

**QUINONES V. SANTA FE COUNTY, 1988-NMSC-098, 107 N.M. 804, 765 P.2d 1172
(S. Ct. 1988)**

**GRACE QUINONES, Petitioner,
vs.
SANTA FE COUNTY, NEW MEXICO, Employer, and ROCKWOOD
INSURANCE COMPANY, Insurer, Respondents**

No. 18028

SUPREME COURT OF NEW MEXICO

1988-NMSC-098, 107 N.M. 804, 765 P.2d 1172

December 21, 1988, Filed. As Corrected January 31, 1989

Original Proceeding in Certiorari, Patricio M. Serna, District Judge

COUNSEL

MARGARET KEGEL, KEGEL LAW FIRM, P.C., Espanola, New Mexico, for Petitioner

ROGER V. EATON, EATON LAW FIRM, Albuquerque, New Mexico, for Respondents

AUTHOR: WALTERS

OPINION

{*805} WALTERS, Justice.

{1} We issued a writ of certiorari to the court of appeals to review the only question presented by the petitioner, *i.e.*, whether NMSA 1978, Section 52-1-35(B) (Cum. Supp. 1983)¹ allows a petitioner in a worker's compensation action to recover expert witness fees for the testimony of expert witnesses who testified but who were not subpoenaed to appear at trial. The district court's award of those fees as costs was reversed by a majority of the court of appeals on grounds that a subpoena or court order to testify is a condition precedent to the recovery of such costs. Judge Fruman dissented on that issue, concluding that Section 52-1-35(B) did not require expert witnesses to be subpoenaed before the trial court could award to the petitioner the costs for their attendance. We think that Judge Fruman's interpretation of the statute is correct and, accordingly, we reverse the court of appeals and affirm the trial court's award.

{2} Section 52-1-35(B), which applies because this action was filed before its repeal in 1986, reads:

No cost shall be charged, taxed or collected by the clerk except fees for witnesses who testify under subpoena. These witnesses shall be allowed the same fee for attendance and mileage as is fixed by law in other civil actions. Notwithstanding the provisions concerning expert witness fees as provided in Section 38-6-4 NMSA 1978, the court may order the payment of reasonable fees for any expert witness whose examination of the claimant, report or trial attendance is determined by the court to be reasonably necessary in the trial of the case.

This version is an amended form of the 1978 statute, which was interpreted to allow an award for costs of expert witnesses only if the witnesses were subpoenaed. **See Sedillo v. Levi-Strauss Corp.**, 98 N.M. 52, 56, 644 P.2d 1041, 1045 (Ct. App.), **cert. denied**, 98 N.M. 336, 648 P.2d 794 (1982); **Lujan v. Circle K Corp.**, 94 N.M. 719, 723, 616 P.2d 432, 436 (Ct. App. 1980); **see also Smith v. City of Albuquerque**, 105 N.M. 125, 128, 729 P.2d 1379, 1382 (Ct. App. 1986) (citing Section 52-1-35(B) as allowing an award of costs only when witness is subpoenaed, and denying plaintiff's own travel costs for appearing as a witness in her own case).

{3} In **Bower v. Western Fleet Maintenance**, 104 N.M. 731, 726 P.2d 885 (Ct. App. 1986), the court of appeals noted that the statute had been amended following the decisions in **Sedillo** and **Lujan**, and that the "language of amended Section 52-1-35(B) appears to have liberalized the standard by which a court may award certain costs." **Id.** at 738-39, 726 P.2d at 892-93. The court in **Bower** declared that pursuant to the amended version of Section 52-1-35(B), the standard of review on appeal was whether the trial court had acted arbitrarily or capriciously in granting or denying the award. **Id.**

{4} A plain and fair reading of the amended Section 52-1-35(B) directs us to the conclusion reached by Judge Fruman that the first two sentences of the statute, which set forth the requirement for a subpoena before costs may be awarded, pertain only to non-expert witnesses. The last clause of {806} the last sentence, however, clearly affords the trial court the discretion to award costs for expert witnesses even if the experts have not testified or have not been consulted under subpoena or court order, if their testimony was reasonably necessary. **See Bowers**, 104 N.M. at 739, 726 P.2d at 893. There has been no challenge made that the trial court, which found the costs to be reasonably necessary, acted arbitrarily or capriciously.

{5} Accordingly, we reverse the court of appeals and order that the trial court's award of costs be reinstated.

SCARBOROUGH, C.J., RANSOM, J., and SOSA, Senior Justice, concur.

DISSENT

STOWERS, J., dissenting.

1 Although NMSA 1978, Section 52-5-7(F) (Repl. Pamp. 1987) contains language similar to Section 52-1-35(B), now repealed, we do not purport to extend our analysis herein or our holding today to Section 52-5-7(F).