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Workmen's Compensation

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WORKMEN'S COMPENSATION

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I. INTRODUCTION

During this Survey year, the appellate courts further refined and developed the Workmen's Compensation law in New Mexico. Workmen's Compensation appeals continue to be a substantial portion of the state's appellate decisions. The 1982 Annual Report of the New Mexico Court of Appeals reveals that Workmen's Compensation cases accounted for 20 percent of the entire civil docket of the court of appeals in 1982.[1] There were 287 civil cases docketed, of which 59 were Workmen's Compensation cases.[2]

This article reviews only the most important of the appellate courts' decisions. Included in this analysis are cases which refine the scheduled injury provisions of the Workmen's Compensation Act (the "Act"), and the provisions dealing with the effective date, rate, and limitation of benefits. There were further refinements in the areas of attorneys' fees, the Act's exclusivity as a remedy, and in the circumstances qualifying employees as being "in the course and scope of employment." Other significant cases are cited for their effect on narrow principles in the Workmen's Compensation Act.

II. REFINEMENTS IN THE SCHEDULED INJURY SECTION

Since *Newhoff v. Good Housekeeping, Inc.*,[3] New Mexico courts have applied N.M. Stat. Ann. § 52-1-43 (1978), also known as the "scheduled injury section," which addresses cases where the worker's injury is solely to a scheduled "member" of the body and does not render the claimant totally disabled. During the Survey year, the court of appeals and the supreme court dealt with two cases which examine the relationship of the scheduled injury section of the Act to the partial[4] and the total disability sections.[5] The appellate courts have clarified the apparent conflict between

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1. The Clerk of the New Mexico Court of Appeals provided this information to the authors.
2. *Id.*
3. 94 N.M. 621, 614 P.2d 33 (Ct.App.), *cert. denied*, 94 N.M. 674 (1980).
4. N.M. Stat. Ann. § 52-1-42 (1978).
5. *Id.* § 52-1-41 (1978).

the dictum found in *American Tank & Steel Corp. v. Thompson*[6] and *Newhoff*.

In *American Tank & Steel Corp.*, the court stated that the scheduled injury section would apply only to cases in which there was impairment but no disability. Thereafter, in reliance on *American Tank & Steel Corp.*, it was argued that where an injury to a scheduled member caused a worker to be partially or totally unable to perform his previous employment or any work for which he was fitted, the compensation would not be limited to the scheduled injury provisions. Instead, compensation would be based on disability to the body as a whole, pursuant to the total or partial disability sections.[7] If followed, the dictum in *American Tank & Steel Corp.* would have severely restricted the meaning and use of the scheduled injury section. *Newhoff* added new life to the scheduled injury section, however, by holding that it applied to injuries to scheduled members whether the injuries caused impairment or disability.

In *Hise Construction v. Candelaria*,[8] the supreme court reversed that portion of the court of appeals decision in *Candelaria v. Hise Construction*[9] which purported to overrule *Newhoff*. The court determined that either the scheduled injury section or partial disability section will apply unless a worker is totally disabled by an injury solely to a specific body member. To determine which section applies, the court first must determine what body members are affected. The claimant in *Hise* injured his right little finger, causing amputation of that finger at the most remote joint. This amputation caused impairment to the right hand. The supreme court determined that there was no "separate and distinct" impairment to a body member so as to allow recovery outside of the scheduled injury section[10] because both the little finger[11] and the hand[12] are body members within the schedule.

In *Mountain States Construction Co. v. Aragon*,[13] the supreme court reinforced the conclusion that the scheduled injury section applies unless there is a "separate and distinct" injury to a non-scheduled body member. The evidence indicated that the injuries to the fingers of the claimant's right hand caused impairment to the use of the right hand which in turn caused impairment to the right arm. The trial court determined that the right arm impairment was the natural result of the hand injury. The court of appeals reversed the trial court, holding as a matter of law that such

6. 90 N.M. 513, 565 P.2d 1030 (1977).
7. 94 N.M. at 623, 614 P.2d at 35.
8. 98 N.M. 759, 652 P.2d 1210 (1982).
9. 98 N.M. 763, 652 P.2d 1214 (Ct.App. 1981).
10. *Id.* at 761, 652 P.2d at 1212.
11. N.M. Stat. Ann. § 52-1-43(A)(27) (1978).
12. *Id.* § 52-1-43(A)(7) (1978).
13. 98 N.M. 194, 647 P.2d 396 (1982).

impairment was a separate and distinct injury.[14] The supreme court reversed the court of appeals. It concluded that the scheduled injury section applied. There was no "separate and distinct" injury to a non-scheduled member because this impairment was a natural result of the injury to the hand, a scheduled member.[15]

These cases demonstrate that a claimant with an injury to a scheduled member cannot, to the apparent dismay of the New Mexico Court of Appeals, avoid the effect of N.M. Stat. Ann. § 52-1-43 (1978) by simply converting the percentage of disability to the scheduled member into a disability to the body as a whole.[16] The partial disability section will be applied to injuries to scheduled members only when there is a "separate and distinct" injury to a body member outside the scheduled injury section.

III. FURTHER APPLICATIONS OF THE "KNEW OR SHOULD HAVE KNOWN" TEST

The New Mexico Workmen's Compensation Act contains two provisions, which set forth a test of whether the claimant "knew or should have known" of a disability.[17] The test is used to determine the date the statute of limitations[18] begins to run. The test also is employed to determine the applicable wage rate in effect for an accidental injury resulting in disability.[19]

During the Survey year, the court of appeals was on the verge of abolishing the "knew or should have known" test for determining the date the statute of limitations begins to run. In *Montano v. ABF Freight Systems*,[20] the court held under N.M. Stat. Ann. § 52-1-31(A) (1978)[21] the statute of limitations does not begin to run until a claimant insists on compensation payments and his request is denied.[22] Under this analysis, whether a claimant "knew or should have known" of a disability would have no effect on the running of the statute of limitations. *Montano* caused uncertainty as to the continued validity of the long-standing rule that the

14. Aragon v. Mountain States Constr. Co., 98 N.M. 225, 647 P.2d 427 (Ct.App. 1982).

15. 98 N.M. at 194, 647 P.2d at 396.

16. Hise Constr. v. Candelaria, 98 N.M. 759, 761, 652 P.2d 1210, 1212 (1982).

17. The "knew or should have known" test also is described in the case law as "reasonably apparent or should be reasonably apparent." *See, e.g.*, Noland v. Young Drilling Co., 79 N.M. 444, 444 P.2d 771 (Ct.App. 1968).

18. N.M. Stat. Ann. § 52-1-31 (1978).

19. *Id.* § 52-1-48 (1978).

20. 21 N.M. St. B. Bull. 999 (Ct.App. April 20, 1982).

21. In relevant part N.M. Stat. Ann. § 52-1-31(A) (1978) provides that: "it is the duty of the workman insisting on the payment of compensation to file a claim therefor as provided in the Workmen's Compensation Act, not later than one year after the failure or refusal of the employer or insurer to pay compensation."

22. 21 N. M. St. B. Bull. at 1000, 1001.

limitations period begins to run when the worker knew or should have known that he or she had a disability.[23]

Recognizing the uncertainty caused by *Montano*, the court of appeals in *Lent v. Employment Security Commission*[24] decided to maintain the traditional rule while *Montano* was heard on certiorari. In *ABF Freight Systems v. Montano*,[25] the supreme court reversed the court of appeals decision in *Montano* and resolved the conflict in the case law. The supreme court, relying on well established precedent, decided to retain the traditional test that the statute of limitations commenced when a worker knew or should have known of a disability.[26]

The New Mexico appellate courts also applied the "knew or should have known" concept of disability in five cases[27] decided under N.M. Stat. Ann. §52-1-48 (1978).[28] Although the statute clearly appears to indicate that the date of accident will determine the applicable wage rate, whether the worker knew of a disability at that time or not, the courts have applied the "knew or should have known" concept to determine the date on which to base the applicable wage rate.[29]

These decisions basically concern three different issues. First, when does the applicable wage rate begin where a workman has a compensable injury, misses short periods of employment due to the injury, and ultimately cannot return to work even for short periods of time? Second, when does the applicable wage rate begin where an employee is unable to perform all of the work which he performed prior to an accident, but is still able to perform some of the functions? Third, where there is evidence of aggravating circumstances by returning to work, is there a new accident and a new applicable wage rate?

With regard to the first issue, the court of appeals in *Lovato v. Duke City Lumber Co.*[30] held that where the plaintiff was injured in a job-related accident, and thereafter returned to work for short periods of time during the following twelve months, the applicable rate of compensation was that in effect on the date of the accident. The court held the worker to have known that he was disabled when he could not return to work except

23. *See* Jowers v. Corey's Plumbing & Heating, 74 N.M. 555, 395 P.2d 827 (1964); Noland v. Young Drilling Co., 79 N.M. 444, 444 P.2d 771 (Ct.App. 1968).

24. 99 N.M. 407, 658 P.2d 1134 (Ct.App. 1982), *cert. quashed*, 99 N.M. 226, 656 P.2d 889 (1983).

25. 99 N.M. 259, 657 P.2d 115 (1982).

26. *Id.* at 260, 657 P.2d at 116.

27. *See infra* notes 30-47 and accompanying text for a discussion of these five decisions.

28. This statute provides that: "The benefits that a workman shall receive during the entire period of disability, and the benefits for death, shall be based on, and limited to, the benefits in effect on the date of the accidental injury resulting in the disability or death."

29. *See infra* notes 30-37 and accompanying text.

30. 97 N.M. 545, 641 P.2d 1092 (Ct.App.), *cert. denied*, 98 N.M. 50, 644 P.2d 1039 (1982).

for short periods of time.[31] Citing *Casias v. Zia Co.*,[32] the court stated that disability, in terms of average weekly wage, begins when a compensable injury manifests itself and a wage earning capacity is affected.[33] The applicable rate pursuant to §52-1-48, therefore, is that which was in effect when the worker knew or should have known that he or she had suffered a disability. The worker in *Lovato* was held to have known that he had suffered a compensable injury when he missed work and was paid compensation as a result of his injury.[34]

In *Howard v. El Paso Natural Gas Co.*,[35] the court of appeals dealt with a question similar to that in *Lovato*. The claimant missed three weeks of work following an accident, and missed an additional seven weeks of work between March of 1978 and December of 1979. There was evidence that after plaintiff returned to work in February of 1978, he worked a reduced work week of only three days due to the pain he was suffering. The court held that this testimony supported the finding that the disability began on the date of the accident. Further, in *Turner v. Shop Rite Foods, Inc.*,[36] the court of appeals stated that where a worker had missed work for over eight months in 1977 as a result of an on-the-job accident, he knew or should have known, as of the date he was unable to work, that he had suffered a compensable injury. With these cases, the court of appeals apparently has decided that where a worker misses work as a result of an on-the-job injury, at least where the worker obtained or was entitled to compensation benefits for the missed work, the worker is held to have knowledge of a disability as of the first time payments were made or could have been made.[37]

The more difficult cases are those which relate to the second issue where the worker does not miss work for even short periods of time, but has difficulties while at work and must reduce work activities. New Mexico courts traditionally have held that the "knew or should have known" test applies in such circumstances.[38] The court of appeals applied

31. *Id.* at 546, 641 P.2d at 1093.

32. 94 N.M. 723, 616 P.2d 436 (Ct.App. 1980).

33. 97 N.M. at 547, 641 P.2d at 1094.

34. The evidence in *Lovato* also indicated that each time plaintiff returned to work he had no restrictions, but he did experience pain and was given lighter work. The court did not regard these facts as being determinative that the worker had knowledge of the compensable injury.

35. 98 N.M. 184, 646 P.2d 1248 (Ct.App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

36. 99 N.M. 56, 653 P.2d 887 (Ct.App. 1982).

37. The factual bases for these decisions do not include the case where a worker has an on-the-job injury and misses a couple of days, but does not have serious problems until months or years later. In such a case, it is clear that a court might not hold the claimant to knowledge of a compensable injury. *See* Swallows v. City of Albuquerque, 59 N.M. 328, 284 P.2d 216 (1955).

38. *See, e.g.*, Casias v. Zia Co., 93 N.M. 78, 596 P.2d 521 (Ct.App.), *cert. denied*, 93 N.M. 8, 595 P.2d 1203 (1979); Gomez v. Hausman Corp., 83 N.M. 400, 492 P.2d 1263 (Ct.App. 1972).

this test in *Sedillo v. Levi Strauss Corp.*,[39] but refined the circumstances in which a worker can be said to have knowledge of his injury. The employee suffered a work-related injury on March 14, 1979. The court of appeals, reversing the trial court, found that the disability did not commence until June 6, 1980 and the applicable wage rate was the rate in effect at that time.

Several doctors testified that during the fifteen month period, between March 1979 and June 1980, knowledge of disability should have been attributable to the claimant because she could not continue her work without pain. The major factor influencing the court of appeals in finding June 1980 to be the time at which the claimant knew or should have known of her compensable injury, however, was the fact that the company's doctors did not advise either the claimant or the employer that the woman had suffered a compensable injury in March of 1979. The court stated that an uneducated worker is not charged with medical knowledge "which apparently transcends that possessed by the attending physician."[40]

The final issue which bears comment regarding the applicable wage rate and the "knew or should have known" test is found in *Murrieta v. Anaconda Co.*[41] In *Murrietta,* the court of appeals affirmed the trial court's assessment that the date of disability is the date when the workman knows or should know he has suffered a compensable injury. The court held that plaintiff's receipt of full compensation benefits on five different occasions, some of which were for extended periods, clearly established that at least temporary total disability manifested itself as a result of an accidental injury in February 1976. Although the permanancy of plaintiff's total disability was not judicially established until July of 1978, the evidence was sufficient to support the finding that the workman knew he had suffered a compensable injury in February 1976.

The supreme court granted certiorari and filed an opinion on August 19, 1982, suggesting that the case should have been decided on other grounds. First, the court stated that the policy behind the Workmen's Compensation Act was to assure that employees who are disabled in work-related injuries do not become dependents on the state's welfare program.[42] The court also noted that the rate of compensation is intended to bear some relationship to the workman's wage earning capacity.[43] Finally, the court stated that when a workman continues to work after he is injured in the course of his employment and his working aggravates

39. 98 N.M. 52, 644 P.2d 1041 (Ct.App.), *cert. denied,* 98 N.M. 336, 648 P.2d 794 (1982).
40. 98 N.M. at 54, 644 P.2d at 1043.
41. 98 N.M. 720, 652 P.2d 742 (Ct.App. 1982).
42. 21 N. M. St. B. Bull. 1125, 1126-27 (1982).
43. *Id.* at 1127.

that injury so that he becomes disabled, his disability benefits should be computed at the later rather than earlier date of disability.[44] The supreme court was, in effect, holding that there was a "new accident" each time the worker was unable to work.

On September 29, 1982, after rehearing, the supreme court filed an order withdrawing the opinion of the court of August 19, 1982 and quashed certiorari as being improvidently granted.[45] The supreme court decision in *Murrietta,* filed August 19, 1983, had it stood, would have substantially altered existing law as to when the statute of limitations would begin to run and when the average weekly rate wage would be in effect under the traditional "knew or should have known" test.[46] This sequence suggests, however, that the court, given the right case, might alter the traditional "knew or should have known" test to encourage workmen to remain employed as long as possible. This new formulation also would entitle workmen to the higher compensation rate in the event they claim compensation benefits.[47]

IV. FURTHER REFINEMENTS IN *PURCELLA*

During this Survey year, three cases dealt with *Purcella v. Navajo Freight Lines*.[48] In *Purcella,* the supreme court held that where an employer voluntarily pays compensation benefits and then wrongfully terminates payment, the date the trial court determines that the claimant was disabled is the date for computing the rate of compensation.[49] *Purcella* initially appeared to be a move away from a "date of accident" test, changing the meaning and interpretation of N.M. Stat. Ann. § 52-1-48 (1978).[50] Three cases decided by the court of appeals during this Survey

44. *Id.*

45. 98 N.M. 696, 652 P.2d 246 (1982).

46. The supreme court's decision, had it stood, would have drastically affected the rulings in such cases as Noland v. Young Drilling Co., 79 N.M. 444, 444 P.2d 771 (Ct.App. 1968) and Cordova v. City of Albuquerque, 71 N.M. 491, 379 P.2d 781 (1962). Those cases held that as soon as it becomes reasonably apparent that a worker has a compensable injury, the statute of limitations begins to run. There is nothing which indicates the statute may be delayed until a more serious disability is ascertainable.

47. The Employment Security Commission of the State of New Mexico annually determines the average weekly wage in New Mexico. N.M. Stat. Ann. § 52-1-41 (1978). This determination becomes the basis for calculating compensation benefits. *Id.*

48. 95 N.M. 306, 621 P.2d 523 (Ct.App. 1980).

49. The supreme court adopted the following rule:

> We hold the rule to be that where a workman suffers disability as a result of an accidental injury and the employer voluntarily pays compensation benefits and then wrongfully terminates payment thereof, causing the workman to seek relief in the courts, the date that disability is determined in the court proceedings is the date that the applicable rate of compensation applies, not the date of the accidental injury.

Id. at 309, 621 P.2d at 526.

50. See *supra* note 28 for the text of this statute.

year, however, clarified that *Purcella* did not change the meaning of § 52-1-48. These cases also limited the *Purcella* court's interpretation of this section to the facts of that case.

In both *Lovato v. Duke City Lumber Co.*[51] and *Howard v. El Paso Natural Gas Co.*,[52] the court of appeals explicitly stated that *Purcella* must be interpreted only on its facts.[53] The court further stated that as a condition precedent to the application of the *Purcella* rule, the employer must have wrongfully terminated compensation. As the court in *Lovato* made clear, "*Purcella* did not by judicial fiat change the meaning or interpretation of N.M. Stat. Ann. § 52-1-48 (1978)."[54]

The third case decided by the court of appeals dealing with the *Purcella* rule is *Ulibarri v. Homestake Mining Co.*[55] In *Ulibarri,* the court found that "wrongful termination" was something other than "arbitrary termination."[56] The court held that "wrongful" is defined as "injurious, heedless, unjust, wreckless or unfair."[57] It is equally important to note that in *Ulibarri,* the employer had not terminated the claimant's compensation benefits, but merely had reduced them from 100 to 35 percent. There was evidence in the record that a year prior to the time compensation payments were reduced the claimant had a 35 percent permanent impairment of function of his body as a whole. It appears, therefore, that the *Purcella* rule will be narrowly construed to apply only in factual circumstances similar to those presented in *Purcella.*

V. ATTORNEYS' FEES AND COSTS

The appellate courts issued six opinions that addressed, at least in part, the issue of attorneys' fees during the Survey year.[58] N.M. Stat. Ann. § 52-1-54(D) (1978)[59] specifies that in setting attorneys' fees, the trial

51. 97 N.M. 545, 641 P.2d 1092 (Ct.App.), *cert. denied,* 98 N.M. 50, 644 P.2d 1039 (1982).
52. 98 N.M. 184, 646 P.2d 1248 (Ct.App.), *cert. denied,* 98 N.M. 336, 648 P.2d 794 (1982).
53. *Lovato,* 97 N.M. at 546, 641 P.2d at 1093; *Howard,* 98 N.M. at 186, 646 P.2d at 1250.
54. 97 N.M. at 547, 641 P.2d at 1094.
55. 97 N.M. 734, 643 P.2d 298 (Ct.App. 1982).
56. *Id.* at 736, 643 P.2d at 300.
57. *Id.*
58. Five of the six opinions are treated here. The remaining case, Aragon v. Anaconda Mining Co., 98 N.M. 65, 644 P.2d 1054 (Ct.App. 1982), stands for the proposition that in an interpleader action brought by the employer, the employer will be liable for attorneys' fees to the claimant who prevails if the employer fails to defend the award on appeal.
59. N.M. Stat. Ann. § 52-1-54(D) (1978) provides that:

> . . . in all cases where compensation to which any person shall be entitled under the provisions of the Workmen's Compensation Act shall be refused and the claimant shall thereafter collect compensation through court proceedings in an amount in excess of the amount offered in writing by an employer thirty days or more prior to the trial by the court of the cause, then the compensation to be paid the attorney for the claimant shall be fixed by the court trying the same or the supreme court upon appeal in such amount as the court may deem reasonable and proper and when so fixed and allowed by the court shall be paid by the employer in addition to the compensation allowed the claimant under the pro-

court must consider: (1) the amount offered by the employer before and after the claimant hired an attorney, but prior to initiating his action for compensation; (2) any offer made in writing within thirty days of trial; and (3) the present value of the compensation award. Attorneys' fees issues have become increasingly important since *Fryar v. Johnsen*[60] and *Johnsen v. Fryar*.[61] Those cases attempted to create a standardized approach to the assessment of attorneys' fees by delineating the relevant criteria necessary for evidentiary support of an award of attorneys' fees.[62] Questions such as the necessity of an evidentiary hearing, the necessity of expert testimony at such a hearing, the use of affidavits instead of testimony at the hearing, and whether there should be an award of attorneys' fees for the time and effort spent by counsel in meeting the *Fryar I* and *II* requirements were subjects of the court's attention, and probably will remain the subject of further appellate discussion.

In *Bufalino v. Safeway Stores, Inc.*,[63] the court of appeals ruled that the trial court did not abuse its discretion in awarding attorneys' fees following a separate hearing to determine the amount of attorneys' fees. The significance of *Bufalino* is that the court tacitly recognized that a full-blown hearing on attorneys' fees comparable to a trial may be necessary in order to determine the justification for additional attorneys' fees for services rendered.[64] The court did not decide, however, whether such a hearing is mandatory.[65] Several months earlier in *Schall v. Schall*,[66] the

visions of the Workmen's Compensation Act; provided, however, that the trial court in determining and fixing a reasonable fee must take into consideration:

(1) the sum, if any offered by the employer:

(a) before the workman's attorney was employed; and

(b) after the attorney's employment but before court proceedings were commenced; and

(c) in writing thirty days or more prior to the trial by the court of the cause; and

(2) the present value of the award made in the workman's favor. . . .

60. 93 N.M. 485, 601 P.2d 718 (1979) [hereinafter cited as *Fryar I*].

61. 96 N.M. 323, 630 P.2d 275 (Ct.App. 1980) [hereinafter cited as *Fryar II*].

62. The following are the standards: the relative success of the workman in the court proceedings; the extent to which the issues were contested; the complexity of the issues, the ability, standing, skill, and experience of the attorney; the rise in the cost of living; the time and effort expended by the attorney in the particular case; the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by the circumstances; and the experience, reputation and ability of the lawyer or lawyers performing the services. *See* Fryar v. Johnsen, 93 N.M. 485, 487, 601 P.2d 718, 720 (1979); Johnsen v. Fryar, 96 N.M. 323, 329-30, 630 P.2d 275, 281-82 (Ct. App. 1980).

63. 98 N.M. 560, 650 P.2d 844 (Ct.App. 1982).

64. *Id.* at 567, 650 P.2d at 851.

65. In Gonzales v. Bates Lumber Co., 96 N.M. 422, 631 P.2d 328 (Ct.App. 1981), the court held that an attorney's affidavit, the trial court's first-hand knowledge of the attorney's work, and the outcome of that work were sufficient evidentiary support of the award. In Jennings v. Gabaldon Constr. Co., 97 N.M. 416, 640 P.2d 522 (Ct.App. 1982), the court held that an attorney's unsworn statements were not a sufficient basis for ultimate findings, unless stipulated to by opposing counsel.

66. 97 N.M. 665, 642 P.2d 1124 (Ct.App. 1982).

court of appeals upheld an award of attorneys' fees and found that the trial court had given adequate consideration to the *Fryar I* and *Fryar II* elements via an uncontested affidavit filed by claimant's attorney.

In *Morgan v. Public Service Co.*,[67] the court of appeals noted there had been two evidentiary hearings on the attorney fee issue, and stated that a separate hearing is permissible but is not required.[68] The court in *Morgan* also summarized recent relevant cases on the attorneys' fees issue,[69] and restated the proper basis for findings and conclusions which if made will support an award on appeal.[70] Finally, the court of appeals reiterated that it is improper to award attorneys' fees for an unsuccessful effort to obtain a lump sum award because obtaining a benefit under the Workmen's Compensation Act is a prerequisite for an award of attorneys' fees.[71]

In *Sena v. Continental Casualty and Creamland Dairies, Inc.*,[72] the court of appeals again reiterated the eleven-point requirement laid down in *Fryar I*, and found that there was substantial evidence to support the attorneys' fees awarded by the trial court. The court, however, rejected an attempt to require comprehensive time records and application of an hourly rate thereto as the basis for attorney fees.[73] Finally, with regard to attorneys' fees, *Aranda v. D.A. & S. Oil Well Service, Inc.*[74] highlights the benefit of detailing the attorney's work subsequent to entry of judg-

67. 98 N.M. 775, 652 P.2d 1226 (Ct.App. 1982).

68. *Id.* at 779, 652 P.2d at 1230.

69. The court cited: Schall v. Schall, 97 N.M. 665, 642 P.2d 1124 (Ct.App. 1982); Jennings v. Gabaldon, 97 N.M. 416, 640 P.2d 522 (Ct.App. 1982); Tafoya v. S & S Plumbing Co., 97 N.M. 249, 638 P.2d 1094 (Ct.App. 1981); Johnsen v. Fryar, 96 N.M. 323, 630 P.2d 275 (Ct.App. 1980); Lopez v. K.B. Kennedy Engineering Co., 95 N.M. 507, 623 P.2d 1021 (Ct.App. 1981); Fitch v. Sam Tanksley Trucking Co., 95 N.M. 477, 623 P.2d 991 (Ct.App. 1980); Clymo v. United Nuclear Corp., 94 N.M. 214, 608 P.2d 526 (Ct.App. 1980).

70. Judge Wood pointed out that the *Fryar I* factors should be "subject to consideration" by the trial court and, when considered, should be the subject of findings of fact. The findings must have evidentiary support, i.e., there must be evidence introduced supportive of the finding. 98 N.M. at 779, 652 P.2d at 1128. Additionally, the trial court must judicially notice the matter covered, or indicate the finding is based on the judge's personal knowledge. *Id.* at 780, 652 P.2d at 1129.

71. Employers Mutual Liability Ins. Co. v. Jarde, 73 N.M. 371, 388 P.2d 382 (1963). *See also* Kelly, *Workmen's Compensation*, 13 N.M.L. Rev. 495 (1983) and Casados, *Workmen's Compensation*, 11 N.M.L. Rev. 236 (1981) for further discussion of the evolution of the attorney fee issue in New Mexico.

72. 97 N.M. 753, 643 P.2d 622 (Ct.App. 1982).

73. With regard to the challenged time records, the court said,

> This court will not hobble our interpretation of *Fryar* and our interpretation of our Workmen's Compensation Act with the requirement that the claimant's counsel must account for every second, every minute, and for every hour expended in preparation and trial of this case, before we accept the trial court's determination on attorneys' fees. We believe that *Fryar* only requires a reasonable accounting of time spent; nothing more is required.

Id. at 759, 643 P.2d at 628.

74. 98 N.M. 217, 647 P.2d 419 (Ct.App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

ment in the brief on appeal to assist the attorney in obtaining the sought-after fee for the appeal itself.

With regard to costs, the court of appeals concurred with the position of the defendant in *Sedillo v. Levi-Strauss Corp.*[75] that N.M. Stat. Ann. § 52-1-35 (1978), which provides that "[n]o costs shall be charged, taxed or collected by the clerk except for witnesses who testify under subpoena," prohibits assessment of witness fees for unsubpoenaed witnesses. The court reversed the trial court's assessment of the cost of expert witness fees against the defendants. The court concluded that although N.M. Stat. Ann. § 52-1-34 (1978) provides that the rules of civil procedure[76] apply to compensation claims, where there is a specific statutory provision in the Workmen's Compensation Act which conflicts with the rules of procedure, the provision in the Act will control.[77]

VI. ACCIDENTAL INJURY ARISING OUT OF AND IN THE SCOPE OF EMPLOYMENT

On four occasions during the Survey year, the court of appeals wrestled with difficult factual situations concerning the application of the "arising out of and in the course of employment" requirement of the Workmen's Compensation Act.[78] Under these provisions, an injury must "arise out of and in the course of" employment in order to be compensable. These are two separate requirements.[79] For an injury to "arise out of" the

75. 98 N.M. 52, 644 P.2d 1041 (Ct.App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

76. *See* N.M. R. Civ. P. 54(d), which allows costs to be awarded to the prevailing party.

77. 98 N.M. at 56, 644 P.2d at 1045.

78. N.M. Stat. Ann. § 52-1-9 and § 52-1-28 (1978) are relevant. Section 52-1-9 provides:

> The right to the compensation provided for in this act [52-1-1 to 52-1-69 NMSA 1978], in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur:
>
> . . .
>
> B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and
>
> C. the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted.

Section 52-1-28 provides:

> A. Claims for workmen's compensation shall be allowed only:
>
> (1) when the workman has sustained an accidental injury arising out of, and in the course of his employment;
>
> (2) when the accident was reasonably incident to his employment; and
>
> (3) when the disability is a natural and direct result of the accident.
>
> B. In all cases where the defendants deny that an alleged disability is a natural and direct result of the accident, the workman must establish that causal connection as a medical probability by expert medical testimony. No award of compensation shall be based on speculation or on expert testimony that as a medical possibility the causal connection exists.

79. Walker v. Woldridge, 58 N.M. 183, 184, 268 P.2d 579, 580 (1954).

employment, there must be a showing that the injury was caused by a risk to which the claimant was subjected by his employment.[80] For an injury to arise "in the course of" the employment it must relate to the time, place, and circumstances under which the injury occurred.[81]

From a review of the four cases decided during the Survey year, it is clear that, when possible, the courts will apply the liberal interpretation which is mandated by the Workmen's Compensation Act.[82]

In *Hernandez v. Home Education Livelihood Program, Inc.*,[83] the plaintiff filed a tort claim against her employer seeking damages for a mental breakdown that the plaintiff claimed was a result of her supervisor telephoning her at home after regular business hours to discharge her. The trial court entered summary judgment in favor of the defendant on the grounds that the Workmen's Compensation Act provided the plaintiff's exclusive remedy. On appeal, the court of appeals reversed the summary judgment and concluded that the second requirement "in the course of employment" test was not met because the causative events occurred away from the job and after normal working hours.

In *City of Santa Fe v. Hernandez*,[84] the claimant was in a fatal accident about 9:00 p.m. on his way home from work. The claimant had consumed several beers at a bar and was on an alternate route home at the time of the accident. The trial court granted summary judgment for the defendants, but the court of appeals relying on the "coming and going rule"[85] reversed and held that if the claimant abandoned his employment, it was only a minor deviation and he had returned to work at the time of the accident. The supreme court, on certiorari, determined there were fact questions which had to be resolved by the trial court before it or the court of appeals could determine, as a matter of law, whether the plaintiff had abandoned his employment by deviating substantially from its course and scope or whether the deceased had re-entered the scope of his employment when the fatal accident occurred. These fact questions included the amount of beer consumed by the plaintiff, his degree of intoxication, and whether

80. Williams v. City of Gallup, 77 N.M. 286, 289, 421 P.2d 804, 806 (1966).

81. *See, e.g.*, Thigpen v. County of Valencia, 89 N.M. 299, 551 P.2d 989 (Ct.App.), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976); Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964).

82. New Mexico courts have traditionally stated that the Workmen's Compensation Act is to be given a liberal interpretation. *See, e.g.*, Lipe v. Bradbury, 49 N.M. 4, 154 P.2d 1000 (1945); Stevenson v. Lee Moor Contracting Co., 45 N.M. 354, 359, 115 P.2d 342, 345 (1941); Corzine v. Sears, Roebuck & Co., 80 N.M. 418, 420, 456 P.2d 892, 894 (Ct.App.), *cert. denied*, 80 N.M. 388, 456 P.2d 221 (1969); Wilson v. Mason, 78 N.M. 27, 28, 426 P.2d 789, 790 (Ct.App. 1967).

83. 98 N.M. 125, 654 P.2d 1381 (Ct.App. 1981), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

84. 97 N.M. 765, 643 P.2d 851 (1982).

85. *Id.* at 768, 643 P.2d at 854 (1982).

he followed a direct route home. The case was remanded by the supreme court for trial on these fact issues, and after retrial, it was appealed a second time.[86]

The *McDaniel v. City of Albuquerque*[87] and *Sena v. Continental Casualty Co.*[88] decisions also turn on the facts, with differing results. In *McDaniel,* plaintiff, an Albuquerque police officer, sought compensation benefits on the basis of a "nervous breakdown" that allegedly occurred during an administrative inquiry.[89] The court of appeals affirmed the trial court and concluded that the causative facts of plaintiff's breakdown related to his personal life, not his duties as a police officer.

In *Sena,* neither the claimant nor anyone else could testify as to how the claimant ended up twelve blocks from his place of employment in an unconscious condition. After analyzing these unexplained events in the context of circumstantial evidence and the claimant's burden of proof relating to the "arising out of" and "in the course of" employment requirements, the court, finding for the claimant, restated a controlling theme that "the New Mexico Workmen's Compensation Act must be liberally construed and reasonable doubts resolved in favor of the workman."[90]

Although a liberal interpretation of the Act's provisions is mandated, development of the facts which prove or disprove an injury was caused by a risk to which the claimant was subjected by his employment and an explanation of the time, place, and circumstances under which the injury occurred will be controlling. The cases discussed above demonstrate that as the factual pattern reaches the outer limits of the traditional "arise out of and in the course of" employment analysis, the more critical the thorough presentation of the causative facts become to a claimant's recovery.

86. The court of appeals filed an opinion in this case on November 10, 1983. City of Santa Fe v. Hernandez, No. 7191 (Ct. App. Nov. 10, 1983). The supreme court granted certiorari on December 19, 1983. City of Santa Fe v. Hernandez, No. 7191 (Dec. 19, 1983). As of this writing the supreme court has not yet filed an opinion in the case.

87. 99 N.M. 56, 653 P.2d 885 (Ct.App. 1982).

88. 97 N.M. 753, 643 P.2d 622 (1982).

89. The court of appeals succinctly summarized the requirements of the "arising out of" language in the Act as follows:

> The requirement in section 52-1-28(A)(1), *supra,* that the accidental injury arise out of the employment relates to cause. . . . The "arising out of" requirement excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause; the causative danger must be peculiar to the work, it must not be independent of the relation of master and servant. After the event, it must appear that the accidental injury had its origin in a risk connected with the employment and to have flowed from that risk as a rational consequence. . . .

99 N.M. at 58, 653 P.2d at 886, 887.

90. 97 N.M. at 756, 643 P.2d at 625.

VII. OTHER SIGNIFICANT CASES

Two cases in the Survey year dealt with the exclusivity of the Workmen's Compensation Act. *Dickson v. Mountain States Mutual Casualty*[91] involved a claim that the employer's insurance carrier made a bad faith refusal to pay hospital and medical expenses, to which the employee was entitled as a beneficiary of the employer's compensation policy. The district court granted the motion to dismiss for failure to state a claim, and the New Mexico Supreme Court affirmed. The supreme court concluded that N.M. Stat. Ann. §§52-1-9, 52-1-8, and 52-1-6(D) (1978) provided the exclusive remedy for benefits to an employee. The court further stated that regardless of whether the denial of benefits might have been in bad faith, these provisions precluded a separate action for damages against the insurer.

Similarly, in *Romero v. J.W. Jones Construction Co.*,[92] the court of appeals reviewed on interlocutory appeal a 16-year-old plaintiff's tort and workmen's compensation actions, which were pending simultaneously before the same district judge. There was no dispute that the accidental injury occurred while at work, and ordinarily, the plaintiff would have been limited to a compensation claim.[93] The plaintiff sought to avoid these exclusivity provisions, however, by relying on the fact that he was under 16 years of age at the time of the injury, and therefore, his employment was violative of N.M. Stat. Ann. §50-6-4 of the Child Labor Law.[94] The action was remanded for a further evidentiary hearing, and the appellate courts failed to reach a conclusive opinion on this issue. The interplay of the Workmen's Compensation Act, the Child Labor Law, and a potential tort action, therefore, remains unclear and will no doubt be the subject of further review by New Mexico's appellate courts.

91. 98 N.M. 479, 650 P.2d 1 (1982).
92. 98 N.M. 658, 651 P.2d 1302 (Ct.App. 1982).
93. *See* N.M. Stat. Ann. §§52-1-8, 52-1-9 (1978); 98 N.M. at 660, 651 P.2d at 1304.
94. 98 N.M. at 660, 651 P.2d at 1304.