HERNANDEZ V. CHILDREN, YOUTH & FAMILIES DEP'T.

JUDY HERNANDEZ,
Worker-Appellee/Cross-Appellant,
v.
CHILDREN, YOUTH AND FAMILIES,
and RISK MANAGEMENT,
Employer/Insurer-Appellant/Cross-Appellee.

NO. 33,549

COURT OF APPEALS OF NEW MEXICO

December 23, 2015

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION, David L. Skinner, Workers' Compensation Judge

COUNSEL

Michael J. Doyle, Los Lunas, NM, for Worker-Appellee/Cross-Appellant

Garcia Law Group, LLC, Katherine E. Tourek, Albuquerque, NM, for Employer/Insurer-Appellant/Cross-Appellee

JUDGES

J. MILES HANISEE, Judge. WE CONCUR: JONATHAN B. SUTIN, Judge, M. MONICA ZAMORA, Judge

AUTHOR: J. MILES HANISEE

MEMORANDUM OPINION

HANISEE, Judge.

{1} The Workers' Compensation Judge (WCJ) entered findings of fact and conclusions of law awarding Judy Hernandez benefits for her permanent partial

disability (PPD). Judy Hernandez (Worker) and Children, Youth & Families (Employer) each appeal. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

{2} Worker was an eligibility interviewer for Employer when she suffered a compensable injury in 2007. The WCJ found that Worker reached maximum medical improvement (MMI) with a 13% impairment rating on August 2, 2010. Worker continued to work for Employer as an eligibility interviewer after the accident until her retirement in 2011. The WCJ ordered Employer to pay Worker PPD benefits for a 500-week period starting July 31, 2011. The WCJ found that Worker was entitled to a 7% formula modification under NMSA 1978, Sections 52-1-26 to -26.4 (1987, as amended through 2015). Both parties appealed.

II. DISCUSSION

{3} "We apply a whole record standard of review when considering appeals from judgments of the [Workers' Compensation] Administration." *Sanchez v. Zanio's Foods, Inc.*, 2005-NMCA-134, ¶ 9, 138 N.M. 555, 123 P.3d 788.

> Whole record review requires us to consider all the evidence properly admitted by the WCJ to determine whether there is substantial support for the judgment. The entire record is viewed in the light most favorable to the judgment. To warrant reversal, this Court must be persuaded it cannot conscientiously say that the evidence supporting the decision is substantial, when viewed in the light that the whole record furnishes. When reviewing the sufficiency of evidence, we account for the whole record, including what fairly detracts from the result the fact[-]finder reached. To conclude that an administrative decision is supported by substantial evidence in the whole record, the [appellate] court must be satisfied that the evidence demonstrates the reasonableness of the decision. No part of the evidence may be exclusively relied upon if it would be unreasonable to do so.

Id. (internal quotation marks and citations omitted). The appellate courts "review the WCJ's application of the law to the facts . . . de novo." *Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, ¶ 13, 137 N.M. 497, 113 P.3d 320.

{4} Employer raises one issue on appeal: whether Worker's retirement in July 2011 disentitles her to statutory formula modifications of her PPD award under Section 52-1-26(D). Worker challenges two of the WCJ's findings on appeal: the WCJ's finding that Worker was entitled to a physical capacity modifier of 1, and the WCJ's determination that Worker's total PPD formula modifier is 7%.

A. Worker's Retirement Does Not Preclude an Award of Formula Modifiers Under Section 52-1-26(D)

{5} Section 52-1-26(A) provides:

> As a guide to the interpretation and application of this section, the policy and intent of [the L]egislature is declared to be that every person who suffers a compensable injury with resulting permanent partial disability should be provided with the opportunity to return to gainful employment as soon as possible with minimal dependence on compensation awards.

Section 52-1-26(C) provides in relevant part:

> Permanent partial disability shall be determined by calculating the worker's impairment as modified by his age, education and physical capacity, pursuant to Sections 52-1-26.1 through 52-1-26.4[.]

Section 52-1-26(D), in turn, provides:

> If, on or after the date of maximum medical improvement, an injured worker returns to work at a wage equal to or greater than the worker's pre-injury wage, the worker's permanent partial disability 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[.]

Employer contends that Worker's decision to retire in 2011 triggered Section 52-1-26(D), so the WCJ's decision awarding formula modifiers was in error.

{6} In *Jeffrey v. Hays Plumbing & Heating*, 1994-NMCA-071, 118 N.M. 60, 878 P.2d 1009, this Court noted a line of precedent interpreting the Workers' Compensation Act to preclude an award of disability benefits "if a claimant, through voluntary conduct unconnected with his injury, takes himself out of the labor market." *Id.* ¶ 12 (internal quotation marks and citation omitted). In *Jeffrey*, we applied this principle to conclude that an employee's unreasonable refusal of an offer of employment at or above wages makes PPD modifiers unavailable under Section 52-1-26(D). *Jeffrey*, 1994-NMCA-071, ¶¶ 14-16. But as we noted in *Jeffrey*, "Section 52-1-26(D) [is not] triggered whenever the employer *offers* a job at a wage equal to or greater than the worker's pre-injury wage." *Id.* ¶ 15 (emphasis added). Rather, there must be a finding that a worker's *refusal* of an employer's offer of employment at pre-disability wages was unreasonable. *Id.* This implies the existence of reasonable grounds for refusing an offer of employment: for example, the employee may have accepted a lower-paying job that offered "greater prospects for the future or greater job security" than the worker's pre-accident employment. *Id.*

{7} In *Cordova v. KSL-Union*, this Court considered whether a worker's decision to retire precluded him from receiving modifier-based PPD benefits. 2012-NMCA-083, ¶¶ 6, 9, 285 P.3d 686. We cited *Jeffrey* for two propositions: (1) that "[a]n employer is relieved of paying modifier-based PPD benefits only when a worker returns to work at or above his pre-injury wage, or voluntarily and unreasonably removes himself from the workforce"[;] and (2) "[a] worker may reasonably refuse a return-to-work offer and remain eligible for modifier-based PPD benefits." *Cordova*, 2012-NMCA-083, ¶ 20. We

then concluded that worker's retirement did not preclude the WCJ's award of modifier-based PPD benefits. We reasoned as follows:

> [the w]orker removed himself from the union workforce through retirement, but he wants to return to employment outside of the union. However, [the w]orker's injuries have prevented him from finding subsequent employment after retirement. While [the w]orker chose to retire, he did not choose to get injured, nor did he choose when he would get injured. These circumstances comport with the Legislature's intent for utilizing a modifier-based calculation of PPD disability. Further, despite the fact that [the e]mployer was unable to make a post-MMI employment offer, [the e]mployer will not be required to pay modifier-based PPD benefits if [the w]orker is able to secure employment with a non-union employer at his pre-injury wage. Thus, interpreting and applying Section 52-1-26 to provide for modifier-based PPD benefits in this case properly recognizes the purposes of PPD benefits and also protects the interests of both [the e]mployer and [the w]orker.

Cordova, 2012-NMCA-083, ¶ 23 (citations omitted).

{8} Employer argues that *Cordova* is distinguishable because Employer continued to employ Worker after she was injured in 2007, and Worker has no desire to obtain other employment after her retirement. We disagree. Although *Cordova* places apparent emphasis on the fact that the worker desired to work after his retirement, its core holding was that a worker's reasonable decision to retire (which prevents the employer from offering the worker continued employment at or above the pre-injury wage) does not necessarily bar an award of modifier-based PPD benefits. *See* NMSA 1978, § 52-1-47.1(A) (1990) (providing that workers' compensation benefits are to be reduced in order to prevent a worker from receiving "more in total payments, including wages and benefits from his employer, by not working than by continuing to work[,]" but explicitly exempting "general retirement payments" from this requirement).

{9} To be sure, the PPD modifiers are intended to measure "the likelihood of the worker being able to return to work in the future." *Connick v. Cty. of Bernalillo*, 1998-NMCA-60, ¶ 6, 125 N.M. 119, 957 P.2d 1153. Since Worker has no desire to return to work, it can be argued that any lost earning capacity stems from Worker's retirement, not her compensable injury. Our precedent does not support the proposition that retirement automatically precludes a worker from obtaining modifier-based PPD benefits, and Employer does not challenge the WCJ's conclusion that Worker's decision to retire was reasonable. *See Cordova*, 2012-NMCA-083, ¶ 20 ("An employer is relieved of paying modifier-based PPD benefits only when a worker returns to work at or above his pre-injury wage, or voluntarily *and* unreasonably removes himself from the workforce." (emphasis added)).

{10} Employer next argues that to the extent that *Cordova* can be read to allow the WCJ's award of modifier-based PPD benefits in this case, it was in essence abrogated by *Gonzalez v. Performance Painting, Inc.*, 2013-NMSC-021, 303 P.3d 802. In

Gonzalez, our Supreme Court rejected an interpretation of the phrase "returns to work" in Section 52-1-26(D) that would only preclude modifier-based benefits when the employee actually returns to work. *Gonzalez*, 2013-NMSC-021, ¶¶ 13-15. The Court reasoned that "[s]uch an interpretation would upset the delicate balance between workers and employer interests present in the WCA. It would give sole control over how long a worker collects modifier-based benefits to the worker." *Id.* ¶ 15. But *Gonzalez* does not overrule *Cordova* or the precedent it relied on. *See Gonzalez*, 2013-NMSC-021, ¶¶ 50-54 (Daniels, J., specially concurring) (noting that the *Jeffrey*'s holding—that a worker may not voluntarily remain unemployed in order to continue receiving modifier-based benefits—was based on earlier judicial interpretations of language in the Workers' Compensation Act that had been repealed, but concluding that *Jeffrey* remained good law). Instead, *Gonzalez* reaffirms that a worker may not *unreasonably* reject an offer of employment in order to continue receiving modifier-based PPD benefits. *Id.* ¶¶ 13-15. We accordingly reject Employer's argument regarding the interrelation of *Gonzalez* and *Cordova*.

B. The WCJ Did Not Err in Its Determination of Worker's Physical Capacity Modifier

{11} Under Section 52-1-26.4(B), a worker is awarded points to the total PPD modifier "based upon the difference between the physical capacity necessary to perform the worker's usual and customary work and the worker's residual physical capacity." The WCJ found that before Worker started working for Employer in March 2005 her physical capacity was "in the sedentary to light category [with] occasional lifting of up to 20 pounds and frequent lifting of up to 10 pounds." The WCJ also found that Worker's "usual and customary job requirements as an eligibility interviewer [for Employer] were in the light to medium category with occasional lifting of up to 25 pounds." The WCJ determined that Worker's residual physical capacity remained the same after her accident because she continued to work as an eligibility interviewer for several years after the accident. The WCJ assigned Worker a physical capacity multiplier of 1 based on these findings.

{12} Worker argues that her "usual and customary pre-accident physical capacity . . . required a 'medium' physical capacity[] and that after the accident she was only able to perform 'sedentary' physical capacity." Worker points to the description of her job responsibilities, which states that eligibility interviewers would occasionally be required to lift and carry objects weighing more than 25 pounds, and frequently lift and carry objects weighing 0 to 26 pounds. But as Worker acknowledges, the WCJ determined Worker's physical capacity multiplier based on the finding that Worker had the same physical capacity after the accident that she did before. Thus the crucial question is not whether the WCJ's conclusion as to Worker's pre-injury physical capacity is in error, but rather whether the WCJ erred in concluding that the 2007 accident did not result in any *change* in Worker's residual physical capacity. *See* § 52-1-26.4(B) ("The award of points to a worker shall be based upon the difference between the physical capacity necessary to perform the worker's usual and customary work and the worker's residual physical capacity.").

{13} The WCJ fixed Worker's physical capacity multiplier based on the finding that Worker "demonstrated an ability to perform her job duties as an eligibility interviewer for Employer for approximately [four and a half] years between the date of the accident and the date of her retirement." Worker challenges this finding first by citing the report of the Independent Medical Examiner (IME), Dr. Juliana Garcia, which concludes that Worker may only perform sedentary tasks (i.e., lifting up to 10 pounds occasionally and up to 5 pounds frequently, *see* § 52-1-26.4(C)(4)), when she returned to work. But while the IME is tasked with determining Worker's physical capacity, *see* § 52-1-26.4(D), the WCJ as the finder of fact retains the ability to reject the IME's conclusions in whole or in part. *See Slygh v. RMCI, Inc.*, 1995-NMCA-081, ¶ 5, 120 N.M. 358, 901 P.2d 776. The WCJ was free to reject the IME's opinions based on the undisputed fact that Worker returned to work as an eligibility interviewer approximately four and a half years after the accident occurred.

{14} Worker's remaining arguments challenging the WCJ's determination of Worker's physical capacity multiplier rely on evidence that the WCJ excluded from the record. Since Worker makes no argument that the WCJ's exclusion of this evidence from the record was erroneous, Worker has waived any argument that the WCJ should have admitted this evidence. Accordingly, we are unable to evaluate Worker's arguments that this evidence undermines the WCJ's findings of fact. *See In re Doe*, 1982-NMSC-099, ¶ 3, 98 N.M. 540, 650 P.2d 824 (explaining that the appellate courts will not reach issues the parties fail to raise on appeal); *Michaluk v. Burke*, 1987-NMCA-044, ¶ 25, 105 N.M. 670, 735 P.2d 1176 ("Where the record on appeal is incomplete, the ruling of the trial court is presumed to be supported by the evidence."). Accordingly, we reject Worker's remaining substantial basis challenges to the WCJ's findings of fact.

C. The WCJ Should Have Imposed an 8% Statutory Modifier on Worker's PPD Compensation Award

{15} Worker argues that the WCJ erroneously concluded that Worker was entitled to a 7% modifier under Section 52-1-26. Employer concedes that if we reject its challenge to the WCJ's award of statutory modifier points, the WCJ erred in concluding that Worker was entitled to a 7% modifier. We also agree. Subsections (B) and (C) of Section 52-1-26.1 provide that the WCJ was to add Worker's age and education modifiers together and then multiply the result by Worker's physical capacity multiplier. There is no dispute that Worker's age modifier is five and her education modifier is three. Since we have upheld the WCJ's finding as to Worker's physical capacity multiplier, the total statutory modifier is 8%. Accordingly, we will reverse the WCJ's compensation order with directions to modify the award based on an 8% statutory modifier.

CONCLUSION

{16} We remand this case to the WCJ with instructions to impose an 8% statutory PPD modifier on the PPD award to Worker. The WCJ's compensation order is affirmed in all other respects.

{17} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

M. MONICA ZAMORA, Judge