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Workers' Compensation

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WORKERS' COMPENSATION

I. INTRODUCTION

New Mexico's legislature has materially amended the state's Workers' Compensation Act ("Act") in each of its past three general sessions. In 1986, the legislature enacted the Workers' Compensation Act of 1986 ("1986 Act")[1] which modified the existing Act ("Old Act").[2] In 1987, lawmakers passed a revised Act ("1987 Act");[3] and, finally, on October 20, 1990, Governor Gary Carruthers signed into law the Workers' Compensation Act of 1990 ("1990 Act").[4] The 1990 Act became effective on January 1, 1991.[5]

The purpose of this survey is twofold. This article discusses how the 1990 Act modifies prior workers' compensation law.[6] Additionally, this article examines New Mexico case law interpreting the various Acts during the survey period. The cases surveyed involve the following areas of workers' compensation law: appellate standard of review, the coming and going rule, definition of "three or more employees," pre-existing injuries, out-of-state injuries and attorneys' fees.

II. THE WORKERS' COMPENSATION ACT OF 1990: CHANGING THE RULES OF THE GAME

The Workers' Compensation Act of 1990 has substantially rewritten or repealed many important provisions of the Act. Frequently, the amendments reveal lawmakers' shifting preference for one theoretical basis of compensation over another.[7] This section begins with a description of

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1. N.M. STAT. ANN. §§ 52-1-1 to 52-5-18 (Cum. Supp. 1986) (effective from May 19, 1986 until before June 17, 1987).

2. N.M. STAT. ANN. §§ 52-1-1 to 52-5-14 (1978).

3. N.M. STAT. ANN. §§ 52-1-1 to 52-1-70 (Repl. Pamp. 1991) (effective from June 17, 1987 until before Jan. 1, 1991). This article refers to the prior versions of the Act by the year in which each new Act was passed. Practitioners, however, employ a different terminology, referring to the 1986 Act as the "Interim Act" and the 1987 Act as the "New Act."

4. *Id.* §§ 52-1-1 to -70 (effective Jan. 1, 1991). One of the earliest commentaries on the 1990 Act is Dunn, The Workers' Compensation Act of 1990, (Nov. 1990) (unpublished manuscript on file with the New Mexico Law Review). Mr. Dunn's article provided invaluable guidance to this survey in organizing the 1990 Act's revisions of prior law.

5. N.M. STAT. ANN. § 52-1-6 (Repl. Pamp. 1991) (effective Jan. 1, 1991). There are two exceptions to the effective date of the 1990 Act. The 1990 Act requires that the Workers' Compensation Act applies only to employers of three or more employees instead of four or more employees as mandated under prior law. *Id.* § 52-1-6(A). The 1990 Act, however, stipulates that, effective Jan. 1, 1992, the Act will be applicable to all employees engaged in construction activities regardless of the number of employees. *Id.* § 52-1-6. The 1990 Act also mandates that the provisions relating to the newly created medical benefits monitoring systems be effective by April 1, 1991. *Id.*

6. This article will not discuss the 1990 Act's amendments to the following: the Group Self-Insurance Act, N.M. STAT. ANN. §§ 52-6-1 to -25 (Repl. Pamp. 1991); the Insurance Code's rate classifications, *id.* §§ 59A-17-8 to -17; and the Workers' Compensation Assigned Risk Pool Law, *id.* §§ 59A-33-3 to -12. The 1990 Act creates two acts which also will not be discussed, including the Self-Insurers' Guarantee Fund Act, *id.* §§ 52-8-1 to -12, and the Employers' Mutual Company Act, *id.* §§ 52-9-1 to -25.

7. *See infra* notes 60-68 and accompanying text.

the policy objectives of the Act and then details those provisions of the 1990 Act that most significantly change, or add to, prior workers' compensation law.[8]

The provisions of the 1990 Act surveyed include: administrative provisions; disability definitions; method of calculating workers' benefits; determination of average weekly wages; the duration of benefits; attorneys' fees and discovery costs; medical care provisions; notice requirements; statutory causes of action; provision for rehiring the injured worker; and lump sum settlement requirements.

A. The Competing Policy Objectives

The revisions of the Workers' Compensation Act over the past five years can be viewed as the legislature's attempt to balance competing policy interests inherent in administering this comprehensive legislation. Historically, the principal objective of workers' compensation schemes has been to provide at least minimal financial security for injured workers so that their families do not become dependant upon state welfare programs.[9] The Act reflects the belief that industry is best situated to bear the costs of personal injuries suffered by workers in the course of their employment.[10]

Policy makers have also recognized that employers should not be unfairly burdened.[11] An important goal of the Act is to contain costs to employers and their insurers in complying with the Act.[12] Consistent with this goal, the legislature has attempted over the past five years to design the Act to encourage workers to return to some level of employment as soon as possible, reducing their dependency on compensation benefits.[13] The Act also seeks to discourage litigation between workers and employers[14] and to limit the administrative costs of implementing the Act.[15]

The 1990 Act represents a generally evenhanded consideration of competing policy objectives. The legislature has tempered its desire to reduce employers' costs with provisions in the 1990 Act that provide additional

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8. Many of the revisions contained in the 1990 Act are not discussed in this article although they may be of interest to practitioners. These include provisions relating to: the establishment of a workers' advisory committee, N.M. STAT. ANN. § 52-1-1.2 (Repl. Pamp. 1991) (effective Jan. 1, 1991); confidentiality of the records of the Workers' Compensation Administration, *id.* § 52-5-21; data collection, *id.* § 52-5-3; payment of the injured worker's uninsured motorist benefits, *id.* § 52-5-17; release of the injured workers' medical records, *id.* § 52-10-7; definition of health care provider, *id.* § 52-4-1; and enforcement of default payments, *id.* § 52-5-10.

9. *See* Jones v. George F. Getty Oil Co., 92 F.2d 255, 259 (10th Cir. 1937), *cert. denied*, 303 U.S. 644 (1938); Casias v. Zia Co., 93 N.M. 78, 81, 596 P.2d 521, 523 (Ct. App.), *cert denied*, 93 N.M. 8, 595 P.2d 1203 (1979).

10. *See, e.g.*, Superintendent of Ins. v. Mountain States Mut. Casualty Co., 104 N.M. 605, 607, 725 P.2d 581, 583 (Ct. App. 1986); Yerbich v. Heald, 89 N.M. 67, 68, 547 P.2d 72, 73 (Ct. App. 1976).

11. *See, e.g.*, Anaya v. New Mexico Steel Erectors Inc., 94 N.M. 370, 372, 610 P.2d 1199, 1201 (1980).

12. *See, e.g., infra* notes 39-54 and accompanying text (case management and fee review programs).

13. *See, e.g., infra* notes 77-81 and accompanying text (return to work provisions).

14. *See, e.g, infra* notes 55-59 and accompanying text (ombudsman program).

15. *See, e.g., infra* notes 39-47 and accompanying text (utilization review program).

protection and benefits to workers.[16] The provisions of the 1990 Act discussed below demonstrate the legislature's consideration of the mix of policy issues inherent in workers' compensation law.

B. The New Workers' Compensation Administration: Sections 52-5-1 through 52-5-22

The 1990 Act significantly changes the nature of the agency responsible for administering workers' compensation law. The 1990 Act replaces the Workers' Compensation Division with the Workers' Compensation Administration ("Administration"),[17] and describes the new agency as being "administratively attached to the labor department."[18] The legislature's original declaration of intent in creating the Workers' Compensation Division is preserved by the 1990 Act and applied to the Administration:

> 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 employers who are subject to the provisions of the Workers' Compensation Act . . . .[19]

The 1990 Act vests the Administration with the authority and responsibility to achieve the legislature's twin aims. Inherent in the broad administrative changes of the 1990 Act, however, is a tension between the Administration's dual roles of enforcement and assistance.[20] The Act's recent amendments require the Administration to aggressively investigate the conduct of workers, employers, health care providers, and insurers in order to monitor compliance with the Act's new provisions.[21] Simultaneously, the Administration must establish programs designed to inform all parties of their rights and responsibilities under the Act, to assist employers in evaluating safety procedures,[22] and to assess the cost-effectiveness of the new compensation scheme.[23] These new functions will require the Administration to be both enforcer and assistant to all parties involved in compensation claims.

1. Safety and Fraud Division: Section 52-5-1.3

Motivated by the observation that a healthy worker needs no compensation benefits,[24] and the perception that fraudulent claims abounded,[25]

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16. *See, e.g., infra* notes 24-38 and accompanying text (workplace safety programs).
17. N.M. STAT. ANN. § 52-5-1.2 (Repl. Pamp. 1991) (effective Jan. 1, 1991). The legislature has grouped the administrative amendments to the Act under the short title, "Workers' Compensation Administrative Act," *Id.* §§ 52-5-1 to -20.
18. *Id.* § 52-1-1.2.
19. *Id.* § 52-5-1.
20. *See* Aurbach, Workers' Compensation Division: Impact of 1990 Act on the Administration of Claims; Safety and Fraud Division; Ombudsman, Administrative Boards; Confidentiality, 3 (Oct. 1990) (unpublished manuscript on file with the New Mexico Law Review).
21. *See infra* notes 24-39 and accompanying text.
22. *See infra* notes 55-59 and accompanying text.
23. *See infra* notes 48-54 and accompanying text.
24. *See* Aurbach, *supra* note 20, at 3.
25. *Id.*

the legislature created the Safety and Fraud Division within the Workers' Compensation Administration.[26] The Safety and Fraud Division ("Division") is responsible for developing new programs designed to heighten safety requirements in the workplace[27] and to investigate and punish fraudulent conduct.[28]

The Division is required to develop a program to identify "extra-hazardous employers."[29] These are employers whose "injury frequencies substantially exceed those that may reasonably be expected in that employer's business or industry."[30] The Division's safety program is intended to identify high-risk employers, notify them of their unsafe status and offer safety consultation while punishing employers who do not comply with the Division's safety requirements.[31]

An employer who receives notice that she is "extra-hazardous" is required to obtain a "safety consultant" within thirty days.[32] The Division provides consultants, or the employer and her insurer can choose another professional approved by the Administration's director.[33] The consultant is required to file a report with the employer and the Division which identifies any hazardous conditions or practices.[34] The 1990 Act then requires the employer, in consultation with the safety consultant, to develop an accident prevention plan that addresses the specific hazards identified by the consultant.[35] Employers who fail to develop a safety plan within "a reasonable time" may be subject to a fine not to exceed $5,000.[36]

The Division, under the 1990 Act, must investigate workers, employers and insurers "to determine whether any fraudulent practice relating to worker's compensation is being practiced."[37] The Division shall refer to law enforcement authorities any finding of fraud and bring such a finding to the attention of the workers' compensation judge if it involves a pending claim.[38]

The Safety and Fraud Division reveals the conflict inherent in the Administration's new duties. The Division is in a position to educate

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26. N.M. STAT. ANN. § 52-5-1.3(A).

27. *See id.* § 52-1-1.3(B). The 1990 Act mandates that every employer subject to the Act's provisions shall receive an annual safety inspection. *Id.* § 52-1-6.2(A). The director is responsible for determining the adequacy and structure of workplace safety inspections, including provisions for employer self-inspection. *Id.*

28. *Id.* § 52-5-1.3(E).

29. *Id.* § 52-5-1.3(B).

30. *Id.*

31. *Id.*

32. *Id.* § 52-5-1.3(C).

33. *Id.*

34. *Id.*

35. *Id.* § 52-5-1.3(D).

36. *Id.*

37. *Id.* § 52-5-1.3(E). This statute defines fraud as including "the intentional misrepresentation of a material fact relating to a workers' compensation . . . coverage." *Id.* § 52-5-1.3 (F). Misrepresentation may occur through "conduct, practices, omissions or representations of any person." *Id.*

38. *Id.* § 52-5-1.3(F).

employers as to safety hazards and consult with them in order to improve workers' safety. The Division is also required to investigate and punish employers who fail to meet its safety requirements or who engage in fraudulent conduct. The Act may encourage employers to cooperate with the Administration to improve safety in the workplace; however, some employers may be dissuaded from open interaction with the Administration in fear of the agency's new investigative and punitive authority.

2. Utilization Review, Case Management, and Fee Schedule Programs: Sections 52-4-2, 52-4-3, 52-4-5

Under the 1987 Act, the director had little authority to investigate whether health care providers were charging excessive fees or providing inadequate services to injured claimants.[39] The 1987 Act allowed a person alleging that a health care provider charged excessive fees to file an application for fee review with the director.[40] The director, under prior law, referred the application to a peer review organization whose report the director evaluated before making "his decision concerning the dispute."[41]

Instead of the director initiating a fee review upon application of an aggrieved party, the 1990 Act requires the director to establish a "system of utilization review" of health care providers.[42] The 1990 Act defines "utilization review" as "an evaluation of the necessity, appropriateness, efficiency and quality of health care services."[43]

If the director, pursuant to his utilization review, finds that a health care provider imposes excessive charges or renders inappropriate services, the director may impose a wide range of penalties.[44] These penalties include a forfeiture of the right to payment for those services found to be excessive or inappropriate;[45] a fine of up to $1,000;[46] or, a temporary or permanent suspension of the right to provide health care services to claimants under the Act.[47]

In order to determine whether a health care provider charges excessive fees, the 1990 Act requires the director to establish a fee schedule setting maximum charges for all types of medical treatment.[48] Section 52-4-5

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39. *See* N.M. STAT. ANN. § 52-4-3 (Repl. Pamp. 1991) (effective until April 1, 1991).
40. *Id.* § 52-4-3(A).
41. *Id.* § 52-4-3(E).
42. *Id.* § 52-4-2.
43. *Id.* The director must conduct his review based on "medically accepted standards and an objective evaluation of the health care services provided." *Id.* § 52-4-2(B). The statute provides further that the director shall establish a system of "pre-admission review of all hospital admissions, except emergency services." *Id.* § 52-4-2(C). Utilization review must commence within one working day of all hospital emergency admissions. *Id.*
44. *Id.* § 52-4-2(F). Health care providers are entitled to a hearing to determine if they are charging excessive fees. *Id.*
45. *Id.* § 52-4-2(F)(1).
46. *Id.* § 52-4-2(F)(2).
47. *Id.* § 52-4-2(F)(3).
48. *Id.* § 52-4-5(A). The fee schedule applies to "treatment or attendance, service, devices, apparatus or medicine provided by a health care provider." *Id.* This provision requires that the

prohibits any health care provider from receiving payments in excess of the maximum fees set by the director.[49] A health care provider found to charge excessive fees may appeal this determination to the director.[50] Finally, the director must establish an advisory committee, consisting primarily of licensed health care providers, to assist him in adopting utilization review standards and establishing maximum fee schedules.[51]

The director, under the 1990 Act, must also establish and maintain a case management system to evaluate injured workers' health care plans and to assess whether alternative health care services are appropriate and cost effective.[52] The case management system is intended to monitor the medical progress of injured workers and to formulate a plan for return to work.[53] The 1990 Act requires the director to contract with an independent organization to assist with the administration of the case management system.[54]

3. Ombudsman Program: Section 52-5-1.4

The director of the Administration is required to establish an ombudsman program to assist workers and employers in understanding and protecting their rights under the Act.[55] The legislature intended ombudsmen to facilitate informal communications among unrepresented claimants, employers, and insurers and to assist unrepresented claimants in presenting their claims.[56] Lawmakers were apparently concerned with diminishing the role of lawyers in situations where informal mediation may suffice.[57] Section 52-5-1.4, however, limits the role of ombudsman to providing information and facilitating communication.[58] An ombudsman may not be an advocate for any party nor assist anyone beyond informal mediation.[59]

C. *Defining Disability: The Theory Shifts Again*

The theoretical basis underlying most workers' compensation schemes belongs in one of three categories.[60] Compensation may be based on a

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maximum rate for any service be set between the sixtieth and eightieth percentile "of current rates for health care providers." *Id.* Regulations promulgated pursuant to section 52-4-5 shall be adopted "after review, notice and public hearing." *Id.* The director is to establish a separate schedule of maximum charges for hospital services. *Id.* § 52-4-5(G).

49. *Id.* § 52-4-5(D).
50. *Id.* § 52-4-5(E).
51. *Id.* § 52-4-5(F).
52. *Id.* § 52-4-3(A).
53. *Id.* § 52-4-3(B).
54. *Id.* § 52-4-3(C).
55. *Id.* § 52-5-1.4.
56. *Id.* § 52-5-1.4(B); *see also* Aurbach, *supra* note 20, at 2-3.
57. *See* Aurbach, *supra* note 20, at 3-4.
58. N.M. STAT. ANN. § 52-5-1.4(D).
59. *Id.* An ombudsman need not be an attorney but he must demonstrate familiarity with workers' compensation law. *Id.* § 52-5-1.4(C). The director may appoint additional ombudsmen as he deems appropriate. *Id.* § 52-5-1.4(B).
60. *Varela*, 109 N.M. 306, 308, 784 P.2d 1049, 1051 (Ct. App. 1989); *cert. denied* 109 N.M. 262, 784 P.2d 1005 (1990); 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 57.14 (1989); DUNN, *supra* note 4, at 5-31.

"loss of occupation" theory which compensates an injured worker based on her inability to return to work at a wage or salary comparable to her pre-injury wage.[61] This is also referred to as a pure wage loss concept.[62] Benefits may also be awarded according to a "pure physical impairment" model in which a worker's impairment rating determines compensation.[63] Under this scheme, the higher an employee's impairment rating, the greater his compensation.[64] The third type of compensation method combines the "pure wage loss" and "pure physical impairment" models. This method, "impairment of earning capacity," compensates a worker based on her inability to earn comparable wages or return to any work for which she is suited by age, education, training, and experience.[65]

New Mexico's several versions of its Workers' Compensation Act have, at one time or another, engendered all three theories of disability compensation.[66] The 1990 Act, however, adopts a benefits theory that is a hybrid of the "pure physical impairment" and the "impairment of earning capacity" models. The 1990 Act awards benefits according to an injured worker's impairment rating which is then modified to reflect the worker's earning capacity by accounting for the worker's age, education, and residual physical capacity.[67] Furthermore, the 1990 Act explicitly imposes a wage loss ceiling on benefits awards, providing that "[u]nless otherwise contracted for by the worker and employer, workers' compensation benefits shall be limited so that no worker receives more in total payments . . . by not working than by continuing to work."[68]

The 1990 Act redefines much of the vocabulary involved in benefits computation. A number of the amendments resurrect provisions of the 1986 Act while others are entirely different formulations. These changes to the Act's benefits structure are discussed below, comparing the theoretical underpinnings of the 1990 Act with its predecessors.

1. Impairment: Section 52-1-24

Impairment, under the 1990 Act, is the base line from which permanent disability benefits are calculated. The 1990 Act materially alters the 1987 Act's definition of impairment by adopting a third-party standard to determine a worker's impairment rating. The amended Act defines impairment as "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 permanent impairment."[69]

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61. LARSON, *supra* note 60, at § 57.17; *see also* N.M. STAT. ANN. § 52-1-24(A) (Cum. Supp. 1986).
62. LARSON, *supra* note 60, at § 57.16.
63. *Id.*
64. *Id.*
65. *Id.*; *see also* N.M. STAT. ANN. § 52-1-25 (Repl. Pamp. 1991) (effective until Jan. 1, 1991).
66. *Varela*, 109 N.M. at 308, 784 P.2d at 1051.
67. N.M. STAT. ANN. § 52-1-26.1-26.4 (Repl. Pamp. 1991).
68. *Id.* § 52-1-47.1.
69. *Id.* § 52-1-24(A).

Impairment under both the 1990 Act and the 1987 Act includes physical impairment, primary mental impairment, and secondary mental impairment.[70]

2. Maximum Medical Improvement: Section 52-1-24.1

Although the 1987 Act did not utilize the concept of "maximum medical improvement," the 1990 Act, like the 1986 Act, relies on this term throughout its disability provisions. Under both the 1986 and 1990 Acts, the date of maximum medical improvement is the "date after which further recovery from or lasting improvement to an injury can no longer be reasonably anticipated based upon reasonable medical probability."[71] The date of maximum medical improvement is important in distinguishing between temporary and permanent disabilities.

3. Total Disabilities

Workers' compensation statutes categorize disabilities as being either permanent or temporary, and either total or partial. Generally, a temporary disability is that "which lasts for a limited time only while the workman is undergoing treatment,"[72] and is "a condition from which there will be either complete recovery or an impaired bodily condition which is static."[73] A permanent impairment is one from which the worker will suffer the remainder of her life, without hope of recovery or improvement.[74] The 1990 Act has modified the definitions of temporary, permanent, and total disabilities.

a. Temporary Total Disability: Section 52-1-25.1

The 1990 Act, like the 1986 Act, defines temporary total disability as the inability of the injured worker "to perform his duties prior to the date of his maximum medical improvement."[75] Case law interpreting temporary total disability under the 1986 Act will provide guidance in applying the 1990 Act's provision as the term is identically defined in both Acts.[76]

The legislature included within section 52-1-25.1 a provision that allows an employer to terminate an injured worker's temporary total disability benefits if the health care provider releases the worker to return to work prior to the date of maximum medical improvement, and the employer offers work at the worker's pre-injury wage.[77] This is contrary to the arrangement under the 1986 Act which allowed an employee to collect total temporary disability benefits, prior to the date of maximum medical

70. *Id.* § 52-1-24(B), (C).
71. *Id.* § 52-1-24.1.
72. Lane v. Levi Strauss & Co., 92 N.M. 504, 506, 590 P.2d 652, 654 (Ct. App. 1979).
73. *Id.*; *see also* Dunn, *supra* note 4, at 51-55.
74. *See* Dunn, *supra* note 4, at 51-55.
75. N.M. STAT. ANN. § 52-1-25.1(A).
76. Dunn, *supra* note 4, at 6-8.
77. N.M. STAT. ANN. § 52-1-25.1(A).

improvement, even if she was able to return to light duty work at her pre-injury wage.[78]

The 1990 Act also contemplates employers offering injured employees work at less than pre-injury wages. A new provision reduces an injured worker's temporary total disability benefits if the health care provider releases the worker to return to work, and the employer offers work at less than pre-injury wages.[79]

The "return to work" provisions contained in section 52-1-25.1 reflect the legislature's intent to encourage employers to offer employment to injured workers as soon as possible. The statute suggests, however, that before a worker's benefits are reduced or terminated, the employer has the burden of establishing that the worker's health care provider released the worker to return to work and that the employer offered employment to the worker at or below her pre-injury wages.[80] Two important implications attach when these statutory requirements are satisfied. First, the worker is expected to return to work and her benefits may be affected if she rejects the employer's offer to return to work. Second, a worker's benefits can be reduced only when her employer offers work, not merely when there is other, similar work available to the injured worker.[81]

b. Permanent Total Disability: Section 52-1-25

The legislature's frequent shifting of the theoretical premise of disability compensation is best revealed by the manner in which it has previously defined "permanent total disability." Under New Mexico's original Workers' Compensation Act, courts applied a "capacity to perform" work test to determine total disability. A worker, in order to claim total disability benefits under the original Act, had to prove that she was wholly unable to perform her pre-injury work and wholly unable to perform any work for which she is suited by age, education and training.[82] The 1986 Act's revision of existing law changed the benefit model to a "wage loss" theory.[83] Total disability, under the 1986 Act, resulted when an injured worker could demonstrate that she was "wholly unable to earn comparable wages or salary."[84]

The 1987 Act defined total disability in terms of an "impairment of earning capacity" theory. Under this model, total disability is that "which prevents the worker from engaging, for remuneration or profit, in any

78. Urioste v. Sideris, 107 N.M. 733, 737, 764 P.2d 504, 508 (Ct. App. 1988).

79. N.M. STAT. ANN. § 52-1-25.1(C). An injured worker who returns to work at less than pre-injury wages receives temporary total disability compensation "equal to sixty-six and two-thirds percent of the difference between the worker's pre-injury wage and his post-injury wage." *Id.*

80. *See* Dunn, *supra* note 4, at 9-10.

81. *Id.*

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

83. *See* Strickland v. Coca-Cola Bottling Co., 107 N.M. 500, 502, 760 P.2d 793, 795 (Ct. App.), *cert. denied* 107 N.M. 413, 759 P.2d 200 (1988).

84. N.M. STAT. ANN. § 52-1-24(A) (Cum. Supp. 1986).

occupation for which he is . . . fitted by age, training or experience."[85]

Permanent total disability under the 1990 Act is defined as the "total loss of use of both hands or both arms or both feet or both legs or both eyes *or any two of them*."[86] Permanent total disability, therefore, is predicated solely on physical impairment. The worker's inability to perform work or earn comparable wages is irrelevant.[87] The 1990 Act's permanent total disability provision is confused by the phrase "or any two of them." This language suggests that a worker who looses any combination of a foot, leg, arm, hand or eye is entitled to permanent total disability benefits even if such a calamity does not render the worker unable to perform her previous employment tasks.

4. Permanent Partial Disability: Section 52-1-26

The 1990 Act continues to include within the definition of partial disability the following declaration: "[t]he policy and intent of the legislature is declared to be that every person who suffers a compensable injury with resulting partial disability should be provided with the opportunity to return to gainful employment as soon as possible with minimal dependance on compensation awards."[88] The 1990 Act's similarity with the 1987 Act ends here, however, as the revised partial disability provision is based on a "modified physical impairment" standard, while the 1987 Act was based on the "impairment of earning capacity" theory.[89]

Partial disability under the 1990 Act is defined as a "condition whereby a worker . . . suffers a permanent impairment."[90] The amended Act then determines permanent partial disability by calculating the worker's "impairment as modified by the worker's age, education and physical capacity."[91] This modification calculation is explained in the following section.[92]

Like the 1990 Act's temporary total disability provision, Section 52-1-26 reduces a worker's benefits if he returns to work at a wage equal

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85. N.M. STAT. ANN. § 52-1-25 (Repl. Pamp. 1991) (effective until Jan. 1, 1991).

86. *Id.* § 52-1-25.1 (effective Jan. 1, 1991) (emphasis added).

87. *See* Dunn, *supra* note 4, at 13. The 1990 Act prohibits a judge from considering the testimony of vocational rehabilitation experts for the purpose of determining the existence or extent of disability. N.M. STAT. ANN. § 52-1-25.1(B).

88. N.M. STAT. ANN. § 52-1-26(A) (Repl. Pamp. 1991) (effective Jan. 1, 1991).

89. *See* Dunn, *supra* note 4, at 14-15. The 1987 Act defined partial disability based on the worker's inability to perform any work for which he is fitted by age, education and training. N.M. STAT. ANN. § 52-1-26 (Repl. Pamp. 1991) (effective until Jan. 1, 1991). The original Act, prior to 1986, was also based on an "impairment of earning capacity" scheme. *See* N.M. STAT. ANN. § 52-1-25 (1978). The 1986 Act, on the other hand, based partial disability on a "pure physical impairment" theory that considered only whether the worker suffered "any anatomical or functional abnormality" after the date of maximum medical improvement. N.M. STAT. ANN. § 52-1-25 (Cum. Supp. 1986).

90. N.M. STAT. ANN. § 52-1-26(B).

91. *Id.* § 52-1-26(C). This subsection limits the percentage of disability awarded to ninety-nine percent. *Id.*

92. *See supra* notes 100-134 and accompanying text.

to or greater than his pre-injury wage.[93] If an injured worker returns to work, his permanent partial disability rating is reduced to his impairment rating which is not subject to modification.[94] This provision reflects the idea that an injured worker's recovery should be limited to his initial impairment rating if he is able to earn a wage equal to or greater than his pre-injury wage.[95]

Section 52-1-26 of the 1990 Act may, in some circumstances, frustrate the legislature's intent to encourage workers to return to work at the earliest possible time. A worker's partial disability rating, under the 1990 Act, is determined by modifying his impairment rating by a number of objective factors.[96] It is conceivable that the portion of a worker's partial disability benefits attributable to the modification factors may exceed the income which he would receive from returning to work.[97] If the worker returns to work his benefits would be reduced to his impairment rating, and his income would be less than when he was not working.[98] Obviously, in this situation, the 1990 Act provides a strong disincentive to return to work.[99]

D. Calculation and Modification of Partial Disability: Sections 52-1-26.1 through 52-1-26.4

Equity demands that workers' compensation law be responsive to an individual's circumstances and characteristics.[100] Judicial efficiency, however, requires that the law be practically applied, taxing limited judicial

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93. N.M. STAT. ANN. § 52-1-26 (Repl. Pamp. 1991). Elsewhere in the 1990 Act are further limitations on the amount of compensation benefits that an injured claimant may receive. Unlike previous versions of the Act, the 1990 Act allows an employer to offset benefits paid under the Act by any benefits paid pursuant to an employer-financed, disability compensation program which the employer may provide in addition to coverage under the Act. *Id.* § 42-1-47.1. This section provides, in pertinent part, that "[c]ompensation 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 the injury." *Id.* Clearly, this section was designed to prevent an injured worker from receiving more money from the combination of benefits received under the Workers' Compensation Act and the employers' self-financed benefit program than she earned while working for the employer. *See* Dunn, *supra* note 4, at 36. This provision obviates case law which has held that employers, under the Act, were not entitled to offset their compensation obligations by any benefits paid pursuant to a voluntary, disability benefit program provided by the employer. *See* Montney v. State of New Mexico, 108 N.M. 326, 772 P.2d 360 (Ct. App. 1989) (there is no statutory requirement for offset of credit to avoid overlapping or double payments); Segura v. Molycorp, Inc., 97 N.M. 13, 636 P.2d 284 (1981) (the Act permits an employer to enter into a private contract with employees to pay disability benefits in addition to those provided under the Act).

94. N.M. STAT. ANN. § 52-1-26. This section's "return to work" provision differs materially from the "return to work" provisions defining temporary total disability contained in section 52-1-25.1. When a worker suffers a permanent partial disability, the decision to return to work is entirely within the worker's discretion; the employer does not have the option of offering work to the injured employee as in the case of temporary total disability. *See id.* § 52-1-25.1(B), (C).

95. *See* Dunn, *supra* note 4, at 34.

96. *See infra* notes 110-34 and accompanying text.

97. *See* Dunn, *supra* note 4, at 34.

98. *Id.*

99. *Id.*

100. *See* Dunn, *supra* note 4, at 32.

resources as little as possible and, in the context of determining permanent partial disability, an objective and easily determinable standard is favored.[101] The 1990 Act attempts to resolve this conflict by employing a modified impairment calculation in which a worker's individual characteristics may adjust his benefits award. Section 52-1-26.1(B) sets out the calculus involved in determining an injured worker's modified impairment rating.

The worker's initial impairment rating as determined under section 52-1-24 is the base-line figure.[102] The worker receives modification "points" for age,[103] education,[104] and loss of physical capacity.[105] These points are combined with the initial impairment rating to arrive at a permanent partial disability rating.[106] First, the age and education modifiers are added together.[107] This sum is then multiplied by the physical capacity modifier.[108] Finally, the product of the sum of the age and education modifiers and the physical capacity modifier is added to the base-line impairment value to determine partial disability.[109]

1. Age Modification: Section 52-1-26.2

An injured worker may receive from zero to four points depending on his age "at the time of the disability rating."[110] The 1990 Act recognizes that the older an injured worker is, the more debilitating his injury is likely to be; consequently, the older the claimant, the more points she is awarded for age modification.[111]

2. Education Modifier: Section 52-1-26.3

Determining a claimant's education modifier is more complicated than the calculation of the age modifier. The education modification provision, which awards from zero to eight points, has three elements: formal education, skills, and training.[112] Points are awarded for each of these

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101. *Id.* "The problem with justice is that it is expensive; the problem with objectivity is that it is arbitrary and, in some instances, unfair." *Id.*

102. *See supra* notes 69-70 and accompanying text. Because an impairment rating is not determined until after the date of maximum medical improvement, the calculation of permanent partial disability cannot be made until after this date. *See id.*

103. N.M. STAT. ANN. § 52-1-26.2 (Repl. Pamp. 1991) (effective Jan. 1, 1991).

104. *Id.* § 52-1-26.3.

105. *Id.* § 52-1-26.4.

106. *Id.* § 52-1-26.1(B).

107. *Id.*

108. *Id.* If the sum of the age and education modifiers is a negative number, then it shall be treated as zero for the purposes of the partial disability calculation. *Id.*

109. *Id.* § 52-1-26.1(C). Mr. Dunn's article suggests the following equation as an aid to applying section 52-1-26.1: Impairment + [(Age Modifier + Education Modifier) x Physical Capacity Modifier] = Partial Disability Rating. Dunn, *supra* note 4, at 16.

110. N.M. STAT. ANN. § 52-1-26.2(A).

111. Dunn, *supra* note 4, at 18. Section 52-1-26.2(B) awards age points as follows: if the claimant is forty-four years old or younger, zero points; forty-five to forty-nine years old, one point; fifty to fifty-four years old, two points; fifty-five to fifty-nine years old, three points; and, if the claimant is sixty years old or older, she is awarded four points. *Id.*

112. N.M. STAT. ANN. § 52-1-26.3(A).

categories; their sum constitutes the total education modification.[113] In general, the better educated, more skilled and better trained a claimant is, the fewer points he will be awarded under Section 52-1-26.3.

a. Formal Education

A claimant is awarded from negative one point to two points for his formal education.[114] A claimant who has completed college receives negative one point while a claimant who has completed the twelfth grade or obtained his GED collects zero points.[115] An injured worker who has completed the sixth-grade, but no higher than the eleventh grade, is entitled to one point.[116] Finally, two points are awarded to a claimant who has completed no higher than the fifth grade.[117]

b. Vocational Skills

The education modifier awards up to four points to a claimant based on the vocational skills he has acquired during the ten years preceding his disability.[118] A claimant's skills are "measured by reviewing the jobs he has successfully performed during the ten years preceding the date of disability determination."[119] The statute defines "successfully performed" as the length of time necessary for the worker "to meet the specific vocational preparation (SVP) time requirement" for each of his past jobs.[120]

In order to determine a claimant's SVP for prior employment, section 52-1-26.3 requires a claimant to consult the "dictionary of occupational tables published by" the United States Department of Labor ("DOL").[121] The DOL defines the specific vocational preparation time for a particular vocation as "the amount of time required to learn the techniques, acquire information, and develop the facility needed for average performance in a specific job-worker situation."[122] The DOL assigns a point value for the SVP time required to learn the skills of a particular job; the greater the length of time required to obtain the skills necessary for "average performance," the higher the SVP point value.[123]

The 1990 Act awards a claimant one to four skill points depending upon his SVP value. A claimant's SVP value and his skill modification

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113. *Id.* § 52-1-26.3(D), (E).
114. *Id.* § 52-1-26.3(B).
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* § 52-1-26.3(C).
119. *Id.*
120. *Id.*
121. *Id.*
122. U.S. Department of Labor, *Dictionary of Occupational Titles*, Selected Characteristics of Occupations, Appendix D, p. 473, (1981) (quoted in Dunn, *supra* note 4, at 20).
123. U.S. Department of Labor, *supra* note 122, at 473. The Department of Labor assigns the following values for specific vocational preparation times:

award are inversely related: the greater the SVP score, the fewer skill points a claimant is awarded.[124]

c. Vocational Training

The training component of the education modifier is the least adequately defined element of section 52-1-26.3. A worker who is unable "to competently perform a specific vocational pursuit" is awarded one point.[125] All other workers receive no points for their training modifier.[126] The statute fails to define competent performance or "specific vocational pursuit." The ambiguity of this provision is not likely to cause much controversy as only one modification point is involved.

3. Physical Capacity Modification: Section 52-1-26.4

The 1990 Act awards from one to eight impairment modification points to a claimant "based on the difference between the physical capacity necessary to perform the worker's usual and customary work and the worker's residual physical capacity."[127] "Physical capacity" is defined in terms of physical ability to lift a certain amount of weight or perform certain functions.[128] The revised Act categorizes physical capacity as being either "Heavy," "Medium," "Light," or "Sedentary."[129] Generally, the greater the loss of physical capacity the claimant suffers as a result of a work-related accident, the more points she is awarded.

In order to calculate a claimant's physical capacity modifier, her residual physical capacity must first be determined. Residual physical capacity

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Points Awarded	Time Required to Learn Job
1	Short demonstration
2	Anything beyond short demonstration up to and including 30 days.
3	Over 30 days up to and including 3 months.
4	Over 3 months up to and including 6 months.
5	Over 6 months up to and including 1 year.
6	Over 1 year up to and including 2 years.
7	Over 2 years up to and including 4 years.
8	Over 4 years up to and including 9 years.
9	Over 10 years.

Id.

124. *See* N.M. STAT. ANN. § 52-1-26.3(C). A claimant with an SVP value of one or two, receives four points for her skill component of the education modification; an SVP value of three or four merits three points; an SVP of five or six entitles the worker to two points; and, the worker with an SVP of seven to nine is awarded one point. *Id.*

125. *Id.* § 52-1-26.3(D).

126. *Id.*

127. *Id.* § 52-1-26.4(B).

128. *Id.* § 52-1-26.4.

129. *Id.* § 52-1-26.4(C). This provision defines the physical capacity categories as follows. "Heavy" is the ability to lift over fifty pounds occasionally or up to fifty pounds frequently. "Medium" is the ability to lift up to fifty pounds occasionally or up to twenty-five pounds frequently. "Light" means the ability to lift up to twenty pounds occasionally or up to ten pounds frequently. This category also includes occupations which require a significant amount of walking or standing as well as jobs which involve sitting while operating leg or arm controls. "Sedentary" is the ability to lift up to ten pounds occasionally or up to five pounds frequently. Sedentary jobs require only occasional walking or standing. *Id.*

refers to the claimant's post-injury functional ability. If, for example, a claimant's pre-injury, customary work required a "Heavy" physical capacity and, as a result of her accident, she is only capable of "Sedentary" work, her residual physical capacity is considered to be "Sedentary." The claimant is then awarded points according to the magnitude of the difference between her pre-injury physical capacity and her residual physical capacity.[130] The statute sets out a table that computes physical capacity modification points as a function of the relationship between a worker's pre-injury, physical capacity and her post-injury, residual capacity.[131] In our example, the claimant is awarded eight points because her physical capacity decreased from "Heavy" to "Sedentary."[132]

In the past, evidence of loss of physical capacity could be introduced through the injured worker, the treating physician, the physician who performed the independent medical examination, a physical therapist specialized in physical capacity evaluations, or any other health care provider who evaluated the claimant and who could provide useful information.[133] The 1990 Act, however, restricts the sources of evidence of loss of physical capacity to chiropractors, medical physicians, and osteopathic physicians.[134]

E. Determination of Average Weekly Wage: Section 52-1-20

The 1990 Act has materially changed the provisions determining a worker's average weekly wage ("AWW"). Under prior law, AWW was calculated on the basis of the weekly, monthly, or hourly wage rate contracted for by the worker and employee.[135] Section 52-1-20(B) of the 1990 Act, however, calculates AWW on the basis of a worker's earnings during a twenty-six week period.[136] The AWW of an injured employee

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130. N.M. STAT. ANN. § 52-1-26.4(B).

131. *Id.* Section 52-1-26.4(B) awards points based on the following table:

		RESIDUAL PHYSICAL CAPACITY			
		Sedentary	Light	Medium	Heavy
PRE-INJURY	Sedentary	1	1	1	1
PHYSICAL CAPACITY	Light	2	1	1	1
(usual and	Medium	4	2	1	1
customary work)	Heavy	8	4	2	1

Thus, a worker with a pre-injury physical capacity of "Medium" who, as a result of her injury, can perform only "Light" work, is awarded two points.

132. *See supra* note 131.

133. *See* Dunn, *supra* note 4, at 24.

134. N.M. STAT. ANN. § 52-1-26.4(D). This section provides: "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." Subsections C, E or G of Section 52-4-1 approve as health care providers chiropractors, medical physicians and osteopathic physicians. *Id.* § 52-4-1.

135. N.M. STAT. ANN. § 52-1-20(B)(1) (Repl. Pamp. 1991) (effective until Jan. 1, 1991). Under this old provision, for example, if a worker is being paid by the month for his services, his AWW is calculated by multiplying his monthly wage at the time of the accident by twelve and dividing by fifty-two. *Id.*

136. *Id.* § 52-1-20(B).

who has been working for longer that twenty-six weeks, for example, is determined by computing the total wages paid to the worker during the twenty-six weeks preceding the date of the injury and dividing that figure by twenty-six.[137] The Act's revised provision also sets out the calculus involved in computing AWW when an employee has worked fewer than twenty-six weeks.[138]

F. Duration of Compensation Benefits: Sections 52-1-41 and 52-1-42

The 1990 Act significantly changes the duration over which a worker may receive both total and partial disability benefits. The revised Act extends the period over which benefits for total disability may be paid from the 700 week limitation imposed by the Old Act,[139] to the entire lifetime of the injured worker.[140] Additionally, partial disability benefits under the 1990 Act may extend for 700 weeks in some circumstances as compared to the 500 week limit imposed by the 1987 Act.[141]

The duration of partial disability benefits is based on the nature and extent of the worker's partial disability. When the worker's partial disability rating is eighty percent or greater, benefits may extend for 700 weeks.[142] If the worker's partial disability rating is less than eighty percent, then the worker can receive benefits for a maximum of 500 weeks.[143]

The 1990 Act provides that, in determining the duration an injured worker is entitled to permanent partial disability benefits, the amount of time a worker received temporary total disability benefits must be considered.[144] If, under the 1990 Act, an injured worker receives temporary total disability benefits prior to an award of partial disability benefits, the maximum period for partial disability benefits shall be reduced by "the number of weeks the worker actually receives temporary total disability benefits."[145] The provision overrules prior case law which held

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137. *Id.* § 52-1-20(B). The revised AWW statute has made only modest changes to the definition of "total wages." Both the Old and 1990 Acts include in the definition of wages "the reasonable value of board, rent housing or lodging received from the employer." *Id.* § 52-1-20(A); *cf.* N.M. STAT. ANN. § 52-1-20(A) (Repl. Pamp. 1991) (effective until Jan. 1, 1991). Unlike its predecessors, the 1990 Act explicitly includes gratuities and overtime pay and excludes "fringe or other employment benefits and bonuses." N.M. STAT. ANN. § 52-1-20(A).

138. N.M. STAT. ANN. § 52-1-20(A). If an employee has worked less than twenty-six weeks in the employment in which he was injured, his AWW is determined by dividing the total wages earned "in the employment in which the worker was injured" by the number of weeks the employee actually worked in that employment. *Id.* § 52-1-20(B)(1). This provision may, in some circumstances, invalidate Justiz v. Walgreen's, 106 N.M. 346, 742 P.2d 1051 (1987). *Justiz* held that when computing the AWW for a worker who holds two jobs, it is appropriate to combine the wages from both his full and part-time jobs. *Id.* In the case of a worker who has worked for less that twenty-six weeks, *Justiz* may no longer apply because of the 1990 Act requirement that a worker's AWW be based only on the wages earned "in the employment in which the worker was injured." N.M. STAT. ANN. § 52-1-20(B)(1); *see also* Dunn, *supra* note 4, at 31-33.

139. N.M. STAT. ANN. § 52-1-41(A) (1978).

140. N.M. STAT. ANN. § 52-1-41 (Repl. Pamp. 1991) (effective Jan. 1, 1991).

141. *Id.* § 52-1-42(A) (effective until Jan. 1, 1991).

142. *Id.* § 52-1-42(A)(1) (effective Jan. 1, 1991).

143. *Id.* § 52-1-42(A)(2).

144. *Id.* § 52-1-42(B).

145. *Id.*

that the duration of a worker's partial permanent disability benefits may not be reduced by the number of weeks the worker received temporary total disability benefits.[146]

G. *Attorneys' Fees and Discovery Costs: Section 52-1-54*

The 1990 Act has materially changed the Act's provisions regulating the allocation of attorneys' fees and discovery costs. Furthermore, the amended Act attempts to encourage settlement by adopting an "offer of judgment" procedure.

1. Attorneys' Fees

Historically, the Act has regulated two aspects of attorneys' fees: who pays the fees and what limits the fees. Under the Old Act, the employer was responsible for paying one hundred percent of the claimant's attorneys' fees which could not exceed ten percent of the injured worker's total compensation award.[147] The 1986 Act limited claimants' attorneys' fees to the combination of twenty-five percent of the $5,000 awarded, fifteen percent of the next $5,000 of benefits and ten percent of the remaining benefits secured for the claimant.[148] The claimant, under the 1986 Act, was responsible for paying his own attorneys' fees except when the employer unreasonably refused to pay benefits or when an employer acted in "bad faith."[149]

The 1987 Act limited claimants' fees to $12,500, except when an employer acted in "bad faith,"[150] in which case the workers' compensation judge could award fees in excess of the statutory limit.[151] The 1987 Act required the worker to pay twenty-five percent of her attorneys' fees and the employer was responsible for the remaining seventy-five percent.[152]

The 1990 Act blends elements of each of its predecessors and obtains the most equitable attorneys' fees arrangement to date. Attorneys' fees, under the 1990 Act, are shared equally between claimant and employer,[153] except when modified by the "offer of judgment" procedure described below.[154] The amended Act, for the first time in New Mexico, imposes a bilateral limitation on attorneys' fees: both claimants' and employers' fees may not exceed $12,500.[155] This rectifies one of the Act's most

146. *See* Sorbet v. Riley Indus. Servs., No. 11, 568, (Ct. App. 1989) (memorandum decision).
147. N.M. STAT. ANN. § 52-1-54(A) (1978).
148. N.M. STAT. ANN. § 52-1-54(A) (Cum. Supp. 1986).
149. *Id.* § 52-1-54(C). This subsection defines "bad faith" as "conduct by the employer in the handling of a claim which amounts to fraud, malice, oppression or willful, wanton or reckless disregard for the rights of the workman." *Id.* § 52-1-54(C)(3). A determination of bad faith is made in a separate fact-finding proceeding. *Id.*
150. N.M. STAT. ANN. § 52-1-54(G) (Repl. Pamp. 1991) (effective until Jan. 1, 1991). This provision adopts the 1986 Act's definition of "bad faith."
151. N.M. STAT. ANN. § 52-1-54(G) (Repl. Pamp. 1991) (effective until Jan. 1, 1991).
152. *Id.* § 52-1-54(H).
153. *Id.* § 52-1-54(I) (effective Jan. 1, 1991). This provision includes within the definition of attorneys' fees the costs of paralegal, law clerk and other related legal services. *Id.*
154. *See infra* notes 172-82 and accompanying text.
155. N.M. STAT. ANN. § 52-1-54(I).

glaring inequities and, perhaps, evidences the legislature's recognition of the "unfair advantage that employers and their insurance companies often had over claimants" because of the one-sided fee limitation.[156]

A workers' compensation judge may, under the 1990 Act, award attorneys' fees in excess of $12,500 if she finds "bad faith" conduct by either the employer or employee.[157] Although the "bad faith" provision of the 1990 Act is nearly identical to the analogous sections of the 1987 and 1986 Acts,[158] the most recent amendment limits the penalty a workers' compensation judge can impose because of bad faith to $2,500.[159] Additionally, the 1990 Act, unlike the previous Acts, subjects both employers and claimants, instead of only employers, to bad faith scrutiny.[160]

The 1990 Act prohibits payment of either parties' attorneys' fees until the worker's claim has been settled or adjudged.[161] This provision is not included in prior versions of the Act and was probably designed to encourage insurance defense firms to accelerate the settlement process.[162] The 1990 Act continues to forbid any person from receiving fees in connection with a worker's claim except as provided for in section 52-1-54,[163] and like each prior Act, imposes criminal sanctions for violating the requirements of the Act's attorneys' fee statute.[164]

2. Discovery Costs

Discovery in a New Mexico workers' compensation case has always been restricted to those procedures authorized by the workers' compensation judge.[165] Additionally, prior Acts required the employer to bear

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156. Vigil, The 1990 Workers' Compensation Act 2 (Oct. 1990) (unpublished manuscript on file with the New Mexico Law Review).

157. N.M. STAT. ANN. § 52-1-54(I).

158. *Cf.* N.M. STAT. ANN. § 52-1-54(G) (Repl. Pamp. 1991) (effective until Jan. 1, 1991); N.M. STAT. ANN. § 52-1-54(C)(2) (Cum. Supp. 1986). The 1990 Act, like the two prior Acts, requires that a party suffer economic loss as a result of the other party's bad faith practices in order to receive an increased fee award. N.M. STAT. ANN. § 52-1-54(I) (Repl. Pamp. 1991) (effective Jan. 1, 1991).

159. N.M. STAT. ANN. § 52-1-54(I) (Repl. Pamp. 1991). It is not clear whether subsection 52-1-54(J)'s requirement that claimants' fees be split equally between claimant and employer applies to a bad faith award. *See* Vigil, *supra* note 156, at 3. Although the statute is ambiguous on this point, it seems unfair and inconsistent with the Act's objective to discourage bad faith practices, to require a party to pay half of the other party's bad faith penalty. The language of the 1990 Act, however, supports this interpretation. *See id.* § 52-1-54(I), (J).

160. *Id.* § 52-1-54(I).

161. *Id.* § 52-1-54(M).

162. *See* Vigil, *supra* note 156, at 3.

163. N.M. STAT. ANN. § 52-1-54(A); *cf.* N.M. STAT. ANN. § 52-1-54(A) (Repl. Pamp. 1991) (effective until Jan. 1, 1991); N.M. STAT. ANN. § 52-1-54(A) (Cum. Supp. 1986).

164. N.M. STAT. ANN. § 52-1-54(N) (Repl. Pamp. 1991). This subsection provides that any person who violates the attorneys' fees provision is guilty of a misdemeanor punishable by a fine of between fifty and five hundred dollars and imprisonment in the county jail for a term not exceeding ninety days. *Id.* This same punishment is required by each of the previous Acts. *Cf.* N.M. STAT. ANN. § 52-1-54(K) (Repl. Pamp. 1991) (effective until Jan. 1, 1991); N.M. STAT. ANN. § 52-1-54(F) (Cum. Supp. 1986); N.M. STAT. ANN. § 52-1-54(H) (1978).

165. *See* N.M. STAT. ANN. § 52-2-7(F) (Repl. Pamp. 1991) (effective until Jan. 1, 1991); N.M. STAT. ANN. § 52-5-7(F) (Cum. Supp. 1986); N.M. STAT. ANN. § 52-1-34 (1978).

the costs of both parties' discovery.[166] The 1990 Act continues the practice of authorized discovery, but reallocates the burden of discovery costs by requiring that each side bear their own discovery costs with the provision that the employer advance the worker an initial one thousand dollars for discovery expenses.[167]

The provision directing employers to advance claimants one thousand dollars for discovery costs is somewhat confusing. Section 51-1-54(D) provides that if a claimant "substantially prevails on the claim, any discovery costs advanced by the employer shall be paid by that employer."[168] If the claimant does not "substantially prevail," however, "the employer shall be reimbursed for any discovery costs advanced."[169] The statute's failure to define "substantially prevail" is likely to generate controversy in cases involving significant discovery costs.[170] Apparently, each party is responsible for their own discovery costs in excess of $1,000 regardless of who prevails.[171]

3. Offer of Judgment Procedure

The legislature grafted the offer of judgment procedure set out in Rule 1-068 of New Mexico's Rules for Civil Procedure into section 52-1-54 of the 1990 Act.[172] The procedure allows an employer or claimant, after a recommended settlement offer is issued and rejected, to offer a compensation settlement to the opposing party.[173] If the offer is accepted by the opposing party, the workers' compensation judge may enter a judgment enforcing the offer.[174] If the offer is not accepted, it is deemed withdrawn and may possibly affect the distribution of discovery costs.[175]

The 1990 Act provides that if a claimant refuses an employer's offer that was greater than the amount finally awarded by a compensation order, the employer is not "liable for his fifty percent share of the attorneys' fees to be paid to claimants' attorneys."[176] On the other hand, if the employer's offer is less than the amount awarded by the final

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166. *See, e.g.*, N.M. STAT. ANN. § 52-2-7 (Repl Pamp. 1991) (effective until Jan. 1, 1991).
167. *See id.* § 52-1-54(D) (effective Jan. 1, 1991).
168. *Id.*
169. *Id.*
170. *See* Vigil, *supra* note 156, at 1.
171. This conclusion may be challenged by Rule 54 of New Mexico's Rules for Civil Procedure which permits a court to require the non-prevailing party in a civil action to bear the opposing party's costs. N.M. R. CIV. P. 1-054(e); *see also* Vigil, *supra* note 156, at 1.
172. N.M. R. CIV. P. 1-068; *cf.* N.M. STAT. ANN. § 52-1-54(F).
173. N.M. STAT. ANN. § 52-1-54(F).
174. *Id.*
175. *Id.* Subsection (F)(1) provides that if a party refuses to accept an offer of judgement by the opposing party and the final judgement is "not more favorable than the offer," that party must pay the opposing party's discovery costs incurred after the making of the offer. *Id.* § 52-1-54(F)(1). Although the 1990 Act does not define what makes a final judgement "more favorable than an offer," presumably, this means a higher disability rating and therefore a greater benefits award.
176. *Id.* § 52-1-54(F)(3).

compensation order, he is liable for one hundred percent of the claimant's fee.[177]

The provisions relating to an employer's rejected offer of judgment are problematic because the language of the statute implies that when an employer's offer is greater than the final compensation order, the claimant's attorney only receives fifty percent of her fee.[178] In this situation, an employer is relieved of paying his one-half portion of claimant's attorneys' fees while the claimant is not required to compensate by increasing his fifty percent share of fees.[179] This may tend to frustrate the goal of encouraging settlement in workers' compensation litigation because only the employer bears the risk of paying one hundred percent of the claimant's fees.[180] If the employer makes no offer, he is only liable for one-half claimant's fees.[181] The claimant, however, is only liable for fifty percent under any circumstance.[182] Employers who are unwilling to bear this risk will be hesitant to make an offer of judgment.

H. Workers' Control Over Medical Care: Sections 52-1-49 and 52-1-5

In New Mexico, a worker injured during the ordinary course of her employment has never enjoyed the privilege of selecting her own treating physician at the employer's expense.[183] Each of the 1990 Act's predecessors vested the employer with control over the choice of the claimant's health care provider.[184]

Professor Larson contends that the choice of treating physicians is "one of the stormiest issues in the history of workers' compensation."[185] The controversy results form a conflict between the worker's interest in selecting her own physician and the state's interest in "achieving maximum standards of rehabilitation by permitting the compensation system to exercise continuous control over the nature and quality of medical services."[186] The 1990 Act begins to tip the balance toward the claimant by providing the injured worker with a modicum of control over both the choice of the health care provider and the procedure for requesting independent medical examinations.

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177. *Id.* § 52-1-54(F)(4). This subsection states that the claimant "shall be relieved from any responsibility for paying any portion of his attorneys' fees." *Id.*

178. *See* Dunn, *supra* note 4, at 67.

179. *Id.*

180. *See* N.M. STAT. ANN. § 52-1-54(F)(4).

181. *See id.* § 52-1-54(J).

182. *Id.*

183. *See, e.g.*, Eldridge v. Aztec Well Servicing Co., 105 N.M. 660, 662, 735 P.2d 1166, 1168 (Ct. App. 1987) ("In New Mexico, an injured workman is precluded from seeking independent medical treatment at the employer's expense when the employer has indicated a willingness to furnish treatment and actively makes such services available."). See Dunn, *supra* note 4, at 38-40, for a more detailed discussion of the history of New Mexico's medical care provision.

184. *See* N.M. STAT. ANN. § 52-1-49(A) (1978); N.M. STAT. ANN. § 52-1-49 (Cum. Supp. 1986); N.M. STAT. ANN. § 52-1-49(A) (Repl. Pamp. 1991) (effective until Jan. 1, 1991).

185. A. LARSON, WORKMEN'S COMPENSATION LAW, § 61.12(b) (1981).

186. Montoya v. Anaconda Mining Co., 97 N.M. 1, 5, 653 P.2d 1323, 1328 (Ct. App. 1988) (quoting 2 A. LARSON, WORKMENS' COMPENSATION LAW, § 61.12(b) (1981)); *see also* Dunn, *supra* note 4, at 40.

1. Selection of Health Care Provider: Section 52-1-49

The 1990 Act provides that "[t]he employer shall initially either select the health care provider for the injured worker or permit the injured worker to make the selection."[187] The initial selection remains in effect for the first sixty days of medical treatment, after which time the party who did not make the initial selection "may select the health care provider of his choice."[188]

The party who made the initial selection may object if the opposing party selects a different health care provider after the initial sixty day treatment period.[189] The party must file a written objection within three days of receiving notice that the opposing party is requesting a change of treating physicians.[190] The party seeking the change has the burden of proving that the care being received is not reasonable.[191] The workers' compensation judge is required to rule on the objection within seven days.[192] The judge, in granting a change of physicians, may designate either the requesting party's choice or the judge may chose a different physician.[193]

The 1990 Act permits either party, in the event of a disagreement over the choice of the health care provider, to request a change of physicians at any time.[194] The workers' compensation judge is required to rule on the request according to the same standards and procedures which attend a ruling on a party's objection to the initial choice of the treating physician.[195] Thus, the judge must rule on the request within seven days; the applicant bears the burden of proving that present care in unreasonable; and the judge may appoint the physician designated in the applicant's request or she may choose a different physician.[196]

2. Independent Medical Examination: Section 52-1-51

Injured workers now have the right, previously enjoyed only by employers, to request an independent medical examination ("IME").[197] If

187. N.M. STAT. ANN. § 52-1-49(B).

188. *Id.* § 52-1-49(C). The party seeking to change health care providers must file notice of the name and address of its choice of health care provider with the other party at least ten days before treatment with the new physician begins. *Id.* Notice of a change of health care providers may be filed on or after the fiftieth day of the initial sixty-day period. *Id.*

189. *Id.* § 52-1-49(D).

190. *Id.* If the employer fails to file notice of his objection within the three day period, he is liable for the cost of treatment provided by the claimant's health care provider until the employer does file a notice of his objection and a workers' compensation judge rules on the objection. *Id.* If the claimant fails to file notice of his objection within three days from receiving notice that the employer seeks to change health care providers, then the employer is liable only for services provided by the physician which he initially chose. *Id.*

191. *Id.* § 52-1-49(F).

192. *Id.*

193. *Id.*

194. *Id.* § 52-1-51(E).

195. *Id.*

196. *Id.* § 52-1-49(F).

197. *Id.* § 52-1-51; *cf.* N.M. STAT. ANN. § 52-1-51 (Repl. Pamp. 1991) (effective until Jan. 1, 1991).

a medical issue is disputed, either party may petition the judge for permission to have the worker undergo an IME.[198] The judge then designates a physician from an approved list of health care providers to perform the IME.[199] The judge is not obligated to choose the petitioner's original health care physician,[200] and the employer pays the costs of any IME.[201]

If the employer chooses the initial treating physician and then, after sixty days, the injured worker selects a new health care provider, the employer is entitled to periodic examinations of the worker conducted by the physician she initially selected.[202] Generally, the employer may not request this type of IME more than once every six months.[203] The employer must also compensate the worker for any reasonable expenses incidental to submitting to an IME at the employer's request.[204] Finally, the 1990 Act again demonstrates an intent to diminish the role of attorneys in the compensation process by explicitly forbidding them from being present at any IME.[205]

I. Notice: Section 52-1-29

The Act's notice provisions have been materially changed by the 1990 Act. The previous notice provision, which had not been amended since its enactment in 1959, required an injured worker to "give notice in writing to his employer of the *accident and the injury* within thirty days after their occurrence."[206] The 1990 Act, however, provides that a worker seeking compensation give "notice in writing to his employer *of the accident* within fifteen days."[207] Not only does a worker now have only fifteen days to give written notice, but also, the worker is required to report all accidents, and not merely those which cause an injury.[208]

The 1990 Act retains the provision that an employee is not required to give written notice of an occurrence of an accident when "the employee or any superintendent or foreman . . . had actual knowledge of the occurrence."[209] The modifications to the Act's notice provisions, however,

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198. N.M. STAT. ANN. § 52-1-51 (Repl. Pamp. 1991).

199. *Id.* § 52-1-51(A). The authorized list of physicians is generated by the "committee appointed by the advisory council on workers' compensation." *Id.* § 52-1-51(B).

200. *Id.*

201. *Id.* § 52-1-51(B).

202. *Id.* § 52-1-51(D).

203. *Id.* The 1990 Act permits a workers' compensation judge to order independent medical examinations within six-month intervals, "upon application . . . and reasonable cause therefore." *Id.* The judge must exercise care to avoid harassing the claimant when considering an applicant for additional IME's. *Id.*

204. *Id.* § 52-1-51(E). These expenses include "the cost of travel, meals, lodging, loss of pay or other like direct expenses." *Id.*

205. *Id.* § 52-1-51(F).

206. *Id.* § 52-1-29 (Repl. Pamp. 1987) (emphasis added).

207. *Id.* § 52-1-29(A) (Repl. Pamp. 1991) (emphasis added).

208. The worker is best advised, therefore, to report every work related accident regardless of how insignificant it may be because an injury may not be detected until well after the occurrence of the accident. *See* Dunn, *supra* note 4, at 51.

209. N.M. STAT. ANN. § 52-1-29(A).

may still undermine precedent which determined when the time requirements of the notice provision begins to run.[210]

The amendments to the Act's notice requirements, while reducing the time within which an employee must notify her employer of an accident, protect workers by requiring that employers "post, and keep posted in a conspicuous place" a notice which informs employees of the fifteen day notice requirement.[211] A failure by an employer to conspicuously post notices will toll the time in which a worker must give notice of an accident up to, but not exceeding, sixty days.[212]

J. Statutory Causes of Action and a Codified Defense

The legislature created two new causes of action and codified a common law defense when it enacted the Workers' Compensation Act of 1990.

1. Bad Faith and Unfair Claims Processing: Section 52-1-28.1

The 1990 Act establishes a cause of action for bad faith practices while simultaneously disposing of a similar, judicially created tort. In 1988, the New Mexico Supreme Court held that an injured worker could bring a cause of action outside of the Workers' Compensation Act against an employer's insurer for bad faith refusal to pay compensation benefits.[213] The 1990 Act, however, explicitly overrules this precedent by amending its exclusivity provision to provide that "[n]o cause of action outside the Workers' Compensation Act shall be brought by an employee . . . against the employer or his representative, including the insurer. . . ."[214]

The 1990 Act provides elsewhere that employees may bring claims under the Act for "unfair claim-processing practices or bad faith by an employer, insurer or claim-processing representative. . . ."[215] This provision instructs the director of the Workers' Compensation Administration to adopt definitions of unfair claims-processing and bad faith practices.[216] The director may also investigate allegations of bad faith or unfair claim processing on his own initiative.[217]

The 1990 Act imposes two types of penalties on employers and insurers for bad faith or unfair claims practices.[218] If a worker can establish that an unfair or bad faith practice has occurred, the director or workers' compensation judge may award the worker a benefit penalty of up to

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210. *See, e.g.*, Martinez v. Darby Constr. Co., 109 N.M. 146, 782 P.2d 904 (1989) (notice requirement is tolled until worker has actual knowledge that injury is compensable); Montell v. Orndorff, 67 N.M. 156, 353 P.2d 680 (1960) (notice requirement tolled until reasonably diligent worker knows or should know that he has suffered a work-related injury); *see also* Dunn, *supra* note 4, at 51-52.

211. N.M. STAT. ANN. § 52-1-29(B).

212. *Id.*

213. Russell v. Protective Ins. Co., 107 N.M. 9, 752 P.2d 693 (1988).

214. N.M. STAT. ANN. § 52-1-6.

215. *Id.* § 52-1-28.1(A).

216. *Id.* § 52-1-28.1(E).

217. *Id.* § 52-1-28.1(A).

218. *Id.* § 52-1-28.1(B).

twenty-five percent of the initial benefit award.[219] The relevant section provides that, if a worker can prove bad faith practices or unfair claims-processing, the worker "[s]hall 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."[220] Apparently, this provision's operation is non-discretionary; if a claimant demonstrates bad faith or unfair practices, she is automatically awarded a benefit penalty.

The 1990 Act, in addition to a benefit penalty, fines employers, insurers and claim-processing representatives who have demonstrated a history or pattern of bad faith or unfair claims practices.[221] The director or a workers' compensation judge may impose a civil penalty of up to one thousand dollars for each violation of the new bad faith, unfair claims-processing provision.[222] Any civil penalty collected under this section shall be deposited in the Workers' Compensation Administration fund.[223]

2. Retaliatory Discharge: Section 52-1-28.2

Prior to the enactment of the 1990 Act, a New Mexican worker had no remedy under the Act if her employer discharged or threatened to discharge her for filing a workers' compensation claim.[224] The 1990 Act, however, explicitly forbids an employer to discharge or threaten to discharge an employee solely because the employee seeks benefits under the Act.[225]

The provision, establishing a cause of action for retaliatory discharge, imposes civil penalties of up to five thousand dollars on employers who violate the statute.[226] This section also requires the employer to offer to rehire a worker who was discharged solely because she filed a claim under the Act.[227]

3. Falsified Employment Application Defense: Section 52-1-28.3

The Workers' Compensation Act of 1990 codifies a common law affirmative defense to a compensation claim, but limits employers' recourse to the defense.[228] New Mexico courts have recognized the "false employment application" defense as a complete bar to recovery under

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219. *Id.*
220. *Id.*
221. *Id.* § 52-1-28.1(C).
222. *Id.*
223. *Id.*
224. *See* Williams v. Amax Chem. Corp., 104 N.M. 293, 720 P.2d 1234 (1986) (Act provides no cause of action in tort or contract against employer where employer threatened employee with termination because employee sought compensation benefits); Shores v. Charter Servs., Inc., 106 N.M. 569, 746 P.2d 1101 (1987) (Act does not allow a contract claim for wrongful discharge based upon filing of a workers' compensation claim).
225. N.M. STAT. ANN. § 52-1-28.2(A).
226. *Id.* § 52-1-28.2(C).
227. *Id.* § 52-1-28.2.
228. *Id.* § 52-1-28.3.

the Act.[229] Section 52-1-28.3 of the 1990 Act, unlike its common law counterpart, allows an employer to utilize this defense only when she "clearly and conspicuously discloses that the worker shall be entitled to no future compensation benefits if he knowingly or willfully conceals or makes a false representation about the information requested" on a written questionnaire.[230] Additionally, the statutory defense, unlike the common law, distinguishes between "concealed information" and "false representations,"[231] and requires a slightly different showing for each in order for an employer to raise this defense.[232]

Section 52-1-28.3 permits the false employment application defense only when the medical condition that was concealed or falsely misrepresented "substantially contributed to the injury or the disability."[233] This contrasts with the judicially-created defense that required only a "causal connection" between the misrepresented medical condition and the worker's subsequent injury.[234] The heightened statutory requirement abrogates case law which holds that the causal connection was satisfied by proof that a worker's prior or pre-existing condition increased the risk that she would be injured on the job.[235]

K. Rehiring the Injured Worker and the Abolition of Vocational Rehabilitation: Section 52-1-50.1

Since 1969, the legislature has required employers to provide vocational rehabilitation services to workers injured in job-related accidents.[236] The purpose of this requirement was to restore the disabled worker to suitable employment.[237] The statutorily mandated provision of vocational rehabilitation services was thought to serve the general public by allowing a claimant to retrain herself for gainful employment and prevent her dependence on state welfare programs.[238] Despite its longstanding commit-

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229. *See* Martinez v. Driver Mechenbier, Inc., 90 N.M. 282, 562 P.2d 843 (Ct. App. 1977). The common law elements of the "false employment application" defense are: (1) the employee knowingly and willfully misrepresented his physical condition; (2) the employer relied upon the misrepresentation; (3) the employer's reliance on the misrepresentation was a substantial factor in hiring the employee; and (4) there is a causal connection between the misrepresentation and the worker's subsequent injury. *See, e.g.*, Tallman v. Arkansas Best Freight, 108 N.M. 124, 132, 767 P.2d 363, 371 (Ct. App. 1988).

230. N.M. STAT. ANN. § 52-1-28.3(B).

231. *Id.* § 52-1-28.3(A).

232. In the case of "concealed information," an employee must not be "aware of the concealed information that, if known, would have been a substantial factor in the initial or continued employment of the worker." *Id.* § 52-1-28.3(A)(2)(a). In order for the employer to utilize the "false representations" defense, she must have relied "upon the false representation, and this reliance was a substantial factor in the initial or continued employment of the worker." *Id.* § 52-1-28.3(A)(2)(b).

233. *Id.* § 52-1-28.3(A)(3).

234. *See, e.g., Tallman*, 108 N.M. at 132, 767 P.2d at 371.

235. *See, e.g.*, Jaynes v. Wal-Mart Store No. 824, 107 N.M. 648, 763 P.2d 82 (Ct. App. 1988). For a more complete discussion of the 1990 Act's modifications of the false employment application defense see Dunn, *supra* note 4, at 56-59.

236. N.M. STAT. ANN. § 52-1-50(A) (1978).

237. *Id.*

238. *See* Lane v. Levi Strauss & Co., 92 N.M. 504, 506-07, 590 P.2d 652, 654-55 (Ct. App. 1979); *see also* Jaramillo v. Consolidated Freightways, 109 N.M. 712, 716, 790 P.2d 509, 513 (Ct. App. 1990).

ment to vocational rehabilitation, the legislature, under the 1990 Act, abolished employers' obligation to provide vocational rehabilitation services to injured workers.[239]

Instead of vocational rehabilitation, the revised Act imposes a duty on employers under certain circumstances to rehire a worker who has stopped work due to a compensable, work-related injury.[240] If an injured worker applies for her pre-injury job or modified job similar to her pre-injury work, her employer is obligated to rehire the injured worker if two conditions are satisfied: (1) the worker's treating health care provider certifies that the worker is fit to work; and (2) the "employer has the pre-injury, or modified work available."[241] If a rehired worker received compensation benefits prior to the date of maximum medical improvement, those benefits shall be reduced according to the formula utilized to reduce temporary total disability benefits.[242]

L. Lump Sum Settlement: Section 52-5-12

New Mexico's Workers' Compensation law has traditionally not favored lump sum settlements. The Old Act provided that "[c]ompensation shall be paid by the employer to the workman in installments."[243] The Act permitted payment of compensation benefits in a lump sum only after a judge determined that a lump sum payment was in the best interests of the injured worker.[244] Section 52-5-12(A) of the 1987 Act, substantially similar to the 1986 Act's lump sum provision,[245] permitted an employee to receive a lump sum benefit payment upon agreement of all parties and only in special circumstances, "as when it can be demonstrated that lump sum payments are clearly in the best interests of the parties."[246]

The 1990 Act retains its predecessor's declaration that the Act's "stated policy" is that it is in the best interests of the injured worker to receive benefits on a periodic basis.[247] The revised Act, however, goes one step further and prohibits lump sum payments of compensation and medical benefits except in two narrowly drafted exceptions.[248] The two exceptions set out in section 52-5-12 of the 1990 Act define the exceptional circumstances that lawmakers believed justify lump sum settlements.[249]

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239. N.M. STAT. ANN. § 52-1-50.
240. *Id.* § 52-1-50.1.
241. *Id.* § 52-1-50.1(A). The statute defines "rehire" as including "putting the injured worker back to active work, regardless of whether he was carried on the employer's payroll during the period of his ability to work." *Id.* § 52-1-50.1(C).
242. *Id.* § 52-1-50.1(B).
243. *Id.* § 30-1-30(A) (1978).
244. *Id.* § 52-1-30(B).
245. N.M. STAT. ANN. § 52-5-12 (Cum. Supp. 1986).
246. N.M. STAT. ANN. § 52-5-12(A) (effective until Jan. 1, 1991).
247. N.M. STAT. ANN. § 52-5-12(A) (effective Jan. 1, 1991).
248. *Id.* § 52-5-12(B).
249. Despite the provision in the 1990 Act that lump sum payments are not permitted "[e]xcept as provided in subsections B, C and D," the 1990 Act allows two, not three, exceptions to its general prohibition against lump sum awards. *Id.* § 52-5-12(A). Subsection D does not contain a lump sum exception; rather, it sets out the penalty imposed on employers who enter into lump-sum payment agreements without the approval of a workers' compensation judge. *Id.* § 52-5-12 (D).

Section 52-5-12(B) allows a worker, with the approval of a workers' compensation judge, to elect to receive a lump sum payment award if he has returned to work for at least six months and is earning at least eighty percent of his pre-injury wage.[250] If a worker elects a lump sum award under this provision, his award is limited to income attributable to his initial impairment rating;[251] he is not entitled to an award based on an enhanced impairment rating modified by his age, education, and loss of physical capacity.[252]

The 1990 Act also permits an injured worker to elect to receive lump sum payments, after the date of maximum medical improvement and with the approval of a workers' compensation judge, for the sole purpose of relieving debts which have accumulated during the worker's period of disability.[253] Cognizant of the potentially burdensome administrative costs of issuing weekly benefit checks for small amounts of money,[254] the revised Act also encourages the consolidation of weekly payments of less than twenty-five dollars into quarterly installments.[255]

The restrictions on lump sum awards contained in the 1990 Act are consistent with the common law's narrow construction of what circumstances warrant a lump sum award.[256]

III. RECENT WORKERS' COMPENSATION CASE LAW

No appellate court has yet been asked to interpret any provision of the Workers' Compensation Act of 1990. Cases decided under prior Acts, however, resolved several important issues that remain relevant under the 1990 Act. These issues include: appellate standard of review of workers' compensation adjudications, the premises exception to the coming and going rule, the definition of "three of more employees," pre-existing injuries, out-of-state accidents, contracts for hire, and attorneys' fees.

A. Appellate Standard of Review

The appellate standard of review for administrative agency determinations changed in New Mexico in 1984. The supreme court modified

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250. *Id.* § 52-5-12(B).
251. *Id.*
252. *Id.*
253. *Id.* § 52-5-12(C).
254. *See* Dunn, *supra* note 4, at 50.
255. N.M. STAT. ANN. § 52-5-12(E).
256. Courts have insisted that only exceptional circumstances justify lump sum awards. *See, e.g.*, Zamora v. CDK Contracting Co., 106 N.M. 309, 742 P.2d 521 (Ct. App. 1987) (lump sum awards are appropriated only when a certain factual situation has emerged which, by its quantum and quality of evidence, has convincingly demonstrated the existence of exceptional circumstances). Lump sum awards are also appropriate when a lump sum payment would be in the best interests of the worker, the parties and the general public. *See, e.g.*, Arther v. Western Co. of N. Am., 88 N.M. 157, 538 P.2d 799 (Ct. App.), *cert denied*, 88 N.M. 318, 540 P.2d 248 (1975) (in applying the Act's lump sum provision, the purpose of workers' compensation must be kept in mind: that compensation be made in such a way as to secure the injured worker against need and to avoid his becoming a public charge).

the substantial evidence standard[257] to include a review of the whole record for findings of fact.[258] The appellate courts have struggled to understand the new standard of review and to apply it consistently to the myriad fact patterns that arise in agency cases.[259] This difficulty continued when the courts attempted to apply the standard to workers' compensation cases.[260] Despite confusion concerning the nuances of the standard, the cases suggest an evolving harmony in results. The supreme court clarified the application of the new standard to workers' compensation cases in *Evans v. Valley Diesel*.[261] Thus, appellate review of workers' compensation cases has shown improvement in congruent applications of the new standard during the survey period.

The court of appeals first applied the whole record standard of review to an action arising under workers' compensation legislation in *Tallman v. Arkansas Best Freight*.[262] The court set out the test as whether, on the whole record, "there is evidence for a reasonable mind to accept as adequate to support the conclusion reached."[263] In applying the test, the court required that the reviewer consider all evidence and discard any discredited evidence.[264] It further required the court to view the evidence in the light most favorable to the agency decision, but not with total disregard to contravening evidence.[265]

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257. State appellate courts apply the substantial evidence standard of review to district court decisions. Sanchez v. Homestake Mining Co., 102 N.M. 473, 475-76, 697 P.2d 156, 158-59 (Ct. App. 1985). It requires the appellate court to view only the evidence in the record supporting the district court judgment. *Id.* The appellate court will uphold the judgment if the limited review of the record shows substantial evidence to support the judgment. *Id.*

258. Duke City Lumber Co. v. New Mexico Envtl. Bd., 101 N.M. 291, 681 P.2d 717 (1984).

259. *See* Browde, *Substantial Evidence Reconsidered: The Post-Duke City Difficulties and Some Suggestions For Their Resolution*, 18 N.M.L. REV. 525 (1988).

260. *See infra* notes 16-41 and accompanying text.

261. 111 N.M. 556, 807 P.2d 740 (1991).

262. 108 N.M. 124, 767 P.2d 363 (Ct. App.), *cert denied*, 109 N.M. 33, 781 P.2d 305 (1988). The court reasoned that *Duke City Lumber Co. v. New Mexico Environmental Board*, 101 N.M. 291, 681 P.2d 717 (1984), modified the substantial evidence standard for administrative agency findings of fact. *Id.* at 127, 767 P.2d at 366. The new standard allowed the appellate court to review the whole record, not merely evidence supporting the agency finding. *Tallman*, 108 N.M. at 128, 767 P.2d at 367. The court reasoned that the Workers' Compensation Division is an administrative agency, and that the court of appeals is bound by supreme court precedent. *Id.* at 127, 767 P.2d at 366. The court found agency determinations must be closely scrutinized because agencies function in dual roles, often acting as the complainant, prosecutor and fact finder in one cause of action. *Id.* at 128, 767 P.2d at 367. Thus, the court of appeals held that the whole record standard of review applies to workers' compensation cases. *Id.* at 126, 767 P.2d at 365.

The court's main objective, however, was to set forth guidelines on how to apply the new standard. The court emphatically stated that the whole record standard of review does not invite nor allow the appellate court to weigh the credibility of live witness testimony. *Id.* at 127, 767 P.2d at 366. Not only would that be impossible, the court reasoned, but neither standard would allow reweighing evidence or a reassignment of the preponderance of the evidence. *Id.* The new standard allows the reviewing court, however, to search the entire record to determine whether there is substantial evidence to support the result. *Id.* at 129, 767 P.2d at 368. In addition, the standard requires the presence of some admissible evidence to sustain the holding. *Id.*

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

264. *Id.*

265. *Id.* at 129-30, 767 P.2d at 368-69.

The court emphasized that the whole record standard of review is not *de novo* review.[266] The agency decision enjoys a strong presumption, and the ability of the court to make independent findings of fact is limited to situations where the agency's findings are contrary to the stipulated record.[267] Noting the agency's essential role as fact finding, the court underscored the need for deference to agency knowledge and expertise.[268]

Finally, the court explained that no remand for fact finding is necessary where the claimant failed to meet his burden of proof of eligibility for benefits.[269] The court indicated that it would not hesitate to overrule an agency grant of benefits if the whole record does not show substantial evidence to support the determination.[270] In such a case, the court would merely remand for entry of judgment, regardless of the disposition below.[271]

The court of appeals muddied the waters in workers' compensation cases, however, when it claimed to apply a different standard in *Sosa v. Empire Roofing Co.*[272] The *Sosa* court focused on the claimant's failure to meet his burden of proof when it affirmed the workers' compensation judge's ("WCJ") denial of additional attorneys' fees.[273] While the court easily could have based its holding on the standard set forth in *Tallman*, it instead defined a different standard of review for cases involving failed burdens of proof.[274] This unnecessary departure from *Tallman* unfortunately increases confusion in an area of law that was just becoming clear.

The underlying case in *Sosa* involved a worker who was injured loading asphalt blocks his first and only day on the job.[275] He was dismissed later in the day when the employer discovered that he could not operate a manual transmission.[276] Sosa filed for workers' compensation, claiming temporary total benefits and seeking permanent total disability.[277] Empire Roofing defended, claiming that Sosa was not an employee because he never filled out necessary employment papers and that no one saw Sosa injure himself.[278] The WCJ found Sosa's on-the-job accidental injury left him five percent permanently partially disabled.[279] The parties settled for a $5,500 lump sum benefit.[280]

Sosa then filed a motion for attorneys' fees which exceeded the statutory maximum of $12,500.[281] His attorneys claimed that they spent 210 hours

266. *Id.*
267. *Id.* at 130, 767 P.2d at 369.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. 110 N.M. 614, 798 P.2d 215 (Ct. App. 1990).
273. *Id.* at 616, 798 P.2d at 217.
274. *Id.*
275. *Id.* at 615, 798 P.2d at 216.
276. *Id.* The opinion is unclear whether the inability was skill-related or injury-related.
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*; *see* N.M. STAT ANN. § 52-1-54(G) (Repl. Pamp. 1991) (effective until Jan. 1991).

on the case because Empire Roofing contested all the facts and legal theories of the case.[282] In addition, they claimed Sosa's inability to speak or read English greatly increased the required hours.[283] Using the *Fryar v. Johnsen* factors for assessing excessive fees,[284] the WCJ found Empire Roofing did not act in bad faith and that only fifty to eighty hours were reasonably necessary.[285] The WCJ awarded $4,000 in fees, and Sosa appealed.[286] The court of appeals affirmed the award, holding that the WCJ did not abuse his discretion when he relied on his own expertise in reaching his conclusions.[287]

The issue on appeal in *Sosa* was whether the WCJ's findings of fact concerning the attorneys' fees were supported by substantial evidence.[288] In assessing this issue, the court declined to apply the *Tallman* whole record-substantial evidence standard of review.[289] It used a "somewhat different"[290] analysis, although it did not explain the need for change.[291] The court defined a narrow standard, applicable only to cases where the agency determines that the claimant failed to meet his burden of proof.[292] Under the new standard, the court will affirm the determination if the WCJ had a rational basis to disbelieve the claimant's evidence.[293] Thus, the standard seems to apply only to cases where the WCJ denied benefits to a claimant he disbelieved.

After defining this new standard, the *Sosa* court examined the evidence advanced by the parties. It found that the WCJ deliberated carefully before rejecting Sosa's claim and that Empire Roofing had presented a meritorious defense inconsistent with bad faith.[294] The court also rejected Sosa's claim that Empire Roofing exhibited bad faith by asking the court to consider a previous supreme court formal reprimand to Sosa's attorney in its assessment of attorneys' fees under *Fryar v. Johnsen*.[295] Finally, the court refused to find abuse of discretion when the WCJ failed to consider the attorney's waiver of Sosa's portion of the awarded fees.[296]

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282. *Sosa*, 110 N.M. at 615-16, 798 P.2d at 216-17.
283. *Id.*
284. 93 N.M. 485, 601 P.2d 718 (1979). The *Fryar* court added several factors to the statutory analysis of excess attorney's fees, including access to adequate representation, attorney effort, characteristics of the controversy and the experience of the attorney. *Id.* at 488, 601 P.2d at 721.
285. *Sosa*, 110 N.M. at 616, 798 P.2d at 217.
286. *Id.*
287. *Id.* at 617, 798 P.2d at 218.
288. *Id.* at 616, 798 P.2d at 217.
289. *Id.*
290. *Id.*
291. The court cites two cases for using a different rule than *Tallman*, but does not explain how these cases control. *Id.* (citing Luchetti v. Bandler, 108 N.M. 682, 684-85, 777 P.2d 1326, 1328-29 (Ct. App. 1989) (trial court not required to accept defendant's proof in its entirety and may doubt a witness's conclusions); Nunez v. Smith's Management Corp., 108 N.M. 186, 769 P.2d 99 (Ct. App. 1988) (uncontradicted medical evidence rule requires the fact finder to accept only the opinion of the expert, not the facts upon which the conclusion is based)).
292. *Id.*
293. *Id.*
294. *Id.* at 617, 798 P.2d at 218.
295. *Id.*
296. *Id.*

The court stated that awarded fees belong to the claimant, not the attorney.[297]

In carefully examining the record and finding that Sosa failed his burden of proof, the court reached the same result as would be obtained under the *Tallman* standard. Under *Tallman*, the court would examine the whole record in the light most favorable to the WCJ determination. In *Sosa*, the court examined the whole record in a manner favorable to the WCJ's denial of the bad faith claim. The new standard announced in *Sosa*, therefore, is an unnecessary variation on *Tallman*.

In *Evans v. Valley Diesel*[298] the court clarified the standard of review and the appellate court role in agency adjudication. Valley Diesel employed Evans as an automotive mechanic and allowed Evans to keep his personal "mudbogger," a type of recreational vehicle, at the work site.[299] Valley Diesel paid Evans by the hour when work was available, and allowed Evans to work on the mudbogger during slow times.[300] Evans was not paid for time spent working on the mudbogger.[301]

Evans was responsible for locking up the premises on September 18, 1987.[302] As he started the mudbogger in order to move it inside the building, the battery exploded.[303] Evans sustained injuries to his eyes.[304] He successfully applied for benefits, and Valley Diesel appealed.[305] The court of appeals reversed the workers' compensation judge's award.[306] The supreme court granted Evans' petition for writ of certiorari and reinstated the WCJ's benefits award.[307]

The supreme court in *Evans* found that the court of appeals exceeded its authority by replacing its view of the facts for the workers' compensation judge's view.[308] The court of appeals placed great significance on the employer's disinterest in having the mudbogger moved inside before the shop was locked.[309] It rejected the finding that Evans started the mudbogger so that he could move his vehicle and thus secure the company property.[310] The court of appeals refused to see this act as done in the course of his employment.[311]

Appellate Judge Chavez dissented, adopting the workers' compensation judge's view of the facts. The WCJ found that Evans regularly moved the mudbogger before locking up, thus his employer had sufficient notice

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297. *Id.*
298. 111 N.M. 556, 807 P.2d 740 (1991).
299. *Id.* at 557, 807 P.2d at 741.
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.* at 559, 807 P.2d at 743.
309. *Id.* at 557-58, 807 P.2d at 741-42.
310. *Id.*
311. *Id.*

that "locking up" included moving the vehicle.[312] Because Evans consistently moved his vehicle in fulfilling his duties, Judge Chavez reasoned that substantial evidence existed which supported the WCJ's finding that the accident occurred in the course of employment.[313]

The supreme court emphasized that while the entire record is reviewed by the appellate court, it is done in the light most favorable to the agency's decision.[314] Citing *Tallman*, the court limited the appellate court's latitude to make independent findings of fact to exceptional circumstances, such as an agency finding clearly contrary to the evidence in the record.[315] The supreme court found that the *Evans* record showed substantial evidence to support the WCJ's finding.[316] Further, no special circumstances existed to support the court of appeals' independent fact finding.[317] Therefore, the court of appeals' lack of deference to the WCJ's findings in its reconsideration of the evidence constituted reversible error.[318]

After clearly setting out the parameters of the proper standard of review, the *Evans* court adopted Judge Chavez's two pronged test.[319] First, while agreeing that Evans' work on the mudbogger was personal, the court found the WCJ's finding of linkage between moving the vehicle and locking the premises a logical construction of the evidence.[320] The court also agreed that Evans was where he was "reasonably expected to be and . . . engaged in a necessary incident of employment."[321] Second, the court concurred with the WCJ's finding that the injury arose out of Evans' employment because Valley Diesel received sufficient intangible value from Evans' on-site work on the vehicle.[322]

The *Evans* court found substantial evidence on review of the entire record to support the WCJ's determination.[323] In doing so, the supreme court clarified that appellate courts must defer to the agency fact finding under the whole record standard of review in workers' compensation cases unless those findings conflict with the record.

B. The Premises Exception to the Coming and Going Rule

The New Mexico Supreme Court first recognized the premises exception to the coming and going rule for claims under the Workers' Compensation

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312. *Id.* at 558, 807 P.2d at 742 (citing Valley Diesel and Mountain States Mutual Casualty Co. v. Evans, No. 11,558 (Ct. App. Dec. 18, 1990) at 1-2, (Chavez, J., dissenting)).

313. *Id.* Judge Chavez further reasoned that the employer sufficiently benefitted from Evans' work on the mudbogger so that the dual purpose of Evans' work, *i.e.*, personal and professional, justified the WCJ finding that the accident occurred in the course of employment. *Id.* (citing Smith v. City of Albuquerque, 105 N.M. 125, 729 P.2d 1379 (Ct. App. 1986) (dual purpose)).

314. *Id.* at 558-59, 807 P.2d at 742-43 (citing National Council Compensation Insurance v. New Mexico State Corp. Comm'n, 107 N.M. 278, 282, 756 P.2d 558, 562 (1988); *Tallman*, 108 N.M. at 129, 767 P.2d at 368).

315. *Id.* at 559, 807 P.2d at 743 (citing *Tallman*, 108 N.M. at 129-30, 767 P.2d at 368-69).

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* (quoting Dupper v. Liberty Mut. Ins. Co., 105 N.M. 503, 506, 734 P.2d 743, 746 (1987)).

322. *Id.* (citing Kloer v. Municipality of Las Vegas, 106 N.M. 594, 596, 746 P.2d 1126, 1128 (Ct. App. 1987)).

323. *Id.* The court reinstated the WCJ's disposition.

Act in *Dupper v. Liberty Mutual Insurance Co.*[324] This section will discuss two New Mexico cases that have followed and further defined the premises exception.[325]

New Mexico's coming and going rule is codified at section 52-1-19. Section 52-1-19 provides that "injury by accident arising out of and in the course of employment . . . 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."[326] This language provides compensation for employees injured "as a result of their employment and while at work in any place where their employer's business requires their presence."[327]

Prior to *Dupper*, when granting compensation under section 52-1-19, New Mexico courts held that if a worker was injured going to or from work, the injury was compensable under the Act only if the employer's negligence was the proximate cause of the worker's injury.[328] Absent employer negligence, a "coming-and-going" accident was not considered to be within the course of employment.[329] In *Dupper*, the New Mexico Supreme Court reassessed section 52-1-19 in order to bring New Mexico in line with every other state in recognizing a premises exception to the coming and going rule.[330]

Dupper involved an employee who injured herself by tripping over a sprinkler head while on her way to the employee parking lot after work.[331] The worker's compensation judge adopted the premises exception to the coming and going rule and awarded the worker benefits.[332] Following New Mexico precedent which denied the existence of such an exception, the court of appeals reversed this decision.[333]

The New Mexico Supreme Court upheld the award and formally adopted the premises exception to the going and coming rule, overruling contrary precedent.[334] Simply stated, the premises exception provides that an injury

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324. 105 N.M. 503, 734 P.2d 743 (1987).

325. Constantineau v. First National Bank, 112 N.M. 38, 810 P.2d 1258 (Ct. App.), *cert. denied* 112 N.M. 21, 810 P.2d 1241 (1991); Lovato v. Maxim's Beauty Salon, Inc., 109 N.M. 138, 782 P.2d 391 (Ct. App. 1989).

326. N.M. STAT. ANN. § 52-1-19 (Repl. Pamp. 1991). This provision has been part of each of New Mexico's Workers' Compensation Acts, *see, e.g.*, N.M. STAT. ANN. § 52-1-19 (1978), and the 1990 Act has left this section undisturbed. *See* N.M. STAT. ANN. § 52-1-19 (Repl. Pamp. 1991).

327. N.M. STAT. ANN. § 52-1-19 (Repl. Pamp. 1991).

328. *Dupper*, 105 N.M. at 504, 734 P.2d at 744 (citing Cuellar v. American Employer's Ins. Co., 36 N.M. 141, 9 P.2d 251 (1935)); *see also* 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 15.44 (1990).

329. *Dupper*, 105 N.M. at 504, 734 P.2d at 744.

330. *Id.*

331. *Id.*

332. *Id.* (citing 1 A. LARSON, *supra* note 328, § 15.00 (1985)).

333. *Id.* (citing Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973)); Gonzales v. New Mexico State Highway Dep't., 97 N.M. 98, 637 P.2d 48 (Ct. App.), *cert. quashed*, 97 N.M. 621, 642 P.2d 607 (1981); Hayes v. Ampex Corp., 85 N.M. 444, 512 P.2d 1280 (Ct. App. 1973)).

334. *Dupper*, 105 N.M. at 504, 734 P.2d at 744. The court stated it was "time for New Mexico to join every other state in the country in its view of compensability for injuries suffered on an employer's premises." *Id.*

occurring on the employer's premises is one occurring within the course of employment even if it occurred when the worker was going to or from work.[335]

The *Dupper* court began its analysis by observing that when New Mexico first enacted workers' compensation law, it limited employer's liability under the coming and going rule to cases of negligence by the employer.[336] In *Cuellar v. American Employer's Insurance Co.*,[337] the supreme court's first opportunity to interpret the Act's coming and going rule, the court held that, absent negligence by the employer, a worker injured going to or from work was not injured in the course of his employment.[338] The *Dupper* court noted that subsequent decisions had interpreted *Cuellar* as rejecting the premises exception to the coming and going rule.[339]

Cuellar notwithstanding, the court in *Dupper* argued that New Mexico precedent supported adopting the premises exception. Fifty years before *Dupper*, the court held that an accident arises in the scope and course of employment when it occurs "at a place where the employee reasonably may be in the performance of his duties . . . or engaged in doing something incidental thereto."[340] Moreover, New Mexico courts had carved out a number of narrow exceptions to the coming and going rule. These included the "personal comfort"[341] and "special mission"[342] exceptions. The supreme court in *Dupper* remarked that these prior decisions rejected a narrow reading of the coming and going rule in order to allow injured workers to recover.[343]

In recognizing the premises exception, the *Dupper* court held that a worker "injured while on the employer's premises coming to or going from the actual workplace, is in a place where" he is "reasonably expected to be," and is "engaged in a necessary incident of employment."[344] The court emphasized that the meaning of "course of employment" included not only the time for which an employee is actually paid, but also a

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335. *Dupper*, 105 N.M. at 506, 734 P.2d at 737. The court in *Dupper* adopted the Arizona Supreme Court's formulation of the premises exception:

> [W]hen 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 Workmen's Compensation Act, 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.

Id. (quoting Pauley v. Industrial Comm'n, 109 Ariz. 298, 302, 508 P.2d 1160, 1164 (1973)).

336. *Id.* (citing 1917 N.M. Laws, ch. 83, § 12(L)).

337. 36 N.M. 141, 9 P.2d 685 (1932).

338. *Id.* at 145, 9 P.2d at 687.

339. *Dupper*, 105 N.M. at 504, 734 P.2d at 735.

340. McKinney v. Dorlac, 48 N.M. 149, 153, 146 P.2d 867, 870 (1944).

341. *See, e.g.*, Whitehurst v. Rainbo Baking Co., 70 N.M. 468, 734 P.2d 849 (1962) (worker injured while crossing the highway during coffee break was entitled to compensation).

342. *See, e.g.*, Edens v. New Mexico Health & Social Servs. Dep't, 89 N.M. 60, 547 P.2d 65 (1976) (employee injured on special assignment was entitled to compensation).

343. *Dupper*, 105 N.M. at 506, 734 P.2d at 736.

344. *Id.* at 506, 734 P.2d at 746 (citing Federal Insurance Co. v. Coram, 95 Ga. App. 622, 98 S.E.2d 214 (1957)).

reasonable time period "during which employee is necessarily on the employer's premises while passing to or from the place where the work is actually done."[345]

Furthermore, *Dupper* defined "premises" to include parking lots, whether separate or on the premises, if intended for employee or customer use.[346] Finally, *Dupper* clarified that under its construction of section 52-1-19, an employee need not prove employer negligence if the injury occurs while going to or returning from work and the injury falls within the premises exception or any other recognized exception.[347]

In *Lovato v. Maxim's Beauty Salon, Inc.*,[348] the New Mexico Court of Appeals extended *Dupper* to include injuries occurring on the "necessary route" to work. Lovato, an employee of Maxim's Beauty Salon ("Maxim's"), injured herself while on her way to work.[349] Maxim's leases space on the lower level of Montgomery Ward's, located in a shopping mall.[350] Maxim's had told its employees to park in the lot on the eastern side of Montgomery Ward's and to walk through the store entrance.[351] Lovato slipped and fell on a heavily waxed floor while inside Montgomery Ward's, before she had reached the salon.[352]

Lovato brought a claim for benefits which the workers' compensation judge denied.[353] The hearing officer found that Lovato's claim was barred because she did not sustain an injury while on the employer's premises as defined in *Dupper*.[354] Lovato appealed claiming this injury was within an exception to the going and coming rule.[355]

Maxim's argued that Lovato's claim was barred because she was between two parts of the employer's premises.[356] The New Mexico Court of Appeals held that Lovato's claim was not barred because the trend in most states

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345. *Id.*

346. *Id.* (citing 1 A. LARSON, *supra* note 328, § 15.42(a)).

347. *Id.* at 506-07, 734 P.2d at 736-37. Thus, *Dupper* overruled all cases that held otherwise. *Id.* at 507, 734 P.2d at 737.

348. 109 N.M. 138, 782 P.2d 391 (Ct. App. 1989).

349. *Id* at 139, 782 P.2d at 392.

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id* at 139, 140, 782 P.2d at 392, 393.

354. *Id.* at 140, 782 P.2d at 393.

355. *Id.*

356. *Id.* A factual controversy existed as to whether Lovato walked straight from the designated parking lot into the store. Maxim's claims that Lovato went from the designated parking area through the mall entrance - not the entrance through the store. *Id.* at 139, 782 P.2d at 392. After entering the mall, Lovato allegedly did not go straight to work but stopped off for coffee first. *Id.* The court stated, however, that the discrepancy is irrelevant because the worker fell while in the store on her way to the salon. *Id.* The injury occurred in a place she would have been had she entered the store from the east parking lot as requested by Maxim's. The relevant issue involved the location of the fall and whether it was an exception to the premises rule. *Id.*

Maxim's conceded that had the fall occurred in the parking lot, Lovato would be entitled to benefits because of the premises exception stated in *Dupper*. *Id.* at 140, 782 P.2d at 393. Maxim's argument focused on whether the area between the store and the parking lot constituted a "premises" recognized by the premises exception to the coming and going rule. *Id.*

was to recognize areas on the "necessary route" to work as "in the course of employment."[357]

The court stated that parking lots are generally accepted as part of an employer's premises.[358] *Dupper* stated that premises includes "parking lots intended for employees or customers, whether 'within the main company premises or separated from it'."[359] Lovato was traveling between two areas considered to be part of an employer's premises - the parking lot and the salon.[360] Because she was injured in an area she was reasonably expected to travel while on her way to work, her claim falls within an exception to the premises rule.[361]

The *Lovato* court extended the *Dupper* definition of a "premise" to include the area between the parking lot and the place of employment.[362] Therefore, Lovato did not have to prove negligence in order to recover.[363]

In *Constantineau v. First National Bank*,[364] the New Mexico Supreme Court denied compensation in a situation similar to *Lovato* and *Dupper*. Ms. Constantineau was on her way to work at First National Bank located on the fourth floor of the First Plaza Building in downtown Albuquerque.[365] She parked in her usual space in the Civic Center parking facility and then walked to the First Plaza Building through an underground tunnel.[366] While walking out of the tunnel and into the Galeria, Ms. Constantineau "tripped over a protruding portion of the wood floor" and injured her shoulder.[367]

First National Bank had contracted with the parking facility for sixty-three of the one hundred spaces available for use by bank employees.[368] The Civic Center retained control over all other spaces by leasing them to individuals.[369] First National Bank did not designate one of these parking spaces to Ms. Constantineau; she independently choose her parking option.[370]

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357. *Id.* at 140, 782 P.2d at 393; *see* 1 A. LARSON, *supra* note 328, § 15.14.

358. *Lovato*, 109 N.M. at 140, 782 P.2d at 393. The location of the parking lot in relation to the place of business is usually irrelevant. The parking lots need not be "owned, controlled, or maintained by the employer." 1 A. LARSON, *supra* note 328, § 15.42(a). The parking lot need not be exclusively used by the employer and may include parking lots for various shops in shopping centers. *Id.*; *cf.* Constantineau v. First Nat'l Bank, 112 N.M. 38, 810 P.2d 1258 (Ct. App. 1991) & text accompanying notes 64-80.

359. Dupper v. Liberty Mutual Ins. Co., 105 N.M. 503, 506, 734 P.2d 743, 746 (1987). Other jurisdictions have recognized that shopping mall parking lots are part of employer premises "whose main premises are located within the mall." *Lovato*, 109 N.M. at 140, 782 P.2d at 393.

360. *Lovato*, 109 N.M. at 140, 782 P.2d at 393.

361. *Id.* at 141, 782 P.2d at 394.

362. *Id.*

363. *Id.*

364. 112 N.M. 38, 810 P.2d 1258 (Ct. App. 1991).

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.* at 39, 810 P.2d at 1259.

369. *Id.*

370. *Id.* The employee in this case therefore chose this lot and dealt with the building manager of the Civic Center, not directly with her employer. *Id.*

Ms. Constantineau sought benefits for injury resulting from her fall.[371] The workers' compensation judge found that her injury did not arise out of or during her course of employment and denied her claim.[372] Ms. Constantineau appealed, claiming she was on a necessary route between two areas of the employer's premises.[373] She argued that under *Dupper* and *Lovato*, she was entitled to compensation because the parking lot was part of the employer's premises even if it was not intended for an employee's use.[374] The supreme court upheld the workers' compensation court's decision and denied compensation to Ms. Constantineau.[375]

The issue before the court in *Constantineau* was whether to extend *Dupper* to include "mere employee 'use' of a parking lot."[376] The court of appeals distinguished the facts of *Dupper* and *Lovato* and stated that *Dupper* "requires some showing that the parking lot was intended for the use of employees."[377] The court held that because "the parking lot was not owned by employer, exclusively used by claimant, or assigned by employer to claimant," First National Bank did not intend nor require its employees to use the parking structure exclusively.[378]

Employee use of a public parking structure was not enough to make the lot part of the employer's premises.[379] Therefore, First National Bank was not liable for Ms. Constantineau's injuries.[380]

In both *Dupper*[381] and *Lovato*[382] the claimant was injured while walking between the work-place and a parking lot designated by the employer for employee use. The worker in *Constantineau*, however, was hurt while

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371. *Id.*
372. *Id.* at 38, 810 P.2d at 1258.
373. *Id.* at 39, 810 P.2d at 1259.
374. *Id.*
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.* at 39-40, 810 P.2d at 1259-60.
379. *Id.* at 39, 810 P.2d at 1259. The court noted that Constantineau argued below that the Galeria was part of the employer's premises. Because she did not brief this on appeal, however, the court deemed this issue waived. *Id.* at 40, 810 P.2d at 1260.
380. Judge Chavez dissented in this case because of the potential for unfair results. *Id.* at 40-41, 810 P.2d at 1260-61. He argued that by limiting such claims to include only parking lots that are part of employer's premises and the actual place of employment, but not to include the area between the two, would lead to unfair results. *Id.* at 40, 810 P.2d at 1260. Judge Chavez used a hypothetical to explain the possibility for unjust results. An employee who parks in an unassigned spot parks next to another employee who parks in an assigned spot. *Id.* If both employees injure themselves on the way to work, this court would grant benefits to the employee with the assigned parking spot, but not the one who did not warrant receiving a special parking place. *Id.* Judge Chavez stated that the majority in this case went against the intent of the definition of premises in Dupper v. Liberty Mutual Insurance Co., 105 N.M. 503, 734 P.2d 743 (1987), and in Lovato v. Maxim's Beauty Salon, Inc., 109 N.M. 138, 782 P.2d 391 (Ct. App. 1989). *Constantineau*, 112 N.M. at 40, 810 P.2d at 1260. *Lovato* did not require that the parking lot be owned or controlled by the employer. *Id.* In this case, the employer knew that employees regularly used the parking structure. *Id.* Therefore, the parking structure should be considered part of the employers's premises. *Id.* at 41, 810 P.2d at 1261.
381. 105 N.M. 503, 734 P.2d 743 (1987).
382. 109 N.M. at 141, 782 P.2d at 394.

walking to work from a parking lot that the employer neither owned nor designated.[383]

The test that emerges from these cases for determining if the premises exception applies is based on employer intent to control and foreseeability of employee use.[384] When a worker going to or from work is injured in an area, such as a parking lot, that is either controlled by the employer or designated by the employer for employee use, the court will consider the injury to have occurred during the course of employment.[385] Similarly, if, when travelling to or from work, an employee is injured while moving between the workplace and an employee-controlled area, compensation is appropriate.[386] In both situations, compensation is justified because the employee is where he reasonably may be expected to be engaged in an activity incidental to his employment.[387]

C. *The Definition of "Three or More Employees": Section 52-1-2*

The New Mexico Court of Appeals clarified section 52-1-2 of the 1987 Act which required compensation benefits only for employers who have three or more employees in *Garcia v. Watson Tile Works, Inc.*[388]

Ramon Garcia was injured while employed by Watson Tile Works, a small corporation which makes and sells tile.[389] Watson Tile Works is run by Savern Watson and his wife who serve as directors and officers, although neither receive compensation from the company.[390] At the time of Mr. Garcia's accident, he was the only person working for the company besides Mr. and Mrs. Watson.[391] Prior to the accident, two other workers had been employed for approximately one month; however, their employment ceased a few days before the injury.[392]

Garcia brought a workers' compensation claim which was dismissed.[393] The workers' compensation judge determined that Watson Tile Works did not have the requisite number of employees necessary to be liable under the Workers' Compensation Act.[394] Therefore, the claim was dis-

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383. *Constanineau*, 112 N.M at 39-40, 810 P.2d at 1259-60.

384. *See, e.g.*, Garcia v. Mount Taylor Millwork, Inc., 111 N.M. 17, 801 P.2d 87 (Ct. App. 1990) (worker is protected by the Act when he was injured while crossing railroad tracks on his way to work and employer had contracted with railroad to allow employees to cross tracks, and crossing was the only way to get to and from workplace).

385. *See Dupper*, 105 N.M. at 503, 734 P.2d at 743.

386. *See Lovato*, 109 N.M. at 141, 782 P.2d at 394.

387. *See Dupper*, 105 N.M. at 506, 734 P.2d at 746.

388. 111 N.M. 209, 803 P.2d 1114 (Ct. App. 1990).

389. *Id.* at 210, 803 P.2d at 1115.

390. *Id.* Mrs. Watson works full-time for the state in addition to working with this company. *Id.*

391. *Id.* at 211, 803 P.2d at 1116.

392. *Id.* at 211 n.1, 803 P.2d at 1116 n.1.

393. *Id.* at 209, 803 P.2d at 1114.

394. *Id. But see* N.M. STAT. ANN. § 52-1-6(A) (effective Jan. 1, 1991) (provision of 1990 Act that places under the Act "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*" (emphasis added)).

missed with prejudice due to lack of jurisdiction.[395] Sections 52-1-2 and 5-1-6(A) hold employers responsible for workers' compensation benefits only if they employ three or more workers.[396] The court of appeals held that because the employer never employed more than two workers at any one time, Garcia was not entitled to benefits.[397]

Garcia argued that the Watsons were workers under section 52-1-7 and that the company therefore employed at least three workers.[398] The court dismissed Garcia's argument. The court of appeals found support for the workers' compensation judge's determination that the Watsons were not considered employees under the Act, because they never received compensation.[399] Under section 52-1-7, executive officers owning stock of ten percent or more are considered employees.[400] The court stated, however, that in using the term "employees," the statute meant to exclude corporate owners-officers.[401] The court of appeals determined that the workers' compensation judge appropriately found the Watsons did not qualify as workers, and were not subject to the Act.[402]

The *Garcia* court also discussed the time frame used to determine the number of employees.[403] Because the Act is silent on this matter, the court determined that "fundamental fairness is the guideline."[404] Garcia argued in favor of using the exact date of the injury as the critical point. The court rejected this argument because focusing on the exact date of the injury to count employees would lead to unfair results if the number of employees varies.[405] Therefore, the court adopted a regular employment test which would provide a more stable and predictable standard.[406] This test provides that "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."[407]

Because the workers' compensation judge used the time of injury to determine the number of employees instead of the regular employment

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395. *Garcia*, 111 N.M. at 210, 803 P.2d at 1115.
396. *Id.*; N.M. STAT. ANN. §§ 52-1-2, -6(A) (Repl. Pamp. 1987) (effective until Jan. 1, 1991).
397. *Garcia*, 111 N.M. at 211, 803 P.2d at 1116.
398. *Id.* at 210-11, 803 P.2d at 1115-16; N.M. STAT. ANN. § 52-1-7 (Repl. Pamp. 1987) (effective until Jan. 1, 1991). Employees are automatically covered under the Act unless they elect exemption and follow a certain procedure. *Id.* § 52-1-7. Garcia argued that because the Watsons did not request exemption, they should be counted as employees. *Garcia*, 111 N.M. at 210, 803 P.2d at 1115. Under section 52-1-7(E), however, even employees who elect not to be subject to the Act will be counted when determining the number of employees for other purposes. Even if the Watsons were counted as employees, Watson's argument is not valid because Watson Tile Works never had more than three employees working at any one time as required under sections 52-1-2 and 52-1-6(A). *Garcia*, 111 at 211, 803 P.2d at 1116.
399. *Garcia*, 111 N.M. at 210, 803 P.2d at 1115.
400. *Id.*
401. *Id.* (citing 1C A. LARSON, *supra* note 328, § 52.31).
402. *Id.*
403. *Id.* at 211, 803 P.2d at 1116.
404. *Id.*
405. *Id.*
406. *Id.*
407. *Id.*

test, the court stated that ordinarily it would remand the case.[408] Watson Tile never employed more than two employees at any one time, however, and thus the court found remand unnecessary and affirmed the dismissal of the claim.[409]

D. Pre-Existing Injuries

The court of appeals discussed the effect of pre-existing injuries on a worker's claim for subsequent injuries in *Kennecott Copper Corp. v. Chavez*.[410] Employee Chavez worked for Kennecott from 1970 until 1986.[411] In August 1977, he injured his knee while playing baseball.[412] In September 1977, he became disabled at work.[413] In 1978, he had surgery and took nine months to recuperate, during which time, Chavez was not terminated.[414] When he returned to work, he experienced no difficulties from the injury.[415] In July 1986, however, he reinjured his knee while jumping onto a bulldozer ladder and tore a ligament.[416]

Chavez received workers' compensation benefits from Kennecott.[417] Kennecott then filed a claim seeking reimbursement from the New Mexico Subsequent Injury Fund ("Fund").[418] Kennecott did not file a certificate of pre-existing impairment until after the injury in 1986.[419] Applying the New Mexico Subsequent Injury Act, the judge found the Fund responsible for fifty percent of the benefits paid to the employee.[420] The Fund appealed the decision claiming Kennecott had insufficient knowledge of a preexisting impairment.[421]

The *Kennecott* court stated that one purpose of the Workers' Compensation Act is "to encourage employers to hire or retain workers they know are handicapped."[422] The court, however, held that mere knowledge of injury and treatment is not sufficient evidence to show that the employer was aware of any permanent impairment.[423] Such an inference may be

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408. *Id.*
409. *Id.*
410. 111 N.M. 366, 805 P.2d 633 (Ct. App. 1990).
411. *Id.* at 369, 805 P.2d at 636.
412. *Id.*
413. *Id.*
414. *Id.*
415. *Id.*
416. *Id.*
417. *Id.*
418. *Id.*; *see* N.M. STAT. ANN. §§ 52-2-1 to -13 (Cum. Supp. 1986).
419. *Kennecott*, 111 N.M. at 369, 805 P.2d at 636.
420. *Id.*
421. *Id.* The court's role in reviewing the evidence is not to reweigh the evidence, but to determine if substantial evidence exists from the whole record to support the lower court's decision. *See* Tallman v. ABF (Arkansas Best Freight), 108 N.M. 124, 767 P.2d 363 (Ct. App. 1988). The Fund argued that there was insufficient evidence to prove that the employer knew of the employee's previous impairment. No visible signs of impairment existed, such as a limp or other physical problems. *Kennecott*, 111 N.M. at 370, 805 P.2d at 367. The Fund claims the only knowledge the employer had was that worker: "(1) was injured in 1977; (2) had surgery on his knee; and (3) returned to work after a nine-month recuperation period." *Id.*
422. *Kennecott*, 111 N.M. at 370, 805 P.2d at 367.
423. *Id.*

accurate where the injury is of a serious nature or of a particular type.[424] The court of appeals found this injury fit into the serious nature category. Evidence from medical experts submitted at the workers' compensation hearing showed that this was the type of injury from which recovery was "notoriously hard."[425] Because it required such an extensive recovery period, the employer should have been on notice.[426]

The fact that the worker recovered enough to return to work with no difficulties did not affect the situation.[427] Kennecott knew of the previous injury and was aware that the type of work required might create difficulties.[428] Therefore, the fact that the worker was able to accomplish his job did not mitigate the right to recovery.[429] The New Mexico Supreme Court recognized that even a vague knowledge of an employee's injury was sufficient to allow the filing of a certificate after a subsequent injury.[430] In this case the evidence exceeded this level. The employer knew the injury required surgery and an extensive recovery period.[431]

The Fund argued that no evidence existed to prove that the second injury affected the same cartilage as the first injury.[432] They also argued that no proof existed to show that the damage to the cartilage was worse because of the first injury.[433] Section 52-2-9 of the 1986 Act required that the judge must determine that the disability was "materially and substantially greater" as a result of the combination of impairments than it would have been as a result of the later accident alone.[434] The court explained that the Act does not require that the second injury must affect the same part of the body or create the same impairment. The Act only requires "that the *disability* (not impairment) suffered after the subsequent injury be greater than it would have been if worker had not already been impaired."[435]

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424. *Id.*

425. *Id.* A doctor testified that the type of surgery performed on the employee "results in a 10% permanent impairment to the lower extremity, even without complications." *Id.* Furthermore, removal of cartilage, according to the American Academy of Orthopedic Surgeons standards, results in a five percent permanent impairment. *Id.*

426. *Id.*

427. *Id.* at 371, 805 P.2d at 368.

428. *Id.* The worker's job included climbing on and jumping off of bulldozers and other heavy labor. *Id.*

429. *Id.*

430. *Id.* (citing Fierro v. Stanley's Hardware, 104 N.M. 50, 716 P.2d 241 (1986)).

431. *Kennecott*, 111 N.M. at 372, 805 P.2d at 639.

432. *Id.*

433. *Id.*

434. *Id.* *See* N.M. STAT. ANN. § 52-2-9 (Cum. Supp. 1986). This section states:

> [w]hen an employee of an employer subject to the provisions of the Workmen's Compensation Act . . . who has a permanent physical impairment and who incurs a subsequent disability by accident arising out of and in the course of his employment, which results in a permanent disability, that is materially and substantially greater than that which would have resulted from the subsequent injury alone, then the employer . . . shall pay awards of compensation for the combined condition of disability . . . .

This section remains virtually unchanged under the 1990 Act. *See* N.M. STAT. ANN. § 52-2-9 (Repl. Pamp. 1991).

435. *Kennecott*, 111 N.M. at 372, 805 P.2d at 639.

The court of appeals in *Kennecott* further upheld the WCJ's decision that the worker was totally disabled because he could not return to the same or similar employment.[436] Furthermore, the employer sufficiently proved that employee was not capable of earning a comparable wage under the 1986 Act's definition of total disability contained in section 52-1-24.[437] A judge has flexibility in determining comparable wage considerations and does not have to rely on speculative possibilities.[438]

When apportioning liability between prior and subsequent injuries, the court is not bound by expert testimony, but must determine whether substantial evidence existed to support the lower court's finding.[439] The court of appeals in *Kennecott* found that substantial evidence supported the WCJ's findings.[440] The Fund was therefore responsible for reimbursing the employer for fifty percent of the benefits paid to the worker.[441]

E. Out-of-State Injuries and Contract of Hire

Orcutt v. S & L Paint Contractors, Ltd.[442] addressed the qualifications of a "contract of hire" and issues involving an out-of-state injury. Mr. and Ms. Orcutt were residents of Albuquerque.[443] S & L Paint Contractors ("S & L"), owned by a New Mexico resident, had offered Mr. Orcutt a job in Las Vegas, Nevada over the telephone.[444] This job involved repairing and painting heavy equipment for auction resale.[445] During this phone conversation, employer (Clark) offered a job to Ms. Orcutt through

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436. *Id.* The workers' compensation judge made the following findings that support this: "(1) the same doctor who stated worker could go back to work placed restrictions on worker's ability to crawl, climb, squat, and press on heavy clutches; (2) worker testified there was no light duty available with employer; (3) worker's duties before his subsequent injury included climbing onto large pieces of machinery, using clutches, and performing other strenuous activities; (4) employer's doctor submitted a letter to employer after worker's second injury, stating that worker is a 'poor candidate and a risk for additional injury' should he return to employment with employer." *Id.*

437. *Id.*; *see* N.M. STAT. ANN. § 52-1-24 (Cum. Supp. 1986). This section defines "permanent total disability" as:

> a permanent physical impairment to a workman resulting by reason of an accidental injury arising out of and in the course of employment whereby workman is wholly unable to earn comparable wages or salary.

This section reflects a "loss of occupation," or "wage loss," theory of compensation. *See supra* notes 60-65 and accompanying text. The 1990 Act adopts a pure physical impairment model of permanent total disability. *See* N.M. STAT. ANN. § 52-1-25; *see supra* notes 83-88 and accompanying text.

438. *Kennecott*, 111 N.M. at 373, 805 P.2d at 640 (citing Kincaid v. WEK Drilling Co., 109 N.M. 480, 786 P.2d 1214 (Ct. App. 1990)). The WCJ in *Kennecott* found that evidence stating employee could earn a comparable wage if he were to obtain a master's degree to be too speculative to consider. *Kennecott*, 111 N.M. at 373, 805 P.2d at 640.

439. *Id.* (citing Mares v. Valencia County Sheriff's Dep't, 106 N.M. 744, 749 P.2d 1123 (Ct. App. 1988)).

440. *Orcutt*, 109 N.M. at 373, 805 P.2d at 370.

441. *Id.*

442. 109 N.M. 796, 791 P.2d 71 (Ct. App. 1990).

443. *Id.* at 797, 791 P.2d at 72.

444. *Id.*

445. *Id.* The company's primary place of business is Iowa, although employees travel to many states for different jobs. *Id.*

Mr. Orcutt.[446] Mr. Orcutt never mentioned this to his wife.[447] Ms. Orcutt, not knowing about the job offer, went to Las Vegas with her husband, planning "to walk around" while her husband worked.[448] Once the Orcutts arrived in Las Vegas, Clark offered a job to Ms. Orcutt which she accepted.[449] However, after working only three hours, Ms. Orcutt fell off of a dump truck and injured her back and ankle.[450]

Ms. Orcutt accumulated $4,623.60 in medical expenses and she applied for workers' compensation in Nevada.[451] Nevada concluded that Ms. Orcutt was temporarily working in the state as an out-of-state employee.[452] Since she had failed to obtain coverage in Las Vegas, Nevada denied her benefits.[453] Ms. Orcutt then sought workers' compensation in New Mexico. Her claim was denied and the court of appeals upheld this denial.[454]

Section 52-1-64 of the 1987 Act provides that if an employee working outside of the state is injured and the employee would be entitled to benefits if the injury occurred within the state, then the employee can receive benefits if one of four criteria are met.[455] Only one situation applies to these facts; the employee must show she entered into a contract of hire in New Mexico and that Nevada's compensation laws do not apply.[456] The court of appeals determined that Ms. Orcutt did not enter into such a contract in New Mexico, because she did not travel to Las Vegas with the intent of working for S & L.[457] Ms. Orcutt did not even know of any offer of employment that might have been extended to her through her husband.[458]

The court of appeals interpreted section 52-1-64 literally to include coverage only for employment "'localized' here" or where "the 'contract

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446. *Id.*

447. *Id.*

448. *Id.* at 799, 791 P.2d at 74. S & L did not pay any travel expenses for Ms. Orcutt and her husband paid for half of the motel room. *Id.* The court took this as evidence that Ms. Orcutt never intended to work for S & L. *Id.*

449. *Id.*

450. *Id.* at 797, 791 P.2d at 72.

451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.* at 801, 791 P.2d at 76.

455. N.M. STAT. ANN. § 52-1-64 (Repl. Pamp. 1991) (effective until Jan. 1, 1991). These criteria are:

> 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 workmen's compensation law is not applicable to his employer; or D. he is working under a contract of hire made in this state for employment outside the United States and Canada.

The 1990 Act contains no major changes. *See* N.M. STAT. ANN. § 52-1-64 (Repl. Pamp. 1991) (effective Jan. 1, 1991). In *Orcutt*, neither party claimed that S & L was principally localized in New Mexico. *Orcutt*, 109 N.M. at 798, 791 P.2d at 73.

456. *Orcutt*, 109 N.M. at 798, 791 P.2d at 73.

457. *Id.* at 799, 791 P.2d at 74.

458. *Id.*

of hire' was formed in the state."[459] In analyzing these facts, the court of appeals used the "place-of-contract or place-of-hiring test" to determine whether Ms. Orcutt should receive compensation.[460] This involves a typical contract analysis.[461] Because Ms. Orcutt did not receive an offer for employment until she was in Nevada, the place of her acceptance, the contract is not deemed effective in New Mexico.[462] Although an employee may accept an offer through actions alone, her traveling to Nevada did not constitute acceptance in this case.[463] Ms. Orcutt was not even aware of an offer.[464] The court therefore concluded that this contract was formed in Nevada.[465]

Ms. Orcutt further argued that under the United States Constitution, New Mexico must give full faith and credit to final judgments of other states.[466] The court of appeals dismissed this contention because this was not a pertinent issue before the court.[467] Nevada did not determine that this contract was made in New Mexico; it merely held that Ms. Orcutt was "an out of state employee and temporarily within the state" under Nevada law.[468] The New Mexico courts adopted this determination; however, the court made its own determination that the contract was created in Nevada.[469] To manipulate full faith and credit to create coverage for Ms. Orcutt would force the court to step outside the statutory provisions of workers' compensation in New Mexico.[470]

Ms. Orcutt finally argued that her employer should be "estopped from denying workers' compensation benefits" because he told the hospital and Ms. Orcutt that he would pay for her medical expenses.[471] However, this theory does not apply here. Ms. Orcutt did not rely on any representations about coverage before accepting this job.[472] Therefore, she was

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459. *Id.* at 798, 791 P.2d at 73.

460. *Id.* (citing 4 A. LARSON, *supra* note 328, § 87.31).

461. *Id.* The court relied on the RESTATEMENT OF CONTRACTS (SECOND) § 22 (1981) to explain the requirements of offer and acceptance. *Id.*

462. *Orcutt*, 109 N.M. at 798, 791 P.2d at 74.

463. *Id.* at 799, 791 P.2d at 74.

464. *Id.* Mr. Orcutt never informed Ms. Orcutt about the offer to work for S & L. She apparently went to Nevada only because her husband was planning to work in Las Vegas.

465. *Id.* The court was not swayed by Ms. Orcutt's humanitarian plea for compensation. Although the court recognized the public policy concern to compensate injured workers, Ms. Orcutt's interpretation would lead to "strained, impractical or absurd results." *Id.* Instead of considering the individual nature of this accident, the court followed the specific provisions of the Act, citing fundamental fairness as its guide. *Id.* The court also determined it was "unable to help worker in her predicament" of being stuck in a "crack" between the wordings of Nevada's and New Mexico's workers' compensation laws. *Id.* at 800, 791 P.2d at 75.

466. *Id.*; *see* U.S. CONST. art. IV, § 1.

467. *Orcutt*, 109 N.M. at 799, 791 P.2d at 74.

468. *Id.*

469. *Id.*

470. *Id.*

471. *Id.* at 800, 791 P.2d at 75. The court found no New Mexico authority supporting an estoppel argument. If such authority existed, the employee would have to show that she "*knew* or *heard* of the coverage and that such knowledge *induced* her to accept the employment or to take any action or position *in reliance* upon it which she would not have taken otherwise." *Id.* No evidence existed to support such a claim in this case. *Id.*

472. *Id.*

not induced into working based on any representations by her employer.[473]

F. *Attorneys' Fees*

Appellate courts addressed several aspects of attorneys' fee awards under the Act during the survey period: fees for legal services provided before the termination of a claimant's benefits; the economic loss requirement; and the bad faith requirement.

1. Attorneys' Fees for Legal Counseling Before Termination of Benefits

The supreme court clarified the categories of legal services eligible for compensation in workers' compensation cases in *Sanchez v. Siemens Transmission Systems*.[474] In interpreting section 52-1-54(D)(2) of the 1987 Act,[475] the supreme court reinstated a workers' compensation judge's award of attorneys' fees that included reimbursement for legal counseling performed before the employer terminated the claimant's disability benefits.[476]

Sanchez was awarded temporary total disability benefits after she injured her back lifting automobile batteries at work.[477] In claimant's bid for attorney's fees, Sanchez's attorney testified that he spent 118 hours on her claim, including 11.5 hours before Siemens terminated her benefits.[478] The WCJ awarded fees for 111 hours,[479] thereby awarding compensation for at least 4.5 hours of pre-termination counseling.

The court of appeals reversed the WCJ's award when it calculated the hours charged for services and found that they possibly included counseling before the termination of benefits.[480] It reasoned that the statute[481] required a recovery of workers' compensation benefits before attorneys' fees became compensable.[482] The court therefore reasoned that the claimant received no benefit from the attorney's services if she had not yet suffered a termination of her benefits.[483] The supreme court vigorously disagreed.[484]

The supreme court first examined the plain meaning of the statute and found that it did not "define the permissible scope of compensable legal representation."[485] The court saw the statute as a classifying scheme of compensable cases, rather than a legislative mandate specifying the charge-

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473. *Id.*
474. 112 N.M. 533, 817 P.2d 726 (1991).
475. N.M. STAT. ANN. §§ 52-1-1 to -70 (Repl. Pamp. 1991) (effective Jan. 1, 1991).
476. *Siemens*, 112 N.M. at 535, 817 P.2d at 728.
477. *Id.* at 534, 817 P.2d at 727.
478. *Id.*
479. *Id.*
480. *Id.*
481. N.M. STAT. ANN. § 52-1-54(D) (Repl. Pamp. 1991) (effective Jan. 1, 1991) ("[W]here compensation. . .is refused and the claimant shall thereafter collect compensation. . .then the compensation to be paid to the attorney shall be fixed by the hearing officer.").
482. *Siemens*, 112 N.M. at 534, 817 P.2d at 727.
483. *Id.*
484. *Id.* at 534-35, 817 P.2d at 727-28.
485. *Id.* at 534, 817 P.2d at 727.

able time or billable amount to be reimbursed.[486] Therefore, the court found nothing within the statute to preclude recovery for pre-termination counseling.[487]

Turning to a public policy argument, the court sought to promote the timely education of claimants and employers by encouraging early consultation with attorneys on statutory rights and liabilities.[488] The court wished to avoid any "chilling" effect its interpretation of the statute might have on such education.[489]

Finally, the court noted that the WCJ's award of benefits was not an abuse of discretion.[490] Here there was a clear relationship between the attorney's services and the recovery of benefits, as required by statute.[491] Furthermore, the court has an interest in assuring adequate representation through fair compensation of attorneys' work.[492] Thus, reasonable counseling performed by the attorney prior to termination of benefits is now clearly compensable.[493]

2. Economic Loss Requirement for Award of Attorneys' Fees

In *Pineda*,[494] the claimant cross-appealed the denial of her claim for attorney's fees arising under section 52-1-54(C)(2) on the theory that a delay in payment is an economic loss as a matter of law.[495] The court of appeals disagreed, and affirmed the Workers' Compensation Division ("WCD") required showing of an actual economic loss.[496]

The court allowed that a delay in payment could cause an economic loss, but did not constitute one *per se*.[497] Because Pineda did not show evidence of an economic loss at the WCD hearing, the court did not reach the issue of the scope of a compensable loss.[498] Instead, the court found the issue was not preserved for appeal and stated that any other result would allow recovery of attorneys' fees on a mere showing of bad faith by the employer.[499] Reasoning that the legislature could have required only

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486. *Id.*
487. *Id.*
488. *Id.* at 534-35, 817 P.2d at 727-28. This policy also promotes dispute resolution between the parties before the jurisdiction of the judicial system need be invoked.
489. *Id.* at 535, 817 P.2d at 728.
490. *Id.* (citing Woodson v. Phillip Petroleum Co., 102 N.M. 333, 339, 695 P.2d 483, 489 (1985) (attorneys are entitled to adequate compensation for work necessarily performed in workers' compensation cases); Genuine Parts Co. v. Garcia, 92 N.M. 62, 582 P.2d 1270, 1275 (1978) (standard of review for award of attorney's fees by WCJ is abuse of discretion)).
491. *Id.*
492. *Id.*
493. *Id.* at 536, 817 P.2d at 729. In addition, the court reiterated that attorney's fees are not controlled by the size of the award. *Id.* at 535, 817 P.2d at 728. It strongly rejected a percentage of award calculation of attorney's fees in workers' compensation cases in order to promote vindication of small, but legitimate claims, even if the fees exceed the amount of the award. *Siemens*, 112 N.M. at 535, 536, 817 P.2d at 728, 729 (quoting *Woodson*, 102 N.M. at 338, 695 P.2d at 488).
494. *Id.*
495. *Id.*; N.M. STAT. ANN. § 52-1-54(c)(2) (Cum. Supp. 1986).
496. *Pineda*, 111 N.M. at 541-42, 807 P.2d at 239-40.
497. *Id.* at 541, 807 P.2d at 239.
498. *Id.* at 541-42, 807 P.2d at 239-40.
499. *Id.* at 542, 807 P.2d at 240.

bad faith, the court refused to rewrite the statute by vitiating the economic loss requirement.[500]

3. Bad Faith Requirement for Award of Attorneys' Fees

In *Cass v. Timberman Corp.*,[501] the supreme court reinstated the Workers' Compensation Division's award of attorneys' fees under the 1986 Act based on a finding of bad faith actions by the employer.[502] In doing so, the court affirmed the right of the injured employee to seek second medical opinions when serious and risky medical interventions are proposed.[503]

Robert Cass, a carpenter, suffered a neck injury when he was hit by scaffolding in May, 1987.[504] Little progress resulted from his initial visits to a general physician.[505] After receiving permission from the claims adjuster, Cass sought treatment from a neurosurgeon who recommended a myelogram and possible surgery.[506] Frightened by this recommendation, Cass sought permission from the adjuster for a second opinion.[507] The adjuster said he would consider the request and inform Cass of his decision.[508]

Cass did not hear from the insurance company until he received notice of the termination of his benefits on December 14, 1987.[509] The notice cited Cass's failure to follow the recommendations of the general practitioner and the neurosurgeon.[510] Cass subsequently sought treatment from a third physician, who recommended aggressive physical therapy rather than surgery.[511] The hearing officer in *Cass* found this treatment recommendation reasonable.[512] He further found that the employer's termination of benefits without good cause or a hearing amounted to bad faith.[513]

Section 52-1-54 of the 1986 Act required that the worker pay his own attorneys' fees unless the employer acted in bad faith and the employer's bad faith caused the worker economic loss.[514] A worker was entitled under the 1986 Act to recover "reasonable attorneys' fees" from a bad faith employer.[515]

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500. *Id.*
501. 111 N.M. 184, 803 P.2d 669 (1990), *rev'g* 110 N.M. 158, 793 P.2d 288 (Ct. App. 1990).
502. *Id.* at 187, 803 P.2d at 672.
503. *See id.*
504. *Id.* at 185, 803 P.2d at 670.
505. *Id.*
506. *Id.*
507. *Id.* at 185-86, 803 P.2d at 670-71.
508. *Id.* at 186, 803 P.2d at 671.
509. *Id.*
510. *Id.*
511. *Id.*
512. *Id.*
513. *Id.*
514. N.M. STAT. ANN. § 52-1-54(C)(2) (1986).
515. *Id.* The "bad faith" and "economic loss" requirements of the 1986 Act are nearly identical to the analogous provisions of the attorneys' fee statute under the 1990 Act. *See* N.M. STAT. ANN. § 51-1-54(I) (Repl. Pamp. 1991) (effective Jan. 1, 1991). The 1990 Act, however, limits to $2,500 the amount that a WCJ can fine an employer who has acted in bad faith. *Id.*

The employer's bad faith actions in *Cass* resulted in an economic loss to Cass,[516] and the hearing officer awarded him $10,000 in attorneys' fees, a "reasonable amount."[517] The court of appeals reversed this award, citing a lack of substantial evidence to support it.[518] The supreme court disagreed, and reversed to reinstate the award.[519]

The *Cass* court focused on the application of the whole record standard of review.[520] It emphasized that the standard does not entertain a reweighing of the evidence.[521] Rather, the standard mandates affirmance if "substantial evidence exists upon which a reasonable mind would have made such a decision. . . ."[522]

In examining the record, the supreme court in *Cass* noted that Timberman based its termination of benefits on Cass's failure to follow the directions of the general physician.[523] The court further noted that the general physician had no expertise in neurology and had not performed any tests to determine whether a neurological problem existed.[524] Cass claimed that Timberman terminated his benefits solely in response to his request for a second opinion.[525]

The court observed that the record showed that Cass was not recalcitrant towards either his physicians or his claims adjuster, but merely requested a second opinion.[526] The court differentiated between a refusal to cooperate and a request for a second opinion and found the request reasonable.[527]

The court in *Cass* labeled the employer's conduct as "reckless disregard of claimant's rights. . . ."[528] Thus, the court found the record supported the hearing officer's determination that Timberman acted in bad faith and reversed the court of appeals.[529] The supreme court also awarded Cass one thousand dollars in attorneys' fees incurred during appellate proceedings.[530]

IV. CONCLUSION

This survey period saw a fundamental change in workers' compensation law in New Mexico. The Workers' Compensation Act of 1990 has sub-

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516. The "economic loss" element of the statute was not explored in the opinion's discussion of the hearing officer's findings, nor in the supreme court's analysis. *See* N.M. STAT. ANN. § 51-1-54(I) (Repl. Pamp. 1991) (effective Jan. 1, 1991).

517. *Cass*, 111 N.M. at 186, 803 P.2d at 671.

518. *Id.* The court of appeals opinion, Cass v. Timberman Corp., 110 N.M. 158, 793 P.2d 288 (Ct. App. 1990), was withdrawn.

519. *Cass*, 111 N.M. at 187, 803 P.2d at 672.

520. *Id.* at 186-87, 803 P.2d at 671-72.

521. *Id.* at 187, 803 P.2d at 672.

522. *Id.*

523. *Id.*

524. *Id.*

525. *Id.*

526. *Id.*

527. *Id.* The nature and serious risk of the proposed procedure impressed the court. *Id.* (citing Aranda v. D.A. & S. Oil Well Servicing, Inc., 98 N.M. 217, 647 P.2d 419 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982)).

528. *Cass*, 111 N.M. at 187, 803 P.2d at 672.

529. *Id.*

530. *Id.*

stantially amended prior statutory law and upset many common law doctrines. Furthermore, courts during the survey period resolved several important issues that remain relevant under the 1990 Act.

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