CASS V. TIMBERMAN CORP., 1990-NMCA-061, 110 N.M. 158, 793 P.2d 288 (Ct. App. 1990)

ROBERT ERASELL CASS, Claimant-Appellee,
vs.
TIMBERMAN CORPORATION, and MOUNTAIN STATES MUTUAL CASUALTY COMPANY, Respondents-Appellants

No. 11273

COURT OF APPEALS OF NEW MEXICO

1990-NMCA-061, 110 N.M. 158, 793 P.2d 288

May 29, 1990, Filed

Administrative Appeal from the New Mexico Department of Labor Workers' Compensation Division; Joseph N. Wiltgen, Judge.

Opinion of April 19, 1990 Withdrawn.

COUNSEL

ROD DUNN, Albuquerque, New Mexico, Attorney for Claimant-Appellee.

DAN BUZZARD, Clovis, New Mexico, WINSTON ROBERTS-HOHL, Santa Fe, New Mexico, Attorneys for Respondents-Appellants.

JUDGES

A. Joseph Alarid, Judge, Pamela B. Minzner, Judge, Harris L. Hartz, Judge, concur.

AUTHOR: ALARID

OPINION

ALARID, Judge.

{1} The formal opinion filed in this case on April 19, 1990, is hereby withdrawn on the court's own motion, and the following opinion is Substituted therefor.

{2} Defendants Timberman Corporation and its insurer (hereinafter collectively "employer") appeal from a compensation order by the Workers' Compensation Division awarding claimant Robert Cass, among other benefits, compensation for temporary total disability and attorney fees. This case arises under the Interim Act. Employer

raises six issues, which we discuss under four headings: (1) whether the hearing officer correctly found temporary total disability: (2) whether termination of benefits, because of refusal to submit to medical examination and treatment, justified recovery of attorney fees from employer based on bad faith and resulting economic loss to claimant; (3) whether award of attorney fees assessed as a penalty, under the Rules and Regulations of the Workers' Compensation Division, for rejecting recommended resolution was proper: and (4) whether the compensation order is overbroad. We affirm in part and reverse in part.

BACKGROUND

{3} According to the hearing officer's findings of fact, claimant, while working as a carpenter, suffered an accidental injury on May 11, 1987, when scaffolding holding a fellow worker collapsed, striking claimant on the neck, shoulders and back. As a result of the accident, claimant suffered a cervical strain with a mild cervical root compression. Employer commenced paying compensation the day following the accident until December 14, 1987, when it terminated further compensation on the basis that claimant did not follow his doctor's advice.

{4} After the claim had been filed, a prehearing officer of the Workers' Compensation Division conducted an informal hearing and recommended reinstatement of compensation retroactive to December 14, 1987, and attorney fees of $1,737.11, with half to be paid by employer. Claimant accepted the recommended resolution and employer rejected it.

{5} Following a hearing on the merits and a later hearing on attorney fees, the hearing officer entered his order awarding claimant, among other things, temporary total disability and $10,000 attorney fees. This appeal followed.

1. TEMPORARY TOTAL DISABILITY

A. Requirements of the Statute

{6} The issue of temporary total disability arises under transient provisions of the New Mexico Workmen's Compensation Act, NMSA 1978, Sections 52-1-1 to -68 (Cum. Supp. 1986) (the Interim Act). Section 52-1-26 of the Interim Act provides:

As used in the Workmen's Compensation Act [Chapter 52, Article 1 NMSA 1978], "temporary total disability" means the inability of the workman, by reason of accidental injury arising out of and in the course of his employment, to perform his duties prior to the date of his maximum medical improvement.

{7} While not challenging the finding that claimant was unable to perform the duties of a carpenter, his job at the time of the accidental injury, employer first argues the determination of temporary total disability lacks support bearing on other types of work claimant was capable of performing. Employer points to testimony that would have

supported a finding that, within the restrictions imposed on claimant by his physician, he was capable of performing the duties of a janitor, a position claimant had held prior to the accident. The hearing officer made no finding that claimant could not perform other work for which he was fitted. Absent such a finding, employer contends that the conclusion of temporary total disability cannot stand. It relies on **In re Will of Carson,** 87 N.M. 43, 529 P.2d 269 (1974) (conclusion of law must be predicated on and supported by findings of fact).

{8} While we have no quarrel with the proposition that a conclusion of law must find support in the findings of fact, we disagree with its application here. Employer confuses the requirements for temporary total disability, under the Interim Act, with the two-prong test for total and partial permanent disability under the original Act, NMSA 1978, Sections 52-1-24 and -25 (Orig. Pamp.). **See Medina v. Zia Co.,** 88 N.M. 615, 544 P.2d 1180 (Ct. App. 1975) (definition of total and partial disability requires worker to be totally or partially unable to perform work he was doing at time of injury **and** any other work for which he is fitted). Section 52-1-26, in defining "temporary total disability," means the inability of the worker to "perform his duties prior to the date of his maximum medical improvement." Clearly this section refers to the duties incidental to the work he was performing when injured.

{9} It would make little sense to require a worker, in order to receive temporary total disability, to prove that he was also unable to perform other work for which he is fitted. First, temporary disability is to be paid only until the worker achieves maximum medical improvement. § 52-1-27 (defining term to mean date after which "recovery from or lasting improvement to an injury can no longer be reasonably anticipated"). **See Baca v. Bueno Foods,** 108 N.M. 98, 99, 766 P.2d 1332, 1333 (Ct. App. 1988) ("After reaching maximum medical improvement the employee may receive scheduled benefits or permanent total or partial disability benefits...."). Second, and consistent with the statement in **Baca,** the provisions for permanent total disability, Section 52-1-24, and permanent partial disability, Section 52-1-25, contemplate maximum medical improvement having been achieved. To interpret Section 52-1-26 as urged by employer would require us to read into the statute language that is not there. This we will not do.

B. Claimant's Failure or Refusal to Submit to Treatment

{10} Employer's second challenge to temporary total disability relates to claimant's alleged failure or refusal to submit to medical treatment as was reasonably essential to promote his recovery. The termination of benefits because of this alleged failure or refusal forms the basis for the bad faith claim discussed under point 2. The issue is whether, by refusing physical therapy and a subsequent diagnostic procedure, claimant was barred from recovering an award of temporary total disability. The question of whether refusal or failure to submit to medical treatment should result in a reduction or suspension of compensation turns on a determination of whether the refusal is arbitrary and unreasonable. **See Brooks v. Hobbs Mun. Schools,** 101 N.M. 707, 688 P.2d 25 (Ct. App. 1984). Whether the refusal of medical treatment is arbitrary and unreasonable is a question of fact. **Id.** The employer bears the burden of proving that claimant's

refusal to submit to treatment that would promote his recovery was unreasonable. **See Byrd v. W.C.A.B. (Temco Servs. Inds.),** 81 Pa. Cmwlth. 325, 473 A.2d 723 (1984).

{11} In reviewing this question, we review the whole record. **Tallman v. ABF (Arkansas Best Freight),** 108 N.M. 124, 767 P.2d 363 (Ct. App. 1988). Under this standard, we view "the live witness testimony as the fact finder did and considering all other evidence, favorable and unfavorable, and disregarding that which is discredited, we then decide if there is substantial evidence in the whole record to support the agency's finding or decision." **Id.** at 128, 767 P.2d at 367. We must decide whether the record as a whole supports the hearing officer's refusal to find that claimant arbitrarily failed or refused to submit to medical treatment reasonably necessary to promote his recovery.

{12} There appears to be little disagreement that, following the accident, claimant was taken to the hospital, where he was examined, X-rayed, and released. The X-rays were negative. Claimant did not return to work. Claimant went to a doctor of his choice, Dr. Graham, who, after examining claimant, recommended physical therapy. Claimant saw Dr. Graham on May 14 and June 4, 9, and 15, but failed to keep his May 18 appointment and did not return after June 15. Thereafter, he sought treatment, with the approval of the insurance company, from Dr. Hag Babur.

{13} In order to determine whether a worker has acted reasonably in refusing medical treatment, the hearing officer must balance the risks against the benefits. This involves weighing the probability that the treatment will reduce the worker's disability by a significant amount against the probable risks associated with the treatment. **Brooks v. Hobbs Mun. Schools;** 1 A. Larson, **The Law of Workmen's Compensation** 13.22(b) (1989).

{14} In this case, claimant's treating physician prescribed physical therapy. However, Dr. Babur noted in his physical therapy notes of September 25, 1987 that, "patient not responding, no significant change, barely able to tolerate treatments. I don't know if p.t. will help... this patient." Dr. Babur goes on in his typed note of the same date to recommend a cervical myelogram to be followed by a CT scan. The above medical evidence provides a reasonable basis for claimant's discontinuation of physical therapy, and for the hearing officer's finding that claimant did nothing to "imperil, retard or impair his recovery."

{15} The hearing officer determined that employer did not meet its burden of proving that recovery was delayed by claimant's failure to submit to medical treatment prescribed to promote his recovery. **Cf. Aranda v. D. A. & S. Oil Well Servicing, Inc.,** 98 N.M. 217, 647 P.2d 419 (Ct. App. 1982) (a repeat myelogram was not shown to be reasonably essential to recovery, and thus it was not proper to reduce compensation under Section 52-1-51). Employer also did not convince the hearing officer that claimant's refusal to undergo a myelogram was unreasonable, and that as a result of his failure to do so, benefits could be terminated.

{16} We hold that on this record, the hearing officer was not compelled to find that claimant acted arbitrarily or unreasonably in refusing to submit to medical treatment. **Cf. Escobedo v. Agriculture Prods. Co.,** 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974) (court held that reasonableness of plaintiff's refusal was a fact question, and the evidence sustained a finding that refusal to submit to a myelogram was arbitrary and unreasonable). We therefore affirm the award of temporary total disability.

2. ATTORNEY FEES BASED ON EMPLOYER'S BAD FAITH IN TERMINATING BENEFITS

{17} Following claimant's injury, employer began paying him temporary total disability benefits. Employer continued to pay benefits until December 14, 1987. On that date, Jerry Mayo, employer's claims adjuster, notified claimant that, as of that date, employer would no longer pay any compensation benefits. Mayo wrote claimant that "this action is being taken because of your failure to follow the advice of your doctor." Mayo later testified at his deposition that he was referring to claimant's failure to follow the advice of both Dr. Graham and Dr. Babur.

{18} Employer relied on Section 52-1-51(C) in support of the termination. Subsection C was not the correct section; the third full paragraph of Section 52-1-51, which does not have an identifying number or letter; is the subsection upon which the adjuster actually relied. Subsequent contacts between employer and claimant's attorney made this clear.

{19} The hearing officer determined in the September 1988 hearing that the decision to terminate claimant's benefits was not reasonable. In a subsequent hearing on attorney fees, the hearing officer determined the termination was in bad faith and caused claimant economic loss -- the two statutory prerequisites to an award of attorney fees under Section 52-1-54(C). Therefore, he ordered employer to pay claimant $10,000 for attorney fees. We reverse this determination.

A. Section 52-1-51

{20} Section 52-1-51, as codified in the Interim Act, consists of four separate paragraphs, none of which is identified by number or letter. The first full paragraph contains seven lettered subsections. This paragraph, along with the second full paragraph, deals with what is commonly referred to as the "independent medical examination." Because the interpretation of the second and third paragraphs is important to this appeal, we set these provisions forth.

If a claimant fails or refuses to submit to examination in accordance with the notice..., he shall forfeit all workmen's compensation benefits which would accrue or become due to him except for such failure or refusal to submit to examination during the period that he persists in such failure and refusal unless he is by reason of disability unable to appear for examination.

If any workman persists in any unsanitary or injurious practice which tends to imperil, retard or impair his recovery or increase his disability or refuses to submit to such medical or surgical treatment as is reasonably essential to promote his recovery, the hearing officer may in his discretion reduce or suspend the workman's compensation benefits.

Id.

{21} Employer's claims adjuster terminated claimant's benefits without seeking an order to terminate from a hearing officer. Claimant argues that this failure to obtain an order by a hearing officer shows employer's bad faith. Employer counters that, under the second paragraph of Section 52-1-51, a claimant's failure or refusal to submit to an examination results in an automatic forfeiture of benefits, so that no hearing is necessary.

{22} There are two problems with employer's argument. First, the record does not reflect that employer relied on any of the language from the second paragraph in the proceedings below. Instead, it focused on the language of the third paragraph of Section 52-1-51. Second, upon examination of the statute, the second paragraph clearly refers to failure to submit to an independent medical examination, and not failure to submit to treatment which is reasonably essential to promote recovery. Thus, even if the second paragraph provides for automatic forfeiture, an issue we do not decide, it does not apply to the facts of this case.

{23} Thus, the real issue on appeal is whether failure to proceed in accordance with the third paragraph's provision for a hearing officer to determine whether to reduce or suspend the benefits constitutes "bad faith" that justifies an award of attorney fees under Section 52-1-54(C).

B. Section 52-1-54(C)

{24} Section 52-1-54(C) provides that a worker who prevails in a court proceeding to recover compensation cannot recover attorney fees except in three instances. The hearing officer found this claim fell within one of the exceptions. Section 52-1-54(C)(2) provides that a claimant may be awarded attorney fees

in cases where the hearing officer finds that an employer acted in bad faith with regard to handling the injured workman's claim and the injured workman has suffered economic loss as a result thereof. As used in the paragraph "bad faith" means conduct by the employer in the handling of a claim which amounts to fraud, malice, oppression or willful, wanton or reckless disregard of the rights of the workman. Any determination of bad faith shall be made by the hearing officer through a separate fact-finding proceeding[.]

{25} Employer makes two separate attacks on the attorney fees award. First, it argues that the hearing officer did not hold a separate fact-finding proceeding on bad faith. This

is incorrect: a hearing on attorney fees, which required a determination of bad faith, was held November 22, 1988. We refuse to set aside the award on this ground.

{26} Second, employer argues that the finding on bad faith is not supported by substantial evidence because there is no showing of "fraud, malice, oppression or willful, wanton or reckless disregard" of claimant's rights. § 52-1-54(C)(2). We agree, and reverse the award of attorney fees.

{27} We recognize that Section 52-1-51 might be read to allow reduction or termination of benefits only by the hearing officer. While we believe that termination of benefits in this manner is preferable, **see Brooks v. Hobbs Mun. Schools,** it is not clear that it is mandatory. Indeed, Payments and Benefits Rule 11(A)(3)(b), discussed in the next section, suggests that the division interprets the statute to permit an employer to reduce or terminate benefits, so long as it observes certain procedural safeguards. Certainly reasonable minds could differ on whether Section 52-1-51 is mandatory.

{28} Thus, we cannot say that failure to comply with the asserted statutory requirement rises to the level of "fraud, malice, oppression or willful, wanton or reckless disregard" of claimant's rights that Section 52-1-54 (C) requires. The "failure or refusal to pay compensation benefits does not constitute bad faith in itself." **Sanchez v. Wohl Shoe Co.,** 108 N.M. 276, 278, 771 P.2d 984, 986 (Ct. App. 1989). Nor is there any other evidence in the record that claimant points to which could be construed as the type of conscious or irresponsible conduct that would support a finding of bad faith.

{29} Because we find no evidence of bad faith, the hearing officer's finding is not supported by substantial evidence on the record as a whole. Therefore, no attorney fees could have been awarded.

C. Alternative Basis for Finding Bad Faith to Support an Award of Attorney Fees

{30} The hearing officer also concluded that employer's termination of claimant's benefits violated Rule II(A)(3)(b) of the Payments and Benefits section or the Workmen's Compensation Division Rules and Regulations. He apparently used this violation to support the conclusion that employer acted in bad faith. Rule II(A)(3)(b) provides that benefits may be terminated "prior to order, judgment or a claim being filed:... (b) If the payor states the reason and the termination notice is accompanied by written instructions about how the claimant may file a claim if the claimant disagrees with the termination[.]" Rules & Regs., N.M. Dep't of Labor, Workmen's Compensation Admin., Payments & Benefits R. II(A)(3)(b), at 23 (undated). The hearing officer found that employer violated this rule because it failed to instruct claimant on how to file a claim.

{31} Employer asserts two attacks on these findings and conclusions. First, it asserts that Rule II(A)(3)(b) is inapplicable to this case because it was not in effect until May 26, 1987. Claimant's injury occurred on May 11, 1987; employer immediately began paying disability benefits. Because it began paying compensation, employer asserts that this

case was a "pending case" when the rule became effective, and that rules cannot be retroactively applied to pending cases. **See generally Gray v. Armijo,** 70 N.M. 245, 372 P.2d 821 (1962) (statutes are presumed to operate prospectively and will not be given retrospective effect unless such intention on the part of the legislature is clearly apparent). Employer also asserts that applying the rule violates the constitutional prohibition against acts of the legislature which affect the rights of a party or the rules of procedure in a pending case. N.M. Const. art. IV, 34.

{32} Employer incorrectly labels this action a "pending case." **Stockard v. Hamilton,** 25 N.M. 240, 180 P. 294 (1919), defined a "pending case" as one which "'remains undecided'" or is "'not terminated.'" **Id.** at 245, 180 P. at 295. It further held that pending cases are those "that are in the process or course of litigation..., and which have not been concluded, finished, or determined by a final judgment." **Id.** New Mexico courts have repeatedly affirmed this definition. **See Phelps v. Phelps,** 85 N.M. 62, 509 P.2d 254 (1973); **Gray v. Armijo** (case not on court's docket is not a pending case).

{33} This case was not in the process of adjudication when Rule II(A)(3)(b) was promulgated, because the worker's compensation complaint was not filed until January 29, 1988, long after the rule became effective. The claim was not placed on any court's docket until after the complaint was filed. Therefore, the case was not pending, and the rule may be constitutionally applied to this claim. We decline to reverse on this basis.

{34} Employer's second attack on the hearing officer's conclusion that it violated Rule II(A)(3)(b) is that it complied with all applicable requirements. It concedes it did not instruct claimant how to file a claim, but argues that it was not required to instruct claimant because he had an attorney who had already drafted a complaint and provided employer with a copy.

{35} Claimant counters that he testified he was not represented by counsel when employer terminated his benefits, so employer was required to instruct him on filing a claim. The record does not support this contention. Thomas Upchurch, Jr. wrote employer on October 14, 1987, informing it that his firm represented claimant for the worker's compensation claim. Enclosed in that letter was a copy of a worker's compensation claim and a notice to employer. Nothing in the record indicates that employer received notice between then and December 14 that Upchurch was no longer representing claimant. Thus, it was reasonable for employer to assume claimant was represented and that his attorney needed no instruction on how to file a claim, especially in light of the fact that Upchurch sent employer a copy of the complaint in October.

{36} Based on these facts, employer argues that the instruction requirement of the rule is surplusage. We agree, and hold that employer substantially complied with the rule. We recognize that both requirements of the rule are beneficial in that they (1) inform an employer or insurer as to the steps they must follow in terminating benefits, and (2) effectuate the legislature's intention of quickly and justly dealing with workers' compensation claims by protecting the employee from arbitrary termination. However,

under these circumstances, these goals are not promoted by requiring an employer or insurer to tell a claimant who is represented how to file a claim.

{37} Furthermore, we note that the rule does not contain a built-in penalty for insurers who violate it. Thus, attorney fees can be awarded only if the claimant proves bad faith under Section 52-1-54(C). We have already held that the facts of this case do not constitute bad faith; we do not see that employer's technical violation of this rule constitutes bad faith either. **See Sanchez v. Wohl Shoe Co.** (refusal to pay benefits does not, by itself, constitute bad faith).

{38} Employer contends, finally, that if the case was not pending for purposes of the constitutional principle on which it relies, then the rule is not applicable because it cannot be allowed to operate on anything but a pending case. Employer offers no support for this contention, and it is not clear what it means. In view of our disposition of this issue, we do not address this argument further.

{39} Therefore, we hold that employer's substantial compliance with the requirements of Rule II(A)(3)(b) does not amount to a violation, nor to the bad faith required by Section 52-1-54(C).

3. ATTORNEY FEES AWARDED UNDER THE PENALTIES PROVISION OF THE WORKERS' COMPENSATION DIVISION RULES AND REGULATIONS

{40} The hearing officer alternatively supported the award of attorney fees by applying the "Penalties" provision of the Payments and Benefits section of the Rules and Regulations. Rule V provides that a hearing officer may award attorney fees to either party when it finds that the other party rejected the recommended resolution of the prehearing officer "without reasonable basis or without reasonable expectation of doing better at formal hearing," or when a party objects in bad faith to issues it "knows or should know to be reasonable beyond the realm of dispute[.]" Rules & Regs., N.M. Dep't of Labor, Workmen's Compensation Admin., Payments & Benefits R. V(1) & (2) at 27 & 28 (undated).

{41} Employer asserts two attacks on the application of Rule V. Although we believe its attacks on the rule may have some merit, we need not address the issues it raises, because we hold that employer did not engage in the conduct for which Rule V provides a penalty. Employer did not reject the recommended resolution "without reasonable basis or without reasonable expectation of doing better at formal hearing[.]" R. V(1). Nor did it object in bad faith to issues it knew or should have known "to be reasonable beyond the realm of dispute[.]" R. V(2). Therefore, we reverse the Division's conclusion that Rule V supported awarding attorney fees.

4. OVERBROADNESS OF THE PROVISION ORDERING COMPENSATION BENEFITS

{42} The hearing officer concluded claimant was entitled to compensation benefits "until further order of the Workers' Compensation Division[.]" Employer claims that the compensation order exceeded the Division's authority because it did not limit benefits to the 600-week statutory Limit. **See, e.g.,** §§ 52-1-41(A), -42, -43(D). We hold this claim is meritless.

{43} The Workers' Compensation Act clearly provides that benefits will never be provided for longer than 600 weeks. The hearing officer's order should be read in this context. "Necessary legal implications are included [in a judgment] although not expressed in terms." 49 C.J.S. **Judgments** 436. a at 864 (1947). **See Lemon v. Hall,** 97 N.M. 429, 640 P.2d 929 (1982) (when meaning of a judgment is doubtful or ambiguous, matters outside the record may be considered for the purpose of construing the judgment). Moreover, we construe a judgment in a manner which will support it, not in a manner which will destroy it. **See Bruce v. Gregory,** 56 Cal. Rptr. 265, 423 P.2d 193 (1967) (En Banc) (judgments should be interpreted in such manner as to make them valid and with reference to the law regulating rights of the parties). Therefore, we hold that the order granting benefits is not overbroad.

CONCLUSION

{44} The order awarding claimant temporary total disability benefits is affirmed, and we reverse the award of attorney fees for the reasons indicated above. The matter is remanded to the Workers' Compensation Division for further proceedings as may be necessary, consistent with this opinion.

{45} IT IS SO ORDERED.