LEVAN V. HAYES TRUCKING

MICHAEL LEVAN,
Worker-Appellee,
v.
HAYES TRUCKING & CONCRETE, INC.,
and GREAT WEST CASUALTY COMPANY,
Employer/Insurer-Appellants.

NO. 33,858

COURT OF APPEALS OF NEW MEXICO

December 23, 2015

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION, Leonard J. Padilla, Workers' Compensation Judge

COUNSEL

Gordon Berman, Las Cruces, NM, for Appellee

Maestas & Suggett, P.C., Paul Maestas, Albuquerque, NM, for Appellants

JUDGES

CYNTHIA A. FRY, Judge. I CONCUR: JONATHAN B. SUTIN, Judge, J. MILES HANISEE, Judge (dissenting).

AUTHOR: CYNTHIA A. FRY

MEMORANDUM OPINION

FRY, Judge.

{1} The Workers' Compensation Judge (WCJ) ordered Employer/Insurer Hayes Trucking & Concrete, Inc. and Great West Casualty Company (collectively, Employer) to compensate Worker Michael LeVan for a low back injury Worker suffered after he fell in

February 2011. Employer appeals the WCJ's compensation order and denial of Employer's motion to reconsider, as well as the WCJ's denial of Employer's motion for sanctions. We affirm.

I. BACKGROUND

{2} Worker suffered six back injuries before the 2011 accident underlying the claim now on appeal, three of which required surgery. Of these prior injuries, the two most relevant to the issues Employer raises on appeal are the injuries Worker sustained in 1988/89 and in 2009. The injury giving rise to the present litigation occurred on February 20, 2011, when Worker was hauling crushed limestone for Employer and fell off his rig during a pre-trip inspection.

{3} Dr. Brian Delahoussaye was the first physician to examine Worker after his urgent care visit. Dr. Delahoussaye ordered an MRI and referred Worker to Dr. Paul Saiz, the same orthopaedic spine surgeon who had treated Worker for his 2009 injury. In his assessment in June 2011, Dr. Saiz tentatively concluded that the fall had aggravated Worker's preexisting stenosis and prescribed conservative treatment measures.

{4} Three months later, Dr. Saiz expressed some hesitation to conclude that Worker's injury was related to work. Dr. Saiz acknowledged that while the injury could have been caused by a "potential aggravation of [Worker's] preexisting condition[,]" it was possibly "related to the fact that Worker [was] 60 years of age." Dr. Saiz stated that he was "considering [performing] a laminectomy at L2, L3, and potentially L4."

{5} Because Worker "was not entirely satisfied with Dr. Saiz's recommendations or care[,]" Dr. Delahoussaye referred Worker to Dr. Jose Reyna, another orthopaedic surgeon. *See* NMSA 1978, § 52-1-49(B), (C) (1990) (providing that an employer may select a worker's treating physician for the first sixty days after an accident, after which the worker may select his own treating physician). Dr. Reyna reviewed Dr. Delahoussaye's and Dr. Saiz's reports and performed his own examination of Worker. Significantly, Dr. Reyna had Dr. Saiz's note from August 17, 2011, in which Dr. Saiz compared Worker's MRIs from 2009 and 2011. In his report, Dr. Reyna stated that he agreed with Dr. Saiz's impression that "the only surgery that is likely to make a significant improvement in the patient's symptoms would be an L2-3 decompression with an exploration and decompression of the left L5 nerve root." Dr. Reyna opined that the injury on February 20, 2011, "probably aggravated whatever preexisting degenerative condition" Worker had prior to that date.

{6} Worker filed a claim under the Workers' Compensation Act, NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2015). Worker and Employer agreed to have Dr. Claude Gelinas perform an independent medical examination of Worker. Dr. Gelinas performed a physical examination of Worker and reviewed the reports of Drs. Delahoussaye, Saiz, and Reyna. Dr. Gelinas concluded that Worker suffered from "multilevel lumbar degenerative disc disease; spinal stenosis, lumbar region; . . . [and]

foraminal stenosis, multilevel, lumbar region." Dr. Gelinas concluded that the February 20, 2011, accident had "[a]ggravated a preexisting degenerative condition of [Worker's] lumbar spine."

{7} Meanwhile, Dr. Delahoussaye continued to provide ongoing medical care to Worker. He agreed with Drs. Saiz and Reyna as to the type of surgery recommended and noted that Dr. Gelinas had made the same recommendation. Dr. Delahoussaye, like Drs. Reyna and Gelinas, drew "a causal connection between [Worker's] work injury, his current condition[,] and his need for surgery."

{8} Dr. Saiz ultimately disagreed with Drs. Reyna, Gelinas, and Delahoussaye on the issue of causation. He testified that if the accident in question had truly aggravated Worker's preexisting stenosis, "his physical exam findings should be more consistent with stenosis." Because Dr. Saiz did not think the physical exam findings were consistent with stenosis, "there's no way you can attribute his symptoms to stenosis."

{9} The WCJ entered findings of fact indicating agreement with Drs. Reyna, Gelinas, and Delahoussaye on the issue of causation and ordered Employer to compensate Worker. Employer filed a motion to reconsider. The case was assigned to a different workers' compensation judge, who deemed the motion denied "by operation of law" on account of the new WCJ's failure to rule on the motion within thirty days of the motion's filing. Employer appealed to this Court, but we dismissed Employer's appeal of that order for lack of jurisdiction and instructed the WCJ to rule on the merits of Employer's motion to reconsider. Following the issuance of that mandate from this Court, the new WCJ denied Employer's motion for reconsideration and made additional findings of fact. Employer then filed a timely notice of appeal from the first WCJ's compensation order and the second WCJ's denial of its motion to reconsider.

II. DISCUSSION

{10} Employer expressly states that it is *not* claiming that insufficient evidence supports the WCJ's compensation order. Instead, Employer argues that the WCJ applied an incorrect legal standard and that under the correct standard, the WCJ should have concluded that the Worker failed to prove that his injury was caused by the February 20, 2011, accident.[1] Employer also challenges the WCJ's denial of Employer's motion for sanctions.

A. Employer's Challenge to the WCJ's Compensation Order

{11} Because Employer challenges the legal standard underlying the WCJ's finding of causation, our review is de novo. *See Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, ¶ 13, 137 N.M. 497, 113 P.3d 320 (stating that the appellate courts "review the WCJ's application of the law to the facts . . . de novo"). "As to the determination of benefits, [Section] 52-1-28 . . ., sets forth the elements necessary to prove a compensable claim" for workers' compensation. *Murphy v. Strata Prod. Co.*, 2006-NMCA-008, ¶ 8, 138 N.M. 809, 126 P.3d 1173. Section 52-1-28(A)(1) provides that

"[c]laims for workers' compensation shall be allowed only . . . when the worker has sustained an accidental injury arising out of and in the course of his employment[.]" If an employer denies that the worker's disability is caused by the accident, "the worker must establish that causal connection as a probability by expert testimony of a health care provider[.]" Section 52-1-28(B).

{12} In the present case, Drs. Reyna, Gelinas, and Delahoussaye all opined that Worker's injury was probably causally related to the accident at work on February 20, 2011, while Dr. Saiz disagreed. Employer argues that the WCJ could not, as a matter of law, rely on the opinions of Drs. Reyna, Gelinas, and Delahoussaye to support a finding of causation because our case law establishes that a health care provider may not offer an opinion that a work-related accident caused a worker's injury unless that provider bases that opinion on *all* pertinent information. Employer maintains that Drs. Reyna, Gelinas, and Delahoussaye did not have all pertinent information because Worker did not tell them about his 2009 back injury, even though the WCJ found that all of them had Dr. Saiz's records that discussed that injury.

{13} In our view, Employer reads our relevant case law too narrowly. In *Niederstadt v. Ancho Rico Consolidated Mines*, the physician who offered an opinion establishing causation was completely unaware of a back injury sustained by the worker thirteen years before the accident in question. 1975-NMCA-059, ¶ 11, 88 N.M. 48, 536 P.2d 1104. This Court held that "since pertinent information existed about which [the physician] apparently had no knowledge, his opinion cannot serve as the basis for compliance" with the predecessor to Section 52-1-28(B). *Niederstadt*, 1975-NMCA-067, ¶ 11.

{14} Our case law analyzed the holding in *Niederstadt* in some depth ten years later in *Sanchez v. Molycorp, Inc.*, where the question was whether the worker's head injury caused his disability. 1985-NMCA-067, ¶ 8, 103 N.M. 148, 703 P.2d 925. The employer, relying in part on *Niederstadt*, challenged the opinions of three doctors whose opinions established causation because they did not know about a brain stem test administered by a fourth doctor. *Sanchez*, 1985-NMCA-067, ¶¶ 9, 20. This Court rejected the employer's argument and distinguished *Niederstadt*, stating that in the case before it "there [was] no evidence of the existence of any prior accident" as there had been in *Niederstadt*. *Sanchez*, 1985-NMCA-067, ¶ 20. In addition, one of the physicians whose testimony supported the finding of causation also testified that he had read the records of the physician who performed the brain stem test. *Id.* Thus, we concluded that substantial evidence supported the finding of causation. *Id.* ¶ 17.

{15} The holding in *Sanchez* teaches that *Niederstadt*'s holding is not the bright-line rule Employer urges us to follow. In other words, even where a health care provider lacks some pertinent information, that provider's opinion supporting causation may be valid, depending on the circumstances surrounding that opinion. *See Martinez v. Fluor Utah, Inc.*, 1977-NMCA-096, ¶ 8, 90 N.M. 782, 568 P.2d 618 (distinguishing physicians' "minor omissions" from the circumstances in *Niederstadt*, in which the physician supporting causation "had not had available highly pertinent medical information").

{16} After *Sanchez* was decided, this Court again had occasion to address *Niederstadt* at some length in *Mendez v. Southwest Community Health Services*, 1986-NMCA-066, ¶¶ 9-16, 104 N.M. 608, 725 P.2d 584. In *Mendez*, the treating physician, who testified that the work-related accident caused the injury to the worker's shoulder, did not know about several prior complaints of pain in that shoulder. *Id.* ¶ 4. Like Employer in the present case, the employer in *Mendez* argued for strict application of the "rule" announced in *Niederstadt*, and we rejected that argument. Specifically, we declined to impose the requirement advocated by the employer that, "without all knowledge of prior injuries to the same place on the body, no medical expert could render an opinion on causation." *Mendez*, 1986-NMCA-066, ¶ 14. This requirement, which we rejected in *Mendez*, is virtually identical to the requirement sought by Employer in the present case: that "a health care provider [must] have all pertinent information before being able to render a causation opinion in a workers' compensation case[.]"[2]

{17} Employer places great stock in our Supreme Court's opinion in *Banks v. IMC Kalium Carlsbad Potash Co.*, where the Court observed that "if [an] expert who testifies [in a workers' compensation case] lacks pertinent information, his or her opinion cannot satisfy the burden imposed by Section 52-1-28." *Banks*, 2003-NMSC-026, ¶ 35, 134 N.M. 421, 77 P.3d 1014. But Employer overlooks the context of the Court's statement. The Court in *Banks* was not addressing the validity of an expert's opinion on causation. Instead, the Court was considering whether the *Daubert/Alberico* standard for scientific expert testimony applies in workers' compensation cases. *Banks*, 2003-NMSC-026, ¶ 1. The Court concluded that *Daubert/Alberico* does not apply in such cases and, in so holding, mentioned other safeguards ensuring the reliability of health care providers' testimony, such as the safeguard outlined in *Niederstadt*. *Banks*, 2003-NMSC-026, ¶¶ 33-35. In our view, this peripheral mention of *Niederstadt* does not dictate the outcome in the present case.

{18} Employer also emphasizes this Court's opinion in *Sanchez v. Zanio's Foods*, *Inc*. where we said that "[t]he essence of *Niederstadt* is that a health[]care provider must be informed about a pertinent prior injury before he or she can render an opinion as to the cause of a subsequent injury." *Zanio's Foods,* 2005-NMCA-134, ¶ 14, 138 N.M. 555, 123 P.3d 788. We decline to rely on this statement in *Zanio's Foods* because of this Court's inability in that case to sort out the record and the WCJ's findings sufficiently to definitively affirm or reverse. *Id.* ¶ 7 (stating that remand was appropriate because this Court was "unable to meaningfully apply our workers' compensation law regarding preexisting injury and the circumstances under which a medical expert must possess a worker's full medical history before rendering an opinion as to causation of an injury"). Furthermore, we observed in *Zanio's Foods* that "*Niederstadt* might be inapplicable" in circumstances similar to those in the present case, "where an undisclosed, pertinent preexisting condition would, once disclosed, be determined to have combined with the recent injury and to be a part of a present disability determination[.]" *Zanio's Foods*, 2005-NMCA-134, ¶ 49.

{19} Reading all of the preceding cases together, we fail to discern the hard-and-fast, bright-line rule Employer urges us to apply. Rather, our case law tells a WCJ to consider the facts and circumstances before him or her and to approach the question of causation from a common sense perspective. If, as in *Niederstadt*, the health care provider offering an opinion supporting causation is completely unaware of prior medical history that would likely impact that opinion, then the WCJ can reject the opinion. On the other hand, if a physician testifies to the existence of causation with incomplete but sufficient knowledge of prior injuries, then the WCJ can accept the opinion.

{20} In the present case, the WCJ applied the appropriate "legal" standard by considering what all of the testifying physicians knew and how their knowledge impacted their opinions on causation. The first WCJ made the following relevant findings.

22. Dr. Delahoussaye expressed sufficient understanding of Worker's prior history of injury and surgical intervention on which to justify his opinions on causation and surgical need.

. . . .

27. Dr. Reyna recommended a decompression surgery of the L2-3 region with an exploration and decompression of the left L5 nerve root[.] . . . Dr. Reyna also found that:

> . . . .
>
> d) Worker aggravated his pre-existing [de]generative low back condition, including the spinal stenosis[.]
>
> . . . .

36. The recommendations of Dr. Delahoussaye, Dr. Reyna[,] and Dr. Gelinas were unbiased and they were credible in recommending a decompression surgical procedure of Worker's lumbar spine. Moreover, the medical records and history on which these doctors relied was sufficiently disclosed:

> . . . .
>
> b) Dr. Saiz started treating Worker for the 2009 injuries, and he was aware of the prior injuries and conditions, as reflected in his medical records, and Dr. Reyna and Dr. Gelinas had Dr. Saiz's reports from 2011, so they were aware of comparative MRIs from 2009 and 2011; the MRI study certainly showed the condition of Worker's spine in more clear terms than referral to past dates of injury.
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> . . . .

(e) There was substantial compliance with disclosure of past medical history; as a result, these doctors' opinions were based on a sufficient medical-factual predicate upon which to render valid opinions on causation[.]

After this Court remanded Employer's first appeal with instructions that the WCJ rule on Employer's motion to reconsider, the new WCJ made the following additional findings of fact.

11. Dr. Delahoussaye reviewed medical records from Dr. Paul Saiz, and those records make reference to an MRI study from 2009.

. . . .

15. Dr. Delahoussaye is aware Worker suffered from a pre-existing back condition.

. . . .

18. Dr. Reyna reviewed the medical records from Dr. Paul Saiz, and those records make reference to Worker's MRI study from 2009, as well as 2011.

. . . .

20. Dr. Reyna is aware Worker suffered from a pre-existing back condition.

21. Dr. Reyna testifie[d] that Worker's 2011 accident aggravated Worker's pre-existing condition.

. . . .

28. Dr. Gelinas is aware Worker suffered from a pre-existing back condition.

. . . .

31. Dr. Gelinas testified that Worker's 2011 accident aggravated Worker's pre-existing condition.

32. Unlike the [situation] in *Sanchez v. Zanio*[*'s*] *Foods, Inc.*, [Worker] did not deny his medical history of three back injuries and surgeries.

33. Unlike the situation in [*Zanio's Foods*], Worker's treating physicians knew about Worker being treated by another doctor (Dr. Saiz) for a pre-existing condition.

34. Dr. Gelinas, unlike the situation in [*Zanio's Foods*], had information about Worker's prior history of back injuries in forming his opinion about Worker's 2011 injury.

35. Unlike [*Zanio's Foods*], the treating physicians here based their opinions on information in addition to Worker's most recent (2011) accident and injury, namely[,] Worker's extensive history of back injuries and surgeries.

36. Unlike [*Zanio's Foods*], Worker here acknowledges his pre-existing condition and is not claiming the 2011 accident is the sole cause of his current condition.

{21} Not only did the WCJ apply the correct standard in making these findings, but Employer does not specifically attack any of these findings on appeal. "[A]n appellant is bound by the findings of fact made below unless the appellant properly attacks the findings, and . . . the appellant remains bound if he or she fails to properly set forth all the evidence bearing upon the findings." *Martinez v. Sw. Landfills, Inc.*, 1993-NMCA-020, ¶ 18, 115 N.M. 181, 848 P.2d 1108. Thus, Employer is bound by the WCJ's findings that Drs. Reyna, Gelinas, and Delahoussaye were aware of Worker's preexisting back condition and had reviewed Dr. Saiz's records regarding the 2009 back injury. Dr. Saiz's note of August 17, 2011, compared the MRI obtained after the 2009 injury with the MRI taken after the 2011 injury and noted that "there does appear to be progression of stenosis at L2-3 and subtly at L3-4." This note supports Dr. Saiz's *initial* conclusion—as well as the opinions of Drs. Delahoussaye, Reyna, and Gelinas—that the February 2011 accident aggravated Worker's preexisting stenosis.

{22} In any event, the WCJ applied the correct legal standard in assessing the opinions of the physicians who testified that the February 2011 accident aggravated Worker's preexisting condition, and Employer is bound by the WCJ's findings accepting those opinions. We therefore affirm the WCJ's judgment awarding Worker compensation.

{23} We briefly respond to the dissent. We first observe that, after its discussion of the applicable case law, the dissent appears to engage in a substantial evidence analysis, an issue that Employer expressly declined to raise. Second, in undertaking this analysis, the dissent presents an incomplete picture of the various physicians' testimony. Suffice it to say that we stand by our analysis of the applicable legal standard to be gleaned from the case law and by our conclusion that the WCJ properly applied this standard. The WCJ's unchallenged findings, which we have quoted above, are controlling, and they support the WCJ's finding of causation, even with the additional consideration of the findings quoted in the dissent.

B. The WCJ's Denial of Employer's Motion for Sanctions

{24} Employer next argues that the WCJ should have granted its motion to sanction Worker for failing to disclose the existence of his injuries from the accident in 1988 or 1989. Worker concedes that he failed to disclose the accident in a response to Employer's written interrogatory. The accident was first revealed at a deposition on March 7, 2013, when Worker testified that he "got busted up" in Arizona in 1989 and had received Social Security disability payments for the next ten years as a result.

Worker testified about the accident in greater detail at the formal hearing before the WCJ.

{25} The WCJ denied Employer's motion for sanctions, holding that "Worker disclosed his 1988 or 1989 injury to Employer in a sufficient manner so as to preclude the imposition of sanctions." This conclusion was based on the following facts: (1) Worker disclosed the 1988 or 1989 injury at his deposition, and Employer had four and a half months between the deposition and the formal hearing to investigate the injury; (2) Worker disclosed that he had been on Social Security disability income for about ten years as a result of the injury at his deposition, thereby giving Employer fair notice of the potential seriousness of that injury; and (3) Employer's attorney asked Dr. Gelinas about the injury at a deposition, providing evidence that Employer was aware of that injury.

{26} We review a trial court's award of sanctions for an abuse of discretion. *See Enriquez v. Cochran*, 1998-NMCA-157, ¶ 20, 126 N.M. 196, 967 P.2d 1136. If an award of sanctions is reviewed for abuse of discretion, it follows that the denial of such an award is reviewed under the same standard.

{27} Employer first argues that the WCJ's finding of fact that Worker's deposition testimony corrected his earlier omission and cured any prejudice to Employer is unreasonable because Worker's omission "prevented" Employer from (a) identifying doctors who treated Worker for that injury; (b) obtaining medical records of the 1988/89 accident; and (c) using this information as a defense to liability in the formal hearing. We disagree. Employer does not challenge the WCJ's finding that Worker disclosed the injury at his deposition and that there was sufficient time between the deposition and the formal hearing for Employer to investigate the injury. Instead, Employer asserts in conclusory fashion that it suffered prejudice anyway because Worker failed to formally supplement his answer to Employer's written interrogatory. We perceive no error, much less an abuse of discretion, in the WCJ's finding that Employer suffered no prejudice as a result of the Worker's failure to identify the 1988 or 1989 injury in his interrogatory answer. Accordingly, the WCJ did not err in declining to impose sanctions against Worker.

III. CONCLUSION

{28} For the foregoing reasons, we affirm the WCJ's compensation order and denial of Employer's motion for sanctions. Worker's motion to expedite is denied.

{29} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

I CONCUR:

JONATHAN B. SUTIN, Judge

J. MILES HANISEE, Judge (dissenting).

DISSENTING OPINION

HANISEE, Judge (dissenting).

{30} I would join my colleagues in affirming the WCJ if the WCJ's findings of fact supported a determination that Worker met his burden of proving as a probability that his disability was caused by the accident he suffered in 2011. Inconsistent with such a conclusion, however, the WCJ found that Worker failed to disclose the occurrence or existence of his 2009 injury to Drs. Reyna, Gelinas, and Delahoussaye. And the WCJ found that uncontradicted expert testimony established that MRIs taken immediately following Worker's 2009 injury—which neither Drs. Reyna, Gelinas, nor Delahoussaye reviewed—were pertinent to determining the cause of Worker's disability. Both of these findings have substantial evidentiary support in the record. Under *Niederstadt*, 1975-NMCA-059, ¶ 11 and its progeny, which require health care providers to consider all pertinent medical information, the WCJ's own findings of fact require us to reverse the WCJ. Because the majority of this panel has voted instead to affirm, I respectfully dissent.

{31} Section 52-1-28(B) of The Workers' Compensation Act provides that "where the employer or his insurance carrier deny that an alleged disability is a natural and direct result of the accident, the worker must establish that causal connection as a probability by expert testimony of a health care provider, as defined in [NMSA 1978, Section 52-4-1 (2007)], testifying within the area of his expertise." Section 52-1-28(B).

{32} *Niederstadt* held that when "pertinent information exist[s] about which [a health care provider] apparently ha[s] no knowledge, his opinion cannot serve as the basis for compliance" with the Workers' Compensation Act's causation requirements. 1975-NMCA-059, ¶ 11. *Niederstadt* cites *Landers v. Atchinson, Topeka & Santa Fe Railway Company*, 1961-NMSC-017, 68 N.M. 130, 359 P.2d 522, for this proposition. *See Niederstadt*, 1975-NMCA-059, ¶ 11. *Landers* held that an expert witness may not provide testimony when it is based on "factors . . . which were either erroneous or about which [the expert has] no accurate knowledge or information[.]" 1961-NMSC-017, ¶ 22.

{33} *Landers* and *Niederstadt* hold that expert testimony is inadmissible if it is unreliable, and that it is unreliable if it does not consider pertinent or accurate facts. The *Landers* approach was revised somewhat in civil and criminal cases in *State v. Alberico*, 1993-NMSC-047, 116 N.M. 156, 861 P.2d 192, when our Supreme Court essentially embraced the standard set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) for determining the admissibility of expert testimony under Rule 11-702 NMRA. *Alberico* adopted a more fine-grained approach to determining the admissibility of expert testimony under Rule 11-702, looking not to whether the proposed expert testimony is based on widely-accepted methods, but rather "the validity and the soundness of the scientific method used to generate the evidence." 1993-NMSC-047, ¶

47. *Alberico* also applies a more deferential "abuse of discretion" standard of review to trial courts' decisions to admit or exclude expert testimony. 1993-NMSC-047 ¶¶ 56-62.

{34} But the *Daubert/Alberico* rule is wholly inapplicable to proceedings before the Workers' Compensation Administration. *Banks*, 2003-NMSC-026, ¶ 31. Instead, if a witness qualifies as a health care provider under Section 52-4-1, then the WCJ *must* admit the provider's testimony on causation even if the WCJ (as the finder of fact) ultimately chooses not to credit it. *Banks*, ¶¶ 31, 34.

{35} Thus, *Banks* renders the chief rationale underlying *Niederstadt*—that unreliable expert testimony is inadmissible—inapplicable to Workers' Compensation Act proceedings. But *Banks* did not overrule *Niederstadt*. Instead, *Banks* explicitly cites *Niederstadt* as good law. *See Banks*, 2003-NMSC-026, ¶ 35. The *Banks* Court's rationale for this latter assertion is that while the trier of fact may reject uncontroverted expert testimony in civil or criminal proceedings as a general rule, the finder of fact must accept uncontradicted expert testimony in Workers' Compensation Act proceedings. *Id.* (citing *Hernandez v. Mead Foods, Inc.*, 1986-NMCA-020, 104 N.M. 67, 716 P.2d 645). *Banks* reasons that *Niederstadt* remains an important check to this rule, "protect[ing] the interests of both workers and employers" by disallowing WCJ's from entering compensation orders based on expert testimony that fails to take pertinent information into account. *Banks*, 2003-NMSC-026, ¶ 35.

{36} In *Mendez v. Southwest Community Health Services* we rejected the employer's argument that under *Niederstadt*, the mere existence of prior injuries implied that "a medical expert would consider them pertinent[,] and would base his opinion on them." 1986-NMCA-066, ¶ 14. Instead, we emphasized *Niederstadt*'s use of the "pertinent" modifier, suggesting that a health care provider's testimony is only excludable to the extent that she failed to consider information that might actually have changed her mind as to the cause of the worker's injury. *Mendez*, 1986-NMCA-066, ¶ 14. In other words, we reasoned that the policy behind Section 52-1-28—that causation be proven with expert, not lay testimony—meant that it is for the health care provider, not the court, to decide whether or not a prior injury or information relating to that injury is pertinent to a causation determination. *Mendez*, 1986-NMCA-066, ¶ 14. So we concluded that "*Niederstadt* will only be applicable when . . . there is uncontradicted testimony of a medical expert that the information on prior injuries is pertinent . . . [or] deemed important for purposes of diagnosis." *Mendez*, 1986-NMCA-066, ¶¶ 15-16.

{37} For all the apparent complexity of the case law interpreting the Workers' Compensation Act, the upshot of *Niederstadt* and *Mendez* is really quite simple: a health care provider must be aware of *pertinent* information concerning prior injuries, and the pertinence of information is to be determined by the health care provider, not the WCJ. Applying this rule to the facts of this case, it is clear to me that the WCJ's order should be reversed.

{38} My first concern with the Majority's interpretation of *Niederstadt* and *Mendez* is that it casts those cases into doubt in an unpublished memorandum opinion. My

secondary grievance is the Majority's omission of particularly material findings of fact by the WCJ from its discussion.

{39} Here is what the Majority omitted from its summary of the WCJ's findings of fact with respect to exactly what Drs. Reyna, Gelinas, and Delahoussaye knew when they opined that Worker's disability was caused by his 2011 accident:

12. Dr. Delahoussaye did not review Worker's 2009 MRI scan.

. . . .

14. Worker did not tell Dr. Delahoussaye about a back injury he suffered in 2009.

. . . .

17. Worker did not tell Dr. Reyna about his 2009 back injury and associated medical treatment.

. . . .

19. Dr. Reyna did not review radiographic studies administered to Worker prior to 2011.

. . . .

24. Worker did not tell Dr. Gelinas about [his] 2009 back injury.

25. Dr. Gelinas admits he lacks information about treatment to Worker's low back in 2008, 2009[,] and 2010.

26. Dr. Gelinas believes the information from 2008, 2009[,] and 2010 is important, and he would like to review the MRI scan from 2009, but whether the information would change his opinion on causation depends on the contents of the information.

27. Dr. Gelinas reviewed the medical records of Dr. Saiz, who treated Worker following his 2009 back injury.

These findings warrant the following two conclusions on appeal: (1) each of the three doctors who testified that Worker's disability was caused by his 2011 accident were unaware of Worker's 2009 injury; and (2) uncontradicted testimony by Dr. Gelinas established that MRIs of Worker's back in 2009 were pertinent to determining the cause of Worker's disability.

{40} Yet the Majority affirms based on the following rule: "even where a health care provider lacks some pertinent information, that provider's opinion supporting causation

may be valid, depending on the circumstances surrounding that opinion." Majority Op. ¶ 15. The Majority then proceeds to conduct its own analysis of Dr. Saiz's comparison. *See* Majority Op. ¶ 21. Since Dr. Saiz's comparison notes a "progression of stenosis," the Majority essentially concludes that even if Drs. Reyna, Gelinas and Delahoussaye had considered the 2009 MRI, they would have reached the same conclusion as to causation anyway. *Id.*

{41} Even if the Majority's analysis had support in our Workers' Compensation Act jurisprudence, the Majority applies it incorrectly. Dr. Saiz's comparison states that "[Worker] *still* has multilevel degenerative disk disease, as well as what appears to be a progression of stenosis at L2-3." (Emphasis added.) Thus, Dr. Saiz found that the medical evidence was not clear as to whether Worker's impairment resulted from or predated the 2011 accident. Dr. Saiz ultimately concluded that Worker's "underlying degenerative change or spondylosis as well as the stenosis was preexisting[,]" and suggested that Worker's impairment resulted from preexisting stenosis.

{42} As the WCJ recognized in his findings of fact, Dr. Gelinas, a board-certified orthopaedic surgeon, declared in uncontradicted testimony that the 2009 MRI was pertinent to his causation determination. Dr. Gelinas further testified that "[s]ince we don't have an MRI prior to the [2011] accident, I couldn't tell you whether or not [Worker] had preexisting stenosis." Dr. Reyna similarly testified that Dr. Saiz would be "in a better position than I would" to evaluate the changes that occurred as a result of his 2011 accident. Given this testimony, I disagree that Dr. Saiz's comparison of the 2009 and 2011 MRIs can properly support a finding of causation when Dr. Saiz himself reached a contrary conclusion. In any event, the Majority essentially concludes that Drs. Gelinas and Reyna's uncontradicted testimony that the 2009 MRI is pertinent may be disregarded because the "circumstances surrounding [their] opinion[s]" suggests that there is no practical difference between Dr. Saiz's comparison of the two MRIs and the 2009 MRI itself. Majority Op. ¶ 15.

{43} This approach is flatly prohibited by *Mendez*. *Mendez* held that the pertinence of any information concerning prior injuries is to be determined by medical experts only. 1986-NMCA-066, ¶ 14. The Majority acknowledges the plain meaning of *Mendez* but rejects its continued precedential value in a footnote, concluding that the limitation expressed by *Mendez*—under its interpretation of *Niederstadt*—no longer "retain[s] viability." Majority Op. ¶ 16 n.2. I respectfully disagree. As *Banks* recognized, *Niederstadt* "protect[s] the interests of both workers and employers" by preventing WCJ's from being bound by the uncontradicted testimony of medical providers who do not consider pertinent information about past injuries. *Banks*, 2003-NMSC-026, ¶ 35. To be sure, *Banks* can be read to suggest that *Niederstadt* applies only where there is *uncontroverted* expert testimony that fails to consider information pertinent to causation. But I can perceive no principled distinction between that situation and the situation here, where the WCJ has rejected the opinion regarding causation of the only expert who actually considered the pertinent information.

{44} Perhaps it is time to abandon *Niederstadt* and give Workers' Compensation Administration judges the same deference we give to trial courts in reviewing their evidentiary rulings and administrative agencies in their interpretations of the statutory schemes they are tasked with administering. *See Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579, 904 P.2d 28. But without a statutory directive to do so from our Legislature or a decision from our Supreme Court overruling *Banks*, *Niederstadt*, and *Mendez*, our Workers' Compensation Act jurisprudence must be adhered to, and in this instance compels reversal of the WCJ's compensation order. *See Zanio's Foods, Inc*., 2005-NMCA-134, ¶ 11 ("we are required to scrutinize the basis for expert opinions [in a Workers' Compensation Act proceeding] to ensure that all pertinent underlying facts have been taken into account."

J. MILES HANISEE, Judge

1Employer has also appealed the second WCJ's denial of its motion to reconsider. But Employer only takes issue with the second WCJ's denial of its motion to reconsider insofar as the second WCJ applied the same legal standard. We will therefore treat the WCJ's compensation order and the second WCJ's denial of Employer's motion to reconsider as the same issue on appeal.

2Although Employer does not cite *Mendez*, the WCJ in its conclusions of law appears to reference an additional statement in that case: "*Niederstadt* will only be applicable when, as in *Niederstadt*, there is uncontradicted testimony of a medical expert that the information on prior injuries is pertinent." *Mendez*, 1986-NMCA-066, ¶ 15. We decline to apply this limitation for two reasons. First, the "limitation" stated in *Mendez* is unnecessary in light of our interpretation of the legal principle to be gleaned from *Niederstadt* and its progeny, as discussed later in this Opinion. Second, even if the limitation retained some viability, Drs. Delahoussaye and Reyna testified that, while an actual comparison of the 2009 and 2011 MRIs would be pertinent, both had Dr. Saiz's note in which he compared the two MRIs. Therefore, there was no uncontradicted medical testimony that viewing the two MRI studies was necessary.