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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
Filed 4/18/2024 8:32 AM

2 **SEAN GLACKMAN,**

3 Worker-Appellee,



Ramon J. Maestas
Chief Clerk

4 v.

No. A-1-CA-40878

5 **NEW MEXICO DEPARTMENT OF**
6 **TRANSPORTATION and STATE OF**
7 **NEW MEXICO RISK MANAGEMENT,**

8 Employer/Insurer-Appellants.

9 **APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION**
10 **Shannon S. Riley, Workers' Compensation Judge**

11 Jeffrey C. Brown
12 Derek M. Thompson
13 Albuquerque, NM

14 for Appellee

15 Garcia Law Group, LLC
16 Teague Williams
17 Albuquerque, NM

18 for Appellants

19 **MEMORANDUM OPINION**

20 **BLACK, Pro Tem Judge.**

21 {1} The New Mexico Department of Transportation (DOT or Employer) appeals
22 the ruling of the Workers' Compensation Judge (the WCJ) determining that Sean
23 Glackman (Worker) is entitled to statutory modifier-based benefits under the
24 Workers' Compensation Act (the Act), NMSA 1978, §§ 52-1-1 to -70 (1929, as

1 amended through 2017). After a formal hearing, the WCJ awarded Worker
2 permanent partial disability (PPD) modifiers, in addition to whole person
3 impairment, on the basis that Worker’s “retirement was reasonable under the facts
4 of this case.” Employer asserts that substantial evidence does not support the WCJ’s
5 findings and conclusions. We disagree and affirm.

6 **DISCUSSION**

7 **I. Standard of Review**

8 (2) “We review workers’ compensation orders using the whole record standard
9 of review.” *Ruiz v. Los Lunas Pub. Schs.*, 2013-NMCA-085, ¶ 5, 308 P.3d 983
10 (internal quotation marks and citation omitted). “[W]e view the live witness
11 testimony as the fact finder did and considering all other evidence, favorable and
12 unfavorable, and disregarding that which is discredited, we then decide if there is
13 substantial evidence in the whole record to support the agency’s finding or decision.”
14 *Baca v. Bueno Foods*, 1988-NMCA-112, ¶ 4, 108 N.M. 98, 766 P.2d 1332 (internal
15 quotation marks and citation omitted). “In applying whole record review, this Court
16 reviews both favorable and unfavorable evidence to determine whether there is
17 evidence that a reasonable mind could accept as adequate to support the conclusions
18 reached by the fact finder.” *Levario v. Ysidro Villareal Lab. Agency*, 1995-NMCA-
19 133, ¶ 15, 120 N.M. 734, 906 P.2d 266. “We will not, however, substitute our
20 judgment for that of the agency; although the evidence may support inconsistent

1 findings, we will not disturb the agency’s finding if supported by substantial
2 evidence on the record as a whole.” *Herman v. Miners’ Hosp.*, 1991-NMSC-021,
3 ¶ 6, 111 N.M. 550, 807 P.2d 734. We review the WCJ’s application of the law to
4 the facts de novo. *Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, ¶ 13, 137
5 N.M. 497, 113 P.3d 320.

6 **II. Applicable Law**

7 {3} PPD benefits are payable under the Act when a worker suffers a permanent
8 impairment resulting from an injury “arising out of and in the course of
9 employment.” Section 52-1-26(B). Under Sections 52-1-26.1 through -26.4, such
10 partial disability must be determined by calculating the worker’s impairment as
11 modified by the worker’s age, education, and physical capacity. If, on or after the
12 date of maximum medical improvement, an injured worker returns to work at a
13 wage equal to or greater than their pre-injury wage, the worker’s PPD rating shall
14 be equal to his impairment and shall not be subject to the modification calculated
15 pursuant to Section 52-1-26. “We have construed Section 52-1-26(D) as
16 relieving the employer of the liability to pay modifier-based PPD benefits if the
17 worker either (1) accepts employment with the pre-injury employer or a different
18 employer at or above his pre-injury wage, or (2) unreasonably refuses offered
19 employment at or above his pre-injury wage.” *Cordova v. KSL-Union*, 2012-
20 NMCA-083, ¶ 13, 285 P.3d 686. The Act therefore “encourages an employer to

1 offer a job to the permanently injured worker within the worker's post-injury
2 abilities and encourages the worker to return to work because modifier-based
3 PPD benefits are not paid if the worker unreasonably refuses an offer to return to
4 work at his pre-injury wage." *Id.* After hearing the evidence in *Cordova* the
5 "WCJ concluded that because [the e]mployer did not make [the w]orker an offer
6 of a permanent return to work, [the w]orker [was] entitled to receive modifier-
7 based PPD benefits, despite [the w]orker's decision to retire." *Id.* ¶ 17.

8 **III. The WCJ's Award of Modifier-Based PPD Benefits Is Supported by**
9 **Substantial Evidence**

10 {4} Worker suffered inhalation burns to his lungs following a 2019 incident at
11 a DOT concrete lab. Worker testified that after his injury, Employer initially placed
12 him in a light duty, temporary position in the Traffic Division for about a month
13 to help with their filing backlog. Worker stated that even though he was able to
14 perform the Traffic Division job within his restrictions, Employer moved him to
15 another temporary position within the Fleet Management Division and offered a
16 permanent, full-time position within the Traffic Division to another individual.
17 Worker was never told the permanent job within the Traffic Division was
18 available, and he was never offered a permanent, full-time position within the Fleet
19 Management Division. Worker remained in his temporary position with the Fleet
20 Management Division from January 2020 until he elected to retire in May 2021 to
21 receive PERA disability benefits.

1 (5) Louise Newbill, an employee relations specialist with DOT, testified that,
2 under DOT policy, an employee cannot remain in temporary, modified positions
3 for more than twelve months. Therefore, as the employee reaches the end of that
4 twelve-month time frame, Employer schedules monthly meetings with Risk
5 Management and the Legal Department to determine Worker's future employment
6 options. Worker testified he was told by Employer that if he could not return to
7 full duty employment after twelve months, he could either apply for PERA
8 disability or participate in an interactive process with Employer to find him a
9 permanent position within his restrictions. Although Employer informed Worker
10 that the interactive rehiring process was an option, Worker was not provided any
11 substantive details regarding the process and was told that it would be discussed in
12 the future. Although testimony was elicited regarding the attempts by Employer
13 to inform Worker of the rehire process, the WCJ found Worker's
14 characterization to be more persuasive. *See Dewitt v. Rent-A-Center, Inc.*, 2009-
15 NMSC-032, ¶ 22, 146 N.M. 453, 212 P.3d 341 (providing that an appellate court
16 shall adhere to the findings and conclusions of the WCJ when based on
17 substantial evidence "[b]ecause weighing evidence and making credibility
18 determinations are uniquely within the province of the trier of fact"); *Garcia v.*
19 *Borden, Inc.*, 1993-NMCA-047, ¶ 15, 115 N.M. 486, 853 P.2d 737 (explaining

1 that, when conducting a whole record review, a reviewing court shall not
2 reweigh the credibility of witness testimony).

3 {6} Worker further testified that he conducted an independent job search both
4 for positions offered by Employer as well as external positions throughout New
5 Mexico, but did not apply for or pursue those jobs because they either paid less
6 than his pre-injury job, such jobs did not meet his lifting restrictions, or he could
7 not meet the job qualifications. Worker was never offered qualifying employment by
8 Employer. Rather, Worker testified that he felt he was pushed to apply for PERA
9 disability benefits so Employer would not have to continue dealing with him
10 based on past incidents and his active involvement in the union. Finally, Worker
11 testified that he chose to retire and move to Texas because he was advised by his
12 authorized healthcare provider that the lower elevation would improve his health
13 and quality of life.

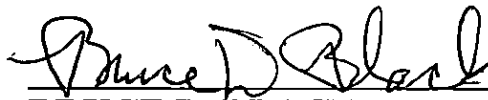
14 {7} Based on the above facts and under our applicable standard of review, we
15 conclude that substantial evidence supports the WCJ's determination that
16 Worker's decision to accept PERA disability benefits and retire, rather than
17 pursue future employment, was reasonable. *See Cordova*, 2012-NMCA-083,
18 ¶¶ 20-22 (providing that where the WCJ's findings of fact establish that a
19 worker's decision to retire was sound and reasonable, the worker remains
20 entitled to modifier-based PPD benefits). In short, we find this case to be

1 virtually indistinguishable from *Cordova* and, accordingly, Worker is entitled to
2 modifier-based PPD benefits.

3 **CONCLUSION**

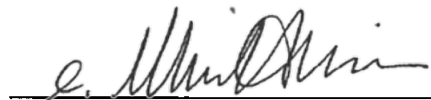
4 {8} For the foregoing reasons, we affirm.

5 {9} **IT IS SO ORDERED.**

6 

7 **BRUCE D. BLACK, Pro Tem Judge**

8 **WE CONCUR:**

9 

10 **J. MILES HANISEE, Judge**

11 

12 **MICHAEL D. BUSTAMANTE, Judge,**
13 **retired, Sitting by Designation**