JESSIE BARRAZA-CERVANTES, Worker-Appellant,
v.
COMPLETE CONCRETE & EXCAVATING and NEW MEXICO MUTUAL INSURANCE COMPANY, Employer/Insurer-Appellees.

No. A-1-CA-37542

COURT OF APPEALS OF THE STATE OF NEW MEXICO

January 11, 2021

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION Reginald C. Woodard, Workers' Compensation Judge

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MEMORANDUM OPINION

ATTREP, Judge.

{1} Jessie Barraza-Cervantes (Worker) appeals from a Workers' Compensation Judge's (WCJ) compensation order limiting his permanent partial disability (PPD) to scheduled injury benefits under NMSA 1978, Section 52-1-43 (2003). Worker raises two issues on appeal: (1) the WCJ erred in finding that Worker failed to establish a separate and distinct nonscheduled injury to his nervous system, which, if established, would have entitled him to greater PPD benefits under NMSA 1978, Section 52-1-42 (1990,

amended 2015); and (2) the WCJ erred by denying Worker's request to call the insurance adjuster as a witness at trial. We affirm.

BACKGROUND

{2} Because this is a memorandum opinion and the parties are familiar with the facts of this case, we set forth only those facts that are necessary for our resolution of this appeal. Worker injured his left ankle in 2014 while working as a laborer for Complete Concrete & Excavating.[1] Several months later, Victoria Matt, MD, performed surgery on Worker's ankle. At a follow-up appointment in April 2015, Worker told Dr. Matt that he thought he might have complex regional pain syndrome (CRPS). Dr. Matt, however, did not diagnose Worker with CRPS; instead, she placed Worker at maximum medical improvement (MMI) for his injury and referred him to Christopher Patton, DO, for an impairment rating. Dr. Patton determined that Worker showed no signs of CRPS and gave an impairment rating based on the injury to Worker's left ankle and ongoing pain.

{3} Worker filed a complaint with the Workers' Compensation Administration (WCA), seeking, in relevant part, PPD benefits based on a diagnosis of CRPS. The parties subsequently stipulated to Worker receiving an independent medical examination (IME). The two medical professionals who performed the IME, Kathy Head, JD, MD, and Irwin Isaacs, MD, did not diagnose Worker with CRPS. Instead, the IME panel diagnosed Worker with "left ankle sprain status post[-]surgical intervention and ongoing left ankle pain." Given Worker's ongoing pain, the panel determined that Worker had not reached MMI and, therefore, could not offer an impairment rating. The IME panel recommended

that Worker see John Panek, DPM, for pain management and treatment options.

{4} Worker subsequently changed his authorized health care provider to Miguel Pupiales, MD, who referred Worker to Dr. Panek. Dr. Panek and Dr. Pupiales treated Worker concurrently for a period of time. Dr. Pupiales initially diagnosed Worker with left ankle neuropathy; he did not diagnose Worker with CRPS, although he noted that Worker showed some signs of CRPS. Over the next several months, Worker received a series of steroid injections from Dr. Panek. On Worker's last visit with Dr. Panek, Dr. Panek noted he did "not see the typical symptoms related to CRPS." Worker continued to receive care from Dr. Pupiales, and approximately one month later, Dr. Pupiales diagnosed Worker with CRPS. Worker later reported that his pain was beginning to spread, and Dr. Pupiales referred Worker to Dr. Michael Malizzo for consideration of a spinal cord stimulator trial and a second diagnosis of CRPS. Worker never visited Dr. Malizzo, however, because Employer/Insurer's insurance adjuster, Ms. Andrea Kubler, did not approve the referral.

{5} Employer/Insurer challenged Dr. Pupiales's diagnosis of CRPS, filing its own complaints with the WCA. The parties agreed to depose Dr. Pupiales and Dr. Panek and submit the depositions to the IME panel for a second IME. After reviewing the depositions of Dr. Pupiales and Dr. Panek and examining Worker themselves, Dr. Head

and Dr. Isaacs concluded in their second IME report that Worker "does not have the diagnosis of [CRPS]." Instead, the IME panel diagnosed Worker with chronic left ankle pain, left ankle neuropathic pain, and left ankle nociceptive pain. The panel also placed Worker at MMI as of his final appointment with Dr. Panek.

{6} The IME panel determined that it could rate Worker's impairment in one of two ways using the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition (Guides). First, by using Chapter 3 of the Guides pertaining to pain-related impairment, Worker could be assigned a one percent whole person impairment rating. Second, by using Chapter 16 of the Guides pertaining to the lower extremities, Worker could be assigned a five percent lower extremity impairment rating. The IME panel opined, based on its experience and training, that the latter method was "the most appropriate methodology to rate" Worker's impairment.

{7} The parties—disputing, among other things, whether Worker suffered from a separate and distinct impairment to a nonscheduled body member—proceeded to trial in July 2018. Worker subpoenaed Ms. Kubler to testify at trial in an attempt to discover why she did not approve Dr. Pupiales's referral to Dr. Malizzo and Worker's additional request for a follow-up visit with Dr. Patton. Upon motion by Employer/Insurer, the WCJ quashed the subpoena. At trial, the WCJ reviewed the medical records and depositions of the treating and IME doctors and heard testimony from Worker. The WCJ found that Worker did not suffer from CRPS and that his nerve-related pain was not separate from his ankle injury. The WCJ thus limited Worker's PPD benefits to 115 weeks following MMI as an injury to a scheduled body member, i.e., Worker's left ankle, under Section 52-1-43(32). This appeal followed.

DISCUSSION

{8} Worker first argues that the WCJ erred in determining Worker did not suffer from a separate and distinct injury to his nervous system. On this basis, Worker contends he is entitled to PPD benefits for a nonscheduled injury under Section 52-1-42, not the scheduled injury benefits the WCJ awarded him under Section 52-1-43. In addition, Worker argues that the WCJ erred in refusing to allow him to call Ms. Kubler as a witness at trial.

I. Permanent Partial Disability Benefits

{9} To be entitled to PPD benefits under Section 52-1-42, Worker had the burden of showing he "suffered a separate and distinct impairment to a

nonscheduled body part." *Jurado v. Levi Strauss & Co.*, 1995-NMCA-129, ¶ 11, 120 N.M. 801, 907 P.2d 205. The WCJ found that Worker did not "suffer[] any job[-]related injuries . . . other than injury to his left ankle." Given the WCJ's determination that Worker's injury fell within Section 52-1-43(A)(32), the WCJ limited Worker's recovery to scheduled injury benefits. *See Torres v. Plastech Corp.*, 1997-NMSC-053, ¶ 23, 124 N.M. 197, 947 P.2d 154 ("A worker will receive scheduled injury benefits if he or she suffers from a physical impairment which creates neither a total disability nor a separate and distinct injury to a non-scheduled

member."); *see also Hise Constr. v. Candelaria*, 1982-NMSC-109, ¶ 11, 98 N.M. 759, 652 P.2d 1210 ("[T]he only partial disability benefits available are those in Section 52-1-43 if the injury is solely to a scheduled member."). Worker argues on appeal that the WCJ erred by not finding he also suffered either from CRPS or neuropathic pain, which, Worker contends, involves a separate and distinct injury to his sympathetic nervous system or peripheral nervous system, respectively. Because the nervous system is not a scheduled body member under Section 52-1-43, Worker asserts the WCJ should have awarded him PPD benefits for a longer period under Section 52-1-42. *See Jurado*, 1995-NMCA-129, ¶ 11 ("For [a w]orker to receive permanent partial disability benefits under Section 52-1-42, rather than scheduled injury benefits under Section 52-1-43, [the w]orker must show that (1) [he] is totally disabled or (2) [he] has suffered a separate and distinct impairment to a nonscheduled body part."). Employer/Insurer responds that substantial evidence supports the WCJ's finding that Worker's injury was limited to his left ankle and that Worker is inappropriately seeking to have this Court reweigh the evidence and substitute our judgment for that of the WCJ. We agree with Employer/Insurer.

{10} "We review workers' compensation orders using the whole record standard of review." *Leonard v. Payday Pro.*, 2007-NMCA-128, ¶ 10, 142 N.M. 605, 168 P.3d 177. Under this standard, we "canvass . . . all the evidence bearing on a finding or decision, favorable and unfavorable, in order to determine if there is substantial evidence to support the result." *Id.* (internal quotation marks and citation omitted). We review the evidence in the light most favorable to the WCJ's decision, but do not disregard contrary evidence. *Ortiz v. Overland Express*, 2010-NMSC-021, ¶ 24, 148 N.M. 405, 237 P.3d 707. "Substantial evidence is evidence that demonstrates the reasonableness of [the WCJ's] decision, and we neither reweigh the evidence nor replace the fact finder's conclusions with our own." *Lewis v. Am. Gen. Media*, 2015-NMCA-090, ¶ 17, 355 P.3d 850 (internal quotation marks and citation omitted). "Where the testimony is conflicting, the issue on appeal is not whether there is evidence to support a contrary result, but rather whether the evidence supports the findings of the trier of fact." *Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, ¶ 13, 137 N.M. 497, 113 P.3d 320 (internal quotation marks and citation omitted).

{11} In support of his contention that he established a separate and distinct injury to his nervous system, Worker relies principally on three pieces of evidence: (1) Dr. Pupiales's diagnosis of CRPS; (2) the IME panel's diagnosis of neuropathic pain; and (3) the IME panel's one percent whole person impairment rating. Reviewing each in turn, we hold the WCJ's finding that Worker's injury was limited to his left ankle is supported by substantial evidence.

A. The CRPS Diagnosis

{12} Worker admits that Dr. Pupiales was the only medical professional to diagnose Worker with CRPS. This does not matter, Worker contends, because "nothing in the Workers' Compensation Act requires more than one health care provider to confirm a diagnosis." True or not, the issue is not whether the record could have supported a

determination by the WCJ that Worker suffered from CRPS; instead, it is whether there is substantial evidence in the record supporting the WCJ's finding that Worker did not suffer from CRPS. *See id*. Such evidence is clear from the record; the IME panel specifically determined that Worker "does not have the diagnosis of [CRPS]." Where, as here, "a conflict arises in the proof, with one or more experts expressing an opinion one way, and others expressing a diametrically contrary opinion, the [WCJ] must resolve the disagreement and determine what the true facts are." *Molinar v. Larry Reetz Constr., Ltd*., 2018-NMCA-011, ¶ 30, 409 P.3d 956 (internal quotation marks and citation omitted). And while the WCJ must have a rational basis for choosing one expert opinion over the other, *see id*., both Dr. Head and Dr. Isaacs gave fully reasoned explanations in the second IME report and in their depositions why they ruled out CRPS as a diagnosis for Worker. Substantial evidence supports the WCJ's finding that Worker did not suffer from CRPS.

B. The Neuropathic Pain Diagnosis

{13} Regarding the IME panel's diagnosis of neuropathic pain, Worker relies on portions of Dr. Head's and Dr. Isaacs' testimony to advance his argument that he suffered injury to his peripheral nervous system, a nonscheduled body member. Dr. Head testified that (1) Worker's neuropathic pain was caused by damage to "the tiny nerve fibers that were cut [during Worker's ankle surgery] and remain irritated" and (2) Worker's "peripheral nervous system . . . is not functioning normally, meaning the peripheral nerves as they're coming into the foot that were cut into when the skin was cut into." Similarly, Dr. Isaacs testified that part of Worker's peripheral nervous system was "causing the continued symptoms of constant burning and numbness." From this, Worker argues he "established a separate and distinct impairment for the neuropathic pain injury in addition to the ankle impairment."

{14} Worker, however, largely ignores other portions of the IME doctors' testimony undermining his theory and supporting the WCJ's finding that he did not suffer a separate and distinct injury to his peripheral nervous system.[2] For instance, Dr. Head testified in her deposition that the only diagnosis she made pertained to Worker's left ankle. Although Dr. Head testified that some "fine peripheral nerves" around Worker's surgical site may have been damaged from the surgery, she affirmed that this damage was limited to Worker's left ankle and did not cause any dysfunction to other parts of Worker's nervous system. Dr. Head also testified that her use of the term "neuropathic pain" should not be interpreted as her making any diagnosis to a body part other than Worker's left ankle. Dr. Isaacs likewise testified that he did not diagnose Worker with any injury or impairment to any body part other than Worker's left ankle. Similar to Dr. Head, Dr. Isaacs testified that although "[t]iny nerves may have be[en] affected" around the surgical scar, he saw no "evidence of permanent injury to [Worker's] nervous

system[.]" By using the term "neuropathic pain," Dr. Isaacs simply meant to convey that Worker "was numb where he had his surgery."

{15} Considering the IME doctors' testimony about their limited use of the term "neuropathic pain" as it relates to Worker's injuries and their lack of intent to diagnose any injury or impairment beyond that to Worker's left ankle, substantial evidence supports the WCJ's rejection of a neuropathic pain injury separate and distinct from Worker's ankle injury. To the extent there are conflicts within Dr. Head's and Dr. Isaacs' deposition testimony, as Worker contends, resolving such conflicts is quintessentially a role of the WCJ, not this Court, and we will not second-guess the WCJ's rational choice. *See Motes v. Curry Cnty. Adult Det. Ctr*., 2019-NMCA-022, ¶ 14, 458 P.3d 557 ("[W]e defer to the WCJ's resolution of conflicts in the evidence.").

C. The One Percent Whole Person Impairment Rating

{16} Worker posits that because "he has already been assigned a separate and distinct whole body impairment rating of [one percent] for the neuropathic pain injury," he is entitled to PPD benefits under Section 52-1-42 rather than scheduled injury benefits under Section 52-1-43. According to Worker, it is "undisputed" that the IME panel determined that Worker qualified for a one percent whole person impairment rating for neuropathic pain—a rating that is "separate and distinct from the lower extremity impairment rating of [five percent] for the original ankle injury." In other words, Worker contends that, because the IME panel determined his "neuropathic pain injury could be rated *separately* from the underlying ankle sprain . . . Worker is entitled to PPD benefits rather than scheduled injury benefits."

{17} Worker's argument, however, misrepresents the record. The IME panel in its second report offered "two ways to rate [Worker's] impairment[.]" It did not, as Worker contends, set forth two ratings for different impairments. As Dr. Head explained when being questioned by Worker's counsel, the one percent whole person impairment rating offered by the panel was *not* a rating for neuropathic pain separate from a rating for the ankle injury. Rather, the whole person impairment rating "was intended for the entirety of the diagnoses" and "include[d] the diagnosis of neuropathic pain, the nociceptive pain, and the chronic ankle sprain." But, as our Supreme Court has held, simply because "an injury to a scheduled member can be converted in some manner to a percentage disability as a whole" does not mean that a worker can avoid scheduled injury benefits. *Hise Constr.*, 1982-NMSC-109, ¶ 16. We thus reject Worker's argument that he is entitled to benefits under Section 52-1-42 on the ground the IME panel set forth an impairment rating for his neuropathic pain separate from an impairment rating for his underlying ankle injury.

{18} Worker making no other argument as to how he satisfied his burden of showing that he "suffered a separate and distinct impairment to a nonscheduled body part[,]" *Jurado*, 1995-NMCA-129, ¶ 11, and our review of the record showing ample support for the WCJ's finding that Worker's injury was limited to his left ankle, we hold this finding is supported by substantial evidence.

Page 7

II. Exclusion of Witness at Trial

{19} Worker additionally argues the WCJ erred in quashing his trial subpoena directed at Ms. Kubler, Employer/Insurer's insurance adjuster. We review the exclusion of evidence by the WCJ for an abuse of discretion. *See Lewis v. Albuquerque Pub. Schs.*, 2019-NMSC-022, ¶ 21, 453 P.3d 445. We may disturb the WCJ's ruling only if it is "clearly against the logic and effect of the facts and circumstances of the case" and can be characterized as "clearly untenable or not justified by reason." *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 36, 127 N.M. 47, 976 P.2d 999 (internal quotation marks and citations omitted).

{20} Worker proposed to question Ms. Kubler about why she did not approve the referral to Dr. Malizzo regarding a diagnosis of CRPS and denied Worker's request for a return visit to Dr. Patton. In his order quashing the subpoena, the WCJ found, among other things, that Worker did not timely disclose his intent to call Ms. Kubler and Worker did not show how Ms. Kubler's testimony was relevant to any issue at trial. As for the relevancy ruling, the WCJ explained that Ms. Kubler's testimony would be relevant only to a claim of bad faith—a claim Worker did not assert. On appeal, Worker challenges both of the WCJ's bases for quashing the subpoena, and Employer/Insurer makes various arguments for affirmance, including that this issue is moot. Because we agree with the WCJ's relevancy ruling, we need not address the other matters raised by the parties.

{21} Worker argues on appeal that Ms. Kubler's testimony was relevant because questioning could reveal an effort by Employer/Insurer to prevent Worker from receiving a second CRPS diagnosis or, alternatively, an impairment rating by Dr.

Pupiales for a neuropathic pain injury. Worker asserts that "the actions or inactions of [Ms. Kubler] affected [his] ability to prove those injuries to some extent." But any testimony from Ms. Kubler regarding her motivations in denying Worker's requests would have no relevance to Worker's medical diagnosis. Simply put, even if Ms. Kubler testified that she acted with a "sinister motive" in refusing Worker's requests, as Worker suggests, such evidence would not have made it more or less probable that Worker *actually* suffered an injury to a nonscheduled body member. *Cf.* Rule 11-401 NMRA ("Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence, and . . . the fact is of consequence in determining the action."). Accordingly, we cannot say the WCJ abused his discretion in quashing the subpoena and excluding Ms. Kubler's testimony as irrelevant.[3]

Page 8

CONCLUSION

{22} For the foregoing reasons, we affirm.

{23} IT IS SO ORDERED.

JENNIFER L. ATTREP, **Judge**

WE CONCUR:

KRISTINA BOGARDUS, **Judge**

ZACHARY A. IVES, **Judge**

Footnotes:

[1.] New Mexico Mutual Insurance Company acted as Complete Concrete & Excavating's insurer, and we refer collectively to these entities as "Employer/Insurer."

[2.] We remind counsel that Rule 12-318(A)(3) NMRA requires the appellant in his brief in chief to set forth *all* facts, favorable and unfavorable, bearing on a proposition so "that we are fully apprised of the fact-finder's view of the facts and its disposition of the issues[.]" *McDonald v. Zimmer Inc.*, 2020-NMCA-020, ¶ 32, 461 P.3d 930. Those appellants that fail to do so risk a determination by this Court that the lower tribunal's findings are binding on appeal. *See id.*

[3.] We do not address Worker's claim that Ms. Kubler's testimony would have been relevant in determining whether Worker was provided reasonable and necessary medical treatment. This argument was not advanced in Worker's brief in chief, nor has he indicated whether it was presented to the WCJ below. *See Mitchell-Carr v. McLendon*, 1999-NMSC-025, ¶ 29, 127 N.M. 282, 980 P.2d 65 (noting that "the general rule is that we do not address issues raised for the first time in a reply brief"); *Crutchfield v. N.M. Dep't of Tax'n & Revenue*, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273 ("[O]n appeal, the party must specifically point out where, in the record, the party invoked the court's ruling on the issue. Absent that citation to the record or any obvious preservation, we will not consider the issue.").

LISA CANAS, Worker-Appellant,
v.
DRIVELINE HOLDINGS INC. and TECHNOLOGY INSURANCE COMPANY, Employer/Insurer-Appellees.

No. A-1-CA-37851

COURT OF APPEALS OF THE STATE OF NEW MEXICO

January 21, 2021

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION Anthony "Tony" Couture, Workers' Compensation Judge

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MEMORANDUM OPINION

VARGAS, Judge.

{1} Worker Lisa Canas appeals from the Workers' Compensation Judge's (WCJ) order granting partial compensation, while denying other benefits, against Employer Driveline Holdings, Inc. Concluding that there is substantial evidence to support the WCJ's findings and that there was no error, we affirm.

BACKGROUND

Page 2

{2} Worker was an employee of Employer on May 26, 2016, when she fell at work and landed on her right knee (the May 2016 accident). Following the May 2016 accident, Worker sought medical treatment for injuries to her right knee, lower back, groin, and hip, and counseling for her mental injuries from various health-care providers. Worker filed for workers' compensation benefits in October 2017, seeking temporary total disability benefits and compensation for the loss of use of her knee, lower back, groin, and hip, primary and secondary medical benefits for her mental injuries, and reimbursement for related medical bills. The parties stipulated that the May 2016 accident arose out of and was reasonably incident to Worker's employment and that Worker's injury to her right knee was caused by the accident. A hearing was held on October 26, 2018, and the WCJ entered a compensation order in December 2018, granting Worker temporary total disability benefits for any period she was unable to work from May 26, 2016, to August 28, 2018, scheduled injury benefits for her right knee at a rate of twenty percent of her pre-injury salary for 150 weeks, and continued treatment for her secondary mental health injuries, but denied medical benefits for past and future treatment that Worker received and will receive for her claimed lower back, hip, and groin injuries, and for those medical services incurred by Worker from unauthorized health-care providers. This appeal follows.

DISCUSSION

{3} On appeal, Worker raises the following arguments: (1) the WCJ erred in determining that Worker's injury resulted in only a twenty percent loss of use to her knee; (2) the WCJ erred in finding that Worker's mental condition was at maximum medical improvement (MMI) and only awarding temporary benefits; (3) the WCJ erred in finding that Worker failed to prove that the claimed injury to her back, groin, and hip were

caused by the accident; (4) the WCJ erred when it denied Worker's request for an MRI with contrast, as it was reasonable and necessary to Worker's medical care; (5) the WCJ's denial of reimbursement for medical bills incurred by her chosen medical providers for Worker's past secondary mental injures was in error.

I. Standard of Review

{4} "We review workers' compensation orders using the whole record standard of review." *Leonard v. Payday Pro.*, 2007-NMCA-128, ¶ 10, 142 N.M. 605, 168 P.3d 177. "We will affirm the [Workers' Compensation Administration's (WCA)] decision if, after taking the entire record into consideration, there is evidence for a reasonable mind to accept as adequate to support the conclusion reached." *Id.* (internal quotation marks and citation omitted). "The [WCA's] findings will not be disturbed so long as they are supported by substantial evidence on the record as a whole." *Tallman v. ABF* (*Arkansas Best Freight*), 1988-NMCA-091, ¶ 15, 108 N.M. 124, 767 P.2d 363. "Whole record review is not an excuse for an appellate court to reweigh the evidence and replace the fact finder's conclusions with its own." *Herman v. Miners' Hosp.*, 1991-NMSC-021, ¶ 10, 111 N.M. 550, 807 P.2d 734.

Page 3

{5} To the extent we are asked to interpret the Workers' Compensation Act (the Act), "[w]e review the interpretation of a statute de novo" and "consider the Act in its entirety, constructing each section in connection with every other section." *Molinar v. Larry Reetz Constr., Ltd.*, 2018-NMCA-011, ¶ 19, 409 P.3d 956 (internal quotation marks and citation omitted).

II. Worker's Right Knee Injury

{6} Worker contends she is entitled to reversal of the WCJ's compensation order regarding her claim for loss of use of her right knee on two separate grounds. First, Worker contends that the WCJ misapplied the law and this Court should remand with "guidance, some standards, some factors, against which to measure [Worker's] claim" for loss of use. Next, Worker contends the WCJ erred in finding that Worker suffered a twenty percent loss of use of her knee, ignoring the evidence Worker offered that showed a loss of use closer to seventy-five percent.

{7} NMSA 1978, Section 52-1-43 (2003) provides for the compensation of workers who suffer accidental injuries to specific body members. Section 52-1-43(B) provides:

> For a partial loss of use of one of the body members or physical functions listed in Subsection A of this section, the worker shall receive compensation computed on the basis of the degree of such partial loss of use, payable for the number of weeks applicable to total loss or loss of use of that body member or physical function.

Thus, the WCJ must determine the "basis of the degree" of Worker's loss of use in order to compute the compensation to which Worker is entitled. *See Roybal v. Chavez Concrete & Excavation Contractors, Inc.*, 1985-NMCA-020, ¶ 10, 102 N.M. 428, 696 P.2d 1021 (requiring the WCJ to enter a "specific percentage of loss of use as the degree of such partial use" as the term is used in Section 52-1-43(B) (internal quotation marks and citation omitted)).

{8} We first address Worker's argument that the WCJ misapplied the law when it calculated Worker's loss of use of her right knee at twenty percent. Worker argues that substantial evidence does not exist to support the WCJ's decision, and asks us to develop standards and factors against which the WCJ should measure her claim for "loss of use," as the term is used in Section 52-1-43(B). Indeed, this Court has previously considered whether specific standards are required by Section 52-1-43(B) and has declined to impose them. *See Lucero v. Smith's Food & Drug Ctrs., Inc.*, 1994-NMCA-076, ¶ 11, 118 N.M. 35, 878 P.2d 353 ("The absence of a requirement of reference to the AMA guides has not historically prevented

determinations of percentage loss of use. . . . [W]e hold that evidence of that specific character is not required under Section 52-1-43 as that section currently exists."). In this instance, beyond her claim that her percentage of loss of use should have been greater, Worker fails to explain how the WCJ misapplied the law and why we should revisit our holding in *Lucero* that the lack of medical guidelines does not prevent a WCJ from determining

Page 4

the percentage of loss of use. *See id.*; *see also State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (explaining that appellate courts are under no obligation to review unclear or undeveloped arguments). Further complicating our review, Worker has not explained what considerations we should take into account in developing the standards and factors she requests and fails to explain how they should be applied. Absent any authority or a clearly developed argument to depart from precedent, we decline to do so. *See Guerra*, 2012-NMSC-014, ¶ 21.

{9} We now turn to Worker's argument that the WCJ's finding that Worker suffered a twenty percent loss of use to her knee was not supported by substantial evidence. Worker contends that her testimony in her deposition and at trial, the testimony of Dr. Evan Knaus, and the notes from her physical therapist, Mary Beth Plummer, support her contention that she suffered severe limitations on the use of her leg. This evidence on whole record review, she claims, supports a conclusion that her percentage of loss of use of her right knee was seventy-five percent.[1]

{10} Initially, we note that Worker contends that she is no longer able to perform her job and "[t]his reduction in the spectrum of job opportunity is relevant to loss of use." As we consider the available evidence "[i]n evaluating the loss of use, . . . it is not necessary to consider the occupation of the worker and how the loss of the specific member of the body may affect his or her ability to perform the duties of his or her job." *Torres v. Plastech Corp.*, 1997-NMSC-053, ¶ 24, 124 N.M. 197, 947 P.2d 154 (internal quotation marks and citation omitted). Therefore, for purposes of our review, we do not consider Worker's testimony that she is not able to perform her job duties, except to the extent that the testimony explains the limitations in her ability to use her right knee. Further, we must consider the WCJ's finding in light of the whole record, not merely evidence offered by Worker, and we hold that there is substantial evidence to support the WCJ's finding. *See Leonard*, 2007-NMCA-128, ¶ 10 ("Whole record review contemplates a canvass by the reviewing court of all the evidence bearing on a finding or decision, favorable and unfavorable, in order to determine if there is substantial evidence to support the result. We may not substitute our judgment for that of the administrative agency[.]" (alterations, internal quotation marks, and citations omitted)).

{11} Prior to the hearing, the parties made various stipulations in a pre-trial order, including that "the right knee injury that . . . Worker suffered in her May 26, 2016 accident reached [MMI] on March 16, 2017[,]" that the injury should be "assigned a two percent (2%) permanent impairment to the right lower extremity," and that Worker was

Page 5

paid loss of use benefits at the two percent rate from March 17, 2017, to the present date.

{12} The evidence presented at trial was that immediately following the May 2016 accident, Worker sought medical treatment from Physician's Assistant Pamela Burks, at Presbyterian Hospital, who examined Worker in June 2016, noting that there was "extensive swelling over the joint with accompanying ecchymosis" but that "there [was] no erythema or signs of infection." Following an MRI of the knee, Ms. Burks again noted that Worker had a sizable subcutaneous hematoma in the anterior and medial aspects of the knee, but that there were no new fractures or meniscal or ligamentous injuries, with an essentially normal MRI of the right knee. Worker continued to see Ms. Burks through

August 2017, with continued complaints of pain in her right knee and loss of strength, but Ms. Burks did not note any major injuries related to Worker's right knee.

{13} Additionally, Dr. Knaus, who conducted an independent medical examination (IME) of Worker in July 2017 to establish an impairment rating for Worker, testified in his deposition that Worker was diagnosed with a "right knee contusion with resolved hematoma" but that there were no other signs of serious injury like internal tendon problems, articular surface problems, meniscal problems, fractures, other issues requiring knee surgery, deep vein thrombosis, or blood clotting.

{14} During his physical examination of Worker, Dr. Knaus observed that Worker was "[c]omfortable, [suffering] no apparent distress, pleasant and cooperative" and "[d]emonstrate[d] no difficulty with transitioning from sitting to standing, supine to sitting, or on/off the examination table, which she performed independently." Worker, however, complained of a pain rating of seven out of ten during the examination. Dr. Knaus noted that Worker's lower extremity motor examination was normal, as was her flexion contracture. Her right knee, he reported, showed some atrophy.

{15} Dr. Knaus also reviewed Worker's medical history, noting that her X-ray following the injury revealed "[t]here is prominent soft tissue swelling in the anterior and medial knee region" but "[t]here is no evidence of acute fracture or dislocation. No bony erosions or sclerotic lesions are seen. Joint spaces are preserved. No evidence of knee joint effusion is seen." Dr. Knaus also noted that Worker received physical therapy from June 2016 through December 2016, when she was discharged from treatment, with improvement in her pain levels, a range of motion of 0 to 135 degrees, and a 5/5 strength rating. Dr. Knaus testified that an MRI conducted in February 2017 identified a bone marrow anomaly, but that it was an underlying hematological problem that was unexplained by the May 2016 accident.

{16} Based on his physical examination of Worker and a review of her medical records, Dr. Knaus concluded that her diagnosis supported the two percent impairment rating and Worker reached MMI for her right knee on March 16, 2017.

{17} Dr. Christopher Patton also conducted an IME of Worker in September 2018. Dr. Patton testified that, although Worker complained of continued pains to her right knee,

his examination and MRI did not show that "there was any specific pathology to the posterior cruciate ligament," which would be present if the ligament were damaged. Additionally, Dr. Patton stated that he did not see any ongoing swelling of the knee joint, problems with the meniscus or ligaments, or fractures. The hematoma caused by Worker's fall had resolved, though Worker complained of ongoing symptoms. Worker advised during Dr. Patton's examination that she was able to walk on a treadmill and ride an exercise bike. Dr. Patton noted that Worker's physical therapy records indicated instances of a gait deficit and some difficulty kneeling. Following his examination of Worker, Dr. Patton did not impose any functional restrictions on Worker's use of her right knee, though he conceded that Worker's activities may be limited, depending on the amount of pain she was experiencing at any given time. Dr. Patton stated explicitly that "[t]here are no objective findings that I have that require restrictions for her right knee."

{18} In her deposition and at the hearing, Worker testified that the injury to her right knee limited her to sedentary duty, requiring her to find another job. She explained that she continued to experience pain and instability in her right knee and did not have full use of her leg, with limitations on her ability to bend and kneel. Worker testified that she suffered lifestyle changes as a result of her injury, including no longer being able to walk to her mother's home, go hiking, or go to the gym in the same way she

did before the accident. Worker also testified that she is still able to walk on a treadmill and ride a bike, attend to her household chores, walk her and her mother's dogs, and care for her mother. Worker acknowledged that any restriction to her lifestyle was not ordered by a health-care provider.

{19} Following the hearing, the WCJ found that "[b]ased upon the totality of the evidence, including the medical evidence, Worker's testimony, and the [c]ourt's observations of . . . Worker, Worker suffers a [twenty percent] loss of use for her right knee injury."

{20} To be sure, the evidence presented to the WCJ indicates that Worker continues to suffer from pain that limits the use of her knee. Notwithstanding the pain, Worker continues to be able to perform her day-to-day activities, including walking on a treadmill, riding an exercise bike, attending to her household chores and taking care of her ailing mother. Further, as the testimony of both Dr. Knaus and Dr. Patton makes clear, Worker does not suffer from ongoing swelling of the knee joint, or structural damage to her knee. Taking into account Worker's testimony, as well as the testimony of the various health-care providers and Worker's medical records, and keeping in mind our whole record standard of review, we cannot conclude that the WCJ's finding that Worker suffered a twenty percent loss of use as a result of her injury is in error. *See Herman*, 1991-NMSC-021, ¶ 10.

III. Worker's Secondary Mental Injuries

{21} Next, Worker argues that substantial evidence does not support the WCJ's findings that Worker merely suffered a temporary exacerbation of her mental condition

and that Worker reached MMI for her secondary mental injuries. Worker contends that the evidence supports a finding of permanent secondary mental health benefits and disputes that she reached MMI as to her mental injuries.

{22} At trial, the parties presented evidence regarding Worker's psychological condition in the form of the deposition testimony and report of Dr. Rex Swanda, a board certified and licensed neuropsychologist. Dr. Swanda performed an independent neuropsychological evaluation of Worker and submitted a report on his evaluation.

{23} Dr. Swanda testified that, as part of his examination, he reviewed Worker's prior mental health history, which included past complaints of anxiety and an October 2015 diagnosis of adjustment disorder with mixed anxiety and depressed mood, as well as a "past history of depression when she was living in California in about [the] year 2000[.]" Dr. Swanda noted that Worker first sought treatment for psychological symptoms related to the May 2016 accident in the spring of 2017. Ten months later, Worker was diagnosed with adjustment disorder with depressed mood secondary to social and medical issues in March 2018, prescribed twenty milligrams of Prozac, and provided with a recommendation that she participate in counseling every three weeks to cope with stress. In the psychotherapy sessions leading up to her March 2018 diagnosis, Worker complained about multiple stressors, including her mother's behavior and progressing dementia, guilty feelings about her ex-husband's suicide, her knee injury and having to work with a lawyer regarding workers' compensation issues, issues related to her son's drinking and behavior, anger with her brother for his failure to help with their mother, and problems with her relationship with her boyfriend.

{24} At the conclusion of his examination, Dr. Swanda opined that to a reasonable degree of medical probability, "the mood symptoms associated with the diagnosis of [a]djustment [d]isorder with mixed anxiety and depressed mood are causally related to the 5/26/2016 work injury." Dr. Swanda went on to conclude that "these mood symptoms are only one of at least four major stressors that have been a focus of the counseling sessions." He explained that, in his opinion, "it is more likely than not that the chronic pain and discomfort associated with the

5/26/2016 work injury did result in an 'exacerbation' of pre-existing mood problems/condition." Further, Worker's "present mood disorder is not a permanent condition but is a temporary condition that is due to multiple stressors that include the chronic pain and discomfort that is associated with the 5/26/2016 work injury." Dr. Swanda concluded that Worker reached MMI for her mental injures on August 28, 2018, and her mental injuries could be reasonably and sufficiently treated with medication and twelve additional counseling sessions.

{25} Based on the evidence presented, the WCJ specifically found that "Worker suffers from an exacerbation of her preexisting mental disorder" and that "Worker reached psychological MMI on August 28, 2018." Worker argues that the WCJ's findings are not supported by substantial evidence, arguing that Dr. Swanda's testimony in fact supports "inclusion of her mental injury in the assessment of her physical injury" and disputes that Worker was at MMI. We are not persuaded. Dr. Swanda gave uncontroverted testimony that the May 2016 accident temporarily exacerbated Worker's

preexisting mental health conditions and that she reached MMI as to those mental injuries on August 28, 2018. Worker does not direct this Court to any evidence that would contradict Dr. Swanda's report or provide evidence that Worker suffered a permanent mental injury. Therefore, we hold that there is substantial evidence to support the WCJ's finding that Worker's underlying mental injuries were only temporarily exacerbated by the May 2016 accident and that she reached MMI on August 28, 2018. Because of this holding, we need not address Worker's claim of permanent indemnity benefits for her mental injuries.

{26} Worker also argues that it was an abuse of discretion for the WCJ to not award an impairment rating for her mental injuries. Worker failed to point us to the location in the record where this issue was raised below, and it was not addressed in the WCJ's compensation order. Our review of the record disclosed that the pretrial order listed among the contested issues, the issue of "[w]hether . . . Worker suffered a permanent impairment to a non-scheduled body member . . . and, if so, whether . . . Worker is entitled to any permanent partial disability benefits as a result thereof[.]" However, we found nothing in Worker's proposed findings of fact and conclusions of law or in the argument at trial requesting such relief. *See Crownover v. Nat'l Farmers Union Prop. & Cas. Co.*, 1983-NMSC-099, ¶ 12, 100 N.M 568, 673 P.2d 1301 (holding that absent a requested finding of fact and conclusion of law on a matter at issue, the issue is waived and not preserved for appeal). We therefore decline to address the matter. *See State v. Leon*, 2013-NMCA-011, ¶ 33, 292 P.3d 493 ("We generally do not consider issues on appeal that are not preserved below." (internal quotation marks and citation omitted)); Rule 12-321(A) NMRA ("To preserve an issue for review it must appear that a ruling or decision by the trial court was fairly invoked.").

IV. Worker's Claims for Lower Back, Hip, and Groin Injuries

{27} Worker next argues that the WCJ's finding that Worker failed to prove that her claimed low back and right hip/groin problems were causally related to the May 2016 accident is not supported by substantial evidence. Worker contends that the evidence supports her claims that her injuries related to her lower back, hip, and groin were caused by the May 2016 accident, arguing that the WCJ improperly disregarded Dr. Patton's conclusions in favor of Dr. Knaus's conclusion.

{28} Dr. Knaus testified that, as part of his examination of Worker, he had examined Worker's low back, which was entirely normal except for some tenderness, and concluded that there was no significant injury to the lower back area. He also noted that in reviewing Worker's medical records, Worker did not complain of any lower back pain until November 2016 and that he could not medically establish a causal relationship

between the lower back pain and the May 2016 accident. Additionally, Dr. Knaus testified that he examined Worker's right hip and found that Worker did not exhibit any hip or groin pain and X-rays of Worker's lower back and hips appeared relatively normally. He specifically concluded that, based upon the medical records and his examination of Worker, he could not conclude the lower back, hip, and groin injuries were causally related to the May 2016 accident.

Page 9

{29} Likewise, Dr. Patton testified that there was no documentation of lower back complaints until approximately November 2016 and no complaints regarding her right hip until December 2016. In his report, Dr. Patton concluded that, in his professional opinion, Worker's "low back and right hip symptoms would be considered causally related to the May 26, 2016, date of injury in that the mechanism of injury could probably cause the symptoms, as well as her altered gait from the right knee. At his deposition, however, Dr. Patton testified that based purely on a temporal timeline from when the accident occurred on May 26, 2016, to when Worker reported her lower back and hip injuries, he could not state to a reasonable degree of medical probability that the lower back and hip injuries were causally related to the May 2016 accident.

{30} The WCJ found that "[t]he opinions of Dr. Knaus related to causation of . . . Worker's groin/hip/back injury are persuasive, credible, and adopted by [the WCJ]" but that he "did not find the testimony of Dr. Patton in relation to [the] causation of the groin/hip/back injury to be persuasive[,]" concluding that Worker did not prove her lower back and right hip injuries were caused by the May 2016 accident. The WCJ is free to "reject expert opinion evidence in whole or in part," *Chapman v. Jesco, Inc.*, 1982-NMCA-144, ¶ 3, 98 N.M. 707, 652 P.2d 257, and "weigh the testimony, determine the credibility of the witnesses, reconcile inconsistent statements of the witnesses, and determine where the truth lies." *Bower v. W. Fleet Maint.*, 1986-NMCA-091, ¶ 23, 104 N.M. 731, 726 P.2d 885. This Court will not reweigh the evidence or second-guess the WCJ. *See Leonard*, 2007-NMCA-128, ¶ 20 ("Although on appeal we take the whole record in account, we do not reweigh the evidence."). Therefore, given the conflict in Dr. Patton's testimony, and that Dr. Knaus offered evidence that a reasonable mind could accept as adequate to support the WCJ's conclusion, we hold that there is substantial evidence to support the WCJ's finding that Worker's lower back, hip, and groin injuries were not causally related to the May 2016 accident. *See id.* ¶ 10.

V. Worker's Claims for MRI With Contrast

{31} Next, Worker contends that it was error for the WCJ to deny her an MRI with contrast of her right knee, which Worker argues was contrary to the evidence as two medical professionals recommended it. Worker requested a finding that she was "entitled to an MRI of her right knee with gadolinium [or contrast] as recommended by Dr. Romanelli[.]" The WCJ denied Worker's claim. Worker argues the WCJ's denial of Worker's request for an MRI with contrast was erroneous, without support, and contrary to NMSA 1978, Section 52-1-49(A) (1990) because it was reasonably necessary. *See id.* (requiring employers to provide injured workers with "reasonable and necessary health care services"). As we explain, we hold that the WCJ's denial of Worker's request for the MRI is supported by substantial evidence.

{32} When Worker sought a second opinion from Dr. Romanelli, he recommended a "repeat MRI with intra-articular gadolinium" to "see the status of the soft tissues today and also to rule out an articular cartilage defect that may have been missed with the initial MRI." Dr. Patton testified that while a second MRI had been done, it was without contrast and it "would have been optimal for [Worker] to have [the MRI] with the contrast

Page 10

as the follow-up" because "the contrast can kind of go under the nooks and crannies of the cartilage looking for any deficits." Contrary to

Worker's characterization, Dr. Patton did not specifically recommend Worker receive the MRI with contrast, nor did he order one himself, though he was authorized to do so. Therefore, we hold that there was substantial evidence for the WCJ to conclude that an MRI with contrast was not medically and reasonably necessary.

VI. Denial of Reimbursement for Mental Health Treatment

{33} Worker argues that the WCJ erred when he denied her reimbursement for mental health treatment she received from Robert Cravens, LPCC and Charlene Broock, MSW, LCSW, and limited medical benefits for her mental health treatments to one year. In this case, we cannot conclude that the WCJ erred when it denied Worker reimbursements for the treatment she received from Mr. Cravens and Ms. Broock as they were not authorized health-care providers.

{34} Section 52-1-49(B) 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." "[A]n injured worker's right to initially select a [health-care provider] occurs only by permission of the employer." *Silva v. Denco Sales Co.*, 2020-NMCA-012, ¶ 23, 456 P.3d 1117. "[U]nder the Act and associated regulations . . . if the employer permits the worker to make the initial [health-care provider] selection, it must provide written notice of its decision allowing the worker to do so." *Id.* (citing Section 52-1-49(B); 11.4.4.12(B)(2)(a) NMAC). "Without written notice from the employer, the worker has been given no right to select the initial [health-care provider], and so the initial [health-care provider] cannot be a selection by the worker." *Id.* The employer is not liable for medical expenses incurred by the worker outside of this procedure as they are unauthorized health-care providers. *See Beckwith v. Cactus Drilling Corp.*, 1972-NMCA-168, ¶ 38, 84 N.M. 565, 505 P.2d 1241 (denying medical benefits for treatment the worker incurred on his own when there was no evidence that the employers offered treatment was unreasonable or inadequate); *see also* 11.4.4.12.G(1) NMAC ("The [e]mployer shall be responsible for all reasonable and necessary medical services provided by an *authorized* [health-care provider] from the date the notice of change is effective." (emphasis added)); 11.4.4.12.G(2) NMAC ("The worker shall be responsible for any medical services rendered by an *unauthorized* [health-care provider]." (emphasis added)).

{35} The WCJ concluded that "Worker sought mental health care outside the chain of authorization" and that Mr. Cravens and Ms. Broock were not authorized health-care providers. The record indicates that Worker did not follow the requisite procedures to obtain authorized treatment from Mr. Cravens and Ms. Broock. Worker testified that she sought out this treatment without requesting prior authorization, noting "with the way the insurance company was going, [I knew] that I had to do this . . . myself." Instead, Worker relies on *Trujillo v. Beaty Electric Co.*, 1978-NMCA-021, ¶ 30, 91 N.M. 533, 577 P.2d 431, in which this Court required employer to pay the worker's medical bills that were incurred by the worker. However, *Trujillo* is distinguishable and not applicable here

because the employer had notice of the worker's injuries but only made a "mere passive willingness" to furnish medical care and thus did not meet their statutory duty under the Act. *Id.* ¶ 18 (internal quotation marks and citation omitted). In this instance, we find nothing in the record, and Worker does not point us to anything, indicating Employer was aware of Worker's mental injuries, triggering its obligation to select a provider. Indeed, Dr. Swanda's review of Worker's medical records performed as part of his independent psychological examination of Worker reveals that the first reference to a mental injury in Worker's medical records was a note that she "was seen on 5/8/2017 by Robert Cravens, LPCC on [a] self-referral due to anxiety and depression that reportedly started with a 6-foot fall onto her knees in 2016." From the record before us, it appears Worker began treatment

with Mr. Cravens and Ms. Broocks five months before she filed her complaint in this action, which is the first indication we find in the record that Worker claimed the May 2016 accident caused her to suffer depression and anxiety. *See Dewitt v. Rent-A-Center Inc.*, 2009-NMSC-032, ¶ 25, 146 N.M. 453, 212 P.3d 341 (holding that the employer did not fail to provide the worker with reasonable and necessary health-care services when the worker had the requisite information to contact the claims adjuster, but did not). In light of Worker's failure to comply with the requirements of Section 52-1-49 and the fact that Mr. Cravens and Ms. Broock were not authorized health-care providers, we find no error on the part of the WCJ in denying Worker's request for reimbursements as to those treatments.

{36} Next, Worker contends that the WCJ erred in adopting Dr. Swanda's recommendation that Worker should only be afforded treatment for her mental injuries for a period of one year. Worker directs this Court to *Graham v. Presbyterian Hospital Center*, 1986-NMCA-064, 104 N.M. 490, 723 P.2d 259, for the proposition that district courts may not restrict future medical benefits. In *Graham*, this Court stated that "[o]nce a compensable injury is found, the [Act] grants, as a substantive right, necessary and reasonable future medical treatment to the injured worker. . . . The [district] court is without authority to limit or restrict in advance future medical benefits once a compensable injury is established." *Id.* ¶ 3 (citation omitted); *see Gearhart v. Eidson Metal Prods.*, 1979-NMCA-019, ¶ 5, 92 N.M. 763, 595 P.2d 401 ("[W]e are of the view that the continuing medical . . . attention for the injury cannot be terminated by the [district] court. The right created by statute is for a period continuing as long as medical . . . attention is reasonably necessary." (internal quotation marks omitted)). *Graham* and *Gearhart* both clarify the requirement of Section 52-1-49(A) that an employer shall provide the worker with reasonable and necessary health-care services, and "continuing as long as medical or related treatment is reasonably necessary."

{37} In this case, the WCJ found that "Worker would benefit from the treatment recommended by the IME panel to help her *maintain* her mental health, and, this treatment is reasonable and necessary care for conditions related to the [May 2016 a]ccident." (Emphasis added.) The WCJ's finding incorporates Dr. Swanda's recommendation that Worker "receive up to [twelve] additional sessions of counseling" either at the continued rate of one session a month, or at longer intervals. We do not interpret the WCJ's finding to be a limitation or restriction on Worker's future mental health care; rather, it was an adoption of Dr. Swanda's recommendation and does not

prevent Worker from seeking reasonable and necessary health-care services as long as reasonably necessary. *See St. Clair v. Cnty. of Grant*, 1990-NMCA-087, ¶¶ 11, 14, 110 N.M. 543, 797 P.2d 993 ("[T]he district court has continuing jurisdiction to reopen a workers' compensation award. . . . Section 52-1-49 authorizes entry of a judgment directing the payment of a worker's reasonable and necessary future medical expenses and invests the [district] court with continuing jurisdiction to enforce such orders."). Therefore, we conclude that the WCJ did not err.

CONCLUSION

{38} For the foregoing reasons, we affirm.

{39} IT IS SO ORDERED.

JULIE J. VARGAS, **Judge**

WE CONCUR:

BRIANA H. ZAMORA, **Judge**

ZACHARY A. IVES, **Judge**

Footnotes:

[1] We note that while Worker briefly refers to the evidence presented at trial, we remind her that she is obligated to provide this Court a detailed explanation of the substance of the evidence she asks us to consider in our whole record review of her substantial evidence claims, including citations to the record. *See* Rule 12-318 (A)(3) NMRA ("A contention that a . . . judgment . . . is not supported by substantial evidence shall be deemed waived unless the summary of proceedings includes the substance of the evidence bearing on the proposition.); *see also State ex rel. Foy v. Vanderbilt Cap. Advisors*, ___-NMCA-___, ¶ 28, ___ P.3d ___ (No. A-1-CA-36925, June 9, 2020) (stating that where an appellant does not properly attack a district court's finding, they are bound by those findings where the letter or spirit of the Rules of Appellate Procedure require that an appellant properly set forth all the evidence bearing upon the findings).

No. A-1-CA-37503
COURT OF APPEALS OF THE STATE OF NEW MEXICO

Taylor v. Waste Mgmt. of N.M.

2021 NMCA 26 · 489 P.3d 994
Decided Apr 6, 2021

No. A-1-CA-37503

04-06-2021

BRYAN K. TAYLOR, Worker-Appellant, v. WASTE MANAGEMENT OF NEW MEXICO, INC. and GALLAGHER BASSETT SERVICES, INC., Employer/Insurer-Appellees.

Gerald A. Hanrahan Albuquerque, NM for Appellant Evie M. Jilek Albuquerque, NM for Appellees

ATTREP, Judge.

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION
Anthony "Tony" Couture, Workers' Compensation Judge Gerald A. Hanrahan Albuquerque, NM for Appellant Evie M. Jilek Albuquerque, NM for Appellees

OPINION

ATTREP, Judge. {1} Bryan Taylor (Worker) appeals from a compensation order entered pursuant to the Workers' Compensation Act (the Act), NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2017), limiting Worker's temporary total disability benefits (TTD benefits). After Waste Management of New Mexico, Inc. (Employer) terminated Worker, Worker earned wages from other employers below his preinjury wage. The Workers' Compensation Judge (WCJ) determined, under these circumstances, that
2 Worker was *2 not entitled to full TTD benefits. Because the WCJ's decision is contrary to the law that existed when Worker was injured,[1] we reverse.

[1] The Legislature enacted Section 52-1-25.1, the statute governing TTD benefits, in 1990, amended it in 2005, and amended it again in 2017. We are called on in this opinion to construe the 2005 version of Section 52-1-25.1, the version in effect at the time of Worker's injury. *See* § 52-1-48 ("The benefits that the worker shall receive during the entire period of disability and the benefits for death shall be based on and limited to the benefits in effect on the date of the accidental injury resulting in the disability or death."); *Jojola v. Aetna Life & Cas.*, 1989-NMCA-085, ¶ 6, 109 N.M. 142, 782 P.2d 395 ("[I]n workers' compensation cases the uniform rule in this state has been that a claim for benefits is governed by the law in effect at the time the cause of action accrued."). As a result, we express no opinion about the meaning of the 2017 version of Section 52-1-25.1, or whether Worker would be entitled to TTD benefits under that provision. All references to Section 52-1-25.1 in this opinion are to the 2005 version, unless otherwise indicated.

BACKGROUND

I. Statutory Background

{2} "Temporary total disability," as used in the Act, "means the inability of a worker, by reason of accidental injury arising out of and in the course of the worker's employment, to perform the duties

of that employment prior to the date of the worker's maximum medical improvement [(MMI)]." Section 52-1-25.1(A). Generally speaking, workers suffering from a temporary total disability are entitled to TTD benefits in the amount of two-thirds their average weekly wage (AWW).[2] *See* § 52-1-41(A) (1999). Absent one of two exceptions, "the statute requires payment of full total disability benefits." *Ortiz v. BTU Block & Concrete Co.*, 1996-NMCA-097, ¶ 10, 122 N.M. 381, 925 P.2d 1 (construing the 1990 version of Section 52-1-25.1); *see also Hawkins v. McDonald's*, 2014-NMCA-048, ¶ 9, 323 P.3d 932 ("Section 52-1-25.1 of the [Act] limits the payment of TTD benefits to an injured worker prior to the date of MMI in only two circumstances."). {3} The two exceptions to a worker's entitlement to full TTD benefits are set out in Section 52-1-25.1. Subsection B defines the first exception:

> If, prior to the date of [MMI], an injured worker's health care provider releases the worker to return to work, the worker is not entitled to [TTD] benefits if:
>
> (1) *the employer offers work* at the worker's preinjury wage; or
>
> (2) the worker *accepts employment with another employer* at the worker's preinjury wage.

Section 52-1-25.1(B) (emphases added). Subsection C defines the second exception: *3

> If, prior to the date of [MMI], an injured worker's health care provider releases the worker to return to work and *the employer offers work* at less than the worker's pre-injury wage, the worker is disabled and shall receive [TTD] compensation benefits equal to two-thirds of the difference between the worker's pre-injury wage and the worker's post-injury wage.

Section 52-1-25.1(C) (emphasis added). At issue in this appeal is the offset provision in Section 52-1-25.1(C).

[2] We refer, throughout this opinion, to preinjury wage and AWW interchangeably.

II. Factual and Procedural Background

{4} The following facts are uncontested. Worker suffered numerous injuries in January 2013 while being trained as a residential garbage collector for Employer. Not long after being hired, Worker was on duty when a garbage container fell through the gripper of the garbage truck and landed inside the truck's hopper. Worker's trainer directed him to climb up the gripper arm, reach into the hopper, and pull the container out. While doing so, Worker lost his balance and fell backward onto the side of the truck and then to the pavement about thirteen feet below. Worker's injuries included a traumatic brain injury, spinal injuries, and a lacerated spleen and kidney. Worker's AWW with Employer was $829.50 and, as a result, his compensation rate for TTD benefits is $553.00 (two-thirds of AWW). *See* § 52-1-41(A) (1999). {5} Worker returned to work in April 2013 and remained employed with Employer until he was terminated in July 2013. After his termination, Worker obtained employment with other companies, although, for the most part, he earned less than AWW. Employer issued partial TTD benefits, taking credit for wages Worker earned from his subsequent employers and claiming that the offset provision in Section 52-1-25.1(C) applied to those earnings. Since December 2017 Employer has been paying full TTD benefits because Worker has been unable to work. At issue below and now on appeal is the appropriate amount of TTD benefits for the period between Worker's termination and December 2017, in which Worker was earning less than AWW from other employers. {6} Worker filed a complaint with the Workers' Compensation Administration, asserting that Employer had no authority to reduce Worker's benefits if his earnings from *other employers* did not exceed

AWW. After a trial, the WCJ entered a compensation order making numerous findings, including that Worker had not reached MMI, Employer's proffered reason for terminating Worker was not credible, Worker had endeavored to remain gainfully employed since being injured, and Worker had not otherwise abandoned his job with Employer. The WCJ, however, disagreed with Worker's position that he was entitled to full TTD benefits during the period in question. Although the WCJ understood that the plain language of Section 52-1-25.1 supported Worker's position, the WCJ thought an award of full TTD benefits would be unfair to Employer and "contrary to the spirit and purpose" of the Act. The WCJ thus capped Worker's TTD benefits, determining that "the total amount . . . Worker receives from his employment and his [TTD benefits] shall not exceed . . . Worker's [AWW] of
4 $829.50." *4 In reducing Worker's TTD benefits, the WCJ did not rely on Section 52-1-25.1(C), but rather on two other provisions of the Act and a case interpreting one of those provisions. Worker appeals.

DISCUSSION

{7} This appeal raises the following question: After Employer terminated Worker, was Employer permitted to reduce the TTD benefits it paid to Worker based on Worker's earnings from other employers that were less than AWW? Resolving this question requires us to interpret Section 52-1-25.1 and other provisions of the Act; our review, accordingly, is de novo. *See Baca v. Los Lunas Cmty. Programs*, 2011-NMCA-008, ¶ 11, 149 N.M. 198, 246 P.3d 1070 ("We review the WCJ's legal conclusions regarding statutory construction de novo."). {8} Our "guiding principle when construing statutes is to determine and give effect to legislative intent."[3] *Fowler v. Vista Care*, 2014-NMSC-019, ¶ 7, 329 P.3d 630 (internal quotation marks and citation omitted). "To discern the Legislature's intent, we rely on the classic canons of statutory interpretation and look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Id.* (internal quotation marks and citation omitted). "Statutory language that is clear and unambiguous must be given effect" unless the result would be "absurd, unreasonable, or contrary to the spirit of the statute." *Id.* (internal quotation marks and citations omitted). In other words, while the existence of a plain meaning might normally end our inquiry, it may nevertheless be necessary to examine, inter alia, the history, background, and overall structure of the statutory provision being construed, as well as the purpose of the statute. *See id.* ¶¶ 7, 13; *see also Dewitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 29, 146 N.M. 453, 212 P.3d 341 (observing that where the plain language of the Act is clear, our statutory construction inquiry should normally end, but considering other principles of statutory construction to the extent the language could be considered ambiguous);
5 *Massengill v. Fisher Sand & *5 Gravel Co.*, 2013-NMCA-103, ¶¶ 7-12, 311 P.3d 1231 (examining the employer's contentions against applying the plain meaning of the statute). Thus, we "exercise caution in relying only on the plain language of a statute because its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute's meaning." *Fowler*, 2014-NMSC-019, ¶ 13 (alteration, internal quotation marks, and citation omitted); *see also Benny v. Moberg Welding*, 2007-NMCA-124, ¶ 5, 142 N.M. 501, 167 P.3d 949 (observing that while "[w]e start with the language itself, giving effect to its plain meaning where appropriate," we must be "careful not to be misled by simplicity of language when the other portions of a statute call its meaning into question, or the language of a section of an act conflicts with an overall legislative purpose" (internal quotation marks and citation omitted)). {9} The parties in this case present divergent views about the plain meaning of the relevant statutory language, legislative history, and

legislative goals and purposes. The WCJ in contrast largely justified his decision based on principles of fairness. We focus our analysis accordingly. Based on our review of the statutory language, legislative history, and the goals and purposes of the Act, these sources all support the conclusion that Worker is entitled under Section 52-1-25.1 to full TTD benefits during the weeks he earned less than AWW from other employers. Further, the WCJ's justifications for departing from the plain meaning of Section 52-1-25.1 are without merit and, accordingly, do not alter our conclusion.

[3] Worker contends that we should liberally construe the Act in his favor. *See, e.g., Dupper v. Liberty Mut. Ins. Co.*, 1987-NMSC-007, ¶ 5, 105 N.M. 503, 734 P.2d 743 ("We are committed to the view that, as remedial legislation, the . . . Act must be liberally construed, with all doubts resolved in favor of the worker."). In 1990, however, the Legislature "declare[d] that the [Act is] not remedial in any sense and [is] not to be given a broad liberal construction in favor of the claimant or employee on the one hand, nor are the rights and interests of the employer to be favored over those of the employee on the other hand." NMSA 1978, § 52-5-1 (1990). We observe that, since the enactment of this provision, our Supreme Court has given conflicting signals on whether courts may continue to liberally construe the Act in favor of workers. *Compare, e.g., Benavides v. E. N.M. Med. Ctr.*, 2014-NMSC-037, ¶ 44, 338 P.3d 1265 (holding that, notwithstanding Section 52-5-1, the Legislature "did not intend [for] the courts to disregard precedent . . . applying liberal construction" and "that liberal construction can still be applied . . . as it is but one of many tools employed in construing legislation"), *with Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶ 12, 378 P.3d 13 (stating, without acknowledging *Benavides*, that Section 52-5-1 *"requires* [courts] to balance equally the interests of the worker and the employer without showing bias or favoritism toward either" (emphasis added) (internal quotation marks and citation omitted)). We do not attempt to synthesize or resolve these seemingly inconsistent approaches advanced by our Supreme Court, however, because, following the Legislature's direction not to construe the Act in favor of either party, we rule for Worker. ------

I. The Plain Language of Section 52-1-25.1

{10} We begin with the language of Section 52-1-25.1, *see Fowler*, 2014-NMSC-019, ¶ 7, and conclude that its plain meaning does not permit Employer to reduce Worker's TTD benefits during the weeks he earned less than AWW from other employers. Critical to our analysis are the words the Legislature chose to use in the two subsections of Section 52-1-25.1 that eliminate or reduce the payment of full TTD benefits under certain circumstances. **{11}** First, Subsection B provides that an injured worker who has not reached MMI but is released to return to work is not entitled to TTD benefits if:

> (1) *the employer offers work* at the worker's preinjury wage; or
>
> (2) the worker *accepts employment with another employer* at the worker's preinjury wage.

Section 52-1-25.1(B) (emphases added). As Employer acknowledges, Subsection B explicitly draws a distinction between "the employer" and "another employer," with the former referring to the entity employing the worker at the time of injury (the at-injury employer), and the latter referring to any other entity employing the worker post-injury. *See Moya v. City of Albuquerque*, 2007-NMCA-057, ¶ 19, 141 N.M. 617, 159 P.3d 266 (recognizing that Section 52-1-25.1(B) "absolves an employer from paying [TTD] *6 benefits if the worker accepts employment with another employer at the worker's pre-injury

wage"), *rev'd on other grounds*, 2008-NMSC-004, 143 N.M. 258, 175 P.3d 926. Under Subsection (B)(1), the worker is not entitled to TTD benefits if the at-injury employer offers work at or above the worker's preinjury wage—even if the worker declines the offer. *See Jeffrey v. Hays Plumbing & Heating*, 1994-NMCA-071, ¶ 6, 118 N.M. 60, 878 P.2d 1009 (explaining that, under the 1990 version of the statute, "Section 52-1-25.1 applies so long as the worker is offered the position, even if the worker does not accept and become rehired"). Under Subsection (B)(2), even if the at-injury employer does not offer work at or above the worker's preinjury wage, the worker still is not entitled to TTD benefits if he or she obtains employment with another employer at or above the preinjury wage. Even though Worker is not seeking TTD benefits for the weeks in which he earned his preinjury wage from other employers, the distinction that the Legislature drew between at-injury employers and other employers in Subsection B guides our examination of Subsection C, the provision at issue in this case. {12} Subsection C permits employers to reduce TTD benefits, where the injured worker has not reached MMI but is released to return to work, if:

> *the employer offers work* at less than the
> 7 worker's pre-injury wage, [in which case the worker] shall receive [TTD] compensation benefits equal to two-thirds of the difference between the worker's pre-injury wage and the worker's post-injury wage.

Section 52-1-25.1(C) (emphasis added). Like Subsection (B)(1), Subsection C applies only when "the employer offers work." Because the phrase "the employer offers work" in Subsection (B)(1) refers to the "at-injury employer" alone, we decline to ascribe to it a different meaning in Subsection C. *See State v. Jade G.*, 2007-NMSC-010, ¶ 28, 141 N.M. 284, 154 P.3d 659 ("[I]t is considered a normal rule of statutory construction to interpret identical words used in different parts of the same act as having the same meaning." (alteration, internal quotation marks, and citation omitted)); *Couch v. Williams*, 2016-NMCA-014, ¶ 19, 365 P.3d 45 (same). Thus, under the plain language of Section 52-1-25.1, Subsection C applies only when the at-injury employer offers work at less than the worker's preinjury wage; unlike Subsection (B)(2), Subsection C does not apply if the at-injury employer makes no such offer of work but the worker "accepts employment with another employer." *Compare* § 52-1-25.1(C), *with* § 52-1-25.1(B)(2). {13} Contrary to the WCJ, who recognized that the plain meaning of Section 52-1-25.1 required Employer to pay Worker full TTD benefits, Employer maintains that the language of Subsection C permits a reduction of Worker's TTD benefits under the circumstances of this case. Although Employer acknowledges that the Legislature drew a clear distinction between the at-injury employer and subsequent employers in Subsection B, Employer asserts, without support in legal authority or argument, that the word "employer" in Subsection C encompasses both the at-injury employer and subsequent employers. Employer's assertion is contrary to the basic principle of statutory construction applied above—that identical words within an act are to be given the same meaning. *See, e.g., Jade G.*, 2007-NMSC-010, ¶ 28. Nor can Employer's *7 contention be reconciled with the general principle that "when the Legislature includes a particular word in one portion of a statute and omits it from another portion of that statute, such omission is presumed to be intentional." *Id.* {14} Furthermore, an absurdity would result were we to accept Employer's contention that "the employer" in Subsection C also means "another employer." Construing "the employer" in this manner would permit the at-injury employer to receive the offset in Subsection C so long as the at-injury employer *or* another employer merely offers work at less than the worker's preinjury wage. *See* § 52-1-25.1(C). In other words, Employer's construction would permit an at-injury employer not offering work to reduce the worker's TTD benefits so long as another employer offered work at less than the

worker's preinjury wage, even if the worker declined that offer. This would be in stark contrast to Subsection B, where an at-injury employer not offering work still has to pay full TTD benefits even if another employer offers work at or above the worker's preinjury wage, but the worker declines that offer. *See* § 52-1-25.1(B). We can think of no principled reason why, under Subsection B, the Legislature would require an at-injury employer not offering work to pay full TTD benefits if the worker declines an offer for work from another employer at or above the preinjury wage, but then, under Subsection C, permit that same at-injury employer to pay reduced TTD benefits if the worker declines an offer for work from another employer paying less than the worker's preinjury wage. We cannot countenance a construction of Section 52-1-25.1(C) that would lead to such an absurdity. *See Provisional Gov't of Santa Teresa v. Doña Ana Cnty. Bd. of Cnty. Comm'rs*, 2018-NMCA-070, ¶ 27, 429 P.3d 981 (providing that the rule that courts will not construe a statute in a manner leading to an absurd result "is equally if not more applicable as a ground for insisting on application of the words' plain meaning to *avoid* an absurdity"). **{15}** Ultimately, to accept Employer's interpretation and also avoid this absurdity, we would have to disregard the "long-established rule of construction prohibiting courts from reading language into a statute which is not there, particularly when it makes sense as it is written." *Faber v. King*, 2015-NMSC-015, ¶ 15, 348 P.3d 173; *see also Moya*, 2008-NMSC-004, ¶ 10 (same). We will not read into Section 52-1-25.1(C) the words "or if the worker accepts employment with another employer" or some other phrase, given that the Legislature easily could have included such language if it so intended. *See Hawkins*, 2014-NMCA-048, ¶ 14 ("It is not our place to insert language into the [Act] that does not exist. That task falls to the Legislature alone."); *see also, e.g., Faber*, 2015-NMSC-015, ¶ 15 (refusing to allow for statutory damages under NMSA 1978, Section 14-2-12 (1993) where the Legislature provided for them in NMSA 1978, Section 14-2-11 (1993) and could have included them in Section 14-2-12 had it so intended). **{16}** For these reasons, we reject Employer's proposed construction of Section 52-1-25.1(C) and conclude that, under the plain language, Subsection C applies only when the at-injury employer offers work at less than the worker's preinjury wage.

II. Legislative History of Section 52-1-25.1

8 *8 **{17}** As noted, Employer maintains that the offset provision in Subsection C applies to the circumstances of this case and further argues that the legislative history supports this contention. We cannot agree. Based on our review, the relevant legislative history supports the plain meaning of Section 52-1-25.1(C)—that this offset provision applies only when the at-injury employer offers work. In particular, we look to the legislative action made in response to this Court's interpretation of the 1990 version of Section 52-1-25.1 in *Grubelnik v. Four-Four, Inc.*, 2001-NMCA-056, 130 N.M. 633, 29 P.3d 533, *overruled by Gonzalez v. Performance Painting, Inc.*, 2013-NMSC-021, ¶ 39, 303 P.3d 802. *See Fowler*, 2014-NMSC-019, ¶ 13 (considering "the history, background, and overall structure of [a statute] as well as its function within a comprehensive legislative scheme" after reviewing its plain language (internal quotation marks and citation omitted)). **{18}** In *Grubelnik*, this Court addressed the same issue confronting us today—i.e., whether an employer not offering to rehire an injured worker could reduce TTD benefits based on less-than-preinjury wages the worker earned from another employer. *See* 2001-NMCA-056, ¶¶ 1, 9, 11. The 1990 version of Section 52-1-25.1(B) made no distinction between "the employer" and "another employer," providing in full: "If, prior to the date of [MMI], an injured worker's health care provider releases the worker to return to work and the employer offers work at the worker's pre-injury wage, the worker is not

entitled to [TTD] benefits." The 1990 version of Section 52-1-25.1(C) is substantively identical to the 2005 version at issue here—providing that the offset in Subsection C applies only when "the employer offers work." *Compare* § 52-1-25.1(C) (1990), *with* § 52-1-25.1(C) (2005). Referring to both Subsections B and C, *Grubelnik* held that " [t]he plain and reasonable reading of Section 52-1-25.1 [(1990)] is that 'the employer' means the employer at the time of the injury." 2001-NMCA-056, ¶ 21. *Grubelnik* concluded by observing that the Legislature could expand Section 52-1-25.1 (1990) to include employers other than the at-injury employer if it so chose. *See* 2001-NMCA-056, ¶ 25. {19} Tellingly, the Legislature did just that a few years later—choosing in 2005 to modify Subsection B, *but not* Subsection C. From this, we must presume that the Legislature was aware of *Grubelnik*'s construction of the term "the employer" in Section 52-1-25.1 (1990) and, accordingly, that it acted with intention when it decided not to expand Subsection C to cover the situation in which the at-injury employer fails to offer work and the worker obtains employment with another employer paying less than the worker's preinjury wage. *See Alarcon v. Albuquerque Pub. Sch. Bd. of Educ.*, 2018-NMCA-021, ¶ 5, 413 P.3d 507 ("When the Legislature amends a statute, we presume the Legislature is aware of existing law, including opinions of our appellate courts[.]"); *see also Jicarilla Apache Nation v. Rodarte*, 2004-NMSC-035, ¶ 15, 136 N.M. 630, 103 P.3d 554 (presuming that the Legislature acted "with full knowledge of, and consistent with, existing legislation" when it amended a statutory presumption but left intact a competing presumption found in another statute); *Vigil v. Thriftway Mktg. Corp.*, 1994-NMCA-009, ¶ 15, 117 N.M. 176, 870 P.2d 138 ("When dealing with a statute or rule which has been amended, the amended language must be read within the context of the previously existing language, and the old and new language, taken as a whole, comprise the
9 intent and purpose of the statute or rule."). *9 {20} Lastly, we recognize that *Grubelnik* was overruled in 2013 by our Supreme Court in *Gonzalez*, but that does not alter our analysis because we do not rely on *Grubelnik* as precedent. We rely on it only to provide context for, and insight into, the Legislature's 2005 amendment of Section 52-1-25.1 in response to that decision. *Cf.* 3C Shambie Singer, *Sutherland Statutory Construction* § 75:3 (8th ed. 2020) ("[W]hen a legislature amends a statute following a judicial decision construing the statute, courts presume the legislature amended the statute with that decision in mind. When a legislature enacts a statute based upon its knowledge of existing law, it is entitled to have that construction of law obtain in future interpretations of the law[.]" (footnote omitted)). And, contrary to Employer's suggestion, we do not believe that our Supreme Court's overruling of *Grubelnik* in *Gonzalez*—occurring after the Legislature amended Section 52-1-25.1 in 2005—somehow modifies the relevant legislative history of Section 52-1-25.1 or otherwise dictates that we construe Section 52-1-25.1(C) contrary to its plain meaning. Unlike this case and *Grubelnik*, the issue in *Gonzalez* was whether a worker earning *more* than his preinjury wage from a subsequent employer was entitled to permanent partial disability modifier benefits. *See* 2013-NMSC-021, ¶ 37. The statutory provision at issue in *Gonzalez* was Section 52-1-26(D) (1990), which, at the time, did not include language referencing "the employer"—the critical term this Court construed in *Grubelnik*. Instead, the statute merely provided that a worker who "returns to work at a wage equal to or greater than" his preinjury wage was not entitled to modifier benefits. *See* § 52-1-26(D) (1990). {21} In spite of the factual and statutory distinctions between *Gonzalez* and *Grubelnik*, the worker in *Gonzalez* analogized to *Grubelnik*, inaptly arguing that he should receive modifier benefits notwithstanding the fact he was earning more than his preinjury wage from an employer other than the at-injury employer. After noting that *Grubelnik*'s reading of Section 52-1-25.1(B) (1990) "was superceded by the Legislature in 2005," our Supreme Court "overruled" *Grubelnik*

and, relying on Section 52-1-25.1(B) (2005), stated in dictum that "[a] return-to-work provision is no longer contingent on returning to work for the pre-injury employer." *Gonzalez*, 2013-NMSC-021, ¶ 39. In "overruling" *Grubelnik*'s interpretation of Section 52-1-25.1(B) (1990) in light of the Legislature's explicit modification of that statutory provision, we think *Gonzalez* was simply acknowledging the obvious—i.e., that the 2005 amendment superseded *Grubelnik*'s holding that an employer still had to pay full TTD benefits even if the worker obtained employment with another employer at or above his preinjury wage. *See Grubelnik*, 2001-NMCA-056, ¶ 21. *Gonzalez*, however, did not purport to construe Section 52-1-25.1(C) (2005) in light of the 2005 amendment to Subsection B. {22} In short, *Gonzalez's* overruling of *Grubelnik* has no bearing on the issue before us, and we conclude that the relevant legislative history supports the application of Section 52-1-25.1's plain meaning.

III. The Plain Meaning of Section 52-1-25.1 Should Be Given Effect

{23} We next consider whether there is reason to depart from the plain meaning of Section 52-1-25.1(C) based on the goals or purposes of the Act
10 or some other reason. *10 *See, e.g., Gurule v. Dicaperl Minerals Corp.*, 2006-NMCA-054, ¶ 7, 139 N.M. 521, 134 P.3d 808 (examining the legislative goals and purposes of the Act after discerning its clear meaning from the plain language). Based on our review of the Act's goals and purposes, as well as the WCJ's justifications for departing from the plain meaning, we discern none. *See Fowler*, 2014-NMSC-019, ¶ 7 (providing that "[s]tatutory language that is clear and unambiguous must be given effect" unless the result would be "absurd, unreasonable, or contrary to the spirit of the statute" (internal quotation marks and citations omitted)); *Benny*, 2007-NMCA-124, ¶ 5 (providing that the plain meaning must yield when "the language of a section of an act conflicts with an overall legislative purpose" (internal quotation marks and citation omitted)).

A. Legislative Purpose of the Act

{24} The overarching purpose of the Act is "to assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers[.]" Section 52-5-1. To fulfill this purpose, the Act enforces "a bargain in which an injured worker gives up his or her right to sue the employer for damages in return for an expedient settlement covering medical expenses and wage benefits, while the employer gives up its defenses in return for immunity from a tort claim." *Morales v. Reynolds*, 2004-NMCA-098, ¶ 6, 136 N.M. 280, 97 P.3d 612; *see also Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't*, 2014-NMCA-019, ¶ 6, 317 P.3d 866 (recognizing that the Act "represents a delicate balance between the rights and interests of the worker and the employer" (internal quotation marks and citation omitted)). {25} In our view, Section 52-1-25.1 represents an enforcement of that bargain and a balancing of interests between workers and employers. Specifically, the Legislature determined that when an employer terminates an injured worker, the employer may avoid paying TTD benefits only if the injured worker is able to find work with another employer at or above the worker's preinjury wage. *See* § 52-1-25.1(B), (C). We cannot say that the Legislature's decision in 2005 to balance the interests of employers and workers in this manner is absurd or unreasonable, and it is not up to the courts to second-guess such a choice. *See, e.g., State v. Maestas*, 2007-NMSC-001, ¶ 14, 140 N.M. 836, 149 P.3d 933 ("Our role is to construe statutes as written and we should not second guess the [L]egislature's policy decisions."); *cf. Montney v. State ex rel. State Highway Dep't*, 1989-NMCA-002, ¶ 16, 108 N.M. 326, 772 P.2d 360 ("[W]e hold that where there is no statutory requirement for offset or credit or some other method to avoid overlapping or double payments, we will not do so by judicial construction."). {26} Of particular importance to this case, and as Worker observes, the Act is designed to encourage at-injury employers to

rehire injured workers so that they may reduce their reliance on compensation benefits. *See Gurule*, 2006-NMCA-054, ¶ 7; *see also* § 52-1-50.1(B) ("If an employer is hiring, that employer shall offer to rehire a worker who applies for any job that pays less than the pre-injury job . . . . Compensation benefits of a worker rehired prior to [MMI] and pursuant to this subsection shall be reduced as provided in Section 52-1-25.1[.]"). This Court previously has recognized that Section 52-1-25.1(C) furthers the goals of the Act "by
11 encouraging employers to rehire *11 injured workers and compensating workers who return to work at less than their pre-injury wage." *Baca*, 2011-NMCA-008, ¶ 32; *see also Gurule*, 2006-NMCA-054, ¶ 7 (same). Permitting a reduction in TTD benefits, as advanced by Employer, would serve as a disincentive to employers to rehire injured workers, thus undermining, not fostering, this legislative goal. We conclude that the plain meaning of Section 52-1-25.1(C) is consistent with the goals and purposes of the Act.

B. The WCJ's Justifications for Limiting Worker's TTD Benefits

{27} Finally, we examine the WCJ's justifications for limiting Worker's TTD benefits to determine whether they provide some basis for departing from the plain meaning of Section 52-1-25.1. In determining that Worker's TTD benefits should be capped such that his earnings and TTD benefits would not exceed AWW, the WCJ largely did not rely on the statutory language or history of Section 52-1-25.1, or the legislative goals and purposes, as we have done here today; the WCJ instead cited
12 *Livingston v. Environmental Earthscapes*, 2013-NMCA-099, 311 P.3d 1196, and Sections 52-1-47(B) (1990) and 52-1-47.1 in support of the view that it would be unfair to Employer if the combination of TTD benefits and wages Worker earned from other employers exceeded AWW. As we explain, however, none of these authorities support the proposition that an injured worker is prohibited from receiving full TTD benefits when, after being terminated by the at-injury employer, the worker earned wages from another employer below the worker's preinjury wage. **{28}** We turn first to Section 52-1-47.1, which provides in relevant part:

> Unless otherwise contracted for by the worker and employer, workers' compensation benefits shall be limited so that no worker receives more in total payments, including wages and benefits from his employer, by not working than by continuing to work. Compensation benefits under the [Act] shall accordingly be reduced, if necessary, to account for any wages and employer-financed disability benefits a worker receives after the time of injury.

Section 52-1-47.1(A). The WCJ's reliance on this provision to deny Worker full TTD benefits is foreclosed by this Court's decision in *Moya*, 2007-NMCA-057. As in this case, the worker in *Moya* obtained employment with another employer after the at-injury employer terminated him without cause. *Id.* ¶¶ 2-3. Also as in this case, the WCJ in *Moya* relied on Section 52-1-47.1(A) to permit the employer, when calculating TTD benefits, to take credit for the wages the worker earned from a subsequent employer. *See Moya*, 2007-NMCA-057, ¶¶ 1, 3. This Court in *Moya* explicitly held that "Section 52-1-47.1 provides an offset *only* for wages and employer-financed benefits that the *at-injury employer* provides[,]" *Moya*, 2007-NMCA-057, ¶ 18 (emphases added), and otherwise rejected the employer's attempt to skirt the plain language of Section 52-1-25.1(C), *Moya*, 2007-NMCA-057, ¶¶ 20-21. *12 **{29}** Next, we consider *Livingston*. The issue in *Livingston* was whether an injured worker who did not work after his injury could receive both permanent partial disability benefits and loss of use benefits concurrently, the combination of which exceeded the worker's AWW. 2013-NMCA-099, ¶¶ 1-2. The worker argued that the limitation in Section 52-1-47.1(A) should apply to a worker's lifetime earnings, not his weekly wages. *Livingtson*, 2013-

NMCA-099, ¶ 6. Relying on various provisions of the Act, this Court disagreed, concluding that Section 52-1-47.1(A) "requires consideration of the amount of benefits a worker can receive on a weekly basis, not over the course of a lifetime[,]" *Livingston*, 2013-NMCA-099, ¶ 9, and thus held that the worker could not "recover more in benefits on a weekly basis than he was earning prior to the accident[,]" *id.* ¶ 10. *Livingston* has no bearing on this case. Worker here worked after his injury and is not seeking more than AWW in benefits. *See* § 52-1-47.1(A) (limiting "workers' compensation benefits . . . so that no worker receives more in total payments, including wages and benefits from his employer, by *not* working than by continuing to work" (emphasis added)). Moreover, as previously explained, Section 52-1-47.1 "does not allow an offset for wages paid by a subsequent employer[,]" as is the case here. *Moya*, 2007-NMCA-057, ¶ 18. **{30}** Lastly, Section 52-1-47(B) (1990) is inapposite. That provision provides that "compensation benefits [other than lifetime benefits awarded pursuant to Section 52-1-41] for any combination of disabilities or any combination of disabilities and death shall not exceed an amount equal to seven hundred multiplied by the maximum weekly compensation payable at the time of the accidental injury[.]" Section 52-1-47(B) (1990) simply does not apply to this case because there is no contention that Worker's benefits exceeded any limitation in that statutory provision. **{31}** Having determined that the authority relied on by the WCJ to limit Worker's TTD benefits is inapposite, we observe that Employer makes little effort to defend the WCJ's reliance on these authorities. Employer admits that "Section 52-1-47.1 is not applicable to the case at hand." As for *Livingston* and Section 52-1-47(B) (1990), Employer agrees that those authorities do not "directly apply" to the facts of this case, but asserts they "demonstrate the overarching principle" that TTD benefits may be limited under certain circumstances. Thus, according to Employer, they support the WCJ's concern for fairness. **{32}** The problem with the WCJ's disregard of the plain language of Section 52-1-25.1(C) in favor of fairness, however, is that there is no need to resort to principles of "fundamental fairness" when construing the Act if the Legislature has provided clear guidance in the statute itself. *See Gurule*, 2006-NMCA-054, ¶ 11 ("Absent an ambiguity, there is no need to undertake a fundamental fairness analysis."); *Ortiz*, 1996-NMCA-097, ¶¶ 9-11 (observing that where the Act provides no guidance in addressing the question at issue, resort to "fundamental fairness" is appropriate). *Ortiz* is instructive on this point. In that case, the employer fired the worker for misconduct that culminated in an accident resulting in the worker's compensable injury and did not afterwards offer her work. *Ortiz*, 1996-NMCA-097, ¶¶ 2, 8. The issue in *Ortiz* was whether, notwithstanding the plain language of the 1990 version of Section 52-1-25.1, which required the *13 employer to offer work before denying or reducing TTD benefits, the employer could refuse to pay TTD benefits because the worker was terminated for cause. *See Ortiz*, 1996-NMCA-097, ¶¶ 5-6. Recognizing that neither Subsection B nor Subsection C of Section 52-1-25.1 explicitly permitted the employer to deny full payment of TTD benefits under the circumstances, the employer urged this Court to rule in its favor on grounds of fundamental fairness. *Ortiz*, 1996-NMCA-097, ¶ 9. This Court rejected the employer's invitation, holding that Section 52-1-25.1 (1990), which "cover[ed] the issue before us[,]" required payment of full TTD benefits because neither of the exceptions to full payment of TTD benefits applied. *Ortiz*, 1996-NMCA-097, ¶ 10. **{33}** Just as in *Ortiz*, there is no ambiguity in the plain language of Section 52-1-25.1(C). Because the Legislature determined how to fairly balance the interests of employers and workers under the circumstances of this case when it enacted Subsection C, the WCJ's resort to principles of fairness upset the balance the Legislature struck. *See Ortiz*, 1996-NMCA-097, ¶ 13 ("Policy arguments may assist us in understanding statutory language, but they cannot

substitute for the legislative text. We find no basis in the language of the . . . Act to carve out another exception."). In short, we conclude the WCJ's justifications for limiting Worker's TTD benefits are without merit and the WCJ's reduction of Worker's benefits was therefore erroneous.

CONCLUSION

{34} For the foregoing reasons, we hold that Section 52-1-25.1 should be given effect as written. Employer thus is not entitled to the offset in Section 52-1-25.1(C) and is required to pay Worker full TTD benefits for the weeks in which he earned less than AWW from subsequent employers. We therefore reverse and remand with instructions to the WCJ to vacate the compensation order and to enter an amended compensation order consistent with this opinion.

{35} IT IS SO ORDERED.

JENNIFER L. ATTREP, Judge

WE CONCUR:

BRIANA H. ZAMORA, Judge ZACHARY A. IVES, Judge

JENNIFER A. STOCKER, Worker-Appellant,
v.
LOVELACE REHAB HOSPITAL and HARTFORD INSURANCE GROUP, Employer/Insurer-Appellees.

No. A-1-CA-37869

COURT OF APPEALS OF THE STATE OF NEW MEXICO

June 21, 2021

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION Rachel A. Bayless, Workers' Compensation Judge

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for Appellees

MEMORANDUM OPINION

MEDINA, Judge.

{1} Jennifer Stocker (Worker) appeals the Workers' Compensation Judge's (WCJ) order denying coverage for a hip surgery she claims was reasonably necessary to address a compensable injury. On appeal Worker raises numerous claims, including (1) the WCJ erred in resetting her February 2016 trial and granting Lovelace Rehab Hospital/Hartford Insurance Group's (collectively, Employer) delayed request for an independent medical evaluation (IME); (2) the WCJ erred as a matter of law by denying

coverage for Worker's hip surgery; and (3) whole record review does not support the WCJ's decision to deny coverage for the hip surgery. We affirm.

BACKGROUND

{2} In March 2011, Worker, a physical therapist assistant, was injured as a result of a patient falling on her. Worker's injuries were diagnosed as a fracture of her left superior pubic root, extending to the anterior wall of the acetabulum, for which she received care from Dr. John Sloan and then Dr. Paul Legant. After the accident, Employer provided Worker with temporary total disability (TTD) benefits until August 29, 2011. Worker reached maximum medical improvement (MMI) on October 13, 2011, and returned to work with a 3 percent whole person impairment rating. Employer commenced payment of permanent partial disability (PPD) payments to Worker on October 13, 2011. However, Worker continued to have pain in her left hip and groin. On April 17, 2012, WCJ Terry Kramer, approved a lump sum settlement agreement that covered 459 weeks of PPD benefit payments at 3 percent impairment. During the settlement hearing, the WCJ advised Worker that she maintained the right to seek modification should her condition change in the future.

{3} In June 2012, Worker resigned her position with Employer for reasons unrelated to her work injury and moved to Michigan. In March 2015, Worker met with Dr. Kevin Snyder, in Michigan who diagnosed Worker with chronic active sacroiliitis[1] and referred her to Dr. Bruce Lawrence.

{4} In July 2015, Worker filed a complaint with the Workers' Compensation Administration (WCA), alleging injuries to her left hip, groin,

buttock, leg, and pelvis, which she attributed to the 2011 work accident. Worker complained in part that she suffered three pelvic fractures as well as a labrum tear and cyst in her left hip. Worker sought benefits for unpaid medical bills incurred, including treatment by Dr. Snyder.

{5} In December 2015, Employer objected to Worker receiving treatment from Dr. Snyder because he was not licensed to practice medicine in New Mexico, and because Worker had not filed a motion with the director seeking approval of an out-of-state health care provider (HCP). In January 2016, Worker sought approval of Dr. Snyder's services, which the WCJ approved in February 2016.

{6} Trial on Worker's complaint was scheduled for February 11, 2016. However in, July 2016 the WCJ granted Employer's motion for an IME and reset trial for November 9, 2016. The IME occurred in July 2016, and the examination report was submitted to the WCJ in August 2016.

Page 3

First Trial

{7} The contested issues during Worker's November 2016 trial included the extent of injuries causally related to the May 2011 work accident; whether Worker's condition deteriorated in March or April 2015 such that she was no longer at MMI; identification of authorized HCPs under NMSA 1978, Section 52-1-49 (1990); and whether Worker is entitled to attorney fees. During trial the WCJ considered Worker's medical records, a form letter from Dr. Snyder, and deposition testimony from Dr. Legant. The WCJ also considered the IME panel report as well as deposition testimony from Dr. Brian Shelley and Dr. Daniel Duhigg of the IME panel. Upon consideration of the evidence, the WCJ issued a compensation order on November 23, 2016. In the order the WCJ found that Worker's injuries did not include a labrum tear and cyst. The WCJ also found in relevant part that Worker was not at MMI for injuries caused by the work accident and was therefore entitled to ongoing medical care; Dr. Snyder was an authorized HCP and Dr. Lawrence was in the chain of authorized referrals; and Worker was entitled to reasonable attorney fees. Neither Employer nor Worker appealed the compensation order.

{8} After entry of the 2016 compensation order Worker continued treatment with Dr. Snyder for the injuries identified by the IME panel. Dr. Snyder referred Worker to Dr. Robert Dowling for physical therapy as recommended by the IME panel and ordered in the 2016 compensation order. On March 28, 2017, Dr. Dowling noted limitations in Worker's hip that he believed were related to a labral tear and referred Worker back to Dr. Snyder for evaluation of the suspected tear. Dr. Snyder diagnosed Worker with a labral tear and referred her to Dr. Philip Schmitt for surgery. Employer denied coverage for Dr. Snyder's surgical referral as unrelated to Worker's injuries identified in the 2016 compensation order.

{9} Nevertheless, Worker consulted with Dr. Schmitt in April 2017 who agreed with the labral tear diagnosis and referred Worker to his partner Dr. Diana Silas for surgery. In May 2017, Employer applied for another IME to address whether Worker was at MMI and because Worker requested approval for surgical consultation and physical therapy. Dr. Silas performed surgery to repair Worker's labral tear in June 2017. Dr. Silas assumed Worker's care after the surgery. WCJ Rachel Bayless granted Employer's application for a second IME in June 2017. The second IME occurred in September 2017. In November 2017, Employer filed a complaint seeking reimbursement from Worker for alleged overpayment of benefits. Worker did not respond to Employer's complaint.

Second Trial

{10} Trial on Employer's complaint occurred in August 2018 during which the WCJ considered:

> a. Whether Worker [has] reached [MMI] , and if so, the date of MMI[;]

Page 4

> b. [i]f MMI has been reached, whether Employer. . . is entitled to a credit for overpayment of [TTD] benefits[;]
>
> c. [i]f MMI has been reached, whether [W]orker is entitled to [PPD] benefits, and if so, to what extent and duration[;]
>
> d. [t]he nature and extent of Worker's entitlement to past and future medical care pursuant to [Section] 52-1-49 . . . and the prior [c]ompensation [o]rders[;]
>
> e. [w]hether Employee . . . is entitled to a credit for overpayment of indemnity benefits[;]
>
> f. [w]ho are authorized [HCP]s as defined by [Section] 52-1-49.

In consideration of these issues the WCJ reviewed the 2016 compensation order, Worker's medical records since the 2016 compensation order, filings by both parties throughout the case, and the second IME panel report.

{11} After reviewing the evidence, the WCJ issued a compensation order in which she concluded that

> 7. Dr. Schmi[tt], Dr. Silas, and Dr. Silas' referrals after the June 5, 2017 surgery, who were out of state [HCP]s not approved by the [WCA] director and for whose services Employer. . . denied payment, are not authorized to treat Worker[;]
>
> 8. [m]edical records and form letters of providers who are not authorized [HCP]s are not admissible as substantive, direct evidence on the work accident and resulting injury[;]
>
> 9. [t]he issue of what injuries Worker suffered as the natural and direct result of the work accident were previously tried and adjudged in the 2016 [c]ompensation [o]rder[;]
>
> 10. [t]he 2016 [c]ompensation [o]rder resolved the issues presented for trial and was [a] final order for purposes of appeal[;]
>
> . . . .
>
> 12. [a]s determined in the 2016 [c]ompensation [o]rder, the nature and extent of Worker's injuries causally related to the March 22, 2011[,] work accident did not include the alleged injury of a "Left hip: Labrum tear and cyst"[;]

Page 5

> 13. Worker having failed to appeal the 2016 [c]ompensation [o]rder or otherwise apply for modification of that compensation order, Worker is bound by [the WCJ]'s determination that her causally related injuries do not include a labral tear of the left hip.

The WCJ also concluded that Employer was entitled to credit for overpayment of benefits paid after Worker reached MMI on October 13, 2017. This appeal followed.

DISCUSSION

{12} Worker raises several legal arguments in response to the WCJ's 2018 and 2016 compensation orders. With regard to the 2018 compensation order, Worker argues that the WCJ erred as a matter of law in denying coverage for her hip surgery. Within this argument Worker raises five sub arguments including (1) the WCJ improperly weighed Worker's treating physicians

testimony; (2) the WCJ erred in finding that Dr. Silas was not an HCP; (3) the WCJ erred in finding that the 2016 compensation order was binding; (4) the WCJ erred in applying a causation analysis when determining whether surgery was reasonable and necessary; and (5) the WCJ erred in denying coverage for Worker's surgery where Employer was in breach of the 2016 compensation order. Worker also argues that whole record review does not support the WCJ's denial of coverage for Worker's hip surgery in the 2018 compensation order. Finally, Worker argues that the WCJ erred prior to the 2016 compensation order in granting Employer's request for an IME and resetting trial. We address each of Worker's arguments in the order presented here.[2]

{13} Before we address the merits of Worker's arguments, we pause to express our concern with Worker's briefing. Worker's brief in chief raises numerous issues but provides little to no substantive analysis of the issues and often fails to cite the record and supporting legal authority. *See* Rule 12-318(A)(4) NMRA (requiring that the brief in chief include "an argument which, with respect to each issue presented, . . . contain[s] a statement of the applicable standard of review, the contentions of the appellant, and a statement explaining how the issue was preserved in the court below, with citations to authorities, record proper, transcript of proceedings, or exhibits relied on"); *Guest v. Berardinelli*, 2008-NMCA-144, ¶ 38, 145 N.M. 186, 195 P.3d 353 ("To present an issue on appeal for review, appellants must submit argument and authority."); *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 (stating that "[t]o rule on an inadequately briefed issue, [appellate courts] would have to develop the arguments [themselves], effectively performing the parties' work for them" and explaining that doing so "creates a strain on judicial resources and a substantial risk of

error" (citations omitted)). We do not develop arguments for parties, and in this opinion we have declined to review multiple arguments for lack of development.[3]

The WCJ's Denial of Coverage for Worker's Hip Surgery and Related Treatment Was Not Error

{14} "We review the WCJ's application of the law to the facts de novo." *Ruiz v. Los Lunas Pub. Schs.*, 2013-NMCA-085, ¶ 5, 308 P.3d 983. "With respect to the admission or exclusion of evidence, we generally apply an abuse of discretion standard where the application of an evidentiary rule involves an exercise of discretion or judgment, but we apply a de novo standard to review any interpretations of law underlying the evidentiary ruling." *Dewitt v. Rent-A-Ctr., Inc.*, 2009-NMSC-032, ¶ 13, 146 N.M. 453, 212 P.3d 341.

The WCJ Appropriately Weighed the Available Opinions of Worker's Treating Physicians and Whole Record Review Supports the WCJ's Denial of Coverage for Worker's Hip Surgery

{15} Worker argues that the WCJ erred as a matter of law in improperly giving greater weight to the opinions of the IME panel than the opinions of Worker's treating physicians. In support of her arguments Worker cites *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-026, ¶ 25, 134 N.M. 421, 77 P.3d 1014, and *Grine v. Peabody Natural Resources*, 2006-NMSC-031, ¶ 25, 140 N.M. 30, 139 P.3d 190, which both recognize that treating physicians are in a better position to evaluate the patient because they have a greater opportunity to know and observe the patient. Worker also generally discusses the policy underpinnings supporting greater deference to treating physician testimony and identifies doctors Sloan, Legant, Snyder, Dowling, and Silas as her treating physicians. While Worker accurately cites *Banks* and *Grine*, the WCJ, as trier of fact, ultimately can accept or reject the evidence once admitted, including testimony in whole or part, from treating physicians. *Banks*, 2003-NMSC-026, ¶ 34. For the reasons we explain below, we conclude the

WCJ did not err in weighing the medical opinions offered in this case.

{16} Worker first directs our attention to Dr. Sloan, who suspected Worker might have a labral tear. Dr. Sloan referred Worker to Dr. Legant for further evaluation, who, after first reviewing Worker's pelvic x-ray, and later an MRI and bone scan, concluded that the MRI was not consistent with a left labral hip tear. Although Worker disagrees with Dr. Legant's opinion and suggests that his opinion is unreliable, we do not reweigh evidence on appeal. *See Dewitt*, 2009-NMSC-032, ¶ 12.

Page 7

{17} To the extent Worker contends the 2018 WCJ should have given more weight to the opinions of Dr. Snyder, Dr. Dowling, and Dr. Silas, we observe that Dr. Snyder was never deposed in this case and the 2018 WCJ was only provided with Dr. Snyder's HCP form letter diagnosing a labral tear and his medical records. Notably Worker does not dispute the 2018 WCJ's finding that the medical records from Worker's out-of-state doctors, including Dr. Snyder, revealed that they had not "reviewed [Worker's] treatment records or imaging studies conducted in New Mexico" and "based their opinions on prior history as given by Worker." The WCJ found that the IME panel had a more complete picture of Worker's treatment and complaints and was therefore "in the best position to form reasonable, educated opinions regarding the nature and extent of injuries causally related as a natural and direct result of the work accident."

{18} With regard to Dr. Silas, the WCJ determined that Dr. Silas was not an authorized HCP and, therefore, not authorized to testify regarding causation of Worker's injuries.[4] Worker separately challenges this finding, however, as explained below, we conclude that the WCJ properly excluded testimony from Dr. Silas.

{19} As for Dr. Dowling, the WCJ acknowledged that he provided physical therapy to Worker, including acupuncture, dry needling, and cupping treatments, beginning in 2017 and referred Worker to Dr. Snyder for a suspected labral tear in 2018. Dr. Dowling's services, however, were limited to providing physical therapy, and Dr. Dowling's referral to Dr. Snyder reveals that Dr. Dowling could not confirm his suspicion of a labral tear, let alone provide an opinion as to how the labral tear occurred.

{20} Given the opinions of Worker's treating physicians in New Mexico, the lack of testimony from Dr. Snyder, the exclusion of testimony from Dr. Silas, the speculative opinion of Dr. Dowling, and the insufficient treatment history reviewed by Worker's out-of-state providers, the WCJ was left with little evidence from Worker's treating physicians. To that end, the 2018 compensation order does show that the WCJ took into account the available evidence from Worker's treating physicians. Our review shows that the WCJ carefully weighed the available evidence and, thus, we conclude that no error occurred.

{21} As related to her arguments above, Worker also summarily argues in one paragraph that under a whole record review, the WCJ erred in finding that Worker is not entitled to surgery as a benefit. In support of this argument, Worker asserts that each of her treating physicians agreed that surgery was necessary. Worker's fleeting assertion scarcely addresses which evidence she contends supports reversal under whole record review and does not address the contrary evidence relied upon by the WCJ. Given Worker's sole reliance on the opinions of her treating physicians and our conclusion that the WCJ properly weighed those opinions as well as the IME recommendations, we

Page 8

conclude that the evidence in the record supports the WCJ's denial of coverage for the hip surgery.

Dr. Silas Was Not an Authorized HCP

{22} Worker argues that the district court erred as a matter of law by not finding Dr. Silas to be an authorized HCP, pursuant to Section 52-1-49. In

the 2018 compensation order, the WCJ determined that (1) Dr. Silas was an out-of-state provider who was not approved and, therefore, not authorized to treat Worker; (2) Worker was aware of the approval requirements for out-of-state HCPs but chose not to seek approval; and (3) nothing prevented Worker from seeking appropriate approvals for Dr. Silas. Worker does not dispute these findings. Instead, Worker argues that because an employer has a duty to provide medical treatment pursuant to Section 52-1-49, it should be the employer's duty to obtain approval of out-of-state HCPs as necessary to provide treatment and that the insurer should also be responsible for obtaining authorization because the purpose of the authorization requirement is to control medical costs and insure benefits from this policy.

{23} Worker's arguments implicate the WCJ's interpretation of the Act's provisions for authorization of HCPs and the corresponding regulations. The interpretation of the Act and associated regulations is a question of law that we review de novo. *Banks*, 2003-NMSC-026, ¶ 11. "Although a court will generally defer to an agency's interpretation of . . . [a] regulation that it is charged with administering, it is the function of courts to interpret the law in a manner consistent with the legislative intent." *Howell v. Marto Elec.*, 2006-NMCA-154, ¶ 16, 140 N.M. 737, 148 P.3d 823. To discern the Legislature's intent, we "look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Fowler v. Vista Care*, 2014-NMSC-019, ¶ 7, 329 P.3d 630 (internal quotation marks and citation omitted).

{24} Section 52-1-49 sets out procedures for HCP selection and authorization, including selection of the initial provider, opportunity to change providers, and means of objecting to selections. Section 52-1-49(B) provides that an employer shall make the initial selection of an HCP or allow the worker to make the selection. Section 52-1-49(C) provides that after an initial sixty-day period "the party who did not make the initial selection may select a [HCP] of his[/her] choice." Section 52-1-49(C) goes on to require that "the party seeking such a change shall file a notice of the name and address of his[/her] choice of [HCP] with the other party at least ten days before treatment from that [HCP] begins." The purpose of the notice requirement is to provide the nonselecting party opportunity to object to the proposed HCP as set out in Section 52-1-49(D).

{25} With regard to selection of HCPs pursuant to Section 52-1-49, the phrase "health care provider" includes various providers in different fields of health care and generally requires licensure under New Mexico law. *See generally* NMSA 1978, § 52-4-1 (2007). However, Section 52-4-1(Q) provides that a HCP may also be "any person or facility that provides health-related services in the health care industry, *as approved by the*

director." (Emphasis added.) A corresponding regulation provides that "[a]n HCP that is not licensed in the state of New Mexico must be approved by the [WCA's] director to qualify as an HCP under the [A]ct." 11.4.7.10(A) NMAC. The regulations also provide that "[t]he [WCA] director's approval may be obtained by submitting an application to the [WCA] director and proposed order, supported by an original affidavit of the HCP seeking approval." 11.4.7.10(C) NMAC.

{26} A plain reading of Section 52-1-49 demonstrates that the HCP selection process shifts between the parties beginning with the initial selection by the employer or—if agreed to—the worker. After the initial selection, the nonselecting party may then choose a different HCP subject to objection by the party that made the initial selection. No matter the stage of this process, however, the proponent of the change in provider must select an HCP as defined in Section 52-4-1. If the proposed provider is not licensed in New Mexico, the WCA's director must approve the provider. Neither the statute nor regulation assign the responsibility of seeking approval from the WCA director to one party over the other, and

it is reasonable to infer that the burden lies with the party seeking to change providers.

{27} To accept Worker's contention that Employer bears the duty to obtain approval of out-of-state HCPs we would have to disregard the "long-established rule of construction prohibiting courts from reading language into a statute which is not there." *Taylor v. Waste Mgmt. of N.M., Inc.*, 2021-NMCA-___, ¶ 15, ___ P.3d ___ (No. A-1-CA-37503, Apr. 6, 2021) (internal quotation marks and citation omitted). Worker's contention could also lead to an absurd result wherein an employer is required to seek approval of a HCP to which the employer objects. *See* § 52-1-49(D) (identifying the process for both worker and employer to object to HCP choice); *Villa v. City of Las Cruces*, 2010-NMCA-099, ¶ 13, 148 N.M. 668, 241 P.3d 1108 (stating that "[w]e are to read related statutes in harmony so as to give effect to all provisions" (internal quotation marks and citation omitted)); *see also Fowler*, 2014-NMSC-019, ¶ 7 ("We will not read the plain language of the statute in a way that is absurd, unreasonable, or contrary to the spirit of the statute, and will not read any provision of the statute in a way that would render another provision of the statute null or superfluous[.]" (internal quotation marks and citations omitted)).

{28} Aside from conclusory assertions that an employer and insurer should always be responsible for obtaining authorization for out-of-state providers, Worker does not substantively develop her arguments or provide any authority in support thereof. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority."). Based on the forgoing we conclude that the WCJ did not err in finding that Dr. Silas was not an authorized HCP.

{29} To the extent Worker contends that (1) the law of the case doctrine required the WCJ to find that Dr. Silas was an authorized HCP as part of the "chain of authorized referrals" discussed in the 2016 compensation order; and (2) 11.4.7.10(D) NMAC "denies equal protection under the laws in violation of Article II, Section 18 of the New

Mexico Constitution[,]" Worker does not substantively discuss the law of the case doctrine or applicable standards of review and cites only to *Cordova v. Larsen*, 2004-NMCA-087, ¶ 10, 136 N.M. 87, 94 P.3d 830, without context or explanation. Similarly, Worker makes a halfhearted argument that 11.4.7.10(D) NMAC denies equal protection under the law in violation of Article II, Section 18 of the New Mexico Constitution and cites to *Corn v. New Mexico Educators Federal Credit Union*, 1994-NMCA-161, 119 N.M. 199, *overruled on other grounds by Trujillo v. City of Albuquerque*, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305, without discussion or analysis of the case. It is not our duty to assume how a particular cited authority applies to the facts at hand without adequate analysis from a party. *See Lukens v. Franco*, 2019-NMSC-002, ¶ 5, 433 P.3d 288 (stating that "counsel should properly present this [C]ourt with the issues, arguments, and proper authority. Mere reference in a conclusory statement will not suffice and is in violation of our rules of appellate procedure" (internal quotation marks and citation omitted)). We will not develop Worker's arguments for her, nor will we guess at what her arguments might be. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076. As such, we consider these arguments to be undeveloped and consider them no further.

The 2016 Compensation Order Was Binding

{30} Worker broadly argues that the WCJ erred as a matter of law in concluding that the 2016 compensation order could not be modified, and as a result, barred Worker from claiming her hip surgery as a medical benefit. In a single string citation, to NMSA 1978, Section 52-1-56 (1989), NMSA 1978, Section 52-5-9 (1989), *Benny v. Moberg Welding*, 2007-NMCA-124, 142 N.M. 501, 167 P.3d 949, and *Henington v. Technical-*

Vocational Institute, 2002-NMCA-025, 131 N.M. 655, 41 P.3d 923, Worker argues that benefits are "always modifiable."

{31} We agree that compensation orders may be modified. For example Section 52-1-56 provides in pertinent part:

> The [WCJ] may, upon the application of the employer, worker or other person bound by the compensation order, fix a time and place for hearing upon the issue of claimant's recovery. . . . If it appears upon such hearing that the disability of the worker has become more aggravated or has increased without the fault of the worker, the [WCJ] shall order an increase in the amount of compensation allowable as the facts may warrant.

Likewise Section 52-5-9(A) sets out the grounds upon which a party may seek to modify a compensation order and provides:

> The [WCJ], after a hearing, may issue a compensation order to terminate, continue, reinstate, increase, decrease or otherwise properly affect compensation benefits provided by the [Act] . . . or in any other respect, consistent with those acts, modify any previous decision, award or action.

Page 11

{32} In addition to these statutory provisions, in *Benny* this Court considered whether a stipulated lump sum settlement barred a worker from seeking additional benefits and concluded that under Section 52-5-9, a worker might seek additional benefits where she proves that her disability "has become more aggravated or has increased without the fault of the worker." *Benny*, 2007-NMCA-124, ¶¶ 1-4, 7-8 (internal quotation marks and citation omitted). Relying on *Henington*, which concluded—under Section 52-1-56—that a worker may seek additional benefits where her disability has worsened, this Court held that benefits may be modified where injuries have worsened and only upon application by a worker or employer. *Benny*, 2007-NMCA-124, ¶¶ 9-10.

{33} Worker's reliance on Sections 52-1-56 and 52-5-9 as well as *Benny* and *Henington* to show that she was entitled to modification of her benefits is misplaced. Worker does not argue that her labral tear was a result of worsening disability caused by compensable injuries identified in the 2016 compensation order but instead, that the labral tear should have been included as a compensable injury from the beginning. Further, although Worker disputes the WCJ's conclusion that the 2016 compensation order was a final, appealable judgment, Worker does not argue that she attempted to otherwise modify the order.[5] Notably, Worker also failed to file a response or answer to the complaint giving rise to the 2018 compensation order in which Worker could have sought modification. Absent application for modification of benefits due to worsening compensable injuries, or analysis explaining why the authorities on which Worker relies apply, based on the record before us, we find no error in the WCJ's conclusion that Worker is bound by the 2016 compensation order.[6]

Worker's Surgery Was Not Compensable Under NMSA 1978, Section 52-1-28(A) (1987)

{34} Worker briefly argues that the "WCJ erred as a matter of law in accepting Dr. Christopher Hanosh's opinion" that her surgery was not related to Worker's compensable hip injury. Specifically, Worker asserts that Dr. Hanosh's opinion was based on tort law principles and that in relying on his opinion the WCJ injected causation into the analysis.

{35} Worker cites to *Molinar v. Larry Reetz Construction, Ltd.*, 2018-NMCA-011, ¶ 26, 409 P.3d 956, for the contention that Employer's liability for Worker's surgery depends on whether the service is "reasonable and necessary" and does not include a causation analysis under Section 52-

1-28(A). However, Worker does not attempt to analyze or explain *Molinar*'s holding nor does Worker attempt to apply *Molinar*'s reasoning to this case. Instead, Worker simply asserts that the WCJ injected causation into its determination.

Page 12

{36} While *Molinar* does distinguish between the causation requirement of Section 52-1-28(A), and the determination of whether treatment is reasonable and necessary for the purposes of Section 52-1-49, Worker's interpretation is overly broad. *Molinar*, 2018-NMCA-011, ¶ 26. The distinction made in *Molinar* was not that services do not need to be related to the compensable injury, but when the injury has already been determined to be caused by a work accident the question of whether treatment for the injury is reasonably necessary no longer concerns causation. *Id.* Worker ignores the fact that the surgery was to repair a tear that was not determined to be part of her compensable work-related injury.

{37} The WCJ's finding that the labral tear was not part of Worker's compensable work-related injury is also dispositive of Worker's claim that the WCJ erred in denying compensation for Worker's surgery to repair that tear. An employer has no obligation to supply medical treatment or to pay for surgery for a condition that was not caused by a work-related injury.

The WCJ Did Not Err in Denying Compensation for Worker's Surgery

{38} Worker argues that the WCJ erred as a matter of law in denying coverage for her hip surgery because Employer was made aware that the surgery was necessary through Worker's demands and because Employer breached their duty to supply prompt medical treatment. In support of her argument Worker cites *Bowles v. Los Lunas Schools*, 1989-NMCA-081, ¶ 26, 109 N.M. 100, 781 P.2d 1178 (citing 2 Arthur Larson, *Workmen's Compensation Law* § 61.12(d) (1989)), for the proposition that an employer's knowledge of an injury imputes a duty to provide medical treatment.

{39} As Worker acknowledges, *Bowles* interpreted a prior version of the Act which is not applicable to this case. Indeed, in *Vargas v. City of Albuquerque*, this Court recognized that an amendment to the Act providing for a choice of provider after sixty days supplanted the test announced in *Bowles* and held that a worker must instead "establish that the services were 'reasonable and necessary' in order to hold the employer to be financially responsible for the payment of such services." 1993-NMCA-136, ¶ 6, 116 N.M. 664, 866 P.2d 392. Other than a conclusory assertion that medical treatment was necessary, Worker offers no argument as to whether surgery was reasonable and necessary, pursuant to *Vargas* let alone as explained in *Molinar*. Therefore, we consider this argument to be undeveloped and consider it no further. *See Corona v. Corona*, 2014-NMCA-040, ¶ 28, 329 P.3d 701 ("This Court has no duty to review an argument that is not adequately developed.").

Worker's Arguments Regarding the Issues Determined in the 2016 Compensation Order Are Untimely

{40} Worker argues that during an earlier phase of this case, the WCJ erred as a matter of law in vacating the February 11, 2016, trial setting to allow for an IME asserting that the decision violated the Act's requirement of a quick adjudication process. Worker also asserts that the 2016 compensation order was not a final,

Page 13

appealable order because the WCJ concluded that Worker had not reached MMI, awarded only TTD benefits and continuing medical treatment. Finally Worker asserts that the 2016 compensation order was not a final, appealable order because attorney fees were never awarded and that the deadline for appeal commences only after the award of attorney fees.

{41} Before evaluating the merits of Worker's arguments regarding error prior to the 2016 hearing, we first determine whether Worker's arguments are timely. *See Singer v. Furr's, Inc.*, 1990-NMCA-120, ¶¶ 1-5, 111 N.M. 220, 804 P.2d 411 (concluding that a worker's failure to comply with filing requirements in appealing the WCJ's dismissal of the worker's claim deprived this Court of jurisdiction). Whether Worker's claims are timely turns on whether the 2016 compensation order was a final and appealable order.

{42} Our Supreme Court has stated, "[A]n order or judgment is not considered final unless all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible." *Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶ 14, 113 N.M. 231, 824 P.2d 1033 (internal quotation marks and citation omitted). This body of law has been applied by this Court to determine the finality for appeal of an order or judgment of a WCJ. *See Gomez v. Nielson's Corp.*, 1995-NMCA-043, ¶ 5, 119 N.M. 670, 894 P.2d 1026; *Kellewood v. BHP Min. Int'l*, 1993-NMCA-148, ¶ 1, 116 N.M. 678, 866 P.2d 406; *see also Massengill v. Fisher Sand & Gravel Co.*, 2013-NMCA-103, ¶ 13, 311 P.3d 1231. In the 2018 compensation order the WCJ determined that "[t]he 2016 [c]ompensation [o]rder resolved the issues presented for trial and was [a] final order for purposes of appeal." As noted Worker disputes that the 2016 compensation order disposed of all issues of law and fact because (1) the order did not award attorney fees, and (2) the order concluded that Worker had not reached MMI and awarded only TTD benefits. We address each of Worker's arguments in turn.

{43} To begin, although Worker contends that no attorney fees have been awarded in this case, the WCJ found in the 2016 compensation order that "Worker's attorney obtained a benefit for Worker and is entitled to a reasonable fee" and ordered that reasonable attorney fees were to be determined under separate order. Nevertheless, because the record does not indicate that the WCJ ever issued a separate order setting the amount of awarded attorney fees, we address Worker's arguments.

{44} In arguing that the 2016 compensation order was not final and appealable because it did not award attorney fees, Worker directs us to *Kelly Inn* without discussion of the case. In *Kelly Inn*, our Supreme Court held that the pendency of a determination on attorney fees does not destroy the finality of a judgment on the merits. 1992-NMSC-005, ¶¶ 14-29. In its discussion of the issue the Court reasoned that, "the question of finality of a judgment adjudicating the rights and liabilities of the parties . . . should not turn on whether attorney[] fees and costs are characterized as an additional element of damages, rather than as supplementary relief awarded to the prevailing party. Likewise, the finality of a judgment should not turn on whether the governing statute or court rule authorizes attorney[] fees as part of the relief to be afforded to a successful plaintiff, rather than, for example, as an amount to be taxed as 'costs' in favor of the prevailing

party." *Id.* ¶ 24. With this in mind the Court seemingly approved a bright-line rule that "an unresolved issue of attorney[] fees for the litigation in question does not prevent judgment on the merits from being final." *Id.* ¶ 24 (quoting *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988).

{45} However, subsequent to its opinion in *Kelly Inn*, in *Trujillo v. Hilton of Santa Fe*, 1993-NMSC-017, 115 N.M. 397, 851 P.2d 1064, our Supreme Court expressly "retreat[ed] from language in *Kelly Inn* that suggested a bright-line rule for notices of appeal in cases involving attorney[] fees." *Trujillo*, 1993-NMSC-017, ¶ 5. The Court explained that its rational in *Kelly Inn* was that "the term 'finality' is to be given a practical, rather than a technical, construction to satisfy the policies of facilitating meaningful appellate review and of achieving judicial efficiency" *Trujillo*, 1993-NMSC-017, ¶ 3. The Court continued stating, "These policies may be

served by appeals from judgments declaring the rights and liabilities of the parties to the underlying controversy when resolution of supplemental questions will not alter the judgment or moot or revise decisions embodied therein." *Id.*

{46} Applying the principles articulated in *Trujillo*, we are unconvinced that the lack of a determination on the amount of attorney fees renders the 2016 compensation a nonfinal appealable decision. The 2016 compensation order stated that Worker's attorney was entitled to an award to be resolved in a separate order. Although a separate order on attorney fees was never issued, a determination on the amount of attorney fees would not have affected the WCJ's decision as to any of the other issues addressed in the order, including determinations relating to compensable injuries, nor would it impede meaningful appellate review of those issues.

{47} Next, Worker argues that the fact that she was not at MMI at the time of the 2016 compensation order, as well as the fact that the order only awarded TTD benefits, support a conclusion that the compensation order was not a final, appealable order. In support of her arguments Worker cites *Kellewood* without discussion. In *Kellewood* this Court considered whether an order denying the employer's objection to worker's change of HCP was a final, appealable judgment. 1993-NMCA-148, ¶¶ 5-9. In doing so this Court construed the order in light of *Kelly Inn* and *Trujillo* and determined that because "the 'question remaining' to be decided is a determination of whether [the w]orker's injuries are causally related to his employment, and thus whether [the w]orker is entitled to compensation[.] If [the w]orker is unable to prove a compensable injury, he will not be entitled to an award of medical benefits." 1993-NMCA-148, ¶¶ 8-9. This Court went on to explain, "In such an event, this Court's determination of the issue on appeal regarding the [HCP] order would become irrelevant, unnecessary, and moot." *Id.* ¶ 9. Having concluded that the judgment at issue was "interrelated to a determination on the merits of the underlying compensation claims," this Court held that the order was not final and appealable. *Id.* ¶¶ 8-9, 12.

{48} Conversely, in *Gomez* this Court addressed whether an ex parte contact order was final and appealable. 1995-NMCA-043, ¶ 1. In that case, the WCJ issued a compensation order awarding TTD until further ordered by the WCA. *Id.* ¶ 2.

Page 15

Subsequently, the district court granted a motion by the employer to enforce medical management, which included a request for ex parte contact with the worker's HCP. *Id.* ¶¶ 3-4. On appeal, the worker argued that the ex parte contact order was final because it addressed the only issues pending before the WCJ. *Id.* ¶ 5. The employer argued first, that the ex parte contact order was not final because it contemplated further proceedings, and second, pursuant to *Kellewood*, that the order was "interrelated with a determination of the merits of the underlying compensation claim." *Gomez*, 1995-NMCA-043, ¶ 5. This Court held that the order was final for the purpose of appeal because at the time the underlying motion was filed no compensation proceedings were pending, therefore, it was possible that no further formal proceedings would be filed. *Id.* ¶ 8. Additionally, this Court acknowledged that unlike *Kellewood*, "the issues of causation and entitlement to some benefits [had] already been determined." *Gomez*, 1995-NMCA-043, ¶ 8.

{49} More recently, in *Massengill* this Court considered whether an order approving a partial lump sum award of PPD was a final decision. 2013-NMCA-103, ¶ 16. In that case, the worker filed a petition for a partial lump sum payment while his complaint for benefits was pending. *Id.* ¶ 2. At the time of the petition the worker had reached MMI and was already receiving PPD but a final PPD determination had not been made. *Id.* The district court granted the worker's petition, but the employer delayed payment of the lump sum award for approximately one month. *Id.* ¶ 3. Because of the delay the worker filed an application for a supplemental compensation order for post-judgment interest on the lump sum

award, which the WCJ granted. *Id*. The employer appealed arguing in part that the lump sum award was not a final order to which post-judgment interest applies until expiration of the thirty day time to appeal. *Id*. ¶ 4. On appeal this Court analyzed the issue under the principles articulated in *Kelly Inn* and *Trujillo* and concluded that the partial lump sum award was a final order. *Massengill*, 2013-NMCA-103, ¶ 17. In support of its conclusion, this Court acknowledged that the employer did not contest the propriety of the lump sum award and that nothing more needed to be decided in relation to the award, nor did the employer make any arguments that the ultimate PPD determination will affect the lump sum award. *Id*.

{50} Applying the reasoning of these cases to the facts here, we are unconvinced that the fact that Worker was not at MMI at the time of the 2016 compensation order or that the order only awarded TTD benefits renders the order nonfinal for the purpose of appeal at that time. The 2016 compensation order addressed all of the issues raised in Worker's complaint, including identification of compensable injuries, except for a final determination of PPD benefits. Unlike *Kellewood*, the 2016 compensation order disposed of all questions related to compensability of Worker's injuries. Although the 2016 compensation order did not include a specific finding or conclusion as to PPD, the order did conclude that because Worker was no longer at MMI, TTD benefits were appropriate until Worker again reached MMI. Like *Massengill*, there is no indication in the record, nor does Worker assert on appeal, that she opposed the WCJ's finding that Worker was not at MMI, thus, there was nothing more to decide in relation to the TTD benefits. Further, Worker does not direct us to any underlying motions pending at the time of the 2016 compensation order that could have altered the findings and

conclusions therein, therefore, like *Gomez*, it is possible that no other proceedings would be filed until Worker reached MMI as contemplated in the order.

{51} Accordingly, we conclude that the 2016 compensation order was a final, appealable order from which Worker did not appeal within the appropriate period under NMSA 1978, Section 52-5-8(A) (1989). As is the case, the time for appealing issues relating to the 2016 compensation order has passed, therefore, Worker's arguments attacking the propriety of the WCJ's order vacating the 2016 trial so that an IME could be conducted are untimely and, thus, this Court does not have jurisdiction to review them. *See Singer*, 1990-NMCA-120, ¶¶ 1-5.

CONCLUSION

{52} For the reasons set out in this opinion we affirm the WCJ's findings and conclusions in the 2018 compensation order.

{53} IT IS SO ORDERED.

JACQUELINE R. MEDINA, **Judge**

I CONCUR:

JANE B. YOHALEM, **Judge**

BRIANA H. ZAMORA, **Judge (concurring in result only).**

Footnotes:

[1.] Sacroiliitis is "an inflammation of one or both of [the] sacroiliac joints—situated where [the] lower spine and pelvis connect." Mayo Clinic Staff, Sacroiliitis, Mayo Clinic: Patient Care & Health Information, https://www.mayoclinic.org/diseases-conditions/sacroiliitis/symptoms-causes/syc-20350747 (last visited Apr. 27, 2021).

[2.] Employer's answer brief includes three separate motions to strike in whole or in part Worker's brief in chief. Rule 12-309 NMRA of our Rules of Appellate Procedure sets out the

procedure for filing motions in this Court. Because Employer's motions fail to comply with our rules, we decline to consider them here. *See* Rule 12-312(D) NMRA.

[3.] We remind Worker that it is in a litigant's interest to limit the number of issues they choose to raise on appeal in order to ensure that the issues presented are ones that can be adequately supported by argument, authority, and factual support in the record, as required by Rule 12-318(A)(4). *See Rio Grande Kennel Club v. City of Albuquerque*, 2008-NMCA-093, ¶¶ 54-55, 144 N.M. 636, 190 P.3d 1131 ("[W]e encourage litigants to consider carefully whether the number of issues they intend to appeal will negatively impact the efficacy with which each of those issues can be presented.").

[4.] NMSA 1978, Section 52-1-51(C) (2005, amended 2013) of the Workers' Compensation Act (the Act) provides "[o]nly a [HCP] who has treated the worker pursuant to Section 52-1-49 . . . or the [HCP] providing the [IME] pursuant to this section may offer testimony at any workers' compensation hearing concerning the particular injury in question."

[5.] We address Worker's arguments regarding finality of the 2016 compensation order in a separate section of this opinion.

[6.] To the extent Worker argues that the 2016 compensation order did not specifically address a labral tear, we disagree. As the WCJ acknowledges in the 2018 compensation order, the 2016 compensation order accepted the medical opinions of the IME panel, which did not include a labral tear.

No. A-1-CA-37460
Court of Appeals of New Mexico

Romero v. St. Vincent Hosp.

Decided Aug 19, 2021

A-1-CA-37460

08-19-2021

ANNA M. ROMERO, Worker-Appellant, v. ST. VINCENT HOSPITAL, Employer/Self-Insured-Appellee.

Gerald A. Hanrahan Albuquerque, NM for Appellant Hale & Dixon, P.C. Timothy S. Hale Albuquerque, NM for Appellee

MEGAN P. DUFFY, JUDGE

Corrections to this opinion/decision not affecting the outcome, at the Court's discretion, can occur up to the time of publication with NM Compilation Commission. The Court will ensure that the electronic version of this opinion/decision is updated accordingly in Odyssey.

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION Shanon S. Riley, Workers' Compensation Judge

Gerald A. Hanrahan Albuquerque, NM for Appellant

Hale & Dixon, P.C. Timothy S. Hale Albuquerque, NM for Appellee *1

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MEMORANDUM OPINION

MEGAN P. DUFFY, JUDGE

{¶1} Anna M. Romero (Worker), then employed as a housekeeper with St. Vincent Hospital (Employer), was injured at work on May 11, 2006, when she slipped while mopping a wet floor, twisting her right foot and ankle. Over the next eleven years, Worker and Employer litigated various aspects of the workers' compensation benefits to which Worker was entitled. Worker appeals from several of the Workers' Compensation Judge's (WCJ) orders, raising multiple issues. We affirm in part and reverse in part.

DISCUSSION

{¶2} Before turning to the merits of the issues raised on appeal, we note that our review of Worker's arguments was hindered by Worker's failure to cite to the record in her brief in chief. We remind counsel of the importance of complying with our Rules of Appellate Procedure, *see* Rule 12-318(A)(3), and that this Court "will not search the record for facts, arguments, and rulings in order to support generalized arguments," even when conducting a whole-record review. *Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104. The rules set forth requirements that are necessary to allow this Court to review and address threshold matters of preservation, as well as the merits of the issues raised on appeal, as efficiently and thoroughly as possible. A failure to adhere to those requirements results in the consumption of scarce judicial resources, particularly given the volume of the record in this eleven-year-long case.

I. Initial matters

{¶3} Turning now to the arguments raised by the parties, we summarily address two initial matters. First, we reject Employer's argument that Worker's appeal was untimely. Worker appealed after the WCJ issued an order awarding attorney fees on June 11, 2018, but raised challenges to two of the

WCJ's earlier compensation *2 orders, as well as a separate order on Worker's bad faith claims. In *Trujillo v. Hilton of Santa Fe*, 1993-NMSC-017, ¶ 4, 115 N.M. 397, 851 P.2d 1064, our Supreme Court held that a compensation order that did not resolve the issue of attorney fees was non-final for purposes of appeal. *See also Barela v. ABF Freight Sys.*, 1993-NMCA-137, ¶¶ 9-12, 116 N.M. 574, 865 P.2d 1218 (applying *Trujillo* and concluding that an employer could appeal from either the original compensation order or a subsequent order awarding attorney fees). In this case, the WCJ deferred resolution of the attorney fee issue until June 11, 2018, and Worker timely filed a notice of appeal thirty days later. We therefore conclude this Court has jurisdiction to consider Worker's appeal.

{¶4} Second, we dispose of Worker's argument that the WCJ improperly calculated her permanent partial disability (PPD) benefits by relying on the sixth, rather than the fifth, edition of the American Medical Association's guide to the evaluation of permanent impairment (AMA Guide). *See* NMSA 1978, § 52-1-26(A), (C) (1990, amended 2017); NMSA 1978, § 52-1-24(A) (1990). Worker stipulated to the WCJ's use of the sixth edition of the AMA Guide in a pretrial order dated February 15, 2017, and thus waived any argument concerning the district court's reliance on that edition of the AMA Guide. *3

II. Sufficiency of the Evidence

{¶5} Worker makes four arguments that we construe as challenges to the sufficiency of the evidence supporting the WCJ's factual findings. " [W]e review the whole record to determine whether the WCJ's findings and award are supported by substantial evidence." *Molinar v. Larry Reetz Constr., Ltd.*, 2018-NMCA-011, ¶ 20, 409 P.3d 956 (internal quotation marks and citation omitted). Applying the standard set forth in *Herman v. Miners' Hosp.*, 1991-NMSC-021, ¶ 6, 111 N.M. 550, 807 P.2d 734, we view the evidence in the light most favorable to the WCJ's decision. As long as substantial evidence supports the WCJ's findings, "an appellate court will not disturb those findings on appeal." *Id.*

{¶6} Before turning to Worker's specific arguments, we address Worker's more general argument that the WCJ erred by not giving the opinions of her treating physicians greater weight than the opinions of the independent medical examiners (IMEs). The authority she relies upon does not stand for that proposition, *see Grine v. Peabody Nat. Res.*, 2006-NMSC-031, 140 N.M. 30, 139 P.3d 190; *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014, and to the extent Worker suggests the WCJ could not have ruled contrary to her treating physicians' testimony, we reaffirm that the WCJ was not required to take the testimony of her treating physician as true. *See Chapman v. Jesco, Inc.*, 1982-NMCA-144, ¶ 6, 98 N.M. 707, 652 P.2d 257 ("Medical testimony, like other expert *4 evidence, is intended to aid but not to conclude the trier of the facts in determining the extent of disability." (internal quotation marks and citation omitted)). Instead, "weighing evidence and making credibility determinations are uniquely within the province of the trier of fact, [and] we will not reweigh the evidence nor substitute our judgment for that of the WCJ, unless substantial evidence does not support the findings." *Dewitt v. Rent-A-Ctr., Inc.*, 2009-NMSC-032, ¶ 22, 146 N.M. 453, 212 P.3d 341.

A. Hip and Lower Back Pain

{¶7} Worker contends that her workplace injury altered her gait, which caused hip and back pain. Worker argues that "[t]he WCJ erred by not ordering Employer to provide Worker with an evaluation of her hip and back pain pursuant to Section 52-1-49(A) (1990). The WCJ found that "Worker's right hip and lower back pain are not a natural and direct result of the May 11, 2006 work related accident." The WCJ quoted and agreed with the IME panel's opinion that "[Worker's] ongoing right hip complaint is not causally related

to the May 11, 2006 injury since she does not ambulate with an altered gait. [Worker] possibly had temporary right hip pain when she ambulated with an antalgic gait."

{¶8}Worker argues that "[t]he WCJ erred by giving greater weight to the opinion of the IME provider (Dr. Mirmiran) rather than the surgeons (Dr. Blake & Dr. Schulhofer)." We have already addressed whether the opinions of treating *5 physicians are entitled to greater weight than IME physicians. The remaining question is whether substantial evidence supports the WCJ's finding that Worker's hip and back pain were not caused by the work-related injury when this finding was based on the IME's opinion that Worker did not ambulate with an altered gait.

{¶9} "The rule is established that where conflicting medical testimony is presented as to whether a medical probability of causal connection existed between [the injury] and work being performed, the [district] court's determination will be affirmed." *Grine v. Peabody Nat. Res.*, 2005-NMCA-075, ¶ 30, 137 N.M. 649, 114 P.3d 329 (internal quotation marks and citation omitted), *rev'd on other grounds*, 2006-NMSC-031. Because there was medical testimony-the IME panel's report-that supported the WCJ's decision, and because this is "sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the [WCJ,]" *see Herman*, 1991-NMSC-021, ¶ 6, we reject Worker's argument that other medical evidence required a different result. *See id.*

{¶10} Further, while Plaintiff's treating physicians, Drs. Blake, Chavez, and Schulhofer, each testified to some degree of probability that Worker's hip pain was causally related to her workplace injury, we note that their testimony is based on examinations performed sometime prior to the IME. Worker points to evidence from September 26, 2007, to November 3, 2011; the IME took place on September 4, 2012. The IME physicians acknowledged prior reports that Worker's gait was *6 abnormal, but did not observe that Worker had an abnormal gait at the time of the IME. Due to the passage of time, it is unclear whether the IME physicians' report conflicts with the earlier physician testimony-it is possible that Worker walked with an abnormal gait as late as 2011, but did not in 2012. To the extent the testimony does conflict, the earlier testimony does not render the WCJ's finding "manifestly wrong or clearly opposed to the evidence." *See Molinar*, 2018-NMCA-011, ¶ 20.

B. Psychological Impairment

{¶11} Worker also contends that the WCJ erred by denying continuing medical benefits for Worker's psychological injuries. Worker makes two arguments. First, Worker argues, "[t]he WCJ erred by giving more weight to the opinions of the IME psychologists (Dr. Naimark & Dr. Granados) rather than the treating psychologist (Dr. Donovan)." Second, she argues, "the opinions of both Dr. Naimark and Dr. Granados should have been denied because they both applied wrong legal standards."

{¶12} Assuming Worker intended this first argument to be that there was not substantial evidence for the WCJ's determination that "beyond June 1, 2016, Worker's psychological treatment, while beneficial, would not be related to her work injury[,]" we reject that argument because the medical evidence was conflicting and Dr. Granados's IME supported the WCJ's decision, as we explain in more detail below. As for Worker's second argument, she contends that Drs. Naimark and *7 Granados applied the wrong legal standard by not recognizing that "[w]orkers are entitled to benefits, including medical treatment, for the resulting combination of a related[ ]accident and any pre-existing conditions." Workers are so entitled, *id.* ¶ 22, but as we explain, neither Dr. Naimark nor Dr. Granados failed to recognize this.

{¶13} In the September 4, 2012 IME, Dr. Naimark diagnosed Worker with psychological conditions that he divided into two diagnoses: (1) "[p]ain [d]isorder associated with both psychological factors and a general medical condition with depressed and anxious features" and (2) " [b]ereavement." Dr. Naimark wrote, "The [p]ain [d]isorder is partially related to the May 11, 2006 injury. The diagnosis of [b]ereavement is unrelated to the job injury." To treat the pain disorder, Dr. Naimark recommended that Worker see a "psychologist or similarly trained professional who specializes in instruction with psychological pain control techniques. It is estimated [twelve to twenty] sessions would be adequate for meeting her treatment needs. This recommendation for treatment is partially related to the May 11, 2006 job injury." To treat the bereavement, Dr. Naimark wrote:

> [Worker] should work with a pastoral counselor (one-to-one) to assist her with her grief reaction related to the loss of her son. This treatment is unrelated to the May 11, 2006 job injury. Her grief reaction has always been severe and was not aggravated or exacerbated by the job injury. Her nonworking status allows for more reflection on this problem[,] but the severity of the grief reaction remains unchanged.

Dr. Naimark thus divided Worker's psychological condition into two injuries: one caused by the workplace accident and another not caused by the
8 workplace accident. *8

{¶14} In its first compensation order, the WCJ essentially agreed with Dr. Naimark, finding that " [a]s a natural and direct result of the accident of May 11, 2006, to a reasonable degree of medical probability, Worker suffer[ed] . . . [p]ain disorder[] and [m]ajor [d]epressive [d]isorder." The WCJ found the Worker also suffered from "bereavement[,]" but that Worker's bereavement was not a result of the May 11, 2006 accident. The WCJ concluded that "Worker has a continuing need for medical care for treatment of the work[-]related conditions as recommended by her authorized health care providers and their referrals."

{¶15} Dr. Naimark did not fail to recognize that, as Worker put it, "[w]orkers are entitled to benefits, including medical treatment, for the resulting combination of a related[ ]accident and any preexisting conditions." Rather, Dr. Naimark opined that Worker suffered from two separate psychological conditions: one "partially related to the May 11, 2006 injury[,]" and another neither caused nor exacerbated by the accident. Worker fails to recognize this distinction, suggesting instead that Dr. Naimark diagnosed Worker's psychological state as a single psychological condition that was present before the accident but was exacerbated by the accident.

{¶16} We turn to Dr. Granados' recommendation. Dr. Granados performed an independent psychological examination pursuant to the WCJ's order granting Employer's application for IME. Like Dr. Naimark, Dr. Granados diagnosed Worker with two psychological conditions: one
9 partially caused by the 2006 workplace *9 accident and one not caused by the accident. The condition that was partially caused by the workplace accident was Worker's "[m]ajor [d]epressive [d]isorder, moderate, without current suicidal ideation or psychotic features, and [s]omatic [s]ymptom [d]isorder, predominant pain, chronic." The condition that was not caused by the workplace accident was "other [s]pecified [t]rauma and [s]tressor-related [d]isorder, specifically as it pertains to the persistent complex [b]ereavement [d]isorder[,]" a diagnosis that was "equivalent to the previous[] diagnosis of [b]ereavement [d]isorder . . . as assigned by Dr. Naimark."

{¶17} Dr. Granados recommended that Worker's benefits for psychological injury end, but the reason for this recommendation was not Worker's pre-existing psychological condition, as Worker contends. To the contrary, Dr. Granados stated that "[Worker] reached [maximum medical improvement] from a psychological standpoint on . . . [October 9, 2014]." Dr. Granados said " [Worker] has had a reasonable and appropriate course of psychological treatment . . . between November 2012 and October 2014. If [Worker] has continued to visit with Dr. Donovan on a monthly or every[two-]month basis, those visits are considered reasonable and appropriate; however, it is proposed that no further psychological treatment be provided beyond June 2016." The WCJ agreed, reiterating that Worker's pain disorder and major depressive disorder were "a natural and direct result of the accident of May 11, 2006," but ordering that "Worker has received
10 all *10 of the psychological medical care which she is entitled to under the Workers' Compensation Act."

{¶18} In sum, neither Dr. Naimark nor Dr. Granados failed to recognize that "[w]orkers are entitled to benefits, including medical treatment, for the resulting combination of a related[ ]accident and any pre-existing conditions." Rather, Dr. Naimark recommended that Worker receive treatment for her pain disorder, which Dr. Naimark acknowledged was a combination of a work-related accident and a psychological condition that was present before May 11, 2006. Dr. Granados recommended that treatment cease, but such recommendation was not because of Worker's pre-existing psychological condition but rather because Worker had already received a "reasonable and appropriate course of psychological treatment[.]" Because the reason for any limitation or denial of treatment for a work-related psychological injury was never the fact that that injury was an exacerbation of a pre-existing psychological condition, Worker's reliance on *Molinar* and other similar cases is misplaced. *See id.* ¶¶ 45-46 (noting that workers are entitled to benefits even when an injury is an exacerbation of a pre-existing condition).

{¶19} For these reasons, we perceive no error in the WCJ's decision to deny continuing medical
11 benefits for Worker's psychological injuries. *11

C. Calculation of PPD Benefits

{¶20} Worker contends the WCJ "erred in assessing Worker's [PPD] benefits . . . by not finding that Worker's loss of physical capacity was from heavy to sedentary." We construe this argument to be that there was not substantial evidence for the WCJ's finding that Worker's physical capacity before the injury was medium as opposed to heavy.

{¶21} The calculation of PPD is based in part on a comparison of the worker's physical capacity before and after the injury. NMSA 1978, § 52-1-26.1 (1990); NMSA 1978, § 52-1-26.4 (2003). In general, if an injury causes a greater change in physical capacity, a worker is awarded a greater PPD benefit. *See* § 52-1-26.1. "Heavy" capacity is "the ability to lift over fifty pounds occasionally or up to fifty pounds frequently[.]" Section 52-1-26.4(C)(1). "Medium" capacity "means the ability to lift up to fifty pounds occasionally or up to twenty-five pounds frequently[.]" Section 52-1-26.4(C)(2). In the February 14, 2014 compensation order, the WCJ found that "Worker's usual and customary work, before injury, was at a *medium* level of exertion." After the workplace injury, Worker was at sedentary capacity. Worker contends the accident reduced her capacity from *heavy* to sedentary.

{¶22} Contrary to Worker's suggestion that the only evidence presented on this issue was her own testimony that she lifted up to fifty pounds and
12 occasionally lifted over *12 fifty pounds, the WCJ made several findings indicating Worker's capacity before the workplace injury was not heavy based on Worker's prior injuries and restrictions. For example, the WCJ found, "[p]rior

to the May 11, 2006 accident, Worker fell in a parking lot and severed nerves in her right hand, Worker sustained a rotator cuff tear of her right shoulder when a case of toilet paper fell on her shoulder, and Worker fell off her Mother's stairs[,] tearing ligaments and tendons in her right knee[.]" Worker underwent surgeries for each of these injuries. As the WCJ noted, "Worker testified that she has continuously experienced pain in her right shoulder and right knee since each of those accidents" and that "while she was employed at Quail Run, as a housekeeper, prior to the May 11, 2006 accident, she 'would only do certain parts of the job and the other person with her would do the other parts' because they knew she had restrictions[.]" On appeal, Worker does not challenge any of these findings. The WCJ credited Worker's testimony, stating that "in the course of her employment with Employer she was required to lift, carry and push heavy items[,]" but wrote that "the [c]ourt remains unpersuaded that Worker's weight estimates were accurate" or that "Worker was capable of lifting greater than fifty pounds given her preexisting injuries[.]"

{¶23} Viewing the WCJ's unchallenged findings in the light most favorable to the WCJ's decision, we hold that substantial evidence supports the WCJs determination that Worker was at medium
13 capacity prior to injury. *13

D. Scheduled Injury Benefits

{¶24} Worker argues the WCJ erred as a matter of law in its award of scheduled injury benefits under NMSA 1978, Section 52-1-43 (2003). The WCJ found that "[a]s a natural and direct result of the accident of May 11, 2006, to a reasonable degree of medical probability, Worker suffers right ankle sprain/pain[.]" Further, the WCJ found that "Worker underwent three surgeries to her right foot and ankle as a result of the May 11, 2006 accident and continues to experience pain in her right ankle." For this injury, the WCJ determined that Worker's impairment rating was 7 percent of the lower extremity. The WCJ concluded that pursuant to Section 52-1-43(A)(32), Worker is entitled to 115 weeks of scheduled injuries benefits for her right foot at the ankle and that Worker's loss of use for the right foot is 14 percent, including the 7 percent impairment. *See id.* (providing 115 weeks for injury to one foot at the ankle).

{¶25} Worker contends that she sustained a permanent injury to her Achilles and peroneal tendons and that the WCJ should have awarded her an additional 130 weeks of scheduled injury benefits pursuant to Section 52-1-43(31) (providing 130 weeks for injury to one leg between the knee and ankle), and that the award should have been at 80 percent. To the extent Worker argues that the percentage for her impairment rating should be higher, we read Worker's argument to be that there was not substantial evidence for the WCJ's finding that
14 Worker's impairment rating was *14 only 7 percent. Without any citation to the record, Worker describes her own testimony regarding the severity of her injury to her foot and ankle and the impact of this injury on her life, suggesting that her impairment rating must have been higher. The evidence on which the WCJ relied for this finding was the recommendation from the 2012 IME. Viewing the WCJ's finding in the light most favorable to the WCJ's decision, we hold that the WCJ could have accepted the IME report to the extent it conflicted with Worker's own testimony; therefore, we will not disturb the WCJ's finding. *See Herman*, 1991-NMSC-021, ¶ 6.

{¶26} We also reject Worker's argument that the WCJ erred in awarding only 115 weeks for an injury to Worker's foot at the ankle under Section 52-1-43(32), and not an *additional* 130 weeks for an injury to an injury to one leg between the knee and the ankle under Section 52-1-43(31), for two reasons. First, we do not see where Worker argued below that she was entitled to two separate scheduled-injury benefits. She submitted proposed findings and conclusions that asked the WCJ to conclude that she suffered a "partial loss of use of

her right leg below the knee" and was entitled to 130 weeks of benefits. The requested conclusion appears to be in lieu of, and not in addition to, a request for 115 weeks of benefits for the injury to her foot. Therefore, preservation of this issue is doubtful.

{¶27} Even assuming for the sake of discussion that the issue is preserved, we find no support for Worker's argument that she suffered an injury between the knee and *15 the ankle. Worker's initial argument in her brief in chief contained no citation to any evidence in the record. In her reply, she cited to an operative report of Dr. Blake, which discussed a surgery on the lateral aspect of Worker's right *foot* and noted a tear in her peroneal tendon. Worker also cited to the deposition testimony of Dr. Schulhofer for his discussion of an injury to Worker's Achilles tendon. In context, however, Dr. Schulhofer made clear that the injury was at the point where the tendon attached to the heel. He was asked specifically, "Is there any injury . . . to her shin or above the ankle?" He responded, "Not that I'm aware of." Worker provided no other citations to the record below. Consequently, we conclude that Worker has not established on appeal that she suffered an injury above the ankle or that she was entitled to 130 weeks of scheduled injury benefits. We affirm the WCJs findings regarding Worker's scheduled injury benefits.

III. Bad Faith Claims

{¶28} From the outset of the proceedings below, Worker claimed that Employer engaged in bad faith and unfair claim-processing practices. *See* NMSA 1978, § 52-1-28.1(B) (1990) ("If unfair claim processing or bad faith has occurred in the handling of a particular claim, the claimant shall be awarded, in addition to any benefits due and owing, a benefit penalty not to exceed twenty-five percent of the benefit amount ordered to be paid."). The WCJ finally heard the matter in 2017 and rejected Worker's bad-faith claims, writing in an order dated October 18, 2017, that *16 "each of Worker's allegations are either time-barred and/or without merit[.]" Worker claims that the WCJ erred as a matter of law in concluding that any of her bad faith claims are time-barred. We agree. The WCJ's ruling on whether Worker's claims were time-barred presents a question of law that we review de novo. *Williams v. Stewart*, 2005-NMCA-061, ¶ 8, 137 N.M. 420, 112 P.3d 281.

{¶29} It is well settled in New Mexico that the filing of the complaint tolls the statute of limitations, and the statute remains tolled during the pendency of the action. *Bracken v. Yates Petroleum Corp.*, 1988-NMSC-072, ¶¶ 10, 12, 107 N.M. 463, 760 P.2d 155. As mentioned above, Worker first requested penalty benefits for Employer's bad faith conduct as part of her initial workers' compensation complaint, filed March 3, 2008. This included Worker's claim that Employer improperly terminated her benefits on August 12, 2007. Worker continued to request penalty benefits throughout the litigation, in filings in 2011 and in 2014, based on Employer's alleged continuing conduct. In at least two orders, the WCJ specifically noted that resolution of the bad-faith issue was deferred for a later determination. Consequently, because Worker's bad faith claims were properly pled and there is no indication in the record that the claims were dismissed or resolved prior to the WCJ's October 18, 2017 order, we fail to see how any of Worker's bad faith claims are time-barred. Accordingly, we hold that the WCJ erred as a matter of law in finding that some of Worker's bad faith allegations were time-barred.

{¶30} *17 Although the WCJ's order indicates that the WCJ also found that some of Worker's claims lacked merit, the WCJ did not enter findings of fact or conclusions of law addressing any of the claims specifically. Consequently, we are unable to determine which claims the WCJ found unmeritorious and why, and we are therefore unable to review this aspect of the order. For this reason, we reverse the WCJ's denial of Worker's bad faith claims and remand for reconsideration of

the entirety of Worker's allegations of bad faith and unfair claims processing, with further instructions to the WCJ to enter findings and conclusions specifying the basis of its ruling as to each claim.

IV. Attorney Fees

{¶31} Finally, Worker argues the WCJ erred in determining Worker's attorney fees. The WCJ found that there were two accidental injury claims in this matter and awarded Worker's attorney $45, 000, payable 75 percent by Employer and 25 percent by Worker. Worker contends the WCJ erred by ordering Worker to pay 25 percent of the fee award.

{¶32} NMSA 1978, Section 52-1-54 (2013) governs attorney fee awards in connection with worker's compensation proceedings, and two subsections of this statute are relevant to our analysis. First, Section 52-1-54(I) sets a cap on the amount of attorney fees at $22, 500 for a single accidental injury claim. Second, Section 52-1-54(F) is a fee-shifting provision, which provides
18 that "[a]fter a recommended *18 resolution has been issued and rejected . . . the employer or claimant may serve upon the opposing party an offer to allow a compensation order to be taken against the employer or claimant for the money or property or to the effect specified in the offer[.]" Section 52-1-54(F)(4) goes on to say that "if the worker's offer was less than the amount awarded by the compensation order, the employer shall pay one hundred percent of the attorney fees to be paid the worker's attorney[.]"

{¶33} In this case, the WCJ issued three separate compensation orders, and Worker filed an application for attorney fees after the WCJ issued its third and final compensation order on March 21, 2017. In that application, Worker noted that she had conveyed two offers of judgment during the pendency of the action. She stated:

> Worker conveyed an [o]ffer of [j]udgment to Employer on October 24, 2008. Employer did not accept this offer. Worker obtained benefits in excess of her [o]ffer of [j]udgment through the [first] [c]ompensation [o]rder entered on . . . April 14, 2009.
>
> Worker conveyed a second [o]ffer of [j]udgment to Employer on November 21, 2013. Employer did not accept this offer. Worker obtained benefits in excess of her Offer of Judgment through the [second] [c]ompensation [o]rder issued on February 14, 2014.

{¶34} At the hearing on Worker's fee application, the WCJ orally ruled "that there are two separate accidents and that the cap in this case is $45, 000." The WCJ further stated "that $22, 500 is payable 100 percent by the employer/insurer to the worker['s attorney] and $22, 500 . . . is payable 50 percent by the Worker and 50 percent by the employer/insurer." In the written order that
19 followed, the WCJ found that Worker *19 had obtained benefits in excess of her *first* offer of judgment, conveyed on October 24, 2008, pursuant to Section 52-1-54(F). The order was silent as to Worker's second offer of judgment, but the WCJ apparently concluded that Worker was not entitled to fee shifting for the second accidental injury.

{¶35} Worker's argument on this point is limited to a single sentence that reads: "[s]ince Worker obtained benefits in excess of her [o]ffer of [j]udgment, the WCJ erred by not ordering Employer to pay 100 [percent] of the attorney fee award[,] pursuant to NMSA 1978, § 52-1-54(F) [.]" Worker did not acknowledge on appeal, as she did before the WCJ, that she issued two separate offers of judgment that relate to two separate fee awards, nor did she address whether she obtained benefits in excess of the second offer. Instead, her

briefing characterizes the $45, 000 attorney fee award as a single award of fees, for a single accident, and states that she "conveyed *an* Offer of Judgment . . . [and] then obtained benefits in excess of *the* [o]ffer of [j]udgment." (Emphasis added.) This, of course, fails to address the core issue of whether the WCJ erred in declining to shift fees with respect to the second injury award. Because Worker has not provided any argument or authority on this point, we decline to address it further. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶¶ 70-71, 309 P.3d 53 (stating that appellate courts will not review undeveloped
20 arguments). *20

CONCLUSION

{¶36} For the foregoing reasons, we remand to the WCJ for reconsideration of Worker's bad faith or unfair claims processing claims, but affirm on all other issues.

{¶37} IT IS SO ORDERED.

WE CONCUR: J. MILES HANISEE, Chief
21 Judge, ZACHARY A. IVES, Judge *21

FRANCES GALLEGOS, Worker-Appellant,
v.
OFFICE OF THE ATTORNEY GENERAL and GSD RISK MANAGEMENT DIVISION, Employer/Self Insured-Appellees.

No. A-1-CA-39447

Court of Appeals of New Mexico

August 19, 2021

Corrections to this opinion/decision not affecting the outcome, at the Court's discretion, can occur up to the time of publication with NM Compilation Commission. The Court will ensure that the electronic version of this opinion/decision is updated accordingly in Odyssey.

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION Reginald C. Woodard, Workers' Compensation Judge

Dorato & Weems LLC Derek L. Weems Albuquerque, NM for Appellant

Garcia Law Group, LLC Katherine E. Tourek Albuquerque, NM for Appellees

MEMORANDUM OPINION

JACQUELINE R. MEDINA, JUDGE

{¶1} Worker appeals from an order entered by the Workers' Compensation Judge (WCJ) that denied her request to make Employer 100 percent responsible for payment of attorney fees. We issued a calendar notice proposing to reverse. Employer has responded with a memorandum in opposition. We reverse.

{¶2} In this appeal Worker has challenged the award of attorney fees arising out of a stipulated compensation order. Specifically, Worker has claimed that Employer should be responsible for 100 percent of the attorney fees under NMSA 1978, Section 52-1-54 (2013).

{¶3} Under Section 52-1-54(F)(4), an employer shall pay 100 percent of the attorney fees paid to a worker's attorney "if the worker's offer was less than the amount awarded by the compensation order[.]" *See Abeyta v. Bumper To Bumper Auto Salvage*, 2005-NMCA-087, ¶ 9, 137 N.M. 800, 115 P.3d 816 (referring to Section 52-1-54 as a fee-shifting provision). The primary purpose of this fee-shifting provision is to facilitate settlement and prevent litigation. *See Baber v. Desert Sun Motors*, 2007-NMCA-098, ¶ 18, 142 N.M. 319, 164 P.3d 1018. The fee-shifting provision of the Act is aimed at encouraging the litigants "to make and accept reasonable offers of judgment by providing financial sanctions for the rejection of an offer of judgment if the rejecting party does not obtain a more favorable ruling." *Id.* (internal quotation marks and citation omitted).

{¶4} The mandatory fee-shifting provision is triggered when the following three requirements are met: (1) a worker's offer of judgment is valid pursuant to the Section 54-1-54(F); (2) the offer is for an amount less than that awarded at trial; and (3) the worker's offer was rejected. *Baker v. Endeavor Servs., Inc.*, 2018-NMSC-035, ¶ 18, 428 P.3d 265. There is no dispute that Worker's offers of judgment satisfied these requirements. However, the WCJ refused Worker's fee-shifting request because the facts of this case were "unique" with respect to the medical evidence, especially on the issue of causation, and Employer's decision not to accept prior offers of judgment should not be "sanctioned" because Employer had a good faith defense. [RP 372, 374-75]

{¶5} We conclude that the WCJ's ruling reads language into the statute that is not there. *See State v. Benally*, 2015-NMCA-053, ¶ 7, 348 P.3d 1039 ("We will not read language into the statute that is not there, especially when the statute makes sense as written." (alteration, internal quotation marks, and citation omitted)). In light of the Legislature's requirement that the fee-shifting provision "shall" be imposed if the statutory language is satisfied, the WCJ did not have the discretion to deny the award based on a "good faith" exception. *See Marbob Energy Corp.*

v. N.M. Oil Conservation Comm'n, 2009-NMSC-013, ¶ 22, 146 N.M. 24, 206 P.3d 135 ("It is widely accepted that when construing statutes, 'shall' indicates that the provision is mandatory, and we must assume that the Legislature intended the provision to be mandatory absent [a] clear indication to the contrary."). Although Employer argues that the statute should provide some flexibility notwithstanding the mandatory language, we rely on our case law that concludes otherwise. *See Baker*, 2018-NMSC-035, ¶¶ 29-32 (interpreting the fee-shifting statute as mandatory where a worker recovered more benefits than she had agreed to accept in an offer of judgment).

{¶6} For the reasons set forth above, we reverse and remand with instructions to recalculate the attorney fees award.

{¶7} IT IS SO ORDERED.

WE CONCUR: KRISTINA BOGARDUS, Judge, JANE B. YOHALEM, Judge

JEROME ROMERO, Worker-Appellant,
v.
LOS ALAMOS NATIONAL LABS,
Employer/Self-Insured-Appellee.

No. A-1-CA-38875

Court of Appeals of New Mexico

September 16, 2021

Corrections to this opinion/decision not affecting the outcome, at the Court's discretion, can occur up to the time of publication with NM Compilation Commission. The Court will ensure that the electronic version of this opinion/decision is updated accordingly in Odyssey.

APPEAL FROM WORKERS' COMPENSATION ADMINISTRATION Shanon S. Riley, Hearing Officer

Dorato & Weems, LLC Derek L. Weems Albuquerque, NM for Appellant

Elmore Law, LLC Christopher T. Elmore Albuquerque, NM for Appellee

MEMORANDUM OPINION

MILES HANISEE, CHIEF JUDGE.

{¶1}Worker appeals an order that he undergo an independent medical examination (IME) in this workers' compensation case. The order at issue recites that it is intended to address "potential future issues" and that the exam itself is "limited to questions about a future treatment plan." [RP 168-69] This Court issued a calendar notice proposing to reverse based upon the absence of statutory authority to order an IME without any present dispute between the parties. *See* NMSA 1978, § 52-1-51(A) (2013) (authorizing an IME "[i]n the event of a dispute between the parties"). Employer has filed a memorandum in opposition to that disposition. Having duly considered that memorandum, we remain unpersuaded. Worker has also filed a memorandum in response to our proposed disposition that invites this Court to issue a published opinion addressing whether the workers' compensation judge exceeded the available statutory authority by attempting to "adjudicate future medical benefits." [MIS 5] Having resolved the question presented by this appeal, however, we decline Worker's invitation to address issues "unnecessary to the decision in the case." *Obiter dictum*, *Black's Law Dictionary* (11th ed. 2019).

{¶2} In its memorandum, Employer argues that there is a dispute between the parties by referring to its own application for an IME, which asserted that it "disputes whether epidural steroid injections and additional treatment recommendations are related to the prior work accident." [RP 157] We note that the order on appeal explicitly recites that "[c]ausation is not at issue in this matter and should not be addressed" in the IME. [RP 169] Thus, it appears that even if there were a dispute regarding whether any existing or future treatment recommendations are related to Worker's accident, the IME at issue in this appeal is explicitly not intended to address any such dispute, since it is not to address causation. More importantly, Employer fails to place its abstract disagreement regarding what medical care overall should be anticipated or provided as reasonable and necessary to the prior accident in the context of any presently existing claim in this case. *[See* MIO 2] As our calendar notice pointed out, "the process surrounding an IME 'occurs within the context of a claim' and 'cannot take place' outside that context." [CN 3 quoting *Brashar v. Regents of Univ. of California,* 2014-NMCA-068, ¶ 13, 327 P.3d 1124]

{¶3} Because the pending issues in this case were resolved by way of an earlier recommended resolution that was accepted by the parties, there was no active claim in the case when Employer filed its application for an IME. [RP 154] In the absence of any pending claim, Employer's academic "dispute" about whether various treatment recommendations are related to Worker's accident are not ripe for resolution in any way, and cannot form the justification for an

IME pursuant to Section 52-1-51. *See Brashar,* 2014-NMCA-068, ¶ 13 (noting that "an IME cannot take place unless a claim has been filed").

{¶4}The order for an independent medical examination is reversed.

{¶5} IT IS SO ORDERED.

WE CONCUR: MEGAN P. DUFFY, SHAMMARA H. HENDERSON, JUDGE

HENRY P. SALAZAR, Worker-Appellant,
v.
BERNALILLO COUNTY WATER UTILITY AUTHORITY and CCMSI,
Employer/Insurer-Appellees.

No. A-CA-38393

Court of Appeals of New Mexico

October 18, 2021

Corrections to this opinion/decision not affecting the outcome, at the Court's discretion, can occur up to the time of publication with NM Compilation Commission. The Court will ensure that the electronic version of this opinion/decision is updated accordingly in Odyssey.

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION Rachel A. Bayless, Hearing Officer

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Veguita, NM

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MEMORANDUM OPINION

JENNIFER L. ATTREP, Judge

{¶1} After Henry P. Salazar (Worker) retired from working for Bernalillo County Water Utility Authority (Employer), he petitioned for modifications (statutory modifiers) to permanent partial disability (PPD) benefits, as provided for by NMSA

1978, Section 52-1-26 (1990, amended 2017)[1] of the Workers' Compensation Act (the Act), NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2017). The workers' compensation judge (WCJ) denied Worker statutory modifiers, and Worker appeals. Because Worker has not convinced us that the WCJ erred, we affirm.

BACKGROUND

{¶2} The facts relevant to this appeal are undisputed. In September 2016 Worker suffered injuries to his left shoulder, left elbow, and low back when he tripped and fell at work. Worker returned to work the following week. He reached maximum medical improvement (MMI) about a year later and, shortly thereafter, filed a complaint with the Workers' Compensation Administration for basic PPD benefits, which Employer paid. *See Cordova v. KSL-Union*, 2012-NMCA-083, ¶ 5, 285 P.3d 686 (providing that at the time a worker, who suffers a compensable injury resulting in PPD, reaches MMI, the worker is entitled to PPD benefits).

{¶3} Worker remained employed with Employer through July 2018, at which point he notified Employer he was retiring. Worker's decision to retire after twenty-seven

years of work was based solely on a pulmonary health condition he developed while working for a previous employer. In retiring, Worker was following the advice of his doctor, who had reasoned that Worker's job with Employer exposed him to chemicals exacerbating his pulmonary condition. Worker waived any claim that his preexisting pulmonary condition was aggravated while working for Employer. As of the WCJ's decision in this case, Worker had not worked since his retirement; nor did Worker claim that he sought, but was unable to obtain, other employment.[2]

{¶4} After retiring, Worker filed a complaint seeking statutory modifiers under Section 52-1-26(C), which increase the base award of PPD

benefits. *See Gonzalez v. Performance Painting, Inc.*, 2013-NMSC-021, ¶ 11, 303 P.3d 802. The case went to trial, and the WCJ issued a compensation order ruling, among other things, that Worker was not entitled to statutory modifiers. Worker appeals only the WCJ's denial of statutory modifiers.

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DISCUSSION

{¶5} Before we address Worker's contention that the WCJ erred in denying statutory modifiers, we first review the relevant law on PPD benefits for needed context.

I. PPD Benefits and Statutory Modifiers

{¶6} "PPD benefits are payable under Section 52-1-26 of the Act when a worker suffers a permanent impairment resulting from an injury arising out of and in the course of employment." *Cordova*, 2012-NMCA-083, ¶ 9. PPD benefits are "determined by calculating the worker's impairment[,]" which may be increased through statutory modifiers based on the worker's age, education, and physical capacity. Section 52-1-26(C), (D) (conditionally providing for modifications pursuant to Sections 52-1-26.1 through -.26.4). Statutory modifiers are designed to "address problems associated with a worker's projected difficulty in obtaining and returning to work after reaching MMI." *Cordova*, 2012-NMCA-083, ¶ 11.

{¶7} A permanently disabled worker, however, is not always entitled to statutory modifiers; under certain circumstances, the worker's PPD benefits are based on the impairment alone. Namely, "[i]f, on or after the date of [MMI], an injured worker returns to work at a wage equal to or greater than the worker's pre-injury wage, the worker's [PPD] rating shall be equal to his impairment and shall not be subject to the modifications calculated pursuant to Sections 52-1-26.1 through 52-1-26.4."

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Section 52-1-26(D). Thus, "if a worker returns to work at a wage equal to or greater than the pre-injury wage, the [PPD] rating remains at the level of the worker's impairment rating and is not subject to the statutory modifiers, no matter what his [or her] age, education and physical capacity." *Connick v. Cnty. of Bernalillo*, 1998-NMCA-060, ¶ 6, 125 N.M. 119, 957 P.2d 1153. A plain reading of Section 52-1-26(D) might suggest that a worker could intentionally evade this limitation on statutory modifiers by voluntary unemployment or underemployment. *See Connick*, 1998-NMCA-060, ¶ 8.

{¶8} This Court, however, has repeatedly rejected such a reading because it would be contrary to the Act and would "violate the policy of encouraging employment and independence from compensation benefits[.]" *Jeffrey v. Hays Plumbing & Heating*, 1994-NMCA-071, ¶¶ 11, 14, 118 N.M. 60, 878 P.2d 1009 (citing Section 52-1-26(A), which provides that the policy and intent of the Legislature is that "every person who suffers a compensable injury with resulting [PPD] should be provided with the opportunity to return to gainful employment as soon as possible with minimal dependence on compensation awards"); *see also Ruiz v. Los Lunas Pub. Schs.*, 2013-NMCA-085, ¶ 24, 308 P.3d 983 ("Permitting a worker to evade application of [Section 52-1-26(D)] by voluntary unemployment or underemployment is contrary to the purposes of the [Act]."); *Connick*, 1998-NMCA-060, ¶ 6 ("The statutory incentive to return to work is unmistakable."). Thus,

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"[statutory modifiers] should be denied if a claimant, through voluntary conduct unconnected with his [or her] injury, takes himself [or herself] out of the labor market." *Gonzalez*, 2013-NMSC-021, ¶ 17 (internal quotation marks and citation omitted); *see also Jeffrey*, 1994-NMCA-071, ¶ 12 (same). This Court, however, has taken the view that not every rejection of an offer of employment will amount to voluntary unemployment or

underemployment. *Jeffrey*, 1994-NMCA-071, ¶ 15. Rather, a worker's rejection of an offer will preclude statutory modifiers if the rejection was unreasonable. *Id.*

{¶9} This Court does not mechanically apply the concepts from *Jeffrey*-of voluntary unemployment or underemployment and unreasonable rejections of work offers-in determining whether a worker is entitled to statutory modifiers. Instead, this Court considers these concepts in light of the legislative policies of encouraging employment and independence from compensation benefits and the purpose at which statutory modifiers are aimed. *See, e.g.*, *Cordova*, 2012-NMCA-083, ¶ 23 ("[a]pplying the policies and directives of Section 52-1-26 and the reasoning of our case law" to determine whether the claimant was entitled to statutory modifiers); *Connick*, 1998-NMCA-060, ¶ 9 ("Based on the purpose and intent behind Section 52-1-26, and the statutory provision in Subsection D eliminating statutory modifiers in certain circumstances, we believe the [L]egislature intended that the present [c]laimant would be denied the benefit of the statutory modifiers" because "[the

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c]laimant's inability to return to work resulted from his own conduct, murdering his wife, which is surely 'unconnected with his injury.' "); *see also, e.g.*, *Hawkins v. McDonald's*, 2014-NMCA-048, ¶ 25, 323 P.3d 932 (applying the statutory principles outlined above and holding that "[the w]orker's decision not to seek employment at a fast food restaurant [due to lifting restrictions from her work injury] and to further her education [does not] mean[] she is voluntarily unemployed or that she refuses to take reasonable steps to help herself" (alteration, internal quotation marks, and citation omitted)).

II. Worker Fails to Establish the WCJ Erred in Denying Statutory Modifiers

{¶10} Turning now to Worker's claims on appeal, Worker makes two arguments, as best we can tell: (1) the WCJ found Worker's reason for leaving employment "reasonable" and this compels Worker's entitlement to statutory modifiers under *Cordova*, an opinion of this Court involving the award of statutory modifiers to a union retiree, and (2) the WCJ adopted a new legal standard that is contrary to *Cordova*. Although our review of these matters is de novo, *see Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, ¶ 13, 137 N.M. 497, 113 P.3d 320 (providing that we review the WCJ's application of the law to the facts, as matters of law, de novo), it remains "the appellant's burden to demonstrate, by providing well-supported and clear arguments, that the [trial] court has erred." *Premier Tr. of Nev., Inc. v. City of Albuquerque,*

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2021-NMCA-004, ¶ 10, 482 P.3d 1261. For the reasons that follow, Worker has not met his burden.

{¶11} As for the first argument, Worker reasons that, "[u]nder . . . *Cordova* the standard is whether or not the reason for leaving the employment was reasonable" and "[s]ince the [WCJ] found that . . . Worker's reasons for leaving employment were reasonable[, statutory] modifiers should be awarded[.]" We do not agree.

{12} Even if we accept Worker's contention that the WCJ unambiguously found that Worker's reason for leaving employment was reasonable, [3] this does not, as Worker contends, compel the award of statutory modifiers under *Cordova* without

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further inquiry. In *Cordova*, the worker, a union member, suffered a workplace injury and thereafter retired from the union workforce because he had reached his maximum union pension. 2012-NMCA-083, ¶ 3. Although the worker sought employment after his union retirement, the worker's injuries prevented him from securing subsequent work. *Id.* ¶ 4. The worker nonetheless planned to go back to work if

he was able to do so. *Id.* Under these circumstances, this Court affirmed the award of statutory modifiers on the basis that the worker's decision to retire from union employment was "reasonable." *Id.* ¶ 1. In reaching this conclusion, this Court took into account that the worker's desire "to return to employment outside of the union[,]" *id.* ¶ 23, was in keeping with both the legislative policy favoring reemployment, *see generally id.* ¶¶ 9, 11-13, 15, and also the purpose of statutory modifiers-to assist workers who have difficulty obtaining work after reaching MMI, *see generally id.* ¶¶ 10-11. *Id.* ¶ 23. This Court further reasoned that the employer's interests were protected, in that it could be relieved of its liability for statutory modifiers under Section 52-1-26(D), should the worker find subsequent employment at or above his pre-injury wage. *Cordova*, 2012-NMCA-083, ¶ 23.

{¶13} In short, we do not read *Cordova* to establish, as Worker suggests, that a worker's reason for leaving employment need only be deemed reasonable by a WCJ for him to qualify for statutory modifiers. Such a limited construction of *Cordova* fails to account for the broader legislative policies and directives of Section 52-1-26,

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as articulated in *Cordova* and other cases. *See, e.g.*, *Cordova*, 2012-NMCA-083, ¶¶ 11-13, 15-16, 23. What is more, Worker does not explain why-when due consideration is given to these policies and directives-the WCJ erred in denying him statutory modifiers. And we do not venture a guess at, or further consider, such an argument. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 (providing that an appellate court will not "guess at what a party's arguments might be" or "develop the arguments itself" in the face of inadequate briefing (alteration, internal quotation marks, and citation omitted)).

{¶14} As for the second argument-regarding Worker's contention that the WCJ applied a new legal standard in denying statutory modifiers-Worker singles out a finding of fact from approximately forty findings and conclusions relating to statutory modifiers adopted by the WCJ. The cited finding reads: "When [Worker] decided to retire for reasons having nothing to do with the work accident or work related injuries, Worker did not reject a return to work offer from Employer as contemplated by the Act." Worker contends this finding evinces the WCJ's adoption of a requirement that there be causal connection between the work-related injury and the reason the worker rejected the employer's work offer, which, Worker contends, is contrary to this Court's opinion in *Cordova*. We do not agree.

{¶15} This finding-read in conjunction with the WCJ's other pertinent findings and conclusions, as it must be-evinces that the WCJ correctly understood and applied

10

Cordova. *See Jones v. Auge*, 2015-NMCA-016, ¶ 2, 344 P.3d 989 (providing that findings of fact "are sufficient if a fair consideration of *all of them taken together* supports the judgment entered below" (emphasis added) (internal quotation marks and citation omitted)); *see also Ortiz v. Overland Express*, 2010-NMSC-021, ¶ 24, 148 N.M. 405, 237 P.3d 707 (providing that findings of fact "*must be read together* and the conclusions of law flow therefrom" (emphasis added) (internal quotation marks and citation omitted)). While it is true, as Worker points out, that the worker in *Cordova* did not leave his union job because of his work injury but nevertheless was entitled to statutory modifiers, this misses the point. The worker in *Cordova* left his union job, but he did not intend to remove himself entirely from the workforce. *See* 2012-NMCA-083, ¶ 4. Instead, the worker attempted to secure non-union employment, but was unable to *because of* his work injury. *See id.* Thus, in *Cordova*, the worker could not be said to, "through voluntary conduct unconnected with his injury, [have] take[n] himself out of the labor market." *Id.* ¶ 15. Such is not the case here.

{¶16} A fair consideration of the WCJ's pertinent findings and conclusions is that the WCJ found that Worker voluntarily removed himself from the workforce entirely for reasons unrelated to his work injury and concluded that, under these circumstances, the award of statutory modifiers would be contrary to the legislative policies and directives articulated in Section 52-1-26. Worker does not explain why

11

such a determination, under the facts of this case, is inconsistent with *Cordova* or is otherwise an erroneous application of Section 52-1-26 in light of the relevant policy considerations. And again, we do not venture a guess at, or further consider, such an argument. *See Elane Photography,* 2013-NMSC-040, ¶ 70. For these reasons, Worker has not persuaded us that the WCJ applied an incorrect legal standard or otherwise misapplied *Cordova* to the facts of this case. *See Premier Tr. of Nev.,* 2021-NMCA-004, ¶ 10.

CONCLUSION

{¶17} For the foregoing reasons, we affirm.

{¶18} IT IS SO ORDERED.

WE CONCUR: J. MILES HANISEE, Chief Judge JANE B. YOHALEM, Judge

12

Notes:

[1]The 1990 version of Section 52-1-26 applies to this case because it was the version in effect at the time of Worker's injury in September 2016. *See Jojola v. Aetna Life & Cas.*, 1989-NMCA-085, ¶ 7, 109 N.M. 142, 782 P.2d 395 ("[I]n the absence of express statutory language or compelling reasons to the contrary, any new provisions of the . . . Act shall apply only to causes of action accruing after the effective date of the provision."). All references in this opinion to Section 52-1-26 are to the 1990 version of that statute.

[2]Worker suggests in his reply brief that he intends to return to work. Worker, however, provides no record citation for this contention. Given this and the timing of his contention, it does not factor into our analysis. *See Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104 ("It is not our practice to rely on assertions of counsel unaccompanied by support in the record. The mere assertions and arguments of counsel are not evidence."); *see also Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶ 23, 110 N.M. 314, 795 P.2d 1006 (declining to address an issue that was raised for the first time in the reply brief).

[3]It is not at all clear that the WCJ indeed found "Worker's reasons for leaving employment were reasonable[,]" as Worker contends. The compensation order includes no finding to that precise effect and instead includes varying statements on the subject: (1) "Worker's decision to retire due to personal health reasons was reasonable but premature under the totality of evidence"; (2) "Although Worker's decision to retire . . . was reasonable, the timing of Worker's premature decision and the reasons for his decision had nothing to do with the work accident or work injuries"; (3) "Worker's reasonable decision to voluntarily retire from employment . . . was . . . not a rejection of a return to work offer"; and (4) "Worker voluntarily removed himself from employment . . . not based on a reasonable rejection of an offer of work[.]" These statements raise a host of questions, including whether the supposed "premature" decision to retire could also be "reasonable," whether Worker's "voluntary" retirement could nonetheless be "reasonable," and whether Worker could "reasonably" remove himself from employment while "[un]reasonab[ly] reject[ing]" Employer's offer of work. While we might simply resolve such potentially ambiguous or inconsistent findings in favor of upholding the WCJ's judgment, *see Motes v. Curry Cnty. Adult Det. Ctr.*, 2019-NMCA-022, ¶ 14, 458 P.3d 557 ("In cases involving uncertain, doubtful, or ambiguous

findings, we are bound to indulge every presumption to sustain the judgment." (internal quotation marks and citation omitted)), it is not necessary to do so, as we explain.

ANA LILIA CARDENAS, Worker-Appellant,
v.
AZTEC MUNICIPAL SCHOOLS and CCMSI, Employer/Insurer-Appellees.

No. A-1-CA-38052

Court of Appeals of New Mexico

January 24, 2022

Corrections to this opinion/decision not affecting the outcome, at the Court's discretion, can occur up to the time of publication with NM Compilation Commission. The Court will ensure that the electronic version of this opinion/decision is updated accordingly in Odyssey.

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION REGINALD C. WOODARD, HEARING OFFICER

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1

OPINION

JANE B. YOHALEM, JUDGE

{¶1}This is an appeal by Ana Lilia Cardenas (Worker) from the order of a Workers' Compensation Judge (WCJ) limiting the duration of her disability benefits for a secondary mental impairment to 150 weeks, the period fixed by the Workers' Compensation Act (the Act) for compensation for the primary scheduled physical injury to her knee. Worker argues that the limit imposed by NMSA 1978, Section 52-1-41(C) (2015), on the duration of total disability benefits, and NMSA 1978, Section 52-1-42(A)(4) (2015) on the duration of partial disability benefits, for a secondary mental impairment, [1] limits not imposed on disability benefits for workers with a secondary physical impairment, [2] violate the Equal Protection Clause of both the New Mexico and the United States Constitutions. In this case, Worker would be

2

entitled to a maximum of 500 weeks of permanent partial disability compensation, under Section 52-1-42(A)(2), if her secondary impairment had been a physical impairment. Instead, she was awarded 150 weeks of compensation solely because her secondary impairment was a mental impairment.

{¶2} We agree with Worker that the Act discriminates between secondary mental impairments and secondary physical impairments, in violation of the Equal Protection Clause of the New Mexico Constitution. N.M. Const. art. II, § 18. Because this decision affords Worker the relief she seeks, we do not reach Worker's claim of discrimination between the Act's treatment of primary and secondary mental impairments, nor do we address Worker's claim under the United States Constitution.

BACKGROUND

{¶3} The facts in this case are undisputed. Worker, a special education teacher, sustained a knee injury in a January 2016 workplace accident. Worker later filed a workers' compensation claim for both her primary knee injury and for a secondary mental impairment she alleged resulted from and was caused by the original injury to her knee. An independent psychological evaluation was conducted. The evaluating psychologist concluded, to a reasonable psychological probability, that Worker's psychological impairment was "causally related" to the workplace injury

3

to Worker's knee and that Worker was percent disabled by her psychological impairment.

{¶4} Employer Aztec Municipal Schools does not dispute that Worker's knee injury was caused by a work-related accident or that Worker's secondary mental impairment was caused by her work-related physical injury. The parties also agree 6 that a knee injury, a scheduled injury listed in NMSA 1978, Section 52-1-43(A)(30) 7 (2003), has a statutory compensation period of 150 weeks.

{¶5} The dispute between the parties concerns the length of time Worker will receive compensation benefits for her secondary mental impairment. Pursuant to Section 52-1-42(A)(4), the duration of partial disability benefits for a secondary mental impairment is limited to the number of weeks allowable for the worker's original physical injury. When the original physical injury is to a scheduled body part, the worker is limited to the duration of benefits listed in Section 52-1-43 for an injury to that body part. The number of weeks a worker will be paid for a scheduled injury ranges from 7 to 200 weeks, depending solely on the body part originally injured.[3] In contrast, where the secondary impairment is a physical impairment the

4

duration of partial disability benefits depends on the "nature and extent" of the secondary physical injury. Sections 52-1-41(C), -42(A).

{¶6} Worker contends that capping the duration of benefits for a secondary mental impairment resulting from a scheduled physical injury, when a secondary physical impairment resulting from a scheduled physical injury is not similarly capped, violates our Constitution's equal protection guarantee because it treats workers with secondary mental impairments differently than similarly situated workers with secondary physical impairments. Worker points out that if her secondary mental impairment was treated the same as an unscheduled secondary physical impairment, she would be entitled to up to 500 weeks of partial disability benefits, rather than the 150 weeks she was awarded.

DISCUSSION

{¶7} The equal protection clauses of both the United States and New Mexico Constitutions require the government to treat similarly situated persons the same, "absent a sufficient reason to justify the disparate treatment." *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 21, 137 N.M. 734, 114 P.3d 1050. In *Breen v. Carlsbad Municipal Schools*, our Supreme Court held that earlier versions of the same sections of the Act that are challenged in this case, Section 52-1-41(B) (1999) and Section 52-1-42 (1990), violated the Equal Protection Clause of the New Mexico Constitution by treating workers with a mental impairment differently, and less

5

favorably, than similarly situated workers with a physical impairment. 2005-NMSC-028, ¶¶ 1, 50, 138 N.M. 331, 120 P.3d 413.

{¶8} Our Supreme Court in *Breen*, and later in *Rodriguez v. Brand West Dairy*, 2016-NMSC-029, 378 P.3d 13, defined three steps necessary to determine whether a worker's equal protection rights under our state Constitution's Equal Protection Clause are violated by the provisions of the Act. The worker "must first prove that they are similarly situated to another group but are treated dissimilarly" by a legislative classification. *Breen*, 2005-NMSC-028, ¶ 8. Second, if the worker proves that the two groups are similarly situated, and yet are treated differently by the Act, then this Court "must determine what level of scrutiny should be applied to the legislation they are challenging." *Id.* The level of scrutiny depends on the nature of the rights the legislation protects or the status of the group of people it affects. *Id.* The Court held in *Breen* that workers with mental impairments or mental disabilities are a "sensitive class" requiring intermediate scrutiny. *Id.* ¶ 28. Third, where intermediate scrutiny applies, the burden then shifts to the employer to show that the Act's different treatment of two equivalent groups is "substantially related to an important government interest." *Id.* ¶ 13 (internal quotation marks and citations omitted).

{¶9} Although *Breen* guides our analysis, we cannot assume, without engaging in a careful analysis of the challenged provisions of the Act, that these statutory

6

provisions violate equal protection. We apply a standard of review deferential to our Legislature when reviewing the constitutionality of legislation. *See Rodriguez v. Scotts Landscaping*, 2008-NMCA-046, ¶ 8, 143 N.M. 726, 181 P.3d 718. During that review, we will not "question the wisdom, policy, or justness of legislation enacted by our Legislature[,]" and will begin by presuming that the legislation is constitutional. *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 10, 122 N.M. 524, 928 P.2d 250. "A statute will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the legislature went outside the constitution in enacting the challenged legislation." *Benavides v. E. N.M. Med. Ctr.*, 2014-NMSC-037, ¶ 43, 338 P.3d 1265 (internal quotation marks and citation omitted).

{¶10} Our careful review of the *Breen* factors follows.

I. Workers With a Secondary Mental Impairment Are Treated Differently Than Similarly Situated Workers With a Secondary Physical Impairment

{¶11} As Employer and Worker both acknowledge, the "threshold question in analyzing all equal protection challenges is whether the legislation creates a class of similarly situated individuals who are treated dissimilarly." *Breen*, 2005-NMSC-028, ¶ 10. *Breen* held that workers with a primary mental impairment are similarly

7

situated to workers with a primary physical impairment.[4] *Id.* With that in mind, we begin our inquiry by examining Worker's claim that workers with "secondary mental impairments" are similarly situated to workers with physical impairments that are secondary to, and a "natural and direct result" of a work-related accidental injury. NMSA 1978, § 52-1-28(A) (1987). Concluding that these groups are similarly situated, we next address whether they are treated differently by the Act in Section 52-1-28(B).

A. Injured Workers With a Secondary Mental Impairment Are Similarly Situated to Injured Workers With a Secondary Physical Impairment With Respect to the Objectives of the Act

{¶12} In deciding whether individuals are similarly situated, our Supreme Court instructs us to "look beyond the classification to the purposes of the law." *Rodriguez*, 2016-NMSC-029, ¶ 11 (internal quotation marks and citation omitted). The Equal Protection Clause does not allow a statute to divide persons" 'into different classes on the basis of criteria wholly unrelated to the objective of that statute.'" *Id.* (quoting *Stanton v. Stanton*, 421 U.S. 7, 13-14 (1975)). Only classifications serving the purposes of the statute are permitted. *See id.*

8

{¶13} We look first to the purposes of the statute. The Act's intention has been described as "to provide a humanitarian and economical system of compensation for injured work[ers]." *Breen*, 2005-NMSC-028, ¶ 36 (internal quotation marks and citation omitted). The main goal of the Act is "to compensate a worker for lost earning capacity." *Id.* ¶ 37.

{¶14} The Act imposes three criteria, which must be met to qualify for compensation: (1) "the worker has sustained an accidental injury arising out of and in the course of his [or her] employment"; (2) "the accident was reasonably incident to his [or her] employment"; and (3) "the disability is a natural and direct result of the accident." Section 52-1-28(A). Pursuant to this provision, the Act treats as compensable both "disability arising immediately from a work-related accident and [. . .] disability that develops later as a result of the normal activities of life."

Aragon v. State Corr. Dep't, 1991-NMCA-109, ¶ 8, 113 N.M. 176, 824 P.2d 316. The worker need only show that the later-arising disability is causally connected to the original accidental injury. *See Baca*, 2002-NMCA-002, ¶ 16, 131 N.M. 413, 38 P.3d 181. As this Court has explained in construing Section 52-1-28, the Act's purpose is to provide compensation for "the disability caused by the accident-not the accident itself[.]" *Baca*, 2002-NMCA-002, ¶ 15. Secondary physical disabilities shown to be caused by the original accident are, therefore, compensable under the Act. *See id.*

9

{¶15} "[S]econdary mental impairment" is defined by the Act as "a mental illness resulting from a physical impairment caused by an accidental injury arising out of and in the course of employment." Section 52-1-24(C). In other words, a secondary mental impairment is a mental illness caused by an accidental work-related injury. Section 52-1-24(A) includes secondary mental impairment as a compensable impairment under the Act. *See id.* ("Impairment includes physical impairment, primary mental impairment and secondary mental impairment[.]"). It is undisputed that Worker qualifies for disability benefits based on a "secondary mental impairment" resulting from the pain and disability caused by her work-related accidental injury to her knee.

{¶16} We see no difference related to the purposes of the Act between workers with subsequently arising secondary physical disabilities that are causally connected to a compensable work-related accidental injury, and workers with "secondary mental impairments," as defined by the Act. The workers in both groups have become secondarily impaired as the result of an original work-related accidental injury and both groups have lost earnings as the result of their secondary disability. They are thus similarly situated with regard to the Act's purpose: to provide workers compensation for earning capacity lost or diminished due to a disability caused by and resulting from a work-related accidental injury. *See Breen*, 2005-NMSC-028, ¶ 37.

10

{¶17} Employer contends on appeal that "differently injured workers are not similarly situated." This contention, however, is plainly at odds with our Supreme Court's decision in *Breen*, which held that workers with primary mental impairments and workers with primary physical impairments are similarly situated classifications for the statutory purposes of compensating workers for either a total or partial loss of earning capacity due to a work-related accidental injury. *Id.* ¶ 10. As our Supreme Court explained in *Breen*, differences in the type of injury or its cause fade in importance "once a worker has been determined to have suffered a compensable disability." *Id.* ¶ 37. There is no dispute in this case that Worker's secondary mental impairment is a compensable disability covered by the Act. *See* § 52-1-24(A), (C) (defining a secondary mental impairment as a compensable impairment).

{¶18} We, therefore, conclude that workers with secondary mental impairments are similarly situated to workers with secondary physical impairments.

B. Workers With Secondary Mental Impairments Are Treated Differently Than Workers With Secondary Physical Impairments

{¶19} Having determined that workers with secondary mental impairments are similarly situated to workers with secondary physical impairments, we now determine whether the Act treats these two classifications of workers differently.

{¶20} The provisions of the Act challenged by Worker, Sections 52-1-41(C), -42(A)(4), limit the period of compensation for a secondary mental impairment to the "maximum period allowable for the disability produced by the

11

[original] physical impairment."[5] Where the original physical impairment arises from an injury to a body part listed in Section 52-1-43 (a scheduled injury), this means that the duration of benefits for the secondary mental impairment, regardless of the actual extent of disability, is capped at a maximum of between 7 and 200 weeks, depending on the body part originally injured. For Worker, whose original injury was to her knee-a body part listed on the schedule-benefits are capped at 150 weeks. Section 52-1-43(A)(30).

{¶21} In contrast, the duration of benefits for a secondary physical impairment is based on the nature and severity of the secondary impairment itself, not on the body part originally injured, and not on the severity of the original injury. *Compare* § 52-1-42(A)(1)-(2), *with* (A)(4). If the secondary impairment is an unscheduled, whole body impairment, [6] total disability benefits continue for the worker's lifetime,

12

§ 52-1-41(B); for a partial disability, the maximum duration of benefits is 700 weeks, depending on the percent of impairment. Section 52-1-42(A)(1), (2).

{¶22} Because the Act limits the duration of disability benefits based solely on whether a compensable impairment, identically caused by an original work-related injury, is a mental or physical impairment, Worker has established disparate treatment of similarly situated workers.

II. Workers With a Mental Impairment Are a Sensitive Class, Meriting Intermediate Scrutiny

{¶23} The second element of the equal protection test-determining the level of scrutiny to apply-has been conclusively resolved by our Supreme Court's decision in *Breen*. *See* 2005-NMSC-028, ¶¶ 18-29. The *Breen* Court adopted intermediate scrutiny for discrimination against persons with mental disabilities. *Id.* ¶ 28. Our Supreme Court in *Breen* directed that our "courts should be sensitive to possible discrimination against persons with mental disabilities contained in legislation that purports to treat them differently based solely on the fact that they have a mental disability." *Id.* We need not repeat our Supreme Court's thorough analysis, reviewing the history of discriminatory treatment of people with mental disabilities. *Id.* ¶¶ 18-29.

13

III. The Classification Is Not Substantially Related to an Important Government Interest, as Required by Intermediate Scrutiny

{¶24} The third element of the equal protection test requires the application of intermediate scrutiny to the challenged statutory terms. Under New Mexico's intermediate scrutiny test, "[the c]hallenged legislation will be upheld if the classification is substantially related to an important government interest." *Id.* ¶ 30. Merely showing a rational basis for the classification is not enough.

{¶25} The burden is on the party supporting the legislation's constitutionality (here Employer) to establish that the classification is substantially related to an important government interest. *Marrujo v. N.M. State Highway Transp. Dep't*, 1994-NMSC-116, ¶ 11, 118 N.M. 753, 887 P.2d 747. The party supporting the constitutionality of the legislation must show that the discriminatory classification is based on a" 'reasoned analysis rather than [arising] through the mechanical application of traditional, often inaccurate assumptions.'" *Breen*, 2005-NMSC-028, ¶ 30 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

{¶26} A number of government interests were proposed by the employer in *Breen* as support for the Legislature's decision to treat mentally impaired workers differently than similarly situated physically impaired workers. The *Breen* Court considered the government's

interest in the financial viability of workers' compensation; the greater possibility of fraudulent claims for mental illness; and the greater uncertainty in diagnosis and evaluation of mental impairments.

14

2005-NMSC-028, ¶¶ 33-49. The Court rejected each of these arguments. *See id.* In the case of possible fraudulent claims, the Court held that the Act's requirements for proof of a compensable disability adequately protected against fraud. *See id.* ¶¶ 40-44. Although the Court acknowledged that cost savings are an important governmental interest, it found that saving by denying comparable benefits to workers with mental disabilities who had met the eligibility requirements of the Act was not substantially related to the Act's purpose of compensating workers disabled by work-related injuries for lost earnings. *See id.* ¶¶ 34, 47-48. Finally, the Court rejected the claim that the mental impairments were harder to diagnose and evaluate. The Court found that adequate methods of evaluation were available and were already being used successfully by the workers' compensation system, and were being reviewed on appeal without difficulty. *Id.* ¶ 45.

{¶27} Beyond the arguments that were rejected in *Breen*, Employer argues only that there is a logical relationship between the duration and severity of a secondary mental impairment and the nature of the physical impairment that is the cause of the mental impairment. Employer's claim, presented without citation to authority, simply is not sufficient to establish the substantial relationship between an important government interest and the challenged classification required by intermediate scrutiny. It is nothing more than a claim that there may be a rational basis for the classification.

15

{¶28} Employer has not carried its burden of showing that the Act's disparate treatment of mentally impaired workers, a sensitive class, is substantially related to an important government interest.

CONCLUSION

{¶29} We, therefore, conclude that Sections 52-1-41(C) and -42(A)(4) of the Act treat workers with secondary mental impairments differently than similarly situated workers with secondary physical impairments, in violation of the Equal Protection Clause of the New Mexico Constitution. We remand for proceedings consistent with this opinion.

{¶30} IT IS SO ORDERED.

WE CONCUR: J. MILES HANISEE, CHIEF JUDGE GERALD E. BACA, JUDGE

16

Notes:

[1] A" 'secondary mental impairment' means a mental illness resulting from a physical impairment caused by an accidental injury arising out of and in the course of employment." NMSA 1978, § 52-1-24(C) (1990).

[2] We refer to physical disabilities, which like secondary mental disabilities, are "caused by an accidental injury arising out of and in the course of employment[,]" *id.*, as "secondary physical impairments." Although not labeling them as "secondary" impairments, *see* § 52-1-24(A), the Act nonetheless recognizes and compensates physical impairments that result from and are caused by a compensable work-related accidental injury. *See Baca v. Complete Drywall Co.*, 2002-NMCA-002, ¶ 16, 131 N.M. 413, 38 P.3d 181 (distinguishing between a work-related sudden accidental injury and a subsequent injury to another body part that is compensable if "the resulting disability is causally connected [or secondary] to the original accidental injury").

[3] For example, if the original injury is to a distal joint of a finger, the schedule provides 7 weeks of partial disability benefits for a secondary mental impairment resulting from and caused by that injury. Section 52-1-43(A)(27). A secondary mental impairment resulting from and caused by an arm injury near the shoulder would qualify for 200 weeks of partial disability benefits. Section 52-1-43(A)(1).

[4] The *Breen* Court identified two classifications adopted by the Legislature: "totally impaired" and "partially impaired," and held that all partially impaired workers are similarly situated, regardless of whether their impairment was a primary physical or primary mental impairment, and that all totally impaired workers are similarly situated, regardless of whether their impairment is a primary physical or a primary mental impairment.

[5] Sections 52-1-41(C) and -42(A)(4) state identically: "For disability resulting in secondary mental impairment, the maximum period of compensation is the maximum period allowable for the disability produced by the physical impairment, as set forth in Section 52-1-26 [(for nonscheduled injuries)] or 52-1-43 . . . [(for scheduled injuries)]." Section 52-1-41(C) specifies the maximum duration of compensation for a secondary mental impairment resulting in total disability and Section 52-1-42(A)(4) specifies the maximum duration of compensation for a secondary mental impairment resulting in partial disability.

[6] Mental illness is not listed on the schedule of specific body parts found in Section 52-1-43 and is not treated by the Act as a scheduled injury. *See Breen*, 2005-NMSC-028, ¶ 10 n.2 (noting that mental illness is not a scheduled impairment under the Act).
