

REGULATORY UPDATE

The 2010, 30-day Legislative Session was confined to budget issues and did not address any workers' compensation issues. Throughout the year there were several workers' compensation proposals introduced and discussed to amend the New Mexico Workers' Compensation Act.

From the 2010 discussions the following recommendations were sent to the governor and legislators for the 2011 Legislative Session. (*See Advisory Council chapter for more.*)

Case Law

Supreme Court

Schultz v. Pojoaque Tribal Police Dept., 2010-NMSC-034, 148 NM 692, 242 P.3d 259 WCJ Helen Stirling; Topic Index: Statute of Limitations; Substantial Compliance

Kevin Schultz (Worker) was employed as a police officer with the Pojoaque Tribal Police Department (Employer). During an outing with a church group the worker, who was not officially on-duty, drowned while rescuing a child who fell into the Rio Grande. Worker's widow (Petitioner) filed a workers' compensation claim for medical and survivor benefits as a result of her husband's death. The WCA judge denied Petitioner's claim on the grounds that (1) the statute of limitations had run and (2) Worker's accident was not in any way caused by his employment. Petitioner then mailed a notice of appeal to the Court of Appeals, but the notice arrived two days after the filing deadline because of delays in the U.S. Mail. Petitioner filed a motion to extend her time to file a notice of appeal with WCA judge which was granted under NMRA Rule 12-201(E)(2) (allows district court to extend time for filing notice upon a finding of "excusable neglect or circumstances beyond the control of the appellant."). The court declined to hear the widow's appeal because (1) the appeal was filed late, (2) the WCA judge had no authority to grant an extension of time to file, and (3) there was no evidence of circumstances beyond the widow's control that caused her appeal to be late.

The New Mexico Supreme Court (Supreme Court) granted a *writ of certiorari* to review the case and agreed with the lower court that the WCA had no authority to grant an extension of time under Rule 12-601 and Rule 12-201(E)(2). These rules apply to the district courts, not to the agency. The Supreme Court confirmed that Rule 12-601 requires litigants to file requests for extension of time with the appellate court, not with the agency. While the Court refused to apply a blanket rule of "substantial compliance" with the Notice of Appeal filing requirement, and instead favored a "case-by-case" analysis to determine whether a late filing is attributable to "excusable neglect." The Supreme Court concluded that the agency had no authority to grant an extension of time but that

the Court of Appeals "abused its discretion in failing to excuse Petitioner's late filing since it was due to an unanticipated mailing delay that was outside the control of Petitioner." The case was remanded to the Court of Appeals for a review of the merits of the appeal.

Court of Appeals

Antonio v. Inn of the Mountain Gods Resort and Casino, 2010-NMCA-077, 148 NM 858, 242 P.3d 425 WCJ Victor Lopez; Topic Index: Jurisdiction; Sovereign Immunity

Michael Antonio (Worker) filed a complaint with the Workers' Compensation Administration (WCA) against his employer, the Inn of the Mountain Gods Resort and Casino (Inn), which is wholly owned and operated by the Mescalero Apache Tribe (Tribe). The worker was injured at work while employed as a snowmaker for Ski Apache, a subsidiary of the Inn. Worker claimed entitlement to benefits beyond those available to him through the Tribe's alternative compensation system. The WCA judge dismissed Worker's complaint on the grounds of lack of subject matter jurisdiction because Worker was injured on tribal lands, outside the coverage of the New Mexico Workers' Compensation Act. On appeal Worker argued that the judge erred in finding that Worker was injured on tribal lands. Worker also asserted that the WCA may assert jurisdiction because the Tribe's workers' compensation program was not comparable to the state system in effect at the time of his injury. The Court of Appeals found that the Tribe had sovereign status under *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998), which precluded suit against the Tribe in state courts. It found that under *Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, tribes cannot implicitly waive immunity from suit. Finally, the WCA could not compare the State and the Tribal systems for similarity because the agency lacks jurisdiction over the Tribe; further, Worker otherwise failed to exhaust his remedies before the tribal court, which was the appropriate forum. The Tribe, as a sovereign entity, was beyond the power of the state court and WCA jurisdiction, absent an express waiver of sovereign immunity. As a result, the Court affirmed the Administration's dismissal on specific grounds of sovereign immunity.

Baca v. Los Lunas Community Programs, 2011-NMCA-008, __ N.M. __, __ P.3d __ (filed December 15, 2010). WCJ Terry Kramer; Topic Index: Average Weekly Wage; Independent Medical Examination; Timely Reporting

Felix E. Baca (Worker) was a "Psych Tech" providing care and supervision to mentally disturbed residents with the Los Lunas Community Programs (Employer). Worker was sexually assaulted (raped) by a resident on

a work-related, overnight trip. Worker did not immediately report the assault due to shame and fear of reprisal. Worker was awarded Temporary Total Disability (“TTD”) benefits for the mental condition of Post Traumatic Stress Disorder (“PTSD”), but the judge refused to include pre-accident over-time wages in calculating the Average Weekly Wage (“AWW”). Upon his return to work, Worker was re-assigned to get him away from the resident who had assaulted him. Employer appealed the judge’s decision, asserting that: (1) Worker failed to report his injury in a timely manner pursuant to NMSA 1978, Section 52-1-29(A); and (2) the judge improperly denied Employer’s request for an independent medical examination (IME) of Worker. On cross-appeal, Worker claimed the judge improperly excluded overtime wage in calculating the AWW and compensation rate.

The Court of Appeals excused Worker’s late notice to Employer based on the undisputed medical evidence demonstrating that PTSD prevented Worker from giving timely notice within 15 days of the sexual assault. In addition, as a latent injury, PTSD had a late onset, which meant “the statutory clock [did] not start ticking until the worker knew, or should have known by the exercise of reasonable diligence, that he or she had sustained a compensable injury.” *Baca v. Los Lunas Community*, pages 5-6, quoting *Garnsey v. Concrete, Inc. of Hobbs*, 1996-NMCA-081, ¶, 12, 122 N.M. 195, 200, 922 P.2d 577, 582. Citing *Montell v. Orndorff*, 67 N.M. 156, 159-60, 353 P.2d 680, 682-83 (1960), the Court found no error in the WCA judge’s finding that timely notice had been given under Section 52-1-29(A).

The Court further found that the WCA judge did not abuse his discretion in denying Employer an IME, where: 1) Employer waited until 20 days before trial to request the IME and the necessary continuance of trial that would have been required; 2) the causation question that would be the subject of the IME existed more than a year before trial; 3) Worker had expended significant sums of money on prescription drugs and co-payments in the intervening year; and 4) Employer was excluding overtime pay in calculating worker’s AWW. “Under these circumstances, the WCJ reasonably could have found that Defendants’ request for a continuance was untimely, and delay in the commencement of trial would be prejudicial to Worker.” *Baca v. Los Lunas Community* at 8. The Court of Appeals found that the WCA judge did not abuse his discretion in denying Employer’s request for IME and continuance; and reversed and remanded for recalculation of the AWW to include pre-accident overtime wages under Section 52-1-20(A).

Jojola v. Fresenius Medical Clinic, 2010-NMCA-101, __ N.M. __, __ P.3d __. WCJ Gregory Griego; Topic Index: Compensable Injury; Loss of Use; Scheduled Injury

Roberta Jojola (Worker) suffered an injury to her left knee while employed with Fresenius Medical Clinic

(Employer). Worker suffered “loss of use” of her left knee and was awarded benefits for that knee. Worker also had a preexisting impairment to her right knee and she sought increased benefits for the combination of both knees, under authority of *Edmiston v. City of Hobbs*, 1997-NMCA-085, 123 N.M. 654, 944 P.2d 883 (“when a preexisting condition combines with a work-related injury to cause a disability, an employee is entitled to benefits commensurate with the total disability sustained.”). Worker conceded that the “preexisting right knee injury was not a consequence of the work-related accident,” and no evidence was presented that “her preexisting right knee impairment became worse as a result of the accident.” The WCA judge denied that Worker’s right knee injury was compensable. Worker appealed the agency decision, contending that the judge should have “combined” the work-related left knee impairment with the preexisting right knee condition in assessing her scheduled injury “loss of use” benefits. The Court of Appeals upheld the WCA judge in concluding that, absent evidence of causality between the right knee impairment and the work-related left knee injury, the judge properly declined to “combine” the scheduled injury left knee “loss of use” with a prior right knee impairment to increase Worker’s scheduled injury award.

May v. DCP Midstream, L.P., 2010-NMCA-087, __ N.M. __, __ P.3d __ (filed July 30, 2010). N.M. Fifth District Court, Lea County, Judge Gary L. Clingman; Topic Index: *Delgado*; Egregious Disregard; Safety
Kristopher May (Plaintiff) was employed by DCP Midstream (Defendant) as a plant operator at the Duke Energy/DCP Linam Ranch Facility. The facility receives “gas pipe inspection gauges” (pigs), which are sent through the pipeline to clean and inspect the pipe. The receiver for the pigs at the Linam Ranch Facility had been modified to accept a different type of pig. Plaintiff was asked to retrieve a pig from the receiver, but due its modified configuration, Plaintiff was unable to determine that the pig had become lodged in the receiver with a large amount of pressure behind it. In order to determine the location of the pig Plaintiff was required to stand directly in front of the receiver opening. When the pig suddenly became dislodged it was ejected and struck Plaintiff at around 90 miles per hour. Plaintiff sued Employer in the District Court of Lea County based on intentional tort, claiming Defendant’s conduct was willful according to the standards set out in *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMCA-034, and outside the “exclusivity” provision of the Workers’ Compensation Act (the Act).

On Defendant’s motion for summary judgment the district court (court) dismissed Plaintiff’s claim and awarded costs to Defendant. Plaintiff appealed the ruling on the grounds that the court erred in its dismissal and in awarding costs to Defendant. The Court Appeals upheld the district court’s decision and found that although the Defendant was negligent in its safety precautions, no

evidence was presented to support the sort of egregious disregard for an employee's well-being that is needed to prove a *Delgado* claim. In addition, the appellate court upheld that district court's award of costs as lawful and within the court's discretion.

Quintero v. N.M. Dept. of Transportation, 2010-NMCA-081, __ N.M. __, __ P.3d __ (filed July 8, 2010), cert. granted (Aug. 31, 2010). N.M. First District Court, Santa Fe County, Judge James A. Hall; Topic Index: Jurisdiction; Negligence; Tort Claim; Workers' Compensation Act

Sarah Quintero (Plaintiff) was employed by the New Mexico Department of Public Safety (Employer). Plaintiff lived in Albuquerque and commuted to work in Santa Fe using the private "Park and Ride" service. Usually riders boarded the "Park and Ride" at Balloon Fiesta Park in Albuquerque; however, during the Balloon Fiesta, a Department of Transportation (DOT or Defendant) lot was temporarily used. Plaintiff sustained a compound fracture to her leg when she fell into an unlit and poorly-marked hole in the DOT parking lot. Employer defended that Plaintiff's injuries were not work-related; Plaintiff was later terminated from her employment.

Plaintiff filed a complaint based on negligence against Defendant in the First Judicial District Court of Santa Fe County. Defendant acknowledged its duty to make visitors, including Plaintiff, aware of any unsafe conditions. Defendant then moved to dismiss based on lack of subject matter jurisdiction, because Plaintiff was a state employee, her exclusive remedy against the state was under the Workers' Compensation Act (the Act); the motion was granted by the district court and Plaintiff appealed.

The Court of Appeals reviewed whether the Act's exclusive remedy provision applied to bar Plaintiff's tort claim in district court. Defendant argued for a literal reading of Section 52-1-19, according to which Plaintiff's injury was due to an "accident arising out of and in the course of employment," since Plaintiff was an employee of the state injured through the negligence of the state. The Court of Appeals found that "the [DOT] commuter lot was not provided exclusively for State employees, and Plaintiff's use of the parking lot was totally unrelated to her duties with DPS [Department of Public Safety]. In this sense, Plaintiff's status as a DPS employee was completely separate and distinct from her status as a commuter using public transportation." *Tatrai v. Pres-*

byterian Univ. Hosp., 439 A.2d 1162, 1166 (Pa.1982); *Ruiz v. Chase Manhattan Bank*, 588 N.Y.S. 2d 251, 253 (N.Y.Civ.Ct. 1992). The Court of Appeals concluded that Plaintiff's fall at the DOT parking lot did not fall within the Act's exclusivity provision and overruled the district court decision and remanded. (The result in this case is subject to review and modification because the N.M. Supreme Court granted a *writ of certiorari* to review this case on August 31, 2010; no decision had been issued on the *writ* prior to publication of this Annual Report.)

Villa v. City of Las Cruces, 2010-NMCA-099, __ N.M. __, 241 P.3d 1108. WCJ Helen L. Stirling; Topic Index: Intoxication; Reduced Benefits; Willful Intent
Edward Villa (Worker) was employed as a garbage truck driver with the City of Las Cruces (Employer). On the morning of the accident, Worker reported for duty, and proceeded to operate his truck. In the course of his work, a dumpster fell into the hopper of the truck. Worker and his supervisor climbed on top of the truck to affix chains to the dumpster so they could hoist it out. While securing the chains, Worker fell down from the top of the truck and sustained serious injuries. Worker was given a blood test and was found to be legally intoxicated; he had a blood-alcohol content of .12. The WCA judge ruled that Worker's accident was not "occasioned" by the intoxication and the injuries were not otherwise willfully or intentionally self-inflicted, such as might bar recovery of benefits under Section 52-1-11, NMSA 1978.

The WCA judge awarded Worker benefits, but he applied a 10 percent penalty reduction, pursuant to Section 52-1-12.1, NMSA 1978, because the intoxication was "a contributing factor to the accident." The Employer appealed, arguing that the judge misinterpreted the Act and that Worker "willfully" injured himself when he climbed on top of the truck while intoxicated. While acknowledging considerable statutory ambiguity, the Court of Appeals found the judge's ruling to be consistent with precedent and the presumed legislative intent of the Act. Citing the stringent standard for proving "willfulness" established in *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148, the appellate court found no reason to suppose that Worker willfully caused his own injury. The Court also concluded, however, that Employer was entitled to reduce benefits by 10 percent in accordance with the penalty provision of Section 52-1-12.1, NMSA 1978. The Court of Appeals affirmed the WCA judge's decision.

