will have the

burden of proof. *Garcia v. Mora Painting & Decorating*, 1991-NMCA-065, 112 N.M. 596, 817 P.2d 1238.

Right to reduction due to overlapping benefits. — When a worker has been awarded benefits for a certain number of weeks of disability, and before that period expires he is injured again and once more becomes entitled to disability benefits, those who are liable for the second injury may be entitled to a reduction on the basis of an overlap. *Garcia v. Mora Painting & Decorating*, 1991-NMCA-065, 112 N.M. 596, 817 P.2d 1238.

The right to a reduction under Subsection D of this section has depended on whether a subsequent employer or the subsequent injury fund made a sufficient showing that specific amounts paid by a previous employer in weekly benefits or by settlement could be said to "overlap" with any amounts for which the subsequent employer would otherwise be liable. *Garcia v. Mora Painting & Decorating*, 1991-NMCA-065, 112 N.M. 596, 817 P.2d 1238.

No credit for payments paid under Arizona law. — Employer was not entitled to a credit pursuant to this section, for benefits paid under Arizona's workers' compensation law where New Mexico could not have asserted jurisdiction over the accident and the resulting benefits were governed by the laws of another jurisdiction. *Yates v. Phelps Dodge Corp.*, 1994-NMCA-087, 118 N.M. 167, 879 P.2d 799, cert. denied, 118 N.M. 256, 880 P.2d 867.

No overlap of benefits where injury to same member or function. — Subsection D does not state that a workman (worker) 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 Cnty. Economic Opportunity Bd.*, 1972-NMCA-094, 84 N.M. 196, 500 P.2d 1319, cert. denied, 84 N.M. 180, 500 P.2d 1303; *Smith v. Trailways Bus Sys.*, 1981-NMCA-041, 96 N.M. 79, 628 P.2d 324, cert. denied, 96 N.M. 116, 628 P.2d 686.

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*, 1986-NMCA-113, 105 N.M. 125, 729 P.2d 1379.

Arguments or recitations of counsel, whether presented orally or by memoranda or in briefs, do not constitute valid evidence to support the granting of an offset of benefits under Subsection D. *Munoz v. Deming Truck Terminal*, 1990-NMCA-084, 110 N.M. 537, 797 P.2d 987.

Under Subsection D of this section, prior employers and their insurers are not responsible for any portion of disability resulting from aggravation of a prior injury if the initial injury did not result in disability. *Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, 137 N.M. 497, 113 P.3d 320.

Subsection D applies to medical benefits as well as disability compensation. *Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, 137 N.M. 497, 113 P.3d 320.

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 (Workers') 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*, 1968-NMSC-073, 79 N.M. 99, 440 P.2d 291.

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 Cnty. Good Samaritan Vill. v. Wojcik*, 1988-NMCA-102, 108 N.M. 76, 766 P.2d 920.

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 Cnty. Good Samaritan Vill. v. Wojcik*, 1988-NMCA-102, 108 N.M. 76, 766 P.2d 920.

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 Cnty. Economic Opportunity Bd.*, 1972-NMCA-094, 84 N.M. 196, 500 P.2d 1319, cert. denied, 84 N.M. 180, 500 P.2d 1303.

IV. PAYMENT OF WAGES.

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.*, 1947-NMSC-021, 51 N.M. 121, 179 P.2d 762 (decided under former law).

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*, 1968-NMSC-073, 79 N.M. 99, 440 P.2d 291.

Regular pay to injured workman (worker) 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 (workers') compensation. *Roybal v. County of Santa Fe*, 1968-NMSC-073, 79 N.M. 99, 440 P.2d 291.

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 (workers') 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*, 1968-NMSC-073, 79 N.M. 99, 440 P.2d 291.

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.*, 1981-NMCA-041, 96 N.M. 79, 628 P.2d 324, cert. denied, 96 N.M. 116, 628 P.2d 686.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers's Compensation §§ 381 to 387, 434.

99 C.J.S. Workmen's Compensation § 296.

52-1-47.1. Compensation benefits limit.

A. Unless otherwise contracted for by the worker and employer, workers' compensation benefits shall be limited so that no worker receives more in total payments, including wages and benefits from his employer, by not working than by continuing to work. Compensation benefits under the Workers' Compensation Act shall accordingly be reduced, if necessary, to account for any wages and employer-financed disability benefits a worker receives after the time of injury. For the purposes of this

section, total payments shall be determined on an after-tax basis. This section does not apply to social security payments, employee-financed disability benefits, benefits or payments a worker received from a prior employer, payments for medical or related expenses or general retirement payments, except it does apply to disability retirement benefits.

B. This section shall only apply to injuries that occur after the effective date of this section; it shall not reduce benefits received or due or affect the benefits due for injuries that occur before the effective date of this section.

History: Laws 1990 (2nd S.S.), ch. 2, § 30.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 Laws 1990 (2nd S.S.), ch. 2, § 30 effective January 1, 1991.

Benefits may not exceed average weekly wage. — Section 52-1-47.1 NMSA 1978 prevents a worker from receiving permanent partial disability and loss of use benefits that exceed the worker's average weekly wage. *Livingston v. Envtl. Earthscapes*, 2013-NMCA-099, cert. denied, 2013-NMCERT-008.

Employer's right to offset. — An employer that employs a worker at the time of an injury receives an off-set only for wages and benefits that that employer provides and does not receive an off-set for wages paid to the worker by an employer who employs the worker after the injury. *Moya v. City of Albuquerque*, 2007-NMCA-057, 141 N.M. 617, 159 P.3d 266, *rev'd*, 2008-NMSC-004, 143 N.M. 258, 175 P.3d 926.

Shared contributions to a disability plan. — Section 52-1-47.1 NMSA 1978 provides an offset only for the portion of disability benefits paid by the employer's contribution. The percentage of disability benefits that correspond to the worker's premium contribution cannot be used by the employer to reduce the worker's benefits. *Esckelson v. Miners' Colfax Med. Ctr.*, 2014-NMCA-052.

Where the worker paid twenty percent of the disability premium and the employer paid eighty percent, the employer was entitled to an offset only for the proportion of the benefit that corresponded to the employer' premium contribution, without any credit for the worker's premium contribution. *Esckelson v. Miners' Colfax Med. Ctr.*, 2014-NMCA-052.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

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.

ANNOTATIONS

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.*, 1981-NMCA-045, 96 N.M. 84, 628 P.2d 329, cert. denied, 96 N.M. 116, 628 P.2d 686, and 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.*, 1982-NMCA-021, 97 N.M. 545, 641 P.2d 1092, cert. denied, 98 N.M. 50, 644 P.2d 1039.

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.*, 1984-NMCA-091, 101 N.M. 713, 688 P.2d 31.

The trial court's award of compensation payments should reflect the amount of benefits properly payable on the date of the workman's (worker's) accidental injury resulting in disability, not the amount payable at the time of trial. *Amos v. Gilbert W. Corp.*, 1985-NMCA-106, 103 N.M. 631, 711 P.2d 908.

Disability begins when a compensable injury manifests itself and wage-earning capacity is affected. *Lovato v. Duke City Lumber Co.*, 1982-NMCA-021, 97 N.M. 545, 641 P.2d 1092, cert. denied, 98 N.M. 50, 644 P.2d 1039.

The date of disability is the date the workman (worker) knows or should know he has suffered a compensable injury. *Turner v. Shop-Rite Foods, Inc.*, 1982-NMCA-165, 99 N.M. 56, 653 P.2d 887.

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.*, 1980-NMCA-109, 94 N.M. 723, 616 P.2d 436.

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.*, 1989-NMCA-039, 108 N.M. 655, 777 P.2d 383, cert. denied, 108 N.M. 681, 777 P.2d 1325.

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 Workers' Compensation § 388.

52-1-49. Medical and related benefits; selection of health care provider; artificial members.

A. After an injury to a worker and subject to the requirements of the Workers' Compensation Act, and continuing as long as medical or related treatment is reasonably necessary, the employer shall, subject to the provisions of this section, provide the worker in a timely manner reasonable and necessary health care services from a health care provider.

B. The employer shall initially either select the health care provider for the injured worker or permit the injured worker to make the selection. Subject to the provisions of this section, that selection shall be in effect during the first sixty days from the date the worker receives treatment from the initially selected health care provider.

C. After the expiration of the initial sixty-day period set forth in Subsection B of this section, the party who did not make the initial selection may select a health care provider of his choice. Unless the worker and employer otherwise agree, the party seeking such a change shall file a notice of the name and address of his choice of health care provider with the other party at least ten days before treatment from that health care provider begins. The director shall adopt rules and regulations governing forms, which employers shall post in conspicuous places, to enable this notice to be promptly and efficiently provided. This notice may be filed on or after the fiftieth day of the sixty-day period set forth in Subsection B of this section.

D. If a party objects to the choice of health care provider made pursuant to Subsection C of this section, then he shall file an objection to that choice pursuant to Subsection E of this section with a workers' compensation judge within three days from receiving the notice. He shall also provide notice of that objection to the other party. If the employer does not file his objection within the three-day period, then he shall be liable for the cost of treatment provided by the worker's health care provider until the employer does file his objection and the workers' compensation judge has rendered his decision as set forth in Subsection F of this section. If the worker does not file his objection within the three-day period, then the employer shall only be liable for the cost

of treatment from the health care provider selected by the employer, subject to the provisions of Subsections E, F and G of this section. Nothing in this section shall remove the employer's obligation to provide reasonable and necessary health care services to the worker so long as the worker complies with the provisions of this section.

E. If the worker or employer disagrees with the choice of the health care provider of the other party at any time, including the initial sixty-day period, and they cannot otherwise agree, then he shall submit a request for a change of health care provider to a workers' compensation judge. The director shall adopt rules and regulations governing forms, which employers shall post in conspicuous places, to submit to a workers' compensation judge a request for change of a health care provider.

F. The request shall state the reasons for the request and may state the applicant's choice for a different health care provider. The applicant shall bear the burden of proving to the workers' compensation judge that the care being received is not reasonable. The workers' compensation judge shall render his decision within seven days from the date the request was submitted. If the workers' compensation judge grants the request, he shall designate either the applicant's choice of health care provider or a different health care provider.

G. If the worker continues to receive treatment or services from a health care provider rejected by the employer and not in compliance with the workers' compensation judge's ruling, then the employer is not required to pay for any of the additional treatment or services provided to that worker by that health care provider.

H. In all cases where the injury is such as to permit the use of artificial members, including teeth and eyes, the employer shall pay for 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; 1990 (2nd S.S.), ch. 2, § 20.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, inserted "selection of health care provider" in the section catchline, rewrote Subsections A and B, added Subsections C to G, and redesignated former Subsection C as Subsection H, substituting "pay for" for "furnish" therein.

I. GENERAL CONSIDERATION.

Purpose. — This section mandates that an employer will provide an injured worker reasonable and necessary health care services and establishes the procedures by which the worker's health care provider is selected and changed. *City of Albuquerque v. Sanchez*, 1992-NMCA-038, 113 N.M. 721, 832 P.2d 412.

Provisions of the act are remedial in nature and must be construed liberally. *Montoya v. Anaconda Mining Co.*, 1981-NMCA-113, 97 N.M. 1, 635 P.2d 1323.

Strained construction proscribed. — The Workmen's (Workers') 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*, 1982-NMCA-177, 99 N.M. 275, 657 P.2d 131 (decided under former law).

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*, 1963-NMSC-156, 72 N.M. 471, 384 P.2d 1022.

Benefits payable as result of an injury. — In order for medical benefits to be payable as a result of an "injury" sustained by the worker within the contemplation of this section, the injury must be of such nature that any "impairment" which may result therefrom would be compensable under 52-1-24 NMSA 1978. *Douglass v. State*, 1991-NMCA-041, 112 N.M. 183, 812 P.2d 1331, cert. denied, 112 N.M. 77, 811 P.2d 575.

No retroactive effect to amendment increasing medical benefits. — To give the amendment increasing the maximum allowable medical benefits under workmen's (workers') 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*, 1963-NMSC-156, 72 N.M. 471, 384 P.2d 1022.

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. Dist. Ct.*, 1958-NMSC-118, 65 N.M. 1, 330 P.2d 964 (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, Inc.*, 1966-NMSC-259, 77 N.M. 213, 421 P.2d 127.

Award of medical expenses is properly made despite absence of finding of disability. *DiMatteo v. County of Dona Ana*, 1985-NMCA-099, 104 N.M. 599, 725 P.2d 575.

"Furnish" requires more than a passive willingness to respond to a demand. *Garcia v. Genuine Parts Co.*, 1977-NMCA-007, 90 N.M. 124, 560 P.2d 545, cert. denied, 90 N.M.

254, 561 P.2d 1347; *Trujillo v. Beaty Elec. Co.*, 1978-NMCA-021, 91 N.M. 533, 577 P.2d 431.

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, Inc.*, 1966-NMSC-259, 77 N.M. 213, 421 P.2d 127.

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. N.J. Zinc Co.*, 1974-NMCA-048, 86 N.M. 538, 525 P.2d 898, cert. denied, 86 N.M. 528, 525 P.2d 888.

Adequate provision where workman (worker) both employer and employee. — Where the workman (worker) 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. *Security Ins. Co. v. Chapman*, 1975-NMSC-052, 88 N.M. 292, 540 P.2d 222.

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 (workers') 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*, 1975-NMSC-052, 88 N.M. 292, 540 P.2d 222.

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*, 1975-NMSC-052, 88 N.M. 292, 540 P.2d 222.

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. Ctr.*, 1986-NMCA-064, 104 N.M. 490, 723 P.2d 259.

Testimony of physician who is not qualified as a treating health care provider and who is not authorized to provide an independent medical examination pursuant to Section 52-1-51 NMSA 1978 is in admissible. *Grine v. Peabody Natural Res.*, 2006-NMSC-031, 140 N.M. 30, 139 P.3d 90.

Increased mortgage debt. — This section does not require worker's increased mortgage debt to be paid as medical care. *Jackson v. K & M Constr.*, 2004-NMCA-082, 136 N.M. 94, 94 P.3d 837, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

Medical marijuana. — The Workers' Compensation Act authorizes reimbursement for medical marijuana. *Vialpando v. Ben's Auto. Servs.*, 2014-NMCA-084, cert. denied, 2014-NMCERT-007.

Where worker sustained a low back injury that resulted in numerous surgical procedures and in severe chronic pain that was debilitating; worker's health care providers certified that medical marijuana was reasonable and necessary for worker's treatment; and worker qualified to participate in the medical cannabis program authorized by the Lynn and Erin Compassionate Use Act, 26-2B-1 NMSA 1978 et seq., the Workers' Compensation Act required the employer and the insurer to reimburse worker for medical marijuana used pursuant to the Lynn and Erin Compassionate Use Act. *Vialpando v. Ben's Auto. Servs.*, 2014-NMCA-084, cert. denied, 2014-NMCERT-007.

Reasonable and necessary health care. — The Workers' Compensation Act requires an employer, after an injury to a worker, to provide the worker reasonable and necessary health care services from a health care provider; conversely, an employer need not provide a worker with health care that is not reasonable and necessary. *Maez v. Riley Industrial*, 2015-NMCA-049.

When medical marijuana is reasonable and necessary. — Where worker's doctor certified, pursuant to the Lynn and Erin Compassionate Use Act, 26-2B-1 NMSA 1978

et seq., that worker has a debilitating medical condition and that the potential health benefits of the medical use of cannabis would likely outweigh the health risks for worker, and that other medical therapies have failed to relieve worker of his symptoms, the fact that the health care provider adopted a treatment plan based on medical marijuana supports a conclusion that he believed medical marijuana was a reasonable treatment for worker, and the fact that worker's doctor treated worker with traditional pain management, and that such treatment failed, clearly established that medical marijuana was necessary for worker's treatment because it would not be possible to carry out the treatment plan without medical marijuana, and lastly the certification required under the Lynn and Erin Compassionate Use Act by a person licensed in New Mexico to prescribe and administer controlled substances is the functional equivalent of a prescription; evidence in the record as a whole does not support the worker's compensation judge's conclusion that medical marijuana was not reasonable and necessary medical care. *Maez v. Riley Industrial*, 2015-NMCA-049.

II. SELECTION OF PROVIDER.

Proof that second selection provider's care is unreasonable is required for change provider. — Where employer made the initial selection of a health care provider; worker made the second selection; employer did not object to the second selection; when the second provider died, employer did not object to worker's choice of a replacement provider; a year later, worker selected another or fourth provider and employer objected; worker filed a formal request with the workers' compensation judge to allow a change of provider; and at the hearing on the request, worker did not present any testimony or documentary evidence to show that the replacement provider's care was unreasonable or request an evidentiary hearing, the workers' compensation judge erred by allowing worker to change providers. *Chavez v. City of Albuquerque*, 2010-NMCA-022, 147 N.M. 741, 228 P.3d 525.

The uninsured employer's fund does not have the authority to act as either an employer or a worker with respect to the selection of a health care provider and does not have authority to select or change a health care provider. *Johnson v. Hoyt & Son Tree Service*, 2007-NMCA-072, 141 N.M. 849, 161 P.3d 894.

Worker may select physician. — The statute now allows a choice under the procedure outlined, but the worker must nevertheless establish that the services were "reasonable and necessary" in order to hold the employer to be financially responsible for the payment of such services. *Vargas v. City of Albuquerque*, 1993-NMCA-136, 116 N.M. 664, 866 P.2d 392.

Obligation to pay costs of doctor of employee's choice. — Where the workman (worker) 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 (worker's) doctor. *Tafoya v. S & S Plumbing Co.*, 1981-NMCA-150, 97 N.M. 249, 638 P.2d 1094, cert. denied, 98 N.M. 50, 644 P.2d 1039 (1982) (decided under former law).

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*, 1981-NMCA-117, 97 N.M. 46, 636 P.2d 317 (decided under former law).

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.*, 1981-NMCA-113, 97 N.M. 1, 635 P.2d 1323 (decided under former law).

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.*, 1981-NMCA-113, 97 N.M. 1, 635 P.2d 1323; *Eldridge v. Aztec Well Servicing Co.*, 1987-NMCA-042, 105 N.M. 660, 735 P.2d 1166, cert. denied, 105 N.M. 644, 735 P.2d 1150.

Changing worker's health care provider. — This section establishes two methods for changing worker's health care provider. Under both, the initial selection is made by either the employer or the worker. The selection is valid for 60 days after the date of the worker's injury. After the 60-day period expires, the party that did not make the initial selection can notify the other party of his choice of a health care provider. *City of Albuquerque v. Sanchez*, 1992-NMCA-038, 113 N.M. 721, 832 P.2d 412.

If an employer makes the initial selection, at the end of the 60-day period the worker can select a health care provider of his choice. Thus, a worker has unfettered discretion to choose his or her own physician at that time without considering the reasonableness of the existing care. *City of Albuquerque v. Sanchez*, 1992-NMCA-038, 113 N.M. 721, 832 P.2d 412.

Both the worker and the employer have input into the selection of worker's health care provider, and either can object to the selection made by the other and obtain review of the selection. *City of Albuquerque v. Sanchez*, 1992-NMCA-038, 113 N.M. 721, 832 P.2d 412.

Subsection C does not provide either party with an unlimited right to change employee's health care provider; after one change has been made, subsequent changes can only be made upon a showing by the party seeking to make the change that the care being

offered by the health care provider is unreasonable. *Chavez v. Intel Corp.*, 1998-NMCA-175, 126 N.M. 335, 968 P.2d 1198.

Worker changing health care provider. — Where employer was aware that worker was dissatisfied with the treatment of worker's first doctor and employer took worker to another doctor who referred worker to worker's second doctor, the second doctor was an authorized health care provider, even though worker did not give employer written notice of worker's change of doctors. *Wagner v. AGW Consultants*, 2005-NMSC-016, 137 N.M. 734, 114 P.3d 1050.

Section allows each party to select health care provider. — This section must be read to allow the employer and the worker each to make a selection of a health care provider at some point in a case. *Grine v. Peabody Nat. Res.*, 2005-NMCA-075, 137 N.M. 649, 114 P.3d 329, *rev'd on other grounds*, 2006-NMSC-031, 140 N.M. 30, 139 P.3d 190.

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*, 1966-NMSC-102, 76 N.M. 340, 414 P.2d 852.

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 Schs.*, 1989-NMCA-081, 109 N.M. 100, 781 P.2d 1178 (decided under form law).

Authority to select health care provider. — An employer has the right to select a treating health care provider for a worker even when the employer denies the worker's claim for benefits. *Grine v. Peabody Natural Res.*, 2006-NMSC-031, 140 N.M. 30, 139 P.3d 190.

Selection of health care provider. — If an employer has received proper notice of a worker's accident and fails to communicate its health care provider selection to the worker within a reasonable period of time, then the health care provider selected by the worker is the employer's initial health care provider. *Grine v. Peabody Natural Res.*, 2006-NMSC-031, 140 N.M. 30, 139 P.3d 90.

Presumption that employer selected the initial health care provider. — Where worker was taken to a rehabilitation hospital after receiving emergency treatment; employer had notice of worker's accident and authorized emergency treatment; neither worker nor employer selected the rehabilitation hospital as a health care provider; employer did not communicate its choice of health care provider until, after eight weeks of treatment at the rehabilitation hospital, worker decided to change health care provider; and a Workers' Compensation Administration regulation provided that if the employer fails to communicate its decision as to which party will choose the initial health care provider, the employer is presumed to have selected the initial health care

provider; the rehabilitation hospital was the initial health care provider and employer's evidence that employer had not selected the rehabilitation hospital as a health care provider did not rebut the presumption of the regulation that employer had selected the rehabilitation hospital. *Howell v. Marto Electric*, 2006-NMCA-154, 140 N.M. 737, 148 P.3d 823.

Initial selection of health care provider must be made within a reasonable amount of time. — Where, following worker's work-related accident, employer's third-party administrator sent a letter to worker stating that employer had decided to allow worker to choose the initial health care provider (HCP), the notice was valid because an employer may communicate the decision to select the initial HCP or to permit the worker the selection by any method reasonably calculated to notify workers, and a letter from a third-party administrator communicating the employer's decision falls within this criterion, but employer's delay of almost one month before providing notice was not a reasonable amount of time in which to give notice. Employer, therefore, failed to comply with the notice requirements and is deemed to have made the initial selection of HCP. *Silva v. Denco Sales Co*., 2020-NMCA-012.

Order denying objection to change not appealable. — A judge's order denying a request, or an objection, to change health care provider is not final and appealable when a claim for benefits is pending before the workers compensation administration. *Kellewood v. BHP Minerals Int'l*, 1993-NMCA-148, 116 N.M. 678, 866 P.2d 406.

A judge's order denying a request, or an objection, to change health care provider is not final and appealable when a claim for benefits is pending before the workers compensation administration. *Murphy v. Strata Prod. Co.*, 2006-NMCA-008, 138 N.M. 809, 126 P.3d 1173.

III. MEDICAL BENEFITS.

Duty to provide attendant care. — The duty to provide nursing services also includes necessary attendant care. *St. Clair v. County of Grant*, 1990-NMCA-087, 110 N.M. 543, 797 P.2d 993.

Evaluating need and cost of home health care. — In evaluating the need and cost of providing home health care, the fact finder must make an initial determination concerning the level and extent of care required by the worker. Home medical care may include a wide spectrum of services, including those of a registered nurse, licensed practical nurse, nurse's aide or assistant, and subprofessional nursing care, such as home health care aide or attendant. *St. Clair v. County of Grant*, 1990-NMCA-087, 110 N.M. 543, 797 P.2d 993.

Four criteria for determining whether an injured worker is entitled to workers' compensation benefits for home health care are: (1) the employer knows of the employee's need for medical attention at home as a result of the industrial accident; (2) the medical attention is performed under the direction and control of a physician, that is,

a physician must state home nursing care is necessary as the result of the accident and must describe with a reasonable degree of particularity the nature and extent of duties to be performed by the spouse; (3) the care rendered by the spouse must be of the type usually rendered only by trained attendants and beyond the scope of normal household duties; and (4) there is a means to determine with proper certainty the reasonable value of the services performed by the spouse. *St. Clair v. County of Grant*, 1990-NMCA-087, 110 N.M. 543, 797 P.2d 993.

Services must be reasonable and necessary. — The purpose of the 1991 amendment was to allow the worker some input into the choice of a health care provider, not to expand the employer's obligation to pay. Regardless of who selects the health care provider, the employer's obligation is limited by Subsection A to paying for "reasonable and necessary" health care services. *Vargas v. City of Albuquerque*, 1993-NMCA-136, 116 N.M. 664, 866 P.2d 392.

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.*, 1987-NMCA-042, 105 N.M. 660, 735 P.2d 1166, cert. denied, 105 N.M. 644, 735 P.2d 1150.

Treatment to be reasonably necessary. — Medical treatment for which payment is sought in a compensation case must be shown to be reasonably necessary. *DiMatteo v. County of Dona Ana*, 1985-NMCA-099, 104 N.M. 599, 725 P.2d 575.

Bill for medical services rendered is prima facie proof of reasonableness. *DiMatteo v. County of Dona Ana*, 1985-NMCA-099, 104 N.M. 599, 725 P.2d 575.

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.*, 1989-NMCA-023, 108 N.M. 587, 775 P.2d 1304, cert. denied, 108 N.M. 433, 773 P.2d 1240.

The determination of whether medical marijuana use was reasonable and necessary medical care. — The Workers' Compensation Act (WCA), 52-1-1 NMSA 1978 et seq., and the Lynn and Erin Compassionate Use Act, 26-2B-1 NMSA 1978 et seq., are two separate statutory schemes. The determinations of whether a worker is certified to participate in the New Mexico department of health medical cannabis program and whether medical marijuana use is reasonable and necessary medical care under the WCA are not dependent on each other; the two determinations are made separately, at different times, and by different administrative authorities. *Lewis v. American Gen. Media*, 2015-NMCA-090.

Where employer claimed that the evidence offered by worker's authorized health care provider was insufficient to support a finding of reasonable and necessary care, and that the workers' compensation judge (WCJ) improperly considered the certification of a

second doctor, who had provided a certification for worker's use of medical marijuana under the Lynn and Erin Compassionate Use Act, 26-2B-1 NMSA 1978 et seq., but was not qualified to present testimony under the Workers' Compensation Act (WCA) because he was neither workers' authorized health care provider nor a health care provider authorized to perform an independent medical examination, the district court did not err in finding that the use of medical marijuana by worker constituted reasonable and necessary medical care that required reimbursement, because, although the administrative regulations promulgated by the department of health pursuant to the Compassionate Use Act may require more than one certification for the condition of severe chronic pain, nothing in the WCA requires evidence from more than one health care provider in order to establish the reasonableness and necessity of medical treatment. *Lewis v. American Gen. Media*, 2015-NMCA-090.

Sufficient evidence of reasonable and necessary health care services. — Where worker's authorized health care providers certified that worker suffered from severe chronic pain and that other treatment, including narcotic medications, had not worked, and that the benefits of medical marijuana would outweigh the risk of hyper doses of narcotic medications, there was sufficient evidence to support the workers' compensation judge's determinations that the use of medical marijuana by worker constituted reasonable and necessary medical care that required reimbursement. *Lewis v. American Gen. Media*, 2015-NMCA-090.

Section grants future medical services as matter of right, if related to the compensable injury. *Chavira v. Gaylord Broad. Co.*, 1980-NMCA-154, 95 N.M. 267, 620 P.2d 1292, cert. denied, 95 N.M. 299, 621 P.2d 516 , *overruled on other grounds by Chapman v. Jesco, Inc.*, 1982-NMCA-144, 98 N.M. 707, 652 P.2d 257.

To the extent that *Hermandez v. Mead Foods, Inc.*, 1986-NMCA-020, 104 N.M. 67, 716 P.2d 645 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. *Sierra Blanca Sales Co. v. Newco Indus., Inc.*, 1975-NMCA-118, 88 N.M. 472, 542 P.2d 52.

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. Ctr.*, 1986-NMCA-064, 104 N.M. 490, 723 P.2d 259.

Because the trial court cannot practically determine the worker's future medical needs at the time of entry of a judgment finding disability, this section authorizes entry of a judgment directing the payment of a worker's reasonable and necessary future medical

expenses and invests the court with continuing jurisdiction to enforce such orders. *St. Clair v. County of Grant*, 1990-NMCA-087, 110 N.M. 543, 797 P.2d 993.

No authority for present award of future medical expenses. — The Workmen's (Workers') 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.*, 1956-NMSC-052, 61 N.M. 166, 297 P.2d 313 (decided under former law).

Nothing in this section, or in any other section of the Workmen's (Workers') 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*, 1967-NMCA-006, 78 N.M. 181, 429 P.2d 379, cert. denied, 78 N.M. 198, 429 P.2d 657; *Gearhart v. Eidson Metal Prods.*, 1979-NMCA-019, 92 N.M. 763, 595 P.2d 401.

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*, 1966-NMSC-102, 76 N.M. 340, 414 P.2d 852.

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.*, 1963-NMSC-205, 73 N.M. 219, 387 P.2d 327.

Burden is on claimant to show reasonableness of spousal home medical and attendant care. — In order to recover an award for spousal home medical and attendant care, plaintiff has the burden of persuasion that the medical expenses were reasonably necessary and that the spouse has the requisite skill or training to provide such services. *St. Clair v. County of Grant*, 1990-NMCA-087, 110 N.M. 543, 797 P.2d 993.

Expert medical testimony required to establish need. — Determination of whether plaintiff is in need of home medical care or attendant care, as in the case of other medical expenses, must be established by expert medical testimony. *St. Clair v. County of Grant*, 1990-NMCA-087, 110 N.M. 543, 797 P.2d 993.

In fixing the amount of compensation payable for home nursing services rendered by a spouse, it is improper to award an hourly amount for nursing services equivalent to that normally received by a registered nurse or LPN, unless there is expert medical testimony concerning the necessity for providing that specific type of care, and that the training and experience of the person performing such services is equivalent to that which would be provided by a registered nurse, LPN, or nurse's aide. *St. Clair v. County of Grant*, 1990-NMCA-087, 110 N.M. 543, 797 P.2d 993.

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, Inc.*, 1966-NMSC-259, 77 N.M. 213, 421 P.2d 127.

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.*, 1976-NMCA-122, 89 N.M. 790, 558 P.2d 59.

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*, 1967-NMCA-006, 78 N.M. 181, 429 P.2d 379, cert. denied, 78 N.M. 198, 429 P.2d 657.

Reasonable travel expenses necessarily incurred in receiving medical treatment come within the language of Subsection A. *Gonzales v. Bates Lumber Co.*, 1981-NMCA-052, 96 N.M. 422, 631 P.2d 328.

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.*, 1985-NMCA-086, 103 N.M. 544, 710 P.2d 738, cert. quashed, 104 N.M. 632, 725 P.2d 832 (1986).

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.*, 1956-NMSC-052, 61 N.M. 166, 297 P.2d 313 (decided under former law).

Once employer provides for medical services and offers those services to workman (worker), 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. N.J. Zinc Co.*, 1974-NMCA-048, 86 N.M. 538, 525 P.2d 898, cert. denied, 86 N.M. 528, 525 P.2d 888.

Limitation of adequate services. — Once the employer provides for medical services, which are reasonably necessary, and offers those services to the workman (worker), the employer is not liable for services other than those offered. *Salcido v. Transamerica Ins. Group, Inc.*, 1983-NMCA-097, 102 N.M. 344, 695 P.2d 494, *rev'd on other grounds*, 1985-NMSC-002, 102 N.M. 217, 693 P.2d 583.

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.*, 1982-NMCA-069, 98 N.M. 52, 644 P.2d 1041, cert. denied, 98 N.M. 336, 648 P.2d 794.

Plaintiff is entitled to reasonable future medical expenses, beyond the date of the last termination of compensation payments. *Ideal Basic Indus., Inc. v. Evans*, 1978-NMSC-020, 91 N.M. 460, 575 P.2d 1345.

Obligation for payment for medical treatment is to workman (worker), not to physician. — Although the Workmen's (Workers') Compensation Act imposes the obligation for payment of reasonable medical treatment to an injured workman (worker) on the employer-insurer, that obligation is to the workman (worker), not to the treating physician. *Speer v. Cimosz*, 1982-NMCA-029, 97 N.M. 602, 642 P.2d 205, cert. denied *sub nom. N.H. Ins. Group v. Speer*, 98 N.M. 50, 644 P.2d 1039.

Trial court cannot restrict or terminate substantive right to payment for continuing medical and surgical attention for an injury. *Gearhart v. Eidson Metal Prods.*, 1979-NMCA-019, 92 N.M. 763, 595 P.2d 401.

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.*, 1986-NMCA-018, 104 N.M. 102, 717 P.2d 78, cert. denied, 103 N.M. 798, 715 P.2d 71.

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. Ctr.*, 1986-NMCA-064, 104 N.M. 490, 723 P.2d 259.

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.*, 1970-NMCA-018, 81 N.M. 236, 465 P.2d 515.

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 Schs.*, 1989-NMCA-081, 109 N.M. 100, 781 P.2d 1178, cert denied, 109 N.M. 131, 782 P.2d 384.

Motion seeking modification of prior award. — A motion seeking to retroactively modify a prior award of medical benefits must also satisfy the requirements of Rule 1-060 NMRA. *St. Clair v. County of Grant*, 1990-NMCA-087, 110 N.M. 543, 797 P.2d 993.

IV. ARTIFICIAL MEMBERS.

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. *Cromer v. J.W. Jones Constr. Co.*, 1968-NMCA-027, 79 N.M. 179, 441 P.2d 219, *overruled on other grounds by Schiller v. Southwest Air Rangers, Inc.*, 1975-NMSC-018, 87 N.M. 476, 535 P.2d 1327.

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 (workers') compensation statute is to be liberally construed in favor of the employee. *Cromer v. J.W. Jones Constr. Co.*, 1968-NMCA-027, 79 N.M. 179, 441 P.2d 219, *overruled on other grounds by Schiller v. Southwest Air Rangers, Inc.*, 1975-NMSC-018, 87 N.M. 476, 535 P.2d 1327.

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. *Cromer v. J.W. Jones Constr. Co.*, 1968-NMCA-027, 79 N.M. 179, 441 P.2d 219, *overruled on other grounds by Schiller v. Southwest Air Rangers, Inc.*, 1975-NMSC-018, 87 N.M. 476, 535 P.2d 1327.

The term "artificial member" does not include the entire cost of a wheelchair-accessible van. *Fogleman v. Duke City Automotive Servs.*, 2000-NMCA-039, 128 N.M. 840, 999 P.2d 1072, cert. denied, 129 N.M. 207, 4 P.3d 35.

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. *Cromer v. J.W. Jones Constr. Co.*, 1968-NMCA-027, 79 N.M. 179, 441 P.2d 219, *overruled on other grounds by Schiller v. Southwest Air Rangers, Inc.*, 1975-NMSC-018, 87 N.M. 476, 535 P.2d 1327.

Chiropractic treatment required. — An employer who is subject to the Workmen's (Workers') 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. 78-06.

Limitation of adequate services. — Once services are provided in an adequate form by the employer, he is under no further obligation. 1978 Op. Att'y Gen. No. 78-06.

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. 78-06 (rendered under former law).

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).

For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 404, 435 to 445.

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.

Workers' compensation as covering cost of penile or similar implants related to sexual or reproductive activity, 89 A.L.R.4th 1057.

Employee's reimbursement for travel expenses incurred in obtaining treatment of work-related injury, 36 A.L.R.5th 225.

99 C.J.S. Workmen's Compensation §§ 266 to 277.

52-1-50. Repealed.

ANNOTATIONS

Repeals. — Laws 1990 (2nd S.S.), ch. 2, § 151, repeals 52-1-50 NMSA 1978, as amended by Laws 1989, ch. 263, § 29, relating to vocational rehabilitation services,

effective January 1, 1991. For provisions of former section, see 1990 Cumulative Supplement. For present comparable provisions, see 52-1-50.1 NMSA 1978.

52-1-50.1. Rehiring of injured workers.

A. If an employer is hiring, the employer shall offer to rehire the employer's worker who has stopped working due to an injury for which the worker has received, or is due to receive, benefits under the Workers' Compensation Act and who applies for his pre-injury job or modified job similar to the pre-injury job, subject to the following conditions:

(1) the worker's treating health care provider certifies that the worker is fit to carry out the pre-injury job or modified work similar to the pre-injury job without significant risk of reinjury; and

(2) the employer has the pre-injury job or modified work available.

B. If an employer is hiring, that employer shall offer to rehire a worker who applies for any job that pays less than the pre-injury job and who has stopped working due to an injury for which he has received, or is due, benefits under the Workers' Compensation Act, provided that the worker is qualified for the job and provided that the worker's treating health care provider certifies that the worker is fit to carry out the job offered. Compensation benefits of a worker rehired prior to maximum medical improvement and pursuant to this subsection shall be reduced as provided in Section 52-1-25.1 NMSA 1978.

C. As used in this section, "rehire" includes putting the injured worker back to active work, regardless of whether he was carried on the employer's payroll during the period of his inability to work.

D. The exclusive remedy for a violation of the section shall be a fine as specified in Section 52-1-61 NMSA 1978.

History: 1978 Comp., § 52-1-50.1, enacted by Laws 1990 (2nd S.S.), ch. 2, § 21.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 Laws 1990 (2nd S.S.), ch. 2, § 21 effective January 1, 1991.

Enforcement of section. — The workers' compensation judge is vested with the authority to order the employer to find work for the injured worker, but any penalty must be levied by the director. *Lucero v. City of Albuquerque*, 2002-NMCA-034, 132 N.M. 1, 43 P.3d 352, cert. denied, 131 N.M. 737, 42 P.3d 842.

Failure to comply with this section may be remedied as an unfair claims processing practice under 52-1-50.1 NMSA 1978. *Lucero v. City of Albuquerque*, 2002-NMCA-034, 132 N.M. 1, 43 P.3d 352, cert. denied, 131 N.M. 737, 42 P.3d 842.

Vocational rehabilitation benefits. — Because worker failed to make a showing that she could not have received vocational rehabilitation to return to a job related to her former employment, the judge erred in awarding her the expenses of her college education as vocational rehabilitation benefits under former 52-1-50 NMSA 1978. *Murphy v. Duke City Pizza, Inc.*, 1994-NMCA-085, 118 N.M. 346, 881 P.2d 706, cert. denied, 118 N.M. 430, 882 P.2d 21.

Benefits not subject to statutory limitation period. — Like medical benefits, vocational rehabilitation benefits are not subject to the statute of limitations contained in Section 52-1-31A NMSA 1978. The limitations imposed on the receipt of vocational rehabilitation benefits were only those contained in former Section 52-1-50 NMSA 1978 (now repealed). *Benavidez v. Bloomfield Mun. Sch.*, 1994-NMCA-023, 117 N.M. 245, 871 P.2d 9.

Applicability of Section 52-1-25.1 NMSA 1978. — The final sentence of Subsection B adjusts compensation benefits prior to maximum medical improvement for a worker who has been "rehired." The explicit terms of the sentence apply only when the worker is actually employed by the employer. Yet, Section 52-1-25.1 NMSA 1978 applies so long as the worker is offered the position, even if the worker does not accept and become rehired. The final sentence of Subsection B was not intended to repeal or limit Section 52-1-25.1 NMSA 1978. *Jeffrey v. Hays Plumbing & Heating*, 1994-NMCA-071, 118 N.M. 60, 878 P.2d 1009.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-1-51. Physical examinations of worker; independent medical examination; unsanitary or injurious practices by worker; testimony of health care providers.

A. In the event of a dispute between the parties concerning the reasonableness or necessity of medical or surgical treatment, the date upon which maximum medical improvement was reached, the correct impairment rating for the worker, the cause of an injury or any other medical issue, if the parties cannot agree upon the use of a specific independent medical examiner, either party may petition a workers' compensation judge for permission to have the worker undergo an independent medical examination. If a workers' compensation judge believes that an independent medical examination will assist the judge with the proper determination of any issue in the case, including the cause of the injury, the workers' compensation judge may order an independent medical examination upon the judge's own motion. The independent medical examination shall be performed immediately, pursuant to procedures adopted by the director, by a health

care provider other than the designated health care provider, unless the employer and the worker otherwise agree.

B. In deciding who may conduct the independent medical examination, the workers' compensation judge shall not designate the health care provider initially chosen by the petitioner. The workers' compensation judge shall designate a health care provider on the approved list of persons authorized by the committee appointed by the advisory council on workers' compensation to create that list. The decision of the workers' compensation judge shall be final. The employer shall pay for any independent medical examination.

C. Only a health care provider who has treated the worker pursuant to Section 52-1-49 NMSA 1978 or the health care provider providing the independent medical examination pursuant to this section may offer testimony at any workers' compensation hearing concerning the particular injury in question.

D. If, pursuant to Subsection C of Section 52-1-49 NMSA 1978, either party selects a new health care provider, the other party shall be entitled to periodic examinations of the worker by the health care provider the other party previously selected. 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 therefor, examinations within six-month intervals may be ordered. In considering such applications, the workers' compensation judge shall exercise care to prevent harassment of the claimant.

E. If an independent medical examination or an examination pursuant to Subsection D of this section is requested, the worker shall travel to the place at which the examination shall be conducted. Within thirty days after the examination, the worker shall be compensated by the employer 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].

F. No attorney shall be present at any examination authorized under this section.

G. Both the employer and the worker shall be given a copy of the report of the examination of the worker made by the independent health care provider pursuant to this section.

H. If a worker fails or refuses to submit to examination in accordance with this section, the worker shall forfeit all workers' compensation benefits that would accrue or become due to the worker except for that failure or refusal to submit to examination during the period that the worker persists in such failure and refusal unless the worker is by reason of disability unable to appear for examination.

I. If any worker persists in any unsanitary or injurious practice that tends to imperil, retard or impair the worker's recovery or increase the worker's disability or refuses to submit to such medical or surgical treatment as is reasonably essential to promote the worker's recovery, the workers' compensation judge may in the judge's discretion reduce or suspend the workers' compensation benefits.

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; 1990 (2nd S.S.), ch. 2, § 22; 2005, ch. 150, § 1; 2013, ch. 134, § 4.

ANNOTATIONS

The 2013 amendment, effective July 1, 2013, allowed all parties to obtain a periodic examination of the worker from a health care provider of choice; and in Subsection D, in the first sentence, after "by the health care provider the", deleted "worker" and added "other party".

The 2005 amendment, effective July 1, 2005, provided in Subsection A that in the event of a dispute concerning the reasonableness of necessity of treatment, the date upon which maximum medical improvement was reached, the correct impartment rating, the cause of an injury or any other medical issue if the parties cannot agree upon a medical examiner, the parties may petition a worker's compensation judge for permission to have the worker undergo an independent examination and provides that if a worker's compensation judge believes that an independent medical examination will assist the judge with the proper determination of any issue in the case, the judge may order the examination upon the judge's own motion; provided in Subsection D that if either party selects a new health care provider, the other party shall be entitled to periodic examinations of the worker by the health care provider he previously selected; and provided in Subsection E that if an independent medical examination or examination pursuant to Subsection D is requested, then the worker shall travel to the place of examination and that within thirty days, the worker shall be compensated by the employer.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, rewrote the section, including the catchline, to the extent that a detailed comparison would be impracticable.

I. GENERAL CONSIDERATION.

Jurisdiction to reopen award. — Under Workmen's (Workers') 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.*, 1947-NMSC-049, 51 N.M. 441, 188 P.2d 160 (decided under former law).

Six-month review right is limited to employers under the unambiguous terms of Subsection D of this section. *Flores v. J.B. Henderson Constr.*, 2003-NMCA-116, 134 N.M. 364, 76 P.3d 1121.

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.*, 1960-NMSC-130, 68 N.M. 18, 357 P.2d 672 (decided under former law).

Specific findings required. — Although worker's compensation judge has discretion to reduce or suspend benefits, the judge is required to make findings as to impairment and, if applicable, injurious practices by claimant, and failure to do so warrants a remand with instructions to make specific findings thereon. *Chavarria v. Basin Moving & Storage*, 1999-NMCA-032, 127 N.M. 67, 976 P.2d 1019.

"Dispute concerning any medical issue". — The phrase "dispute concerning any medical issue," in Subsection A encompasses, inter alia, any disagreement between a worker's authorized health care providers as to the necessity for conducting a specific test, medical procedure, or course of treatment for the worker. *Gutierrez v. J & B Mobile Homes*, 1999-NMCA-007, 126 N.M. 494, 971 P.2d 1284 (decided under former law).

No application to dispute between employer and its health care provider. — Disputes regarding medical issues that would allow for an independent medical examination must be between health care providers; thus, a dispute between the employer and its selected health care provider regarding the compensibility of the accident did not qualify. *Ramirez v. IBP Prepared Foods*, 2001-NMCA-036, 130 N.M. 559, 28 P.3d 1100, cert. denied, 130 N.M. 459, 26 P.3d 103.

Change of healthcare provider not a final order. — Order allowing change in healthcare provider is not final and appealable. *Murphy v. Strata Prod. Co.*, 2006-NMCA-008, 138 N.M. 809, 126 P.3d 1173.

New Mexico license not required. — When the legislature used the phrase "health care provider as defined in Section 52-4-1," it was not referring solely to persons licensed in New Mexico. *Coslett v. Third St. Grocery*, 1994-NMCA-046, 117 N.M. 727, 876 P.2d 656, cert. denied, 117 N.M. 802, 877 P.2d 1105.

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.*, 1968-

NMSC-034, 78 N.M. 756, 438 P.2d 166, *overruled on other grounds by American Tank & Steel Corp. v. Thompson*, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

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).

Treating health care provider. — Physician who met with worker on one occasion for ten minutes more than sixteen months after worker's heart attack, after worker's claim was denied and after worker filed a complaint for worker compensation benefits and who had worker's medical records, deposition and job description to review, did not qualify as a treating physician. *Grine v. Peabody Natural Res.*, 2006-NMSC-031, 140 N.M. 30, 139 P.3d 90.

Insufficient evidence of maximum medical improvement where workers' compensation judge relied solely on inadmissible hearsay. — In a workers' compensation case, an independent medical examination report (IME), offered by an employer as evidence of the truth of the assertion that worker had reached maximum medical improvement (MMI) with an impairment rating of zero percent, constitutes hearsay subject to no exceptions in the rule, statutes or regulations. The workers' compensation judge (WCJ) erred in admitting the IME and relying on it as the basis for determining that worker reached MMI with a zero percent impairment rating, and therefore, there was insufficient evidence in the record to support the WCJ's conclusions concerning workers' MMI and impairment rating. *Valenzuela v. A.S. Horner, Inc.*, 2016-NMCA-031, cert. denied.

II. MEDICAL EXAMINATION.

Medical examination that discovers unknown work injuries. — A doctor who performs an independent medical examination pursuant to the parties' agreement does not exceed the scope of his authority when he diagnoses injuries not specifically identified in the agreement and concludes that they were caused by the on-the-job accident and the worker is not precluded from seeking compensation for the newly diagnosed work injuries. *Hall v. Carlsbad Supermarket/IGA*, 2008-NMCA-026, 143 N.M. 479, 177 P.3d 530.

No authority for exam on judge's own motion. — A worker's compensation judge abused his discretion by determining that he could order an independent medical examination on his own motion based on his determination that the medical record was confusing and that an independent examination would assist him in determining the issues in the case. *Ramirez v. IBP Prepared Foods*, 2001-NMCA-036, 130 N.M. 559, 28 P.3d 1100, cert. denied, 130 N.M. 459, 26 P.3d 103.

Discretion of workers' compensation judge. — Party seeking an order authorizing the conducting of an independent medical examination must present evidence to show that the request is reasonably necessary; the workers' compensation judge is then invested with the discretion to determine whether, based upon the evidence presented, good cause exists for conducting the examination. *Gutierrez v. J & B Mobile Homes*, 1999-NMCA-007, 126 N.M. 494, 971 P.2d 1284.

Ordered examination 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.*, 1974-NMCA-063, 86 N.M. 466, 525 P.2d 393.

Motion for independent medical examination not timely. — Where worker filed a complaint on May 10, 2007; trial was scheduled for January 25, 2008 and rescheduled for May 21, 2008; defendants had knowledge of worker's medical expert's opinion as to causation as early as May 10, 2007; and on May 1, 2008, defendants filed a motion for an independent medical examination on the issue of causation, the workers' compensation judge properly denied the motion because it was not timely. *Baca v. Los Lunas Cmty. Programs*, 2011-NMCA-008, 149 N.M. 198, 246 P.3d 1070.

III. REFUSAL OF TREATMENT.

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. Schs.*, 1984-NMCA-088, 101 N.M. 707, 688 P.2d 25.

Failure to perform home exercises. — Where worker, who injured worker’s back and shoulder, failed to perform a home exercise program that had been planned as part of worker’s therapy; and although two independent evaluators had recommended that worker perform a home exercise program to improve worker’s recovery, worker’s health care professionals had never prescribed a specific home exercise program, worker’s failure to perform a home exercise program was not an injurious practice. *Ruiz v. Los Lunas Pub. Sch.*, 2013-NMCA-085.

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 (worker) on that account. *Fowler v. W.G. Constr. Co.*, 1947-NMSC-049, 51 N.M. 441, 188 P.2d 160.

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.*, 1974-NMCA-063, 86 N.M. 466, 525 P.2d 393; *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.*, 1974-NMCA-063, 86 N.M. 466, 525 P.2d 393.

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.*, 1960-NMSC-130, 68 N.M. 18, 357 P.2d 672.

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. Schs.*, 1984-NMCA-088, 101 N.M. 707, 688 P.2d 25.

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.*, 1982-NMCA-035, 98 N.M. 217, 647 P.2d 419, cert. denied, 98 N.M. 336, 648 P.2d 794.

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 (workers') 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.*, 1981-NMCA-052, 96 N.M. 422, 631 P.2d 328.

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.*, 1960-NMSC-130, 68 N.M. 18, 357 P.2d 672.

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.*, 1960-NMSC-130, 68 N.M. 18, 357 P.2d 672.

A workmen's (workers') 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.*, 1974-NMCA-063, 86 N.M. 466, 525 P.2d 393.

Refusal of simple operation may reduce compensation. — When workman's (worker'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.*, 1947-NMSC-049, 51 N.M. 441, 188 P.2d 160.

It is in the discretion of the court to reduce or suspend compensation if the workman (worker) shall refuse to submit to medical or surgical treatment as is reasonably essential to promote his recovery. *Dudley v. Ferguson Trucking Co.*, 1956-NMSC-052, 61 N.M. 166, 297 P.2d 313.

Where workman (worker) 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).

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 (worker'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.*, 1974-NMCA-063, 86 N.M. 466, 525 P.2d 393.

An injured workman (worker) 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.*, 1974-NMCA-063, 86 N.M. 466, 525 P.2d 393.

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.*, 1947-NMSC-049, 51 N.M. 441, 188 P.2d 160.

Refusal to participate in physical therapy justified. — There was sufficient evidence to uphold the judge's decision not to reduce or suspend the claimant's compensation since the record showed that the claimant was unable to fully participate in physical therapy because of incapacitating pain that was not of his own making, and that it was

reasonable for patients not to fully participate in physical therapy under these circumstances. *Crespin v. Consolidated Constructors, Inc.*, 1993-NMCA-109, 116 N.M. 334, 862 P.2d 442, cert. denied, 116 N.M. 364, 862 P.2d 1223.

Where evidence supported finding that injured workman (worker) 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.*, 1974-NMCA-063, 86 N.M. 466, 525 P.2d 393.

Lower court order, involving surgery for removal of a herniated vertebrae in which the injured workman's (worker'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.*, 1974-NMCA-063, 86 N.M. 466, 525 P.2d 393.

Worker cannot postpone indefinitely determination of maximum medical improvement by declining surgery. — A worker cannot postpone indefinitely a determination of maximum medical improvement (MMI) by declining surgery. Once a physician has made a determination of MMI, discontinuing temporary total disability and calculating a permanent partial disability does not subject the worker to a Hobson's choice ("Have surgery or starve") or penalize him for declining surgery. It is merely a determination that a worker has reached a plateau of medical stability for the foreseeable future. *Rael v. Wal-Mart Stores, Inc.*, 1994-NMCA-017, 117 N.M. 237, 871 P.2d 1, cert. denied, 117 N.M. 215, 870 P.2d 753.

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.*, 1974-NMCA-063, 86 N.M. 466, 525 P.2d 393.

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.*, 1982-NMCA-035, 98 N.M. 217, 647 P.2d 419, cert. denied, 98 N.M. 336, 648 P.2d 794.

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).

IV. UNSANITARY OR INJURIOUS PRACTICES.

"Persist in any injurious practice" as used in this section means that a workman (worker) 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.*, 1982-NMCA-172, 99 N.M. 80, 653 P.2d 1226.

Worker's compensation judge did not abuse his discretion in finding that claimant's continued use of back brace and cane following back injury, against physician's recommendation, was an injurious practice, within the meaning of Subsection I, because it interfered with defendant's recovery from the injury. *Chavarria v. Basin Moving & Storage*, 1999-NMCA-032, 127 N.M. 67, 976 P.2d 1019.

What constitutes "bad faith". — Where an employer terminated a claimant's temporary benefits, alleging that the claimant failed to follow the advice of his doctor, without seeking an order to terminate, the employer's conduct did not constitute fraud, malice, oppression or willful, wanton or reckless disregard of the claimant's rights; thus, the hearing officer erred in awarding attorney's fees. *Cass v. Timberman Corp.*, 1990-NMCA-061, 110 N.M. 158, 793 P.2d 288, *rev'd on other grounds*, 1990-NMSC-112, 111 N.M. 184, 803 P.2d 669.

V. EXPERT TESTIMONY.

Permissible scope of testimony of a qualified health care provider. — A health care provider may testify about the entirety of a worker’s relevant medical history, including treatment the health care provider provided and observations the health care provider made before the health care provider was lawfully designated as the worker’s treating health care provider. *DeWitt v. Rent-A-Ctr., Inc.*, 2009-NMSC-032, 146 N.M. 453, 212 P.3d 341.

Doctor who was not an independent medical examiner under 1997 version was not allowed to testify. — Where worker was a chemistry technician at the employer’s laboratory testing samples for heavy metals; worker became sick from exposure to heavy metals, worker’s claim accrued under the 1997 version of 52-1-51 NMSA 1978; worker consulted two doctors about worker’s illness who found that worker suffered from heavy metal toxicity that resulted from performing chemical analysis at the employer’s laboratory; the medical director of the employer’s occupational medicine unit recommended that worker see a third doctor; the third doctor, who saw worker one time, found no evidence of heavy metal poisoning; worker filed a compensation claim a year after worker saw the third doctor; there was no dispute as to a medical issue between the two doctors who were worker’s authorized care givers; worker and the employer did not agree to select the third doctor as an independent medical examiner; and the workers’ compensation judge did not appoint the third doctor as an independent medical examiner, the third doctor’s testimony was inadmissible at the hearing on worker’s claims because the third doctor was not a treating physician or an independent medical

examiner. *Brashar v. University of Calif. Regents*, 2014-NMCA-068, cert. denied, 2014-NMCERT-006.

Expert testimony in death benefits cases. — In a contested death benefits workers' compensation case, the parties can agree upon an independent medical examination (IME) examiner to perform an IME, the purpose of which is to determine the causal connection, if any, between the worker's injury and the worker's death, and the workers' compensation judge has the authority to order an IME for this purpose on the motion of a party or on its own motion. *Lewis v. Albuquerque Public Schools*, 2019-NMSC-022, *aff'g in part and rev'g in part* 2018-NMCA-049, 424 P.3d 643.

Section not applicable to cause of death determination. — Where worker sought and obtained an award of workers' compensation disability benefits after she contracted allergic bronchopulmonary aspergillosis (ABPA) as a result of exposure to aspergillus mold while employed with the Albuquerque public schools, and where claimant, worker's widower, sought workers' compensation death benefits following worker's death, the workers' compensation judge (WCJ) erred in determining that 52-1-51(C) NMSA 1978 barred admission and consideration of cancer treatment records and the testimony of worker's oncologist in determining the cause of worker's death, because 52-1-51(C) NMSA 1978 does not apply to a WCJ's cause of death determination pursuant to 52-1-46 NMSA 1978, and therefore does not limit expert testimony regarding the circumstances and cause of a worker's death in connection with a claim for death benefits. *Lewis v. Albuquerque Pub. Schs.*, 2018-NMCA-049, cert. granted.

Written report constitutes "testimony". — The medical opinions of a health care provider prepared in the form of a written report constitute testimony under Subsection C. *Jurado v. Levi Strauss & Co.*, 1995-NMCA-129, 120 N.M. 801, 907 P.2d 205, cert. denied, 120 N.M. 715, 905 P.2d 1119.

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.*, 1958-NMSC-087, 64 N.M. 282, 327 P.2d 797 (decided under former law).

Error in considering unsworn testimony of two physicians. — In a case under the Workmen's (Workers') 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.*, 1959-NMSC-025, 65 N.M. 307, 336 P.2d 1062.

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 Section 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.*, 1974-NMCA-063, 86 N.M. 466, 525 P.2d 393.

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.*, 1986-NMCA-109, 105 N.M. 97, 728 P.2d 1366.

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.*, 1986-NMCA-109, 105 N.M. 97, 728 P.2d 1366.

Use of records of unauthorized health care provider. — The records of an unauthorized health care provider were admissible in a workers' compensation hearing as the basis for expert opinion testimony of an authorized health care provider; but these medical records could not be used to rebut the opinion of an authorized health care provider as to the cause of the employee's injury. *Lopez v. City of Albuquerque*, 1994-NMCA-122, 118 N.M. 682, 884 P.2d 838, cert. denied, 118 N.M. 533, 882 P.2d 1046.

Expert testimony. — The standard for admitting expert testimony established by *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as adopted in N.M. by *State v. Alberico*, 1993-NMSC-047, 116 N.M. 156, 861 P.2d 192, does not apply to the testimony of a health care provider pursuant to 52-1-28(B) or 52-3-32 NMSA 1978. *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014.

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).

For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 504 to 506.

Workers' Compensation: Compensability of injuries incurred traveling to or from medical treatment of earlier compensable injury, 83 A.L.R.4th 110.

What amounts to failure or refusal to submit to medical treatment sufficient to bar recovery of workers' compensation, 3 A.L.R.5th 907.

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.

ANNOTATIONS

Section not unconstitutional on either due process or equal protection grounds. *Pedrazza v. Sid Fleming Contractor, Inc.*, 1980-NMSC-018, 94 N.M. 59, 607 P.2d 597.

Applicability of exemption. — By its terms, the exemption applies to "claims of creditors" and to "any attachment, garnishment or execution." It does not address assignments. If the legislature had intended a "spendthrift" provision that would preclude the assignment of all or part of the proceeds before received, such a provision readily could have been articulated. *Romero v. Earl*, 1991-NMSC-042, 111 N.M. 789, 810 P.2d 808.

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 (Workers') Compensation Act. *Kent*

Nowlin Constr. Co. v. Gutierrez, 1982-NMSC-123, 99 N.M. 389, 658 P.2d 1116, 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*, 1983-NMCA-146, 101 N.M. 44, 678 P.2d 219, cert. denied, 101 N.M. 77, 678 P.2d 705 (1984).

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*, 1935-NMSC-071, 39 N.M. 496, 50 P.2d 430.

Bankruptcy debtor's checking account containing proceeds exempt. — Debtor's checking account, consisting of the proceeds of the settlement of the workmen's (workers') 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; 82 Am. Jur. 2d Workers' Compensation §§ 219, 220.

Workers' compensation: incarceration as terminating benefits, 54 A.L.R.4th 241.

Validity, construction, and effect of statutory exemptions of proceeds of workers' compensation awards, 48 A.L.R.5th 473.

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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

52-1-54. Fee restrictions; appointment of attorneys by the director or workers' compensation judge; discovery costs; offer of judgment; penalty for violations.

A. It is 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 except as provided in this section.

B. In all cases where the jurisdiction of the workers' compensation administration 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 the director's or judge's 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 I of this section.

C. In all cases where the jurisdiction of the workers' compensation administration 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 the 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 I of this section.

D. The cost of discovery shall be borne by the party who requests it. If, however, the claimant requests any discovery, the employer shall advance the cost of paying for discovery up to a limit of three thousand dollars ($3,000). If the claimant substantially prevails on the claim, as determined by a workers' compensation judge, any discovery cost advanced by the employer shall be paid by that employer. If the claimant does not substantially prevail on the claim, as determined by a workers' compensation judge, the employer shall be reimbursed for discovery costs advanced according to a schedule for reimbursement approved by a workers' compensation judge.

E. In all cases where compensation to which any person is entitled under the provisions of the Workers' Compensation Act is refused and the claimant thereafter collects compensation through proceedings before the workers' compensation administration 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 administration, 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 I 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) any failure of a party to participate in a good-faith manner in informal claim resolution methods adopted by the director.

F. After a recommended resolution has been issued and rejected, but more than ten days before a trial begins, the employer or claimant may serve upon the opposing party an offer to allow a compensation order to be taken against the employer or claimant for the money or property or to the effect specified in the offer, with costs then accrued, subject to the following:

(1) if, within ten days after the service of the offer, the opposing party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof, and thereupon that compensation order may be entered as the workers' compensation judge may direct. An offer not accepted shall be deemed withdrawn, and evidence thereof is not admissible except in a proceeding to determine costs. If the compensation order finally obtained by the party is not more favorable than the offer, that party shall pay the costs incurred by the opposing party after the making of the offer. The fact that an offer has been made but not accepted does not preclude a subsequent offer;

(2) when the liability of one party to another has been determined by a compensation order, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ten days prior to the commencement of hearings to determine the amount or extent of liability;

(3) if the employer's offer was greater than the amount awarded by the compensation order, the employer shall not be liable for the employer's fifty percent share of the attorney fees to be paid the worker's attorney and the worker shall pay one hundred percent of the attorney fees due to the worker's attorney; and

(4) if the worker's offer was less than the amount awarded by the compensation order, the employer shall pay one hundred percent of the attorney fees to be paid the worker's attorney, and the worker shall be relieved from any responsibility for paying any portion of the worker's attorney fees.

G. In all actions arising under the provisions of Section 52-1-56 NMSA 1978 where the jurisdiction of the workers' compensation administration 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 the claimant's 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 I of this section.

H. In determining reasonable attorney fees for a claimant, 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 attorney fees.

I. Attorney fees, including, but not limited to, the costs of paralegal services, legal clerk services and any other related legal services costs on behalf of a claimant or an employer for a single accidental injury claim, including representation before the workers' compensation administration and the courts on appeal, shall not exceed twenty-two thousand five hundred dollars ($22,500). This limitation applies whether the claimant or employer has one or more attorneys representing the claimant or employer 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 a claimant. The workers' compensation judge may exceed the maximum amount stated in this subsection in awarding a reasonable attorney fee if the judge finds that a claimant, an insurer or an employer acted in bad faith with regard to handling the injured worker's claim and the injured worker or employer has suffered economic loss as a result. However, in no case shall this additional amount exceed five thousand dollars ($5,000). As used in this subsection, "bad faith" means conduct by the claimant, insurer or employer in the handling of a claim that amounts to fraud, malice, oppression or willful, wanton or reckless disregard of the rights of the worker or employer. Any determination of bad faith shall be made by the workers' compensation judge through a separate fact-finding proceeding. Notwithstanding the provisions of Subsection J of this section, the party found to have acted in bad faith shall pay one hundred percent of the additional fees awarded for representation of the prevailing party in a bad faith action.

J. Except as provided in Paragraphs (3) and (4) of Subsection F of this section, the payment of a claimant's attorney fees determined under this section shall be shared equally by the worker and the employer.

K. It is unlawful for any person except a licensed attorney to receive or agree to receive any fee or payment for legal services in connection with any claim for compensation under the Workers' Compensation Act.

L. Nothing in this section applies to agents, excluding attorneys, representing employers, insurance carriers or the subsequent injury fund in any matter arising from a claim under the Workers' Compensation Act.

M. No attorney fees shall be paid until the claim has been settled or adjudged.

N. Every person violating the provisions of this section is 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.

O. Nothing in this section shall restrict a claimant from being represented before the workers' compensation administration by a nonattorney as long as that nonattorney receives no compensation for that representation from the claimant.

History: 1978 Comp., § 52-1-54, enacted by Laws 1987, ch. 235, § 24; 1989, ch. 263, § 32; 1990 (2nd S.S.), ch. 2, § 23; 1993, ch. 193, § 5; 2003, ch. 265, § 3; 2013, ch. 168, § 1.

ANNOTATIONS

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.

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.

The 2013 amendment, effective June 14, 2013, raised the limits for attorney fees; and in Subsection I, in the first sentence, after "shall not exceed", deleted "sixteen thousand five hundred dollars ($16,500)" and added "twenty-two thousand five hundred dollars ($22,500)", in the fourth sentence, after "additional amount exceed", deleted "two thousand five hundred dollars ($2,500)" and added "five thousand dollars ($5,000)", and added the seventh sentence.

The 2003 amendment, effective June 20, 2003, substituted "three thousand dollars ($3,000)" for "one thousand dollars ($1,000)" following "discovery up to a limit of" near the middle of Subsection D; and substituted "sixteen thousand five hundred dollars ($16,500)" for "twelve thousand five hundred dollars ($12,500)" following "shall not exceed" at the end of the first sentence in Subsection I.

The 1993 amendment, effective June 18, 1993, made minor stylistic changes in Subsections C and E; in Subsection F(3), substituted "worker's" for "claimant's" following "paid the" and added "and the worker shall pay one hundred percent of the attorney's fees due to the workers' attorney" at the end of the paragraph; in Subsection (F)(4), substituted "worker's" for "employer's" preceding "offer", "worker's" for "claimant's" preceding "attorney", "worker" for "claimant", and "the worker's" for "his attorneys' " preceding "fees"; deleted "Except for attorneys' fees incurred by an agency of the state or any political subdivision of the state" at the beginning of Subsection M; and made a minor stylistic change in Subsection O.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, inserted "discovery costs; offer of judgment" in the section catchline; substituted "administration" for "division" throughout the section; added present Subsections D, F and M, redesignated former Subsection D as Subsection E and former Subsections E through L as Subsections G through O, rewriting those subsections; and made stylistic changes.

I. GENERAL CONSIDERATION.

Limit on attorney fees. — The limitation on attorney fees in Section 52-1-54I NMSA 1978 of the Workers' Compensation Act does not violate workers' state constitutional rights to equal protection and due process. *Wagner v. AGW Consultants*, 2005-NMSC-016, 137 N.M. 734, 114 P.3d 1050.

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. *N.M. State Hwy. Dep't v. Bible*, 1934-NMSC-025, 38 N.M. 372, 34 P.2d 295.

Constitutionality of limitation on attorney fees. — The limitation on attorney fees contained in Subsection I does not violate the due process or equal protection guarantees of the federal or state constitutions. *Mieras v. Dyncorp*, 1996-NMCA-095, 122 N.M. 401, 925 P.2d 518, cert. denied, 122 N.M. 279, 923 P.2d 1164.

Standing to challenge constitutionality of limitation. — A worker's compensation claimant had standing to raise an equal protection challenge to the cap on attorney fees because, following a contested trial in which she was successful, the workers' compensation judge found that the reasonable value of the services of her attorney was in excess of the statutory limitation. *Mieras v. Dyncorp*, 1996-NMCA-095, 122 N.M. 401, 925 P.2d 518, cert. denied, 122 N.M. 279, 923 P.2d 1164.

Section should be applied to ensure adequate compensation of workmen's (workers') compensation claimants but avoid excessive legal fees. *Superintendent of Ins. v. Mountain States Mut. Cas. Co.*, 1986-NMCA-012, 104 N.M. 605, 725 P.2d 581.

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.*, 1989-NMCA-039, 108 N.M. 655, 777 P.2d 383, cert. denied, 108 N.M. 681, 777 P.2d 1325.

Judicial award of attorney fees and expenses. — The legislature intended for a district court that has entered judgment on a Workers' Compensation Division supplemental order to retain jurisdiction for purposes of awarding additional attorney's fees and additional medical expenses. *Martinez v. Southwest Moving Specialists*, 1990-NMSC-048, 110 N.M. 68, 792 P.2d 45.

Cumulative limit on amount of fees. — Under Subsection G (now Subsection I), $12,500 (now $16,500) is a cumulative limit on the amount of attorney's fees to be awarded for all legal services relative to a single accidental injury. *Garcia v. Mt. Taylor Millwork, Inc.*, 1989-NMCA-100, 111 N.M. 17, 801 P.2d 87 (Ct. App.), cert. denied, 110 N.M. 282, 795 P.2d 87.

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.*, 1973-NMCA-068, 85 N.M. 254, 511 P.2d 580, cert. denied, 85 N.M. 229, 511 P.2d 555.

"Economic loss". — A delay in payment does not in itself constitute an "economic loss" within the meaning of this section. *Pineda v. Grande Drilling Corp.*, 1991-NMCA-004, 111 N.M. 536, 807 P.2d 234 (decided under former law).

"Present value of the award" means value computed as of date of award to the workman (worker). *Davis v. Homestake Mining Co.*, 1986-NMCA-082, 105 N.M. 2, 727 P.2d 941, cert. denied, 104 N.M. 702, 726 P.2d 856.

Attorney's fees are not "compensation" for the purpose of allowing attorney fees. *Archuleta v. Safeway Stores, Inc.*, 1986-NMCA-092, 104 N.M. 769, 727 P.2d 77.

Claim initiation is court "proceeding". — Initiation of a claim for workman's (worker's) compensation benefits is a court "proceeding." *Rumpf v. Rainbo Baking Co.*, 1981-NMCA-037, 96 N.M. 1, 626 P.2d 1303, cert. denied, 96 N.M. 17, 627 P.2d 412.

Award of attorneys' fees should have run to claimant and not to attorneys. *Scott v. Transwestern Tankers, Inc.*, 1963-NMSC-205, 73 N.M. 219, 387 P.2d 327.

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*, 1961-NMSC-119, 69 N.M. 262, 365 P.2d 912.

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.*, 1974-NMCA-063, 86 N.M. 466, 525 P.2d 393.

Attorney fees not taxed as costs. — This section requires attorney fees to be compensation and not taxed as costs. *Genuine Parts Co. v. Garcia*, 1978-NMSC-059, 92 N.M. 57, 582 P.2d 1270.

Separate hearing on the issue of attorneys' fees is permissible, but not required. *Morgan v. Public Serv. Co.*, 1982-NMCA-152, 98 N.M. 775, 652 P.2d 1226; *Sanchez v. Homestake Mining Co.*, 1985-NMCA-022, 102 N.M. 473, 697 P.2d 156.

Claimant absent from hearing on attorney's fees. — It was not error for the workers' compensation judge to proceed without claimant's presence at the hearing on attorney's fees, where any information regarding a fee agreement between claimant and her attorney could have been obtained by cross-examining the attorney. *Sanchez v. Siemens Transmission Sys.*, 1991-NMCA-028, 112 N.M. 236, 814 P.2d 104, *rev'd on other grounds*, 1991-NMSC-093, 112 N.M. 533, 817 P.2d 726.

No challenge to award without findings. — An employer who requests no findings on the issue of attorneys fees cannot contest the sufficiency of the evidence to support an award by the workers' compensation administration. *Apodaca v. Payroll Express, Inc.*, 1993-NMCA-141, 116 N.M. 816, 867 P.2d 1198.

When employer failed to request findings, it waived all arguments as to the form of the ruling of the workers' compensation judge; however, there is no requirement that every order setting attorney fees be supported by specific findings and since the record was sufficiently clear to allow the appellate court to clearly understand which issues were raised and argued to the trial court and not abandoned, the appellate court could address those issues on the merits. *Cordova v. Taos Ski Valley, Inc.*, 1996-NMCA-009, 121 N.M. 258, 910 P.2d 334.

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.*, 1985-NMSC-018, 102 N.M. 333, 695 P.2d 483.

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.*, 1978-NMCA-014, 91 N.M. 462, 575 P.2d 1347 (decided under former law).

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.*, 1973-NMCA-111, 85 N.M. 487, 513 P.2d 1269, cert. denied, 85 N.M. 483, 513 P.2d 1265.

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.*, 1973-NMCA-111, 85 N.M. 487, 513 P.2d 1269, cert. denied, 85 N.M. 483, 513 P.2d 1265.

Fee premature where case remanded for new trial. — Where an order reducing plaintiff's compensation under New Mexico Workmen's (Workers') 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.*, 1959-NMSC-025, 65 N.M. 307, 336 P.2d 1062.

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 Furniture Co.*, 1943-NMSC-036, 47 N.M. 356, 143 P.2d 572.

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 Furniture Co.*, 1943-NMSC-036, 47 N.M. 356, 143 P.2d 572.

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*, 1967-NMCA-006, 78 N.M. 181, 429 P.2d 379, cert. denied, 78 N.M. 198, 429 P.2d 657.

II. AWARD OF FEES.

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*, 1956-NMSC-007, 60 N.M. 441, 292 P.2d 121.

Award of attorney's fee is authorized in each case. — 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*, 1939-NMSC-041, 44 N.M. 31, 97 P.2d 374.

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.*, 1938-NMSC-033, 42 N.M. 378, 79 P.2d 921.

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.*, 1963-NMSC-205, 73 N.M. 219, 387 P.2d 327.

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.*, 1982-NMCA-076, 98 N.M. 65, 644 P.2d 1054.

Attorney fees can be awarded in suit for medical expenses only. *Minnerup v. Stewart Bros. Drilling Co.*, 1979-NMCA-125, 93 N.M. 561, 603 P.2d 300, cert. denied, 94 N.M. 629, 614 P.2d 546 (1979), *overruled on other grounds by Raines v. W.A. Klinger & Sons*, 1988-NMSC-083, 107 N.M. 668, 763 P.2d 684.

Amount of fees to be fixed and allowed by court is discretionary. *Mascarenas v. Kennedy*, 1964-NMSC-179, 74 N.M. 665, 397 P.2d 312.

The award of attorney's fees in a workmen's (workers') compensation case is discretionary with the court. *Herndon v. Albuquerque Pub. Schs.*, 1978-NMSC-090, 92 N.M. 287, 587 P.2d 434.

The amount of the award is within the sound discretion of the trial court. *Manzanares v. Lerner's, Inc.*, 1985-NMSC-022, 102 N.M. 391, 696 P.2d 479; *Smith v. Trailways, Inc.*, 1986-NMCA-001, 103 N.M. 741, 713 P.2d 557.

Fees under stipulated agreement. — Although the parties entered into a stipulated agreement, and there was no contested agreement, Paragraph F(4) was applicable, and the workers' compensation judge erred in not holding the employer responsible for paying one hundred percent of the worker's attorney's fees. *Hise v. City of Albuquerque*, 2003-NMCA-015, 133 N.M. 133 , 61 P.3d 842.

Authority to require statement of employer's attorney's fees. — A worker's compensation judge had the authority under Subsection I to require an employer's counsel to file a pleading detailing his legal fees as a means of facilitating the legislative policy of discouraging excessive litigation of compensation claims. *Jurado v. Levi Strauss & Co.*, 1996-NMCA-112, 122 N.M. 519, 927 P.2d 1057.

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.*, 1986-NMCA-092, 104 N.M. 769, 727 P.2d 77.

Scope of Subsection E. — Subsection D (now Subsection E) does not define the permissible scope of compensable legal representation. Rather, that subsection describes but one of several classes of cases in which reasonable attorney's fees may be recovered under the Workers' Compensation Act. *Sanchez v. Siemens Transmission Sys.*, 1991-NMSC-093, 112 N.M. 533, 817 P.2d 726.

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.*, 1974-NMCA-063, 86 N.M. 466, 525 P.2d 393.

Amount of award of attorneys' fees in workmen's (workers') compensation proceeding is discretionary with the trial court and will not be disturbed except for abuse of discretion. *Hedgecock v. Vandiver*, 1970-NMCA-117, 82 N.M. 140, 477 P.2d 316.

The amount of the award of attorney's fees is discretionary. — 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.*, 1970-NMCA-114, 82 N.M. 72, 475 P.2d 466; *Pacheco v. Alamo Sheet Metal Works, Inc.*, 1978-NMCA-057, 91 N.M. 730, 580 P.2d 498; *Gearhart v. Eidson Metal Prods.*, 1979-NMCA-019, 92 N.M. 763, 595 P.2d 401; *Marez v. Kerr-McGee Nuclear Corp.*, 1978-NMCA-128, 93 N.M. 9, 595 P.2d 1204, cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

The workers' compensation judge, in his sound discretion and using all relevant and statutory judicial factors, should determine whether to award attorney's fees for services rendered prior to termination of the claimant's benefits. In so doing, due consideration must be given to the relationship that pretermination counseling bears to the

successfully recovered award. *Sanchez v. Siemens Transmission Sys.*, 1991-NMSC-093, 112 N.M. 533, 817 P.2d 726.

Award of fees 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. N.M. State Hwy. Dep't*, 1966-NMSC-250, 77 N.M. 185, 420 P.2d 771; *Lamont v. N.M. Military Inst.*, 1979-NMCA-047, 92 N.M. 804, 595 P.2d 774, cert. denied, 92 N.M. 675, 593 P.2d 1078.

Only where the workers' compensation judge exceeds his or her discretion will an appellate court upset a fee award. *Sanchez v. Siemens Transmission Sys.*, 1991-NMSC-093, 112 N.M. 533, 817 P.2d 726.

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.*, 1985-NMSC-018, 102 N.M. 333, 695 P.2d 483.

Pre-termination attorney consultation fees. — There is no statutory impediment to compensating attorneys for time reasonably spent counseling clients prior to termination of benefits. Only if the employer does not wrongly terminate benefits should the employer clearly not be liable for consultation fees. *Sanchez v. Siemens Transmission Sys.*, 1991-NMSC-093, 112 N.M. 533, 817 P.2d 726.

Attorneys' fees may only be awarded when there has been recovery of compensation by the claimant. *Employers Mut. Liab. Ins. Co. v. Jarde*, 1963-NMSC-215, 73 N.M. 371, 388 P.2d 382.

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'g Co.*, 1951-NMSC-046, 55 N.M. 287, 232 P.2d 689.

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.*, 1972-NMCA-005, 83 N.M. 452, 493 P.2d 418.

The recovery of compensation is a prerequisite to the allowance of attorneys' fees. *Sisneros v. Breese Indus., Inc.*, 1963-NMSC-166, 73 N.M. 101, 385 P.2d 960, *overruled on other grounds by American Tank & Steel Corp. v. Thompson*, 1977-NMSC-052, 90 N.M. 513, 565 P.2d 1030.

Plaintiff's attorney in workmen's (workers') compensation proceeding is not entitled to an attorney fee unless compensation is recovered herein. *Geeslin v. Goodno, Inc.*, 1965-NMSC-053, 75 N.M. 174, 402 P.2d 156.

Where the supreme court reverses a holding by the trial court that a claim under the Workmen's (Workers') 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.*, 1959-NMSC-027, 65 N.M. 314, 336 P.2d 1066.

Recovery of compensation is a prerequisite to the allowance of attorneys' fees. *Witt v. Marcum Drilling Co.*, 1964-NMSC-029, 73 N.M. 466, 389 P.2d 403; Morgan v. Pub. Serv. Co., 1982-NMCA-152, 98 N.M. 775, 652 P.2d 1226.

Until there has been an award of compensation at the trial court level, an allowance of attorney's fees in a workmen's (workers') compensation case is improper. *Phelps Dodge Corp. v. Guerra*, 1978-NMSC-053, 92 N.M. 47, 582 P.2d 819.

The award of attorney's fees must be predicated upon a successful recovery by the claimant of workmen's (workers') compensation or other medical or related benefits to which the workman (worker) is entitled. *Montoya v. Anaconda Mining Co.*, 1981-NMCA-113, 97 N.M. 1, 635 P.2d 1323.

Unless worker is entitled to compensation or medical benefits, an allowance of attorney's fees is improper. *Douglass v. State*, 1991-NMCA-041, 112 N.M. 183, 812 P.2d 1331, cert. denied, 112 N.M. 77, 811 P.2d 575; *Alcala v. Saint Francis Gardens*, 1993-NMCA-134, 116 N.M. 510, 864 P.2d 326.

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.*, 1981-NMCA-037, 96 N.M. 1, 626 P.2d 1303, cert. denied, 96 N.M. 17, 627 P.2d 412.

Attorney fees 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.*, 1960-NMSC-130, 68 N.M. 18, 357 P.2d 672.

Evidentiary basis must support an award of attorney's fees. *Jennings v. Gabaldon*, 1982-NMCA-016, 97 N.M. 416, 640 P.2d 522, *overruled on other grounds by Woodson v. Phillips Petroleum Co.*, 1985-NMSC-018, 102 N.M. 333, 695 P.2d 483.

An award of fees must have evidentiary support. *Candelaria v. Gen. Elec. Co.*, 1986-NMCA-016, 105 N.M. 167, 730 P.2d 470, cert. quashed, 105 N.M. 111, 729 P.2d 1365.

Where plaintiff's attorneys submitted statements of services rendered, this was "evidentiary support" for the award of attorneys fees in a workmen's (workers')

compensation case. *Lopez v. K.B. Kennedy Eng'g Co.*, 1981-NMCA-011, 95 N.M. 507, 623 P.2d 1021.

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.*, 1981-NMCA-052, 96 N.M. 422, 631 P.2d 328.

Amount of attorney's fees awarded is reviewable only for an abuse of discretion under this section. *Escobedo v. Agric. Prods. Co.*, 1974-NMCA-063, 86 N.M. 466, 525 P.2d 393.

Even when made pursuant to Subsection D (now Subsection E), the attorney's fee award is reviewable for abuse of discretion. *Provencio v. N.J. Zinc Co.*, 1974-NMCA-048, 86 N.M. 538, 525 P.2d 898, cert. denied, 86 N.M. 528, 525 P.2d 888.

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.*, 1970-NMCA-130, 82 N.M. 253, 479 P.2d 533.

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.*, 1980-NMCA-106, 94 N.M. 716, 616 P.2d 429.

Attorney's fees recoverable as separate award. — In workmen's (workers') 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 (worker's) award. *Brazfield v. Mountain States Mut. Cas. Co.*, 1979-NMCA-100, 93 N.M. 417, 600 P.2d 1207, cert. denied, 93 N.M. 205, 598 P.2d 1165.

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.*, 1976-NMCA-095, 89 N.M. 579, 555 P.2d 700.

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., 1971-NMCA-126, 83 N.M. 73, 488 P.2d 123.

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.*, 1974-NMCA-047, 86 N.M. 375, 524 P.2d 991, cert. denied, 86 N.M. 372, 524 P.2d 988.

Award of fees even though prior judgment reduced. — A workman (worker) 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 (worker) no longer has any disability, even if the prior judgment is ordered reduced. *Jaramillo v. Kaufman Plumbing & Heating Co.*, 1985-NMSC-089, 103 N.M. 400, 708 P.2d 312.

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*, 1988-NMCA-091, 108 N.M. 124, 767 P.2d 363, cert. denied, 109 N.M. 33, 781 P.2d 305.

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 Cnty. Comm'rs*, 1954-NMSC-088, 58 N.M. 626, 274 P.2d 145.

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.*, 1981-NMCA-120, 96 N.M. 765, 635 P.2d 320.

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 (worker), the workman (worker) is entitled to an attorney fee for additional services rendered. *Romo v. Raton Coca Cola Co.*, 1981-NMCA-120, 96 N.M. 765, 635 P.2d 320.

Additional attorney's fees for employer's bad faith were not justified. *Murphy v. Duke City Pizza, Inc.*, 1994-NMCA-085, 118 N.M. 346, 881 P.2d 706, cert. denied, 118 N.M. 430, 882 P.2d 21.

Award of attorney fees upon a finding of bad faith. — In a workers' compensation case where the workers' compensation judge (WCJ) found that insurer had willfully disregarded worker's rights, had violated the WCJ's orders, and knew that there was no reasonable basis for its conduct, and where the WCJ determined that insurer's conduct constituted bad faith, the WCJ did not err in failing to assess attorney fees entirely to insurer when the prior version of 52-1-54 NMSA 1978 explicitly stated that attorney fees shall be shared equally by the worker and the employer, despite worker's reliance on a workers' compensation regulation, that could be read in a manner inconsistent with 52-1-54 NMSA 1978, to support his argument that it was reasonable to asses one hundred percent of worker's attorney fees to insurer. *Romero v. Laidlaw Transit Servs.*, Inc., 2015-NMCA-107, cert. granted, 2015-NMCERT-009.

Award of attorneys fees not proper. — Where an employer terminated a claimant's temporary benefits, alleging that the claimant failed to follow the advice of his doctor, without seeking an order to terminate, the employer's conduct did not constitute fraud, malice, oppression or willful, wanton or reckless disregard of the claimant's rights; thus, the hearing officer erred in awarding attorney's fees. *Cass v. Timberman Corp.*, 1990-NMCA-061, 110 N.M. 158, 793 P.2d 288, *rev'd on other grounds*, 1990-NMSC-112, 111 N.M. 184, 803 P.2d 669.

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.*, 1982-NMCA-152, 98 N.M. 775, 652 P.2d 1226.

III. FACTORS DETERMINING FEES.

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 (worker's) favor, then amount awarded as attorney's fee was not an abuse of discretion. *Trujillo v. Tanuz*, 1973-NMCA-048, 85 N.M. 35, 508 P.2d 1332.

Range of fee amount. — A useful range for trial courts to keep in mind when awarding attorney's fees is generally between 10% to 20% of the total award depending on the complexity of the case; the pertinent inquiry should be to determine whether the attorney contributed anything to the case for which he should be paid. *County of Bernalillo v. Sisneros*, 1994-NMCA-156, 119 N.M. 98, 888 P.2d 980.

Award is not to be set at a specific percentage of the recovery. *Candelaria v. General Elec. Co.*, 1986-NMCA-016, 105 N.M. 167, 730 P.2d 470, cert. quashed, 105 N.M. 111, 729 P.2d 1365.

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.*, 1986-NMCA-082, 105 N.M. 2, 727 P.2d 941, cert. denied, 104 N.M. 702, 726 P.2d 856.

Guidelines to determine amount to award for attorney's fees in workmen's (workers') compensation cases include the following considerations: the chilling effect of miserly fees upon the ability of an injured workman (worker) to obtain adequate representation; the fees normally charged in the locality for similar legal services; and the amount involved. *Fryar v. Johnsen*, 1979-NMSC-080, 93 N.M. 485, 601 P.2d 718.

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 (worker) 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 (worker) in the court proceeding; (8) the amount involved; and (9) the rate of inflation. *Woodson v. Phillips Petroleum Co.*, 1985-NMSC-018, 102 N.M. 333, 695 P.2d 483.

When determining reasonable attorney fees, the workers' compensation judge must consider the present value of the award made in the claimant's favor. However, the amount of the worker's award is not the sole inquiry. Other factors to consider are those set forth in *Fryar v. Johnsen*, 1979-NMSC-080, 93 N.M. 485, 601 P.2d 718: success of claimant, extent to which issues contested, complexity of the issues, experience of attorney, cost of living, and time/effort expended. *Sanchez v. Siemens Transmission Sys.*, 1991-NMCA-028, 112 N.M. 236, 814 P.2d 104, *rev'd on other grounds*, 1991-NMSC-093, 112 N.M. 533, 817 P.2d 726.

Factors in determining attorney's fees. — In addition to those stated in Subsection D (now Subsection E) 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.*, 1979-NMCA-019, 92 N.M. 763, 595 P.2d 401.

In determining the amount to award for attorney's fees in workmen's (workers') compensation cases the courts consider the following factors: the relative success of the workman (worker) 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*, 1979-NMSC-080, 93 N.M. 485, 601 P.2d 718; *Gonzales v. Bates Lumber Co.*, 1981-NMCA-052, 96 N.M. 422, 631 P.2d 328.

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 (workers') compensation case. *Woodson v. Phillips Petroleum Co.*, 1985-NMSC-018, 102 N.M. 333, 695 P.2d 483.

Facility in non-English speaking claimant's own language can be a proper factor in awarding attorney's fees and worker's counsel bears the burden of providing evidentiary support for his assertion that his language ability actually facilitated his representation of worker. *Medina v. Honemuller Constr., Inc.*, 2005-NMCA-123, 138 N.M. 422, 122 P.3d 839.

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.*, 1985-NMCA-106, 103 N.M. 631, 711 P.2d 908.

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.*, 1958-NMSC-087, 64 N.M. 282, 327 P.2d 797.

The relationship between the fee award and the recovery is but one of several important elements that bear on the reasonableness of the attorney's fee. *Sanchez v. Siemens Transmission Sys.*, 1991-NMSC-093, 112 N.M. 533, 817 P.2d 726.

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 (workers') 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.*, 1962-NMSC-047, 70 N.M. 65, 370 P.2d 502.

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*, 1979-NMSC-080, 93 N.M. 485, 601 P.2d 718.

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*, 1982-NMCA-016, 97 N.M. 416, 640 P.2d 522, *overruled on other grounds by Woodson v. Phillips Petroleum Co.*, 1985-NMSC-018, 102 N.M. 333, 695 P.2d 483.

Amount of work expended by attorney not determinative factor in fixing a reasonable attorney's fee. *Marez v. Kerr-McGee Nuclear Corp.*, 1978-NMCA-128, 93 N.M. 9, 595 P.2d 1204, cert. denied, 92 N.M. 532, 591 P.2d 286.

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. N.M. Military Inst.*, 1979-NMCA-047, 92 N.M. 804, 595 P.2d 774, cert. denied, 92 N.M. 675, 593 P.2d 1078.

Factors not included in section for determining attorney's fees. — Subsection D (now Subsection E) 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. N.M. Military Inst.*, 1979-NMCA-047, 92 N.M. 804, 595 P.2d 774, cert. denied, 92 N.M. 674, 593 P.2d 1078.

Failure to consider all proper factors. — Where a workers' compensation judge refused to consider any benefit to the worker provided by his attorney in preserving both compensation benefits and a tort recovery, there was a refusal of a proper factor in the calculation of attorney fees. *Martinez v. Eight N. Indian Pueblo Council, Inc.*, 1997-NMCA-078, 123 N.M. 677, 944 P.2d 906.

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.*, 1978-NMCA-128, 93 N.M. 9, 595 P.2d 1204, cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

Medical and hospital expenses are compensation for purpose of allowing attorney's fees under Subsection D (now E). *Schiller v. Southwest Air Rangers, Inc.*, 1975-NMSC-018, 87 N.M. 476, 535 P.2d 1327.

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.*, 1978-NMCA-128, 93 N.M. 9, 595 P.2d 1204, cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

A trial court is not to base attorney's fees purely upon some percentage of the workman's (worker'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.*, 1985-NMSC-018, 102 N.M. 333, 695 P.2d 483.

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*, 1985-NMSC-020, 102 N.M. 433, 697 P.2d 116.

Findings as to factors in awarding fees. — An award of attorney fees must have evidentiary support. The worker's compensation judge, however, is not required to make a finding of fact on each factor set forth for attorney fees under *Fryar v. Johnsen*, 1979-NMSC-080, 93 N.M. 485, 601 P.2d 718; *Sanchez v. Siemens Transmission Sys.*, 1991-NMCA-028, 112 N.M. 236, 814 P.2d 104, *rev'd on other grounds*, 1991-NMSC-093, 112 N.M. 533, 817 P.2d 726.

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.*, 1985-NMCA-022, 102 N.M. 473, 697 P.2d 156, *citing Fryar v. Johnsen*, 1979-NMSC-080, 93 N.M. 485, 601 P.2d 718.

Fees improperly awarded on basis of future medical needs. — Where the workers' compensation judge improperly considered the value of future surgery in awarding attorney's fee, that component of the fee award was set aside. *Buckingham v. Health S. Rehab. Hosp.*, 1997-NMCA-127, 124 N.M. 419, 952 P.2d 20.

Future medical benefits. — Medical benefits yet to be received constitute future medical benefits, and the value of those benefits may not be considered in determining attorney's fees even though the value of those benefits may be calculated with certainty at present. *Medina v. Hunemuller Constr., Inc.*, 2005-NMCA-123, 138 N.M. 472, 122 P.3d 839.

IV. FEE SHIFTING.

Fee shifting. — The purpose of Section 52-1-54F NMSA 1978 would be undercut by a determination that parties cannot enter into settlements where the maximum medical improvement date is to be determined at a later date due to a worker's continuing healing process. The time and effort expended by an attorney is relevant to the amount of an attorney fee award, not to the fee-shifting scheme in Section 52-1-54F NMSA 1978. *Abeyta v. Bumper To Bumper Auto Salvage*, 2005-NMCA-087, 137 N.M. 800, 115 P.3d 816.

Requirements for a valid offer of judgment. — To force the employer to pay 100% of the attorney fees, an offer of judgment must be a valid offer under 52-1-54(F) NMSA 1978, for an amount less than the award at trial, and an offer which the employer rejected. *Baker v. Endeavor Servs*., 2018-NMSC-035, *rev'g* Nos. 36,142 and 36,272, mem. op. (N.M. Ct. App. Aug. 8, 2017) (non-precedential).

Fee shifting is mandatory if requirements of section are met. — The plain language of the statute is clear and unambiguous and requires attorney fees to be shifted to the rejecting party if the final compensation awarded to the offeror exceeds what was initially offered. *Baker v. Endeavor Servs*., 2018-NMSC-035, *rev'g* Nos. 36,142 and 36,272, mem. op. (N.M. Ct. App. Aug. 8, 2017) (non-precedential).

Valid offer of judgment triggered the fee-shifting provision. — Where worker suffered injuries as a result of a compensable motor vehicle accident, and where there was a dispute as to whether worker reached maximum medical improvement (MMI), and where employer rejected worker's offer of judgment to settle the case, and where, following trial, the worker's compensation judge (WCJ) issued a compensation order that exceeded the amount proposed in worker's offer of judgment, the WCJ erred in declining to order employer to pay 100% of worker's attorney fees, because the language in worker's offer of judgment put employer on notice that the offer was intended to trigger the fee-shifting provision of 52-1-54(F) NMSA 1978, and although MMI was not yet determined and the permanent partial disability benefits and impairment rating remained unknown at the time of worker's offer of judgment, the framework of what worker offered was clear, and employer was well informed as to the scope of its liability. *Baker v. Endeavor Servs*., 2018-NMSC-035, *rev'g* Nos. 36,142 and 36,272, mem. op. (N.M. Ct. App. Aug. 8, 2017) (non-precedential).

Minimum content of an offer that invokes the fee shifting provision. — At a minimum, the documents conveying an offer of settlement must explicitly refer to Section 52-1-54 NMSA 1978 or address each of its material requirements, including the requirement that if the offer is accepted a judgment is to be entered against the employer. *Rivera v. Flint Energy*, 2011-NMCA-119, 268 P.3d 525.

Offers of compensation order did not invoke fee shifting mechanism. — Where the proceedings held on the day scheduled for the trial of worker's workers' compensation claim focused on worker's motion to compel discovery, no opening statements were made, no evidence was presented, no witnesses were sworn in or gave testimony, and the depositions and exhibits that had been submitted to the workers' compensation judge prior to the start of the proceedings were returned to the parties; during the proceeding, the workers' compensation judge stated that the case was not going to trial on that day and that the case had been rescheduled for purposes of trial; and after the proceeding on worker's motion to compel discovery, employer made an offer of compensation, the employer's offer was timely because the trial did not commence on the day originally scheduled for trial but after employer made its offer of compensation. *Ruiz v. Los Lunas Pub. Sch.*, 2013-NMCA-085.

Offer did not invoke the fee shifting provision. — Where the worker sent a letter to the employer proposing the terms of a settlement; the letter did not mention Section 52-1-54 NMSA 1978, state that the offer was valid only for the ten-day period required by the statute, or indicate that the offer was to allow a compensation order to be taken against the employer or to invoke the fee shifting provision of the statute; the employer rejected the offer; and the compensation order awarded the worker benefits in excess of those the worker had proposed in the letter, the letter was not a valid offer that could invoke the fee shifting provision of the statute. *Rivera v. Flint Energy*, 2011-NMCA-119, 268 P.3d 525.

Offer of judgment. — Where worker suffered two injuries, each while working for different employers, worker's offer of judgment that did not specify a dollar amount or a

percentage of liability for which each employer would be responsible had no legal effect because it would not have disposed of the merits of the case. *Leonard v. Payday Prof'l*, 2007-NMCA-128, 142 N.M. 605, 168 P.3d 177.

Compensation order required to determine attorney fees. — Where, after an offer of judgment had been made and rejected, the employer agreed to pay for the worker's surgery, a compensation order is necessary to determine whether to shift attorney fees and the workers' compensation judge cannot dismiss the case as moot and reserve jurisdiction to determine attorney fees. *Baber v. Desert Sun Motors*, 2007-NMCA-098, 142 N.M. 319, 164 P.3d 1018.

Stipulated compensation. — The fee shifting provision of Subsection F of Section 52-1-54 NMSA 1978 applies where pursuant to a stipulated compensation order, worker recovered benefits in excess of an earlier offer of judgment that was rejected by the employer, despite the fact that the award was not the result of a contested hearing. *Hise v. City of Albuqueque*, 2003-NMCA-015, 133 N.M. 133, 61 P.3d 842.

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 Cnty. Sand & Gravel Co.*, 1956-NMSC-004, 60 N.M. 399, 292 P.2d 93.

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.*, 1989-NMCA-023, 108 N.M. 587, 775 P.2d 1304, cert. denied, 108 N.M. 433, 773 P.2d 1240.

No fee shifting for employee's bad faith. — Although this section requires the employer to pay all or a portion of a prevailing employee's attorney's fees, there is no corresponding provision for shifting any portion of a prevailing employer's attorney's fees to the worker; therefore, Subsection I could not be the basis for shifting the employer's attorney's fees to the employee as a sanction for bad faith in pursuing a meritless benefits claim. *Carrillo v. Compusys, Inc.*, 2002-NMCA-099, 132 N.M. 710, 54 P.3d 551.

Fee-shifting mechanism of Subsection F unavailable. — Where employer's offer based on a weekly compensation rate was less than the amount that was determined on appeal worker should receive using the reinstated weekly compensation rate, the fee-shifting mechanism of Subsection F of this section is unavailable to employer. *Medina v. Honemuller*, 2005-NMCA-123, 138 N.M. 472, 122 P.3d 839.

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. Sch. Dist. No. 6*, 1984-NMSC-004, 100 N.M. 625, 674 P.2d 515.

Offer for compensation order. — Subsection F(1) did not apply to require an employer to pay 100% of the worker's attorneys' fee since, even assuming that the employer made an offer for a compensation order, there was no offer that complied with Subsection F(4), and there was no basis for the workers' compensation judge to order a payment regimen different from that contemplated by Subsection J. *Cordova v. Taos Ski Valley, Inc.*, 1996-NMCA-009, 121 N.M. 258, 910 P.2d 334.

The term "amount awarded by the compensation order" in Paragraph F(4) includes all orders that are part of the total resolution of the case, including a bad faith sanction. *Meyers v. W. Auto*, 2002-NMCA-089, 132 N.M. 675, 54 P.3d 79, cert. denied, 132 N.M. 551, 52 P.3d 411.

Attorney fees not allowed unless recovery exceeds amount tendered. — 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.*, 1976-NMCA-122, 89 N.M. 790, 558 P.2d 59.

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.*, 1974-NMCA-063, 86 N.M. 466, 525 P.2d 393.

V. CHANGE OF BENEFITS.

Fees awarded where past benefits placed in jeopardy. — Employer's request for credit for benefits paid in an action to reduce worker's compensation benefits placed all past benefits in jeopardy, thus entitling the court to award attorney's fees to the worker based on these past benefits after the attorney successfully established that the employer was not entitled to credit for them. *Baca v. Highlands Univ.*, 1992-NMSC-010, 113 N.M. 170, 824 P.2d 310.

Because worker's attorney was successful in obtaining for worker more than she would have gotten under employer's original scheme of 21% for 140 weeks, and because employer's litigation stance placed all benefits, even those employer had already paid, in jeopardy, worker was entitled to a fee award for the services of her attorney in obtaining more benefits for worker and for preserving worker's past benefits. *Gomez v. Bernalillo Cnty. Clerk's Office*, 1994-NMCA-102, 118 N.M. 449, 882 P.2d 40.

The attorney's preservation of past benefits from attack by an employer constitutes a quantifiable benefit to a worker and entitles the attorney to a fee award. *County of Bernalillo v. Sisneros*, 1994-NMCA-156, 119 N.M. 98, 888 P.2d 980.

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 (worker) has been aggrieved at the trial court level, and to preserve the right of an injured workman (worker) 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. Schs.*, 1978-NMSC-090, 92 N.M. 287, 587 P.2d 434.

In an appeal, a workman (worker) 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.*, 1981-NMCA-120, 96 N.M. 765, 635 P.2d 320.

VI. REASONABLENESS OF FEES.

Fees greater than amount of compensation awarded. — Attorney's fees in an amount equivalent to 102 percent of the present value of the worker's final award did not place the fee award beyond the discretionary authority of the workers' compensation judge. *Sanchez v. Siemens Transmission Sys.*, 1991-NMSC-093, 112 N.M. 533, 817 P.2d 726.

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*, 1970-NMCA-117, 82 N.M. 140, 477 P.2d 316.

No abuse of discretion. — Where the worker’s counsel secured benefits for the worker in the amount of $86,037; the workers’ compensation judge awarded worker’s attorney $15,00 in attorney fees to be borne fifty-fifty by each side; there were no settlement offers and the award was substantially the result of worker’s attorney’s efforts; the issues, which were complex and novel, involved the determination of the worker’s average weekly wage in a multiple employment situation; and the record showed that the employer used sharp practices, the attorney fee was not unreasonable. *Vinyard v. Palo Alto, Inc.*, 2013-NMCA-001, 293 P.3d 191.

Awarding to plaintiff $1,000 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*, 1973-NMCA-048, 85 N.M. 35, 508 P.2d 1332.

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 $4,250 awarded claimant as attorney's fees, based on 15% of his total

recovery, was an abuse of discretion. *Gallegos v. Duke City Lumber Co.*, 1975-NMCA-039, 87 N.M. 404, 534 P.2d 1116.

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 $2,600 with an additional award to plaintiff of $1,000 for the services of his attorney in representing him in this appeal. *Reed v. Fish Eng'g Corp.*, 1966-NMSC-183, 76 N.M. 760, 418 P.2d 537.

Award of compensation affirmed, and an additional award was given to plaintiff of $1,250 for the services of his attorney in this appeal. *Quintana v. East Las Vegas Mun. Sch. Dist.*, 1971-NMCA-029, 82 N.M. 462, 483 P.2d 936; *Brown v. Safeway Stores, Inc.*, 1970-NMCA-132, 82 N.M. 424, 483 P.2d 305.

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 Corp./Nobel Sysco*, 1989-NMCA-051, 108 N.M. 639, 776 P.2d 1258.

Where it was rational for the workers' compensation judge (WCJ) to decide that "claimant had not established the employer's bad faith, and there was a basis on which the WCJ could find that claimant's counsel's alleged expenditure of time was unreasonable and unnecessary, the amount of fees awarded was not an abuse of discretion. *Sosa v. Empire Roofing Co.*, 1990-NMCA-097, 110 N.M. 614, 798 P.2d 215.

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.*, 1974-NMCA-063, 86 N.M. 466, 525 P.2d 393.

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*, 1967-NMCA-006, 78 N.M. 181, 429 P.2d 379, cert. denied, 78 N.M. 198, 429 P.2d 657; *Davis v. Los Alamos Nat'l Lab.*, 1989-NMCA-023, 108 N.M. 587, 775 P.2d 1304, cert. denied, 108 N.M. 433, 773 P.2d 1240.

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.*, 1960-NMSC-003, 66 N.M. 351, 348 P.2d 271.

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 (now E) rather than Subsection E (now G) of this section. *Turrieta v. Creamland Quality Chekd Dairies, Inc.*, 1966-NMSC-252, 77 N.M. 192, 420 P.2d 776.

Subsection E (now Subsection G) 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 Section 52-1-56 NMSA 1978. *Turrieta v. Creamland Quality Chekd Dairies, Inc.*, 1966-NMSC-252, 77 N.M. 192, 420 P.2d 776.

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 $4,500. *Provencio v. New Jersey Zinc Co.*, 1974-NMCA-048, 86 N.M. 538, 525 P.2d 898, cert. denied, 86 N.M. 528, 525 P.2d 888.

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'g Co.*, 1981-NMCA-011, 95 N.M. 507, 623 P.2d 1021.

Award was not excessive. — Where an award of attorneys fees of $30,000 was equal to 63% of the worker’s benefits award; the case involved complex medical issues requiring the depositions of fourteen attending physicians; all issues were hotly contested, including causation and degree of disability; the present value of the worker’s award was $61, 392; the worker’s attorney expended 395.9 hours on the case; the attorney’s normal hourly rate was $95; no written offers of settlement were made by the employer before or after the informal and formal hearings; prior to either party retaining counsel, the employer offered $50,000 in settlement, but withdrew the offer at the informal hearing, and the worker was partially successful in the worker’s claim. There are sufficient findings to suggest the award of attorney fees. *Fuyat v. Los Alamos Nat. Laboratory*, 1991-NMCA-045, 112 N.M. 102, 811 P.2d 1313.

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.*, 1986-NMCA-016, 105 N.M. 167, 730 P.2d 470, cert. quashed, 105 N.M. 111, 729 P.2d 1365.

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 $1,750. *Seal v. Blackburn Tank Truck Serv.*, 1958-NMSC-087, 64 N.M. 282, 327 P.2d 797.

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. N.M. State Hwy. Dep't*, 1966-NMSC-250, 77 N.M. 185, 420 P.2d 771.

Failure to comply with procedural rules. — The award of attorney's fees for obtaining past-due disability benefits was reversed where the record did not show compliance with rules and procedures in requesting a fee pursuant to Subsection C, or whether this ground was relied upon by the worker's compensation judge. *Buckingham v. Health S. Rehab. Hosp.*, 1997-NMCA-127, 124 N.M. 419, 952 P.2d 20.

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*, 1979-NMSC-080, 93 N.M. 485, 601 P.2d 718.

Increase in disability. — Where a disability has increased in the sense that it will continue to the end of the period for which Section 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.*, 1978-NMCA-047, 91 N.M. 717, 580 P.2d 485.

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).

For note, "Workers' Compensation Law - Bad Faith Refusal of an Insurer To Pay Workers' Compensation Benefits: Russell v. Protective Insurance Company," see 20 N.M.L. Rev. 757 (1990).

For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 457, 459.

Attorney's compensation for services in connection with claim under Workmen's Compensation Act, 159 A.L.R. 912.

Excessiveness or inadequacy of attorney's fees in matters involving commercial and general business activities, 23 A.L.R.5th 241.

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 the worker's employment or thereafter at the request of the employer to submit to examination by a physician or surgeon duly authorized to practice medicine in the state, or by a physician assistant, advanced practice registered nurse or certified nurse-midwife working within that person's scope of practice, who shall be paid by the employer, for the purpose of determining the worker's physical condition.

B. It is also the duty of the worker, if required, to give the names, addresses, relationship and degree of dependency of the worker's dependents, if any, or any subsequent change thereof to the employer, and when the employer or the employer's 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 the employer's insurance carrier, to make a detailed verified statement as part of an application for employment disclosing specifically any preexisting permanent physical impairment.

History: Laws 1929, ch. 113, § 23; C.S. 1929, § 156-123; 1941 Comp., § 57-924; 1953 Comp., § 59-10-24; 1987, ch. 235, § 25; 2015, ch. 116, § 14.

ANNOTATIONS

The 2015 amendment, effective June 19, 2015, amended the Worker’s Compensation Act provision, relating to physical examinations of workers, to include other health care professionals with each reference to "physician"; in Subsection A, after "the time of", deleted "his" and added "the worker’s", after "the employer to submit", deleted "himself", after "medicine in the state", added "or by a physician assistant, advanced practice registered nurse or certified nurse-midwife working within that person’s scope of practice", and after "determining", deleted "his" and added "the worker’s"; in Subsection B, after "degree of dependency of", deleted "his" and added "the worker’s", after "the employer or", deleted "his" and added "the employer’s"; and in Subsection C, after "by the employer or", deleted "his" and added "the employer’s", after "disclosing specifically any", deleted "pre-existing" and added "preexisting", and after "physical impairment", deleted "as that term is defined in Section 52-2-6 NMSA 1978".

Temporary provisions. — Laws 2015, ch. 116, § 16 provided that by January 1, 2016, every cabinet secretary, agency head and head of a political subdivision of the state shall update rules requiring an examination by, a certificate from or a statement of a licensed physician to also accept such examination, certificate or statement from an advanced practice registered nurse, certified nurse-midwife or physician assistant working within that person's scope of practice.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 504 to 506, 595.

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.

ANNOTATIONS

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.

Cross references. — For filing insurance policy or other evidence of coverage in office of director, *see* 52-1-4 NMSA 1978.

I. GENERAL CONSIDERATION.

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*, 1962-NMSC-068, 71 N.M. 422, 379 P.2d 69.

Workmen's (Workers') compensation statutes should be liberally and fairly construed in the workman's (worker'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 (worker), 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.*, 1962-NMSC-051, 70 N.M. 99, 370 P.2d 816.

Dismissal of claim with prejudice contrary to Act's policy. — Dismissal with prejudice of a workman's (worker's) compensation claim, even when the claimant's attorney agreed to dismissal, is contrary to the policy of the Workmen's (Workers') Compensation Act as it deprives the workman (worker) 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.*, 1981-NMCA-037, 96 N.M. 1, 626 P.2d 1303, cert. denied, 96 N.M. 17, 627 P.2d 412.

Act not written with intent that it be penuriously interpreted that a workman (worker) 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*, 1980-NMCA-076, 94 N.M. 587, 613 P.2d 729, cert. denied, 94 N.M. 675, 615 P.2d 992.

Sections provide for continuing jurisdiction over award. — Both Section 52-1-46 NMSA 1978 and this section provide for a continuing jurisdiction of the court over a compensation award. *Clauss v. Electronic City*, 1979-NMCA-066, 93 N.M. 75, 596 P.2d 518.

Under this section, the court is invested with continuing jurisdiction to increase, diminish, or terminate compensation benefits payable to an injured worker based upon

evidence indicating a change in the worker's condition and justifying modification. However, the filing of a motion under this section does not invest the court with jurisdiction to retroactively modify a prior final judgment. *St. Clair v. County of Grant*, 1990-NMCA-087, 110 N.M. 543, 797 P.2d 993.

This act has no extra-territorial effect. *Kandelin v. Lee Moor Contracting Co.*, 1933-NMSC-058, 37 N.M. 479, 24 P.2d 731.

Statute is reimbursement statute and there is but one cause of action. *Herrera v. Springer Corp.*, 1973-NMCA-041, 85 N.M. 6, 508 P.2d 1303, *rev'd on other grounds*, 1973-NMSC-057, 85 N.M. 201, 510 P.2d 1072.

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.*, 1973-NMCA-041, 85 N.M. 6, 508 P.2d 1303, *rev'd on other grounds*, 1973-NMSC-057, 85 N.M. 201, 510 P.2d 1072.

"Claim". — As used in Workmen's (Workers') Compensation Act, the word "claim" is synonymous with "demand"; it means the assertion of liability against another. *Ritter v. Albuquerque Gas & Elec. Co.*, 1943-NMSC-035, 47 N.M. 329, 142 P.2d 919.

Section is unquestionably intended to meet effect of changes which could occur in a workman's (worker'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*, 1980-NMCA-076, 94 N.M. 587, 613 P.2d 729, cert. denied, 94 N.M. 675, 615 P.2d 992.

Accepting lesser amount of compensation not deny appeal. — Under Workmen's (Workers') Compensation Law, a workman (worker) 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 (worker) on the ground that he is receiving benefits under some other local or federal statute. *Snead v. Adams Constr. Co.*, 1963-NMSC-075, 72 N.M. 94, 380 P.2d 836.

Payments as separate not community property. — Payments under this act are based upon degree of disability of injured workman (worker), not loss of earning power, so that such payments are considered the separate property of injured workman (worker) rather than community property for purpose of divorce settlement. *Richards v. Richards*, 1955-NMSC-043, 59 N.M. 308, 283 P.2d 881.

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.*, 1940-NMSC-025, 44 N.M. 289, 101 P.2d 1021.

Ordinary tort law governs tortious acts of medical personnel and employee. — Section 52-1-49 NMSA 1978 coupled with Section 52-1-6 NMSA 1978 and this section clearly demonstrate a legislative intent that ordinary tort law, except as modified by Section 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*, 1975-NMSC-052, 88 N.M. 292, 540 P.2d 222 (decided under prior law).

Right of workman (worker) to recover damages for injuries occasioned by negligence or wrong of a person other than the employer is not affected by the Workmen's (Workers') Compensation Act. *Herrera v. Springer Corp.*, 1973-NMCA-041, 85 N.M. 6, 508 P.2d 1303, *rev'd on other grounds*, 1973-NMSC-057, 85 N.M. 201, 510 P.2d 1072.

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.*, 1943-NMSC-035, 47 N.M. 329, 142 P.2d 919.

II. MODIFICATION OF AWARD.

Modification of benefits award. — A worker may, pursuant to this section, seek an increase in his compensation based on change in condition at any time during the statutory benefits period under Section 52-1-42 NMSA 1978, even if, as a result of receiving partial lump-sum payments for debt pursuant to Section 52-5-12C NMSA 1978, the worker has received the monetary equivalent of the benefits allowed in a compensation order before the benefits period expires. *Souter v. Ancae Heating & Air Conditioning*, 2002-NMCA-078, 132 N.M. 608, 52 P.3d 980.

Modification of determination of maximum medical improvement. — Where worker suffered a back injury in 2003 and underwent a spinal fusion in 2006, the workers' compensation judge determined that worker had reached maximum medical improvement in 2006 and awarded worker a lump sum payment of permanent partial disability benefits; in 2007, worker's physician discovered that worker had a new injury that related to the original injury; worker underwent surgery in 2010, and in a 2010 compensation order, the workers' compensation judge concluded that worker was not at maximum medical improvement as of 2007 and awarded worker temporary total disability benefits, the workers' compensation judge had authority to modify the maximum medial improvement determination upon a change of condition if worker's

injury became aggravated or worsened to an extent that worker was no longer at maximum medical improvement and the previous finding of maximum medical improvement and payment of lump sum benefits did not preclude the workers' compensation judge from concluding that worker was not at maximum medical improvement in 2007. *Fowler v. Vista Car*e, 2013-NMCA-036, 298 P.3d 491, *rev'd*, 2014-NMSC-019.

Construction with Section 52-1-26.3 NMSA 1978. — The term "disability," as used in this section for purposes of modification of a compensation order, refers to a worker's physical condition and does not include the education modifier used pursuant to 52-1-26.3 NMSA 1978 to determine disability rating. *Herrera v. Quality Imports*, 1999-NMCA-140, 128 N.M. 300, 992 P.2d 313.

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.*, 1984-NMCA-097, 101 N.M. 773, 689 P.2d 289.

The interest in encouraging voluntary payments mandates that some form of credit be permitted for overpayments resulting from such voluntary payments. An employer will not necessarily be entitled to the full amount of a credit, if allowing the full credit would require repayment by a worker of overpaid amounts. *Apex Lines v. Lopez*, 1991-NMCA-023, 112 N.M. 309, 815 P.2d 162.

Increase of "disability" required. — Under the provisions of this section, an increase or aggravation of "disability" is required. *Holliday v. Talk of Town, Inc.*, 1982-NMCA-103, 98 N.M. 354, 648 P.2d 812.

Physical impairment does not automatically equate with disability. *Tafoya v. Leonard Tire Co.*, 1980-NMCA-106, 94 N.M. 716, 616 P.2d 429.

Nondisabling pain is not compensable. *Tafoya v. Leonard Tire Co.*, 1980-NMCA-106, 94 N.M. 716, 616 P.2d 429.

Termination for failure to appear for deposition held reversible error. — Termination of an employee's workmen's (workers') 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.*, 1986-NMCA-110, 105 N.M. 105, 729 P.2d 503.

Provision for reexamination of a workman (worker), when first enacted, provided for relief for the employer only when an injured workman's (worker's) condition had improved or his disability had terminated. It was later amended to put the workman (worker) 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*, 1958-NMSC-101, 64 N.M. 413, 329 P.2d 432.

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 (workers') 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.*, 1975-NMCA-082, 88 N.M. 157, 538 P.2d 799, cert. denied, 88 N.M. 318, 540 P.2d 248.

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.*, 1976-NMCA-044, 89 N.M. 213, 549 P.2d 628.

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.*, 1976-NMCA-044, 89 N.M. 213, 549 P.2d 628.

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.*, 1976-NMCA-044, 89 N.M. 213, 549 P.2d 628.

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.*, 1976-NMCA-044, 89 N.M. 213, 549 P.2d 628.

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.*, 1976-NMCA-044, 89 N.M. 213, 549 P.2d 628.

Reopening lump-sum judgment. — A lump-sum judgment, fully paid and satisfied, is conclusive under the Workmen's (Workers') Compensation Act, and absent stipulation to the contrary may not be reopened under a claim of aggravation or increase in disability of the workman (worker). *Durham v. Gulf Interstate Eng'g Co.*, 1964-NMSC-130, 74 N.M. 277, 393 P.2d 15.

Judgment payable in installments is not final until the full statutory period has elapsed. *Durham v. Gulf Interstate Eng'g Co.*, 1964-NMSC-130, 74 N.M. 277, 393 P.2d 15.

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*, 1959-NMSC-101, 66 N.M. 325, 347 P.2d 752 (decided under prior law).

Admission of liability established right to compensation. — This section and Section 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.*, 1975-NMCA-082, 88 N.M. 157, 538 P.2d 799, cert. denied, 88 N.M. 318, 540 P.2d 248.

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*, 1964-NMSC-094, 74 N.M. 254, 392 P.2d 668, *overruled on other grounds by Montoya v. AKAL Sec., Inc.*, 1992-NMSC-056, 114 N.M. 354, 838 P.2d 971.

Discretion to reduce compensation where workman (worker) refuses treatment. — Where workman (worker) 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 (worker'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 (worker) 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 (Workers') Compensation Act. *Evans v. Stearns-Roger Mfg. Co.*, 253 F.2d 383 (10th Cir. 1958).

III. HEARING.

A worker has a right to reopen his claim when there is a showing that his disability has increased and that the increase in disability is causally related to his initial compensable injury. An increase in physical impairment, however, will not automatically result in an increase in the worker's disability. *Jaramillo v. Consolidated Freightways*, 1990-NMCA-008, 109 N.M. 712, 790 P.2d 509, cert. denied, 109 N.M. 704, 789 P.2d 1271.

Judgment for compensation in workman's (worker'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*, 1980-NMCA-076, 94 N.M. 587, 613 P.2d 729, cert. denied, 94 N.M. 675, 615 P.2d 992.

Jurisdiction to reopen award. — Under Workmen's (Workers') 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.*, 1947-NMSC-049, 51 N.M. 441, 188 P.2d 160.

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 Cnty. Comm'rs*, 1954-NMSC-088, 58 N.M. 626, 274 P.2d 145 (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*, 1978-NMSC-059, 92 N.M. 57, 582 P.2d 1270.

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 (worker) 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.*, 1978-NMCA-100, 92 N.M. 204, 585 P.2d 649.

Section applies to agreements. — Agreements to pay medical and compensation benefits to the worker were compensation orders within the meaning of this section, even if they had not been reduced to writing and approved by the workers' compensation judge. *Henington v. Technical-Vocational Inst.*, 2002-NMCA-025, 131 N.M. 655, 41 P.3d 923, cert. denied, 131 N.M. 737, 42 P.3d 842.

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 Res. Co.*, 1977-NMCA-067, 90 N.M. 590, 566 P.2d 838.

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.*, 1937-NMSC-038, 41 N.M. 421, 70 P.2d 150.

Application 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.*, 1937-NMSC-038, 41 N.M. 421, 70 P.2d 150.

Application not affected 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.*, 1937-NMSC-038, 41 N.M. 421, 70 P.2d 150.

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*, 1958-NMSC-101, 64 N.M. 413, 329 P.2d 432.

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.*, 1969-NMCA-012, 80 N.M. 59, 451 P.2d 308.

Employer bears burden to establish diminution or termination of disability. — Pursuant to this section, once a workman (worker) 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 (worker's) disability has diminished or terminated. *Amos v. Gilbert W. Corp.*, 1985-NMCA-106, 103 N.M. 631, 711 P.2d 908.

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*, 1962-NMSC-007, 69 N.M. 417, 367 P.2d 916.

Court may extend compensation time. — In the case of a change in the workman's (worker'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.*, 1969-NMCA-012, 80 N.M. 59, 451 P.2d 308.

Motion for increased compensation. — Judgment entered after trial in workmen's (workers') 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.*, 1975-NMCA-068, 88 N.M. 95, 537 P.2d 703, cert. denied, 88 N.M. 318, 540 P.2d 248.

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*, 1958-NMSC-101, 64 N.M. 413, 329 P.2d 432.

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 (worker) 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.*, 1958-NMSC-119, 65 N.M. 21, 331 P.2d 523.

Not error to reduce benefits where workman (worker) 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*, 1966-NMSC-197, 76 N.M. 753, 418 P.2d 533.

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 (Workers') Compensation Law. *Goolsby v. Pucci Distrib. Co.*, 1969-NMCA-012, 80 N.M. 59, 451 P.2d 308.

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*, 1951-NMSC-078, 55 N.M. 579, 237 P.2d 923.

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.*, 1981-NMCA-150, 97 N.M. 249, 638 P.2d 1094, cert. denied, 98 N.M. 50, 644 P.2d 1039 (1982).

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 (worker'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.*, 1985-NMSC-089, 103 N.M. 400, 708 P.2d 312.

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 Workers' Compensation §§ 446 to 463, 507 to 516, 651.

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.

Workers' compensation: reopening lump-sum compensation payment, 26 A.L.R.5th 127.

101 C.J.S. Workmen's Compensation §§ 849 to 912.

52-1-57. Repealed.

ANNOTATIONS

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.

52-1-58. Reports to be filed with director.

A. It is the duty of every employer of labor in this state subject to the provisions of the Workers' Compensation Act or the employer's workers' compensation insurance carrier to make a written report to the director of all accidental injuries or occupational diseases that occur to any of his employees during the course of their employment and that result in lost time of an employee of more than seven days. A copy of the report shall be sent by the employer to the worker. Such reports shall be made within ten days after such accidental injury or ten days after notification to the employer of employee disability, upon forms approved by the director and shall contain such information concerning the accident or injury as may be required by the director.

B. 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; 1990 (2nd S.S.), ch. 2, § 24.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, divided the preexisting language into Subsections A and B and, in Subsection A, substituted "or occupational diseases that" for "which may" and "that" for "which", added the second sentence, and inserted "or ten days after notification to the employer of employee disability".

Meaning of lost time of more than seven days. — The phrase "result in lost time of an employee of more than seven days" in Subsection A of Section 52-1-58 NMSA 1978 means the employee is unable to work anywhere for more than seven days, regardless of whether the employee actually still works for the employer. *Nelson v. Homier Distrib. Co., Inc.*, 2009-NMCA-125, 147 N.M. 318, 222 P.3d 690.

Where an employee's injury would prevent the employee working for more than seven days following an injury, an employer must file a report. *Nelson v. Homier Distrib. Co.*, Inc., 2009-NMCA-125, 147 N.M. 318, 222 P.3d 690.

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 (Section 52-1-31 NMSA 1978) was tolled by the employer's subsequent failure to file a report of the accident. Cisneros v. Molycorp, Inc., 1988-NMCA-080, 107 N.M. 788, 765 P.2d 761, cert. denied, 107 N.M. 785, 765 P.2d 758 (decided under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation § 608.

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, 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.

ANNOTATIONS

Employer's failure to file injury report. — Where employer employed worker for one day; worker's injuries were severe enough that if employment had lasted longer than one day, worker would have lost more than seven days of work; employer did not file an injury report required by Section 52-1-58(A) NMSA 1978; employer denied workers' compensation benefits to worker; and worker filed a claim for workers' compensation with the workers' compensation administration nineteen months after employer denied worker's claim for benefits, worker's claim was not barred by statute of limitations. *Nelson v. Homier Distrib. Co., Inc.*, 2009-NMCA-125, 147 N.M. 318, 222 P.3d 690.

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*, 1969-NMSC-025, 80 N.M. 54, 451 P.2d 303.

Workman (Worker) cannot avoid limitations because employer failed to file report. — A workman (worker) 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 (now director of the labor and industrial division) a report concerning a compensable injury where the employer had no reason to believe that a compensable injury had occurred. *Sanchez v. Bernalillo Cnty.*, 1953-NMSC-038, 57 N.M. 217, 257 P.2d 909.

Claim for death benefits in the case of a hospital nurse who died of a heart attack was not time barred, where the hospital had actual notice of the compensable injury, yet failed to file a written report as required. *Herman v. Miners' Hosp.*, 1991-NMSC-021, 111 N.M. 550, 807 P.2d 734.

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. Every employer's workers' compensation insurance carrier shall notify the director of the date on which the initial payment of any claim for benefits has been made within ten days of such payment.

B. The director shall provide on a quarterly basis to the child support enforcement division of the human services department [health care authority department] the name, social security number, home address and employer of all injured workers reported.

C. A court order filed by the child support enforcement division of the human services department [health care authority department] in the claim of the workers' compensation administration stating that the claimant owes past due or ongoing support shall constitute a notice that lump sum and partial-lump sum payment of benefits to a claimant are barred contingent on satisfaction of the child support arrearage. No order approving a lump sum or partial-lump sum payment to a claimant pursuant to Section 52-5-12 NMSA 1978 shall be executed or entered until:

(1) the arrearage has been satisfied;

(2) provision has been made in the order for lump sum or partial-lump sum settlement for direct payment of sufficient funds to the child support enforcement division to satisfy the arrearage; or

(3) the workers' compensation judge makes a specific written finding of extreme hardship to the worker excusing the satisfaction of the arrearages from those funds.

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; 1990 (2nd S.S.), ch. 2, § 25; 1993, ch. 202, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

The 1993 amendment, effective June 18, 1993, made stylistic changes in Subsection A, substituted "division" for "bureau" in Subsection B, and added Subsection C.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, deleted "also" following "is" and substituted "benefits" for "compensation" in Subsection A and deleted "promptly thereafter" following "shall" and inserted "on a quarterly basis" in Subsection B.

52-1-61. Penalties.

The director shall impose a penalty on any person who fails to file a report required by, or who violates any provision of, the Workers' Compensation Act or any rule or regulation adopted pursuant to that act. Unless specified otherwise in the Workers' Compensation Act, the penalty shall be a fine of not less than twenty-five dollars ($25.00) and not more than one thousand dollars ($1,000) for each occurrence, subject to the director's discretion.

History: 1978 Comp., § 52-1-61, enacted by Laws 1990 (2nd S.S.), ch. 2, § 26.

ANNOTATIONS

Repeals and reenactments. — Laws 1990 (2nd S.S.), ch. 2, § 26 repealed former 52-1-61 NMSA 1978, as amended by Laws 1989, ch. 263, § 37 and enacted a new section, effective January 1, 1991.

52-1-62. Director to enforce Workers' Compensation Act.

For the purpose of enforcing the Workers' Compensation Act, 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.

ANNOTATIONS

Failure to comply subjects employer to injunction. — Failure to comply with Section 52-1-4 NMSA 1978 subjects the employer to an injunction from continuing his business operations until he has complied. *Quintana v. Nolan Bros.*, 1969-NMCA-083, 80 N.M. 589, 458 P.2d 841.

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 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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Construction of section. — The exemption of this section applies to the educational institution, not to student workers. *Bajart v. University of N.M.*, 1999-NMCA-064, 127 N.M. 311, 980 P.2d 94.

The exemption of this section is in the nature of a privilege to claim immunity from the obligations and benefits of the Workers' Compensation Act, and it does not operate to exclude those institutions that wish to be covered by the act. *Bajart v. University of N.M.*, 1999-NMCA-064, 127 N.M. 311, 980 P.2d 94.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation § 126.

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 the employee or, in the event of the employee's death, the employee's dependents would have been entitled to the benefits provided by the Workers' Compensation Act, had such injury occurred within this state, the employee or, in the event of the employee's death resulting from the injury, the employee's dependents shall be entitled to the benefits provided by that act; provided that at the time of the injury:

A. the employee's employment is principally localized in this state;

B. the employee is working under a contract of hire made in this state in employment not principally localized in any state;

C. the employee 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 the employee's employer;

D. the employee is working under a contract of hire made in this state for employment outside the United States and Canada; or

E. the employee is an unpaid health professional deployed outside this state by the department of health in response to a request for emergency health personnel made pursuant to the Emergency Management Assistance Compact [12-10-14, 12-10-15 NMSA 1978].

History: 1953 Comp., § 59-10-33.1, enacted by Laws 1975, ch. 241, § 1; 1989, ch. 263, § 40; 2007, ch. 328, § 2.

ANNOTATIONS

Repeals and reenactments. — Laws 1975, ch. 241, § 1, repealed 59-10-33.1, 1953 Comp., relating to extraterritorial coverage, and enacted a new section.

The 2007 amendment, effective June 15, 2007, added Subsection E.

Requirement that worker submit to drug and safety testing was a condition subsequent. — Where employer's rig master called worker and offered worker a job on a drilling rig in Pennsylvania; the rig master called worker from the rig master's home in New Mexico; the call was made to worker's home in New Mexico; employer had an office in New Mexico; the rig master traveled to worker's home to complete employment paperwork, including a job application and a safety application; after the meeting in worker's home and after worker had accepted the offer of employment, the rig master told the worker that the worker was hired; the rig master and worker drove together to Pennsylvania; worker understood that upon arrival in Pennsylvania, worker would have to take a drug test and complete additional paperwork before working; and after worker passed the drug screen and completed additional written safety tests, worker began work, the contract for employment was made in New Mexico and the requirement that worker submit to drug and safety testing upon arrival in Pennsylvania was a condition subsequent that did not affect the formation of the underlying employment contract in New Mexico. *Potter v. Patterson UTI Drilling Co.*, 2010-NMCA-042, 148 N.M. 270, 234 P.3d 104.

This section is not ambiguous. New Mexico can provide extraterritorial coverage only if the employment is "localized" here or the "contract for hire" was formed in the state. *Orcutt v. S & L Paint Contractors*, 1990-NMCA-036, 109 N.M. 796, 791 P.2d 71.

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.*, 1954-NMSC-054, 58 N.M. 349, 270 P.2d 983 (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.*, 1954-NMSC-054, 58 N.M. 349, 270 P.2d 983 (decided under prior law).

No formality is required to accomplish effective hiring. Words or conduct may be sufficient. *Roan v. D.W. Falls, Inc.*, 1963-NMSC-154, 72 N.M. 464, 384 P.2d 896 (decided under prior law).

Worker did not meet the "contract of hire" requirements under this section, where she admitted that no offer of employment was made by employer directly to her while she was in New Mexico, nor did she accept any offer of employment while in New Mexico, and worker first knew of her opportunity to work for employer after she arrived in Nevada, where she accepted an offer. *Orcutt v. S & L Paint Contractors*, 1990-NMCA-036, 109 N.M. 796, 791 P.2d 71.

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.*, 1963-NMSC-154, 72 N.M. 464, 384 P.2d 896 (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.*, 1953-NMSC-017, 57 N.M. 93, 254 P.2d 1059 (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.*, 1954-NMSC-054, 58 N.M. 349, 270 P.2d 983 (decided under prior law).

"Principally localized" under Section 52-1-67A(2) NMSA 1978. — A New Mexico resident injured at an Arizona construction site while working for a Colorado contractor was entitled to recovery by virtue of the fact that he was spending a substantial part of his working time for the contractor in New Mexico, since he had been working for the contractor in Arizona barely a month before the accident, and before starting work on the two Arizona jobs the claimant had worked for the contractor in New Mexico for more than a year with minimal interruption. *Todacheene v. G & S Masonry*, 1993-NMCA-126, 116 N.M. 478, 863 P.2d 1099, cert. denied *sub nom. Todacheene v. Travelers Indem.*, 116 N.M. 364, 862 P.2d 1223.

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.*, 1953-NMSC-017, 57 N.M. 93, 254 P.2d 1059 (decided under prior law).

Nevada agency's findings properly denied full faith and credit. — Trial court did not err in failing to give full faith and credit to certain "findings and conclusions" of a workers' compensation agency in Nevada concerning the place of hire, or in failing to conclude that employer was estopped from denying coverage by representing to worker and a Nevada hospital after the injury that employer would provide coverage for medical expenses incurred for treatment. *Orcutt v. S & L Paint Contractors*, 1990-NMCA-036, 109 N.M. 796, 791 P.2d 71.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

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 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.

ANNOTATIONS

Tests for compensation award in one state as bar to award in another. — Whether the payment of benefits under a workmen's (workers') 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.*, 1963-NMSC-214, 73 N.M. 261, 387 P.2d 462 (decided under prior law).

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 (workers') compensation cases. *Webb v. Arizona Pub. Serv. Co.*, 1981-NMCA-007, 95 N.M. 603, 624 P.2d 545.

Benefits neither barred nor offset by receipt of federal benefits. — Workmen's (Workers') compensation benefits awarded under the New Mexico Workmen's (Workers') Compensation Act are not barred or even offset by the receipt of any federal benefits. *Clemmer v. Carpenter*, 1982-NMCA-098, 98 N.M. 302, 648 P.2d 341, cert. denied, 98 N.M. 336, 648 P.2d 794.

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, 1983-NMCA-043, 100 N.M. 15, 665 P.2d 277, cert. denied, 100 N.M. 53, 665 P.2d 809.

Effect of award under another state's statute. — An award made under the workmen's (workers') 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.*, 1981-NMCA-007, 95 N.M. 603, 624 P.2d 545.

A worker is not precluded from receiving New Mexico compensation benefits merely because that worker has also received compensation benefits in another state. *Cawyer v. Cont'l Express Trucking*, 1997-NMCA-008, 122 N.M. 819, 932 P.2d 509.

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 (Workers') Compensation Law. *Chapman v. John St. John Drilling Co.*, 1963-NMSC-214, 73 N.M. 261, 387 P.2d 462 (decided under prior law).

An appeal from judgment prevents its operation as res judicata. *Chapman v. John St. John Drilling Co.*, 1963-NMSC-214, 73 N.M. 261, 387 P.2d 462 (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 (workers') compensation law on the ability of a different state to award supplemental benefits under its own workmen's (workers') 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.*, 1963-NMSC-214, 73 N.M. 261, 387 P.2d 462 (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.*, 1954-NMSC-054, 58 N.M. 349, 270 P.2d 983 (decided under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 416, 417.

52-1-66. Nonresident employers employing workers in state; requirement for insurance; enforcement.

A. Every employer not domiciled in the state who employs workers engaged in activities required to be licensed under the Construction Industries Licensing Act [Chapter 60, Article 13 NMSA 1978] and every other employer not domiciled in the state who 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 workers' 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 enjoined from doing business in the state pursuant to Section 52-1-62 NMSA 1978 and 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, the employer's license is subject to revocation or suspension for the violation.

B. The construction industries division of the regulation and licensing department shall promulgate rules and regulations to insure compliance with Subsection A of this section.

History: 1978 Comp., § 52-1-66, enacted by Laws 1988, ch. 119, § 1; 1990 (2nd S.S.), ch. 2, § 27; 2003, ch. 259, § 6.

ANNOTATIONS

Repeals and reenactments. — Laws 1988, ch. 119, § 1 repealed 52-1-66 NMSA 1978, as amended by Laws 1986, ch. 22, § 25, and enacted a new section, effective May 18, 1988.

The 2003 amendment, effective June 20, 2003, inserted "enjoined from doing business in the state pursuant to Section 52-1-62 NMSA 1978 and shall be" following "requirement shall be" near the middle of Subsection A.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, in Subsection A, substituted "who employs workers engaged in activities required to be licensed under the Construction Industries Licensing Act and every other employer not domiciled in the state who employs" for "that employs", inserted "Licensing" near the end, and deleted "then" preceding "the employer's license" near the end; and rewrote Subsection B.

No exemption from liability under the act. — This section does not exempt nondomiciled employers employing fewer than three workers in N.M. from liability under the act. Rather, it relieves certain nondomiciled employers from the administrative

burden of obtaining a separate workers' compensation insurance policy that complies with New Mexico requirements in the filing documentation with New Mexico workers compensation administration under Section 52-1-4A NMSA 1978. *Hammonds v. Freymiller Trucking, Inc.*, 1993-NMCA-030, 115 N.M. 364, 851 P.2d 486.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 32 to 38.

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.

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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Enforcement of agreement on choice of law. — Subsection B allows an explicit agreement concerning choice of law and such agreement may be enforceable without an explicit agreement about where employment is "principally localized." *Cawyer v. Continental Express Trucking*, 1997-NMCA-008, 122 N.M. 819, 932 P.2d 509.

Subsection B requires that the state of choice in an agreement must be one in which the worker travels regularly, and the totality of the circumstances of employment in the context of the business involved must be considered in deciding whether a worker was required to travel regularly in a particular state. *Cawyer v. Continental Express Trucking*, 1997-NMCA-008, 122 N.M. 819, 932 P.2d 509.

Substantial working time in New Mexico. — New Mexico resident injured at an Arizona construction site while working for a Colorado contractor was entitled to recovery by virtue of the fact that he was spending a substantial part of his working time for the contractor in New Mexico, since he had been working for the contractor in Arizona barely a month before the accident, and before starting work on the two Arizona jobs the claimant had worked for the contractor in New Mexico for more than a year with minimal interruption. *Todacheene v. G & S Masonry*, 1993-NMCA-126, 116 N.M. 478, 863 P.2d 1099, cert. denied *sub nom. Todacheene v. Travelers Indem.*, 116 N.M. 364, 862 P.2d 1223.

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.*, 1963-NMSC-154, 72 N.M. 464, 384 P.2d 896 (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 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.

52-1-69. Repealed.

ANNOTATIONS

Repeals. — Laws 1986, ch. 22, § 102 repealed 52-1-69 NMSA 1978, as enacted by Laws 1959, ch. 67, § 29, relating to limitation on filing claims, effective May 21, 1986. 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 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.

ARTICLE 2
Subsequent Injuries (Repealed, Recompiled.)

52-2-1 to 52-2-3. Repealed.

ANNOTATIONS

Repeals. — Laws 1996 (1st S.S.), ch. 10, § 5 repealed 52-2-1 NMSA 1978, as enacted by Laws 1961, ch. 134, § 1, the short title section for the Subsequent Injury Act, effective July 1, 1999. For provisions of former section, *see* the 1998 NMSA 1978 on *NMOneSource.com*.

Laws 1996 (1st S.S.), ch. 10, § 4 repealed 52-2-2 and 52-2-3 NMSA 1978, as amended by Laws 1989, ch. 263, §§ 44 and 45, relating to policy, legislative intent and definitions, effective March 29, 1996. For provisions of former sections, *see* the 1995 NMSA 1978 on *NMOneSource.com*.

52-2-3.1. Recompiled.

ANNOTATIONS

Recompilations. — Section 52-2-3.1 NMSA 1978, relating to definitions of "director" and "hearing officer", was recompiled as 52-1-1.1 NMSA 1978.

52-2-4 to 52-2-14. Repealed.

ANNOTATIONS

Repeals. — Laws 1996 (1st S.S.), ch. 10, § 5 repealed 52-2-4 and 52-2-5 NMSA 1978, as enacted by Laws 1961, ch. 134, §§ 4 and 5, respectively, relating to the subsequent injury fund, effective July 1, 1999. For provisions of former sections, *see* the 1998 NMSA 1978 on *NMOneSource.com*.

Laws 1996 (1st S.S.), ch. 10, § 4 repealed 52-2-6 to 52-2-9 NMSA 1978, as enacted by Laws 1975, ch. 298, § 2 and Laws 1961, ch. 134, §§ 6, 7 and 9, respectively, relating to certificates of pre-existing permanent physical impairments, restrictions on lump sum payments, collection of money due fund, and compensable injuries, effective March 29, 1996. For provisions of former sections, *see* the 1995 NMSA 1978 on *NMOneSource.com*.

Laws 1986, ch. 22, § 102 repealed 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.

Laws 1996 (1st S.S.), ch. 10, § 4 repealed 52-2-11 and 52-2-12 NMSA 1978, as enacted by Laws 1961, ch. 134, §§ 11 and 12, respectively, relating to liability for payment and awards, effective March 29, 1996. For provisions of former sections, *see* the 1995 NMSA 1978 on *NMOneSource.com*.

Laws 1988, ch. 109, § 8 repealed 52-2-13 NMSA 1978, as enacted by Laws 1961, ch. 134, § 13, relating to determination of rights, effective March 8, 1988.

Laws 1996 (1st S.S.), ch. 10, § 4 repealed 52-2-14 NMSA 1978, as enacted by Laws 1988, ch. 109, § 7, relating to the employer's statute of limitations and notice, effective March 29, 1996. For provisions of former sections, *see* the 1995 NMSA 1978 on *NMOneSource.com*.

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.

ANNOTATIONS

Compiler’s notes. — 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, 52-3-32, 52-3-34 to 52-3-41, 52-3-43 to 52-3-46, 52-3-48 to 52-3-54 NMSA 1978.

Cross references. — For Occupational Health and Safety Act not to supersede or affect this act, *see* 50-9-21 NMSA 1978.

Liberal construction applies to law. — Liberal construction under the Workmen's (Workers') Compensation Act applies only to the law and not to the facts. *Ojinaga v. Dressman*, 1972-NMCA-017, 83 N.M. 508, 494 P.2d 170.

Calculation for total disablement. — In calculating a worker’s disability benefits for total disablement, the date of disablement shall be used in determining the worker’s compensation rate, not the date of last employment or the date of last injurious exposure to the hazards of the employment. *Di Luzio v. City of Santa Fe*, 2015-NMCA-042.

Where worker was employed as a firefighter for the city of Santa Fe for twenty-one years and was diagnosed with mantle cell non-Hodgkin’s lymphoma twelve years after his service as a firefighter, the worker’s compensation judge erred in using the date of worker’s last employment as a firefighter to calculate disability benefits, and not the date of the occurrence of the disablement as required by this section. *Di Luzio v. City of Santa Fe*, 2015-NMCA-042.

Application of rules of procedure. — Language in Section 52-3-18 NMSA 1978 is comparable to Section 52-1-34 NMSA 1978 of the present Workmen's (Workers') 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*, 1965-NMSC-029, 75 N.M. 52, 400 P.2d 471 (decided under former law).

Rule for leave to amend applicable. — Rule 15(a), N.M.R. Civ. P., (now Rule 1-015 A NMRA) 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*, 1965-NMSC-029, 75 N.M. 52, 400 P.2d 471.

Applicability of estoppel doctrine in Occupational Disease Disablement Law. — Even though the Workmen's (Workers') Compensation Act does not specifically provide for equitable defenses, nevertheless, the appellate court has considered equitable claims and defenses in workmen's (workers') 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.*, 1979-NMCA-088, 93 N.M. 192, 598 P.2d 654.

Disease must be peculiar to worker's occupation. — In order for the Occupational Disease Disablement Law to apply, it must be established that the disease is peculiar to

the worker's occupation and not merely to his workplace. *Rader v. Don J. Cummings Co.*, 1989-NMCA-079, 109 N.M. 219, 784 P.2d 38, cert. denied, 109 N.M. 131, 782 P.2d 384.

Unusual hazard must be shown. — In order for there to be an occupational disease, in addition to the requirement that it be peculiar to claimant's occupation, the conditions must attach to that occupation a hazard that distinguishes it from the usual run of occupations and is in excess of the hazards attending employment in general. *Rader v. Don J. Cummings Co.*, 1989-NMCA-079, 109 N.M. 219, 784 P.2d 38, cert. denied, 109 N.M. 131, 782 P.2d 384.

Standard for admitting expert testimony established by *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as adopted in *New Mexico by State v. Alberico*, 1993-NMSC-047, 116 N.M. 156, 861 P.2d 192, does not apply to the testimony of a health care provider pursuant to 52-1-28(B) or 52-3-32 NMSA 1978. *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014.

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).

Reinstatement of act. — The decision in *State ex rel. Hovey Concrete Prods. Co. v. Mechem*, 1957-NMSC-075, 63 N.M. 250, 316 P.2d 1069 in effect reinstated the Occupational Disease Disablement Act. 1959 Op. Att'y Gen. No. 59-125.

Law reviews. — 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 Workers' Compensation Law, see 20 N.M.L. Rev. 459 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d, Workers' Compensation §§ 326, 327.

30 C.J.S. Employers' Liability §§ 4 to 11; 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.

ANNOTATIONS

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 Op. Att'y Gen. No. 45-4778.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Employment Relationship §§ 241, 265.

52-3-3. Definitions; employee and lessee in mines.

The term "employee" or "worker" as used in the New Mexico Occupational Disease Disablement Law means:

A. every person in the service of the state and of a county, municipality or school district, including the regular members of lawfully constituted police and fire departments of municipalities;

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 in 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 that 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; 1990 (2nd S.S.), ch. 2, § 33.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, inserted "or worker" in the introductory undesignated paragraph; substituted "municipality" for "city, town, municipal corporation" and "municipalities" for "cities and towns" in Subsection A; substituted "52-3-2 NMSA 1978" for "59-11-2 NMSA 1953" in Subsection B; and substituted "that" for "which" in Subsection C.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53A Am. Jur. 2d Mines and Minerals §§ 255, 256, 257.

52-3-3.1. Recompiled.

ANNOTATIONS

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.

ANNOTATIONS

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.

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.

Cross references. — For the definitions of "director" and "hearing officer", *see* 52-1-1.1 NMSA 1978.

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*, 1976-NMCA-105, 89 N.M. 704, 556 P.2d 1180, cert. denied, 90 N.M. 7, 558 P.2d 619.

"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 (worker) was engaged. *Salazar v. Kaiser Steel Corp.*, 1973-NMCA-068, 85 N.M. 254, 511 P.2d 580, cert. denied, 85 N.M. 229, 511 P.2d 555 (decided under prior law).

Construed in pari materia. — The provisions in Sections 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 Section 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*, 1976-NMCA-105, 89 N.M. 704, 556 P.2d 1180, cert. denied, 90 N.M. 7, 558 P.2d 619 (decided under prior law).

Workman (Worker) able to perform other work. — 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*, 1976-NMCA-105, 89 N.M. 704, 556 P.2d 1180, cert. denied, 90 N.M. 7, 558 P.2d 619 (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*, 1965-NMSC-029, 75 N.M. 52, 400 P.2d 471 (decided under prior law).

Under prior law, to be totally disabled, a worker had to prove that he or she was completely unable to perform the tasks comprising the work performed at the time of injury and also was unable to perform any work for which he or she was fitted, based upon his or her age, education, and experience. Under present law, the inquiry is limited to whether the worker is totally unable to perform any work in the occupation in which the worker was engaged. Thus, in determining whether a worker is totally incapacitated, other occupations for which the worker might be fitted are not considered. *Bryant v. Lear Siegler Mgmt. Servs. Corp.*, 1993-NMCA-052, 115 N.M. 502, 853 P.2d 753, cert. denied, 115 N.M. 535, 854 P.2d 362.

Work after finding of disability. — A workman (worker) 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.*, 1973-NMCA-068, 85 N.M. 254, 511 P.2d 580, cert. denied, 85 N.M. 229, 511 P.2d 555 (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 (workers') compensation law, to suffer an entire loss of wage earning ability does not mean that a workman (worker) must be in a state of absolute helplessness, or unable to do work of any kind. *Salazar v. Kaiser Steel Corp.*, 1973-NMCA-068, 85 N.M. 254, 511 P.2d 580, cert. denied, 85 N.M. 229, 511 P.2d 555 (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.*, 1976-NMCA-045, 89 N.M. 245, 550 P.2d 144, cert. denied, 89 N.M. 321, 551 P.2d 1368.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 380 to 386.

30 C.J.S. Employers' Liability §§ 35 to 37; 99 C.J.S. Workmen's Compensation §§ 299 to 305.

52-3-5. Acceptance.

A. All employers of employees, subject to the provisions of the New Mexico Occupational Disease Disablement Law, 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 an employer of private domestic servants or of an employer of ranching or agricultural laborers or of a person for 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; 1990 (2nd S.S.), ch. 2, § 34.

ANNOTATIONS

Cross references. — For when right to compensation exclusive, *see* 52-3-8 NMSA 1978.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, rewrote Subsection A and, in Subsection B, substituted "an employer" for "employers" twice and inserted "for" following "person".

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.

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.

ANNOTATIONS

Compiler's notes. — For the meaning of "this act", *see* 52-3-1 NMSA 1978 and the compiler's 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 NMRA.

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.

ANNOTATIONS

Compiler's notes. — For the meaning of "this act", *see* 52-3-1 NMSA 1978 and the compiler's notes thereto.

Disease contracted from pigeons roosting in warehouse. — Where worker was injured and died from psittacosis which worker contracted from exposure to pigeons and pigeon feces in the warehouse where worker was employed as a laborer, while worker was performing the duties that were assigned to worker by the employer during work hours; and there was no evidence that pigeons or psittacosis were incidental to the character of the employer's oilfield supply business or businesses that employ people in warehouses, psittacosis was not a natural incident of employment in the warehouse and worker's injury and death did not fall within the exclusivity provisions of the occupational disease disablement law. *Castillo v. Caprock Pipe & Supply, Inc.*, 2012-NMCA-085, 285 P.3d 1072, cert. denied, 2012-NMCERT-007.

Receipt of retirement benefits would not prevent a workman (worker) from receiving occupational disease benefits if disablement has been established. *Salazar v. Kaiser Steel Corp.*, 1973-NMCA-068, 85 N.M. 254, 511 P.2d 580 (Ct. App.), cert. denied, 85 N.M. 229, 511 P.2d 555.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 C.J.S. Employers' Liability §§ 4 to 11.

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. The required certificate must be provided by an authorized insurer as defined in Section 59A-1-8 NMSA 1978. 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 that 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. In the event of an insurance policy cancellation, the occupational disease disablement insurance carrier shall file notice with the director within ten days of such cancellation on a form approved by the director.

History: 1978 Comp., § 52-3-9, enacted by Laws 1987, ch. 235, § 33; 1990 (2nd S.S.), ch. 2, § 35.

ANNOTATIONS

Repeals and reenactments. — Laws 1987, ch. 235, § 33, repealed former 52-3-9 NMSA 1978, as amended by Laws 1986, ch. 22, § 55 and enacted a new section, effective June 19, 1987.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, added the second sentence in Subsection A, substituted "that" for "which" following "certificate" in Subsection C, and rewrote Subsection D which formerly pertained to the applicability of the section to localities.

52-3-9.1. Repealed.

ANNOTATIONS

Repeals. — Laws 1999, ch. 172, § 4 repealed 52-3-9.1 NMSA 1978, as enacted by Laws 1980, ch. 88, § 4, relating to fee for filing insurance policy or security bond in office of director, effective June 1, 1999. For provisions of former section, *see* the 1998 NMSA 1978 on *NMOneSource.com*.

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.

52-3-9.3. Repealed.

ANNOTATIONS

Repeals. — Laws 1987, ch. 235, § 54B repealed 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.

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.

ANNOTATIONS

Unconstitutional. — Although the legislative goal and the time limit of maintaining reasonable costs to employers under the workers' compensation system is a legitimate legislative goal and the time limit prescribed by this section is rationally related to this legislative goal because it lowers employer costs by eliminating all claims arising more than ten years after the last day of employment, this section is unconstitutional as it is currently enacted because it abridges the substantive due process rights of claimants contracting diseases ten to fifteen years after radiation exposure. *Schirmer v. Homestake Mining Co.*, 1994-NMSC-095, 118 N.M. 420, 882 P.2d 11.

"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.*, 1982-NMCA-110, 98 N.M. 389, 648 P.2d 1202, cert. denied, 98 N.M. 478, 649 P.2d 1391.

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.*, 1979-NMCA-088, 93 N.M. 192, 598 P.2d 654.

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 Transfer Co.*, 1987-NMCA-089, 106 N.M. 461, 744 P.2d 1264, cert. denied, 106 N.M. 405, 744 P.2d 180.

Release not bar to dependents' death claim. — A worker's dependents are entitled to an award of death benefits if death arises or proximately results from an occupational disease, notwithstanding what the worker received or was deemed entitled to receive during his lifetime; thus, surviving dependents were entitled to death benefits notwithstanding any release the worker may have executed in his lifetime. *Buchanan v. Kerr-McGee Corp.*, 1995-NMCA-131, 121 N.M. 12, 908 P.2d 242, cert. denied, 120 N.M. 715, 905 P.2d 1119.

Am. Jur. 2d, A.L.R. and C.J.S. references. — When time period commences as to claim under workers' compensation or occupational diseases act for death of worker due to contraction of disease, 100 A.L.R.5th 567.

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.

ANNOTATIONS

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.*, 1976-NMCA-106, 89 N.M. 740, 557 P.2d 589, cert. denied, 90 N.M. 8, 558 P.2d 620.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 326, 327.

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.

ANNOTATIONS

Compiler's notes. — For the meaning of "this act", *see* 52-3-1 NMSA 1978 and the compiler's notes thereto.

Cross references. — For extraterritorial coverage, *see* 52-3-55 NMSA 1978.

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.

ANNOTATIONS

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.

52-3-14. Compensation; limitations.

A. The compensation to which a worker who has suffered disablement, or the worker's 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 that does not result in either the temporary disablement of the worker lasting for more than seven days or in the worker's permanent disablement as herein described or in death; provided, however, that if the period of temporary disablement of the worker 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 worker 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 this section, 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 worker shall receive sixty-six and two-thirds percent of the worker's average weekly wage, not to exceed a maximum compensation of eighty-five percent of the average weekly wage in the state, a week, effective July 1, 1987, continuing through December 31, 1999, and thereafter not to exceed a maximum of one hundred percent of the average weekly wage in the state, a week, but not 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 when the workers' wages are less than thirty-six dollars ($36.00) a week, then the compensation to be paid such worker shall be the full amount of such weekly wages; provided further that the benefits paid or payable during a worker'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 partial benefits extend longer than five hundred weeks.

D. In no event shall the duration of any combination of disablements, whether temporary or partial disablements, and death be payable for a period in excess of seven hundred weeks.

E. For the purpose of the New Mexico Occupational Disease Disablement Law, the average weekly wage in the state shall be determined by the workforce solutions department on or before June 30 of each year and shall be computed from all wages reported to the department from employing units, including reimbursable employers, in accordance with the rules of the department 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.

F. The average weekly wage in the state, determined as provided in Subsection E 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.

G. Unless the computation provided for in Subsection E 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.

H. In case death proximately results from the disablement within the period of two years, compensation benefits to be paid such worker 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 seven thousand five hundred dollars ($7,500) 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 seven thousand five hundred dollars ($7,500) 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 specified in this paragraph 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 worker; provided that the total death compensation, unless otherwise specified, payable in any of the cases mentioned in this section 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 compensation rate, as provided in Subsection B of this section, 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 worker for support at the time of the worker's 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 worker for support at the time of the worker's death, 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 a worker'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 the deceased's 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; 1999, ch. 172, § 3; 2015, ch. 70, § 4.

ANNOTATIONS

The 2015 amendment, effective June 19, 2015, specified that the limitation on compensation benefits for any combination of disablements, whether temporary or

partial disablements, and death is seven hundred weeks; references to "employee" were changed to "worker", references to "him" were changed to "worker", and references to "his" were changed to "the worker's" throughout the section; in Subsection A, after the second occurrence of "disablement", deleted "which" and added "that", and after "in accordance with", deleted "the following" and added "this section"; in Subsection B, after "and thereafter", added "not to exceed", and after "however, that", deleted "where his" and added "when the worker's"; in Subsection C, after "duration of", added "partial"; added Subsection D and redesignated the succeeding subsections accordingly; in Subsection E, after "determined by the", deleted "employment security division of the labor" and added "workforce solutions", after "wages reported to the", deleted "employment security division" and added "department", after "in accordance with the", deleted "regulations" and added "rules", and after "of the", deleted "employment security division" and added "department"; in Subsection G, after "Subsection", changed "D" to "E"; in Paragraph (2)(c) of Subsection H, after "forty-five percent of the", deleted "average weekly wage" and added "compensation rate, as provided in Subsection B of this section"; in Paragraph (2)(e) of Subsection H, after "death", deleted "he or"; and in Paragraph (2)(f) of Subsection H, after "support at the time of", deleted "his" and added "the deceased's".

The 1999 amendment, effective June 18, 1999, in Subsection B deleted Paragraphs (1) through (5), relating to the maximum compensation on certain effective dates, deleted the Paragraph (6) designation and substituted the language beginning "continuing through" and ending "but not" for "eighty-five percent of the average weekly wage in the state, effective July 1, 1987"; and in Subsection G substituted "seven thousand five hundred dollars ($7,500)" for "three thousand dollars ($3,000)" in Paragraphs (1) and (2) and made minor stylistic changes in Paragraph (2).

Liberal construction applies to law. — Liberal construction under the Workmen's (Workers') Compensation Act applies only to the law and not to the facts. *Ojinaga v. Dressman*, 1972-NMCA-017, 83 N.M. 508, 494 P.2d 170.

Release not bar to dependents' death claim. — A worker's dependents are entitled to an award of death benefits if death arises or proximately results from an occupational disease, notwithstanding what the worker received or was deemed entitled to receive during his lifetime; thus, surviving dependents were entitled to death benefits notwithstanding any release the worker may have executed in his lifetime. *Buchanan v. Kerr-McGee Corp.*, 1995-NMCA-131, 121 N.M. 12, 908 P.2d 242, cert. denied, 120 N.M. 715, 905 P.2d 1119.

52-3-15. Disablement compensation restrictions; medical and related services; selection of health care provider; 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, or 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, subject to the provisions of this section, provide the worker in a timely manner reasonable and necessary health care services from a health care provider.

C. The employer shall initially either select the health care provider for the injured worker or permit the injured worker to make the selection. Subject to the provisions of this section, that selection shall be in effect during the first sixty days from the date the worker receives treatment from the initially selected health care provider.

D. After the expiration of the initial sixty-day period set forth in Subsection C of this section, the party who did not make the initial selection may select a health care provider of his choice. Unless the worker and employer otherwise agree, the party seeking such a change shall file a notice of the name and address of his choice of health care provider with the other party at least ten days before treatment from that health care provider begins. The director shall adopt rules and regulations governing forms, which employers shall post in conspicuous places, to enable this notice to be promptly and efficiently provided. This notice may be filed on or after the fiftieth day of the sixty-day period set forth in Subsection C of this section.

E. If a party objects to the choice of health care provider made pursuant to Subsection D of this section, then he shall file an objection to that choice pursuant to Subsection F of this section with a workers' compensation judge within three days from receiving the notice. He shall also provide notice of that objection to the other party. If the employer does not file his objection within the three-day period, then he shall be liable for the cost of treatment provided by the worker's health care provider until the employer does file his objection and the workers' compensation judge has rendered his decision as set forth in Subsection G of this section. If the worker does not file his objection within the three-day period, then the employer shall only be liable for the cost of treatment from the health care provider selected by the employer, subject to the provisions of Subsections F, G and H of this section. Nothing in this section shall remove the employer's obligation to provide reasonable and necessary health care services to the worker so long as the worker complies with the provisions of this section.

F. If the worker or employer disagrees with the choice of the health care provider of the other party at any time, including the initial sixty-day period, and they cannot otherwise agree, then he shall submit a request for a change of health care provider to a workers' compensation judge. The director shall adopt rules and regulations governing forms, which employers shall post in conspicuous places, to submit to a workers' compensation judge a request for a change of a health care provider.

G. The request shall state the reasons for the request and may state the applicant's choice for a different health care provider. The applicant shall bear the burden of

proving to the workers' compensation judge that the care being received is not reasonable. The workers' compensation judge shall render his decision within seven days from the date the request was submitted. If the workers' compensation judge grants the request, he shall designate either the applicant's choice of health care provider or a different health care provider.

H. If the worker continues to receive treatment or services from a health care provider rejected by the employer and not in compliance with the workers' compensation judge's ruling, then the employer is not required to pay for any of the additional treatment or services provided to that worker by that health care provider.

I. In all cases where the disablement is such as to permit the use of artificial members, including teeth and eyes, the employer shall pay for 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; 1990 (2nd S.S.), ch. 2, § 36.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, inserted "selection of health care provider" in the catchline, substituted "or" for "nor" in Subsection A, rewrote Subsections B and C, added Subsections D to H, and redesignated former Subsection D as Subsection I, substituting "pay for" for "furnish" therein.

Lump-sum payment and release agreement effective as waiver of statutory rights. — Lump-sum payment and release agreement which stated, among other things, that claimant would be treated by present physician or his referral for life was a binding contract, and constituted a waiver of employer's right under this section to designate a change in claimant's primary care provider. *Ramirez v. Johnny's Roofing, Inc.*, 1999-NMCA-038, 127 N.M. 83, 977 P.2d 348.

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*, 1972-NMCA-017, 83 N.M. 508, 494 P.2d 170.

Expert testimony. — The standard for admitting expert testimony established by Daubert v. Merrel Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), as adopted in New Mexico by *State v. Alberico*, 1993-NMSC-047, 116 N.M. 156, 861 P.2d 192, does not apply to the testimony of a health care provider pursuant to Section 52-1-28(B) or 52-3-32 NMSA 1978. *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014.

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.

ANNOTATIONS

Requirement that written claim be filed within 90 days is mandatory. *Holman v. Oriental Refinery*, 1965-NMSC-029, 75 N.M. 52, 400 P.2d 471 (decided under former law).

No provision for extension of time limit to file claim. — Section 37-1-17 NMSA 1978 prohibits Section 37-1-14 NMSA 1978 from applying in workmen's (workers') compensation and occupational disablement cases, since the Workmen's (Workers') Compensation Act and the Occupational Disablement Law contain specific statutes of limitations in Section 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*, 1979-NMCA-130, 93 N.M. 584, 603 P.2d 323, *overruled on other*

grounds by Bracken v. Yates Petroleum Corp., 1988-NMSC-072, 107 N.M. 463, 760 P.2d 155.

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.

ANNOTATIONS

Repeals and reenactments. — Laws 1987, ch. 235, ch. 38 repealed 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.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Bookkeeping not "suitable employment" for sheet-metal fabricator. — A bookkeeping position was not "suitable employment" for a worker who, prior to his injury, was a sheet-metal fabricator. *Bryant v. Lear Siegler Mgmt. Servs. Corp.*, 1993-NMCA-052, 115 N.M. 502, 853 P.2d 753, cert. denied, 115 N.M. 535, 854 P.2d 362.

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.

ANNOTATIONS

Application of rules of procedure. — Language in this section is comparable to Section 52-1-34 NMSA 1978 (repealed) of the present Workmen's (Workers') 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*, 1965-NMSC-029, 75 N.M. 52, 400 P.2d 471 (decided under former law).

Relation back of amended complaint. — All that is required by Section 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*, 1965-NMSC-029, 75 N.M. 52, 400 P.2d 471.

52-3-19. Notice of disablement to employer; employer to post clear notice of requirement.

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 fifteen 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.

C. Each employer shall post, and keep posted in conspicuous places upon his premises where notices to employees and applicants for employment are customarily posted, a notice that advises workers of the requirement specified in Subsection A of this section to give the employer notice in writing of the disablement within fifteen days of its occurrence. The notice shall be prepared or approved by the director. The failure of an employer to post the notice required in this subsection shall toll the time a worker

has to give the notice in writing specified in Subsection A of this section up to but no longer than the maximum sixty-day period.

D. An employer may not use lack of notice under this section as a defense to a worker's disablement compensation claim when the employer files a report of accident under Section 52-3-51 NMSA 1978.

History: 1953 Comp., § 59-11-16.1, enacted by Laws 1965, ch. 299, § 6; 1989, ch. 263, § 54; 1990 (2nd S.S.), ch. 2, § 37.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, rewrote the catchline, substituted "fifteen days" for "thirty days" in Subsection A, and added Subsections C and D.

Notice as required by statute is a condition precedent to the right to plaintiff to recover compensation. *Sanchez v. Azotea Contractors*, 1973-NMCA-039, 84 N.M. 764, 508 P.2d 34.

Requirement that a written claim be filed is mandatory. *Holman v. Oriental Refinery*, 1965-NMSC-029, 75 N.M. 52, 400 P.2d 471.

Actual knowledge required to excuse notice. — In workmen's (workers') 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*, 1973-NMCA-039, 84 N.M. 764, 508 P.2d 34.

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.*, 1973-NMCA-068, 85 N.M. 254, 511 P.2d 580, cert. denied, 85 N.M. 229, 511 P.2d 555.

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*, 1973-NMCA-039, 84 N.M. 764, 508 P.2d 34.

Am. Jur. 2d, A.L.R. and C.J.S. references. — When limitations period begins to run as to claim for disability benefits for contracting of disease under Workers' Compensation or Occupational Diseases Act, 86 A.L.R.5th 295.

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 fourteen days after the worker has missed seven days of lost time from work, whether or not the days are consecutive. Remaining installments shall be paid twice a month at intervals not more than sixteen days apart, in sums as nearly equal as possible, except as provided in Section 52-5-12 NMSA 1978.

History: 1953 Comp., § 59-11-16.2, enacted by Laws 1965, ch. 299, § 7; 1989, ch. 263, § 55; 1993, ch. 193, § 6; 2003, ch. 259, § 7.

ANNOTATIONS

Cross references. — For payment of compensation benefits; installments, *see* 52-1-30 NMSA 1978.

The 2003 amendment, effective June 20, 2003, substituted "the worker has missed seven days of lost time from work, whether or not the days are consecutive" for "the filing of the report required in Section 52-3-51 NMSA 1978" at the end of the first sentence and added "except as provided in Section 52-5-12 NMSA 1978" at the end of the section.

The 1993 amendment, effective June 18, 1993, in the second sentence, substituted "fourteen" for "thirty one" and "filing of the report required in Section 52-3-51 NMSA 1978" for "date of occurrence of the disablement".

52-3-21 to 52-3-24. Repealed.

ANNOTATIONS

Repeals. — Laws 1986, ch. 22, § 102 repealed 52-3-21 through 52-3-24 NMSA 1978, as enacted by Laws 1965, ch. 299, relating to the filing and trial of claims, effective May 21, 1986. 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.

ANNOTATIONS

Cross references. — For effect of failure to give required notice or to file claim within time allowed, *see* 52-3-16 NMSA 1978.

For effect of failure of employee to file claim or bring suit by reason of conduct of employer, *see* 52-3-50 NMSA 1978.

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*, 1973-NMCA-039, 84 N.M. 764, 508 P.2d 34.

52-3-26 to 52-3-30. Repealed.

ANNOTATIONS

Repeals. — Laws 1986, ch. 22, § 102 repealed former 52-3-26 through 52-3-30 NMSA 1978, relating to judgment, appeals, and venue of claims, effective May 21, 1986. For present comparable provisions, *see* 52-3-18 NMSA 1978.

52-3-31. Repealed.

ANNOTATIONS

Repeals. — Laws 1983, ch. 153, § 1, repealed 52-3-31 NMSA 1978, relating to disablement or death payment due to silicosis or asbestosis.

Laws 1983, ch. 153, contained 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.

ANNOTATIONS

Work-related factors need not be predominate causative agent of occupational disease or death, so long as the work-related factors can be reasonably categorized by medical experts as a nonnegligible contributing cause as a matter of medical probability. *Buchanan v. Kerr-McGee Corp.*, 1995-NMCA-131, 121 N.M. 12, 908 P.2d 242, cert. denied, 120 N.M. 715, 905 P.2d 1119.

Establishment of neurosis as compensable disease under this law. — Since anxiety neurosis can be a work-connected injury compensable under the Workmen's (Workers') 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.*, 1979-NMSC-073, 93 N.M. 455, 601 P.2d 425.

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.*, 1979-NMSC-073, 93 N.M. 455, 601 P.2d 425.

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.*, 1979-NMSC-073, 93 N.M. 455, 601 P.2d 425.

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.*, 1979-NMSC-073, 93 N.M. 455, 601 P.2d 425.

Evidence supported judge's determination that worker's compensable occupational disease was caused by work environment. *Bryant v. Lear Siegler Mgmt. Servs. Corp.*, 1993-NMCA-052, 115 N.M. 502, 853 P.2d 753, cert. denied, 115 N.M. 535, 854 P.2d 362.

Expert testimony. — The standard for admitting expert testimony established by *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as adopted in New Mexico by *State v. Alberico*, 1993-NMSC-047, 116 N.M. 156, 861 P.2d 192, does not apply to the testimony of a health care provider pursuant to 52-1-28(B) or 52-3-32 NMSA 1978. *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014.

The "expert" testimony required by Section 52-1-28(B) NMSA 1978, which should be construed to have the same meaning as this section, refers to testimony based on the treating health care provider’s training, experience and familiarity. *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Employment Relationship §§ 253, 254; 82 Am. Jur. 2d Workers' Compensation §§ 263, 264, 317, 326.

99 C.J.S. Workmen's Compensation §§ 163, 169.

52-3-32.1. Firefighter occupational conditions.

A. As used in this section, "firefighter" means a person who is employed as a full-time non-volunteer firefighter by the state or a local government entity and who has taken the oath prescribed for firefighters.

B. If a firefighter is diagnosed with one or more of the following conditions after the period of employment indicated, and the condition was not revealed during an initial employment medical screening examination or during a subsequent medical review pursuant to the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] and rules promulgated pursuant to that act, the condition is presumed to be proximately caused by employment as a firefighter:

(1) brain cancer after ten years;

(2) bladder cancer after twelve years;

(3) kidney cancer after fifteen years;

(4) colorectal cancer after ten years;

(5) non-Hodgkin's lymphoma after fifteen years;

(6) leukemia after five years;

(7) ureter cancer after twelve years;

(8) testicular cancer after five years if diagnosed before the age of forty with no evidence of anabolic steroids or human growth hormone use;

(9) breast cancer after five years if diagnosed before the age of forty without a breast cancer 1 or breast cancer 2 genetic predisposition to breast cancer;

(10) esophageal cancer after ten years;

(11) multiple myeloma after fifteen years;

(12) hepatitis, tuberculosis, diphtheria, meningococcal disease and methicillin-resistant staphylococcus aureus appearing and diagnosed after entry into employment; or

(13) posttraumatic stress disorder diagnosed by a physician or psychologist that results in physical impairment, primary or secondary mental impairment or death.

C. The presumptions created in Subsections B and D of this section may be rebutted by a preponderance of evidence in a court of competent jurisdiction showing that the firefighter engaged in conduct or activities outside of employment that posed a significant risk of contracting or developing a described condition.

D. If a firefighter is diagnosed with a heart injury or stroke suffered within twenty-four hours of fighting a fire, while responding to an alarm, while returning from an alarm call, while engaging in supervised physical training or while responding to or performing in a non-fire emergency, the heart injury or stroke is presumed to be proximately caused by employment as a firefighter. The presumption created in this subsection shall not be made if the firefighter's employer does not have a current physical training program and the firefighter does not have a current medical screening examination or review pursuant to the Occupational Health and Safety Act and rules promulgated pursuant to that act allowing participation in that program.

E. When any presumptions created in this section do not apply, it shall not preclude a firefighter from demonstrating a causal connection between employment and condition or injury by a preponderance of evidence in a court of competent jurisdiction.

F. Medical treatment based on the presumptions created in this section shall be provided by an employer as for a job-related condition or injury unless and until a court of competent jurisdiction determines that the presumption does not apply. If the court determines that the presumption does not apply or that the condition or injury is not job related, the employer's workers' compensation insurance provider shall be reimbursed

for health care costs by the medical or health insurance plan or benefit provided for the firefighter by the employer.

History: Laws 2009, ch. 252, § 1; 2019, ch. 118, § 1.

ANNOTATIONS

The 2019 amendment, effective June 14, 2019, added posttraumatic stress disorder to the list of conditions presumed to be proximately caused by employment as a firefighter; replaced "disease" with "condition" throughout the section; in Subsection A, added Paragraph A(13); and in Subsection F, replaced each occurrence of "illness" with "condition".

Statutory presumption that the development of a listed disease is proximately caused by employment as a firefighter. — By enacting the firefighter occupational disease statute, the legislature adopted a statutory presumption that the development of the listed disease by a firefighter is linked to his or her service in that role under certain circumstances and exempts firefighters in certain situations from the burden of establishing a causal connection between their disease and their duties as a firefighter; when a firefighter establishes that he or she is suffering from one or more of the diseases listed in this section and the firefighter served the requisite number of years, subject to any other requirements under this section, the firefighter is entitled to the rebuttable presumption that the disease was caused by his or her employment as a firefighter. *Di Luzio v. City of Santa Fe*, 2015-NMCA-042.

Where worker was employed as a firefighter for the City of Santa Fe for twenty-one years and was diagnosed with mantle cell non-Hodgkin's lymphoma twelve years after his service as a firefighter, worker met the statutory prerequisites to be entitled to the presumption that his disease was the result of his years of service as a firefighter, and was not required to establish that his disease was causally connected to his employment. *Di Luzio v. City of Santa Fe*, 2015-NMCA-042.

Test for retroactive application of the statute. — The relevant inquiry for determining whether this section was being applied retroactively or prospectively is not whether the firefighter was employed as a firefighter at the time of the statute's enactment, but rather whether this section was in existence at the time the firefighter filed for disability benefits. Di Luzio v. City of Santa Fe, 2015-NMCA-042.

Where worker was employed as a firefighter for the city of Santa Fe for twenty-one years and was diagnosed with mantle cell non-Hodgkin's lymphoma twelve years after his service as a firefighter, and where worker filed for disability benefits two years after this section's enactment, application of the statute was not retroactive. *Di Luzio v. City of Santa Fe*, 2015-NMCA-042.

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.

ANNOTATIONS

An occupational disease must result from the occupation, not the workplace, in order to be compensable. *Chadwick v. Public Serv. Co.*, 1986-NMCA-123, 105 N.M. 272, 731 P.2d 968, cert. denied, 105 N.M. 290, 731 P.2d 1334 (1987).

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.*, 1978-NMCA-113, 92 N.M. 261, 586 P.2d 1090.

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.*, 1979-NMSC-073, 93 N.M. 455, 601 P.2d 425.

Occupational disease does not include a disease which results from peculiar conditions surrounding the workmen's (workers') 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.*, 1978-NMCA-113, 92 N.M. 261, 586 P.2d 1090.

A gradual, noise-induced hearing loss is an accidental injury compensable under Section 52-1-28 NMSA 1978 of the Workers' Compensation Act, and is not an occupational disease. *Cisneros v. Molycorp, Inc.*, 1988-NMCA-080, 107 N.M. 788, 765 P.2d 761, cert. denied, 107 N.M. 785, 765 P.2d 758.

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.*, 1986-NMCA-123, 105 N.M. 272, 731 P.2d 968, cert. denied, 105 N.M. 290, 731 P.2d 1334 (1987).

Allergic reaction may be compensable under the Workmen's (Workers') Compensation Act rather than as an occupational disease. *Chadwick v. Public Serv.*

Co., 1986-NMCA-123, 105 N.M. 272, 731 P.2d 968, cert. denied, 105 N.M. 290, 731 P.2d 1334 (1987).

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.*, 1986-NMCA-123, 105 N.M. 272, 731 P.2d 968, cert. denied, 105 N.M. 290, 731 P.2d 1334 (1987).

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.*, 1976-NMCA-045, 89 N.M. 245, 550 P.2d 144, cert. denied, 89 N.M. 321, 551 P.2d 1368.

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.*, 1978-NMCA-113, 92 N.M. 261, 586 P.2d 1090.

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 Workers' Compensation §§ 326, 327.

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.

Workers' compensation: Lyme disease, 22 A.L.R.5th 246.

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.

ANNOTATIONS

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.

ANNOTATIONS

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.

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.

ANNOTATIONS

Compiler's notes. — For the meaning of "this act", *see* 52-3-1 NMSA 1978 and the compiler's notes thereto.

Cross references. — For rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, *see* Rules 1-065.1, 2-801, and 3-801 NMRA, respectively.

For form for claim of exemptions on executions, *see* Rule 4-803 NMRA.

For form for order on claim of exemption and order to pay in execution proceedings, *see* Rule 4-804 NMRA.

For form for application for writ of garnishment and affidavit, *see* Rule 4-805 NMRA.

For form for notice of right to claim exemptions from execution, *see* Rule 4-808A NMRA.

For form for claim of exemption from garnishment, *see* Rule 4-809 NMRA.

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.

ANNOTATIONS

52-3-39. Physical examinations of worker; independent medical examination; unsanitary or injurious practices by worker; testimony of health care providers.

A. In the event of a dispute concerning any medical issue, if the parties cannot agree upon the use of a specific independent medical examiner, either party may petition a workers' compensation judge for permission to have the worker undergo an independent medical examination. The independent medical examination shall be performed immediately, pursuant to procedures adopted by the director, by a health

care provider other than the designated health care provider, unless the employer and the worker otherwise agree.

B. In deciding who may conduct the independent medical examination, the workers' compensation judge shall not designate the health care provider initially chosen by the petitioner. The workers' compensation judge shall designate a health care provider on the approved list of persons authorized by the committee appointed by the advisory council on workers' compensation to create that list. The decision of the workers' compensation judge shall be final. The employer shall pay for any independent medical examination.

C. Only the health care provider who has treated the worker pursuant to Section 52-3-15 NMSA 1978 or the health care provider providing the independent medical examination pursuant to this section may offer testimony at any workers' compensation hearing concerning the particular disablement in question.

D. If, pursuant to Subsection D of Section 52-3-15 NMSA 1978, the injured worker selects a new health care provider, the employer shall be entitled to periodic examinations of the worker by the health care provider he previously selected. 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 therefor, examinations within six-month intervals may be ordered. In considering such applications, the workers' compensation judge should exercise care to prevent harassment of the claimant.

E. If the employer requests an independent medical examination or an examination pursuant to Subsection D of this section, the worker shall travel to the place at which the examination shall be conducted. Within thirty days after the examination, the worker 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].

F. No attorney shall be present at any examination authorized under this section.

G. Both the employer and the worker shall be given a copy of the report of the examination of the worker made by the independent health care provider pursuant to this section.

H. If a worker fails or refuses to submit to examination in accordance with this section, he shall forfeit all disablement compensation benefits that 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.

I. If any employee persists in any unsanitary or injurious practice that 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.

History: 1978 Comp., § 52-3-39, enacted by Laws 1987, ch. 235, § 40; 1989, ch. 263, § 61; 1990 (2nd S.S.), ch. 2, § 38.

ANNOTATIONS

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.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, rewrote the section, including the catchline, to the extent that a detailed comparison would be impracticable.

Expert testimony. — The standard for admitting expert testimony established by *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as adopted in New Mexico by *State v. Alberico*, 1993-NMSC-047, 116 N.M. 156, 861 P.2d 192, does not apply to the testimony of a health care provider pursuant to Section 52-1-28(B) or 52-3-32 NMSA 1978. *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 389 to 391, 504 to 506.

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.

ANNOTATIONS

Cross references. — For the New Mexico Occupational Disease Disablement Law, *see* 52-3-1 NMSA 1978 and compiler's notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation § 605.

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.

ANNOTATIONS

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.

ANNOTATIONS

Relation back of amended complaint. — All that is required by this section is the timely filing of a complaint. As noted, Section 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*, 1965-NMSC-029, 75 N.M. 52, 400 P.2d 471.

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 Section 52-3-10B(3) NMSA 1978, where her husband died sixteen years after the date of his last employment. *Tapia v. Springer Transf. Co.*, 1987-NMCA-089, 106 N.M. 461, 744 P.2d 1264, cert. denied, 106 N.M. 405, 744 P.2d 180.

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.

ANNOTATIONS

Compiler's notes. — For the meaning of "this act", *see* 52-3-1 NMSA 1978 and compiler's notes thereto.

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*, 1976-NMCA-105, 89 N.M. 704, 556 P.2d 1180, cert. denied, 90 N.M. 7, 558 P.2d 619.

Benefits awarded for psychological symptoms. — An award of benefits for "depression," the effect of toxic solvent syndrome, was not error. This section applies only when a worker's occupational disease either aggravates or is aggravated by a noncompensable disease. Benefits can be awarded however, for psychological symptoms of a compensable disease. *Bryant v. Lear Siegler Mgmt. Servs. Corp.*, 1993-NMCA-052, 115 N.M. 502, 853 P.2d 753, cert. denied, 115 N.M. 535, 854 P.2d 362.

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.

ANNOTATIONS

Compiler's notes. — For the meaning of "this act", *see* 52-3-1 NMSA 1978 and compiler's notes thereto.

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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Standard of willfulness applied to employees. — The standard of willfulness required to deny workers' compensation benefits to an employee for self injury is the same as applied to employers under *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148; *Pearson v. Johnson Controls*, 2011-NMCA-034, 149 N.M. 740, 255 P.3d 318, cert. denied, 2011-NMCERT-003, 150 N.M. 620, 264 P.3d 521.

Employee's actions did not constitute willful self-exposure to injury. — Where worker, who was a welder for more than thirty-two years, had been diagnosed with a chronic lung condition from previous exposures to fumes caused by welding; although worker was warned by worker's doctors on at least seven different occasions that continued welding might exacerbate worker's preexisting lung condition, the doctors always released worker to return to welding; notwithstanding the doctors' warnings, worker continued to work as a welder; none of the doctors definitively advised worker to completely stop welding; during worker's career, worker alternated between welding and non-welding jobs when worker experienced a flare-up of worker's lung condition; even though worker sometimes worked as a welder without a problem, the flare-up of worker's lung condition was closely correlated with welding, worker's decision to continue welding despite the doctors' warnings did not constitute a willful act. *Pearson v. Johnson Controls*, 2011-NMCA-034, 149 N.M. 740, 255 P.3d 318, cert. denied, 2011-NMCERT-003, 150 N.M. 620, 264 P.3d 521.

52-3-45.1. Unfair claim-processing practices; bad faith.

A. Claims may be filed under the New Mexico Occupational Disease Disablement Law alleging unfair claim-processing practices or bad faith by an employer, insurer or claim-processing representative relating to any aspect of the New Mexico Occupational Disease Disablement Law. The director may also investigate allegations of unfair claim processing or bad faith on his own initiative.

B. If unfair claim processing or bad faith has occurred in the handling of a particular claim, the claimant shall be awarded, in addition to any benefits due and owing, a benefit penalty not to exceed twenty-five percent of the benefit amount ordered to be paid.

C. If an employer, insurer or claim-processing representative has a history or pattern of repeated unfair claim-processing practices or bad faith, the director or a workers' compensation judge may impose a civil penalty of up to one thousand dollars ($1,000) for each violation. The civil penalty shall be deposited in the workers' compensation administration fund.

D. Any person aggrieved by an order under this section may request a hearing pursuant to the New Mexico Occupational Disease Disablement Law.

E. The director shall adopt by regulation definitions of unfair claim-processing practices and bad faith.

F. This section shall not be construed as limiting or interfering with the authority of the superintendent of insurance as provided by law to regulate any insurer, including his jurisdiction over unfair claim settlement practices.

History: Laws 1990 (2nd S.S.), ch. 2, § 44.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 44 effective January 1, 1991.

52-3-45.2. Retaliation against employee seeking benefits; civil penalty.

A. An employer shall not discharge, threaten to discharge or otherwise retaliate in the terms or conditions of employment against a worker who seeks occupational disease disablement benefits for the sole reason that that employee seeks occupational disease disablement benefits.

B. Any person who discharges a worker in violation of Subsection A of this section shall rehire that worker pursuant to the provisions of the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] and the New Mexico Occupational Disease Disablement Law, provided the worker agrees to be rehired.

C. The director or a workers' compensation judge shall impose a civil penalty of up to five thousand dollars ($5,000) for each violation of the provisions of Subsection A or B of this section.

D. The civil penalty shall be deposited in the workers' compensation administration fund.

History: Laws 1990 (2nd S.S.), ch. 2, § 47.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 47 effective January 1, 1991.

52-3-45.3. False statements or representations with regard to physical condition; forfeiture.

A. When an employer asks by written questionnaire for the disclosure of a worker's medical condition, no compensation is payable from that employer for a disablement to that worker under the provisions of the New Mexico Occupational Disease Disablement Law if:

(1) the worker knowingly and willfully concealed information or made a false representation of his medical condition;

(2) the employer:

(a) was not aware of the concealed information that, if known, would have been a substantial factor in the initial or continued employment of the worker; or

(b) relied upon the false representation, and this reliance was a substantial factor in the initial or continued employment of the worker; and

(3) a medical condition that was concealed or falsely represented substantially contributed to the disablement.

B. The provisions of this section do not apply unless, in the written questionnaire, the employer clearly and conspicuously discloses that the worker shall be entitled to no future compensation benefits if he knowingly and willfully conceals or makes a false representation about the information requested.

C. Nothing in this section shall be construed to deny or limit compensation benefits paid or being paid for prior disablements.

D. This section shall apply only prospectively. It shall not alter, as to prior reports, the law governing questionnaires and information reported that was in effect prior to the effective date of this section.

History: Laws 1990 (2nd S.S.), ch. 2, § 46.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 46 effective January 1, 1991.

52-3-45.4. Compensation benefits limit.

A. Unless otherwise contracted for by the worker and employer, occupational disease disablement benefits shall be limited so that no worker receives more in total payments, including wages and benefits from his employer, by not working than by continuing to work. Compensation benefits under the New Mexico Occupational Disease Disablement Law shall accordingly be reduced, if necessary, to account for any wages and employer-financed disability benefits a worker receives after the time of disablement. For the purposes of this section, total payments shall be determined on an after-tax basis. This section does not apply to social security payments, employee-financed disability benefits, benefits or payments a worker received from a prior employer, payments for medical or related expenses or general retirement payments, except it does apply to disability retirement benefits.

B. This section shall only apply to disablements that occur after the effective date of this section; it shall not reduce benefits received or due or affect the benefits due for disablements that occur before the effective date of this section.

History: Laws 1990 (2nd S.S.), ch. 2, § 45.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 45 effective January 1, 1991.

Compiler's notes. — The phrase "effective date of this section", referred to in Subsection B, means January 1, 1991, the effective date of Laws 1990 (2nd S.S.), ch. 2, § 45.

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.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — When time period commences as to claim under workers' compensation or occupational diseases act for death of worker due to contraction of disease, 100 A.L.R.5th 567.

52-3-47. Fee restrictions; appointment of attorneys by the director or workers' compensation judge; discovery costs; offer of judgment; penalty for violations.

A. It is 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 administration 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 the director's or judge's 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 I of this section.

C. In all cases where the jurisdiction of the workers' compensation administration 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 the 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 I of this section.

D. The cost of discovery shall be borne by the party who requests it. If, however, the claimant requests any discovery, the employer shall advance the cost of paying for discovery up to a limit of three thousand dollars ($3,000). If the claimant substantially prevails on the claim, as determined by a workers' compensation judge, any discovery cost advanced by the employer shall be paid by that employer. If the claimant does not substantially prevail on the claim, as determined by a workers' compensation judge, the employer shall be reimbursed for discovery costs advanced according to a schedule for reimbursement approved by a workers' compensation judge.

E. 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 thereafter collects compensation through proceedings before the workers' compensation administration 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 administration, 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 I 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;

(2) the present value of the award made in the employee's favor; and

(3) the failure of a party to participate in a good-faith manner in informal claim resolution methods adopted by the director.

F. After a recommended resolution has been issued and rejected, but more than ten days before a trial begins, the employer or claimant may serve upon the opposing party

an offer to allow a compensation order to be taken against the employer or claimant for the money or property or to the effect specified in the offer, with costs then accrued, subject to the following:

(1) if, within ten days after the service of the offer, the opposing party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof, and thereupon that compensation order may be entered as the workers' compensation judge may direct. An offer not accepted shall be deemed withdrawn, and evidence thereof is not admissible except in a proceeding to determine costs. If the compensation order finally obtained by the party is not more favorable than the offer, that party shall pay the costs incurred by the opposing party after the making of the offer. The fact that an offer has been made but not accepted does not preclude a subsequent offer;

(2) when the liability of one party to another has been determined by a compensation order, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ten days prior to the commencement of hearings to determine the amount or extent of liability;

(3) if the employer's offer was greater than the amount awarded by the compensation order, the employer shall not be liable for the employer's fifty-percent share of the attorney fees to be paid the worker's attorney and the worker shall pay one hundred percent of the attorney fees due to the worker's attorney; and

(4) if the worker's offer was less than the amount awarded by the compensation order, the employer shall pay one hundred percent of the attorney fees to be paid the worker's attorney, and the worker shall be relieved from any responsibility for paying any portion of the worker's attorney fees.

G. In all actions arising under the provisions of Section 52-3-35 NMSA 1978, where the jurisdiction of the workers' compensation administration 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 I of this section.

H. In determining reasonable attorney fees for a claimant, 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 attorney fees.

I. Attorney fees, including, but not limited to, the costs of paralegal services, legal clerk services and any other related legal services costs on behalf of a claimant or an employer for a single disablement claim, including representation before the workers' compensation administration and the courts on appeal, shall not exceed twenty-two thousand five hundred dollars ($22,500). This limitation applies whether the claimant or employer has one or more attorneys representing the claimant or employer 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 a claimant. The workers' compensation judge may exceed the maximum amount stated in this subsection in awarding a reasonable attorney fee if the judge finds that a claimant, an insurer or an employer acted in bad faith with regard to handling the disabled employee's claims and the employer or disabled employee has suffered economic loss as a result thereof. However, in no case shall this additional amount exceed five thousand dollars ($5,000). As used in this subsection, "bad faith" means conduct by the claimant, insurer or employer in the handling of a claim that amounts to fraud, malice, oppression or willful, wanton or reckless disregard of the rights of the employee or employer. Any determination of bad faith shall be made by the workers' compensation judge through a separate fact-finding proceeding. Not withstanding the provisions of Subsection J of this section, the party found to have acted in bad faith shall pay one hundred percent of the additional fees awarded for representation of the prevailing party in a bad faith action.

J. Except as provided in Paragraphs (3) and (4) of Subsection F of this section, the payment of a claimant's attorney fees determined under this section shall be shared equally by the employee and the employer.

K. It is unlawful for any person except a licensed attorney to receive or agree to receive any fee or payment for legal services in connection with any claim for compensation under the New Mexico Occupational Disease Disablement Law.

L. Nothing in this section applies to agents, excluding attorneys, representing employers, insurance carriers or the subsequent injury fund in any matter arising from a claim under the New Mexico Occupational Disease Disablement Law.

M. No attorney fees shall be paid until the claim has been settled or adjudged.

N. Every person violating the provisions of this section is 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.

O. Nothing in this section shall restrict a claimant from being represented before the workers' compensation administration by a nonattorney as long as that nonattorney receives no compensation for representation from the claimant.

History: 1978 Comp., § 52-3-47, enacted by Laws 1987, ch. 235, § 41; 1989, ch. 263, § 65; 1990 (2nd S.S.), ch. 2, § 39; 1993, ch. 193, § 7; 2013, ch. 168, § 2.

ANNOTATIONS

Repeals and reenactments. — Laws 1987, ch. 235, § 41 repealed 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.

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.

The 2013 amendment, effective June 14, 2013, raised the limits for discovery costs; raised the limits for attorney fees; and in Subsection I, in the second sentence, after "up to a limit of", deleted "one thousand dollars ($1,000)" and added "three thousand dollars ($3,000)"; and in Subsection I, in the first sentence, after "shall not exceed", deleted "twelve thousand five hundred dollars ($12,500)" and added "twenty-two thousand five hundred dollars ($22,500)", in the fourth sentence, after "additional amount exceed", deleted "two thousand five hundred dollars ($2,500)" and added "five thousand dollars ($5,000)", and added the seventh sentence.

The 1993 amendment, effective June 18, 1993, substituted "discovery" for "deposition" in the catchline; made a minor stylistic change in Subsection C; in Subsection F(3), substituted "worker's" for "claimant's" and added "and the worker shall pay one hundred percent of the attorneys' fees due to the worker's attorney" at the end; in Subsection F(4), substituted "worker's" for "employer's" preceding "offer", "worker's" for "claimant's" preceding "attorney", "worker" for "claimant", and "the worker's" for "his attorneys' " preceding "fees"; deleted "Except for attorneys' fees incurred by an agency of the state or any political subdivsion of the state" at the beginning of Subsection M; and made a minor stylistic change in Subsection O.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, inserted "deposition costs; offer of judgment" in the catchline and rewrote the section to the extent that a detailed comparison would be impracticable.

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.*, 1973-NMCA-068, 85 N.M. 254, 511 P.2d 580, cert. denied, 85 N.M. 229, 511 P.2d 555.

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.*, 1973-NMCA-068, 85 N.M. 254, 511 P.2d 580, cert. denied, 85 N.M. 229, 511 P.2d 555.

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.*, 1973-NMCA-068, 85 N.M. 254, 511 P.2d 580, cert. denied, 85 N.M. 229, 511 P.2d 555.

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.*, 1973-NMCA-068, 85 N.M. 254, 511 P.2d 580, cert. denied, 85 N.M. 229, 511 P.2d 555.

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*, 1965-NMSC-029, 75 N.M. 52, 400 P.2d 471.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 724, 726.

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.

ANNOTATIONS

Compiler's notes. — Section 52-2-6 NMSA 1978, referred to in Subsection C, was repealed by Laws 1996 (1st S.S.), ch. 10, § 4, effective March 29, 1996.

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.

ANNOTATIONS

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*, 1976-NMCA-105, 89 N.M. 704, 556 P.2d 1180, cert. denied, 90 N.M. 7, 558 P.2d 619.

52-3-49.1. Rehiring of disabled workers.

A. If an employer is hiring, the employer shall offer to rehire any worker who has stopped working due to a disablement for which he has received or is due to receive benefits under the New Mexico Occupational Disease Disablement Law and who applies for his pre-disablement job or modified job similar to the pre-disablement job, subject to the following conditions:

(1) the worker's treating health care provider certifies that the worker is fit to carry out the pre-disablement job or modified work similar to the pre-disablement job without significant risk of repeating or compounding the disablement; and

(2) the employer has the pre-disablement job or modified work available.

B. If an employer is hiring, that employer shall offer to rehire a worker who applies for any job that pays less than the pre-disablement job and who has stopped working due to a disablement for which he has received, or is due, benefits under the New Mexico Occupational Disease Disablement Law, provided that the worker is qualified for the job and provided that the worker's treating health care provider certifies that the worker is fit to carry out the job offered. Occupational disease disablement benefits of a worker hired pursuant to this subsection shall be reduced as provided in Section 52-1-25.1 NMSA 1978.

C. As used in this section, "rehire" includes putting the disabled worker back to active work, regardless of whether he was carried on the employer's payroll during the period of his inability to work.

History: Laws 1990 (2nd S.S.), ch. 2, § 48.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 48 effective January 1, 1991.

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.

ANNOTATIONS

Cross references. — For effect of failure of workman (worker) to file claim or bring suit by reason of conduct of employer, *see* 52-3-25 NMSA 1978.

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 that may be filed by any of his employees during the course of their employment. A copy of the report shall be sent by the employer to the worker. 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; 1990 (2nd S.S.), ch. 2, § 40.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "that" for "which" in the first sentence, and added the second sentence.

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.

A. 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 any claim for benefits under the New Mexico Occupational Disease Disablement Law has been made, within ten days after such payment.

B. The director shall provide on a quarterly basis to the child support enforcement bureau of the human services department [health care authority department] the name, social security number, home address and employer of all disabled workers reported.

History: 1941 Comp., § 57-1139, enacted by Laws 1945, ch. 135, § 39; 1953 Comp., § 59-11-40; Laws 1986, ch. 22, § 71; 1990 (2nd S.S.), ch. 2, § 41.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, designated the preexisting text as Subsection A, substituting therein "any claim for benefits" for "compensation", and added Subsection B.

52-3-53. Penalties.

The director shall impose a penalty on any person who fails to file a report required by, or who violates any provision of, the New Mexico Occupational Disease Disablement Law or any rule or regulation adopted pursuant to that act. Unless specified otherwise in the New Mexico Occupational Disease Disablement Law, the penalty shall be a fine of not less than twenty-five dollars ($25.00) and not more than one thousand dollars ($1,000), subject to the director's discretion.

History: 1978 Comp., § 52-3-53, enacted by Laws 1990 (2nd S.S.), ch. 2, § 42.

ANNOTATIONS

Repeals and reenactments. — Laws 1990 (2nd S.S.), ch. 2, § 42, repealed former 52-3-53 NMSA 1978, as amended by Laws 1986, ch. 22, § 72, and enacted a new section, effective January 1, 1991.

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.

ANNOTATIONS

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.

ANNOTATIONS

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. Nonresident employers employing workers in state; requirement for insurance; enforcement.

A. Every employer not domiciled in the state who employs workers engaged in activities required to be licensed under the Construction Industries Licensing Act [Chapter 60, Article 13 NMSA 1978] and every other employer not domiciled in the state who 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 52-3-9 NMSA 1978 and, unless self-insured, shall obtain an occupational disease disablement 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, 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., § 52-3-57, enacted by Laws 1990 (2nd S.S.), ch. 2, § 43.

ANNOTATIONS

Repeals and reenactments. — Laws 1990 (2nd S.S.), ch. 2, § 43, repealed former 52-3-57 NMSA 1978, as amended by Laws 1986, ch. 22, § 74, and enacted new section, effective January 1, 1991.

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.

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.

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.

ARTICLE 4
Health Care Providers

52-4-1. Definition; health care provider.

As used in Chapter 52 NMSA 1978, "health care provider" means:

A. a hospital maintained by the state or a political subdivision of the state or any place currently licensed as a hospital by the department of health that has:

(1) accommodations for resident bed patients;

(2) a licensed professional registered nurse always on duty or call;

(3) a laboratory; and

(4) an operating room where surgical operations are performed;

B. an optometrist licensed pursuant to the provisions of Chapter 61, Article 2 NMSA 1978;

C. a chiropractic physician licensed pursuant to the provisions of Chapter 61, Article 4 NMSA 1978;

D. a dentist licensed pursuant to the provisions of Chapter 61, Article 5 NMSA 1978;

E. a physician licensed pursuant to the provisions of Chapter 61, Article 6 NMSA 1978;

F. a podiatrist licensed pursuant to the provisions of Chapter 61, Article 8 NMSA 1978;

G. an osteopathic physician licensed pursuant to the provisions of Chapter 61, Article 10 NMSA 1978;

H. a physician assistant licensed pursuant to the provisions of Section 61-6-7 NMSA 1978;

I. a certified nurse practitioner licensed pursuant to Section 61-3-23.2 NMSA 1978;

J. a physical therapist licensed pursuant to the provisions of Chapter 61, Article 12 NMSA 1978;

K. an occupational therapist licensed pursuant to the provisions of Chapter 61, Article 12A NMSA 1978;

L. a doctor of oriental medicine licensed pursuant to the provisions of Chapter 61, Article 14A NMSA 1978;

M. an athletic trainer licensed pursuant to the provisions of Chapter 61, Article 14D NMSA 1978;

N. 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 of clinical experience in a recognized health setting, or who has met the standards of the national register of health services providers in psychology;

O. a certified nurse-midwife licensed by the board of nursing as a registered nurse and registered with the behavioral health services division of the human services department [health care authority department] as a certified nurse-midwife;

P. a pharmacist licensed pursuant to the provisions of Chapter 61, Article 11 NMSA 1978; or

Q. any person or facility that provides health-related services in the health care industry, as approved by the director.

History: 1978 Comp., § 52-4-1, enacted by Laws 1983, ch. 116, § 1; 1989, ch. 263, § 69; 1990 (2nd S.S.), ch. 2, § 49; 1993, ch. 158, § 2; 2007, ch. 325, § 11; 2007, ch. 327, § 1; 2007, ch. 328, § 3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

2007 Multiple Amendments. — Laws 2007, ch. 325, § 11, Laws 2007, ch. 327, § 1 and Laws 2007, ch. 328, § 3 enacted different amendments to this section that can be reconciled. Pursuant to 12-1-8 NMSA 1978, Laws 2007, ch. 328, § 3, as the last act signed by the governor, is set out above and incorporates all amendments. The amendments enacted by Laws 2007, ch. 325, § 11, Laws 2007, ch. 327, § 1 and Laws 2007, ch. 328, § 3 are described below. To view the session laws in their entirety, *see* the 2007 session laws on *NMOneSource.com*.

Laws 2007, ch. 328, § 3, effective June 15, 2007, added Subsection O.

Laws 2007, ch. 325, § 11, effective June 15, 2007, changed "chiropractor" to "chiropractic physician" and "department of health" to "human services department".

Laws 2007, ch. 327, § 1, effective June 15, 2007, added athletic trainers to the definition of "health care provider".

The 1993 amendment, effective June 18, 1993, in Subsection A, substituted "a hospital" for "any hospital", "a political" for "any political", and "department of health" for "health and environment department"; substituted "Section 61-3-23.2" for "Section 61-3-14" in Subsection I; substituted "a doctor of oriental medicine" for "an acupuncture practitioner" in Subsection L; and substituted "department of health" for "health and environment department" in Subsection N.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, rewrote this section, which formerly prohibited restrictions in workers' compensation policies on choice of health care providers, to the extent that a detailed comparison would be impracticable.

"Health care provider" is a phrase with a very specific meaning and includes those in professions whose expertise would not necessarily require "scientific knowledge."

Banks v. IMC Kalium Carlsbad Potash Co., 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014.

Health care provider, no NewMexico license. — The phrase "health care provider" used throughout the 1987 Workers' Compensation Act is a shorthand expression referring to licensed occupations without reference to the requirement of licensure in New Mexico. *Coslett v. Third St. Grocery*, 1994-NMCA-046, 117 N.M. 727, 876 P.2d 656, cert. denied, 117 N.M. 802, 877 P.2d 1105.

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.*, 1985-NMSC-002, 102 N.M. 217, 693 P.2d 583.

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 Schs.*, 1989-NMCA-081, 109 N.M. 100, 781 P.2d 1178, cert. denied, 109 N.M. 131, 782 P.2d 384.

Standard for admitting expert testimony established by *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as adopted in New Mexico by State v. Alberico, 1993-NMSC-047, 116 N.M. 156, 861 P.2d 192, does not apply to the testimony of a health care provider pursuant to Section 52-1-28(B) or 52-3-32 NMSA 1978. *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014.

Law reviews. — For case note, "Workers' Compensation Law: A Clinical Psychologist Is Qualified to Give Expert Medical Testimony Regarding Causation: Madrid v. Univ. of California, d/b/a Los Alamos National Laboratory," see 18 N.M.L. Rev. 637 (1988).

For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 435 to 445.

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.

52-4-2. Utilization review; penalties.

A. The director shall establish a system of peer group utilization review of selected outpatient and inpatient health care provider services to workers claiming benefits under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] or the New Mexico Occupational Disease Disablement Law [52-3-1 NMSA 1978]. Subject to the provisions of this section, the decisions issued pursuant to the utilization review system shall be binding on the affected health care providers, workers, employers, insurers and their representatives.

B. As used in this section, "utilization review" means an evaluation of the necessity, appropriateness, efficiency and quality of health care services provided to an injured or disabled worker based on medically accepted standards and an objective evaluation of the health care services provided.

C. The director shall also establish a system of pre-admission review of all hospital admissions, except for emergency services. Utilization review shall commence within one working day of all emergency hospital admissions.

D. The director may contract with an independent utilization review organization to provide utilization review, including peer review.

E. Nothing in this section shall prevent an employer from electing to provide his own utilization review; however, if the worker, provider or any other party not contractually bound to the employer's utilization review program disagrees with that employer's utilization review, then that worker, provider or other party shall have recourse to the workers' compensation administration's utilization review program.

F. Pursuant to utilization review conducted by the director, including providing an opportunity for a hearing, any health care provider who imposes excessive charges or renders inappropriate services shall be subject to:

(1) a forfeiture of the right to payment for those services that are found to be excessive or inappropriate or payment of excessive charges;

(2) a fine of not less than one hundred dollars ($100) or more than one thousand dollars ($1,000); or

(3) a temporary or permanent suspension of the right to provide health care services for workers' compensation or occupational disease disablement claims if the health care provider has established a pattern of violations.

History: 1978 Comp., § 52-4-2, enacted by Laws 1990 (2nd S.S.), ch. 2, § 50; 1993, ch. 193, § 8.

ANNOTATIONS

Repeals and reenactments. — Laws 1990 (2nd S.S.), ch. 2, § 50 repealed former 52-4-2 NMSA 1978, as enacted by Laws 1990, ch. 65, § 1, and enacted a new section, effective April 4, 1991.

The 1993 amendment, effective June 18, 1993, in Subsection A, inserted "peer group" preceding "utilization", substituted "provider services" for "providers", and added the second sentence; in Subsection C, deleted "However, a" at the beginning of the second sentence, deleted "pursuant to Subsections A and B of this section" following "review" in the second sentence, and made a minor stylistic change; deleted "Pursuant to the director's established system of utilization review" at the beginning of Subsection D; deleted "as provided for in this section" at the end of Subsection E; and made a minor stylistic change in Subsection F.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-4-3. Case management.

A. The director shall establish a system of case management for coordinating the health care services provided to workers claiming benefits under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] or the New Mexico Occupational Disease Disablement Law [52-3-1 NMSA 1978].

B. As used in this section, "case management" means the ongoing coordination of health care services provided to an injured or disabled worker, including but not limited to:

(1) developing a treatment plan to provide appropriate health care services to an injured or disabled worker;

(2) systematically monitoring the treatment rendered and the medical progress of the injured or disabled worker;

(3) assessing whether alternate health care services are appropriate and delivered in a cost-effective manner based on acceptable medical standards;

(4) ensuring that the injured or disabled worker is following the prescribed health care plan; and

(5) formulating a plan for return to work.

C. The director shall contract with an independent organization to assist with the administration of the provisions of this section.

D. Nothing in this section shall prevent an employer from establishing his own program of case management; however, for the purposes of resolving choice of health

care provider disputes, an employer or worker shall only use the program as provided by the workers' compensation administration, as set forth in Section 52-1-49 NMSA 1978.

History: 1978 Comp., § 52-4-3, enacted by Laws 1990 (2nd S.S.), ch. 2, § 51.

ANNOTATIONS

Repeals and reenactments. — Laws 1990 (2nd S.S.), ch. 2, § 51 repealed former 52-4-3 NMSA 1978, as enacted by Laws 1990, ch. 65, § 2, and enacted a new section, effective April 1, 1991.

Effective dates. — Laws 1990, ch. 65, § 5 made §§ 1 and 2 of the act effective July 1, 1990.

Appropriations. — Laws 1990, ch. 65, § 3, effective May 16, 1990, appropriated $750,000 from the workers' compensation administration fund to the workers' compensation division of the labor department for expenditure in the seventy-ninth fiscal year for the purpose of providing for the review and other services provided pursuant to 52-4-2 and 52-4-3 NMSA 1978.

Laws 1990 (2nd S.S.), ch. 3, § 8C, effective January 1, 1991, provided that the appropriation in Laws 1990, ch. 65, § 3 be expended for the purpose of carrying out the provisions for utilization review and case management pursuant to 52-4-2 and 52-4-3 NMSA 1978.

Legislative intent requires case managers to be under contract. — The plain language of this section demonstrates that the legislature intended that a workers' compensation administration case manager be a contractor with a contract in effect. The administrative rules implement this intent by creating a framework requiring case managers to be contractors who are paid as provided in the contract. *Trace v. Univ. of N.M. Hosp.*, 2015-NMCA-083.

Where case manager's contract with the worker's compensation administration to coordinate health care services provided to worker expired, the workers' compensation judge was without statutory authority to order that the case manager continue providing services as worker's case manager in the absence of a contract under the Procurement Code. *Trace v. Univ. of N.M. Hosp.*, 2015-NMCA-083.

Private case management company. — A private case management company hired by an insurer could not engage in ex parte contacts with the claimant's private physician, the claimant or the claimant's counsel. *Gomez v. Nielson's Corp.*, 1995-NMCA-043, 119 N.M. 670, 894 P.2d 1026.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-4-4. Temporary provision; rules and regulations.

A. The director shall adopt and promulgate regulations and contract with a peer review organization pursuant to Section 52-4-2 NMSA 1978 no later than October 1, 1990.

B. The director shall establish a baseline period of no less than six months, adjusted for seasonal variations, for the purpose of providing data for the calculations required pursuant to Subsection C of this section no later than January 1, 1991.

C. For the one-year period ending December 31, 1991, the director shall issue a report concerning the results of the utilization review program as provided in Section 52-4-3 NMSA 1978 no later than December 1, 1992. If the director determines that based on such data the program has not resulted in a ten percent reduction in the utilization and cost of services subject to the utilization program, he shall have the authority to adopt and promulgate regulations, after notice and public hearings, to establish schedules of maximum charges for fees that are payable to health care providers as defined in Section 52-4-1 NMSA 1978. Such schedules shall be annually revised.

D. For the purposes of calculating the percentage as provided in Subsection C of this section, a comparison of both baseline and utilization program data shall be performed. Factors that shall be considered include, but are not limited to:

(1) severity and frequency of illness or injury;

(2) average length of stay of hospitalization;

(3) number of admissions per one hundred workers' compensation claims;

(4) number of services provided per one hundred workers' compensation claims; and

(5) factors that may affect the utilization and cost of medical services provided under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978].

History: Laws 1990, ch. 65, § 4.

ANNOTATIONS

Effective dates. — Laws 1990, ch. 65 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 16, 1990.

52-4-5. Fee schedule.

A. The director shall adopt and promulgate regulations establishing a schedule of maximum charges as deemed necessary for treatment or attendance, service, devices,

apparatus or medicine provided by a health care provider. The rates in the schedules of maximum charges shall not fall below the sixtieth percentile or above the eightieth percentile of current rates for health care providers. In determining current rates for health care providers, the director shall utilize a variety of health care provider charges, including the charges of those providers serving low income, medicare and medicaid patients.

B. A health care provider shall be paid his usual and customary fee for services rendered or the maximum charge established pursuant to Subsection A of this section, whichever is less. However, in no case shall the usual and customary fee exceed the maximum charge allowable.

C. The fee schedule shall be revised annually by the director.

D. No amount in excess of the amount required by Subsection B of this section for a service shall be paid by the employer, the employer's insurer, the worker, a representative of the worker or any other person to a health care provider for rendering that service in connection with an injury or disablement within the purview of the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] or the New Mexico Occupational Disease Disablement Law [52-3-1 NMSA 1978].

E. If it is determined by the person primarily responsible for payment that the charges of a health care provider exceed the amount established pursuant to Subsection B of this section or that a health care provider over-utilized or otherwise rendered or ordered inappropriate health care or health care services, and payment is withheld on those grounds, the health care provider may appeal to the director regarding that determination. The director shall establish by regulation procedures for an appeal by a health care provider.

F. The director shall establish an advisory committee that shall:

(1) be appointed and serve at the pleasure of the director;

(2) consist of members, a majority of whom represent health care providers;

(3) reflect the diversity of authorized licensed health care providers available for workers' compensation and occupational disease disablement cases;

(4) assist in establishing the schedules of maximum charges under Subsection A of this section for any fees that are payable to health care providers;

(5) assist the director in adopting regulations for employers' utilization review procedures and the establishment and conduct of utilization review boards; and

(6) report its findings, upon request, to the director and the advisory council on workers' compensation.

G. The schedule of maximum charges specified in this section shall not apply to hospital charges. The director shall establish a separate schedule of maximum charges for hospital charges no later than April 1, 1991.

H. Nothing in this section shall prevent an employer from contracting with a health care provider for fees less than the maximum charges allowable.

History: 1978 Comp., § 52-4-5, enacted by Laws 1990 (2nd S.S.), ch. 2, § 52; 1993, ch. 193, § 9.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, in Subsection A, substituted the present last sentence for the former last sentence, which read "The regulations adopted under this subsection shall be adopted not later than January 1, 1992, after review, notice and public hearing."; and made a minor stylistic change in Subsection E.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

ARTICLE 5
Workers' Compensation Division

52-5-1. Purpose.

It is the intent of the legislature in creating the workers' compensation administration 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 [52-3-1 NMSA 1978]. 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; 1990 (2nd S.S.), ch. 2, § 53.

ANNOTATIONS

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.

Cross references. — For authority to establish workers' compensation division, *see* N.M. Const., art. III, § 1.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "administration" for "division of the labor department" near the beginning of the first sentence.

Appropriations. — Laws 1990, ch. 65, § 3, effective May 16, 1990, appropriated $750,000 from the workers' compensation administration fund to the workers' compensation division of the labor department for expenditure in the seventy-ninth fiscal year for the purpose of providing for the review and other services provided pursuant to 52-4-2 and 52-4-3 NMSA 1978.

Constitutionality. — This section is a statement of legislative intent; legislature did not intend the courts to disregard precedent by applying a liberal construction, and therefore this section does not violate the constitutional doctrine of separation of powers. *Benavides v. Eastern N.M. Med. Ctr.*, 2014-NMSC-037, *rev'g* No. 32,450, mem. Op. (N.M. Ct. App. Mar. 25, 2013) (non-precedential).

Workers' Compensation Act fulfills its purpose through a bargain in which an injured worker gives up his or her right to sue the employer for damages in return for an expedient settlement covering medical expenses and wage benefits, while the employer gives up her defenses in return for immunity from a tort claim. *Morales v. Reynolds*, 2004-NMCA-098, 136 N.M. 280, 97 P.3d 612, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Legislative intent. — This section calls for a balanced and evenhanded construction of the Workers' Compensation Act. *Gomez v. B.E. Harvey Gin Corp.*, 1990-NMSC-057, 110 N.M. 100, 792 P.2d 1143.

The legislature's rejection of the rule of liberal construction of the Workers' Compensation Act in favor of workers does not preclude adoption of the traveling-employee rule. *Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, 128 N.M. 601, 995 P.2d 1043.

This section is a prospectively applicable statement of legislative intent that neither attempts nor purports to retroactively dismantle established workers' compensation case law enunciated under the rule of liberal construction. *Garcia v. Mt. Taylor Millwork,*

Inc., 1989-NMCA-100, 111 N.M. 17, 801 P.2d 87, cert. denied, 110 N.M. 282, 795 P.2d 87.

This section is a prospective statement of legislative intent which leaves intact the premises exception to the going and coming rule adopted in *Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, 105 N.M. 503, 734 P.2d 743. *Garcia v. Mt. Taylor Millwork, Inc.*, 1989-NMCA-100, 111 N.M. 17, 801 P.2d 87, cert. denied, 110 N.M. 282, 795 P.2d 87.

The decision in this case comports with the legislative intent expressed in this section. *Jackson v. K & M Constr.*, 2004-NMCA-082, 136 N.M. 94, 94 P.3d 837, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

All claims to be filed with division. — All claims, regardless of when the injury or death may have occurred, shall be filed with the workmen's (workers') compensation administration (now the workers' compensation division). *Wylie Corp. v. Mowrer*, 1986-NMSC-075, 104 N.M. 751, 726 P.2d 1381.

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

For annual survey of New Mexico Workers' Compensation Law, see 20 N.M.L. Rev. 459 (1990).

For note, "Workers' Compensation Law - Bad Faith Refusal of an Insurer To Pay Workers' Compensation Benefits: Russell v. Protective Insurance Company," see 20 N.M.L. Rev. 757 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 55 to 58.

100 C.J.S. Workmen's Compensation §§ 369 to 377.

52-5-1.1. Short title.

Chapter 52, Article 5 NMSA 1978 [except 52-5-22 NMSA 1978] may be cited as the "Workers' Compensation Administration Act".

History: Laws 1990 (2nd S.S.), ch. 2, § 61.

ANNOTATIONS

Compiler’s notes. — Section 52-5-22 NMSA 1978 was not enacted as part of the Workers' Compensation Administration Act, but was compiled there for the convenience of the user.

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 61 effective January 1, 1991.

52-5-1.2. Workers' compensation administration created.

There is created as an entity of state government the "workers' compensation administration".

History: Laws 1990 (2nd S.S.), ch. 2, § 62; 2003, ch. 259, § 8.

ANNOTATIONS

The 2003 amendment, effective June 20, 2003, deleted provisions following "workers' compensation administration" which related to the administrative attachment to the labor department.

No jurisdiction over claims between insurers. — The workers' compensation administration does not have jurisdiction over a controversy between workers' compensation insurers that has no effect on the rights of the worker. *Jones v. Holiday Inn Express*, 2014-NMCA-082.

Where worker sustained a back injury; thirteen days before the accident, the employer changed worker's compensation carriers from plaintiff to defendant; unaware of the change, the employer's manager gave notice to plaintiff of worker's claim for benefits; without researching whether the employer was insured through plaintiff, plaintiff accepted the claim and began paying benefits to worker; plaintiff also erred by miscalculating the amount of benefits which gave worker 700 weeks instead of 500 weeks of benefits; when plaintiff discovered the error, plaintiff filed a complaint with the workers' compensation administration requesting that the workers' compensation judge order defendant to pay future benefits to worker and to reimburse the benefits paid by plaintiff, the workers' compensation administration lacked jurisdiction over the controversy because the controversy did not involve or affect worker's claim for compensation. *Jones v. Holiday Inn Express*, 2014-NMCA-082.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-5-1.3. Enforcement bureau.

A. There is created in the workers' compensation administration an "enforcement bureau".

B. The enforcement bureau shall investigate to determine whether any fraudulent conduct relating to workers' compensation is being practiced. The enforcement bureau shall refer to an appropriate law enforcement agency any finding of fraud. For any claim

pending in the administration, the enforcement bureau shall also bring its findings to the attention of the workers' compensation judge assigned to that claim.

C. For the purposes of this section, "fraud" includes the intentional misrepresentation of a material fact resulting in workers' compensation or occupational disablement coverage, the payment or withholding of benefits or an attempt to obtain or withhold benefits. The intentional misrepresentation of a material fact may occur through the conduct, practices, omissions or representations of any person. Any person found guilty of committing fraud shall be sentenced pursuant to the provisions of Section 30-16-6 NMSA 1978 and the provisions of the Criminal Sentencing Act [Chapter 31, Article 18 NMSA 1978].

History: Laws 1990 (2nd S.S.), ch. 2, § 63; 2013, ch. 134, § 5.

ANNOTATIONS

The 2013 amendment, effective July 1, 2013, replaced the safety and fraud division of the worker's compensation administration with an enforcement bureau; in the title, deleted "safety and fraud division" and added "enforcement bureau"; in Subsections A and B, deleted "safety and fraud division" and added "enforcement bureau"; deleted former Subsection B, which required the safety and fraud division to develop a program to identify extra-hazardous employers; deleted former Subsection C, which required extra-hazardous employers to obtain a safety consultation from the safety and fraud division; and deleted former Subsection D, which required extra-hazardous employers to formulate an accident prevention plan.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-5-1.4. Ombudsman program.

A. The director shall establish an ombudsman program to assist injured or disabled workers, persons claiming death benefits, employers and other persons in protecting their rights and obtaining information available under workers' compensation and occupational disease disablement laws.

B. An ombudsman shall meet with or otherwise provide information to injured or disabled workers, investigate complaints and communicate with employers, insurance carriers and health care providers on behalf of injured or disabled workers. An ombudsman shall otherwise assist unrepresented claimants, employers and other parties to enable them to protect their rights in the workers' compensation and occupational disease disablement system. At least one specially qualified employee in each location that the administration has an office shall be designated by the director as an ombudsman, and duties described in this section shall be that person's primary responsibility. The director may designate additional ombudsmen and assign them as the director deems appropriate.

C. An ombudsman need not be an attorney but shall demonstrate familiarity with workers' compensation and occupational disease disablement laws.

D. An ombudsman shall not be an advocate for any person and shall restrict ombudsman's activities to providing information and facilitating communication. An ombudsman shall not assist a claimant, employer or any other person in any proceeding beyond the informal conference held pursuant to Section 52-5-5 NMSA 1978.

E. Each employer shall notify the employer's employees of the ombudsman service in a manner prescribed by the director. The notice shall include the posting of a notice in one or more conspicuous places. The director shall also describe clearly the availability of the ombudsmen on the first report of accident form required under Section 52-1-58 NMSA 1978, or the first report of disablement form required under Section 52-3-51 NMSA 1978.

History: Laws 1990 (2nd S.S.), ch. 2, § 64; 2004, ch. 118, § 1; 2013, ch. 134, § 6.

ANNOTATIONS

The 2013 amendment, effective July 1, 2013, allowed an ombudsman to hold another position in the workers' compensation administration upon leaving the position of ombudsman; and in Subsection C, deleted the former second sentence, which made an ombudsman ineligible to hold another position in the workers' compensation administration for one year after leaving the position of ombudsman.

The 2004 amendment, effective July 1, 2004, amended Subsection C to change the period of ineligibility for serving in another position in the administration from five years to one year.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-5-2. Director; appointment; employees; workers' compensation judges.

A. The workers' compensation administration 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. Workers' compensation judges shall not be subject to the provisions of the Personnel Act [Chapter 10, Article 9 NMSA 1978] 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 equal to 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 workers' compensation judges. A workers' compensation judge shall be required to conform to all canons of the code of judicial conduct as adopted by the supreme court, except canon 21-900 of that code. Violation of those canons shall be exclusive grounds for dismissal prior to the expiration of his term. Any complaints against a workers' compensation judge shall be filed with the state personnel board, which shall report its findings to the director.

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; 1990 (2nd S.S.), ch. 2, § 54; 2004, ch. 118, § 2.

ANNOTATIONS

The 2004 amendment, effective July 1, 2004, deleted in Subsection A "The director's salary shall be equal to ninety-five percent of that of district court judges." This sentence was amended to change "district court judges" to "court of appeals judges", however, the governor line-item vetoed the entire sentence and a four thousand four hundred forty-six dollar appropriation.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, in Subsection A, substituted "administration" for "division" near the beginning of the first sentence and added the last sentence; in Subsection B, deleted language regarding the appointment of workers' compensation judges between September 1, 1986 and April 1, 1987, and substituted "equal to" for "not more than"; and in Subsection C, substituted "all canons of" for "canons 1, 2, 3, 4, 5, and 7 of", "except Canon 21-900 of that code. Violation" for "and violation", and the final sentence for language regarding dismissal of judges.

No jurisdiction over claims between insurers. — The workers' compensation administration does not have jurisdiction over a controversy between workers'

compensation insurers that has no effect on the rights of the worker. *Jones v. Holiday Inn Express*, 2014-NMCA-082.

Where worker sustained a back injury; thirteen days before the accident, the employer changed worker's compensation carriers from plaintiff to defendant; unaware of the change, the employer's manager gave notice to plaintiff of worker's claim for benefits; without researching whether the employer was insured through plaintiff, plaintiff accepted the claim and began paying benefits to worker; plaintiff also erred by miscalculating the amount of benefits which gave worker 700 weeks instead of 500 weeks of benefits; when plaintiff discovered the error, plaintiff filed a complaint with the workers' compensation administration requesting that the workers' compensation judge order defendant to pay future benefits to worker and to reimburse the benefits paid by plaintiff, the workers' compensation administration lacked jurisdiction over the controversy because the controversy did not involve or affect worker's claim for compensation. *Jones v. Holiday Inn Express*, 2014-NMCA-082.

A workers' compensation judge pro tem may be appointed by the director under statutory and constitutional authority. *Carrillo v. Compusys, Inc.*, 1997-NMCA-003, 122 N.M. 720, 930 P.2d 1172.

52-5-3. Reports; data gathering.

A. The intent of this section is to allow the director to gather data and conduct studies to evaluate the workers' compensation and occupational disease disablement system in New Mexico. This includes evaluating the benefits structure and the costs incurred under each version of the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] and the New Mexico Occupational Disease Disablement Law [52-3-1 NMSA 1978]. To this end, the director shall establish baseline data against which to assess the changes in the law.

B. The director shall independently evaluate insurance industry data pertaining to workers' compensation and occupational disease disablement claims and payments, as well as other information the director believes to be necessary and relevant to a thorough evaluation of the system's effectiveness. In addition to data generated by insurance industry representatives and organizations, the director shall collect data from employers, claimants and other relevant parties.

C. Unless otherwise provided by law, the director shall have access to insurance industry information that contains workers' compensation and occupational disease disablement claim data as the director determines is necessary to carry out the provisions of this section.

D. The director shall have access to files and records of:

(1) the workforce solutions department that pertain to:

(a) the name and number of employees reported by employers;

(b) employers' mailing addresses;

(c) federal identification numbers; and

(d) general wage information;

(2) the office of superintendent of insurance that pertain to:

(a) historical insurance classification rates and total premiums paid during given periods of time;

(b) insurers licensed to underwrite casualty insurance; and

(c) records of group self-insurers;

(3) the human services department [health care authority department] that include names, addresses and other identifying information of recipients of benefits and services pertaining to income support;

(4) the taxation and revenue department that identify employers paying workers' compensation assessments in accordance with Section 52-5-19 NMSA 1978; and

(5) the motor vehicle division of the taxation and revenue department that pertain to the identity of licensed drivers and the ownership of motor vehicles.

E. Information that is confidential under state law shall be accessible to the director and shall remain confidential.

F. The director shall prepare an annual report. The director shall publish in that report and in other reports as the director deems appropriate such statistical and informational reports and analyses based on reports and records available as, in the director's opinion, will be useful in increasing public understanding of the purposes, effectiveness, costs, coverage and administrative procedures of workers' compensation and in providing basic information regarding the occurrence and sources of work injuries or disablements to public and private agencies engaged in industrial injury prevention activities. The reports shall include information concerning the nature and frequency of injuries and occupational diseases sustained and the resulting benefits, costs and other factors that are important to furthering the intent of this section.

History: Laws 1986, ch. 22, § 29; 1987, ch. 342, § 32; 1989, ch. 263, § 72; 1990 (2nd S.S.), ch. 2, § 55; 2003, ch. 259, § 9; 2013, ch. 74, § 5.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

The 2013 amendment, effective March 29, 2013, gave the director access to the files and records of the superintendent of insurance; and in Paragraph (2) of Subsection D, at the beginning of the sentence, after "the", added "office of superintendent of" and after "insurance", deleted "division of the public regulation commission".

The 2003 amendment, effective June 20, 2003, substituted "division of the public regulation commission" for "department" near the middle of Subsection D(2); and added Subsection D(5).

The 1990 (2nd S.S.) amendment, effective January 1, 1991, added "data gathering" to the catchline; added Subsections A to E; designated the preexisting text as Subsection F, substituting therein "shall prepare an annual report. He shall publish in that report and in other reports as he deems appropriate such statistical" for "shall prepare and publish such statistical", deleting "and vocational rehabilitation" following "compensation", inserting "or disablements", and adding the final sentence.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

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 [52-3-1 NMSA 1978]. 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 [Chapter 14, Article 4 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.

D. The director shall adopt rules for approval and establishment of controlled insurance plans, including performance standards compliance enforcement. In an advisory role only to participate in the rulemaking process, the director shall provide for the participation of:

(1) general contractors;

(2) subcontractors;

(3) organized labor;

(4) municipalities;

(5) counties; and

(6) business.

History: Laws 1986, ch. 22, § 30; 1989, ch. 263, § 73; 2003, ch. 263, § 3.

ANNOTATIONS

The 2003 amendment, effective June 20, 2003, deleted "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 of hearings" following the first sentence in Subsection A; and added Subsection D.

Requirement that rules and regulations be definite and certain. — Rules and regulations adopted by the workers' compensation administration pursuant to this section should be definite and certain so the parties know what is expected of them. *Rodriguez v. El Paso Elec. Co.*, 1992-NMCA-042, 113 N.M. 672, 831 P.2d 608.

Award of prejudgment interest allowed. — Section 56-8-4B NMSA 1978 (award of prejudgment interest) does not apply to decisions made pursuant to the Occupational Disease Disability Law. However, such interest is allowed under Workers' Compensation Division Rules, WCD 89-4(V)(A)(3) (now NMAC 11.4.4.13), promulgated under this section. *Bryant v. Lear Siegler Mgmt. Servs. Corp.*, 1993-NMCA-052, 115 N.M. 502, 853 P.2d 753, cert. denied, 115 N.M. 535, 854 P.2d 362.

52-5-4.1. Qualifications to be a self-insurer; certification; application; fee.

A. The director shall adopt rules and regulations to determine the qualifications necessary to be a self-insurer. To qualify to be a self-insurer, a private employer must show to the satisfaction of the director that the employer is financially solvent and that providing workers' compensation and occupational disease disablement insurance

coverage is unnecessary. The director shall consider the employer's financial ability to pay promptly workers' compensation and occupational disease disablement benefits and assessments that may be imposed under the Self-Insurers' Guarantee Fund Act.

B. The director shall certify each private employer who qualifies to be a self-insurer.

C. Each application for certification as a self-insurer shall be accompanied by payment of a fee not to exceed one hundred fifty dollars ($150). The fee shall be set by the director as necessary to cover the administrative costs of evaluating the applicants' qualifications. The fee shall be deposited in the workers' compensation administration fund.

D. Any employer formerly certified as a self-insurer who ceases to be certified may not apply again for certification until three years after certification ceases.

History: Laws 1990 (2nd S.S.), ch. 3, § 6.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 3, § 10 made Laws 1990 (2nd S.S.), ch. 3, § 6 effective January 1, 1991.

Compiler's notes. — For the Self-Insurers' Guarantee Fund Act, *see* 52-8-1 NMSA 1978 and compiler's 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 [52-3-1 NMSA 1978], 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 that 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 that is due and not paid.

C. Upon receipt, every claim shall be evaluated by the director or the director's 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 recommendations for resolution and serve the parties with a copy. Within thirty days of receipt of the recommendation of the director, each party shall notify the director on a form provided by the director 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:

(1) the employer and the employer's insurer shall constitute a single party for purposes of this subsection;

(2) this peremptory right to disqualify one worker's compensation judge shall not apply to the judge appointed pursuant to Section 52-1-49 NMSA 1978 to render a decision within seven days on a request for a different health care provider; and

(3) no party shall be required to disqualify a workers' compensation judge until a judge has been assigned to a case.

History: Laws 1986, ch. 22, § 31; 1987, ch. 235, § 47; 1989, ch. 263, § 74; 1993, ch. 193, § 10; 2013, ch. 134, § 7.

ANNOTATIONS

The 2013 amendment, effective July 1, 2013, allowed the workers' compensation administration to serve parties in formats in addition to certified mail; and in Subsection C, in the second sentence, after "resolution and", deleted "provide" and added "serve" and after "with a copy" deleted "by certified mail, return receipt requested".

The 1993 amendment, effective June 18, 1993, in Subsection D, added the Paragraph (1) designation and made a minor stylistic change in Paragraph (1), and added Paragraphs (2) and (3).

Modification of resolution. — A party may petition a workers' compensation judge to modify a binding recommended resolution within the two-year time period provided by statute, so long as the party's application is based on one of the statutorily enumerated grounds. *Hidalgo v. Ribble Contracting*, 2008-NMSC-028, 144 N.M. 117, 184 P.3d 429.

Jurisdiction over Indians. — Where worker was injured during the course of worker's employment by an Indian tribe at a ski run that was operated by the Indian tribe and the ski run was located on federal, not tribal land; the Indian tribe did not waive sovereign immunity by operating the ski run off tribal land, the location of the ski run off tribal land did not confer jurisdiction to the state, and the workers' compensation judge lacked subject matter jurisdiction of worker's claim. *Antonio v. Inn of the Mountain Gods Resort*

& Casino, 2010-NMCA-077, 148 N.M. 858, 242 P.3d 425, cert. denied, 2010-NMCERT-007, 148 N.M. 610, 241 P.3d 611.

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.*, 1988-NMSC-072, 107 N.M. 463, 760 P.2d 155 (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*, 1989-NMCA-014, 108 N.M. 281, 771 P.2d 989.

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*, 1989-NMCA-014, 108 N.M. 281, 771 P.2d 989.

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*, 1989-NMCA-014, 108 N.M. 281, 771 P.2d 989.

Relief from mistake. — Subsection C of this section provides the exclusive procedure for obtaining relief from the binding effect of an accepted recommended resolution on the grounds of mistake. *Medina v. Hunemuller Constr., Inc.*, 2005-NMCA-123, 138 N.M. 472, 122 P.3d 839.

Failure to timely respond to recommended resolution. — Examination of Subsection C of this section in context with the act as a whole indicates that the legislature intended that a party's failure to timely respond to a recommended resolution would preclude a later attempt to contest the recommended resolution for mistake, inadvertence, surprise or excusable neglect under Subsection B(2) of Section 52-5-9 NMSA 1978. *Norman v. Lockheed Eng'g & Science Co.*, 1991-NMCA-101, 112 N.M. 618, 817 P.2d 1260.

To the extent that the provisions of Section 52-5-5C and 52-5-9B(2) NMSA 1978 are conflicting, the former section is the more specific and governs. *Norman v. Lockheed Eng'g & Science Co.*, 1991-NMCA-101, 112 N.M. 618, 817 P.2d 1260.

Since respondents failed to notify the workers' compensation judge of excusable neglect within the time limit specified in Subsection C of this section, they could not subsequently file a rejection to the recommended resolution under the two-year time limit provided in Section 52-5-9 NMSA 1978. *Norman v. Lockheed Eng'g & Science Co.*, 1991-NMCA-101, 112 N.M. 618, 817 P.2d 1260.

Allowing a party up to two years to assert mistake or excusable neglect as a basis for filing a rejection to the recommended resolution would make a nullity of the time limits in Subsection C of this section. *Norman v. Lockheed Eng'g & Science Co.*, 1991-NMCA-101, 112 N.M. 618, 817 P.2d 1260.

Time limits for modifications. — A party who fails to file a response to a recommended resolution is governed by the time limits of Subsection C when seeking to modify compensation order based on mistake or excusable neglect; when considering other grounds for modification under Section 52-5-9 NMSA 1978, excluding mistake or excusable neglect, the two-year limitation period of Section 52-5-9 NMSA 1978 applies as with any other compensation order. *Fasso v. Sierra Healthcare Ctr.*, 1994-NMCA-170, 119 N.M. 132, 888 P.2d 1014.

Since the worker sought to modify recommended worker's compensation resolution on the basis of her change in condition, the two-year provision in Section 52-5-9B NMSA 1978 applied and not the shorter limitations period in Subsection C. *Fasso v. Sierra Healthcare Ctr.*, 1994-NMCA-170, 119 N.M. 132, 888 P.2d 1014.

Time limits for relief from recommended resolution. — Section 52-5-9 B(2) NMSA 1978 does not provide a basis for obtaining relief from a recommended resolution on the basis of mistake once the time limits of Subsection C of this section governing withdrawal of an acceptance have expired. *Medina v. Hunemuller Constr., Inc.*, 2005-NMCA-123, 138 N.M. 472, 122 P.3d 839.

Worker's burden to establish entitlement to benefits. — Although an employer filed with the administration a petition to reduce benefits seeking a termination or reduction of temporary total disability benefits, it did not bear the burden of persuading the judge that the worker's benefits should be terminated or reduced. The burden was on the worker to establish entitlement to benefits. *Gallegos v. City of Albuquerque*, 1993-NMCA-050, 115 N.M. 461, 853 P.2d 163, cert. denied, 115 N.M. 535, 854 P.2d 362.

Initiation of claim by employer. — An employer had standing to initiate a worker's compensation action for death benefits on behalf of its employee. *Eldridge v. Circle K Corp.*, 1997-NMCA-022, 123 N.M. 145, 934 P.2d 1074, cert. denied, 122 N.M. 808, 932 P.2d 498.

When an employer initiated a worker's compensation death claim on behalf of its employee, and the employee's estate filed an action in district court against the employer for intentional wrongful acts, action on the worker's compensation claim would be deferred until the estate's action for intentional tort was resolved. *Eldridge v. Circle K*

Corp., 1997-NMCA-022, 123 N.M. 145, 934 P.2d 1074, cert. denied, 122 N.M. 808, 932 P.2d 498.

Modification of binding resolution. — A conclusively binding recommendation under this section, after the running of the time for contesting the recommendation, is synonymous with and constitutes an "award" within the meaning of Subsection A of Section 52-5-9 NMSA 1978. Thus, jurisdiction vests with the workers' compensation judge (W.C.J.) to modify a conclusively binding recommended resolution under Section 52-5-9 NMSA 1978, and the W.C.J. erred in concluding that a conclusively binding recommended resolution is not a "compensation order" as used in Section 52-5-9 NMSA 1978. *Norman v. Lockheed Eng'g & Science Co.*, 1991-NMCA-101, 112 N.M. 618, 817 P.2d 1260.

The grounds for modification listed in Subsection B of Section 52-5-9 NMSA 1978 do not permit a party to file a delayed response to a recommended resolution once the resolution has become final. *Norman v. Lockheed Eng'g & Science Co.*, 1991-NMCA-101, 112 N.M. 618, 817 P.2d 1260.

Disqualification of judge. — The formal hearing rule adopted by the worker's compensation administration was erroneously interpreted to require a worker to file a provisional challenge to an alternative worker's compensation judge within ten days of the initial notice of judge assignment, in anticipation of the possibility that the opposing party would challenge the first judge. The rule could be properly interpreted to permit each party to exercise a peremptory challenge within ten days of the initial notice of judge assignment or a subsequent notice of judge assignment, if the first judge is excused or recuses himself or herself. *Wineman v. Kelly's Restaurant*, 1991-NMCA-128, 113 N.M. 184, 824 P.2d 324.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation § 488 et seq.

100 C.J.S. Workmen's Compensation § 458 et seq.

Law reviews. — For note, "The District Court Should Make the Initial Determination of Jurisdiction in Workers' Compensation Cases Involving Intentional Tort Claims - Eldridge v. Circle K Corp.," see 28 N.M.L. Rev. 665 (1998).

52-5-6. Authority of the director to conduct hearings.

A. Unless the parties agree otherwise, or it is ordered by the workers' compensation judge or the director in the case of a director's hearing, hearings shall be held at an office of the workers' compensation administration that is located nearest to the location of injury or disablement. In determining the site of hearing, the judge or the director shall consider cost-effectiveness, judicial efficiency, the health and mobility of the worker and the convenience of parties and witnesses. Hearings may be conducted by videoconferencing or by telephone at the discretion of the judge or the director.

B. The workers' compensation judge and the director 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 that may be necessary to enable the judge or the director to discharge the duties of the judge's or the director's office effectively.

C. In addition to the noncriminal sanctions that may be ordered by the workers' compensation judge or the director, any person committing any of the following acts in a proceeding before a workers' compensation judge or the director may be held accountable for the person's 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; 2001, ch. 87, § 4; 2013, ch. 134, § 8.

ANNOTATIONS

The 2013 amendment, effective July 1, 2013, removed the requirement that workers' compensation claims be heard in the county in which the injury occurred; deleted former Subsection A, which required that workers' compensation claims be heard in the county in which the injury occurred; and added Subsection A.

The 2001 amendment, effective July 1, 2001, added the last sentence in Subsection A.

The workers' compensation administration has inherent and statutory authority to suspend an attorney from practicing before it. *Chavez v. N.M. Workers' Comp. Admin.*, 2012-NMCA-060, 280 P.3d 927.

Suspension of an attorney from practicing before the workers' compensation administration. — Where the director of the worker's compensation administration proposed to assess administrative penalties against an attorney who practiced before the workers' compensation administration for seventeen violations of the Worker's Compensation Act and rules; the parties entered into a stipulated agreement which provided that if the attorney violated the terms of the stipulated agreement, a stipulated order which suspended the attorney from practice before the workers' compensation administration would be filed; and the attorney violated the terms of the stipulated agreement and was suspended from practicing before the workers' compensation administration, the workers' compensation administration had authority to suspend the attorney from practicing before it and the suspension did not infringe upon the exclusive authority of the supreme court to discipline attorneys because the workers' compensation administration took no action against the attorney's status as an attorney as such. *Chavez v. N.M. Workers' Comp. Admin.*, 2012-NMCA-060, 280 P.3d 927.

Sanction of an attorney exceeded the workers' compensation administration's authority. — Where a stipulated order suspending an attorney from practicing before the workers' compensation administration prohibited the attorney from generating any fees associated with worker's compensation matters, the prohibition exceeded the worker's compensation administration's authority to control proceedings before it and infringed upon the supreme court's exclusive jurisdiction to discipline attorneys. *Chavez v. N.M. Workers' Comp. Admin.*, 2012-NMCA-060, 280 P.3d 927.

A workers' compensation judge does not have authority to issue injunctions. *Leonard v. Payday Prof'l/Bio-Cal Comp.*, 2008-NMCA-034, 143 N.M. 637, 179 P.3d 1245, cert. denied, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 674.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 523 to 527.

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 [52-3-1 NMSA 1978].

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 as provided in Section 52-1-54 NMSA 1978. 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; 1993, ch. 193, § 11.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, substituted "as provided in Section 52-1-54 NMSA 1978" for "by the employer, and in no event shall an unsuccessful claimant be responsible for the cost and expense of any discovery procedure" in the second sentence of Subsection F.

Attorney fees. — Nothing in the language of Section 52-5-7B NMSA 1978 indicates that it applies to subsequent orders awarding attorney fees. *Trujillo v. Hilton of Santa Fe*, 1993-NMCA-005, 115 N.M. 398, 851 P.2d 1065, *rev'd on other grounds*, 1993-NMSC-017, 115 N.M. 397, 851 P.2d 1064.

Discovery. — The statute directs that discovery shall be conducted only upon the hearing officer's findings that good cause exists. *Cantrell v. W & C Contracting Co.*, 1991-NMCA-091, 112 N.M. 609, 817 P.2d 1251, cert. denied, 112 N.M. 440, 816 P.2d 509.

"Cost and expense". — The words "cost and expense" in Subsection F also permit the workers' compensation judge to allow a reasonable fee charged by an expert witness in necessarily reviewing records or otherwise preparing to testify by deposition. *Cantrell v. W & C Contracting Co.*, 1991-NMCA-091, 112 N.M. 609, 817 P.2d 1251, cert. denied, 112 N.M. 440, 816 P.2d 509.

The words "cost and expense," as used in Subsection F of this section, have been interpreted to include the actual costs of taking a deposition, such as stenographer and reporter fees. *Cantrell v. W & C Contracting Co.*, 1991-NMCA-091, 112 N.M. 609, 817 P.2d 1251, cert. denied, 112 N.M. 440, 816 P.2d 509.

Award of expert fees. — The requirement of a subpoena must be met before any expert fees can be awarded. *Murphy v. Duke City Pizza, Inc.*, 1994-NMCA-085, 118 N.M. 346, 881 P.2d 706, cert. denied, 118 N.M. 430, 882 P.2d 21.

Authority of judge over worker's residual physical capacity. — Even though evidence must be presented by a qualified health provider on the issue of a worker's residual physical capacity, a worker's compensation judge is free to consider this evidence in the same manner, and to the same degree, as any other expert testimony. *Slygh v. RMCI, Inc.*, 1995-NMCA-081, 120 N.M. 358, 901 P.2d 776.

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 Workers' Compensation § 602 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.

ANNOTATIONS

Final order. — A compensation order of the workers' compensation administration awarding compensation and medical benefits but not resolving the issue of attorney fees was not a final order for purposes of appeal. *Trujillo v. Hilton of Santa Fe*, 1993-NMSC-017, 115 N.M. 397, 851 P.2d 1064, *rev'g* 1993-NMCA-005, 115 N.M. 398, 851 P.2d 1065.

Extension of time to file notice of appeal. — Rule 12-601 NMRA applies to requests for extensions of time to file a notice of appeal challenging a decision by the workers' compensation administration, and a workers' compensation judge does not have authority to grant an extension of time to file a notice of appeal. *Schultz v. Pojoaque Tribal Police Dep't*, 2010-NMSC-034, 148 N.M. 692, 242 P.3d 259.

Where petitioner mailed a notice of appeal four days before the filing deadline, but the notice of appeal was filed two days after the filing deadline, the workers' compensation judge did not have authority under Rule 12-601 NMRA to grant petitioner's unopposed motion for an extension of time to file the notice of appeal. *Schultz v. Pojoaque Tribal Police Dep't*, 2010-NMSC-034, 148 N.M. 692, 242 P.3d 259.

Calculation of time for filing a notice of appeal. — Section 39-1-1 NMSA 1978 applies to workers' compensation cases. *Bianco v. Horror One Prods.*, 2009-NMSC-006, 145 N.M. 551, 202 P.3d 810.

Where the worker filed a motion to reconsider within thirty days after a final compensation order had been entered and filed a notice of appeal within thirty days after the motion to reconsider had been denied, but more that thirty days after the final compensation order had been entered, the defendant's notice of appeal was timely filed. *Bianco v. Horror One Prods.*, 2009-NMSC-006, 145 N.M. 551, 202 P.3d 810.

Motion for reconsideration. — Where defendants filed a motion for reconsideration sixteen days after the workers' compensation judge filed a final order and defendants filed a notice of appeal twenty days after the workers' compensation judge denied the motion, defendants' notice of appeal was timely filed under Section 39-1-1 NMSA 1978 and Rule 12-201 NMRA. *Baca v. Los Lunas Cmty. Programs*, 2011-NMCA-008, 149 N.M. 198, 246 P.3d 1070.

Rule 12-601 NMRA governs over this section. — Rule 12-601 NMRA, which allows appeal within 30 days from the filing, governs over this section, which allows appeal within 30 days from the mailing. *Maples v. Stat*e, 1990-NMSC-042, 110 N.M. 34, 791 P.2d 788.

Inapplicability to appeals from district court. — This section is not applicable to appeals taken from the district court. *Torres v. Smith's Mgmt. Corp.*, 1990-NMCA-022, 111 N.M. 547, 807 P.2d 245.

An order by the director of the workers' compensation administration is not appealable to the court of appeals. *Sun Country Physical Therapy Assocs. v. N.M. Self-Insurers' Fund*, 1996-NMCA-008, 121 N.M. 248, 910 P.2d 324.

Notice of appeal from a final disposition order of the workers' compensation administration had to be filed within 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*, 1989-NMCA-031, 108 N.M. 418, 773 P.2d 363.

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*, 1988-NMCA-091, 108 N.M. 124, 767 P.2d 363, cert. denied, 109 N.M. 33, 781 P.2d 305.

Appellate court considers evidence in most favorable light. — In reviewing a workmen's (workers') 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.*, 1977-NMCA-017, 90 N.M. 220, 561 P.2d 493, cert. denied, 90 N.M. 254, 561 P.2d 1347; *Marez v. Kerr-*

McGee Nuclear Corp., 1978-NMCA-128, 93 N.M. 9, 595 P.2d 1204, cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

Appellate court considers evidence that supports the finding. — In workmen's (workers') 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.*, 1969-NMCA-005, 79 N.M. 789, 450 P.2d 198.

Appellate review of a workman's (worker'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.*, 1975-NMCA-039, 87 N.M. 404, 534 P.2d 1116.

If there is substantial evidence to support the findings of the trial court they will not be disturbed. *Moorhead v. Gray Ranch Co.*, 1977-NMCA-017, 90 N.M. 220, 561 P.2d 493, cert. denied, 90 N.M. 254, 561 P.2d 1347; *Marez v. Kerr-McGee Nuclear Corp.*, 1978-NMCA-128, 93 N.M. 9, 595 P.2d 1204, cert. denied, 92 N.M. 532, 591 P.2d 286.

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.*, 1968-NMCA-064, 79 N.M. 485, 444 P.2d 996, cert. denied, 79 N.M. 448, 444 P.2d 775.

Unfavorable part of evidence 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.*, 1939-NMSC-038, 43 N.M. 357, 94 P.2d 99 (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." *Janes v. Aguadero Corp.*, 1935-NMSC-025, 39 N.M. 159, 42 P.2d 775 (decided under former law).

In reviewing workmen's (workers') 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. Sch. Dist.*, 1971-NMCA-029, 82 N.M. 462, 483 P.2d 936.

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.*, 1977-NMCA-017, 90 N.M. 220, 561 P.2d 493, cert. denied, 90 N.M. 254, 561 P.2d 1347.

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.*, 1968-NMCA-064, 79 N.M. 485, 444 P.2d 996, cert. denied, 79 N.M. 448, 444 P.2d 775; *Marez v. Kerr-McGee Nuclear Corp.*, 1978-NMCA-128, 93 N.M. 9, 595 P.2d 1204, cert. denied, 92 N.M. 532, 591 P.2d 286.

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.*, 1975-NMCA-039, 87 N.M. 404, 534 P.2d 1116.

Interest on compensation orders. — A review of the Workers' Compensation Act as a whole demonstrates a legislative intent to apply post-judgement interest to final compensation orders. *Sanchez v. Siemens Transmission Sys.*, 1991-NMCA-028, 112 N.M. 236, 814 P.2d 104, *rev'd on other grounds*, 1991-NMSC-093, 112 N.M. 533, 817 P.2d 726.

Appeal not dismissed because claimant accepts benefits. — The claimant's appeal should not be dismissed because he accepted benefits under the judgment. *Howard v. El Paso Natural Gas Co.*, 1982-NMCA-075, 98 N.M. 184, 646 P.2d 1248, cert. denied, 98 N.M. 336, 648 P.2d 794.

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. N.M. Office Furniture*, 1983-NMCA-028, 99 N.M. 525, 660 P.2d 615; *Manzanares v. Lerner's, Inc.*, 1985-NMSC-022, 102 N.M. 391, 696 P.2d 479.

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.*, 1989-NMCA-076, 109 N.M. 47, 781 P.2d 319, cert. denied, 109 N.M. 54, 781 P.2d 782.

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.*, 1989-NMCA-076, 109 N.M. 47, 781 P.2d 319, cert. denied, 109 N.M. 54, 781 P.2d 782.

Order reopening lacked finality to render it appealable. — The order reopening the claim for workmen's (workers') 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.*, 1957-NMSC-093, 63 N.M. 285, 317 P.2d 901.

Order opening up judgment in workmen's (workers') compensation case is not final order, but merely interlocutory and not appealable. *Davis v. Meadors-Cherry Co.*, 1957-NMSC-093, 63 N.M. 285, 317 P.2d 901 (decided under former law).

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*, 1954-NMSC-028, 58 N.M. 296, 270 P.2d 708 (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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65.

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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65.

Whether findings of fact reviewable. — In workmen's (workers') 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. N.M. Health & Soc. Servs. Dep't*, 1976-NMSC-008, 89 N.M. 60, 547 P.2d 65.

Review precluded by failure to file timely request for findings. — The failure of a party to file a timely request for findings of fact and conclusions of law precludes evidentiary review by the court of appeals. *Pennington v. Chino Mines*, 1990-NMCA-023, 109 N.M. 676, 789 P.2d 624.

Review of judgment was limited to correction of errors at law. *N.M. State Hwy. Dep't v. Bible*, 1934-NMSC-025, 38 N.M. 372, 34 P.2d 295; *De Lost v. Phelps Dodge Corp.*, 1927-NMSC-077, 33 N.M. 15, 261 P. 811 (decided under former law).

Order reopening judgment not vacating judgment. — The order reopening the judgment in workmen's (workers') compensation case was not, in effect, an order vacating the judgment. *Davis v. Meadors-Cherry Co.*, 1957-NMSC-093, 63 N.M. 285, 317 P.2d 901 (decided under former law).

Order allowing ex parte contract by insurer's agent with claimant's physician. — An order allowing consultants of a medical management company hired by the insurer to have ex parte contact with the claimant's private physician outside the presence of the claimant's counsel was final and appealable. *Gomez v. Nielson's Corp.*, 1995-NMCA-043, 119 N.M. 670, 894 P.2d 1026.

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*, 1920-NMSC-016, 25 N.M. 686, 187 P. 560 (decided under former law).

Supreme court not bound by trial court's conclusion. — In workmen's (workers') 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.*, 1966-NMSC-124, 76 N.M. 463, 415 P.2d 847.

Workman (Worker) 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 (worker) 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.

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 of 1990-91 appellate procedure, see 22 N.M.L. Rev. 623 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation § 688 et seq.

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 [52-3-1 NMSA 1978] 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.

ANNOTATIONS

Compiler's notes. — For the New Mexico Occupational Disease Disablement Law, *see* 52-3-1 NMSA 1978 and compiler's notes thereto.

Applicability. — This section was intended to govern all proceedings before the workers' compensation administration. It would make no sense for the implementing statutes setting forth the procedures of the administration not to apply to every case heard by the administration from the administration's inception; otherwise there would be a gap in the law. *Lucero v. Yellow Freight Sys.*, 1991-NMCA-087, 112 N.M. 662, 818 P.2d 863.

This section applied where the cause of action arose in October 1986 and claimant filed his claim with the workers' compensation administration on June 25, 1987. *Lucero v. Yellow Freight Sys.*, 1991-NMCA-087, 112 N.M. 662, 818 P.2d 863.

Modifications of lump-sum settlements. — The workers' compensation administration has continuing jurisdiction over both modification and enforcement of

lump-sum settlement agreements. *Cruz v. Liberty Mut. Ins. Co.*, 1995-NMSC-006, 119 N.M. 301, 889 P.2d 1223.

A compensation order is modifiable even when premised on a lump-sum settlement agreement. *Fasso v. Sierra Healthcare Ctr.*, 1994-NMCA-170, 119 N.M. 132, 888 P.2d 1014.

Mistake, surprise or excusable neglect. — Mistake or excusable neglect, as used in Subsection B(2) of this section, does not, as a matter of law, constitute a valid basis to subsequently seek to contest a recommended resolution once the time limits specified in Subsection C of Section 52-5-5 NMSA 1978 have expired. *Norman v. Lockheed Eng'g & Science Co.*, 1991-NMCA-101, 112 N.M. 618, 817 P.2d 1260.

Examination of Subsection C of Section 52-5-5 NMSA 1978 in context with the act as a whole indicates that the legislature intended that a party's failure to timely respond to a recommended resolution would preclude a later attempt to contest the recommended resolution for mistake, inadvertence, surprise or excusable neglect under Subsection B(2) of this section. *Norman v. Lockheed Eng'g & Science Co.*, 1991-NMCA-101, 112 N.M. 618, 817 P.2d 1260.

To the extent that the provisions of Subsection C of Section 52-5-5 NMSA 1978 and Subsection B(2) of Section 52-5-9 NMSA 1978 are conflicting, the former section is the more specific and governs. *Norman v. Lockheed Eng'g & Science Co.*, 1991-NMCA-101, 112 N.M. 618, 817 P.2d 1260.

Allowing a party up to two years to assert mistake or excusable neglect as a basis for filing a rejection to the recommended resolution would make a nullity of the time limits in Subsection C of Section 52-5-5 NMSA 1978. *Norman v. Lockheed Eng'g & Science Co.*, 1991-NMCA-101, 112 N.M. 618, 817 P.2d 1260.

Since respondents failed to notify the workers' compensation judge of excusable neglect within the time limit specified in Subsection C of Section 52-5-5 NMSA 1978, they could not subsequently file a rejection to the recommended resolution under the two-year time limit provided in this section. *Norman v. Lockheed Eng'g & Science Co.*, 1991-NMCA-101, 112 N.M. 618, 817 P.2d 1260.

Failure of judge to enter order. — Employer properly sought relief under Subsection B(2), where the judge had apparently intended to enter a compensation order in accordance with what he had orally stated at a prior hearing but, given the fading of memories, had failed to do so. *Lucero v. Yellow Freight Sys.*, 1991-NMCA-087, 112 N.M. 662, 818 P.2d 863.

Mistaken acceptance of mediator's recommendation. — An employer who mistakenly notifies the workers' compensation administration of its acceptance of a mediator's recommended resolution may not obtain relief from the binding effect of the

recommended resolution pursuant to Subsection B(2) of this section. *Medina v. Hunemuller Constr., Inc.*, 2005-NMCA-123, 138 N.M. 472, 122 P.3d 839.

Incomplete diagnosis as mistake of fact. — An incorrect diagnosis or a complete failure to diagnose an injury constitutes a mutual mistake of fact which can be a sufficient basis for setting aside a settlement agreement. *Curliss v. B & C Auto Parts*, 1993-NMCA-139, 116 N.M. 668, 866 P.2d 396.

Under the facts and circumstances of the instant case, the worker's brain injury was not diagnosed until sixteen months after the settlement and the failure to diagnose the injury was based on the failure of the insurer to secure the neurological examination recommended by the university of New Mexico hospital. Furthermore, the worker agreed to the lump sum settlement based on the insurer's negligent misrepresentations regarding the provisions of the New Mexico Workers' Compensation Act. Since the worker entered into the settlement under the mistaken belief that he had suffered no brain injury, the lump sum settlement is set aside for mistake. *Curliss v. B & C Auto Parts*, 1993-NMCA-139, 116 N.M. 668, 866 P.2d 396.

Change in condition. — The term "change in condition" refers to a change in a worker's medical or physical condition. *Fasso v. Sierra Healthcare Ctr.*, 1994-NMCA-170, 119 N.M. 132, 888 P.2d 1014.

A compensation order may be modified under the change in condition criteria of Subsection B(1) even if the compensation order is the result of a recommended resolution following a settlement conference. *Fasso v. Sierra Healthcare Ctr.*, 1994-NMCA-170, 119 N.M. 132, 888 P.2d 1014.

Although a change in condition must relate to a worker's physical or medical condition, a change in condition may occur when the worker's physical or medical condition may change due to a worker's election to undergo different treatment. *Laughlin v. Convenient Mgmt. Servs., Inc.*, 2013-NMCA-088, cert. denied, 2013-NMCERT-007.

Worker's condition changed due to worker's election to have surgery. — Where worker filed a petition for partial lump sum payment for debts at a time when worker had elected not to undergo surgery to treat worker's work-related injury; the workers compensation judge determined that worker had reached maximum medical improvement and granted worker a partial lump sum payment for debts; five months later, worker decided to undergo surgery to treat the injury; and worker did not claim that worker's physical condition had changed, the workers compensation judge did not err in determining that worker had a change of condition by electing to undergo surgery and that worker was no longer at maximum medical improvement. *Laughlin v. Convenient Mgmt. Servs., Inc.*, 2013-NMCA-088, cert. denied, 2013-NMCERT-007.

Judicial estoppel and the law-of-the-case did not bar change of position regarding medical improvement. — Where worker filed a petition for partial lump sum

payment for debts, claiming that worker's injuries were at maximum medical improvement; at that time, worker had elected not to undergo surgery to treat worker's injuries; the workers compensation judge determined that worker had reached maximum medical improvement and granted worker a partial lump sum payment for debts; five months later, worker decided to undergo surgery to treat the injury and took the position that worker was no longer at maximum medical improvement; and the workers compensation judge determined that worker had a change of condition by electing to undergo surgery and that worker was no longer at maximum medical improvement, neither judicial estoppel nor the law-of-the-case doctrine barred worker's change of position regarding whether worker was at maximum medical improvement despite the worker's compensation judge's previous finding that worker was at maximum medical improvement at the time worker was awarded a lump sum payment for debts. *Laughlin v. Convenient Mgmt. Servs., Inc.*, 2013-NMCA-088, cert. denied, 2013-NMCERT-007.

Evidence not presented to judge not reviewable. — A judicial review of an order from which a worker appeals cannot be based on evidence in a supplemental record on appeal, evidence that had not been presented to the worker's compensation judge at the time the order was issued. *Gallegos v. City of Albuquerque*, 1993-NMCA-050, 115 N.M. 461, 853 P.2d 163, cert. denied, 115 N.M. 535, 854 P.2d 362.

Modification of binding resolution. — A conclusively binding recommendation under Section 52-5-5 NMSA 1978, after the running of the time for contesting the recommendation, is synonymous with and constitutes an "award" within the meaning of Subsection A of this section. Thus, jurisdiction vests with the workers' compensation judge (W.C.J.) to modify a conclusively binding recommended resolution under this section, and the W.C.J. erred in concluding that a conclusively binding recommended resolution is not a "compensation order" as used in this section. *Norman v. Lockheed Eng'g & Science Co.*, 1991-NMCA-101, 112 N.M. 618, 817 P.2d 1260.

The grounds for modification listed in Subsection B of this section do not permit a party to file a delayed response to a recommended resolution once the resolution has become final. *Norman v. Lockheed Eng'g & Science Co.*, 1991-NMCA-101, 112 N.M. 618, 817 P.2d 1260.

Failure to respond to recommended resolution. — A party who fails to file a response to a recommended resolution is governed by the time limits of Section 52-5-5C NMSA 1978 when seeking to modify compensation order based on mistake or excusable neglect; when considering other grounds for modification under this section, excluding mistake or excusable neglect, the two-year limitation period of this section applies as with any other compensation order. *Fasso v. Sierra Healthcare Ctr.*, 1994-NMCA-170, 119 N.M. 132, 888 P.2d 1014.

No abuse of discretion in denying increase. *Bustamante v. City of Las Cruces*, 1992-NMCA-065, 114 N.M. 179, 836 P.2d 98, cert. denied, 114 N.M. 82, 835 P.2d 80.

Compensation order not "void". — A compensation order rendered by a workers' compensation judge who improperly failed to honor a peremptory challenge was not a "void" compensation order that could be set aside pursuant to Paragraph B(6). *Alvarez v. County of Bernalillo*, 1993-NMCA-034, 115 N.M. 328, 850 P.2d 1031, cert. denied, 115 N.M. 408, 852 P.2d 138.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 651 to 667.

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 solely for the purposes of entry of judgment upon the supplementary compensation order and the imposition of appropriate sanctions, 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 [52-3-1 NMSA 1978] or related thereto. The district court shall accept the supplementary compensation order as valid, and shall not review or supplement the findings and conclusions of the workers' compensation judge, other than to enforce the supplementary compensation order and impose appropriate sanctions. The district 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 or the New Mexico Occupational Disease Disablement Law.

History: Laws 1986, ch. 22, § 36; 1989, ch. 263, § 79; 1990 (2nd S.S.), ch. 2, § 56.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, in Subsection B, substituted "solely for the purposes of" for "for" and inserted "and the imposition of appropriate sanctions" in the first sentence; substituted "The district court shall accept" for "If the court finds" and inserted "as" and "and shall not review or supplement the findings and conclusions of the workers' compensation judge, other than to enforce the supplementary compensation order and impose appropriate sanctions" in the third sentence; and inserted "district" in the fourth sentence.

Judicial award of attorney fees and expenses. — The legislature intended for a district court that has entered judgment on a Workers' Compensation Division supplemental order to retain jurisdiction for purposes of awarding additional attorney's fees and additional medical expenses. *Martinez v. Southwest Moving Specialists*, 1990-NMSC-048, 110 N.M. 68, 792 P.2d 45.

Lump-sum settlements. — The workers' compensation administration has continuing jurisdiction over both modification and enforcement of lump-sum settlement agreements. *Cruz v. Liberty Mut. Ins. Co.*, 1995-NMSC-006, 119 N.M. 301, 889 P.2d 1223.

Claimant must exercise diligence in prosecuting petition. — Where the state of New Mexico uninsured employers' fund (UEF) filed a 2006 petition with the district court seeking enforcement of a worker's compensation judge's compensation order, where the district court twice-dismissed the petition for lack of prosecution, and where the UEF did not moved to reinstate the petition within the thirty-day period set forth in the district court's second dismissal order, but filed a motion to reinstate the petition in 2015, the district court did not abuse its discretion in denying the UEF's 2015 motion to reinstate its 2006 petition when six years had passed since the issuance of the 2008 dismissal, because the duty rests upon the claimant at every stage of the proceeding to use diligence to expedite its case, and the UEF failed to diligently prosecute the 2006 petition. *N.M. Uninsured Employers' Fund v. Gallegos*, 2017-NMCA-044.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 668 to 673.

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 [52-3-1 NMSA 1978] 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.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Workers' compensation statute as barring illegally employed minor's tort action, 77 A.L.R.4th 844.

52-5-12. Payment; periodic or lump sum; settlement.

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 [52-3-1 NMSA 1978] that it is in the best interest of the injured worker or disabled employee that the worker or employee receive benefit payments on a periodic basis. Except as provided in this section, lump-sum payments in exchange for the release of the employer from liability for future payments of compensation or medical benefits shall not be allowed.

B. With the approval of the workers' compensation judge, a worker may elect to receive compensation benefits to which the worker is entitled in a lump sum if the worker has returned to work for at least six months, earning at least eighty percent of the average weekly wage the worker earned at the time of injury or disablement. If a worker receives the benefit income in a lump sum, the worker is not entitled to any additional benefit income for the compensable injury or disablement and the worker shall only receive that portion of the benefit income that is attributable to the impairment rating as determined in Section 52-1-24 NMSA 1978. In making lump-sum payments, the payment due the worker shall not be discounted at a rate greater than a sum equal to the present value of all future payments of compensation computed at a five-percent discount compounded annually.

C. After maximum medical improvement and with the approval of the workers' compensation judge, a worker may elect to receive a partial lump-sum payment of workers' compensation benefits for the sole purpose of paying debts that may have accumulated during the course of the injured or disabled worker's disability.

D. The worker and employer may elect to resolve a claim for injury with a lump-sum payment to the worker for all or a portion of past, present and future payments of compensation benefits, medical benefits or both in exchange for a full and final release or an appropriate release of the employer from liability for such compromised benefits. The proposed lump-sum payment agreement shall be presented to the workers' compensation judge for approval, and a hearing shall be held on the record. The workers' compensation judge shall approve the lump-sum payment agreement if the judge finds that:

(1) a written agreement describing the nature of the proposed settlement has been mutually agreed upon and executed by the worker and the employer;

(2) the worker has been fully informed and understands the terms, conditions and consequences of the proposed settlement;

(3) the lump-sum payment agreement is fair, equitable and provides substantial justice to the worker and employer; and

(4) the lump-sum payment agreement complies with the requirements for approval set forth in Sections 52-5-13 and 52-5-14 NMSA 1978.

E. The workers' compensation judge shall approve a lump-sum payment agreement pursuant to Subsection D of this section by order. Once the agreement has been approved and filed with the clerk of the administration, any further challenge to the terms of the settlement is barred and the lump-sum payment agreement shall not be reopened, set aside or reconsidered nor shall any additional benefits be imposed.

F. If a worker and employer elect to enter into a lump-sum payment agreement pursuant to Subsection D of this section, the limit on attorney fees pursuant to Subsection I of Section 52-1-54 NMSA 1978 shall apply.

G. If an insurer pays a lump-sum payment to an injured or disabled worker without the approval of a workers' compensation judge and if at a later date benefits are due for the injured or disabled worker's claim, the insurer alone shall be liable for that claim and shall not in any manner, including rate determinations and the employer's experience modifier, pass on the cost of the benefits due to the employer.

H. If the compensation benefit to which a worker is entitled is less than fifty dollars ($50.00) per week, any party may petition the workers' compensation judge to consolidate that payment into quarterly installments.

History: Laws 1986, ch. 22, § 38; 1987, ch. 235, § 50; 1990 (2nd S.S.), ch. 2, § 57; 1993, ch. 193, § 12; 2003, ch. 259, § 10; 2009, ch. 235, § 1.

ANNOTATIONS

The 2009 amendment, effective July 1, 2009, added Subsections D through F and deleted former Subsection F, which provided that periodic compensation payments for disability arising from primary mental impairments or secondary mental impairment shall be paid as incurred and shall not be included in lump-sum payments.

The 2003 amendment, effective June 20, 2003, substituted "fifty dollars ($50.00)" for "twenty-five dollars ($25.00)" near the middle of Subsection E.

The 1993 amendment, effective June 18, 1993, deleted the former second sentence of Subsection F, which read "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."

The 1990 (2nd S.S.) amendment, effective January 1, 1991, in Subsection A, inserted "or disabled employee", substituted "Subsections B, C, and D" for "Subsection B", inserted "not", and deleted language regarding lump sum payments by agreement or best interest of the parties; added Subsections B to E; and redesignated former Subsection B as Subsection F, inserting therein "or the New Mexico Occupational Disease Disablement Law".

I. GENERAL CONSIDERATION.

Lump sum settlement. — When an employer or insurer and an employee agree to a lump-sum settlement for workers' compensation benefits, and that agreement is reduced to writing and is signed, it becomes "a binding expression of the parties' intent." *Rojo v. Loeper Landscaping, Inc.*, 1988-NMSC-065, 107 N.M. 407, 759 P.2d 194.

Duty of worker's compensation judge to advise worker. — When an employer/insurer solicits a lump sum payment from an unrepresented worker, the worker's compensation judge has an affirmative duty to ensure that the worker understands the lump sum settlement agreement into which he or she is entering. *Sommerville v. Southwest Firebird*, 2008-NMSC-034, 144 N.M. 396, 188 P.3d 1147.

The restrictions on lump sum payments set forth the in this section do not violate equal protection. *Rodriguez v. Scotts Landscaping*, 2008-NMCA-046, 143 N.M. 726, 181 P.3d 718.

When a worker enters into a final settlement of a workers' compensation claim in exchange for a lump-sum payment of all future benefits, the worker may not proceed with an intentional tort action against the employer. *Salazar v. Torres*, 2007-NMSC-019, 141 N.M. 559, 158 P.3d 449.

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. *Livingston v. Loffland Bros.*, 1974-NMCA-047, 86 N.M. 375, 524 P.2d 991, cert. denied, 86 N.M. 372, 524 P.2d 988.

Legislature's policy favoring periodic over lump sum payments in Subsection A of this section also applies to compensation due a deceased worker's dependents under Section 52-1-46 NMSA 1978. *Paradiso v. Tipps Equip.*, 2004-NMCA-009, 134 N.M. 814, 82 P.3d 985, cert. denied, 2004-NMCERT-001.

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.*, 1974-NMCA-047, 86 N.M. 375, 524 P.2d 991, cert. denied, 86 N.M. 372, 524 P.2d 988.

Accelerated periodic payments are not lump-sum settlements requiring pre-approval by the judge. Therefore, employer was entitled to a credit without discount for advance periodic payments made to worker. *Gomez v. Bernalillo Cnty. Clerk's Office*, 1994-NMCA-102, 118 N.M. 449, 882 P.2d 40.

Lump-sum payment and release agreement effective as waiver of statutory rights. — Lump-sum payment and release agreement which stated, among other things, that claimant would be treated by present physician or his referral for life was a binding contract, and constituted a waiver of employer's right under Section 52-3-15 NMSA 1978 to designate a change in claimant's primary care provider. *Ramirez v. Johnny's Roofing, Inc.*, 1999-NMCA-038, 127 N.M. 83, 977 P.2d 348.

Limitation on release. — Subsections A and B of this section do not allow the release of an employer from liability for further benefit payments in exchange for partial lump-sum payments when worker's condition becomes worse. *Souter v. Ancae Heating & Air Conditioning*, 2002-NMCA-078, 132 N.M. 608, 52 P.3d 980.

Facilitating the production of income. — The term "to facilitate the production of income," as used in the *Padilla v. Frito-Lay* test (see annotation this section), does not mean maximizing return on investment. *Merrifield v. Auto-Chlor Sys.*, 1983-NMCA-098, 100 N.M. 263, 669 P.2d 739.

No lump-sum award of attorney's fees. — 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 Corp./Nobel Sysco*, 1989-NMCA-051, 108 N.M. 639, 776 P.2d 1258.

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.*, 1978-NMCA-106, 92 N.M. 295, 587 P.2d 442, cert. denied, 92 N.M. 260, 586 P.2d 1089, *overruled on other grounds by Raines v. W.A. Klinger & Sons*, 1988-NMSC-083, 107 N.M. 668, 763 P.2d 684; *Neumann v. A.S. Horner, Inc.*, 1983-NMCA-039, 99 N.M. 603, 661 P.2d 503, *overruled on other grounds by Maitlen v. Getty Oil Co.*, 1987-NMCA-002, 105 N.M. 370, 733 P.2d 1and *Raines v. W.A. Klinger & Sons*, 1988-NMSC-083, 107 N.M. 668, 763 P.2d 684.

Rehabilitation is restoration of individual to his greatest potential — physically, mentally, socially and vocationally. *Lane v. Levi Strauss & Co.*, 1979-NMCA-012, 92 N.M. 504, 590 P.2d 652.

Temporary disability is that which lasts for a limited time only while the workman (worker) 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.*, 1979-NMCA-012, 92 N.M. 504, 590 P.2d 652.

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*, 1980-NMCA-149, 95 N.M. 176, 619 P.2d 852.

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 (Workers') 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 (worker) an early opportunity to solve an economic problem. *Briscoe v. Hydro Conduit Corp.*, 1975-NMCA-147, 88 N.M. 568, 544 P.2d 283 (decided under prior law).

II. LUMP SUM PAYMENT.

Return-to-work lump sum payments may be modified if the worker's physical condition changes. *Benny v. Moberg Welding*, 2007-NMCA-124, 142 N.M. 501, 167 P.3d 949, cert. denied, 2007-NMCERT-008, 142 N.M. 435, 166 P.3d 1089.

A worker can receive a partial lump-sum payment for payment of debts while pursuing an intentional tort action against the employer. *Luna v. Lewis Casing Crews, Inc.*, 2007-NMSC-020, 141 N.M. 607, 159 P.3d 256.

Lump-sum payment exception rather than rule. — Periodic compensation payments are the rule, and lump-sum awards are the exception, and in applying this exception the purpose of workmen's (workers') 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.*, 1975-NMCA-082, 88 N.M. 157, 538 P.2d 799, cert. denied, 88 N.M. 318, 540 P.2d 248.

Three factors determine an award of lump-sum: (1) total permanent disability; (2) rehabilitation of the workman (worker) and (3) the best interest of the workman (worker). *Lane v. Levi Strauss & Co.*, 1979-NMCA-012, 92 N.M. 504, 590 P.2d 652 (decided under former law).

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.*, 1976-NMCA-044, 89 N.M. 213, 549 P.2d 628.

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.*, 1976-NMCA-044, 89 N.M. 213, 549 P.2d 628.

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.*, 1987-NMCA-093, 106 N.M. 309, 742 P.2d 521, cert. denied, 106 N.M. 353, 742 P.2d 1058.

It was error to award a claimant lump-sum benefits, when such a payment would create an undue risk that the worker would end up on the welfare rolls well before the periodic payments would have terminated. *Riesenecker v. Arkansas Best Freight Sys.*, 1990-NMCA-059, 110 N.M. 654, 798 P.2d 1040, *vacated on other grounds*, 1990-NMCA-100, 110 N.M. 451, 796 P.2d 1147 (decided under prior law).

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.*, 1979-NMCA-125, 93 N.M. 561, 603 P.2d 300, cert. denied, 94 N.M. 629, 614 P.2d 546 (1980), *overruled on other grounds by Raines v. W.A. Klinger & Sons*, 1988-NMSC-083, 107 N.M. 668, 763 P.2d 684.

Lump-sum payments are justified only when exceptional circumstances exist. *Woodson v. Phillips Petroleum Co.*, 1985-NMSC-018, 102 N.M. 333, 695 P.2d 483.

Each case considered independently in determining lump sum. — 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.*, 1981-NMCA-154, 97 N.M. 354, 639 P.2d 1208, cert. denied, 98 N.M. 50, 644 P.2d 1039.

Special circumstances for lump sum award. — 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.*, 1985-NMSC-018, 102 N.M. 333, 695 P.2d 483.

No limitation on full lump-sum payments in Subsection C. — The different statutory provisions of this section applicable to full and partial lump sum payments, represent a legislative balancing of competing interests. Subsection C recognizes the economic difficulties faced by injured and disabled workers who, because of injury or disability, are unable to pay certain debts and authorizes a lump sum payment, rather than periodic payment, if necessary to avoid extreme hardship. Because the purpose of such a payment is need, rather than convenience, there is no reason to reduce benefits to the level calculated based solely on impairment. *Cabazos v. Calloway Constr.*, 1994-NMCA-091, 118 N.M. 198, 879 P.2d 1217, cert. denied, 119 N.M. 168, 889 P.2d 203.

Periodic compensation payments are the 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. N.M. Military Inst.*, 1979-NMCA-047, 92 N.M. 804, 595 P.2d 774, cert. denied, 92 N.M. 675, 593 P.2d 1078; *Spidle v. Kerr-McGee Nuclear Corp.*, 1981-NMSC-058, 96 N.M. 290, 629 P.2d 1219.

Periodic payments ordinarily serve the policy of this article; the award of a lump sum is the exception. *Padilla v. Frito-Lay, Inc.*, 1981-NMCA-154, 97 N.M. 354, 639 P.2d 1208, cert. denied, 98 N.M. 50, 644 P.2d 1039.

Subsection C of this section enacted into law what had been treated in case law as an exception to the periodic payment provision of the workers' compensation law. *Jackson v. K & M Constr.*, 2004-NMCA-082, 136 N.M. 94, 94 P.3d 837, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

Unaccrued disability benefits for lump sum payment of debt. — In enacting Subsection C of this section, there is no intent on the part of the legislature to call upon unaccrued disability benefits for the lump sum payment of debt when the worker is no longer disabled, due to his or her death, and, as a result, there no longer exist any period payments due from which a lump sum payment for debt would be deducted. *Jackson v. K & M Constr.*, 2004-NMCA-082, 136 N.M. 94, 94 P.3d 837, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

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.*, 1975-NMCA-082, 88 N.M. 157, 538 P.2d 799, cert. denied, 88 N.M. 318, 540 P.2d 248.

Obtaining lump sum award through court proceeding. — 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.*, 1983-NMCA-039, 99 N.M. 603, 661 P.2d 503, *overruled on other grounds by Raines v. W.A. Klinger & Sons*, 1988-NMSC-083, 107 N.M. 668, 763 P.2d 684.

Application of statute of limitations to lump-sum credit. — Worker's compensation judge did not abuse her discretion in applying a credit for lump-sum payments previously made to claimant to a period of time during which employer had failed to pay benefits, even though the employer had initially stopped paying benefits more than one year prior to claimant's action. *West v. Home Care Res.*, 1999-NMCA-037, 127 N.M. 78, 976 P.2d 1030.

Matter is vested in trial court's discretion whether to grant lump-sum award. *Boughton v. W. Nuclear, Inc.*, 1983-NMCA-052, 99 N.M. 723, 663 P.2d 382.

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.*, 1983-NMCA-052, 99 N.M. 723, 663 P.2d 382.

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.*, 1981-NMSC-058, 96 N.M. 290, 629 P.2d 1219; *Boughton v. Western Nuclear, Inc.*, 1983-NMCA-052, 99 N.M. 723, 663 P.2d 382.

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.*, 1976-NMCA-044, 89 N.M. 213, 549 P.2d 628 (decided under former law).

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.*, 1981-NMCA-154, 97 N.M. 354, 639 P.2d 1208, cert. denied, 98 N.M. 50, 644 P.2d 1039; *Boughton v. W. Nuclear, Inc.*, 1983-NMCA-052, 99 N.M. 723, 663 P.2d 382; *Woodson v. Phillips Petroleum Co.*, 1985-NMSC-018, 102 N.M. 333, 695 P.2d 483 (decided under former law).

Expert testimony not required. — There is no mandatory requirement in the workmen's (workers') compensation law that the claimant produce expert testimony at a hearing to obtain an advance payment of compensation. *Padilla v. Frito-Lay, Inc.*, 1981-NMCA-154, 97 N.M. 354, 639 P.2d 1208, cert. denied, 98 N.M. 50, 644 P.2d 1039.

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.*, 1975-NMCA-082, 88 N.M. 157, 538 P.2d 799, cert. denied, 88 N.M. 318, 540 P.2d 248.

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.*, 1985-NMCA-081, 103 N.M. 267, 705 P.2d 172.

Stipulated compensation order that failed to comply with approval process was invalid and unenforceable. — Where, in 2004, the parties entered into a stipulated compensation order (SCO) to settle a dispute regarding worker's entitlement to workers' compensation benefits as the result of an accident and injuries to worker's back that occurred in 2002, and where there was no hearing by the workers' compensation judge (WCJ) to approve the provisions of the SCO or otherwise confirm worker's knowledge of the partial lump-sum settlement or any of the material facts contained therein, and where, in 2014, employer filed a motion for a supplemental compensation order (MSCO), the WCJ erred in granting the MSCO and in approving the SCO under 52-5-13 and -14 NMSA 1978, because the SCO was not in compliance with 52-5-12(C) NMSA 1978, and therefore the WCJ had no authority to approve the SCO containing a partial lump-sum payment of benefits; the SCO was invalid and unenforceable. *Baca v. State*, 2017-NMCA-076, cert. denied.

Payment of debts accumulated during disability. — Only those debts that have been added during the worker's disability may be paid off with a lump sum; other debts are not eligible for lump-sum payment. *Carrasco v. Phelps Dodge/Chino Mines*, 1995-NMCA-001, 119 N.M. 347, 890 P.2d 408.

The renewal of a promissory note does not constitute an accumulation of debt within the scope of this section. *Carrasco v. Phelps Dodge/Chino Mines*, 1995-NMCA-001, 119 N.M. 347, 890 P.2d 408.

Premature lump-sum award. — In the present case, because the worker had not returned to work for six months earning 80% of his average weekly wage, he did not qualify for a full lump-sum payment under Subsection B. Therefore, the employer could not be required to pay the full amount of the remaining disability as determined at the time of the hearing, notwithstanding the fact that the payment was denominated as partial. Subsection C does allow, after maximum medical improvement has been achieved and with the approval of the judge, a partial lump-sum payment for the sole purpose of paying debts that may have accumulated during the course of the injured or disabled worker's disability. However, the judge here did not award a partial lump-sum payment; he awarded full payment. Therefore, Subsection C was not in fact properly utilized and the award as made must be set aside. *Quintana v. Ilfelds*, 1993-NMCA-158, 116 N.M. 836, 867 P.2d 1218.

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.*, 1981-NMSC-058, 96 N.M. 290, 629 P.2d 1219.

Modification of benefits award. — A worker may, pursuant to Section 52-1-56 NMSA 1978, seek an increase in his compensation based on change in condition at any time during that statutory benefits period under Section 52-1-42 NMSA 1978, even if, as a result of receiving partial lump-sum payments for debt pursuant to Subsection C, the worker has received the monetary equivalent of the benefits allowed in a compensation order before the benefits period expires. *Souter v. Ancae Heating & Air Conditioning*, 2002-NMCA-078, 132 N.M. 608, 52 P.3d 980.

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

For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 679 to 683.

Tort liability of worker's compensation insurer for wrongful delay or refusal to make payments due, 8 A.L.R.4th 902.

Workers' compensation: reopening lump-sum compensation payment, 26 A.L.R.5th 127.

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.

ANNOTATIONS

Modifications of lump-sum settlements. — The workers' compensation administration has continuing jurisdiction over both modification and enforcement of lump-sum settlement agreements. *Cruz v. Liberty Mut. Ins. Co.*, 1995-NMSC-006, 119 N.M. 301, 889 P.2d 1223.

Approval by workers' compensation judge in accordance with requirements of this section and Section 52-5-14(A) NMSA 1978 is necessary to assure adherence to the policies established by the legislature favoring periodic payments over lump sum payments, requiring careful effort to assure that a worker or the dependents understand the consequences of replacing periodic payments with a discounted lump sum amount, and assuring that the settlement is fair, equitable, and consistent with the Worker's Compensation Act. *Paradiso v. Tipps Equip.*, 2004-NMCA-009, 134 N.M. 814, 82 P.3d 985, cert. denied, 2004-NMCERT-001.

Failure to ensure worker understood agreement. — Where worker, who was not represented by counsel, filed a petition for lump sum payment and the workers' compensation judge approved the petition without a hearing, the lump sum settlement was unenforceable because the workers' compensation judge failed to perform the judge's affirmative duty to ensure that the worker understood the lump sum settlement agreement. *Sommerville v. Southwest Firebird*, 2008-NMSA-034, 144 N.M. 396, 188 P.3d 1147.

Stipulated compensation order that failed to comply with approval process was invalid and unenforceable. — Where, in 2004, the parties entered into a stipulated compensation order (SCO) to settle a dispute regarding worker's entitlement to workers' compensation benefits as the result of an accident and injuries to worker's back that occurred in 2002, and where there was no hearing by the workers' compensation judge (WCJ) to approve the provisions of the SCO or otherwise confirm worker's knowledge of the partial lump-sum settlement or any of the material facts contained therein, and where, in 2014, employer filed a motion for a supplemental compensation order (MSCO), the WCJ erred in granting the MSCO and in approving the SCO under 52-5-13 and -14 NMSA 1978, because the SCO was not in compliance with 52-5-12(C) NMSA 1978, and therefore the WCJ had no authority to approve the SCO containing a partial lump-sum payment of benefits; the SCO was invalid and unenforceable. *Baca v. State*, 2017-NMCA-076, cert. denied.

Written agreements binding. — When an employer or insurer and an employee agree to a lump-sum settlement for workers' compensation benefits, and that agreement is reduced to writing and is signed, it becomes a binding expression of the parties' intent; a lump-sum settlement agreement, however, must be submitted to the workers' compensation administration for approval. *Cruz v. Liberty Mut. Ins. Co.*, 1995-NMSC-006, 119 N.M. 301, 889 P.2d 1223.

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 [52-3-1 NMSA 1978], 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. 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; 1990 (2nd S.S.), ch. 2, § 58.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, deleted the former first sentence of Subsection B regarding compensation converted into lump sum settlement by agreement.

Jurisdiction pending appeal. — The workers' compensation division did not have jurisdiction to enter an order of settlement in a case where an appeal was pending. *Riesenecker v. Arkansas. Best Freight Sys.*, 1990-NMCA-100, 110 N.M. 451, 796 P.2d 1147.

Approval by workers' compensation judge in accordance with requirements of Subsection A of this section and Section 52-5-13 NMSA 1978 is necessary to assure adherence to the policies established by the legislature favoring periodic payments over lump sum payments, requiring careful effort to assure that a worker or the dependents understand the consequences of replacing periodic payments with a discounted lump sum amount, and assuring that the settlement is fair, equitable, and consistent with the Worker's Compensation Act. *Paradiso v. Tipps Equip.*, 2004-NMCA-009, 134 N.M. 814, 82 P.3d 985, cert. denied, 2004-NMCERT-001.

Stipulated compensation order that failed to comply with approval process was invalid and unenforceable. — Where, in 2004, the parties entered into a stipulated compensation order (SCO) to settle a dispute regarding worker’s entitlement to workers’ compensation benefits as the result of an accident and injuries to worker’s back that occurred in 2002, and where there was no hearing by the workers’ compensation judge (WCJ) to approve the provisions of the SCO or otherwise confirm worker’s knowledge of the partial lump-sum settlement or any of the material facts contained therein, and where, in 2014, employer filed a motion for a supplemental compensation order (MSCO), the WCJ erred in granting the MSCO and in approving the SCO under 52-5-13 and -14 NMSA 1978, because the SCO was not in compliance with 52-5-12(C) NMSA 1978, and therefore the WCJ had no authority to approve the SCO containing a partial lump-sum payment of benefits; the SCO was invalid and unenforceable. *Baca v. State*, 2017-NMCA-076, cert. denied.

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 [52-3-1 NMSA 1978] in all particulars.

History: Laws 1986, ch. 22, § 41; 1989, ch. 263, § 83.

ANNOTATIONS

Interest on compensation orders. — A review of the Workers' Compensation Act as a whole demonstrates a legislative intent to apply post-judgement interest to final compensation orders. *Sanchez v. Siemens Transmission Sys.*, 1991-NMCA-028, 112 N.M. 236, 814 P.2d 104, *rev'd on other grounds*, 1991-NMSC-093, 112 N.M. 533, 817 P.2d 726.

There was no authorization for the cost of copying charges as "valid expenses." *Archuleta v. Safeway Stores, Inc.*, 1986-NMCA-092, 104 N.M. 769, 727 P.2d 77 (decided under former 52-1-35 NMSA 1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 634 to 640.

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.

52-5-17. Subrogation.

A. The right of any worker 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 [52-3-1 NMSA 1978], 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, except as provided in Subsection C of this section.

B. In a circumstance covered by Subsection A of this section, 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 for compensation or any other benefits to which the worker was entitled under the Workers' Compensation Act or the New Mexico Occupational Disease Disablement Law and that were occasioned by the injury or disablement, that the worker or his legal representative or others may have against any other party for the injury or disablement.

C. The worker or his legal representative may retain any compensation due under the uninsured motorist coverage provided in Section 66-5-301 NMSA 1978 if the worker paid the premium for that coverage. If the employer paid the premium, the worker or his legal representative may not retain any compensation due under Section 66-5-301 NMSA 1978, and that amount shall be due to the employer. For the purposes of this section, the employer shall not be deemed to pay the premium for uninsured motorist coverage in a lease arrangement in which the employer pays the worker an expense or mileage reimbursement amount that may include as one factor an allowance for insurance coverage.

History: Laws 1986, ch. 22, § 43; 1987, ch. 235, § 51; 1989, ch. 263, § 85; 1990 (2nd S.S.), ch. 2, § 59.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, added the Subsection A and B designations, deleted "or employee" following "worker" four times in Subsections A and B, added "except as provided in Subsection C of this section" at the end of Subsection A, substituted "In a circumstance covered by Subsection A of this section" for "In such case", and "that" for "which" twice in Subsection B, and added Subsection C.

I. GENERAL CONSIDERATION.

Section was not expanded to recognize an independent right to bring suit against a third-party tortfeasor. *Liberty Mut. Ins. Co. v. Salgado*, 2005-NMCA-144, 138 N.M. 685, 125 P.3d 664.

This section provides a derivative right. *Liberty Mut. Ins. Co. v. Salgado*, 2005-NMCA-144, 138 N.M. 685, 125 P.3d 664.

The legislature intended that (1) an injured workman (worker) shall not be denied the right to recover damages caused by the negligence of a third person because he has received workmen's (workers') 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 (worker) received as compensation benefits. *Reed v. Styron*, 1961-NMSC-119, 69 N.M. 262, 365 P.2d 912.

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 (Workers') 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 (workers') compensation statute. *Brown v. Arapahoe Drilling Co.*, 1962-NMSC-051, 70 N.M. 99, 370 P.2d 816.

Purpose of Subsection C. — The plain language of the statute is evidence that the legislature intended to prevent an employee's double recovery from discrete and independent insurance coverage provided by the employer. *Draper v. Mountain States Mut. Cas. Co.*, 1994-NMSC-002, 116 N.M. 775, 867 P.2d 1157.

II. RECOVERY FROM THIRD PARTY.

Workman (Worker) 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 (Workers') Compensation Act because it is the workman (worker) who has the claim against the third party. *Herrera v. Springer Corp.*, 1973-NMCA-041, 85 N.M. 6, 508 P.2d 1303, *rev'd on other grounds*, 1973-NMSC-057, 85 N.M. 201, 510 P.2d 1072.

Compensation insurer not indispensable party to workmen's (workers') suit. — As the right to collect is in the workman (worker), 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 (workers') suit. *Herrera v. Springer Corp.*, 1973-NMCA-041, 85 N.M. 6, 508 P.2d 1303, *rev'd on other grounds*, 1973-NMSC-057, 85 N.M. 201, 510 P.2d 1072.

The underlying concern with third party actions is that the claimant will receive a "double recovery." *Transp. Indem. Co. v. Garcia*, 1976-NMCA-059, 89 N.M. 342, 552 P.2d 473, cert. denied, 90 N.M. 9, 558 P.2d 621.

Provisions for assignments valid. — Provisions of the Workmen's (Workers') Compensation Act providing for assignments of personal injury causes of action are

valid. *Motto v. State Farm Mut. Auto. Ins. Co.*, 1969-NMSC-178, 81 N.M. 35, 462 P.2d 620.

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.*, 1969-NMSC-178, 81 N.M. 35, 462 P.2d 620.

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 (Workers') Compensation Act. *Kandelin v. Lee Moor Contracting Co.*, 1933-NMSC-058, 37 N.M. 479, 24 P.2d 731.

Although the workmen's (workers') 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 (workers') injuries. *Seaboard Fire & Marine Ins. Co. v. Kurth*, 1980-NMCA-112, 96 N.M. 631, 633 P.2d 1229, cert. denied, 95 N.M. 426, 622 P.2d 1046 (1981).

Recovery from third-party not a bar to benefits. — Prosecution to judgment of a third-party action is not a bar to subsequent collection of workers' compensation benefits; if there is a problem with a satisfaction of the third-party claim, it does not go to double recovery, it goes to the amount of reimbursement or credit to which the employer is entitled. *Montoya v. AKAL Sec., Inc.*, 1992-NMSC-056, 114 N.M. 354, 838 P.2d 971.

The decision in *Montoya v. AKAL Sec., Inc.*, 1992-NMSC-056, 114 N.M 354, 838 P.2d 971, applied retroactively to allow an employee to continue to recover compensation benefits notwithstanding her settlement of a third-party tort claim. *Gutierrez v. City of Albuquerque*, 1995-NMCA-139, 121 N.M. 172, 909 P.2d 732, *rev'd on other grounds*, 1998-NMSC-027, 125 N.M. 643, 964 P.2d 807.

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*, 1976-NMCA-059, 89 N.M. 342, 552 P.2d 473, cert. denied, 90 N.M. 9, 558 P.2d 621.

Carrier charged with proportionate share of costs for action against third party. — Workmen's (Workers') Compensation Acts are to be liberally interpreted in favor of the workman (worker). 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, 1976-NMCA-059, 89 N.M. 342, 552 P.2d 473, cert. denied, 90 N.M. 9, 558 P.2d 621.

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.*, 1960-NMSC-053, 67 N.M. 137, 353 P.2d 358.

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.*, 1933-NMSC-058, 37 N.M. 479, 24 P.2d 731.

Employer's share of attorneys' fees. — Determination of an employer's proportionate share of attorney fees and costs incurred in an action against a third-party tortfeasor must take into consideration both compensation benefits already paid and relief from future workers' compensation liability. *Trujillo v. Sonic Drive-In/Merritt*, 1996-NMCA-106, 122 N.M. 359, 924 P.2d 1371.

Recovery of advanced litigation expenses by employer. — Reimbursement by the worker of a proportionate share of litigation expenses advanced by the employer in an action against a third-party tortfeasor was appropriate under Subsection B. *Trujillo v. Sonic Drive-In/Merritt*, 1996-NMCA-106, 122 N.M. 359, 924 P.2d 1371.

Resolution of issues between workman (worker) and third party controls both the rights and liabilities of the compensation insurer as if the workman (worker) obtains a settlement, or recovers from the tort-feasor; the right to reimbursement is established, and if the workman (worker) fails to recover, the right to reimbursement is lost. *Herrera v. Springer Corp.*, 1973-NMCA-041, 85 N.M. 6, 508 P.2d 1303, *rev'd on other grounds*, 1973-NMSC-057, 85 N.M. 201, 510 P.2d 1072.

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*, 1963-NMSC-036, 71 N.M. 444, 379 P.2d 84.

Insurance company 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*, 1963-NMSC-036, 71 N.M. 444, 379 P.2d 84.

Insurance company 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*, 1963-NMSC-036, 71 N.M. 444, 379 P.2d 84.

Insurance company not compelled to be party. — The workmen's (workers') 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.*, 1982-NMCA-036, 98 N.M. 547, 650 P.2d 831, cert. denied, 98 N.M. 478, 649 P.2d 1391.

Assessment of costs against intervenor insurer. — It is within the informed discretion of the trial court to assess costs against an insurer who intervenes in the worker's suit against an alleged tortfeasor. *Eskew v. National Farmers Union Ins. Co.*, 2000-NMCA-093, 129 N.M. 667, 11 P.3d 1229.

Carrier cannot intervene until damages awarded. — The court erred by granting a worker's compensation carrier leave to file a complaint-in-intervention for reimbursement and by ordering the carrier's intervention into an underlying wrongful death suit against a third-party defendant prior to a judgment for damages being awarded the plaintiff. *Fernandez v. Ford Motor Co.*, 1994-NMCA-063, 118 N.M. 100, 879 P.2d 101, cert. denied, 118 N.M. 90, 879 P.2d 91

Immunity of co-employee. — 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 (Workers') 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*, 1981-NMCA-014, 95 N.M. 551, 624 P.2d 60, *overruled by Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148.

Workman (Worker) giving release to third person. — A workman (worker) 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. N.M. Hwy. Comm'n*, 1938-NMSC-060, 42 N.M. 626, 83 P.2d 457.

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 Section 37-1-4 (four-year period), which governs unspecified actions, but Section 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.*, 1987-NMCA-094, 106 N.M. 195, 740 P.2d 1179.

III. REIMBURSEMENT.

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.*, 1960-NMSC-053, 67 N.M. 137, 353 P.2d 358.

This section is a reimbursement statute and provides a right of reimbursement for benefits paid under the Workmen's (Workers') 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*, 1961-NMSC-119, 69 N.M. 262, 365 P.2d 912.

The workers' compensation carrier's claim for reimbursement of proceeds paid is against the worker and not the third party. *St. Joseph Healthcare Sys. v. Travelers Cos.*, 1995-NMCA-020, 119 N.M. 603, 893 P.2d 1007.

The insurers of the third-party tortfeasors had no affirmative duty to reimburse a compensation insurance carrier directly when disbursing settlement proceeds even though the insurers knew of the compensation carrier's rights; the latter's only statutory right is the right to reimbursement from the settlement proceeds, to be enforced against the employee. *St. Joseph Healthcare Sys. v. Travelers Cos.*, 1995-NMCA-020, 119 N.M. 603, 893 P.2d 1007.

This section provides a right for reimbursement that derives from a worker's right to recover damages from a negligent third party. *Liberty Mut. Ins. Co. v. Salgado*, 2005-NMCA-144, 138 N.M. 685, 125 P.3d 664.

Formula for calculating employer reimbursement. – The employer's extent of reimbursement for compensation paid is determined by identifying the nature and purpose of the payments made by the employer and comparing the elements of the tort recovery with those which are duplicative of the employer's compensation payments; the total of the duplicative payments is the amount which must be reimbursed. *Paradiso v. Tipps Equip.*, 2004-NMCA-009, 134 N.M. 814, 82 P.3d 985, cert. denied, 2004-NMCERT-001.

Receipt of benefits no bar to action against third-party. — Although the estate of the deceased has received workmen's (workers') 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, Inc.*, 1979-NMCA-095, 93 N.M. 511, 602 P.2d 195.

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.*, 1980-NMCA-136, 95 N.M. 22, 618 P.2d 366.

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 (workers') compensation claim. *Seminara v. Frank Seminara Pontiac-Buick, Inc.*, 1980-NMCA-136, 95 N.M. 22, 618 P.2d 366.

Having been made "financially whole" by a damage award, the plaintiff may not retain both compensation benefits and the damages recovered. *Strickland v. Roosevelt Cnty. Rural Elec. Coop.*, 1982-NMCA-184, 99 N.M. 335, 657 P.2d 1184, cert. denied, 99 N.M. 358, 658 P.2d 433 (1983), and 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 (worker) 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 (worker'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.*, 1983-NMSC-052, 100 N.M. 138, 667 P.2d 445.

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 (Workers') 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*, 1975-NMSC-052, 88 N.M. 292, 540 P.2d 222.

This section of the New Mexico Workmen's (Workers') Compensation Act has been consistently interpreted as a reimbursement statute involving only one cause of action, under which the workman (worker) 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 (worker). *Security Ins. Co. v. Chapman*, 1975-NMSC-052, 88 N.M. 292, 540 P.2d 222.

Reimbursement limited to worker's duplicative recovery. — An employer is not necessarily entitled to a full reimbursement from an employee's fair, but partial, tort recovery, but is entitled to recoup the amount of a worker's duplicative recovery; moreover, those amounts that the employee reasonably receives for injuries not addressed by workers' compensation, such as pain and suffering, may not be recovered by the employer. *Gutierrez v. City of Albuquerque*, 1998-NMSC-027, 125 N.M. 643, 964 P.2d 807.

Where an employee received workers' compensation benefits under the employer's policy and also received benefits under the employer's uninsured motorist policy, the employer was entitled solely to reimbursement and potential future offset credit for those uninsured motorist benefits that duplicated the workers' compensation benefits paid or to be paid to the employee. *Chavez v. S.E.D. Labs.*, 2000-NMSC-034, 129 N.M. 794, 14 P.3d 532.

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 (worker's) action against the third party. *Herrera v. Springer Corp.*, 1973-NMCA-041, 85 N.M. 6, 508 P.2d 1303, *rev'd on other grounds*, 1973-NMSC-057, 85 N.M. 201, 510 P.2d 1072.

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 Section 52-1-49 NMSA 1978 nor filing suit against the employer for additional workmen's (workers') 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*, 1975-NMSC-052, 88 N.M. 292, 540 P.2d 222.

IV. UNINSURED MOTORIST INSURANCE.

Recoveries based upon an employer-provided uninsured motorist policy, as opposed to a third-party tort action, is a distinction without a difference for the purpose of calculating the amount of reimbursement due an employer. *Chavez v. S.E.D. Labs.*, 2000-NMCA-034, 128 N.M. 768, 999 P.2d 412.

No offset for underinsured motorist insurance provider. — Subsection C of this section does not entitle the uninsured or underinsured motorist insurance provider to a credit for the amount of workers' compensation benefits that the employee was not required to reimburse to the workers' compensation carrier by reason of a settlement between the employee and the workers' compensation carrier; the settlement did not implicate or affect the UIM insurer's responsibility under the UIM policy and the UIM insurer remained liable for the full amount of UIM coverage to the extent of damages proved by the employee. *Mountain States Mut. Cas. Co. v. Vigil*, 1996-NMCA-062, 121 N.M. 812, 918 P.2d 728.

Employee may retain difference from coverage benefits. — Subsection C does not preclude an employee from retaining the difference between uninsured motorist benefits

and workers' compensation benefits, notwithstanding the fact that the employer has paid the premiums for each coverage. The fact that the same insurer issued both policies to the employer is immaterial. If the employee is an insured occupant of the vehicle under the terms of the automobile policy, he is entitled to recover the proceeds of the uninsured motorist coverage subject only to his employer's statutory right to reimbursement for the workers' compensation benefits that it has paid. *Draper v. Mountain States Mut. Cas. Co.*, 1994-NMSC-002, 116 N.M. 775, 867 P.2d 1157.

Estate of deceased worker not entitled to recover under employer's uninsured motorist insurance. — Where estate of decedent sought to recover damages under decedent's employer's uninsured/underinsured motorist coverage after decedent was killed in the course of his employment by a co-worker operating an employer-owned motor vehicle, decedent's estate was not entitled to recover damages under the employer's uninsured motorist insurance, because the uninsured motorist statute, 66-5-301(A) NMSA 1978, only benefits persons "legally entitled to recover damages from owners or operators of uninsured motor vehicles", and under the Workers' Compensation Act (WCA), 52-1-1 to -70 NMSA 1978, an employee who was injured in a workplace accident caused by an employer or its representative may only seek a remedy authorized under the WCA, and under the WCA such a employee is not legally entitled to recover damages under the uninsured motorist statute. *Vasquez v. American Cas. Co. of Reading*, 2017-NMSC-003.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

For note, "Pursuing the 'Benevolent Purpose' of New Mexico's Workers' Compensation Statute as a Reimbursement Statute: *Montoya v. AKAL Sec., Inc.*," see 24 N.M.L. Rev. 577 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workmen's Compensation §§ 429 to 432.

Right of workers' compensation insurer or employer paying to a workers' compensation fund, on the compensable death of an employee with no dependents, to indemnity or subrogation from proceeds of wrongful death action brought against third-party tortfeasor, 7 A.L.R.5th 969.

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.

ANNOTATIONS

Purpose of section is to save the employer the expense and cost of litigation. *Armijo v. Co-Con Constr. Co.*, 1978-NMCA-106, 92 N.M. 295, 587 P.2d 442, cert. denied, 92 N.M. 260, 586 P.2d 1089.

Where maximum compensation benefits are being paid, this section bars a suit to establish liability for compensation. *Arther v. Western Co. of N. Am.*, 1975-NMCA-082, 88 N.M. 157, 538 P.2d 799, cert. denied, 88 N.M. 318, 540 P.2d 248.

One purpose of section is to bar suit to establish liability for compensation. *Rollins v. Albuquerque Pub. Schs.*, 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. Schs.*, 1979-NMCA-039, 92 N.M. 795, 595 P.2d 765, cert. denied, 92 N.M. 675, 593 P.2d 1078.

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 (workers') compensation benefits. *Briscoe v. Hydro Conduit Corp.*, 1975-NMCA-147, 88 N.M. 568, 544 P.2d 283.

"No claim shall be filed" means any workman (worker) 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. Schs.*, 1979-NMCA-039, 92 N.M. 795, 595 P.2d 765, cert. denied, 92 N.M. 675, 593 P.2d 1078.

"Maximum compensation benefits" means benefits paid for total disability. *Rollins v. Albuquerque Pub. Schs.*, 1979-NMCA-039, 92 N.M. 795, 595 P.2d 765, cert. denied, 92 N.M. 675, 593 P.2d 1078.

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. Schs.*, 1979-NMCA-039, 92 N.M. 795, 595 P.2d 765, cert. denied, 92 N.M. 675, 593 P.2d 1078.

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*, 1988-NMSC-083, 107 N.M. 668, 763 P.2d 684.

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. Schs.*, 1979-NMCA-039, 92 N.M. 795, 595 P.2d 765, cert. denied, 92 N.M. 675, 593 P.2d 1078.

When maximum compensation benefits are refused or reduced, a workman (worker) 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. Schs.*, 1979-NMCA-039, 92 N.M. 795, 595 P.2d 765, cert. denied, 92 N.M. 675, 593 P.2d 1078.

Claimant not prevented from moving for change in compensation as the district court has jurisdiction, when compensation is being paid, to decrease, increase or terminate the payments, and to order a lump-sum settlement. *Livingston v. Loffland Bros.*, 1974-NMCA-047, 86 N.M. 375, 524 P.2d 991, cert. denied, 86 N.M. 372, 524 P.2d 988 (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*, 1983-NMCA-037, 99 N.M. 632, 661 P.2d 1331, cert. denied, 99 N.M. 644, 662 P.2d 645.

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.*, 1984-NMCA-097, 101 N.M. 773, 689 P.2d 289.

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 Section 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.*, 1975-NMCA-147, 88 N.M. 568, 544 P.2d 283.

52-5-19. Fee for funding administration; workers' compensation administration fund created.

A. Beginning with the calendar quarter ending September 30, 2004 and for each calendar quarter thereafter, there is assessed against each employer who is required or elects to be covered by the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] a fee equal to two dollars thirty cents ($2.30) multiplied by the number of

employees covered by the Workers' Compensation Act that the employer has on the last working day of each quarter. At the same time, there is assessed against each employee covered by the Workers' Compensation Act on the last working day of each quarter a fee of two dollars ($2.00), which shall be deducted from the wages of the employee by the employer and remitted along with the fee assessed on the employer. The fees shall be remitted by the last day of the month following the end of the quarter for which they are due.

B. The taxation and revenue department may deduct from the gross fees collected an amount not to exceed five percent of the gross fees collected to reimburse the department for costs of administration.

C. The taxation and revenue department shall pay over the net fees 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; provided that an amount equal to thirty cents ($.30) per employee of the fee assessed against an employer shall be distributed from the workers' compensation administration fund to the uninsured employers' fund.

D. The workers' compensation fee authorized in this section shall be administered and enforced by the taxation and revenue department 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; 1990 (2nd S.S.), ch. 3, § 3; 1992, ch. 52, § 1; 2004, ch. 36, § 2.

ANNOTATIONS

The 2004 amendment, effective July 1, 2004, changed the employer's fee provided in Subsection A from two dollars ($2.00) to two dollars thirty cents ($2.30) and amended Subsection C to add the "provided" language after the semi-colon at the end of the subsection.

The 1992 amendment, effective May 20, 1992, rewrote Subsection A; deleted former Subsection B, which defined "employee" and "employer" and redesignated former Subsection C as present Subsection B, substituting "fees collected" for "assessments" in two places therein; and added the Subsection C and D designations, substituting references to fees for references to assessments near the beginning of both subsections.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "administration" for "division" in the catchline, added the Subsection designations, added Subsection B, and otherwise rewrote the section.

Transfer of funds. — The fees assessed against employers and employees and paid into the workers' compensation administration fund may be diverted to another fund, like the computer systems enhancement fund, even though the other purposes are not specified in the statute creating the workers' compensation administration fund. The general rule permits the transfer to the different fund or purpose as long as the money remains subject to legislative control. 1994 Op. Att'y Gen. No. 94-05.

52-5-20. Notification to employer; penalty.

A. Each insurer, guarantor, surety or group self-insurance administrator shall, on written request of the insured employer, provide the employer with a list of claims made against the employer. The information provided to the employer shall include amounts paid for closed claims, the combined cumulative reserve for all open claims and, if requested, details regarding the treatment and condition of the injured or disabled worker. The employer shall also receive notice of any proposed settlement of any claim against the employer if he so requests in writing.

B. Failure to comply with this section may subject the violator to a fine, upon hearing held by the director, of not less than twenty-five dollars ($25.00) or more than one hundred dollars ($100).

History: 1978 Comp., § 52-5-20, enacted by Laws 1990 (2nd S.S.), ch. 2, § 60.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 60 effective January 1, 1991.

52-5-21. Administration records confidentiality; authorized use.

Except as otherwise provided in this section, unless introduced as evidence in an administrative or judicial proceeding or filed with the clerk of the court as part of an enforcement or compliance proceeding, all records of the administration shall be confidential. Once an accident or disablement occurs, any person who is a party to a claim upon that accident or disablement is entitled to access to all files relating to that accident or disablement and to all files relating to any prior accident, injury or disablement of the worker. Upon the filing of a rejection of a recommended resolution, all records filed with the clerk of the court as part of the judicial proceeding shall be open to the public.

History: Laws 1990 (2nd S.S.), ch. 2, § 65; 2001, ch. 87, § 5.

ANNOTATIONS

The 2001 amendment, effective July 1, 2001, inserted "Except as otherwise provided in this section" at the beginning of the section; inserted "or filed with the clerk or the court

as a part of an enforcement or compliance proceeding" near the middle of the first sentence; deleted "provided, however, that" following "shall be confidential" at the end of the first sentence; and inserted the final sentence.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-5-22. Accident and payment reports; penalties.

A. The director shall monitor the accident or disablement and payment reports filed by employers or insurers pursuant to Sections 52-1-58, 52-1-60 and 52-3-51 NMSA 1978. The director shall publish reports on those employers or insurers who are late either in submitting their accident or disablement reports or in making their initial payments on claims. In determining the timeliness of an initial payment on a claim, the director shall consider any initial payment to be late if it is received more than fourteen days after the filing of the report required in Section 52-1-58 or 52-3-51 NMSA 1978.

B. The director is authorized to take corrective action to prevent delays from occurring and may impose a penalty upon an employer or insurer who is at fault in causing a late initial payment on a claim. The insurance policy may not provide that any such penalty imposed upon an employer be paid by his insurer. That penalty may be an additional award to the worker who received the late payment of up to one hundred percent of the amount of the initial payment due.

History: Laws 1990 (2nd S.S.), ch. 2, § 89.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 89 effective January 1, 1991.

Compiler's notes. — Laws 1990 (2nd S.S.), ch. 2, § 89 was not enacted as part of the Workers' Compensation Administration Act but has been compiled here for the convenience of the user.

ARTICLE 6
Group Self-Insurance

52-6-1. Short title.

Chapter 52, Article 6 NMSA 1978 may be cited as the "Group Self-Insurance Act".

History: Laws 1986, ch. 22, § 75; 1990 (2nd S.S.), ch. 2, § 66.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "Chapter 52, Article 6 NMSA 1978" for "Sections 75 through 99 of this act".

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 82 Am. Jur. 2d Workers' Compensation §§ 465, 466, 675.

100 C.J.S. Workmen's Compensation §§ 354 to 356.

52-6-2. Definitions.

As used in the Group Self-Insurance Act:

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 that are engaged in the same or similar type of business, are members of the same bona fide trade or professional association that has been in existence for not less than five years and that 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 that a group is unable to pay its outstanding lawful obligations as they mature in the regular course of business, as shown both by having an excess of required reserves and other liabilities over assets and by not having sufficient assets to reinsure all outstanding liabilities after paying all accrued claims owed;

D. "net premium" means premium derived from standard premium adjusted by any advance premium discounts;

E. "private employer" means every employer that 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 that 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; and

K. "workers' compensation benefits" means benefits pursuant to the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] or the New Mexico Occupational Disease Disablement Law [52-3-1 NMSA 1978].

History: Laws 1986, ch. 22, § 76; 1987, ch. 11, § 1; 1989, ch. 263, § 88; 1990 (2nd S.S.), ch. 2, § 67; 2013, ch. 74, § 6.

ANNOTATIONS

The 2013 amendment, effective March 29, 2013, changed the definition of "superintendent" to mean the superintendent of insurance; and in Subsection J, after "superintendent", deleted "designated by the state corporation commission".

The 1990 (2nd S.S.) amendment, effective January 1, 1991, in Subsection C, substituted "both" for "either", inserted "having", and substituted "and" for "or"; and made stylistic changes throughout the section.

52-6-3. Scope.

The provisions of the Group Self-Insurance Act apply to groups. Except as provided by the provisions of that act, groups that are issued a certificate of approval by the director shall not be deemed to be insurers or businesses of insurance and shall not be subject to the provisions of the Insurance Code or other insurance laws and regulations.

History: Laws 1986, ch. 22, § 77; 1990 (2nd S.S.), ch. 2, § 68.

ANNOTATIONS

Cross references. — For the Insurance Code, *see* 59A-1-1 NMSA 1978 and notes thereto.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "that" for "which" and "director" for "superintendent".

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 director.

History: Laws 1986, ch. 22, § 78; 1990 (2nd S.S.), ch. 2, § 69.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "director" for "superintendent".

52-6-5. Initial approval and continued approval to act as a group; qualifications.

A. A proposed group shall file with the director an application for a certificate of approval accompanied by a nonrefundable filing fee in an amount established by the director. The application shall include the group's name, the location of its principal office, the date of organization, the name and address of each member and such other information as the director 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 and occupational disease disablement 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 director showing the financial ability of the group to pay the workers' compensation and occupational disease disablement 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 director. 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 not inconsistent with the following:

(1) a combined net worth of all members of a group of private employers of three million dollars ($3,000,000) or greater, as determined by the director; provided that if a group's annual financial statement for the prior calendar year shows that at the end of that year the group had a surplus of at least one-third of its claim reserves and not less than five million dollars ($5,000,000), then for the current calendar year, the group shall not be required to provide the director with evidence of the net worth of all of the group's members;

(2) security in a form and amount prescribed by the director, 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 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 and backed by the full faith and credit of the state. Any such securities shall be deposited with the director and assigned to and made negotiable by the director pursuant to a trust document acceptable to the director. 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 or occupational disease disablement benefits it is legally obligated to pay. The director 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 director shall 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 director 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 director. The director 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 of the group to meet the workers' compensation and occupational disease disablement obligations of each member. The indemnity agreement shall be in a form prescribed by the director and shall include minimum uniform substantive provisions prescribed by the director. Subject to the director'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 director; and

(7) a fidelity bond for the service company in a form and amount prescribed by the director. The director may also require the service company providing claim services to furnish a performance bond in a form and amount prescribed by the director.

C. A group shall notify the director 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 that change.

D. The director 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 and occupational disease disablement benefits will be available on a timely basis.

E. The director shall act upon a completed application for a certificate of approval within sixty days. If, because of the number of applications, the director is unable to act upon an application within that period, the director shall have an additional sixty days to so act.

F. The director shall issue to the group a certificate of approval upon finding that the proposed group has met all requirements, or the director shall issue an order refusing the certificate, setting forth reasons for refusal, upon finding that the proposed group does not meet all requirements.

G. Each group shall be deemed to have appointed the director 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 or occupational disease disablement benefits.

History: Laws 1986, ch. 22, § 79; 1989, ch. 263, § 89; 1990 (2nd S.S.), ch. 2, § 70; 2007, ch. 112, § 1.

ANNOTATIONS

The 2007 amendment, effective July 1, 2007, revised the requirement that to obtain and maintain certificate of approval a group report its net worth to the director so that a group does not have to file a report if the group has a surplus of at least one-third of its claim reserves and not less than $5,000,000.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, throughout the section, substituted "director" for "superintendent" and inserted references to occupational disease disablement, and, in Subsection B(1), substituted "three million dollars ($3,000,000) or greater, as determined by the director" for "at least one million dollars ($1,000,000)".

52-6-6. Certificate of approval; termination.

A. The certificate of approval issued by the director to a group authorizes the group to provide workers' compensation and occupational disease disablement benefits. The certificate of approval remains in effect until terminated at the request of the group or revoked by the director, pursuant to provisions of Section 52-6-23 NMSA 1978.

B. The director 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 or occupational disease disablement obligations with an authorized insurer under an agreement filed with and approved in writing by the director. 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 director, 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 director 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; 1990 (2nd S.S.), ch. 2, § 71.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "director" for "superintendent" throughout the section and inserted references to occupational disease disablement in Subsections A and B.

52-6-7. Examinations.

The director may examine the affairs, transactions, accounts, records and assets and liabilities of each group as often as the director 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; 1990 (2nd S.S.), ch. 2, § 72.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "director" for "superintendent" twice in the first sentence.

52-6-8. Board of trustees; membership, powers, duties and prohibitions.

Each group shall be operated by a board of trustees that 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 or service company, or any owner, officer or employee of, or any other person affiliated with, the 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, to be called the "claims fund account", 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; provided that income taxes may be paid from the actuarially determined surplus portion of the claims fund account at the discretion of the board of trustees. The remaining net premium shall be placed into a designated depository, to be called the "administrative fund account", for the payment of taxes, general regulatory fees and assessments and administrative costs. The director 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 director'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 the minutes available to the director;

(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 director; or

(2) borrow any money from the group or in the name of the group except in the ordinary course of business, without first advising the director of the nature and purpose of the loan and obtaining prior approval from the director.

History: Laws 1986, ch. 22, § 82; 1987, ch. 11, § 2; 1990 (2nd S.S.), ch. 2, § 73; 1997, ch. 184, § 1.

ANNOTATIONS

The 1997 amendment, effective April 10, 1997, in Subsection A, in Paragraph (1), in the first sentence, inserted "to be called the 'claims fund account'" and added the language beginning "provided that income taxes" at the end of the sentence, deleted the former second sentence, which read: "This shall be called the claims fund account", inserted "to be called the 'administrative fund account'" in the second sentence, and deleted the former fourth sentence, which read: "This shall be called the administrative fund account" and made a stylistic change in Paragraph (2).

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "director" for "superintendent" throughout the section, "that" for "which" in the first sentence, and "money" for "monies" in Subsection B(2).

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 director 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 director that the canceled or terminated member has procured workers' compensation and occupational disease disablement insurance, has become an approved self-insurer or has become a member of another group.

C. The group shall pay all workers' compensation and occupational disease disablement benefits for which each member incurs liability during its period of membership. A private employer member who elects to terminate his membership or is canceled by a group remains jointly and severally liable for workers' compensation and occupational disease disablement obligations of the group and its members that were incurred during the canceled or terminated member's period of membership.

D. A group member is not relieved of his workers' compensation or occupational disease disablement liabilities incurred during his period of membership except through payment by the group or the member of required workers' compensation and occupational disease disablement 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 or occupational disease disablement benefits incurred during the insolvent or bankrupt member's period of membership.

History: Laws 1986, ch. 22, § 83; 1989, ch. 263, § 91; 1990 (2nd S.S.), ch. 2, § 74.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, throughout the section, substituted "director" for "superintendent", inserted references to occupational disease disablement, and made stylistic changes.

52-6-10. Administrators and service companies; conflicts.

A. Each group shall have an administrator. In providing day-to-day management for the group, the administrator may provide 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.

B. Each group may have a service company. The service company may provide services the administrator delegates to it or does not itself provide.

C. 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 for the same group. 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 for the same group. Nothing in this section shall prohibit an administrator or service company for one group from being an administrator or service company for another group.

D. An administrator, officer, trustee or employee of a group or an employee of an administrator shall disclose in writing to the group's board of trustees and director a conflict of interest. For purposes of this subsection, a "conflict of interest" means that a person accepts or is a beneficiary of a fee, brokerage, gift or other thing of value, other than fixed salary or compensation, as consideration for an investment, loan, deposit, purchase, sale, exchange, insurance, reinsurance or other similar transaction made by or for the group, or that a person is financially interested in any capacity in a transaction for the group except on behalf of the group.

E. No group shall pay remuneration, compensation or any thing of value to an officer, administrator or director of the group unless the payment has been authorized by the group's board of trustees.

F. A service contract shall state that, unless the director 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; 1990 (2nd S.S.), ch. 2, § 75; 1993, ch. 96, § 1.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, added "Administrators and" at the beginning of the catchline; inserted present Subsections A, B, D, and E, and redesignated former Subsections A and B as present Subsections C and F; and, in Subsection C, added "for the same group" at the end of the first and second sentences, and added the last sentence.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "director" for "superintendent" in Subsection B.

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.

History: Laws 1986, ch. 22, § 85.

ANNOTATIONS

Cross references. — For the Insurance Code, *see* 59A-1-1 NMSA 1978 and notes thereto.

52-6-12. Financial statements; other reports.

A. Each group shall submit to the director 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 director 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 director 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; 1990 (2nd S.S.), ch. 2, § 76.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "director" for "superintendent" throughout the section.

52-6-13. Repealed.

History: Laws 1986, ch. 22, § 87; 1987, ch. 145, § 1; repealed by Laws 2021, ch. 65, § 38.

ANNOTATIONS

Repeals. — Laws 2021, ch. 65, § 38 repealed 52-6-13 NMSA 1978, as enacted by Laws 1986, ch. 22, § 87, relating to premium tax, effective July 1, 2021. For provisions of former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

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.

ANNOTATIONS

Compiler's notes. — For the 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.

52-6-16. Investments.

Funds not needed for current obligations may be invested by the board of trustees in accordance with the provisions of Chapter 59A, Article 9 NMSA 1978 applicable to investments, except that, notwithstanding the provisions of Section 59A-9-18 NMSA 1978:

A. the board of trustees may make loans or investments not otherwise expressly permitted under Chapter 59A, Article 9 NMSA 1978, in an aggregate amount not exceeding ten percent of the group's assets and not exceeding two percent of such assets as to any one such loan or investment, provided that such loans and investments do not constitute an amount that is greater than total surplus, if the loan or investment meets the requirements of Section 59A-9-3 NMSA 1978 and by reason of safety of principal and yield otherwise qualifies as a sound investment; and

B. the calculation of the group's other loans and investments described in Subsection A of this section shall not include the fair market value of any real property occupied by the group.

History: Laws 1986, ch. 22, § 90; 2007, ch. 205, § 1.

ANNOTATIONS

The 2007 amendment, effective July 1, 2007, added Subsections A and B.

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 director.

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 director, 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 director 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 director to verify proper classifications, experience rating, payroll and rates. A report of the audit shall be filed with the director in a form acceptable to him. A group or any member thereof may request a hearing on any objections to the classifications. If the director 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 director 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; 1990 (2nd S.S.), ch. 2, § 77.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "director" for "superintendent" throughout the section.

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.

52-6-19. Premium payment; reserves.

A. Each group shall establish to the satisfaction of the director a premium payment plan that 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. Upon approval by the director, a group may establish an alternative premium payment plan that shall include:

(1) provision by each member of premium security by surety bond in an amount equal to at least twenty-five percent of the member's annual premium; provided that the surety bond shall be in a form acceptable to the group, shall be issued by a corporate surety company authorized to transact business in this state and shall be effective before the start of the group's fund year; and

(2) payment by each member of the member's annual premium in monthly or quarterly installments during the group's fund year.

C. Each group shall establish and maintain actuarially appropriate loss reserves that shall include reserves for:

(1) known claims and associated expenses; and

(2) claims incurred but not reported and associated expenses.

D. 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; 1990 (2nd S.S.), ch. 2, § 78; 1997, ch. 146, § 1.

ANNOTATIONS

The 1997 amendment, effective April 9, 1997, added Subsection B and redesignated former Subsections B and C as Subsections C and D.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "director" for "superintendent" in Subsection A and made stylistic changes.

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, 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 director may approve or direct.

The director 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 director shall order it to do so.

D. If the group fails to make the required assessment of its members within thirty days after the director 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 director, the group shall be deemed to be insolvent.

E. The director 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. The director shall have the same powers and limitations in such proceedings as are provided to the superintendent under that code, except as otherwise provided in the Group Self-Insurance Act.

F. In the event of the liquidation of a group, the director shall levy an assessment upon its members for such an amount as the director determines to be necessary to discharge all liabilities of the group, including the reasonable cost of liquidation.

History: Laws 1986, ch. 22, § 94; 1990 (2nd S.S.), ch. 2, § 79.

ANNOTATIONS

Cross references. — For the Insurance Code, *see* 59A-1-1 NMSA 1978 and notes thereto.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "director" for "superintendent" throughout the section and inserted "to the superintendent" in Subsection E.

52-6-21. Monetary penalties.

After notice and opportunity for a hearing, the director may impose a monetary penalty on any person or group found to be in violation of any provision of the Group Self-Insurance Act 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 director for credit to the workers' compensation administration fund.

History: Laws 1986, ch. 22, § 95; 1990 (2nd S.S.), ch. 3, § 4.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "director" for "superintendent" twice and, at the end of the last sentence, substituted "workers' compensation administration fund" for "general fund".

52-6-22. Cease and desist orders.

A. After notice and opportunity for a hearing, the director 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 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 director 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); and

(2) revoke the group's certificate of approval or any insurance license held by the person.

History: Laws 1986, ch. 22, § 96; 1990 (2nd S.S.), ch. 2, § 80.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "director" for "superintendent" in both subsections and "and" for "or" at the end of Subsection B(1).

52-6-23. Revocation of certificate of approval.

A. After notice and opportunity for a hearing, the director 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, with any rules or regulations promulgated thereunder or with any lawful order of the director within the time prescribed.

B. The director 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 has been entrusted to the group or its administrator in its fiduciary capacities.

History: Laws 1986, ch. 22, § 97; 1990 (2nd S.S.), ch. 2, § 81.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "director" for "superintendent" throughout the section and "has" for "have" at its second occurrence in Subsection B(3).

52-6-24. Notice and hearing; appeal.

Notice and hearing required by the provisions of Sections 52-6-21, 52-6-22 and 52-6-23 NMSA 1978 shall be given and held pursuant to the applicable provisions of Chapter 59A, Article 4 NMSA 1978. A party may appeal from an order of the director made after a hearing, pursuant to Section 39-3-1.1 NMSA 1978.

History: Laws 1986, ch. 22, § 98; 2003, ch. 259, § 11.

ANNOTATIONS

The 2003 amendment, effective June 20, 2003, rewrote this section to the extent that a detailed comparison is impracticable.

52-6-25. Rules and regulations.

The director may make rules and regulations necessary to implement the provisions of the Group Self-Insurance Act.

History: Laws 1986, ch. 22, § 99; 1990 (2nd S.S.), ch. 2, § 82.

ANNOTATIONS

The 1990 (2nd S.S.) amendment, effective January 1, 1991, substituted "director" for "superintendent" and deleted "pursuant to Section 59A-2-9 NMSA 1978" following "Act".

Temporary provisions. — Laws 1990 (2nd S.S.), ch. 2, § 147, effective January 1, 1991, provided that all rules and regulations adopted by the superintendent pursuant to the Group Self-Insurance Act shall remain in effect until rules are adopted by the director pursuant to the Group Self-Insurance Act.

Applicability. — Laws 1986, ch. 22, § 101 made Laws 1986, 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.

ARTICLE 7
Workers' Compensation Oversight Committee (Repealed.)

52-7-1 to 52-7-6. Repealed.

ANNOTATIONS

Repeals. — Laws 2003, ch. 223, § 3 repealed 52-7-1 to 52-7-6 NMSA 1978, as enacted by Laws 1990 (2nd S.S.), ch. 2, §§ 83 to 88, relating to workers' compensation oversight committee. For provisions of former sections, *see* the 2002 NMSA 1978 on *NMOneSource.com*.

ARTICLE 8
Self-Insurers' Guarantee Fund Act

52-8-1. Short title.

Sections 109 through 120 [52-8-1 to 52-8-12 NMSA 1978] of this act may be cited as the "Self-Insurers' Guarantee Fund Act".

History: Laws 1990 (2nd S.S.), ch. 2, § 109.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 109 effective January 1, 1991.

Compiler's notes. — The phrase "this act" means Laws 1990 (2nd S.S.), ch. 2, §§ 109 through 120 which appear as 52-8-1 to 52-8-12 NMSA 1978.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-8-2. Purpose.

The purpose of the Self-Insurers' Guarantee Fund Act is to provide a guarantee fund for self-insurers to protect the workers and the families of workers employed by self-insurers who become insolvent. The Self-Insurers' Guarantee Fund Act is designed to help ensure the integrity and financial health of the workers' compensation and occupational disease disablement system as it applies to self-insurers in New Mexico.

History: Laws 1990 (2nd S.S.), ch. 2, § 110.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 110 effective January 1, 1991.

52-8-3. Definitions.

As used in the Self-Insurers' Guarantee Fund Act:

A. "benefits" means any benefits to which a worker may be entitled under the provisions of the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978], the Subsequent Injury Act or the New Mexico Occupational Disease Disablement Law [52-3-1 NMSA 1978];

B. "board" means the board of directors of the self-insurers' guarantee fund commission;

C. "commission" means the self-insurers' guarantee fund commission;

D. "director" means the director of the workers' compensation administration;

E. "fund" means the self-insurers' guarantee fund;

F. "insolvent" means that a self-insurer is unable to pay its outstanding lawful obligations as they mature in the regular course of business, as shown both by having an excess of required reserves and other liabilities over assets and by not having sufficient assets to reinsure all outstanding liabilities after paying all accrued claims owed;

G. "private employer" means an employer subject to the Workers' Compensation Act or the New Mexico Occupational Disease Disablement Law who is not a public employer or a public hospital employer;

H. "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;

I. "public hospital employer" means any local, county, district, city-county or other public hospital or public health-related facility, whether operating in wholly or partially owned or leased premises;

J. "self-insurer" means a private employer certified by the director as being qualified to be self-insured for workers' compensation purposes. "Self-insurer" does not include a member of a group covered by the Group Self-Insurance Act [Chapter 52, Article 6 NMSA 1978]; and

K. "worker" means an individual who is defined to be a "worker" under Section 52-1-16 NMSA 1978 or "employee" under Section 52-3-3 NMSA 1978.

History: Laws 1990 (2nd S.S.), ch. 2, § 111.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 111 effective January 1, 1991.

Compiler's notes. — For the Subsequent Injury Act, *see* 52-2-1 NMSA 1978 and notes thereto.

52-8-4. Scope of act.

Every private, individual certified self-insurer shall be a general member of the commission and shall comply with the provisions of the Self-Insurers' Guarantee Fund Act.

History: Laws 1990 (2nd S.S.), ch. 2, § 112.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 112 effective January 1, 1991.

52-8-5. Self-insurers' guarantee fund commission created; organized as an independent commission; board created; administrative support.

A. The "self-insurers' guarantee fund commission" is created as a nonprofit, independent, public corporation for the purpose of administering the Self-Insurers' Guarantee Fund Act. The commission shall not be considered either a state agency or an insurance company.

B. The commission shall have a board of directors which shall consist of five members. Four members shall represent small, medium and large employers, provided that not more than one member shall be from any single employer or industry. The director shall serve, ex officio, as the fifth member. The initial membership of the board shall include four self-insurer representatives appointed by the director. Two of the four self-insurer members originally appointed to the board shall be appointed for an initial term of two years, and two for an initial term of four years. Thereafter, except for the director, members of the board shall serve four-year terms and shall be elected by the general membership of the commission. In the event of a resignation prior to the end of a board member's term, the board shall appoint a replacement to serve the remainder of the term.

C. The workers' compensation administration shall provide office space, staff and supplies as is necessary to support the board's operation.

D. Each general member of the commission shall have one vote in determining the board membership.

History: Laws 1990 (2nd S.S.), ch. 2, § 113.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 113 effective January 1, 1991.

52-8-6. Board powers and duties; liability.

A. The board may:

(1) purchase insurance or reinsurance as is necessary to insure any potential liabilities to the fund;

(2) provide for the imposition of assessments to ensure the financial stability of the fund; and

(3) adopt bylaws and rules necessary to carry out the functions of the commission.

B. Except for intentional acts or acts of gross negligence, neither board members nor general members of the commission shall be liable for their acts or omissions in the administration of the Self-Insurers' Guarantee Fund Act.

History: Laws 1990 (2nd S.S.), ch. 2, § 114.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 114 effective January 1, 1991.

52-8-7. Guarantee fund created; assessment for funding.

A. Each certified self-insurer shall contribute to a fund to be known as the "self-insurers' guarantee fund". The fund shall be used as a last resort to provide benefits to workers and the families of workers of self-insurers who become insolvent and otherwise unable to meet their financial obligations. The board shall determine, subject to approval by the director, when payments may be made from the fund and when a self-insurer becomes insolvent and otherwise unable to meet his financial obligations.

B. At the time of the initial certification, each self-insurer shall deposit in the fund an amount equal to one percent of his paid losses for the immediately preceding year or an average of the preceding three years' New Mexico paid losses, whichever is less or, in the event the self-insurer has no previous experience, an amount to be determined by the board and approved by the director.

C. After the initial contribution, each certified self-insurer shall continue to make an annual contribution, based on one percent of the previous year's paid losses, for two more years. After three years of consecutive contributions, a certified self-insurer shall no longer be required to pay additional contributions to the fund unless:

(1) the director determines that, due to the insolvency of a member of the fund, an additional assessment is necessary to make the fund actuarially sound; or

(2) the board determines the need for any special assessment to ensure the financial stability of the fund.

D. If, at any time, the fund account balance of the self-insurer exceeds one hundred fifty percent, as calculated in Subsection C of this section, the amount in excess of one hundred fifty percent shall be refunded to the insurer.

E. In computing the account balance due, a self-insurer shall be credited with past contributions, including interest earned on those contributions.

F. Each self-insurer may be required to contribute additional amounts, as determined by the board and approved by the director, to maintain the financial stability of the fund. The board shall review at least annually the fund account balance and shall assess members as appropriate to maintain an adequate fund balance. Catastrophic losses shall be accounted for by a special assessment on members as determined by the board and approved by the director.

G. The assets of the fund are the sole property of the fund; they are not the property of the self-insurers who contribute to the fund.

H. The fund shall be maintained at one or more New Mexico financial institutions as determined by the board. The fund shall not be considered public money.

History: Laws 1990 (2nd S.S.), ch. 2, § 115.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 115 effective January 1, 1991.

52-8-8. Fund liability period for guarantee fund.

A. The fund may be used to pay benefits to the worker or legal representative of the worker that are required of the self-insurer who becomes insolvent and otherwise unable to meet his financial obligations, provided that the injury or death occurred on or after January 1, 1992, or, in the case of an occupational disease, that the last injurious exposure occurred on or after January 1, 1992.

B. Notwithstanding the provisions of Subsection A of this section, the fund may only be used to pay benefits to an injured worker if the worker's injury occurs after the date on which the self-insurer is certified and has made a contribution to the fund.

History: Laws 1990 (2nd S.S.), ch. 2, § 116.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 116 effective January 1, 1991.

52-8-9. Fund membership termination.

A. The board may recommend to the director that a private employer be terminated as a self-insurer. The director may also terminate a self-insurer at his own initiative.

B. In the case of termination, the fund shall remain liable for future compensation for injuries and diseases to workers of the private employer that occurred prior to termination as a qualified self-insurer.

History: Laws 1990 (2nd S.S.), ch. 2, § 117.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 117 effective January 1, 1991.

52-8-10. Withdrawal of certification; grounds.

A. If certification of a self-insurer is withdrawn by the director, the private employer shall not be considered a self-insurer during any appeal of that determination. The private employer shall therefore obtain any necessary coverage from other sources pending resolution of the appeal.

B. Certification of a self-insurer may be withdrawn by the director in accordance with regulations he adopts. The regulations shall consider the following as grounds for termination:

(1) the employer no longer meets the requirements, financial or otherwise, of being a qualified self-insurer;

(2) the self-insurer engages in or induces workers to engage in fraudulent practices;

(3) the self-insurer fails to comply with rules and regulations of the director; or

(4) the self-insurer fails to maintain a sufficient fund balance, in which event certification shall be withdrawn effective the date that the fund balance is insufficient.

History: Laws 1990 (2nd S.S.), ch. 2, § 118.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 118 effective January 1, 1991.

52-8-11. Rules and regulations.

The director shall adopt rules and regulations that he determines are necessary or appropriate to fulfill the purposes of and implement the provisions of the Self-Insurers' Guarantee Fund Act including requiring adequate accountability of the collection and disbursement of money in the fund.

History: Laws 1990 (2nd S.S.), ch. 2, § 119.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 119 effective January 1, 1991.

52-8-12. Regulations remain in effect; initial commission general members.

A. The regulations adopted by the director to determine whether a private employer is financially solvent and does not need insurance coverage under Section 52-1-4 NMSA 1978 shall remain in effect until superceded by regulations adopted by the director pursuant to the Self-Insurers' Guarantee Fund Act. The director may require a self-insurer to provide a bond or other suitable financial instrument.

B. The initial general members of the commission shall be private employers certified as of January 1, 1992, as being financially solvent and not needing insurance coverage under Section 52-1-4 NMSA 1978.

History: Laws 1990 (2nd S.S.), ch. 2, § 120.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 120 effective January 1, 1991.

ARTICLE 9
Employers Mutual Company

52-9-1. Short title.

Sections 121 through 144 [52-9-1 to 52-9-24 NMSA 1978] of this act may be cited as the "Employers Mutual Company Act".

History: Laws 1990 (2nd S.S.), ch. 2, § 121.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 121 effective January 1, 1991.

Compiler’s notes. — The phrase "this act" means Laws 1990 (2nd S.S.), ch. 2, §§ 121 to 144 which appear as 52-9-1 to 52-9-24 NMSA 1978.

Constitutionality. — Under existing New Mexico case law, the legislation creating the employers mutual company appears to be an unconstitutional special law chartering or licensing an insurance company. Because the company is intended to be operated as a private entity, it is not clear that the exemption from the prohibition against special laws created by other states' courts for public corporations would save the legislation. 1990 Op. Att'y Gen. No. 90-25.

The latest pronouncements of the New Mexico supreme court indicate that a loan of state funds to the employers mutual company, as authorized by the workers' compensation law, violates the antidonation clause of Article IX, Section 14 of the New Mexico Constitution. 1990 Op. Att'y Gen. No. 90-25.

The 1990 workers' compensation legislation is constitutionally infirm under N.M. Const., Art. VIII, § 10 to the extent the legislature intends to supplant its judgment for that of the state investment council and the state investment officer in determining whether to invest the severance tax permanent fund in bonds issued by the employers mutual company and to direct that the severance tax permanent fund purchase those bonds. To that extent also, the legislation may constitute a prohibited loan guaranty arrangement under N.M. Const., Art. IX, § 14. However, the legislature has not clearly and unequivocally mandated the purchase. Consequently, it may not be concluded that the legislation is patently unconstitutional on those grounds. 1990 Op. Att'y Gen. No. 90-25.

Law reviews. — For survey of 1990-91 workers' compensation law, see 22 N.M.L. Rev. 845 (1992).

52-9-2. Findings and purpose.

A. The legislature finds that the cost, service and benefits of workers' compensation and occupational disease disablement insurance are of utmost importance to the health, welfare and economic well-being of all the citizens of New Mexico. To help provide competitive workers' compensation insurance coverage, the legislature enacts the Employers Mutual Company Act.

B. The legislature finds that, based on the relative amounts of premiums paid, small and medium-sized employers who are good risks for workers' compensation and occupational disease disablement insurance nevertheless can face serious obstacles in securing insurance at reasonable rates in the private voluntary market. A primary purpose of the Employers Mutual Company Act is to create an insurance entity that will provide, consistent with sound underwriting practices, assistance and competitively priced workers' compensation and occupational disease disablement insurance to those small and medium-sized employers.

C. The legislature finds that employers of all sizes should benefit from the availability of competitively priced insurance from the employers mutual company. A purpose of the Employers Mutual Company Act is to create an insurance entity that will

provide assistance and competitively priced workers' compensation and occupational disease disablement insurance to all employers; provided, however, that priority attention is reserved for small and medium-sized employers.

D. The legislature finds that workers' compensation and occupational disease disablement insurance premiums and costs are at a critically high level that threatens the health of New Mexico's economy. A purpose of the Employers Mutual Company Act is to improve and stimulate the state's economy, including critical industries relating to oil and gas production in the state. The legislature further finds that improving the workers' compensation and occupational disease disablement system in New Mexico by creating the employers mutual company will enhance the performance of industries relating to oil and gas production and increase severance tax revenues. For these reasons, the legislature finds investment of the severance tax permanent fund in revenue bonds issued by the employers mutual company is a prudent investment and provides adequate legal consideration for the state.

E. The legislature finds a serious lack of relevant data based on New Mexico experience alone that can be used to assess the impact of workers' compensation and occupational disease disablement laws in the state. A purpose of the Employers Mutual Company Act is to generate data on New Mexico experience alone to assess more accurately the performance of New Mexico's workers' compensation and occupational disease disablement system and the impact of New Mexico's laws.

History: Laws 1990 (2nd S.S.), ch. 2, § 122.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 122 effective January 1, 1991.

52-9-3. Definitions.

As used in the Employers Mutual Company Act:

A. "benefits" means any benefits to which a worker may be entitled under the provisions of the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978], the Subsequent Injury Act and the New Mexico Occupational Disease Disablement Law [52-3-1 NMSA 1978];

B. "board" means the board of directors of the employers mutual company created under the Employers Mutual Company Act;

C. "claim" means the assertion by or on behalf of a worker of a right to benefits;

D. "company" means the employers mutual company created and authorized under the Employers Mutual Company Act;

E. "director" or "member" means a member of the board;

F. "president" means the president of the employers mutual company; and

G. "worker" means an individual who is included in the definition of "worker" under Section 52-1-16 NMSA 1978 or "employee" under Section 52-3-3 NMSA 1978.

History: Laws 1990 (2nd S.S.), ch. 2, § 123.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 123 effective January 1, 1991.

Compiler's notes. — For the Subsequent Injury Act, *see* 52-2-1 NMSA 1978 and notes thereto.

52-9-4. Employers mutual company created; organized as a domestic mutual insurance company.

The "employers mutual company" is created as a nonprofit, independent, public corporation for the purpose of insuring employers against the risk of liability for payment of benefits claims to workers. The company shall be organized as a domestic mutual insurance company and shall be domiciled in a class A county.

History: Laws 1990 (2nd S.S.), ch. 2, § 124.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 124 effective January 1, 1991.

52-9-5. Company's board of directors; appointment; powers.

A. The company's board of directors shall consist of the president and eight members appointed or elected as provided in this section.

B. Each director shall hold office until a successor is appointed or elected and begins service on the board.

C. The governor shall appoint, with the consent of the senate, the initial eight directors of the board, and they shall then appoint the president, who shall be the ninth member of the board.

D. After the governor appoints the initial eight directors of the board, those directors shall determine by lot their initial terms, which shall be two directors for two years, three

directors for four years and three directors for six years. Thereafter, each director shall be appointed or elected to a six-year term. At the expiration of the terms of the two initial directors whose terms are two years, the governor shall appoint one director and the policyholders shall elect one director for full six-year terms. At the expiration of the terms of the three initial directors whose terms are four years, the governor shall appoint two directors and the policyholders shall elect one director for full six-year terms. At the expiration of the terms of the three initial directors whose terms are six years, the governor shall appoint two directors and the policyholders shall elect one director for full six-year terms. Thereafter, as vacancies arise, directors shall be appointed or elected so that at all times five directors shall be appointed by the governor and three directors shall be elected by the company's policyholders in accordance with provisions determined by the board.

E. The governor shall not remove a director he appoints unless the removal is approved by a two-thirds vote of the members of the senate.

F. At all times, two of the governor's appointees to the board shall be public members who have general expertise in workers' compensation, but they shall not be employed by or represent policyholders of the company. Of the remaining six appointed or elected board members, excluding the company president, three directors shall be managers or represent the management of policyholders of the company and three directors shall be nonmanagement employees or represent the nonmanagement employees of policyholders of the company, subject to the following restrictions:

(1) at least two of the three directors who are managers or represent the management of policyholders of the company shall be from or represent private, for-profit enterprises;

(2) at least five members of the board, including the president, shall be knowledgeable in investments and economics;

(3) no member of the board shall represent or be an employee or member of the board of directors of an insurance company;

(4) no two members of the board shall be employed by or represent the same company or institution;

(5) no more than two members of the board shall be employed by or represent a governmental entity; and

(6) any director who has served a full six-year term shall not be eligible for another term until one year after the end of his term.

The provisions of this subsection that apply to managers or representatives of management and nonmanagement employees or representatives of nonmanagement employees of policyholders shall, in the case of the governor's initial director

appointments, apply instead to the management and nonmanagement employees of any employer in the state.

G. The board shall annually elect a chairman from among its members and shall elect those other officers it determines necessary for the performance of its duties.

H. The power to set the policies and procedures for the company is vested in the board. The board may perform all acts necessary or appropriate to exercise that power. The board shall have the same power, authority and jurisdiction as that authorized by law for the governing body of a private insurance carrier. The board shall, consistent with sound underwriting practices, seek to provide priority assistance and competitively priced workers' compensation and occupational disease and disablement insurance to small and medium-sized employers who are good risks for that insurance.

I. Directors' compensation shall be set by the board but shall be limited so that total compensation and reimbursement for expenses incurred as a director, except for the president, do not exceed two thousand five hundred dollars ($2,500) for each director annually.

History: Laws 1990 (2nd S.S.), ch. 2, § 125; 1991, ch. 134, § 1.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, substituted "eight members" for "six members" in Subsection A; substituted "eight directors" for "six directors" and "ninth member" for "seventh member" in Subsection C; in Subsection D, substituted "eight directors" for "six directors" and "three directors" for "two directors" in two places in the first sentence, substituted "three initial directors" for "two initial directors" and "two directors" for "one director" in the fourth sentence, rewrote the fifth sentence which read "At the expiration of the terms of the two initial directors whose terms are six years, the policyholders shall elect two directors for full six-year terms" and substituted "five directors" for "two directors" and "three directors" for "four directors" in the final sentence; deleted former Subsection F, relating to termination of the governor's power to appoint directors; designated former Subsections G to J as Subsections F to I; in Subsection F, rewrote the introductory paragraph, substituted "five members" for "four members" in Paragraph (2) and "two members" for "one member" in Paragraph (5) and deleted "six" preceding "director appointments" in the final sentence of the Subsection; and added the final sentence in Subsection H.

No jurisdiction over claims between insurers. — The workers' compensation administration does not have jurisdiction over a controversy between workers' compensation insurers that has no effect on the rights of the worker. *Jones v. Holiday Inn Express*, 2014-NMCA-082.

Where worker sustained a back injury; thirteen days before the accident, the employer changed worker's compensation carriers from plaintiff to defendant; unaware of the

change, the employer's manager gave notice to plaintiff of worker's claim for benefits; without researching whether the employer was insured through plaintiff, plaintiff accepted the claim and began paying benefits to worker; plaintiff also erred by miscalculating the amount of benefits which gave worker 700 weeks instead of 500 weeks of benefits; when plaintiff discovered the error, plaintiff filed a complaint with the workers' compensation administration requesting that the workers' compensation judge order defendant to pay future benefits to worker and to reimburse the benefits paid by plaintiff, the workers' compensation administration lacked jurisdiction over the controversy because the controversy did not involve or affect worker's claim for compensation. *Jones v. Holiday Inn Express*, 2014-NMCA-082.

52-9-6. Board; directors as appointed public officials of state; excluded from personal liability.

Directors are appointed public officials of the state while carrying out their duties and activities under the Employers Mutual Company Act. The directors and the employees of the company are not liable personally, either jointly or severally, for any debt or obligation created or incurred by the company or for any act performed or obligation entered into in an official capacity when done in good faith, without intent to defraud and in connection with the administration, management or conduct of the company or affairs relating to it.

History: Laws 1990 (2nd S.S.), ch. 2, § 126.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 126 effective January 1, 1991.

52-9-7. President.

The company is under the administrative control of the president. He shall be in charge of the day-to-day operation and management of the company. The board shall appoint the president, and he shall serve at the pleasure of the board. He shall receive compensation as set by the board. The president shall have proven successful experience as an executive at the general management level in the insurance, or self-insurance, business.

History: Laws 1990 (2nd S.S.), ch. 2, § 127.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 127 effective January 1, 1991.

52-9-8. Exclusion of state's liability.

The state shall not be liable for any obligations incurred by the company.

History: Laws 1990 (2nd S.S.), ch. 2, § 128.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 128 effective January 1, 1991.

52-9-9. Use of company assets.

The assets of the company shall be applicable to the payment of losses sustained on account of insurance issued by it and to the payment of salaries, dividends as provided in Sections 131 and 132 [52-9-11, 52-9-12 NMSA 1978] of this act and other expenses.

History: Laws 1990 (2nd S.S.), ch. 2, § 129.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 129 effective January 1, 1991.

52-9-10. Company to be competitive; safety incentives and penalties; loss control, case management and utilization review.

A. The company shall be competitive with other insurers of workers' compensation and occupational disease disablement insurance. It is the expressed intent of the legislature that the company shall ultimately become self-supporting. For that purpose, loss experience and expense shall be ascertained, and dividends, credits or rate deviations may be made, as provided in the Employers Mutual Company Act. In order to control costs, the company shall provide as many of its services in-house as practicable.

B. The company shall be liable to the same extent as any private insurance company for the payments that are required to be made under Chapter 59A, Article 43 NMSA 1978 to protect against the insolvency of any other insurer of workers' compensation or occupational disease disablement. Likewise, the company shall receive the same benefits under those provisions as any other insurer of workers' compensation or occupational disease disablement.

C. The company shall provide necessary assistance to its policyholders regarding workplace safety. The company may reward or penalize policyholders depending upon

their participation in workplace safety programs, actual loss reduction and safety performance. The company shall notify its policyholders of all safety services provided at the time of issuance or renewal of a policy.

D. The company shall provide its policyholders with loss-control services to prevent accidents from occurring, case management review to monitor the status, progress and appropriateness of each claim filed and to help workers return to work, and utilization review to determine the appropriateness of medical services charged.

History: Laws 1990 (2nd S.S.), ch. 2, § 130.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 130 effective January 1, 1991.

52-9-11. Annual accountings; possible dividends and credits.

The incurred loss experience and expense of the company shall be ascertained each year. If there is an excess of assets over liabilities, necessary reserves and a reasonable surplus for the catastrophe hazard, then a cash dividend may be declared to or a credit allowed to an employer who has been insured with the company in accordance with criteria approved by the board, which may account for the employer's safety record and performance.

History: Laws 1990 (2nd S.S.), ch. 2, § 131.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 131 effective January 1, 1991.

52-9-12. Amount of dividends or credits.

The cash dividend or credit to an employer shall be an amount that the board in its discretion considers appropriate.

History: Laws 1990 (2nd S.S.), ch. 2, § 132.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 132 effective January 1, 1991.

52-9-13. Ability of company to transact workers' benefits insurance.

Effective no later than January 1, 1992, the company shall transact insurance business to provide coverage for workers' benefits and employers' liability.

History: Laws 1990 (2nd S.S.), ch. 2, § 133.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 133 effective January 1, 1991.

52-9-14. Investment counsel.

The company may retain an independent investment counsel. The board shall periodically review and appraise the investment strategy being followed and the effectiveness of such services. Any investment counsel retained or hired shall report at least once a month to the board on investment results and related matters.

History: Laws 1990 (2nd S.S.), ch. 2, § 134.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 134 effective January 1, 1991.

52-9-15. Powers of company.

The company may:

A. insure any New Mexico employer for workers' compensation and employer's liability coverage to the same extent as any other insurer;

B. indemnify a New Mexico employer against his liability for workers' compensation and employer's liability coverage under the laws of any other state for New Mexico employees temporarily working outside this state if the company insures the employer's workers who work within this state;

C. sue and be sued in all actions arising out of any act or omission in connection with its business or affairs;

D. enter into any contracts or obligations relating to the company that are authorized or permitted by law;

E. issue revenue bonds as authorized pursuant to the Employers Mutual Company Act;

F. invest and reinvest money belonging to the company as provided in the Employers Mutual Company Act; and

G. conduct all business and affairs and perform all acts in carrying out its function whether or not specifically designated in the Employers Mutual Company Act.

History: Laws 1990 (2nd S.S.), ch. 2, § 135.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 135 effective January 1, 1991.

52-9-16. Powers of president.

In conducting the business and affairs of the company, the president may, subject to restrictions imposed by the board, carry out the policies and procedures established by the board and may:

A. enter into contracts of workers' compensation and employer's liability insurance;

B. sell annuities covering workers' compensation and employer's liability insurance;

C. decline to insure any risk that does not meet the minimum underwriting standards established by the board;

D. reinsure any risk or a part of a risk;

E. cause the payrolls or other operations of employers applying for insurance to the company to be inspected and audited;

F. make rules for the settlement of claims against the company;

G. contract, on the same basis as insurers, with health care providers, as defined in Section 52-4-1 NMSA 1978, for the treatment and care of workers entitled to benefits from the company;

H. make safety inspections of risks and furnish advisory services to employers on safety and health measures;

I. act for the company in collecting and disbursing money necessary to administer the company and conduct its business;

J. sign contracts and incur obligations, including revenue bonds, on behalf of the company;

K. perform all acts necessary to exercise power, authority or jurisdiction over the company to discharge its functions and fulfill its responsibilities, including the establishment of premium rates; and

L. conduct all business and affairs and perform all acts in carrying out his duties whether or not specifically designated in the Employers Mutual Company Act.

History: Laws 1990 (2nd S.S.), ch. 2, § 136.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 136 effective January 1, 1991.

52-9-17. Company audit.

The board shall cause an annual audit of the books of accounts, funds and securities of the company to be made by a competent and independent firm of certified public accountants, the cost of the audit to be a charge against the company. A copy of the audit report shall be filed with the superintendent of insurance and the president. The audit shall be open to the public for inspection.

History: Laws 1990 (2nd S.S.), ch. 2, § 137.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 137 effective January 1, 1991.

52-9-18. Company assets.

In addition to other provisions of law governing regulation of insurance companies, if the superintendent of insurance finds that the company does not own assets at least equal to all liabilities and required reserves together with the minimum basic surplus and free surplus required of a mutual casualty insurer by the Insurance Code, or that its condition is such as to render the continuance of its business hazardous to the public or to the holders of its policies or certificates of insurance, the superintendent shall:

A. notify the president and chairman of the board of that determination;

B. furnish the company with a written list of the superintendent's recommendations to abate the determination; and

C. notify the governor, the president pro tempore of the senate, the speaker of the house of representatives and the legislative finance committee of the recommendations of the superintendent and any actions taken in response by the company.

History: Laws 1990 (2nd S.S.), ch. 2, § 138.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 138 effective January 1, 1991.

Cross references. — For the Insurance Code, *see* 59A-1-1 NMSA 1978 and notes thereto.

52-9-19. Money and property of the company.

All premiums and other money paid to the company, all property and securities acquired through the use of money belonging to the company and all interest and dividends earned upon money belonging to the company and deposited or invested by the company are the sole property of the company and shall be used exclusively for the operation and obligations of the company. The money of the company is not state money. The property of the company is not state property.

History: Laws 1990 (2nd S.S.), ch. 2, § 139.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 139 effective January 1, 1991.

52-9-20. No state appropriation.

The company shall not receive any state appropriation.

History: Laws 1990 (2nd S.S.), ch. 2, § 140.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 140 effective January 1, 1991.

52-9-21. Exemption from and applicability of certain laws.

The company shall not be considered a state agency for any purpose. This includes exempting the company from all state personnel, salary and procurement statutes, rules and regulations. The insurance operations of the company are subject to all of the applicable provisions of the Insurance Code in the same manner as those provisions apply to a private insurance company. The company is subject to the same tax liabilities and assessments as a private insurance company.

History: Laws 1990 (2nd S.S.), ch. 2, § 141.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 141 effective January 1, 1991.

Cross references. — For the Insurance Code, *see* 59A-1-1 NMSA 1978 and notes thereto.

52-9-22. Marketing.

A. Pursuant to rules adopted by the board, the company, private independent insurance agents licensed to sell workers' compensation insurance in New Mexico and any insurance association acting as a general agent, provided the association has at least one hundred members, may sell insurance coverage for the company. The board shall establish a standard agency contract for any insurance association acting as a general agent with which the board contracts. The board shall adopt a schedule of commissions that the company will pay to any qualified independent insurance agent or association.

B. The marketing representatives employed directly by the company shall obtain a license from the superintendent of insurance. The marketing representatives employed directly by the company shall not be licensed to sell any type of insurance other than workers' compensation or occupational disease disablement insurance.

History: Laws 1990 (2nd S.S.), ch. 2, § 142.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 142 effective January 1, 1991.

52-9-23. Annual report.

The president shall submit an annual, independently audited report, in accordance with procedures governing annual reports adopted by the national association of insurance commissioners, by October 1 of each year to the governor, the legislative finance committee and any other appropriate legislative committee indicating the business done by the company during the previously completed fiscal year and containing a statement of the resources and liabilities of the company. The report shall include:

A. the volume of premiums insured through the company and its share of the workers' benefits market in the state;

B. the percent division of the premium dollars among various types of benefit payments and administrative costs for policies and claims under the company;

C. the average rate of return enjoyed by the company on invested assets;

D. recommendations concerning desired changes in the company to promote its prompt and efficient administration of policies and claims;

E. recommendations to the legislature and the governor regarding the continued operation of the company; and

F. any other information the president deems appropriate.

History: Laws 1990 (2nd S.S.), ch. 2, § 143.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 143 effective January 1, 1991.

52-9-24. Loan fund created.

There is hereby created in the state treasury a fund to be known as the "employers mutual company loan fund".

History: Laws 1990 (2nd S.S.), ch. 2, § 144.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 144 effective January 1, 1991.

52-9-25. Authorization to issue revenue bonds.

A. In order to provide funds for the continued development and operation of the employers mutual company, the board of directors of the company is authorized to issue revenue bonds from time to time, in a principal amount outstanding not to exceed ten million dollars ($10,000,000) at any given time, payable solely from premiums received from insurance policies and other revenues generated by the company.

B. The board may issue bonds to refund other bonds issued pursuant to this section.

C. The bonds shall have a maturity of no more than ten years from the date of issuance. The board of directors of the employers mutual company shall determine all other terms, covenants and conditions of the bonds; provided, however, that the bonds

may provide for prepayment in part or in full of the balance due at any time without penalty, and the company shall not make any prepayments until it has established adequate reserves for the risks it has insured and has received approval from the superintendent of insurance for the proposed prepayment.

D. The bonds shall be executed with the manual or facsimile signature of the president of the employers mutual company or the chairman of the board of directors of the company and attested by an other member of the board. The bonds may bear the seal, if any, of the company.

E. The proceeds of the bonds and the earnings on those proceeds are appropriated to the board of directors of the employers mutual company for the development and operation of the employers mutual company, to pay expenses incurred in the preparation, issuance and sale of the bonds, to pay any obligations relating to the bonds and the proceeds of the bonds under the federal Internal Revenue Code of 1986, as amended, and for any other lawful purpose.

F. The bonds may be sold either at a public sale or at a private sale to the state investment officer or to the state treasurer. If the bonds are sold at a public sale, the notice of sale and other procedures for the sale shall be as determined by the president or the board of directors of the employers mutual company.

G. This section is full authority for the issuance and sale of the bonds, and the bonds shall not be invalid for any irregularity or defect in the proceedings for their issuance and sale and shall be incontestable in the hands of bona fide purchasers or holders of the bonds for value.

H. An amount of money from the sources specified in Subsection A of this section sufficient to pay the principal of and interest on the bonds as they become due in each year shall be set aside, and is hereby pledged, for the payment of the principal and interest on the bonds.

I. The bonds shall be legal investments for any person or board charged with the investment of public funds and may be accepted as security for any deposit of public money, and the bonds and interest thereon are exempt from taxation by the state and any political subdivision or agency of the state.

J. The bonds shall be payable by the employers mutual company, which shall keep a complete record relating to the payment of the bonds.

History: Laws 1990 (2nd S.S.), ch. 3, § 7; 1992, ch. 24, § 1.

ANNOTATIONS

Cross references. — For the Insurance Code, *see* 59A-1-1 NMSA 1978 and notes thereto.

The 1992 amendment, effective May 20, 1992, in Subsection A, inserted "of directors of the company"; in Subsections C, E, and F, inserted "of directors of the employers mutual company"; in Subsection D, inserted "of the employers mutual company" and "of directors of the company"; in Subsection E, deleted the former first sentence, which read "Proceeds from the sale of the bonds shall be used first to pay back the one million dollar ($1,000,000) loan provided to the company from the appropriations contingency fund under Section 9 of this act" and, in the second sentence, deleted "for the repayment of that loan," preceding "for the development and operation" and inserted "and for any other lawful purpose" at the end; in Subsection J, inserted "employers mutual"; and made stylistic changes.

ARTICLE 10
Release of Medical Records

52-10-1. Release of medical records.

A. A health care provider shall immediately release to a worker, that worker's employer, that employer's insurer, the appropriate peer review organization or the health care selection board all medical records, medical bills and other information concerning any health care or health care service provided to the worker, upon either party's written request to the health care provider for that information. Except for those records that are directly related to any injuries or disabilities claimed by a worker for which that worker is receiving benefits from his employer, the request shall be accompanied by a signed authorization for that request by the worker.

B. An employer or worker shall not be required to continue to pay any health care provider who refuses to comply with Subsection A of this section.

History: Laws 1990 (2nd S.S.), ch. 2, § 90.

ANNOTATIONS

Effective dates. — Laws 1990 (2nd S.S.), ch. 2, § 153 made Laws 1990 (2nd S.S.), ch. 2, § 90 effective January 1, 1991.

Severability. — Laws 1990 (2nd S.S.), ch. 2, § 152, provided for the severability of the act if any part or application thereof was held invalid.

Ex parte contacts properly prohibited. — The district court did not err in issuing an order prohibiting employer's workers' compensation insurer from engaging in ex parte contacts with worker's treating physician. *Church's Fried Chicken No. 1040 v. Hanson*, 1992-NMCA-115, 114 N.M. 730, 845 P.2d 824, cert. denied, 114 N.M. 577, 844 P.2d 827 (1993).