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Special Insert:
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- All significant NMSA 1978 criminal and traffic provisions as well as hundreds of related sections in such areas as local law, procedure, law enforcement, and constitutional law.
- Children’s Code, Children’s Court Rules and Rules of Evidence
- Selected civil law matters and court rules
- NEW! Hundreds of useful cross references to facilitate research
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- New Mexico Advanced Legislative Service 2005
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- New Mexico One Source of Law™ CD-ROM and DVD
SEMINARY REGISTRATION FORM
State Bar Center

JULY

15
Lawyering With Emotional Intelligence
Friday, July 15, 2005 • 1:30 - 4:30 p.m.
State Bar Center, Albuquerque
2.0 Professionalism and 1.2 Ethics CLE Credits
Reception: 4:30 - 6:30 p.m.

Co-Sponsor: New Mexico Hispanic Bar Association
Presenters: Arturo Jaramillo, Superintendent,
NM Dept. Regulation and Licensing

There are both professional and ethical considerations involved in the practice of law. The principles of emotional intelligence provide an innovative approach for attorneys that can be used to enhance communication skills, listening skills and general effectiveness in presentations. The focus of this program will be on the fundamentals of emotional intelligence and how these learned competencies can be utilized to further one's practice.

☐ Standard and Non-Attorney $79
☐ Government & Paralegal $69
☐ NM Hispanic Bar Member $59

20
Legislative Process: A 2005 Update
Wednesday, July 20, 2005
State Bar Center, Albuquerque
Lunch: Noon - 12:45 p.m. • CLE: 12:45 - 2:45 p.m.
2.4 General CLE Credits

Presenters: Cisco McSorley, Esq., Chair, New Mexico Senate Judiciary Committee and Al Park, Esq., New Mexico House Judiciary Committee

Join us for an informative update on legislative issues before members of the New Mexico House and Senate Judiciary Committees. The speakers will discuss recent legislative developments that will be affecting New Mexico practitioners.

☐ Standard Fee $59

21
Current Developments in Handling Discrimination Charges at the EEOC and the NM Human Rights Division
Thursday, July 21, 2005 • 2 - 4:30 p.m.
State Bar Center, Albuquerque
2.7 General CLE Credits

Co-Sponsor: Employment and Labor Law Section
Presenters: Loretta Medina, Esq. and Francie Cordova

EEOC attorney Loretta Medina and HRD Director Francie Cordova will discuss recent developments in handling discrimination charges in New Mexico, tips for responding to charges and recent activities in their agencies. Recent amendments to the New Mexico Human Rights Act become effective July 1, 2005. Come find out how these changes will be implemented, how they affect the EEOC and HRD work-share agreement and how they could affect your client's interests.

☐ Standard Fee $69

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PHONE: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m.
(Please have credit card information ready)
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then area of interest
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

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Street ____________________________
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Email ____________________________
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Program Date ____________________________
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Exp Date ____________________________
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* Professionalism Tip *

With respect to the courts and other tribunals:

I will avoid the appearance of impropriety at all times.

Meetings

July
11
Public Legal Education Committee, noon, State Bar Center

11
Attorney Support Group, 5:30 p.m., First Methodist Church

14
Public Law Section Board of Directors, noon, RMD Legal Bureau, Santa Fe

14
Business Law Section Forms Committee, 2:30 p.m., State Bar Center

15
Business Law Section Board of Directors, 4 p.m., State Bar Center

15
Board of Bar Commissioners, 11:30 a.m., State Bar Center

15
International and Immigration Law Section Board of Directors, 1:30 p.m., State Bar Center

16
Young Lawyers Division Board of Directors, 10 a.m., State Bar Center

State Bar Workshops

July
27
Family Law Workshop, 5:30 p.m., Branigan Library, Las Cruces

27
Consumer Debt/Bankruptcy Workshop*, 6 p.m., State Bar Center

28
Consumer Debt/Bankruptcy Workshop*, 5:30 p.m., Branigan Library, Las Cruces

August
10
Landlord/Tenant Workshop - Landlords, 6 p.m., State Bar Center

24
Family Law Workshop, 5:30 p.m., Branigan Library, Las Cruces

24
Consumer Debt/Bankruptcy Workshop*, 6 p.m., State Bar Center

25
Consumer Debt/Bankruptcy Workshop*, 5:30 p.m., Branigan Library, Las Cruces

*Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-876-6227; or visit the SBNM Web site, www.nmbar.org.
NOTICES

COURT NEWS
Supreme Court
Law Library Hours

The New Mexico Supreme Court Law Library is now open during the following hours:
Mon. – Fri.  8 a.m. to 5:30 p.m.
Sat.  10 a.m. to 3 p.m.

Compilation Commission Request for Proposals for Attorney Services

Pursuant to Sections 13-1-111 through -119.1 NMSA 1978, the New Mexico Compilation Commission and its Advisory Committee request competitive sealed proposals for an attorney to provide legal drafting and research services. The duties of the Compilation Commission and the Advisory Committee are set forth in the NMSA 1978. A copy of the Request for Proposals may be obtained from:
New Mexico Compilation Commission
Kathleen Jo Gibson, Secretary
PO Box 848
Santa Fe, NM 87504-0848
Competitive Sealed Proposals must be received on or before 5 p.m., July 20.

Judicial Performance Evaluation Commission Upcoming Meeting

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers. The commission’s next meeting will be from 8 a.m. to 5 p.m., July 22 at the Farmington Public Library, 2101 Farmington Ave. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

N.M. Board of Legal Specialization Comments Solicited

The following attorney is applying for certification as a specialist in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA. The Rules of the New Mexico Board of Legal Specialization provide that the names of those seeking to qualify shall be released for publication. Further, any person may comment upon any of the applicant’s qualifications within 30 days after the independent inquiry and review process carried on by the board and appropriate specialty committee. The board and specialty committee encourage attorneys and others to comment upon any applicant. Address comments to New Mexico Board of Legal Specialization, P.O. Box 92860, Albuquerque, NM 87199.

Employment and Labor Law
Michael Schwarz

First Judicial District Court
Criminal Bench and Bar Brownbag

The First Judicial District Court Criminal Bench and Bar will have a brownbag meeting at noon, July 19 in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to any of the First Judicial District Court’s Criminal Divisions.

Second Judicial District Court
Destruction of Exhibits: Criminal and Children

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy exhibits filed with the court in the criminal cases for years 1980 to 1991, and children cases for years 1985 to 1989, included but not limited to cases which have been consolidated. Cases on appeal are excluded. Exhibits may be retrieved from now until July 22. Attorneys who have cases with exhibits should verify exhibit information with the Special Services Division, at (505) 841-7596/7405, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by order of the court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed.

Settlement Week 2005

The Second Judicial District Court’s 17th Annual Settlement Week is scheduled for Oct. 17 to Oct. 21. The deadline for requesting a referral of a civil or domestic relations case to Settlement Week 2005 is July 29. For complete details regarding referral requests, refer to LR2-602, Section C, of the Second Judicial District Court’s Local Rules governing the Settlement Facilitation Program. Blank request forms may be picked up in the civil clerk’s office, domestic relations clerk’s office or court alternatives. When using a settlement week request form, include names, addresses and phone numbers of all parties and attorneys (especially Pro Se parties) involved and any other individuals requiring notice of the settlement facilitation. For more information contact the court alternatives office, (505) 841-7412.

Thirteenth Judicial District Court
Sandoval County Court Operations Moving

The new Sandoval County Courthouse is now ready for occupancy. In order to accommodate moving the Bernalillo clerk’s office, the Thirteenth Judicial District Court
there will be closed for moving July 21 and July 22. The court will reopen on July 25 at its new location. The new address is:
Thirteenth Judicial District Court
1500 Idalia Road, Building A
Bernalillo, NM 87004.
All current phone numbers will stay the same, but the court asks that attorneys be patient with communications as the new phone and computer systems come on line. For more information call Theresa Valencia, chief clerk, (505) 867-2376.

U.S. District Court for the District of New Mexico Revised Criminal Justice Act (CJA)
Effective July 1, 2005, the U.S. District Court for the District of New Mexico revised its CJA Information Manual and amended its Attorney Information Manual. Also, a new Federal Bar Attorney Admission Form and processing information are now available. Visit the U.S. District Court Web site at www.nmcourt.fed.us to review copies of these documents in their entirety.

STATE BAR NEWS
Annual Meeting
The 2005 Annual Meeting of the State Bar of New Mexico will be held at noon, Sept. 23, at the Ruidoso Convention Center in Ruidoso. Resolutions and motions to be considered must be submitted in writing and received in the office of Joe Conte, executive director, PO Box 92860, Albuquerque, NM 87199; fax, (505) 828-3765; or e-mail, jconte@nmbar.org, by 5 p.m., Aug. 23.

Appellate Practice Section
Annual Meeting
The annual meeting of the Appellate Practice Section will take place at 1 p.m., Aug. 19 at the State Bar Center. It will be held in conjunction with the 16th Annual Appellate Practice Institute, which will be held that day at the State Bar Center from 8:20 a.m. to 4:30 p.m. All members of the section and other interested persons are invited to attend and to participate.

Attorney Support Group Monthly Meeting
The next Attorney Support Group meeting will be held at 5:30 p.m., July 11 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month, but is meeting on the second Monday due to the Fourth of July holiday. For more information, contact Bill Stratvert, (505) 242-6845.

Board of Bar Commissioners
July 15, 2005 Meeting Agenda
1. Approval of May 20, 2005 meeting minutes
2. Finance Committee report
3. Acceptance of financials
5. Executive session
6. Executive session report
7. Approval of Annual Award Committee recommendations
8. Appointment of commissioner to Seventh Bar Commissioner District
9. Approval of Client Protection Fund recommendation
10. Report and recommendations of Legal Services & Programs Committee
11. Discussion regarding LREP/aging issues
12. Public Defender report
13. Results on Board of Editors survey of members
14. Committee reports
   A. Bench and Bar Relations Committee
   B. Membership Services Committee
15. President’s report
16. Executive director’s report
17. Division reports
18. FYI correspondence
   A. Reciprocity
   B. Court Regulated Programs (MCLE and Legal Specialization)
19. New business

Lawyers Assistance Committee
Wanted: Lawyers in Recovery in Las Cruces
The Lawyers Assistance Committee is looking for attorneys in recovery in Las Cruces who are willing to make 12-Step calls. Attorneys who are able to help, call Bill Stratvert, (505) 242-6845.

Legal Career Center
Legal Administrators Luncheon
Join State Bar Membership Services and the Legal Career Center for lunch from noon to 1 p.m., July 20 at the State Bar Center. The Legal Career Center has added a new recruiting tool to its Web site and would like an opportunity to introduce it over a delicious lunch – as well as get feedback on how it can enhance the service to best meet the legal community’s needs. Not only is the Legal Career Center picking up the check, but it’s also providing a coupon for a free online job listing including résumé database access for members to use as the need arises. Attendees can expect:
· Delicious lunch by one of the top caterers in Albuquerque
· 15-minute overview of the services offered with the NMBar Career Center
· Q&A session on the services the legal community would like to see added to the Career Center
· Free 30-day online job listing including résumé database access for those attending
Legal administrators can take a pre-tour of the Career Center by going to www.nmbar.org and clicking on the “Career Center” button at the bottom of the home page. Attendees should R.S.V.P. to Richard Hackett at rhackett2@qwest.net, (800) 659-5589.

Paralegal Division
Brownbag CLE
Bring a lunch and join the Paralegal Division for their monthly CLE from noon to 1 p.m., July 13 at the State Bar Center. Registration begins at 11:30 a.m. and the cost is $16 for attorneys and $15 for paralegals, legal assistants and secretaries. The topic for this month’s CLE is “Water Issues in New Mexico: The Pueblo Perspective,” presented by Jessica Aberly, Esq. For more information, contact Debi Shoemaker-Scott, (505) 243-1443.
**Pro Hac Vice**

The New Mexico Supreme Court has established a new rule for practice by non-admitted lawyers before state courts (Pro Hac Vice). The new Rule 24-106 NMRA, is effective for cases filed on or after Jan. 20, 2005. Attorneys authorized to practice law before the highest court of record in any state or territory wishing to enter an appearance, either in person or on court papers, in a New Mexico civil case should consult the new rule. This rule requires non-admitted lawyers to file a registration certificate with the State Bar of New Mexico, file an affidavit with the court and pay a nonrefundable fee of $250. Fees collected under this rule will be used to support legal services for the poor. For more information on the rule, a copy of the registration certificate and sample affidavit, go to www.nmbar.org. For questions about compliance with the rule, please contact Richard Spinello, Esq., Director of Public and Legal Services, State Bar of New Mexico, (505) 797-6050, (800) 876-6227, or rspinello@nmbar.org.

**Public Law Section Board Meeting**

The next Public Law Section board meeting will be held at noon, July 14 in the Risk Management Division Legal Bureau Conference Room on the first floor of the Montoya Building, 1100 St. Frances Dr., Santa Fe. Contact Deborah Moll, (505) 827-2000, for more information.

**Young Lawyers Division Judicial Luncheon with the Chief Justice**

The Young Lawyers Division (YLD) will sponsor a judicial luncheon with Chief Justice Richard C. Bosson of the New Mexico Supreme Court. This is a great opportunity to learn about the New Mexico State Supreme Court, appellate practice, and get to know YLD members. The luncheon is from noon to 1 p.m., July 12 at the New Mexico Supreme Court, 237 Don Gaspar Ave., Santa Fe. Lunch will be provided by the YLD. For more information, contact Erika Anderson, (505) 982-8405, eanderson@nm.net, or Brent Moore, (505) 476-3783, brent_moore@nmenv.state.nm.us.

**OTHER BARS**

**Hispanic National Bar Association**

**30th Annual Convention**

Alan M. Varela, president of the Hispanic National Bar Association has announced the 30th Annual HNBA Convention in Washington D.C. at the Mandarin Oriental Hotel Oct. 16 to 20. The convention provides an opportunity to network with hundreds of the most influential Hispanics in the nation and will include world-class legal education seminars focusing on crucial issues facing the legal profession and the nation. On Oct. 19 a professional job fair will be held for law students and experienced attorneys seeking employment with Fortune 500 corporations and the nation’s most prestigious law firms. “Unidos in Washington” will feature social events at various venues, such as the Mexican Cultural Institute for a “Taste of Latin America and the Caribbean.”

Registration for the convention can be found at the HNBA Web site, www.hnba.com, and completed entirely online. The convention is open to all interested legal professionals. There are special discounted rates for HNBA members as well as those who sign up for the early bird rate now until Aug. 31. Job fair employers may also register online at the HNBA Web site for the job fair. The registration fee for job employers includes day passes for two interviewers, prominent listing in the convention program book and one full day of interviews with one of the highest caliber talent pools in the United States. The HNBA is a non-profit, national association that represents the interests of over 27,000 Hispanic American attorneys, judges, law professors, law students and legal professionals throughout the United States and Puerto Rico. For more information go to www.hnba.com or contact the HNBA Washington office, (202) 223-4777.

**National Association of Counsel for Children**

**28th National Children’s Law Conference**

This summer, the National Association of Counsel for Children will hold its annual national child advocacy training Aug. 25 to 28 at the Hollywood Renaissance Hotel in Los Angeles. Each year in America, over one million children suffer abuse and neglect. These are serious incidents of beatings, sexual assault, and the kind of neglect that results in serious health problems. NACC members serve as child advocates for these children and guide them through the difficult legal process that determines their fate. The NACC is a nonprofit agency that provides the professional training and technical assistance the child advocates need to do their work. For more information, contact NACC at (888) 828-6222, or visit its Web site at www.NACCchildlaw.org.

**New Mexico Defense Lawyers Association**

**2005 Outstanding Civil Defense Lawyers Nominations**

Nominations are being accepted for the 2005 Outstanding Civil Defense Lawyer. The award will be presented at the 2005 DLA Annual Meeting Oct. 27 in Albuquerque. This award is given to one or more attorneys who, over long and distinguished legal careers, have, by their ethical, personal, and professional conduct, exemplified for their fellow attorneys the epitome of professionalism and ability. Letters of nomination should be sent to: NMDLA, PO Box 94116, Albuquerque, NM 87199, faxed to (505) 797-6017 or e-mail to nmdefense@nmdla.org. Deadline for nomination submissions is July 31.

**Advanced Trial Techniques**

The NM Defense Lawyers Association will present a CLE program Aug. 25 at the State Bar Center entitled “Advanced Trial Techniques.” Registration information will be available soon. Visit the NMDLA Web site at www.nmdla.org or contact Rhonda Dahl, (505) 797-6021, for more information.

**NM Women’s Bar Association**

**Mid-State Chapter Monthly Networking Luncheon**

The New Mexico Women’s Bar Association’s next networking lunch will be from noon to 1:30 p.m., July 13 at Conrad’s in the La Posada Hotel, Albuquerque. The topic for the meeting is “Making the Short List,” and will feature a presentation about the Judicial Nomination Commission and being selected by the commission for recommendation to the governor. Invited speakers include UNM
Law School Dean Suellyn Scarnecchia, chair of the commission, Judge Wendy York, Ret., Judge Nan Nash, Judge Linda Vanz, Monica Zamora, Esq., and Eugene Zamora, Esq. Members and visitors are welcome. Advance reservations are required. Lunch prices range from $6 to $11, and payment is made directly to the restaurant. Anyone interested in attending this meeting should R.S.V.P. to Rendie R. Moore, womensbarnm_admnasst@msn.com by July 11.

**Other News**

**UNM Law Library Summer Hours**

Law Library hours through Aug. 21:
- Mon. – Thurs. 8 a.m. to 9 p.m.
- Fri. 8 a.m. to 6 p.m.
- Sat. 9 a.m. to 6 p.m.
- Sun. noon to 9 p.m.

Reference:
- Mon. – Fri. 9 a.m. to 6 p.m.
- Sat. noon to 4 p.m.
- Sun. noon to 4 p.m.

**Workers’ Compensation Administration Notice of Public Hearing**

Notice is hereby given that at 1:30 p.m., July 13 the New Mexico Workers’ Compensation Administration will conduct a public hearing on the emergency rule change to Part 7 of the Workers’ Compensation Rules requiring payers to provide in-patient hospital data. Comment will also be accepted concerning the proposed addition to Part 3 of the rules interpreting the Court of Appeals ruling in Church’s Fried Chicken v. Hanson and, also, concerning updates to the mandatory forms. The hearing will be conducted at the Workers’ Compensation Administration, 2410 Centre Avenue SE, Albuquerque. Videoconferencing may also be made available in the WCA Field Offices upon request. Contact Renee Blechner at (505) 841-6083 to reserve videoconferencing. The emergency rule and the proposed rule changes will be available June 29. Comments made in writing and at the public hearing will be taken into consideration. Written comments pertaining to these issues will be accepted until the close of business July 20. For further information call (505) 841-6000. Please inquire at the WCA Clerk’s Office, (505) 841-6000, for copies of the proposed rules. Individuals with a disability, who are in need of special accommodations, contact Renee Blechner, (505) 841-6083.

**Visit the State Bar of New Mexico’s web site**

[www.nmbar.org](http://www.nmbar.org)
### JULY

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**G** = General  **E** = Ethics  **P** = Professionalism  **VR** = Video Replay

Programs have various sponsors; contact appropriate sponsor for more information.
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### WRITS OF CERTIORARI

**As Updated by the Clerk of the New Mexico Supreme Court**

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court

PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**Effective July 8, 2005**

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OPINION

EDWARD L. CHÁVEZ, JUSTICE

{1} Worker prevailed in a heavily litigated worker’s compensation claim and was awarded $58,599 in medical expenses, plus $26,761 in past and future weekly benefits. At the hearing on attorney fees, the worker’s attorney sought $61,125 in attorney fees, of which the worker would have been liable for $30,562. See NMSA § 52-1-54(J) (2003) (providing worker and employer shall share payment of attorney fees equally except as otherwise provided by the statute). Worker argued the $12,500 limitation on attorney fees in NMSA 1978, Section 52-1-54(I) (1993, prior to 2003 amendment) should not apply because such a limitation violated constitutional guarantees of equal protection and due process.1 The Workers’ Compensation Judge took judicial notice of the chilling effect of miserly fees on representation but found the $12,500 award for attorney fees to be reasonable.

{2} The employer appealed the worker’s award to the Court of Appeals and the worker cross-appealed the attorney fee award. The Court of Appeals certified the issue of the constitutionality of the limitation on attorney fees and otherwise proposed affirming the compensation award. We accepted certification to decide whether the limitation on attorney fees in Section 52-1-54(I) of the Workers’ Compensation Act violates Worker’s state constitutional rights to equal protection and due process. The Workers’ Compensation Judge took judicial notice of the chilling effect of miserly fees on representation but found the $12,500 award for attorney fees to be reasonable.

{3} We review the attorney fee limitation provision under rational basis scrutiny, as the record in this case fails to demonstrate that the limitation has a sufficient impact on important rights to trigger a higher level of scrutiny. We hold that the fee limitation is rationally related to legitimate government purposes, particularly those of maximizing the limited benefits workers may currently

1 At the time of this case, Section 52-1-54(I) of the WCA limited attorney fees to $12,500. Section 52-1-54(I) was amended in 2003 to raise the attorney fee limitation to $16,500. NMSA 1978, § 52-1-54(I) (2003). Because this case was already pending at the time the statute was amended, this Opinion considers only the constitutionality of the pre-2003 fee limitation.
obtain through the workers’ compensation system. On these facts, were we to declare the fee limitation unconstitutional, the worker’s benefits of $26,761 would be insufficient to pay his share of the $61,125 in requested attorney fees. The $12,500 attorney fee limitation, which in this case limits the worker’s share of attorney fees to $6,250, still allows the worker to take home $20,511 in benefits. Therefore, while we do not decide whether other provisions of Section 52-1-54 would pass constitutional muster, we uphold the fee limitation itself. We adopt and append the Court of Appeals’ analysis to all other issues raised in this appeal and cross-appeal. See Wagner v. AGW Consultants, No. 22,370 (N.M. Ct. App. Oct. 24, 2003) (certification order).

BACKGROUND

{4} David Wagner (Worker) filed a claim for workers’ compensation benefits against AGW Consultants, d/b/a Turner Environmental Consultants (AGW), a ground-water hydrology consulting firm where he was injured while employed as a geologist. After realizing that AGW was a business trust, Worker amended his complaint to add as a defendant William Turner, AGW’s sole trustee, in the event that Turner was the real party in interest. Turner appeared pro se to challenge Worker’s claim, while separate counsel represented AGW.

{5} Several issues were heavily litigated at trial, including the applicability of the Workers’ Compensation Act (WCA) to AGW, whether Turner was the real party in interest, Worker’s ability to sue Turner, and the constitutionality of the attorney fee limitation. Turner himself filed a significant number of the roughly 2,500 pages of pleadings, independent of post-judgment motions and this appeal. The Workers’ Compensation Judge (“WCJ”) noted that although the issues were of average complexity, the case had the most extensive pleading record he had ever seen. At one point the WCJ stated on the record that had Turner been an attorney, the WCJ would have issued sanctions against him for repeatedly filing motions without merit. The WCJ did not initially enter findings of fact or conclusions of law regarding whether the parties engaged in bad faith, and therefore whether either party was entitled to additional attorney fees up to $2,500 under Section 52-1-54(I). On appeal the Court of Appeals retained jurisdiction but ordered the WCJ to enter findings and conclusions regarding the issue of bad faith. The WCJ found that some of Turner’s pleadings were frivolous and without sound basis in law, but concluded that Turner’s bad faith was irrelevant to awarding additional attorney fees under Section 51-2-54(I) because Turner was not Worker’s employer. The WCJ ultimately found that Turner was an employee of AGW and that AGW was subject to the WCA, ordering AGW to pay Worker $58,599 in medical expenses and $26,671 in past and future weekly benefits.

{6} At the subsequent hearing on attorney fees, Worker’s attorney claimed to have worked more than 400 hours, at $150 per hour, on the pre-trial and trial work. Worker’s attorney argued the $12,500 statutory limitation on attorney fees was unreasonable in this case given the extraordinary amount of time involved, and that the limitation was unconstitutional due to its chilling effect on workers’ ability to obtain adequate representation. Worker presented expert testimony that the fee limitation can be unfair and can make it uneconomical for attorneys to pursue certain time-consuming cases. AGW and Turner challenged the jurisdiction of the WCJ to declare Section 52-1-54 unconstitutional and did not present evidence in support of the fee limitation.

{7} The WCJ awarded Worker $12,500 in attorney fees and made the following findings: (1) Worker’s attorney reasonably expended over 200 hours at an hourly rate of $175 per hour; (2) the miserly fee limitation has a chilling effect on representation, and (3) $12,500 was a reasonable fee in this case. On certification, Worker argues the attorney fee limitation violates state equal protection and substantive due process, claiming that as applied, the limitation unconstitutionally infringes on the right to access the courts and the right to an appeal guaranteed in the New Mexico Constitution. AGW contends Worker does not have standing to challenge the fee limitation and that in any event the fee limitation is constitutional.

I. Worker Has Standing to Challenge Fee Limitation

{8} AGW claims Worker lacks standing to challenge the constitutionality of the fee limitation under Mieras v. Dyncorp, 1996-NMCA-095, ¶ 22, 122 N.M. 401, 925 P.2d 518, because the WCJ specifically found the $12,500 attorney fee to be reasonable and declined to find that Worker’s attorney would have been entitled to a higher attorney fee but-for the limitation. We disagree.

{9} To have standing, Worker must either show, or the WCJ must explicitly find, that but for the fee limitation, reasonable attorney fees would have exceeded the awarded amount. See Meyers v. Western Auto & CNA Ins. Cos., 2002-NMCA-089, ¶ 29, 132 N.M. 675, 54 P.3d 79; cf. Mieras, 1996-NMCA-095, ¶ 22 (holding the claimant had standing where the WCJ specifically found the value of the attorney’s services to exceed the limitation). Although the WCJ found $12,500 to be a reasonable fee, the WCJ also found that Worker’s attorney reasonably expended over 200 hours representing Worker at a fee of $175 per hour. While these findings appear inconsistent, the latter indicates at a minimum that but for the limitation, Worker’s attorney would have been reasonably entitled to at least $35,000 in attorney fees even before this appeal. Unlike in Meyers, where the claimant lacked standing because he neither reached the fee limitation nor showed that he would have secured a higher attorney fee in the absence of the limitation, 2002-NMCA-089, ¶ 29, here Worker not only reached the limitation, but the WCJ found that his attorney reasonably expended over 200 hours at $175 an hour, bringing him well over the limitation of $12,500.

{10} We note that the fact Worker is represented by counsel, who continues to honor her ethical duty to represent him, does not preclude standing in this case. See Rule 16-116(B)(5) NMRA 2005 (declining or terminating representation). In Corn v. New Mexico Educators Fed. Credit Union, the Court of Appeals held the claimant had standing to challenge the constitutionality of the unilateral limitation on workers’ attorney fees although claimant continued to be represented by counsel. 119 N.M. 199, 202, 889 P.2d 234, 237 (Ct. App. 1994), overruled on other grounds in Trujillo v. City of Albuquerque, 1998-NMSC-031, ¶ 32, 125 N.M. 721, 965 P.2d 305 (Trujillo III) (overruling Corn to the extent it adopted a fourth tier of scrutiny, while affirming Corn’s holding and subsuming its “heightened rational basis” analysis under a “modest rational basis” standard). The WCJ in Corn found that but for the limitation, the claimant’s attorney would have been entitled to nearly $20,000, and noted that although attorneys exceeded the limitation in only one of five hundred cases, the limitation caused workers to be at an unfair disadvantage compared to employers and significantly reduced the number of competent attorneys willing to take workers’ compensation cases. Id. at 201, 208, 889 P.2d at 236, 243. Although the claimant in Corn was represented, the court found a significant risk of future injury because his attorney could withdraw during the appeals process if the lack of payment posed an unreasonable financial

2 Apparently the judge mistook Worker’s attorney’s fees for $175 an hour instead of the $150 hourly rate she requested.

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burden, which would have required claimant to “pursue matters of impairment and permanent disability without the aid of counsel.” Id. at 202, 889 P.2d at 237.

[11] Thus, despite the fact that Worker is represented by counsel, he has shown that he is at risk of significant injury because of his inability to compensate a lawyer on appeal. Section 52-1-54 prohibits Worker from paying his counsel more than $12,500, either before the WCA or on appeal. See § 52-1-54(A), (I), (N) (making it unlawful to accept fees except as provided in the Act, punishable as a misdemeanor offense). The ethical rules allow Worker’s lawyer to withdraw if the case poses an “unreasonable financial burden,” and Worker would be unable to offer a new attorney any compensation on appeal. See id.; Rule 16-116(B)(5). This evidence certainly does not detract from Worker’s having standing; if anything, it strengthens his argument. We hold Worker has standing to challenge the constitutionality of the fee limitation.

II. Rational Basis is the Appropriate Level of Scrutiny

[12] Before turning to the merits of the equal protection and due process challenges, we must identify the appropriate level of scrutiny for reviewing the challenged law. What level of scrutiny we use depends on the nature and importance of the individual interests asserted and the classifications created by the statute. See Mieras, 1996-NMCA-095, ¶ 24. Ordinarily we defer to the Legislature’s judgment in enacting social and economic legislation such as the WCA. See Corn, 119 N.M. at 204, 889 P.2d at 239. So long as such legislation does not impact important rights or protected classes, it is upheld unless the challenger can show the provision at issue is not rationally related to a legitimate government purpose. See Trujillo III, 1998-NMSC-031, ¶¶ 14, 26; Mieras, 1996-NMCA-095, ¶ 30. If legislation impacts important but not fundamental rights, or sensitive but not suspect classifications, intermediate scrutiny is warranted and we require the State to demonstrate that the law is substantially related to an important government purpose.7 Mieras, 1996-NMCA-095, ¶ 26. If a law draws suspect classifications or impacts fundamental rights, we apply strict scrutiny and require the State to demonstrate that the provision at issue is closely tailored to a compelling government purpose. See id. ¶ 25.

[13] Worker and amicus New Mexico Trial Lawyers Association (NMTLA) urge us to review the attorney fee limitation under intermediate or strict scrutiny, arguing that the fee limitation impacts important or fundamental rights. They contend that certain claimants cannot obtain adequate representation because the fee limitation discourages lawyers from taking their cases, and that this lack of adequate representation threatens the meaningful exercise of two separate rights: (1) meaningful access to the courts as implied in the due process clause of the state constitution, see N.M. Const. art. II, § 18; Richardson, 107 N.M. at 696, 763 P.2d at 1161; and (2) the explicit constitutional right to an appeal in New Mexico. N.M. Const. art. VI., § 2. To warrant intermediate or strict scrutiny, Worker must first persuade us that at least one of these rights is “important” or “fundamental,” and secondly that such a right is sufficiently impacted to warrant more than minimal scrutiny.

Worker Fails to Demonstrate the Impact on Important Constitutional Rights Is Sufficient to Trigger Intermediate Scrutiny

[14] New Mexico appellate courts have previously recognized that the right to access the courts and the right to an appeal are important, although not fundamental, rights for purposes of constitutional analysis. See Trujillo III, 1998-NMSC-031, ¶¶ 18-19; Herndon v. Albuquerque Pub. Schools, 92 N.M. 287, 288, 587 P.2d 434, 435 (1978); Mieras, 1996-NMCA-095, ¶¶ 48, 51 (Hartz, J., specially concurring). Because the right to access the courts and the right to an appeal are synonymous in the context of the workers’ compensation system, as both are implicated when a litigant seeks to appeal an administrative decision to the judicial branch, we consider them collectively. See Herndon, 92 N.M. at 288, 587 P.2d at 435; Trujillo III, 1998-NMSC-031, ¶ 21; Mieras, 1996-NMCA-095, ¶¶ 48, 51 (Hartz, J., specially concurring). Any legislation shown to truly impact these appellate rights should be subjected to more than rational basis review. See, e.g., Carson v. Maurer, 424 A.2d 825, 830-32 (N.H. 1980) (applying intermediate scrutiny to invalidate a statute that limited medical malpractice recovery, after holding the right to recover for personal injuries was an important right under the state constitution).

[15] Worker argues that the fee cap impacts workers’ appellate rights because it discourages lawyers from taking complex or time-consuming cases, depriving those claimants of meaningfully exercising their appellate rights. Meaningful access to our appellate courts depends in part on an individual’s ability to obtain adequate representation. See Herndon, 92 N.M. at 288, 587 P.2d at 435; Mieras, 1996-NMCA-095, ¶ 48 (Hartz, J., specially concurring) (“A statute that deprives someone of the ability to obtain adequate representation in litigation could, in a very real sense, deprive the person of a right of access to the courts.”); Corn, 119 N.M. at 210, 889 P.2d at 245 (Apodaca, J., concurring). Whether representation is “adequate,” however, depends on the circumstances, including the nature of proceedings and the ability of the other side to secure representation. See United States Dep’t of Labor v. Triplet, 494 U.S. 715, 733-34 (1990) (Marshall, J., concurring) (distinguishing the complexities and adversarial nature of the regulatory system for obtaining benefits under the Black Lung Benefits Act from the more informal Veterans Administration system at issue in Walters v. Nat’l Ass’n of Radiation Survivors, 473 U.S. 305 (1985), such that the due process challenge in Triplet would have been successful had claimants shown the fee limitation deprived claimants of legal representation in proceedings under the Act); Corn, 119 N.M. at 207-08, 889 P.2d at 242-43.4

[16] In arguing that intermediate scrutiny applies, it is not enough to simply point to an important constitutional right; the challenger must show that the legislation in fact impacts the exercise of this right. See Mieras, 1996-NMCA-095, ¶¶ 48-52 (Hartz, J., concurring). To support their argument that the fee limitation makes it difficult for those with complex or highly contested cases to obtain representation, and that such a “chilling effect” effectively deprives these workers of their appellate rights, Worker and amicus NMTLA rely on testimony

1 We emphasize that this standard requires either an important right or a sensitive class, contrary to what we may have suggested in dicta in Trujillo III, 1998-NMSC-031, ¶ 15, and Richardson v. Carnegie Library Rest., Inc., 107 N.M. 688, 693, 763 P.2d 1153, 1158 (1988), overruled on other grounds by Trujillo III, 1998-NMSC-031, ¶¶ 18-21, 32 (adopting rational basis test as appropriate standard for reviewing equal protection challenge to damage cap, rather than the intermediate scrutiny standard used in Richardson, but upholding the result in Richardson under modern rational basis test). Both cases indicated that intermediate scrutiny is used when a statute impacts important rights and sensitive classes. See Alvarez v. Chavez, 118 N.M. 732, 736, 886 P.2d 461, 465 (Ct. App. 1994); Plyler v. Doe, 457 U.S. 202, 223-24 (1982).
presented at trial about the impact of the fee limitation on representation. Worker’s expert, a workers compensation attorney, opined that the number of New Mexico attorneys who exclusively represent claimants in workers’ compensation proceedings have decreased to about two or three since the benefits scheme was restructured in 1991, and that in light of this reduction in available benefits, the fee limitation can be unfair to workers’ attorneys in some circumstances, may discourage claimants’ attorneys from pursuing complex or time-consuming cases, and should be relaxed in particularly time-consuming cases.

{17} The record in this case is not meaningfully different from that in Mieras, where the Court of Appeals was unpersuaded that the fee limitation infringed on the right to access the courts by preventing a class of workers from obtaining adequate representation. See Mieras, 1996-NMCA-095, ¶¶ 27, 34; see also id. ¶¶ 49-52 (Hartz, J., specially concurring) (noting that claimant failed to show the cap actually prevented workers with complex cases from obtaining adequate representation). In Mieras, the claimant demonstrated that the limitation on attorney fees prevented her attorney from being compensated for the time he reasonably expended on behalf of his client. Id. ¶¶ 17-19. The claimant failed, however, to illustrate how the fee limitation resulted in workers being denied adequate representation, either in theory or fact. Id. ¶¶ 49-52 (Hartz, J., specially concurring). The court therefore applied rational basis review. Id. ¶ 27.

{18} As in Mieras, the record here fails to demonstrate that some claimants are unable to obtain representation in workers’ compensation proceedings, either initially or on appeal, or that a decrease in available attorneys renders access to our appellate courts any less meaningful. Worker’s expert did not directly attribute a decline in available lawyers to the attorney fee limitation, nor did Worker offer any direct evidence in support of this testimony. Rather, Worker’s expert seemed to emphasize that the decline in lawyers representing workers was due to the overall reduction in benefits to injured workers. While the WCJ found a “chilling effect of misery attorney fees on representation,” the record fails to show that this chilling effect has impacted claimants’ ability to access the courts sufficiently to trigger intermediate scrutiny of Section 52-1-54(A). See Tripplett, 494 U.S. at 724 (holding the affidavits of three lawyers, which stated anecdotally that there were fewer qualified lawyers available to take black lung cases due to the attorney fee limitation, were “blatantly insufficient” to demonstrate that claimants could not obtain representation due to the fee limitation, even if assertions were left unrebuted); see also Trujillo III, 1998-NMSC-031, ¶¶ 19-23.

{19} Before finding that the fee limitation meaningfully impacts claimants’ appellate rights, therefore, we would require more evidence in the record, such as testimony or data showing that workers with complex cases are unable to obtain representation due to the fee limitation. See Tripplett, 494 U.S. at 723-24. Our conclusion might also be different in a case in which, because of the fee limitation, a worker’s lawyer were unable to continue representing the worker on appeal because of the unreasonable financial burden, thus relieving the lawyer of the ethical duty to continue representation, or a worker were dissatisfied with his attorney but could not afford to hire a new attorney on appeal. See, e.g., Crosby v. State of New York, Workers’ Compensation Bd., 442 N.E.2D 1191, 1194-95 (N.Y. 1982); cf. Mieras, 1996-NMCA-095, ¶ 34 (recognizing that the fee limitation “may under certain circumstances preclude any additional award of attorney fees for appellate legal services when the maximum limit has been attained for legal services rendered at the trial level,” although those circumstances did not exist in that case).

{20} In seeking to elevate our review to intermediate scrutiny under the facts of this case, the dissent suggests a more “charitable” approach, even to the extent of selectively considering anecdotal information not of record. Dissent, ¶¶ 51-52. However, the facts and record of this case simply do not demonstrate how the fee limitation impacts the right to access the courts and the right to an appeal. Worker was free to appeal her case from the workers’ compensation proceedings and did so. She continues to be represented by her counsel, whom we commend for her skilled and committed advocacy on behalf of her client, particularly in light of the volume of “frivolous and excessive” pleadings filed by the pro se litigant at the administrative level. Because this case fails to demonstrate that the fee limitation impacts important rights or sensitive classes, rational basis is the proper standard of review for reviewing the equal protection and due process challenges.

III. Equal Protection Challenge to Fee Limitation

{21} The New Mexico Constitution provides that no person shall be denied equal protection of the laws. N.M. Const. art. II, § 18. Like its federal equivalent, this is essentially a mandate that similarly situated individuals be treated alike, absent a sufficient reason to justify the disparate treatment. See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985); Garcia ex rel. Garcia v. La Farge, 119 N.M. 532, 537, 893 P.2d 428, 433 (1995).

{22} In Corn, we evaluated an equal protection challenge to the WCA fee limitation and declared the fee limitation unconstitutional because it applied only to the worker’s attorney. Corn,119 N.M. at 209, 889 P.2d at 244. While Corn was pending, the Legislature partially corrected the inequality by amending the fee limitation provision to apply to both employers and workers. § 52-1-54(A) (1990). Nonetheless, the Legislature continues to treat workers and employers differently in a manner which may disparately affect workers’ rights to access our appellate courts by requiring workers to obtain judicial approval for attorney fees without imposing the same requirement on employers under Section 52-1-54(C). Employers, through their insurance companies, are free to contract to pay their attorneys up to $12,500 for each workers compensation case, regardless of the work expended or any of the factors relevant to assessing reasonable fees for workers’

4 The dissent maintains that representation is particularly important at the appellate level, Dissent, ¶¶ 48-49, and cautions that we “should not encourage parties to attempt the rigors of the appellate process unaided by counsel.” Dissent, ¶ 62. In doing so, the dissent seems to minimize the significance of administrative hearings in workers compensation cases. In fact, it is at the workers compensation level that skilled counsel is most crucial to ultimately preserving benefits awarded to an injured worker. The better the quality of the record below, the greater the likelihood of prevailing on the merits on appeal, particularly given the Court of Appeals’ efficient summary calendar process, supported by a skilled and dedicated Prehearing Division.

5 Amicus Workers’ Compensation Administration alleges that in fact there was an increase in attorneys who represented workers before the WCA. Again, because this information is not in the record and was not subject to cross-examination to test its accuracy, we cannot rely on it. See State v. Martin, 101 N.M. 595, 603, 686 P.2d 937, 945 (1984) (appellate court cannot consider facts that are not of record).
Wo v. Hopkins

not found to be unusually complex; rather, the record suggests the case was time-consuming because of the pro se litigant’s frivolous and excessive pleadings.7 Nonetheless, having determined that Section 52-1-54(I) does differentiate between two classes of workers compensation cases.

the courtroom.

not rationally related to a legitimate government purpose.

Section 52-1-54(I) distinguishes between similarly situated individuals, and if so whether Worker has demonstrated that the limitation is not rationally related to a legitimate government purpose.

As applied, Section 52-1-54(I) creates two classes of workers compensation litigants: those who do and do not reach the limitation at the administrative stage, and consequently those who can and cannot lawfully pay an attorney a reasonable fee on appeal.6 See Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (holding law violated equal protection as applied, although neutral on its face). Although Worker also urges us to recognize a class of workers with complex cases who are unable to obtain adequate representation because of the fee limitation, Worker fails to demonstrate both that this class exists and how he would be a member of such a class. Worker’s case was not found to be unusually complex; rather, the record suggests the case was time-consuming because of the pro se litigant’s frivolous and excessive pleadings.7 Nonetheless, having determined that Section 52-1-54(I) does differentiate between two classes of workers compensation litigants, we must now decide whether such disparate treatment is rationally related to a legitimate government purpose. See Trujillo III, 1998-NMSC-031, ¶ 14.

While our rational basis test is neither “toothless” nor a “rubber stamp” for challenged legislation, it nonetheless requires us to defer to the validity of the statute, with the challenger carrying the burden of persuasion. See id. ¶¶ 14, 30. To successfully challenge the statute under this standard of review, Worker must demonstrate that the classification created by the legislation is not supported by a “firm legal rationale” or evidence in the record. See Corn, 119 N.M. at 203-04, 889 P.2d at 238-39. This Worker fails to do.

Section 52-1-54(I) is Rationally Related to a Legitimate Government Purpose

The WCA was enacted as an exclusive remedy for employees to subject employers to liability without fault for work-related injuries. Mieras, 1996-NMCA-095, ¶ 30. We have consistently stated our approval of the Legislature’s principal objectives in enacting the WCA: (1) maximizing the limited recovery available to injured workers, in order to keep them and their families at least minimally financially secure; (2) minimizing costs to employers; and (3) ensuring a quick and efficient system. NMSA 1978, § 52-5-1 (1990); see Archer v. Roadrunner Trucking Inc., 1997-NMSC-003, ¶ 7, 122 N.M. 703, 930 P.2d 1155; Sanchez v. M.M. Sundt Constr Co., 103 N.M. 294, 296-97, 706 P.2d 158, 160-61 (Ct. App. 1985). We believe the first goal, maximizing a worker’s recovery, is particularly important in the workers’ compensation arena, where workers’ ability to recover needed benefits is circumscribed by the legislation itself. See Walters, 473 U.S. at 321-22, 334 (recognizing the rational basis government policy of maximizing claimants’ awards in rejecting a procedural due process challenge to the ten dollar limitation on attorney fees for those seeking benefits for service-connected deaths or disabilities in Veterans Administration proceedings); cf. Mieras, 1996-NMCA-095, ¶ 39 (Hartz, J., specially concurring) (describing the severe restrictions on recovery in workers’ compensation actions).

Worker does not challenge these government purposes for the attorney fee limitation, but rather argues that the fee limitation is not rationally related to these purposes. Contrary to Worker’s argument, we find there to be a firm legal rationale, supported by the record of this case, to justify the $12,500 attorney fee limitation as a rational means to achieving the Legislature’s goals. As we recognized in Corn, it is certainly rational for the State to minimize the role of attorneys in seeking to maximize claimants’ awards quickly and efficiently. 119 N.M. at 208, 889 P.2d at 243. In addition, as we have already noted, the fee limitation is important to maximizing the limited benefits available to workers, particularly when workers must generally pay half of their attorneys’ fees. See § 52-1-54(J); Mieras, 1996-NMCA-095, ¶ 38 (Hartz, J., specially concurring); see also Corn, 199 N.M. at 207, 889 P.2d at 242.

In this case, Worker’s $12,500 attorney fee award represented just under fifteen percent of Worker’s total award, not including future medical benefits. This is well within the parameters that this Court has identified as generally appropriate for attorney fees in workers’ compensation cases. Woodson v. Phillips Petroleum, 102 N.M. 333, 338, 695 P.2d 483, 488 (1985) (noting, inter alia, that in states that set attorney fees at some percentage of the worker’s recovery, ten to twenty percent is generally considered to be an appropriate range). On the other hand, the fee proposed by Worker’s attorney was $61,125, or 407.5 hours at $150 an hour. In contrast to the generally accepted rate of attorney fees to total recovery, this proposed fee would have amounted to roughly seventy-two percent of the Worker’s total award, not including time spent on appeal. Further, of the $85,360 that the WCJ awarded to Worker, only $26,761 was for actual compensation, while the bulk of the award was to cover Worker’s medical expenses. Because Worker would have been liable for half of his attorney’s proposed fee of $61,125, Worker’s attorney fees would have exceeded his actual compensation. Were we to strike the fee limitation, Worker would be required to deplete his entire compensation award and dig into his own pocket to pay his attorney fees. While we do not pass on whether such attorney fees were reasonable in this case, these figures certainly suggest that the attorney fee limitation of $12,500 is a rational means to maximize a worker’s take-home award.

Worker points to no legal authority or evidence in the record to show the $12,500 fee cap is an arbitrary and irrational means to achieve the State’s objectives. For instance, there is no evidence in the record to suggest either what percentage of claimants approach or

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6 In addition, as discussed above, by subjecting workers, but not employers, to judicial approval of reasonable attorney fees, Section 52-1-54 creates an additional classification of those who can and cannot lawfully contract to pay an attorney of their choice reasonable fees on appeal. Again, however, the facts and record of this case do not squarely present such an issue, nor was this particular classification discussed by the parties below. See Richardson, 107 N.M. at 692, 763 P.2d at 1157.

7 In this case, the WCJ may have been able to minimize the time expended by the attorneys by using appropriate sanctions to control the courtroom. See NMSA 1978, § 52-5-6(B) (2001). However, whether the WCJ was correct in his use of sanctions is not before us.
reach the fee limitation at the administrative level, or the typical amount of time expended by attorneys either at the administrative level or on appeal in such cases, to somehow demonstrate that $12,500 is an irrational figure.\textsuperscript{8} Cf. \textit{Corn}, 119 N.M. at 208, 889 P.2d at 243 (finding that the WCA’s data that less than one fifth of one percent exceeded the limitation undermined the State’s rationale by showing a de minimus effect from the unilateral limitation). There is simply no evidence in the record to demonstrate that, other than in this particular case, $12,500 has been insufficient to cover workers’ attorney fees at the administrative and appellate levels. The dissent proposes, as an alternative to the current scheme it describes as inflexible, that the Legislature maintain an attorney fee limitation but create a separate category of fees on appeal. Dissent, \textsection 60. The dissent does not necessarily quarrel with a fee limitation but disagrees on where to draw the line. It remains unclear what the dissent believes would be an appropriate limitation for appellate fees, presumably because of the lack of any evidence in the record to suggest what such a limit should be, or how this alternative would make the fee limitation more flexible. If the legislation provided for a limit of $10,000 in attorney fees at the administrative level and $2,500 on appeal, how would that make the scheme more flexible or less burdensome on the worker? The dissent also fails to address the fact that such fees would still reduce the worker’s take-home award.

\{29\} We find nothing in Worker’s argument to undermine the rationale that by limiting attorney fees at $12,500, Section 52-1-54(I) helps to maximize workers’ take-home awards, minimize costs to employers and increase the efficiency of the system for the reasons discussed above.\textsuperscript{9} Further, the fact that the Legislature increased the fee limitation to $16,500 in 2003 suggests to us that rather than setting the fee limitation arbitrarily, the Legislature continues to consider the role of attorney fees in order to maximize workers’ awards while minimizing litigation costs. Because Worker fails to show the $12,500 fee limitation is not rationally related to a legitimate government purpose, his equal protection challenge must fail.\textsuperscript{10}

IV. Due Process Challenge to Fee Limitation

\{30\} The due process clause in the New Mexico Constitution reads: ”No person shall be deprived of life, liberty or property without due process of law . . .”. N.M. Const. art. II, \textsection 18. Substantive due process cases inquire whether a statute or government action “‘shocks the conscience’ or interferes with rights ‘implicit in the concept of ordered liberty.’” \textit{See State v. Rotherham}, 1996-NMSC-048, 122 N.M. 246, 259, 923 P.2d 1131, 1144 (quoting \textit{United States v. Salerno}, 481 U.S. 739, 746 (1987) (quoted authorities omitted)). Worker and amicus NMTLA argue the fee limitation unconstitutionally interferes with workers’ substantive due process rights to access the courts and to an appeal by chilling qualified lawyers from taking their cases. Using the rational basis standard discussed in Section II, we uphold Section 52-1-54(I) under substantive due process unless Worker shows it is not rationally related to a legitimate governmental purpose. \textit{Id.} \textsection\textsection 101-02.

\{31\} For the reasons stated above, Worker and amicus NMTLA fail to show that Section 52-1-54(I) is not rationally related to the legitimate government purposes. \textit{See Triplett}, 494 U.S. at 723-24 (holding that anecdotal evidence, in the form of attorneys’ conclusions that a fee limitation would negatively impact the quality of representation or cause attorneys to leave the field of practice, was insufficient to prove due process violation); \textit{Rhodes v. Indus. Comm’n}, 868 P.2d 467, 470-71 (Idaho 1993). Under the facts and record of the present challenge, the fee limitation satisfies substantive due process as well as equal protection.

CONCLUSION

\{32\} We hold that under the record in this case, the WCA attorney fee limitation satisfies state guarantees of equal protection and due process. Section 52-1-54(I) is rationally related to legitimate government purposes, particularly the important goal of maximizing workers’ recovery. Assuming the Legislature limits workers’ recovery in a constitutional manner, the fee limitation is a rational means to advance this goal. We adopt the Court of Appeals’ analysis and conclusions regarding the remaining issues that were raised on appeal. We affirm.

\{33\} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:
PAMELA B. MINZNER, Justice
PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Chief Justice (concurring in part and dissenting in part)

RICHARD C. BOSSON,
CHIEF JUSTICE

(Concurring In Part And
Dissenting In Part)

\textsuperscript{8} According to amicus WCA, reasonable attorney fees would have exceeded the $12,500 limitation in only 1.5% of workers’ compensation cases prior to 2003. Again, this information was not in the record, so it is of little use to us here.

\textsuperscript{9} The WCA also argues that the fee limitation minimizes insurance costs, which keeps down insurance premiums, increases economic development and employment, and encourages employers to continue to support and follow the mandatory system. However, there is no evidence to support this in the record and we decline to find this to be a firm legal rationale.

\textsuperscript{10} This limited holding in no way suggests our belief that by requiring judicial approval for workers’, but not employers’, attorney fees, Section 52-1-54(C) rationally furthers the goals of minimizing costs to employers or maximizing workers’ take-home awards.
I concur in part and dissent in part. Under the facts of this case, I reluctantly agree that the attorney fee limitation in NMSA 1978, Section 52-1-54(1) (1993) of the Workers’ Compensation Act (the Act) passes the rational basis test, and is therefore constitutional, for proceedings before the Workers’ Compensation Administration (the Administration). I write separately to express my concerns regarding the effect of the attorney fee limitation on a worker’s right to appeal.

In my mind, the absence of any provision for attorney fees at the appellate level impermissibly burdens the constitutional rights of those workers with complex or time-consuming cases. I believe the Legislature’s failure to allow additional fees in the limited number of cases that reach our courts after exhausting the cap is contributing to an intolerable decline in adequate representation in the field of workers’ compensation law. While I am not yet convinced that this decline impacts workers’ access to the courts to the point of violating due process and equal protection rights in administrative proceedings, I would reach a different result when analyzing the impact of the fee limitation on the right to appeal.

In part, I disagree with the majority because I would apply intermediate scrutiny to the important right to have access to the judiciary for the purpose of an appeal. Under intermediate scrutiny analysis, I would find the cap unconstitutional. I also dissent because I am troubled with the way the majority presents the rational basis test. I think our courts, attorneys, and litigants in New Mexico would benefit from further elaboration.

**Rational Basis Test**

To begin, I respectfully disagree with the rational basis test presented by the majority. Ever since we overruled the fourth tier of judicial scrutiny defined as heightened rational basis in *Trujillo v. City of Albuquerque*, we have avoided explaining what we meant by our so-called “modern articulation” of the rational basis test. 1998-NMSC-031, ¶ 32, 125 N.M. 721, 965 P.2d 305 (Trujillo III)(overruling, but “subsuming” the fourth tier of rational basis analysis applied in *Alvarez v. Chavez*, 118 N.M. 732, 738-39, 886 P.2d 461, 467-68 (Ct. App. 1994) and *Corn v. New Mexico Educators Fed. Credit Union*, 119 N.M. 199, 202-04, 889 P.2d 234, 237-39 (Ct. App. 1994)). I am afraid we continue to avoid explaining that test today in a way that will only perpetuate confusion.

The majority professes that our rational basis test is one test, simultaneously deferential to the validity of the statute but not a “rubber stamp” or “toothless.” Maj. Op. ¶ 24. The majority then explains the requirements of our rational basis test by using language from *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) that was referred to in *Corn*, 119 N.M. at 204, 889 P.2d at 239 (requiring legislative classifications to be supported by either a factual foundation or a firm legal rationale). The majority accepts that although *Corn* and *Alvarez* were overruled in *Trujillo*, *Trujillo* subsumed the “heightened rational basis” analysis from those cases in the modern rational basis test. Thus, in the majority’s words: “To successfully challenge the statute under this standard of review, Worker must demonstrate that the classification created by the legislation is not supported by a ‘firm legal rationale’ or evidence in the record.” Maj. Op. ¶ 24.

I believe the language from *Cleburne* in fact creates a different test than the type of minimal scrutiny we usually associate with the rational basis test. *See City of Cleburne*, 473 U.S. at 455-60 (Marshall, J., concurring) (noting that the Court’s analysis was at odds with traditional rational basis by seeming to require that the legislature has the burden to prove an act was constitutional, that the Court could sift through the record to find a firm factual foundation for an act’s policy, and that legislation could not proceed incrementally). The traditional rational basis test is simply that the party challenging the legislation has the burden to prove “that the statute’s classification is not rationally related to the legislative goal.” *Trujillo*, 1998-NMSC-031, ¶ 14. “In rational basis scrutiny, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *State v. Druktenis*, 2004-NMCA-032, ¶ 112, 135 N.M. 223, 86 P.3d 1050 (quoting *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993)).

I do not object to giving our rational basis test more teeth in some situations, if we clearly identify what triggers heightened scrutiny, just as the Court of Appeals did in *Alvarez*, 118 N.M. at 740, 886 P.2d at 469 (applying heightened rational basis when legislation implicated a significant interest). But I do not believe it is desirable or appropriate to do so at the expense of the traditional deferential test. If the majority really intends to read *Trujillo* as adopting a single, but broader rational basis test, I think the Court should provide a detailed explanation.

On the other hand, if this Court feels constrained by the traditional rational basis test, I would prefer not to follow the lead of the United States Supreme Court. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne*, 473 U.S. 432; *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). In a confusing array of cases, the Court professes to have only one rational basis test, but sometimes appears to apply heightened scrutiny. *See Laurence H. Tribe, American Constitutional Law § 16-33, at 1614 (2d ed. 1988) (concluding there is no coherent explanation for when heightened scrutiny is triggered). It seems to me that a better approach would be to give more flexibility to our intermediate scrutiny standard, and to forthrightly acknowledge that we are doing so.

**Level of Scrutiny**

Equal protection challenges to legislative classifications that infringe on important, but not fundamental rights, or involve sensitive, but not suspect classes, must be analyzed under intermediate scrutiny. *See, e.g., Cleburne v. Cleburne Living Ctr.*, 472 U.S. 612 (1985). In a confusing array of cases, the Court professes to have only one rational basis test, but sometimes appears to apply heightened scrutiny. *See Laurence H. Tribe, American Constitutional Law § 16-33, at 1614 (2d ed. 1988) (concluding there is no coherent explanation for when heightened scrutiny is triggered). It seems to me that a better approach would be to give more flexibility to our intermediate scrutiny standard, and to forthrightly acknowledge that we are doing so.

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Equal protection challenges to legislative classifications that infringe on important, but not fundamental rights, or involve sensitive, but not suspect classes, must be analyzed under intermediate scrutiny. *See Alvarez*, 118 N.M. at 736, 886 P.2d at 465.

This Court has recognized that the right of access to the courts is an implicit fundamental right. *See Richardson v. Carnegie Library Rest., Inc.*, 107 N.M. 688, 696, 763 P.2d, 1153, 1161 (1988), overruled on other grounds by *Trujillo*, 1998-NMSC-031, ¶ 32; *Otero v. Zouhar*, 102 N.M. 482, 486, 697 P.2d 482, 486 (1985), overruled on other grounds by *Grantland v. Lea Reg’l Hosp., Inc.*, 110 N.M. 378, 380, 796 P.2d 599, 601 (1990); *Jiron v. Mahlab*, 99 N.M. 425, 426, 659 P.2d 311, 312 (1983). In addition, and of utmost importance in this challenge to the attorney fee limitation, the right of one appeal is explicitly guaranteed by the New Mexico Constitution. N.M. Const. art. VI, § 2 (“an aggrieved party shall have an absolute right to one appeal”).

Of course, an individual’s ability to have access to the judiciary to resolve legal claims is not endless. *See Jiron*, 99 N.M. at 427, 659 P.2d at 313. As the majority observes, our “courts have previously recognized that the right to access the courts and the right to an appeal are important, although not fundamental, rights for purposes of constitutional analysis.” Maj. Op. ¶ 14.

I believe that a worker’s right to retain an attorney is one aspect of the right of access to the courts. *See Corn*, 119 N.M. at 210, 889 P.2d at 245 (Apodaca, J., specially concurring). A statute that deprives a class of persons “of the ability to obtain adequate representation in litigation could” deprive that class of a right of access to the courts. *Mieras v. Dyncorp*, 1996-NMCA-095, ¶ 48, 122 N.M. 401, 925 P.2d 518.
As Worker argues, the fee cap discourages attorneys from taking complex or time-consuming workers’ compensation cases. It also creates a risk that attorneys will have to abandon a case when they have exceeded the cap due to economic hardship. As a result of this chilling effect on representation, Amicus New Mexico Trial Lawyers Association claims Section 52-1-54(1) unfairly burdens claimants with complex or time-consuming cases and deprives them of meaningfully exercising the right to an appeal. Because I believe that adequate representation by an attorney is necessary to obtain meaningful access to the courts for an appeal from a workers’ compensation proceeding, I would hold that this part of the equal protection challenge is entitled to intermediate scrutiny.

The majority acknowledges that “[m]eaningful access to our appellate courts depends in part on an individual’s ability to obtain adequate representation.” Maj. Op. ¶ 15 (citing Herndon v. Albuq. Pub. Sch., 92 N.M. 287, 288, 587 P.2d 434, 435 (1978); Mieras, 1996-NMCA-095, ¶ 48 (Hartz, J., specially concurring); Corn, 119 N.M. at 210, 889 P.2d at 245 (Apodaca, J., specially concurring)). The majority holds, however, that the attorney fee cap does not require intermediate scrutiny because Worker has not shown that any workers are prevented from obtaining adequate representation. See Maj. Op. ¶¶ 17-20.

Unlike the majority, I would make a distinction between the administrative proceedings and appeals before our courts. In administrative proceedings before a workers’ compensation judge, I am willing to agree that the attorney fee cap survives rational basis scrutiny. As the majority observes, whether representation is “adequate,” “depends on the circumstances, including the nature of proceedings and the ability of the other side to secure representation.” Maj. Op. ¶ 15. Given the nature of the workers’ compensation system, which the Legislature designed as an administrative alternative for dispute resolution, it may be a rational legislative choice to limit attorney fees in order to discourage litigation, reduce costs, and ensure the quick delivery of benefits. See Corn, 119 N.M. at 204, 889 P.2d at 239 (stating that due process is a flexible concept when it comes to devising alternative processes for dispute resolution). Thus, vesting adjudicative power in administrative law judges does not, by itself, deny workers the right of access to the courts. See Walters v. Nat’l Ass’n of Radiation Survivors, 473 U.S. 305, 326 (1985) (holding that an attorney fee limitation, even if it resulted in discouraging attorneys from representing claimants altogether, did not violate due process in a veterans’ administrative proceeding which Congress wanted to keep as simple and informal as possible).

In my opinion, however, this analysis changes for appeals before our courts. Unlike the United States Constitution, our State Constitution guarantees the absolute right to an appeal. See N.M. Const. art. VI, § 2. Thus, once a worker’s case moves from the administrative setting to our courts, “the nature of the proceedings and the ability of the other side to secure representation” requires a more searching inquiry into whether representation is adequate. Maj. Op. ¶ 15. The cap prohibits workers, who have already received the statutory maximum for attorney fees, but are compelled to defend their benefit awards on appeal, from paying for necessary legal services, even out of their own pocket.1 Thus, the cap forces a class of workers into a position of intolerable risk. They must rely on the good graces of their attorneys to continue representing them in litigation without hope of additional compensation. If these attorneys withdraw, or even worse cut corners, because they cannot afford to continue the representation due to economic hardship, this vulnerable class of workers may lose the very benefits they won during administrative proceedings.

The majority declines to address the impact of the attorney fee limitation on appeals because it contends there is simply not enough evidence in the record to indicate that Worker was deprived from exercising his right to appeal. The majority relies on United States Dep’t of Labor v. Triplett, 494 U.S. 715, 723-24 (1990). In Triplett, the United States Supreme Court rejected a claim that an attorney fee restriction violated access to the courts, concluding the challengers only presented anecdotal evidence that the fee limitation deprived them of legal representation. Id. at 724. The Court ruled that the affidavits of three lawyers, which stated that there were fewer qualified lawyers available to take black lung cases, were “blatantly insufficient.” Id. at 724-25. Similar to Triplett, the majority would require more evidence in the record that workers with complex or time-consuming cases are unable to obtain representation because of the fee limitation. See Maj. Op. ¶ 19.

The majority seems to require an enormous evidentiary burden before it is willing to apply intermediate scrutiny – either that a class of workers are completely unable to obtain representation or that an attorney actually withdraw from representation because of an unreasonable financial burden. I would be more charitable and recognize a class of workers exists whose right to appeal is burdened by the attorney fee cap.

I believe the record and decisions of our courts have sufficiently indicated that the attorney fee limitation deters legal counsel from taking cases like this one. In Triplett, the Supreme Court applied a “heavy presumption of constitutionality” to an attorney fee regime enacted by Congress. 494 U.S. at 721. The Court thus required those challenging the law to make “an extraordinarily strong showing” that the fee limitation violated due process. Id. at 722. Unlike our case, Triplett did not involve the absolute right to an appeal guaranteed by our State Constitution.2 Because of that difference, the Supreme Court could apply the rational basis test. In contrast, considering the importance of the rights involved, I believe Worker presented enough evidence to challenge the attorney fee cap. Worker presented an expert witness who testified that, since the implementation of the attorney fee cap, very few attorneys are practicing, and only a couple are specializing, in the field of workers’ compensation law. The expert testified that attorneys are not representing workers in those cases in which the injury will not result in a large benefit award and the employer is uninsured. This testimony was not contested by the opposing parties. Anecdotally, we all know it to be true. In addition, the workers’ compensation judge made a specific finding that the cap causes a chilling effect on legal representation. Our courts have previously acknowledged this chilling effect. See Corn, 119 N.M. at 207, 889 P.2d at 242 (“In fact, the cap applies as a cumulative limitation on compensation for all legal services rendered in all proceedings,” including representation before the courts on appeal. The Act makes it unlawful to accept fees except as provided; any person violating the attorney fee cap may be convicted of a misdemeanor, fined up to $500, and imprisoned for up to 90 days. Section § 52-1-54(A) & (N) (2003). As one state court noted in invalidating an attorney fee cap, most states with statutory limits on workers’ compensation attorney fees allow fees to be increased when necessary, or do not make acceptance of additional compensation a crime. See Irwin v. Surdyk’s Liquor, 599 N.W.2d 132, 142 n.3 (Minn. 1999).

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1 Section 52-1-54(I) “applies as a cumulative limitation on compensation for all legal services rendered in all proceedings,” including representation before the courts on appeal. The Act makes it unlawful to accept fees except as provided; any person violating the attorney fee cap may be convicted of a misdemeanor, fined up to $500, and imprisoned for up to 90 days. Section § 52-1-54(A) & (N) (2003). As one state court noted in invalidating an attorney fee cap, most states with statutory limits on workers’ compensation attorney fees allow fees to be increased when necessary, or do not make acceptance of additional compensation a crime. See Irwin v. Surdyk’s Liquor, 599 N.W.2d 132, 142 n.3 (Minn. 1999).
appears to discourage representation of workers by counsel.").

While it is true that Worker appears to have been fortunate enough to obtain legal representation before the Administration and our courts, he still represents a class of workers who face a burden not shared by other claimants or employers who seek to exercise their right to an appeal. For that reason, intermediate scrutiny is appropriate.

Intermediate Scrutiny Applied

Under intermediate scrutiny, the burden on the party maintaining the statute’s validity “to prove that the classification is substantially related to an important government interest.” Marrujo v. N.M. State Highway Transp. Dep’t, 118 N.M. 753, 757, 887 P.2d 747, 751 (1994) (quoted authority omitted). Thus, this Court must examine the governmental interests served by the attorney fee cap, and whether the statutory classifications bear a substantial relationship to any such important interests. Corn, 119 N.M. at 211, 889 P.2d at 246 (Apodaca, J., specially concurring).

I have no problem accepting that the attorney fee cap is aimed at advancing important government interests. However, upon examining the impact of the cap on those workers who must participate in an appeal to preserve their hard-won benefits, I do not believe that the employer and the Administration have carried their burden of proving that the attorney fee cap is substantially related to the interests it was designed to address.

Under intermediate scrutiny, a less restrictive means analysis is appropriate. See Corn, 119 N.M. at 211, 889 P.2d at 246 (Apodaca, J., specially concurring). Intermediate scrutiny requires a court to balance the importance of the government interests against the burdens imposed on the individual and society. Id. One way to assess this balance is for the court “to determine whether alternatives exist that would not burden protected interests as heavily as the classification scheme chosen.” Id. (quoted authority omitted). Applying this analysis, it is clear to me that the Legislature could have advanced its goals in ways that would have burdened the right to an appeal less.

The majority argues that by discouraging litigation, the attorney fee cap advances one of the purposes of the Act, which is to assure quick and efficient delivery of benefits to workers at a reasonable cost to employers. See Maj. Op. ¶ 26. In this case, I fail to see how the cap has prevented the employer from prolonging litigation through its own appeal. Worker was brought involuntarily to the judiciary, and had no choice but to defend his benefits. While I do not mean to suggest that an employer should not have a constitutional right to appeal a decision of a workers’ compensation judge, I do think that in some situations the employer has nothing to lose by appealing a decision. If the worker’s counsel is already bled dry by the attorney fee cap, then even if the employer loses on appeal, the employer will not have to pay any more of the worker’s attorney fees.

Meanwhile, the fee cap might not have the same effect on employers’ attorneys. Paid if they win or lose, and not subject to judicial approval of fees, employers’ counsel may be in a better position to prolong litigation through an appeal. If retained by an insurance company, employers’ counsel may be able to offset losses incurred in one case due to the fee cap with gains from future cases. Usually, workers’ attorneys are not similarly situated. In its practical effect, the fee cap provides employers with an unfair tactical advantage on appeal.

In addition, the cap puts workers in a vulnerable position. Workers who can no longer pay their attorney on appeal might lose benefits won at the administrative level. Thus, at the appellate level, the attorney fee cap is not substantially related to legislative goals of reducing litigation and providing quick and efficient delivery of benefits.

Reducing costs is another important purpose behind the attorney fee limitation. However, in my view, the evidence that only a few cases will exceed the cap, coupled with the fact that not all of those cases will go through an appeal, argues against the necessity of the cap in its present inflexible form. There is no evidence in the record that making allowances for the few cases that deserve attorney fees in excess of the cap for the purposes of an appeal will harm the system. I acknowledge that actuarial uncertainty and insurance costs might rise if the cap were eliminated altogether. But under a less restrictive means analysis, there are other ways to address this potential problem. Instead of precluding a reasonable award altogether for appellate attorney fees, the Legislature could provide for some additional fees for appellate services. The Legislature could cap those fees. I find it persuasive that many state legislatures allow workers an additional award of attorney fees on appeal, usually with restrictions. Thus, an absolute prohibition on appellate attorney fees is not substantially related to the important interest in reducing costs. The Legislature could advance this goal in less burdensome ways.

The majority also finds that the statutory cap promotes the Legislature’s interest in protecting workers’ limited benefits. See Maj. Op. ¶ 27. In its present form, the Act holds the worker responsible for paying half of any fee awarded to his attorney. If the fee cap is overturned, then fewer net benefits will be available to the worker. I acknowledge the force of this argument. Protecting workers’ benefits is an important government interest. However, I do not believe a prohibition on paying appellate attorney fees is substantially related to protecting workers in this situation. Rather, it threatens them with severe harm. Forced to defend their benefits on appeal, workers need adequate representation. Unlike any other appellate party I know of, those workers who have exceeded the cap must either rely on an attorney who is working for free, or proceed alone.

We should not encourage parties to attempt the rigors of the appellate process unaided by counsel. As is evident from the conclusion

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3 Worker raises his claim under the New Mexico Constitution. Federal cases do not control when interpreting our State Constitution, but are used only to the extent they are persuasive. See Alvarez, 118 N.M. at 735, 886 P.2d at 464. Because the right to one appeal is a state constitutional right, I do not think federal cases are persuasive on this issue. See William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 491 (“State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”).

4 The Administration states in its amicus brief that “less than 1.5 percent of all attorney fees for workers even potentially penetrated the cap” in 2001 and 2002.

of the workers’ compensation judge that miserly attorney fees cause a chilling effect on representation, the cap discourages counsel from representing workers when there is no money available on appeal. In the extreme, attorneys may withdraw when continued representation will result in unreasonable financial burden. See Rule 16-116(B)(5) NMRA 2005; *Corn*, 119 N.M. at 202, 889 P.2d at 237. While any change to the fee cap may cost workers some money, an even greater threat awaits if workers respond inadequately on appeal. Without adequate representation, Worker could lose everything. As one treatise admonishes:

Some legislatures, in their zeal to save claimants from diminution of their net benefits through legal fees, carry restrictions on fees to the point where they may well injure claimants as a class both by hindering the growth of an able compensation bar and by making it economically impossible for claimants’ lawyers to give the necessary time to the preparation of each case.

8 Arthur Larson & Lex K. Larson, *Workers’ Compensation Law* § 133.07, at 133-44 (2003). As we have previously said, [w]e must avoid a policy or a practice which would discourage representation or the taking of appeals where counsel feels that an injured work[er] has been aggrieved at the trial court level. We must also preserve the right of an injured work[er] to have representation where the employer has appealed.

*Herndon*, 92 N.M. at 288, 587 P.2d at 435.

{63} While I recognize the legislative power to draw lines, there are better ways to accomplish the important government goals at stake than drawing the line at zero. The Legislature is free to set a reasonable limit on fees as long as it makes a reasonable provision for the possibility of fees incurred during appellate review. I also am confident that workers’ compensation judges can determine reasonable supplemental awards that would compensate attorneys without unduly impairing workers’ benefits.

**RICHARD C. BOSSON,**
Chief Justice

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**CERTIFICATION TO THE SUPREME COURT**

**CYNTHIA A. FRY, JUDGE**

{64} AGW Consultants, d/b/a Turner Environmental Consultants, (AGW) appeals and David Wagner (Worker) cross-appeals from the compensation order and order concerning attorney fees from the Workers’ Compensation Judge (WCJ) and William M. Turner, individually and as trustee.


**APPEAL FROM THE WORKERS’ COMPENSATION ADMINISTRATION**

GREGORY D. GRIEGO, Workers’ Compensation Judge

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New Mexico Trial Lawyers Association

**From the New Mexico Court of Appeals**

DAVID WAGNER,
Worker/Appellee/Cross-Appellant,
versus
AGW CONSULTANTS, d/b/a TURNER ENVIRONMENTAL CONSULTANTS, and WILLIAM M. TURNER, individually and as trustee,
Employer/Insurer/Appellants/Cross-Appellees.
tion of twenty percent loss of use for Worker’s scheduled injury is not supported by substantial evidence.

With respect to the issues concerning attorney fees, AGW argues that (1) the WCJ erred in the determination of the fee amount to be paid fifty-fifty. Worker argues that (2) the WCJ erred in rejecting Worker’s request to find that AGW and Turner acted in bad faith, a finding that would have permitted an additional award of attorney fees pursuant to NMSA 1978, § 52-1-54(I) (2003). In addition, Worker argues (3) the $12,500 limit (cap) on attorney fees violates equal protection or due process or Worker’s right of access to the courts.

We certify the issue concerning the constitutionality of the attorney fee cap to the New Mexico Supreme Court. However, because the certification statute, NMSA 1978, § 34-5-14(C) (1972), and Rule 12-606 NMRA 2003 refer to the certification of “a matter” to the Supreme Court, we conclude that we must certify the entire case even if we wish only to certify one issue. See Collins v. Tabet, 111 N.M. 391, 404, 806 P.2d 40, 53 n.10 (1991) (construing “matter” to mean the entire case). In an effort to assist the Supreme Court, we submit our analysis of the other issues, which we would affirm for the reasons that follow. See State v. Wilson, 116 N.M. 793, 796, 867 P.2d 1175, 1178 (1994) (attaching Court of Appeals’ proposed opinion to Supreme Court’s opinion on certification).

BACKGROUND

The Accident and Subsequent Medical Care

AGW, a ground-water hydrology consulting firm, is a common-law business trust. William Turner is AGW’s sole trustee. It is undisputed that at the time of the accident, AGW had two part-time employees, Worker and Todd McCabe. Whether Turner was a worker or employee of AGW is a disputed issue.

On April 7, 1999, Worker and McCabe were sent to a particular water well, the S-10, to set up the equipment necessary for temperature readings to be taken of the well. Worker was climbing a ladder on the side of a water tank located near S-10, in order to fill a plastic tube with water so that the tube could be inserted in the S-10. The ladder came loose and Worker fell, breaking his left leg just above the ankle.

He was in a cast at the time and he was instructed to use crutches, to avoid putting weight on the injured leg, and to keep his leg elevated.

Dr. Gehlert. At that time, there was concern that the fracture was not healing. Dr. Gehlert provided additional medical treatment, including a bone graft. Ultimately, the WCJ found that Worker incurred over $58,000 in medical bills and was unable to work for roughly a year. The WCJ also found that Worker reached maximum medical improvement (MMI) for the injury on June 5, 2000.

Worker filed his claim on October 12, 1999. At that time he had not yet been released to return to work. He sought Temporary Total Disability (TTD) benefits, Permanent Partial Disability (PPD) benefits, attorney fees, disfigurement compensation, and payment of his medical bills. The complaint indicated the employer/respondent was AGW.

Two things happened during pretrial proceedings that bear on the issues raised on appeal. First, once it became clear that AGW was a business trust, Worker moved to amend his complaint by adding Turner as an Employer/Insurer, on the ground that Turner was the real first treating physician, Dr. Felter, testified that Worker had “what we considered a compound fracture. That means part of the bone was sticking through the skin, and it was a highly comminuted fracture, which means in many pieces, and it involved the ankle joint itself.”

McCabe took Worker to Lovelace Medical Center, where Dr. Felter performed surgery. Worker was released two days later. His leg was in a cast at the time and he was instructed to use crutches, to avoid putting weight on the injured leg, and to keep his leg elevated.

Three days after his release from the hospital, Worker was at home, on crutches. He was reaching for a checkbook that was on top of a bookcase when he raised his arm, lost his crutch, swung on the remaining crutch, kicked out with his injured foot for balance, struck his unprotected toes on the bookcase, pivoted 180 degrees, and fell. He was taken to Lovelace and Dr. Felter performed additional surgery.

Worker subsequently told Turner that he was dissatisfied with his care from Lovelace. Turner suggested another doctor, Dr. White, who suggested Dr. Legant. Turner drove Worker to meet with Dr. Legant. After the meeting, Worker had a second surgery in April and continued to receive medical care from Lovelace until August 1999. At that point Worker again called Dr. Legant, who referred Worker to Dr. Gehlert. At that time, there was concern that the fracture was not healing. Dr. Gehlert provided additional medical treatment, including a bone graft. Ultimately, the WCJ found that Worker incurred over $58,000 in medical bills and was unable to work for roughly a year. The WCJ also found that Worker reached maximum medical improvement (MMI) for the injury on June 5, 2000.

The WCJ granted the motion to amend.

Second, AGW filed a motion to dismiss, based on the contention that Turner, as sole trustee of the business trust, was not within the definition of a “worker” and therefore could not be counted as an employee. Thus, AGW argued, AGW had only two employees, Worker and McCabe, and the Act did not apply. The WCJ denied the motion.

The WCJ found that Turner was “in the same shoes” as a corporate executive and therefore would be treated as an employee. In support of this decision, Turner’s decisions were supervised or controlled in any way by anyone but himself, the WCJ’s finding that Turner was an employee and therefore was subject to the control of another. Consequently, AGW argues, there is no evidence that Turner’s decisions were supervised or controlled in any way by anyone but himself, the WCJ’s finding that Turner was an employee...
of AGW is not supported by substantial evidence.

[79] We review de novo the application of the law to the facts. Hise v. City of Albuquerque, 2003-NMCA-015, ¶ 8, 133 N.M. 133, 61 P.3d 842. We apply whole record review to the factual determination of the WCJ. Herman v. Miners’ Hosp., 111 N.M. 550, 552, 807 P.2d 734, 736 (1991). In applying whole record review, this Court reviews both favorable and unfavorable evidence to determine whether there is evidence that a reasonable mind could accept as adequate to support the conclusions reached by the fact finder. Levario v. Ysidro Villareal Labor Agency, 120 N.M. 734, 737, 906 P.2d 266, 269 (Ct. App. 1995).

[80] AGW relies on In re Hayes’ Case, 204 N.E.2d 277, 278-79 (Mass. 1965), where the managing trustee of a business trust filed a claim for workers’ compensation benefits after he was injured on the job. The Massachusetts Supreme Judicial Court held that a trustee of a business trust was not an employee of the trust and therefore was not entitled to bring compensation proceedings before the Industrial Accident Board. Id. at 280. However, under Massachusetts law, a business trust is not a legally separate entity from its trustees. Id. In this case, the parties have assumed that AGW is a separate and distinct entity.

[81] AGW also relies on federal cases holding that the trustees of a business trust are not employees within the meaning of that term as used in the Social Security Act. United States v. Griswold, 124 F.2d 599 (1st Cir. 1941); Loring v. United States, 80 F. Supp. 781 (D. Mass. 1948). Under federal law “the most important factor has been the existence of a right in some one [sic] else, either an individual or a collective entity, to control the employee in the performance of his work.” Loring, 80 F. Supp. at 784; see also Griswold, 124 F.2d at 601 (explaining that employees are subject to supervision and control pursuant to the Social Security Act). However, New Mexico uses a different standard to determine whether an individual is a “worker” within the meaning of the Act.

[82] By statute, the provisions of the Act apply to employers of three or more workers. Section 52-1-6(A). The parties do not dispute that AGW is a separate legal entity and that it was an employer within the meaning of the Act. The Act defines a “worker” as “any person who has entered into the employment of or works under contract of service or apprenticeship with an employer….” The term ‘worker’ shall include ‘employee’ and shall include the singular and plural of both sexes.” NMSA 1978, § 52-1-16(A) (1989).

[83] In determining whether a given individual is a worker, the label that the parties have attached to their relationship is not controlling. Yerbich v. Heald, 89 N.M. 67, 69, 547 P.2d 72, 74 (Ct. App. 1976). Instead, the critical question is whether the individual has a contract of hire with the employer for wages or something of value that is like wages. See Trembath v. Riggs, 100 N.M. 615, 619, 673 P.2d 1348, 1352 (Ct. App. 1983), overruled on other grounds by Dupper v. Liberty Mut. Ins. Co., 105 N.M. 503, 734 P.2d 743 (1987). Cf. Joyce v. Pecos Benedictine Monastery, 119 N.M. 764, 766, 895 P.2d 286, 288 (Ct. App. 1995) (stating that a religious novice is not an employee, largely because the novice does not exchange her service for wages); Jelso v. World Balloon Corp., 97 N.M. 164, 168, 637 P.2d 846, 850 (Ct. App. 1981) (explaining that an unpaid volunteer is not a worker or employee). In addition, the phrase “contract for hire” has been construed to require a mutuality of assent as well as an exchange of labor for wages or something similar. Joyce, 119 N.M. at 767, 895 P.2d at 289.

[84] In this case, the WCJ found that the business trust was created by a contract between Turner and his wife, Regina. Under the contract and supporting documents, Turner is the sole trustee. Trustees are paid reasonable compensation for their services. The contract specifically provides that “Trustee(s)… are like employees and not personally liable when dealing with the Trust properties or matters.” Turner signed a document accepting his appointment as trustee. In short, there is substantial evidence in the record supporting the WCJ’s finding that Turner is an employee of AGW under the statutory definition of “worker” as interpreted by cases of this Court. The fact that Turner is not subject to the control of another in making decisions concerning AGW is irrelevant.

Worker’s Accident Arose out of and Was in the Course of Employment

[85] All the remaining issues concerning Worker’s entitlement to benefits are challenges to the sufficiency of the evidence. In reviewing a claim for sufficiency of the evidence, we review the record as a whole. Lucero v. City of Albuquerque, 2002-NMCA-034, ¶ 14, 132 N.M. 1, 43 P.3d 352. “In applying whole record review, this Court reviews both favorable and unfavorable evidence to determine whether there is evidence that a reasonable mind could accept as adequate to support the conclusions reached by the fact finder.” Levario, 120 N.M. at 737, 906 P.2d at 269.

[86] AGW challenges the WCJ’s finding that the first accident arose out of and was in the course of Worker’s employment. An injury is in the course of employment if it is incurred when the employee is at a place where he may reasonably be and is engaged in doing something incidental to fulfilling the duties of his employment. Edens v. N.M. Health & Social Servs. Dep’t, 89 N.M. 60, 63, 547 P.2d 65, 68 (1976). Similarly, an injury arises out of employment if it is a risk “to which the worker is subjected in the course and scope of his employment.” Losinski v. Corcoran, Barkoff & Stagnone, P.A., 97 N.M. 79, 80, 636 P.2d 898, 899 (Ct. App. 1981).

[87] In support of its argument that Worker was not in the course and scope of his employment, AGW points to Turner’s testimony that he had given Worker specific directions concerning how and where to fill the tube with water and that Worker did not follow those specific directions. We note, however, that the WCJ was not required to believe Turner’s testimony on this issue. See Powers v. Miller, 1999-NMCA-080, ¶ 16, 127 N.M. 496, 984 P.2d 177 (explaining that the trier of fact is not required to believe any particular witness). More to the point, even if Worker did not follow Turner’s instructions, that does not, by itself, establish that he was no longer in the course and scope of his employment at the time of the injury. Instead, the question is whether the deviation was so great that Worker was no longer doing anything to further his employer’s business. Frederick v. Younger Van Lines, 74 N.M. 320, 325-27, 393 P.2d 438, 441-43 (1964); see also 1 Arthur Larson The Law of Workmen’s Compensation § 19.50 (2003). It is undisputed that Worker was injured during work hours at a place that Worker was expected to be while attempting to set up the equipment necessary to take the well temperature measurements. Thus, substantial evidence supports the WCJ’s finding that Worker’s injury arose out of and was in the course of employment.

The Second Fall Was Not an Independent Intervening Cause

[88] AGW contends that Worker’s fall at home while on crutches was an independent intervening cause and, therefore, AGW was not liable for any of the consequences of the second fall. AGW recognizes that this Court has previously held that “an injury resulting from the concurrence of a preexisting injury and the normal movements of everyday life is a ‘direct and natural result’ of the original injury.” Aragon v. State Corr. Dep’t, 113 N.M. 176, 181, 824 P.2d 316, 321 (Ct. App. 1991) (internal citation omitted). In essence, AGW contends
that the second fall was not the result of the normal movements of everyday life. Common sense tells us that moving around one’s home is a normal activity of daily life. Indeed, banging one’s foot against a stationary object is woefully common. Consequently, substantial evidence supports the WCJ’s finding that Worker’s fall was compensable. Moreover, we doubt whether Aragon’s definition of independent intervening cause would apply at any time before the worker has reached MMI for the accidental injury.

**Dr. Gehlert Was an Authorized Health Care Provider**

[89] AGW also challenges the finding that Dr. Gehlert was an authorized health care provider. AGW acknowledges that Turner was aware that Worker was dissatisfied with his treatment at Lovelace and that Turner suggested to Worker that he consult Dr. White. Dr. White informed Worker that he did not treat ankle injuries and referred Worker to Dr. Legant. Turner drove Worker to Worker’s appointment with Dr. Legant. Later, Dr. Legant declined to accept Worker as a patient and referred Worker to Dr. Gehlert. This is substantial evidence supporting the WCJ’s finding.

[90] It may be that AGW is arguing that Dr. Gehlert was not authorized because Worker failed to provide AGW with a notice of change of health care provider as required by NMSA 1978, § 52-1-49(C) (1990). We question whether an employer who refuses to pay for medical treatment at the time of the injury is nevertheless entitled to formal written notice of a worker’s decision to change his health care provider. AGW acknowledges that Worker made the initial selection of health care provider and that AGW never sought to change his selection. AGW paid $2000 to Lovelace for Worker’s initial care and thereafter refused to pay for any of Worker’s medical care. AGW was well aware of Worker’s dissatisfaction with Lovelace and encouraged Worker to see Dr. Legant. AGW did not come forward with any medical evidence that would have supported a determination that Dr. Gehlert’s treatment was either unreasonable or unnecessary. Under these circumstances, Worker’s failure to notify AGW that he was changing his health care provider is so minor that it does not justify the potentially drastic consequences that AGW seeks. See Fuentes v. Santa Fe Pub. Sch., 119 N.M. 814, 816-17, 896 P.2d 494, 496-97 (Ct. App. 1995) (discussing the legal doctrine of de minimis). Thus, we would hold that Worker’s failure to notify AGW of his change of health care provider does not make Dr. Gehlert’s treatment unauthorized.

**Reasonableness and Necessity of Medical Bills**

[91] AGW also argues that the WCJ erred in ordering it to pay Worker’s medical bills. AGW contends that the finding of reasonableness and necessity is not supported by substantial evidence. However, AGW did not ask the WCJ to find that the medical bills or expenses were not reasonable and necessary. AGW’s findings incorporated Turner’s by reference. The only findings Turner asked for on this issue were, in essence, findings that Worker questioned the accuracy of the bills. Thus, AGW cannot challenge the sufficiency of the evidence to support the WCJ’s finding. Pennington v. Chino Mines, 109 N.M. 676, 678, 789 P.2d 624, 626 (Ct. App. 1990) (stating that “[t]he failure of a party to file a timely request for findings of fact . . . precludes evidentiary review”).

**Twenty Percent Loss of Use**

[92] Although Worker does not challenge the WCJ’s determination that the scheduled injury section of the Act is applicable, he argues that the WCJ’s finding of twenty percent loss of use of his left leg between the ankle and the knee is not supported by substantial evidence. Worker points out that Dr. Gehlert and Dr. Diskant both gave Worker a permanent partial impairment rating of forty-five percent for the left leg below the knee. However, the WCJ based his determination on loss of use rather than on the impairment rating.

[93] In Lucero v. Smith’s Food & Drug Centers, Inc., 118 N.M. 35, 37, 878 P.2d 353, 355 (Ct. App. 1994), this Court held that it is not necessary to prove an impairment, as defined by NMSA 1978, § 52-1-24(A) (1990), in order to obtain scheduled injury benefits under NMSA 1978, § 52-1-43 (2003). Worker recognizes our holding, but contends that the concept of impairment rating is essential to determining permanent partial disability. We disagree. Benefits for scheduled injuries are not governed by the rules that apply to benefits for permanent partial disability. See Baca v. Complete Drywall Co., 2002-NMCA-002, ¶ 24, 131 N.M. 413, 38 P.3d 181. Thus, we would affirm on this issue as well.

**Issues Concerning Attorney Fees**

**The WCJ Correctly Split the Liability for Worker’s Attorney Fees**

[94] During pretrial proceedings, the WCJ ordered AGW to pay $2000 to Worker’s attorney as a sanction. The order found that AGW had initially stipulated on the record that it had three employees and the Act applied, and that AGW had later argued its stipulation was incorrect or in error. The order awarded “a sanction in the form of an attorney fee of $2000” payable to Worker’s attorneys, representing “the number of hours of work devoted to address this issue including time expended on this issue at two separate hearings before the Administration.”

[95] Later, during the fee proceeding, the WCJ awarded Worker the maximum allowable attorney fee of $12,500, and Worker requested a finding that the $2000 previously awarded was a sanction that should not be credited against the attorney fee award. AGW countered that, pursuant to Section 52-1-54(J), it could only be required to pay half of $12,500 plus tax, or $6,613.28, and that the $2000 should be credited against the total amount it owed, leaving it owing $4,613.28. Instead, the WCJ credited the $2000 against the total fee of $12,500, and ordered AGW to pay half of $10,500.

[96] AGW contends the $2000 was simply a part of the total fee awarded to Worker, and pursuant to Section 52-1-54(J), “the payment of a claimant’s attorney fees determined under this section shall be shared equally by the worker and the employer.” Whether the award was a fee or a sanction is an issue of statutory construction, which is reviewed de novo on appeal. Morgan Keegan Mortgage Co. v. Candelaria, 1998-NMCA-008, ¶ 5, 124 N.M. 405, 951 P.2d 1066. We conclude the $2000 awarded by the WCJ was not awarded as a fee under Section 52-1-54, but as a sanction.

[97] We first note that Worker did not argue below or on appeal that the $2000 was awarded pursuant to Section 52-1-54(I) for AGW’s bad faith claims processing or litigation conduct. Therefore, we do not consider this potential argument on appeal. Pin nell v. Bd. of County Comm’rs, 1999-NMCA-074, ¶ 14, 127 N.M. 452, 982 P.2d 503 (explaining that appellate court will not affirm on grounds not presented to the trial court when to do so would be unfair to the appellant).

[98] We turn now to an analysis of whether the $2000 was a fee or a sanction. A WCJ is authorized by statute to “enter noncriminal sanctions for misconduct” pursuant to NMSA 1978, § 52-5-6(B) (2001). Carrillo v. Compuyys, Inc., 2002-NMCA-099, ¶ 11, 132 N.M. 710, 54
Worker argues that the limitation on attorney fees set forth in Section 52-1-54(I) violates his constitutional rights of equal protection, due process, and access to the courts. The question of whether Section 52-1-54(I) violates a worker’s rights of equal protection and due process has not been addressed by a New Mexico appellate court since our Supreme Court established heightened rational basis analysis in Trujillo v. City of Albuquerque, 2002-NMCA-078, ¶ 19, 132 N.M. 608, 52 P.3d 980. Therefore, “bad faith” is a mixed question of law and fact.

103 Worker asserts a general argument that the “voluminous and repetitive filings of pleadings,” the “repetitious and irrelevant examination” of witnesses, and the “unreasonable contestation of every claim set forth by Worker” establish AGW’s bad faith. However, as Worker admits, most of this litigation excess was due to the conduct of Turner rather than AGW. Worker claims that AGW was equally guilty of Turner’s bad faith conduct because it concurred in Turner’s pleadings.

104 We are not persuaded. The record shows that Turner filed fifty motions, and AGW did not file any pleadings indicating its concurrence in any of those motions. It is true that AGW adopted and incorporated by reference Turner’s list of witnesses and exhibits and Turner’s requested findings of fact and conclusions of law. However, we cannot say it was unreasonable for the WCJ to conclude that AGW’s adoption of a small number of Turner’s pleadings did not constitute “fraud, malice, oppression or willful, wanton or reckless disregard of the rights of the worker.” Section 52-1-54(I). The purpose of the bad faith statutory provision is to punish and to deter others from the commission of a claimant, an insurer or an employer acted in bad faith with regard to handling the injured worker’s claim and the injured worker or employer has suffered economic loss as a result. However, in no case shall this additional amount exceed two thousand five hundred dollars ($2,500). As used in this subsection, “bad faith” means conduct . . . that amounts to fraud, malice, oppression or willful, wanton or reckless disregard of the rights of the worker or employer.

AGW also requested findings that Worker acted in bad faith. Because the WCJ made no findings at all regarding the bad faith of either party, we remanded the case and asked the WCJ to enter findings and conclusions on the issue.

101 The WCJ found that, while some of Turner’s filings were without a sound basis in law or fact, Turner was not Worker’s employer and, therefore, Turner’s bad faith was irrelevant. AGW was Worker’s employer, and the WCJ found that AGW “did not file excessive, frivolous, or bad faith matters.” Consequently, the WCJ concluded that AGW “did not engage in bad faith or unfair claims processing.”

102 This Court has treated bad faith in this context as a finding of fact subject to substantial evidence review. Murphy v. Duke City Pizza, Inc., 118 N.M. 346, 349, 881 P.2d 706, 709 (Ct. App. 1994); Trujillo v. City of Albuquerque, 116 N.M. 640, 646, 866 P.2d 368, 374 (Ct. App. 1993). However, since those cases were decided, the law concerning mixed questions of law and fact has been extended to civil cases. See, e.g., Ponder v. State Farm Mut. Auto. Ins. Co., 2000-NMSC-033, ¶¶ 6-7, 129 N.M. 698, 12 P.3d 960; Souter v. Ancae Heating & Air Conditioning, 2002-NMCA-078, ¶ 19, 132 N.M. 608, 52 P.3d 980. Therefore, “bad faith” is a mixed question of law and fact.

103 Worker argues that the “voluminous and repetitive filings of pleadings,” the “repetitious and irrelevant examination” of witnesses, and the “unreasonable contestation of every claim set forth by Worker” establish AGW’s bad faith. However, as Worker admits, most of this litigation excess was due to the conduct of Turner rather than AGW. Worker claims that AGW was equally guilty of Turner’s bad faith conduct because it concurred in Turner’s pleadings.

CONCLUSION

107 For the foregoing reasons, we would affirm the WCJ’s compensation order on all issues except that involving the constitutionality of Section 52-1-54(I), which we certify to the Supreme Court.

108 IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
CELIA FOY CASTILLO, Judge
OPINION

CELIA FOY CASTILLO, JUDGE

{1} In this workers’ compensation case, we review the dismissal of Worker Gary Grine’s claim, based on the determination that the heart attack he suffered on the job did not arise out of or occur in the course and scope of his employment. We must first decide the threshold issue of an employer’s right to choose a health care provider for a worker when the employer has denied the worker’s claim. Because we hold that NMSA 1978, § 52-1-49 (1990), authorized the employer in this case to select a health care provider for Worker, notwithstanding employer’s denial of Worker’s claim, and because the testimony of the provider furnished the requisite evidence that work-related stress factors did not contribute to or trigger the heart attack, we affirm the dismissal of Worker’s complaint with prejudice.

I. WORKER’S ISSUES ON APPEAL

{2} Worker suffered his heart attack on October 2, 2000, filed claim for benefits on July 16, 2001, and died a little more than a year later, on June 21, 2002. Margie Grine (Margie), Worker’s surviving spouse, was substituted as Claimant to continue to assert Worker’s claims and to assert her own claims on July 16, 2001, and died a little more than a year later, on October 2, 2000.

{3} Worker appeals from the Workers’ Compensation Administration (WCA) to this Court for review of the compensation order that dismissed Worker’s complaint with prejudice. This appeal is taken against Worker’s employer, Peabody Natural Resources, dba Lee Ranch Coal Company, and its insurer, Old Republic Insurance Company (together referred to as Appellees). On appeal, Worker argues (1) that there was ample evidence that work-related stress triggered Worker’s heart attack and that the Workers’ Compensation Judge (WCJ) erred as a matter of law in requiring a higher standard of proof; (2) that under whole record review, the evidence supports the conclusion that numerous work-related stress factors contributed to or triggered Worker’s heart attack and that the WCJ’s decision to the contrary was clearly against logic and reason; (3) that pursuant to Section 52-1-49 of the Workers’ Compensation Act (Act), NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2004), the WCJ erred by permitting Appellees to switch Worker’s treating physician; (4) that the WCJ erred by allowing Appellees’ treating physician to testify, in violation of Section 52-1-51(C) of the Act; and (5) that Worker’s rights to due process, equal protection, and a fair trial were violated by the wrongful actions of the current WCA director.

{4} We first address the issue related to health care providers. We begin with the pertinent facts. Although Worker was not aware of it, his heart attack occurred during his shift on October 1-2, 2000. After obtaining permission to leave work because he was feeling bad, Worker left work shortly after 1:30 a.m. on October 2, drove himself home, and went to sleep. On the morning of October 2, Worker saw Margie’s doctor, Dr. Cubine, because Worker thought he was still experiencing heartburn. Dr. Cubine did not diagnose Worker’s heart attack. Rather, she felt that Worker had stomach problems, ordered an upper GI to be performed in ten days, and gave Worker some medicine to drink. He still did not feel well, and on the evening of October 3, 2000, he went to the emergency room at Cibola Hospital in Grants, and it was determined that he had suffered a heart attack. Worker was then airlifted to the Heart Hospital of New Mexico in Albuquerque. He was treated for coronary artery disease the following morning, and an angioplasty was performed. Initially, Worker sought treatment from the Heart Hospital of New Mexico, the New Mexico Heart Institute, and his own physician, Dr. Orchard. On July 16, 2001, more than nine months after the heart attack, Worker sought treatment from the Heart Hospital of New Mexico, the New Mexico Heart Institute, and his own physician, Dr. Orchard.

II. DISCUSSION

A. Appellees’ Referral to Dr. Shadoff and the Admission of His Report and Deposition

{4} We first address the issue related to health care providers. We begin with the pertinent facts. Although Worker was not aware of it, his heart attack occurred during his shift on October 1-2, 2000. After obtaining permission to leave work because he was feeling bad, Worker left work shortly after 1:30 a.m. on October 2, drove himself home, and went to sleep. On the morning of October 2, Worker saw Margie’s doctor, Dr. Cubine, because Worker thought he was still experiencing heartburn. Dr. Cubine did not diagnose Worker’s heart attack. Rather, she felt that Worker had stomach problems, ordered an upper GI to be performed in ten days, and gave Worker some medicine to drink. He still did not feel well, and on the evening of October 3, 2000, he went to the emergency room at Cibola Hospital in Grants, and it was determined that he had suffered a heart attack. Worker was then airlifted to the Heart Hospital of New Mexico in Albuquerque. He was treated for coronary artery disease the following morning, and an angioplasty was performed. Initially, Worker sought treatment from the Heart Hospital of New Mexico, the New Mexico Heart Institute, and his own physician, Dr. Orchard. On July 16, 2001, more than nine months after the heart attack, Worker filed a workers’ compensation complaint. Up to the time of the filing of the complaint, Appellees had not directed any of Worker’s health care.

{5} Appellees denied liability. In its October 17, 2001, answer to Worker’s complaint, Appellees set forth a number of affirmative defenses -- denying that Worker was hurt on the job, that there was any causal link between disability and accident, and that Worker’s heart condition was work related or aggravated at work. Appellees requested that Worker’s complaint be dismissed in whole. The WCA assigned Judge Joan O’Connell as the WCJ to hear Worker’s case.

{6} Appellees raised the issue of health care providers by filing a motion in limine to exclude all medical records of the Heart Hospital
of New Mexico, the New Mexico Heart Institute, and Dr. Orchard or, in the alternative, to allow a second opinion or an independent medical examination. After a hearing on December 10, 2001, the WCJ denied Appellees’ request for an independent medical evaluation, a second opinion, or appointment of an expert witness but did allow Appellees to select a health care provider to treat Worker. In its order, the WCJ concluded that under Section 52-1-49(B), Appellees did not initially select a health care provider for Worker because it had denied liability for Worker’s injuries. The WCJ further concluded that Worker had selected his own health care provider for the alleged injury of October 2, 2000: Dr. Orchard and physicians at the Heart Hospital of New Mexico and the New Mexico Heart Institute. The WCJ also concluded that no conflict existed between authorized medical providers and that an independent medical examination was therefore not authorized. Appellees’ right to select a health care provider to treat Worker was based on a “reservation of rights,” allowing Appellees to select a health care provider without admitting the compensability of the claim under the Act. In addition, the WCJ concluded that Appellees must pay for any medical care offered to Worker under Section 52-1-49 and that the records of such care would be admissible under Section 52-1-51(C). In reaching this conclusion, the WCJ observed that two of the purposes behind Section 52-1-49 are (1) to ensure that each party may select a doctor to provide medical care and inform the WCJ about relevant medical issues and (2) to limit the number of medical providers who may treat Worker, in order to prevent expensive and time-consuming litigation.

7 Understanding the order to have allowed Worker to have already made the choice of first health care provider, Appellees issued a notice of change of health care provider to Worker on January 16, 2002. Appellees wanted Worker to be treated by Dr. Shadoff. Worker objected to this notice and asserted that Appellees made the initial selection of physicians or waived its right to do so under Section 52-1-49 and 11.4.4.11 NMAC (2005). Additionally, Worker stated that by denying his claim to benefits, Appellees had no right to change treating physicians under Section 52-1-49. Thus, Worker requested that Appellees’ attempt to change treating physicians be denied.

8 Based on the WCJ’s conclusion that Appellees’ initial selection of a health care provider was Dr. Shadoff, the WCJ issued an order sustaining Worker’s objection to Appellees’ notice of change and ordered Worker to cooperate with the treatment offered by Dr. Shadoff. We conclude that because Appellees’ choice of health care provider was its initial choice under Section 52-1-49(B), there was no need for Appellees to execute a notice of change under Section 52-1-49(C). Further, the WCJ referred to 11.4.4.11(C)(2)(c) NMAC, which characterizes medical treatment provided to a worker before the employer’s written decision under Section 52-1-49(B) as “authorized health care.”

9 Worker contends that because Dr. Shadoff is not a properly authorized health care provider under Section 52-1-49, his testimony concerning Worker’s heart attack under Section 52-1-51(C) is not admissible and that the WCJ could therefore only rely on the testimony of expert Dr. Orchard. We agree with Worker that determination of this issue is pivotal to this case. Section 52-1-51(C) states that “[o]nly a health care provider who has treated the worker pursuant to Section 52-1-49 . . . may offer testimony at any workers’ compensation hearing concerning the particular injury in question.” If Dr. Shadoff were not a qualified health care provider, the WCJ would not be able to rely on his testimony.

10 This determination depends on the meaning of the language in Section 52-1-49. “Interpretation of statutory language is a question of law[, which] this Court reviews de novo.” Ramirez v. IBP Prepared Foods, 2001-NMCA-036, ¶ 10, 130 N.M. 559, 28 P.3d 1100; see Bajart v. Univ. of N.M., 1999-NMCA-064, ¶ 7, 127 N.M. 311, 980 P.2d 94. “In interpreting the meaning of a statute, we endeavor to give effect to the legislature’s intent.” Ramirez, 2001-NMCA-036, ¶ 10. We observe that the workers’ benefit system in New Mexico is based on “a mutual renunciation of common law rights and defenses by employers and employees alike.” NMSA 1978, § 52-5-1 (1990). The legislature has declared that the Act is not remedial and is not to be construed to favor one party over another. Id. “[W]e examine the wording of the statute and consider the statute’s history and background.” Ramirez, 2001-NMCA-036, ¶ 10.

11 Section 52-1-49 states in pertinent part:

A. After an injury to a worker and subject to the requirements of the Workers’ Compensation Act . . . , and continuing as long as medical or related treatment is reasonably necessary, the employer shall, subject to the provisions of this section, provide the worker in a timely manner reasonable and necessary health care services from a health care provider.

B. The employer shall initially either select the health care provider for the injured worker or permit the injured worker to make the selection. Subject to the provisions of this section, that selection shall be in effect during the first sixty days from the date the worker receives treatment from the initially selected health care provider.

C. After the expiration of the initial sixty-day period set forth in Subsection B of this section, the party who did not make the initial selection may select a health care provider of his choice. Unless the worker and employer otherwise agree, the party seeking such a change shall file a notice of the name and address of his choice of health care provider with the other party at least ten days before treatment from that health care provider begins. The director shall adopt rules and regulations governing forms, which employers shall post in conspicuous places, to enable this notice to be promptly and efficiently provided. This notice may be filed on or after the fiftieth day of the sixty-day period set forth in Subsection B of this section.

Section 52-1-49(A)-(C).

12 In 1990, the Act was rewritten, and the pertinent sections concerning the selection of a health care provider were changed. Ramirez, 2001-NMCA-036, ¶¶ 11-12. “In making these revisions, the legislature set forth an orderly process for the treatment and examination of injured workers that gives both parties the opportunity to control the medical treatment.” Id. ¶ 12. “The legislature has provided a procedure for when a party does not agree with the choice of a health care provider.” Id. ¶ 16. “Section 52-1-49 mandates that an employer . . . provide an injured worker reasonable and necessary health care services and establishes the procedures by which the worker’s health care provider is selected and changed.” City of Albuquerque v. Sanchez, 113 N.M. 721, 723, 832 P.2d 412, 414 (Ct. App. 1992).

13 We agree with Worker that neither the Act nor our case law specifically states whether a denial of a claim prohibits an employer from selecting a health care provider. However, based on our review of the statute and regulations, Section 52-1-49 must be read to allow the employer and the worker each to make a selection of a health care provider at some point in a case. The employer’s right
to make this selection would be eliminated if we were to adopt Worker’s interpretation of the statute. We also find support in a WCA regulation, which characterizes medical treatment provided to the worker before the employer’s written decision under Section 52-1-49(B) as “authorized health care.” 11.4.4.11(C)(2)(c) NMAC. This regulation contemplates allowing an employer to exercise its rights under Section 52-1-49(B), even though the worker may have already obtained medical treatment before the employer makes its choice under the statute. See 11.4.4.11(C)(2)(c) NMAC. Accordingly, we find no error in the WCJ’s determination that Dr. Shadoff was Appellees’ initial selection of a health care provider and that his testimony was properly admitted.

B. Causal Link Between Worker’s Heart Attack and His Employment

14. Worker presents two arguments regarding the cause of his heart attack. First, he argues that under whole record review, the evidence supports Dr. Orchard’s opinion that work-related stress factors contributed to or triggered Worker’s heart attack and that the WCJ erred by deciding otherwise. Worker also contends that the WCJ erred as a matter of law by requiring proof that the stress precipitating Worker’s heart attack must have been “acute stress.” Appellees assert that there was substantial evidence to support the WCJ’s decision and that the WCJ did not base its determination solely on the acute-stress issue. As in Section A, we begin with the facts pertinent to this issue.

15. From 1985 until the heart attack, on October 2, 2000, Peabody Natural Resources (Employer) employed Worker as a blade operator at Employer’s coal mine, located in a remote area about forty-one miles west of Grants, New Mexico. A blade is a heavy-equipment vehicle, somewhat similar to a bulldozer. The blade vehicle is used to cut and maintain roads for huge haul trucks that transport dirt from the excavation site to a dump site. The vehicle is about twenty feet high and weighs several tons. A blade operator generally drives the vehicle back and forth over the haul roads to keep the road surface in good condition for the haul trucks. A blade operator primarily operates blades roads that are approximately one half to one mile long with a width of 120 to 140 feet. The blade has an automatic transmission, with a climate-controlled cabin area, where the operator sits and manipulates the blade vehicle. When operating, the blade is moving at approximately six miles per hour. Employer has not experienced any blade rollovers, and the operators are not in fear of such a rollover. Nor are blade operators in fear of avalanches. A blade operator has not killed any person on the ground at Employer’s mine.

16. For several years prior to October 2, 2000, Worker was required to work for twelve hours per day for four consecutive days. He would then have four days off, unless directed to work overtime. During the first two four-day periods, Worker was required to work from 7:00 a.m. to 7:00 p.m. After two four-day periods, he was then required to work from 7:00 p.m. to 7:00 a.m. for the following two four-day periods. Worker’s schedule rotated every two four-day periods thereafter. Worker had been on the rotating four-day schedule for several years. His work hours remained about the same while he was on this schedule. For example, Worker worked 1,481.5 hours from January 3, 1999, to October 3, 1999, and he worked 1,487 hours from January 2, 2000, to October 1, 2000. While at work, Worker was entitled to a thirty-minute lunch break, though he stated that he usually ate his lunch while operating his blade. Although he was never told by Employer that he could not take breaks, Worker typically worked his twelve-hour shift with few or no breaks, which he considered stressful. Employer did not enforce any regular system of fifteen-minute rest breaks. Worker claimed that the long hours were stressful and confused his body.

17. Worker had to commute to work. In order to arrive at work by 7:00 a.m./p.m., Worker had to leave his home by 5:30 a.m./p.m. He would return home by 8:00 a.m./p.m. Thus, including commuting time, Worker worked approximately 14.5 hours a day during his work periods. Worker asserted that because of this long work schedule, he became sleep deprived, fatigued, and physically and emotionally stressed.

18. Employer had mandatory overtime, and as an hourly employee, Worker was required to work mandatory overtime. Mandatory overtime begins with volunteers who want to get their overtime out of the way, and then a rotation occurs in which employees who have not signed up for the overtime get assigned to the remaining overtime. Employer attempts to keep the amount of overtime even for all employees. Worker did not volunteer for overtime; consequently, he was sometimes assigned overtime without much advance notice. Worker asserted that the required overtime was stressful.

19. In late June 2000, Worker’s immediate supervisor, Ernest Ortiz (Ortiz), informed Worker that he had some vacation days remaining and that he needed to schedule some time off from work soon. Worker understood that he had four days available and took time off from work the following week. When Worker returned to work, he was informed that he needed to report immediately to the new production manager, Carl McMinn (McMinn). McMinn accused Worker of taking an unearned and unauthorized day of vacation time, thereby stealing money from the company. Worker maintained that McMinn threatened to fire him if he missed one more day of work. McMinn acknowledged that he had this heated exchange of words with Worker and admitted he was angry and raised his voice while speaking to Worker; however, McMinn considered Worker to be a good friend and a person who helped him learn the coal business. This confrontation upset Worker, and he asserted that he continued to brood over this incident until his heart attack. In fact, Worker contended that he lived in fear of losing his job if he missed even one day of work for any reason. That said, Worker did report to work every day after the exchange with McMinn; however, Worker did go home on sick leave in early September 2000 after 1.5 hours of work. He also knew Employer had no history of firing workers for taking sick days. Worker interacted with McMinn on a friendly basis between July and September 2000.

20. Worker was scheduled to work the 7:00 p.m. to 7:00 a.m. shift on October 1-2, 2000, the day of his heart attack. He was not feeling well but, despite the advice from Margie, did not call in sick and went to work. On the night of October 1, Worker complained of heartburn to some co-workers. Ortiz testified he saw Worker standing outside his blade and smoking a cigarette, though Worker denied that he had been smoking. Worker said he was having stomach problems and had just vomited. When Ortiz asked if Worker wanted to go home, he responded that he felt okay and that he wanted to continue to work. Worker testified that subsequently he was not feeling well at all and that his attempts to notify Ortiz were unsuccessful.

21. In fact, Worker suffered a heart attack in the late hours of October 1 or the early hours of October 2. He radioed Ortiz around midnight for assistance. There was no response. Worker radioed again, and still no assistance was provided. Finally, around 1:30 a.m.,
Based on medical studies and other literature, Dr. Shadoff stated that the temporal relationship between the physical or emotional stress circumstances precipitated this heart attack and his eventual death. The disagreement was based on a reasonable medical probability.

Worker drove his blade to the change house and spoke directly to Ortiz. Worker informed Ortiz that he was not feeling well, and Ortiz essentially told him to go home and not to bother him. Employer did not provide any on-site medical treatment to Worker. Worker returned home. The facts regarding the provision of subsequent health care to Worker are explained above, in section II of this opinion.

After Worker’s death, the matter of his complaint came before the WCJ for a hearing on June 13, 2003. The main question was whether there was a causal link, as a matter of reasonable medical probability, between Worker’s heart attack on October 2, 2000, and his employment. After considering all the evidence and arguments, including the depositions and records of both Dr. Orchard and Dr. Shadoff, the WCJ entered findings of fact, upon which it concluded that Worker’s “heart attack on October 1-2, 2000, did not arise out of, or occur in the course and scope of, Worker’s employment with Employer.” The WCJ found that Worker was not under any unusual emotional or physical stress from his work hours. Further, the WCJ determined that “[t]here is no causal link between the Worker’s heart attack and employment as a matter of reasonable medical probability” and dismissed Worker’s complaint with prejudice. Worker appeals from this decision.

1. Standard of Review


Dr. Orchard also testified that he did not review Worker’s prior medical records, did not talk about Worker’s work in great detail, and was not familiar with Worker’s work history, the nature of his job, or his employment records. Further, Dr. Orchard testified that a heart attack can occur without any precipitating factors; that he did not know of any acute-stress event on October 1, 2000, involving Worker; that based on Worker’s long-standing work schedule, Dr. Orchard could not say stress was the event that caused the heart attack on October 2, 2000; and that he did not discuss Worker’s heart attack as being work-related until January 2001.

2. Work-Related Stress

NMSA 1978, § 52-1-28(B) (1987) requires that “[i]n all cases 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.” In this case, the burden was therefore on Worker to provide medical evidence showing that his heart attack and death was a “medically probable result of the work-related stress.” Herman, 111 N.M. at 552, 807 P.2d at 736. In Oliver v. City of Albuquerque, 106 N.M. 350, 352, 742 P.2d 1055, 1057 (1987), our Supreme Court noted that when a preexisting condition is aggravated by employment-related stress, the requirement of a work-related injury is met. Although there is no requirement that a worker must prove “that stress was the only factor causing the . . . heart attack,” a worker must “show that the heart attack more likely than not was the result of stress.” Herman, 111 N.M. at 553, 807 P.2d at 737; see also Bufalino v. Safeway Stores, Inc., 98 N.M. 560, 565, 650 P.2d 844, 849 (Ct. App. 1982).

Here, the WCJ was faced with conflicting medical evidence. Dr. Orchard continued to treat Worker until his death, and Dr. Orchard believed that while Worker had coronary artery disease caused by plaque that had built up in his arteries, work-related stress was a factor that triggered Worker’s heart attack. In Dr. Orchard’s February 15, 2001, letter, he stated the following:

The circumstances of [Worker’s] work at [the time of the heart attack] were such that he was under extreme stress, both mental and physical, and long hours. The conditions that he worked under, while not being the sole cause for his heart attack, certainly may have been a precipitating factor. . . . [I]t is a likely probability that [Worker’s] work conditions may have precipitated his myocardial infarction, although of course would not have been responsible for the plaque that was the original culprit.

Dr. Orchard also testified that he did not review Worker’s prior medical records, did not talk about Worker’s work in great detail, and was not familiar with Worker’s work history, the nature of his job, or his employment records. Further, Dr. Orchard testified that a heart attack can occur without any precipitating factors; that he did not know of any acute-stress event on October 1, 2000, involving Worker; that based on Worker’s long-standing work schedule, Dr. Orchard could not say stress was the event that caused the heart attack on October 2, 2000; and that he did not discuss Worker’s heart attack as being work-related until January 2001.

Dr. Shadoff met with Worker once and concluded, as had Dr. Orchard, that Worker had coronary artery disease. However, based on a review of all of Worker’s medical records, his history of risk factors for heart attack, such as smoking and diabetes, his work environment and work history, and medical literature, Dr. Shadoff determined to a reasonable degree of medical probability that the October 2, 2000, heart attack was not work related, but rather was a random event.

Dr. Shadoff testified that Worker’s schedule would not be a stressful event that would trigger a heart attack “because this was the kind of cycle that he had [ ] been working for a number of years.” Dr. Shadoff further stated that Worker’s “fear of being fired for taking time off after McMinn admonished Worker was not a stressful event that caused his heart attack. Rather, Worker may have had a chronic sense of stress. Therefore, Dr. Shadoff disagreed with Dr. Orchard’s opinion that “[i]f the events [the argument with McMinn and long work hours] as [Worker] told them to me are accurate, then I feel that there is a medical probability that the stress of those circumstances precipitated this heart attack and his eventual death.” The disagreement was based on a reasonable medical probability. Based on medical studies and other literature, Dr. Shadoff stated that the temporal relationship between the physical or emotional stress and the triggering of myocardial infarction is important and that Worker’s attack was a random event. Dr. Shadoff testified that he might concur with Dr. Orchard’s opinion on causation if Worker’s heart attack had occurred within twenty-four hours of his being threatened with termination by McMinn and being accused of stealing a day’s pay from Employer. Instead, Dr. Shadoff tied the heart attack to risk factors, such as smoking, diabetes, and Worker’s continued risky behavior, even though he had been advised to stop smoking and watch his diet. While Dr. Shadoff only met with Worker on one occasion, the doctor did review Worker’s prior medical records and understood the nature of Worker’s job.

Where there is conflicting evidence from both experts, it is within the discretion of the WCJ to reach a determination of medical
probability. See Bufalino, 98 N.M. at 565, 650 P.2d at 849. Reviewing the record as a whole shows that there was sufficient evidence to support the WCJ’s conclusion that as a matter of reasonable medical probability, there was no causal link between Worker’s heart attack and his employment.

{30} The WCJ’s findings of fact demonstrate that the WCJ disbelieved Worker’s testimony that he was stressed. Further, the WCJ found that Dr. Orchard was not familiar with Worker’s job conditions or his past medical history. Therefore, the WCJ relied on Dr. Shadoff’s testimony that Worker’s hours and the incident with McMinn did not cause the heart attack and that smoking and diabetes were significant risk factors. In addition, Dr. Orchard agreed that a person achieves equilibrium if he performs a task over and over and that it is “very hard to say that chronic stress will cause a heart condition.” Thus, the WCJ agreed with Dr. Shadoff that Worker’s heart attack was a “random event to a reasonable degree of medical probability.” “The rule is established that where conflicting medical testimony is presented as to whether a medical probability of causal connection existed between myocardial infarction and work being performed, the trial court’s determination will be affirmed.” Id. at 565, 650 P.2d at 849.

3. Acute Stress

{31} Worker additionally argues that the WCJ erred in basing its determination solely on the lack of an acute-stress event occurring within a short time before Worker’s heart attack. We disagree with Worker’s characterization of the WCJ’s determination. As described above, the WCJ did consider a number of factors, including Worker’s contention that the long work hours and his confrontation with McMinn contributed to the heart attack. The following evidence was presented on this contention. Worker testified that he did not realize he was experiencing stress from working his “four-on, four-off” work schedule until after his October 2, 2000, heart attack. Further, Worker testified that he thought the stressful event he alleged in his complaint was the incident with McMinn. Moreover, during the May 14, 2001, telephonic interview, when Worker was asked whether he had been doing anything stressful at work or had been involved in any argument prior to the heart attack, he responded, “O[ ] my god, no. We all got along good. I mean, even the boss.” Thus, the record demonstrates that the WCJ considered evidence of Worker’s alleged stress but was not persuaded. Although the WCJ addressed acute-stress factors in its decision, we do not read the dismissal to be based on a requirement that only events of acute stress can cause a heart attack. The WCJ’s conclusion was general in nature: Worker failed to establish that the cause of his heart attack was work-related stress. We therefore reject Worker’s argument that the WCJ held him to a higher standard of proof.

C. Violation of Worker’s Rights by the WCA Director

{32} Worker argues that his rights to due process of law, to equal protection under the law, and to a fair trial before an independent and impartial judiciary, as well as other fundamental and statutory rights, were violated by the wrongful actions of the current WCA director and the structure of the WCA. Worker also contends that the WCJ who heard the case acted unfairly, arbitrarily, capriciously, or with bias. See Colónias Dev. Council v. Rhino Envtl. Servs., Inc., 2003-NMCA-141, ¶¶ 35-47, 134 N.M. 637, 81 P.3d 580 (discussing the alleged bias of the hearing officer when the plaintiff argued that the hearing officer’s bias violated the plaintiff’s constitutional right to due process and a fair hearing). Nothing in the briefs supports Worker’s contention that he received an unfair trial. Worker’s argument that his constitutional rights were violated by the staff appointment procedure is a political question and is not justiciable. See State ex rel. Coll v. Johnson, 1999-NMSC-036, ¶ 24, 128 N.M. 154, 990 P.2d 1277 (discussing that generalized insinuations of governmental wrongdoing did not set forth a clear legal duty to perform the actions the plaintiffs sought). The legislature is responsible for enacting laws that set forth the terms for the administration of the workers’ compensation scheme. Worker provides no legal support for the contention that the Act and its administration are unconstitutional, and we presume the Act is constitutional. Madrid v. St. Joseph Hosp., 1996-NMSC-064, ¶ 10, 122 N.M. 524, 928 P.2d 250.

III. CONCLUSION

{33} For the foregoing reasons, we affirm the WCJ’s decision.

{34} IT IS SO ORDERED.

CELIA FOY CASTILLO,
Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE,
Chief Judge
A. JOSEPH ALARID, Judge
{1} Defendant appeals his conviction for aggravated driving while under the influence of intoxicating liquor or drugs on three grounds: (1) the trial court acquitted him of aggravated DWI during the proceedings and therefore violated double jeopardy protections when it found him guilty later on in the same proceedings; (2) the trial court incorrectly interpreted the applicable statutory provisions on refusal to submit to testing by holding that Defendant refused to comply even though he had provided one breath sample; and (3) it is fundamentally unfair and a violation of substantive due process to admit a breath sample into evidence while also finding Defendant guilty of refusing to provide a breath sample. For the reasons that follow, we are not persuaded by Defendant’s first two arguments. We do not reach Defendant’s due process argument because it is insufficiently developed. We therefore affirm Defendant’s conviction.

BACKGROUND

{2} Defendant was arrested after failing field sobriety tests and was taken to Bernalillo County Detention Center, where he was asked to provide breath samples approximately sixty minutes after he had been driving. The arresting officer testified that after Defendant successfully blew the first test, he could see his score of 0.16 and was advised of what his score was. The officer testified that Defendant then took a deep breath and pretended to blow into the machine for a second and third test resulting in readings of “insufficient sample” and “no sample introduced” respectively. The officer testified that the Intoxilyzer breath-test device was working properly, that it had been certified and passed its own internal calibration and diagnostic tests and, finally, that there was no need to replace the disposable mouthpiece since it had worked on the first sample. There was conflicting testimony at trial regarding whether Defendant’s actions were intentional. The officer testified that Defendant was argumentative during the testing, and the officer felt Defendant’s failure to blow a second sample was intentional. Defendant testified that he neither refused to blow into the device nor refused to follow the officer’s instructions, and that he could not hear the officer’s instructions due to a hearing impairment.

{3} Defendant was charged with aggravated DWI based on both the breath alcohol content (BAC) score of 0.16, often referred to as a per se DWI violation, and based upon his refusal to provide sufficient breath samples. See NMSA 1978, § 66-8-102(D)(1) (2004) (defining aggravated DWI as driving with a BAC of 0.16 or higher); § 66-8-102(D)(3) (defining aggravated DWI as refusing to submit to chemical testing as provided for in the Implied Consent Act if the court determines the person operated a motor vehicle while under the influence of liquor or drugs). Defendant was tried and convicted in a bench trial in metropolitan court (the trial court) on the aggravated DWI charge. In so holding, the trial court noted that after consideration of the testimony, it generally did not find Defendant credible.

{4} During the course of the trial, the trial court made oral and written statements that Defendant contends constituted an acquittal of the refusal basis for aggravated DWI. We discuss these statements more fully below in conjunction with the discussion of double jeopardy.

{5} Defendant appealed to the district court. The district court rejected his double jeopardy and due process claims, and affirmed his conviction on grounds that there was sufficient evidence to find that Defendant had refused to submit to testing and that he had driven while intoxicated in violation of Section 66-8-102(D)(3). The district court concluded that there was insufficient evidence to support a conviction under the per se provision of Section 66-8-102(D)(1) because the State did not produce any corroborative evidence relating the sixty-minute-old 0.16 BAC score back to the time of driving, particularly where the officer testified that the Intoxilyzer device had a 0.02 margin of error. Since the State does not appeal this holding, we do not consider it further. Therefore, the refusal provision of Section 66-8-102(D)(3) is the only basis upon which Defendant’s conviction of aggravated DWI can stand. We address the refusal basis after considering Defendant’s double jeopardy argument.

DISCUSSION

Double Jeopardy

{6} Defendant argues that the trial court acquitted him of the refusal basis for aggravated DWI when it issued oral and written rulings during the course of the trial. Defendant invokes both the United States and New Mexico double jeopardy clauses. U.S. Const amend. V; N.M. Const. art. II, § 15; NMSA 1978, § 30-1-10 (1963) (stating that double jeopardy claims are not waived and can be raised at any time before or after entry of a judgment). We conclude that Defendant did not preserve his claims under the state constitution as...

(7) Under Gomez, we first consider whether the state constitution has been held to provide greater protection under similar circumstances than the federal constitution. State v. Lynch, 2003-NMSC-020, ¶ 13, 134 N.M. 139, 74 P.3d 73. Although our Supreme Court has interpreted our double jeopardy clause more expansively than its federal counterpart in three situations, no case has applied an expansive interpretation to the acquittal aspect of double jeopardy, the circumstance presented by this case. Id. ¶ 15 (giving protection from greater charges for the same conduct after a conviction on lesser charges); see State v. Nunez, 2000-NMSC-013, ¶¶ 17-18, 27, 129 N.M. 63, 2 P.3d 264 (holding that, unlike under the federal constitution, a civil forfeiture is punishment under the New Mexico double jeopardy clause); State v. Breit, 1996-NMSC-067, ¶¶ 35-36, 122 N.M. 655, 930 P.2d 792 (providing more protection where mistrial is provoked by prosecutorial misconduct). Therefore, in order to preserve a claim under the state constitution, Defendant would have had to raise this claim in the trial court and provide a basis to interpret the state constitution differently. Lynch, 2003-NMSC-020, ¶ 13. Defendant first raised his claim under the state double jeopardy clause in his appeal to the district court, so that claim is not preserved.

(8) Turning to the federal constitution, such claims are reviewed de novo and need not be raised in the trial court to be preserved. State v. Rowell, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995); State v. Attaway, 117 N.M. 141, 145, 870 P.2d 103, 107 (1994); § 30-1-10. Generally, the federal double jeopardy clause has been held to offer three core protections: (1) protection against a second prosecution for the same offense after an acquittal, (2) protection against a second prosecution for the same offense after a conviction, and (3) protection against multiple punishments for the same offense. State v. Angel, 2002-NMSC-025, ¶ 7, 132 N.M. 501, 51 P.3d 1155. Defendant in this case is impliedly focusing on the first protection, which is intended to prevent the government from “harassing citizens by subjecting them to multiple suits until a conviction is reached, or from repeatedly subjecting citizens to the expense, embarrassment and ordeal of repeated trials.” Id. ¶ 15 (internal quotation marks and citation omitted). Jeopardy begins or attaches when the trier of fact is empowered to decide guilt or innocence and jeopardy terminates upon an acquittal, a conviction, or with certain types of mistrial. County of Los Alamos v. Tapia, 109 N.M. 736, 737, 790 P.2d 1017, 1018 n.1 (1990). Since the fact-finder in this case was empowered to find Defendant guilty, jeopardy had attached; our task is to determine when jeopardy terminated when point Defendant would be protected from any further prosecution for the same offense.

(9) Under the doctrine of double jeopardy, a verdict of acquittal is given “absolute” protection to guarantee finality of that verdict because the defendant’s interest in such finality is “at its zenith[.]” Id. at 742, 790 P.2d at 1023. Also, “once an accused is actually, and in express terms, acquitted by a court, the finality of that judgment will not yield to any attempts to dilute it.” Id. at 741, 790 P.2d at 1022. The United States Supreme Court has said that it is “the most fundamental rule” that a defendant cannot be re-tried after a verdict of acquittal, even if that verdict is egregiously erroneous, United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977), and that acquittals have “special weight” under double jeopardy analysis. Tibbs v. Florida, 457 U.S. 31, 41 (1982). This Court has recently held that such double jeopardy protection is triggered by a jury verdict of acquittal even if the verdict was issued erroneously and the jury issued a new verdict within a matter of minutes. State v. Rodriguez, 2004-NMCA-125, ¶ 14, 136 N.M. 494, 100 P.3d 200, cert. granted, 2004-NMCERT-10, 136 N.M. 542, 101 P.3d 808 (explaining that the jury had been discharged after issuance of the verdict and the jury could have been subject to outside influences before being re-assembled). After an acquittal, any type of fact-finding proceeding going to elements of the charged offense violates the federal double jeopardy clause. Smalis v. Pa., 476 U.S. 140, 142 (1986); see Sanabria v. United States, 437 U.S. 54, 75 (1978) (holding that no exceptions permit a retrial once the defendant is acquitted). The Supreme Court has also instructed that what constitutes an acquittal “is not to be controlled by the form of the judge’s action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged” and the focus is on “substance as well as form.” Martin Linen Supply Co., 430 U.S. at 571-72 (internal quotation marks and citations omitted).

(10) Defendant claims that comments made by the trial court during his trial and a written order the judge issued both constituted acquittals. We set out the comments and order in the context in which they were given.

(11) In his closing argument on June 2, 2003, Defendant contended that the breath score alone was insufficient to support a conviction as a matter of law. After the State noted that Defendant was charged in the alternative with refusal, Defendant argued that the per se provision and the refusal provision are mutually exclusive, contending that once a breath score is in evidence it is contrary to logic for the State to claim the Defendant refused to submit to testing.

(12) When the trial court issued its initial decision on June 3, 2003, it stated “Mr. Vaughn, I’m going to find you guilty of the aggravated DWI on the basis of the breath score, not on the basis of the refusal, although I do think that alternatively that could have been argued as well.” (Emphasis added.) Defendant contends this oral statement operated as an acquittal on the refusal basis for aggravated DWI. The trial court then issued its sentence for that decision, saying, “I’m going to go ahead and sentence your client to the first offender program. There is a mandatory 48 hours associated with the aggravated.”

(13) Defendant moved for reconsideration of the decision on the ground that the State failed to adduce testimony relating the breath score back to the time of driving. Defense counsel also mentioned that he had not found any authority specifically on whether a defendant can be guilty of refusal after providing one sample. The trial court agreed to review the relation back issue urged by Defendant and scheduled a hearing on the motion for reconsideration on Friday, June 6, 2003. The trial court stated, “The aggravation I’m going to support with a subsequent order, which will then at that time, if I do find that, I will order that he turn himself in . . . And I’ll defer the aggravation, and consider it on the motion to reconsider on Friday.” (Emphasis added.) The trial court also issued a written form titled “Sentencing Order - DWI First Offender Program.” The trial court checked the box for Defendant “having been found guilty” of “[d]riving while intoxicated, first offense,” although the form does not indicate which statutory provision was violated. The trial court noted on the form that the parties were to return in three days for the “Mo to reconsider Agg.” Defendant claims this form was both a judgment of acquittal and a deferred sentence that precluded later imposition of jail time.

(14) Following the hearing on the motion for reconsideration, the trial court rejected Defendant’s contention that the per se charge was
not supported by sufficient evidence. During this final session, the trial court commented, “I think it’s to your client’s benefit that I find in this particular case that it was the point one six as opposed to the refusal because of the status of his license.” (Emphasis added.)

Defendant claims this comment also operated as an acquittal of the refusal basis for aggravated DWI. The written judgment filed after this hearing stated, “Aggravation found - Defendant guilty at trial of Agg DWI[.]”

{15} In determining whether any of the trial court’s actions constituted an acquittal that terminated jeopardy, we look first to New Mexico law. The general rule in New Mexico is that an oral ruling by a trial court is not final and, with only limited exceptions, it is not binding. *State v. Diaz*, 100 N.M. 524, 525, 673 P.2d 501, 502 (1983) (“It is well established that an oral ruling by the trial court is not a final judgment, and that the trial court can change such ruling at any time before the entry of written judgment.”). There are limited exceptions to this general rule, such as for oral declarations of mistrial, *State v. Reyes-Arreola*, 1999-NMCA-086, ¶ 10, 127 N.M. 528, 984 P.2d 775, and the oral granting of a new trial, *State v. Ratchford*, 115 N.M. 567, 570-71, 855 P.2d 556, 559-60 (1993).

{16} Defendant raises two distinctions that he claims preclude the application of the general rule that oral rulings are not binding and that justify application of double jeopardy protection in this case: (1) the trial court issued a written ruling instead of just an oral ruling, and (2) oral acquittals are recognized by other jurisdictions and should be treated differently than oral statements regarding sentencing. We address and reject each contention in turn.

**The June 3, 2003 Order Did Not Constiutute an Acquittal**

{17} Defendant places great emphasis on the sentencing order issued by the trial court on June 3, 2003, three days before the final judgment and sentence. Defendant argues that this written order puts this case beyond the reach of *Diaz* because in that case our Supreme Court focused on the lack of a filed written judgment. *Diaz*, 100 N.M. at 525, 673 P.2d at 502. Defendant characterizes this order as either a written judgment of acquittal, which precluded the subsequent finding of guilt on aggravated DWI, or as a written deferment of sentence, which precluded the later imposition of a sentence of confinement. The State responds that the sentencing order was a “partial” judgment and sentence.

{18} We agree with the State and conclude that this order was interlocutory and not binding. Both the content of this order and the context in which it was given convince us that it was interlocutory and neither terminated jeopardy nor imposed a sentence upon Defendant. As the State notes, this order was not a final judgment and sentence because it expressly contemplated further proceedings on the issue of aggravation, and therefore did not “dispose[ ] of” all issues of law and fact “to the fullest extent possible” under traditional finality rules. *State v. Candy L.*, 2003-NMCA-109, ¶ 5, 134 N.M. 213, 75 P.3d 429 (internal quotation marks and citations omitted). Although this order was signed and filed, because it expressly continued the proceedings to determine guilt, the trial court had not terminated the proceedings. Looking to the touchstone of *Martin Linen Supply Co.*, we ask if the substance of this order represented “a resolution, correct or not, of some or all of the factual elements of the offense.” 430 U.S. at 571. If anything, this order was a resolution of guilt of simple DWI and made it clear that the proceedings would continue while the trial court contemplated guilt on the charge of aggravated DWI. Such an interlocutory order, even if written and filed, does not terminate jeopardy because it so clearly was not a resolution of the charge for which Defendant was being tried. This order also does not operate as an acquittal of aggravated DWI under the metro court rules since it is not a judgment of “not guilty” on that charge. Rule 7-701 NMRA (“If the defendant has been acquitted, a judgment of not guilty shall be rendered.”).

{19} New Mexico cases address similar circumstances in the context of sentencing. Where a defendant is on notice that the trial court’s oral sentence was not final, he has no reasonable expectation of finality. *State v. Rushing*, 103 N.M. 333, 706 P.2d 875 (1985). Double jeopardy considerations “exist to protect a defendant’s expectations of finality without providing . . . [him] with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be.” *Id.* at 335, 706 P.2d at 877 (internal quotation marks and citation omitted); see also *Angel*, 2002-NMSC-025, ¶ 15 (holding that a defendant’s expectations of finality after entering a no-contest plea were outweighed by state’s right to a “full and fair opportunity” to convict criminals). Here, where Defendant specifically asked the court to make its order not final by requesting reconsideration, it is inconsistent for Defendant to point to the order as final or to claim he had an expectation of finality in that order.

{20} Defendant also advances an argument that the June 3, 2003 order was final because, under *Diaz*, oral judgments are not final but written judgments are final. Defendant appears to view this as a strictly binary situation—that an order must either be oral and not final or written and final. We disagree because not all written orders are final. See *Smith v. Love*, 101 N.M. 355, 356, 683 P.2d 37, 38 (1984); *State v. Durant*, 2000-NMCA-066, 129 N.M. 345, 7 P.3d 495; *Levenson v. Haynes*, 1997-NMCA-020, ¶ 10, 123 N.M. 106, 934 P.2d 300 (describing a written order as interlocutory and subject to modification or reconsideration by the trial court); *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 119 N.M. 29, 37, 888 P.2d 475, 483 (Ct. App. 1994) (stating that a letter is a non-final order or judgment, and that final orders must be formal and contain decretal language). Defendant’s logic that the order must be final because it is in writing is strained in this case, where the written document clearly indicates on its face that the proceedings are continuing.

{21} Defendant further argues that this order was an acquittal on the refusal basis for aggravated DWI, apparently under the theory that it somehow finalized or solemnized the trial court’s oral comment “guilty of the aggravated DWI on the basis of the breath score, not on the basis of the refusal, although I do think that alternatively that could have been argued as well.” (Emphasis added.) This argument is speculative since the form simply indicates a determination of guilt for “[d]riving while intoxicated, first offense.” It is unclear from Defendant’s argument how this initial order operates as an acquittal on the refusal basis apart from simply being “a writing.” As noted above, not all writings by a judge are final orders. As Defendant has no persuasive or clear argument on how the June 3, 2003, writing could operate as a final verdict of acquittal, we reject it as being without merit or support in the record.

{22} We also reject Defendant’s contention that the June 3, 2003 order imposed a deferred sentence, which would bar any later sentence of confinement under *State v. Lopez*, 99 N.M. 791, 795-96, 664 P.2d 989, 993-94 (Ct. App. 1982) (holding that a court has no power to impose jail time as a condition of a deferred sentence). Because this order was interlocutory, it was neither a judgment of guilt on aggravated DWI nor a sentence for that charge. This order, therefore, did not impose a deferred sentence upon Defendant and the trial
court was free to impose any authorized sentence, including the forty-eight consecutive hours of confinement, on June 6, 2003.

**Oral Rulings of Acquittal Are Not Binding**

(23) Defendant next contends that an oral ruling going to guilt or innocence should be binding because its constitutional gravity is greater than an oral ruling regarding sentencing. He directs us to out-of-state authority holding that oral rulings can terminate jeopardy. See *Lowe v. State*, 744 P.2d 856, 857-58 (Kan.1987) (holding that an oral acquittal terminates jeopardy and bars any further action for that offense). *But see United States v. Wash.*, 48 F.3d 73, 79 (2nd Cir. 1995) (“An oral grant of a motion for acquittal is no more than an interlocutory order, which the court has inherent power to reconsider and modify . . . prior to the entry of judgment.”) (internal quotation marks omitted) (quoting *United States v. LoRusso*, 695 F.2d 45, 52-53 (2nd Cir. 1982)). We are not persuaded and decline the invitation to import such a rule into New Mexico for three reasons.

(24) First, Defendant has not meaningfully distinguished this case from the general rule in New Mexico that oral rulings are ineffective and are not final judgments. *Smith*, 101 N.M. at 356, 683 P.2d at 38 (stating that a written order that is never filed is equivalent to an oral ruling and therefore is not a final judgment); *Diaz*, 100 N.M. at 525, 673 P.2d at 502 (holding that a court is free to change an orally pronounced sentence until a written judgment is filed). The two current exceptions to this rule are not implicated in this case. The *Ratchford* exception is limited to an oral grant of a new trial being effective to defeat automatic denial provisions built into the rules of criminal procedure. 115 N.M. at 570-71, 855 P.2d at 559-60. The cases involving discharge of a jury can be distinguished because in those cases the proceedings were terminated and the fact-finder was discharged by the oral comments of the judge, while here, proceedings were ongoing and the court expressly reserved ruling on the aggravated DWI charge. *Rodriguez*, 2004-NMCA-125, ¶ 14 (holding that oral discharge of jury terminated jeopardy); *Reyes-Arreola*, 1999-NMCA-086, ¶ 10 (holding that oral declarations of mistrial which discharge the jury “are unlike other oral decisions by the trial court, which are not binding and are subject to change until a final written order or judgment is entered”).

(25) Defendant also makes no argument why finality for purposes of appeal should be different from finality for a criminal verdict in terms of terminating jeopardy. This court has held that “in criminal cases, the judgment is final for the purpose of an appeal when it terminates the litigation on the merits and leaves nothing to be done but [enforcement].” *Durant*, 2000-NMCA-066, ¶ 5 (internal quotation marks and citations omitted). We see no reason to differentiate between finality for purposes of a verdict (termination of jeopardy) and finality for purposes of appeal.

(26) Second, permitting oral acquittals would require us to clarify what words used by a trial court would or would not constitute an acquittal—an exercise with serious practical and conceptual difficulties. After surveying cases from other jurisdictions in this area, it is clear that those courts that allow jeopardy to terminate upon an oral ruling have had to make subtle, fine-line distinctions, including: (1) which words are sufficiently final, (2) whether words have hung in the air for long enough to solidify into irrevocable orders, (3) whether parties did or did not reasonably rely on such rulings to their detriment, and (4) whether an interactive dialogue with the court truly communicated an acquittal on the merits. See generally *State v. Collins*, 771 P.2d 350, 353 (Wash. 1989) (en banc) (concluding that in light of their experience with oral acquittals the superior rule was to only allow a final written order terminating jeopardy); *Barnes v. State*, 9 S.W.3d 646, 649 (Mo. Ct. App. 1999) (concluding that when the judge changed her mind on an oral ruling during a few minutes of conversation, jeopardy had been terminated, contrary to the judge’s understanding that she was hearing argument).

(27) Discouraging courts from engaging in open dialogue with the parties or forcing judges to constantly issue disclaimers that all oral rulings are tentative and under advisement is not a practical way to guarantee the verdict is truly communicated an acquittal on the merits. Words are tentatively and under advisement is not a practical way to guarantee the verdict is truly communicated an acquittal on the merits. Words are not words, which are sufficient until a final written order is entered. See *Lowe v. State*, 744 P.2d 856, 857-58 (Kan.1987) (holding that an oral acquittal terminates jeopardy and bars any further action for that offense). *But see United States v. Wash.*, 48 F.3d 73, 79 (2nd Cir. 1995) (“An oral grant of a motion for acquittal is no more than an interlocutory order, which the court has inherent power to reconsider and modify . . . prior to the entry of judgment.”) (internal quotation marks omitted) (quoting *United States v. LoRusso*, 695 F.2d 45, 52-53 (2nd Cir. 1982)). We are not persuaded and decline the invitation to import such a rule into New Mexico for three reasons.

(28) Third, acceptance of the concept of oral acquittals would dilute double jeopardy’s core focus on verdict finality with concerns about trial process. Those courts that find jeopardy terminated by oral rulings often slide into concerns about prejudice in the trial process, which is not the focus of double jeopardy doctrine. See *Brooks v. State*, 827 S.W.2d 119, 123 (Ark. 1992) (stating that “prejudice is clear” when a defendant is deprived of an opportunity to know the charges against him during trial). In the adversarial and high-stakes dynamic of an ongoing criminal trial, it is understandable that a defendant would seize a favorable statement or decision and seek to freeze such a ruling. This is not the purpose of double jeopardy protection. It is crucial to distinguish between fairness in the trial process and finality in the trial result. Double jeopardy protection is aimed at ensuring finality in the results of a trial, particularly where a defendant is acquitted, so that an acquitted defendant has secure and peaceful “repose.” *Tapia*, 109 N.M. at 742, 790 P.2d at 1023.

(29) In New Mexico, the result of a trial, traditionally, is the final written judgment and sentence, and not oral rulings during the trial. *Diaz*, 100 N.M. at 525, 673 P.2d at 501; Rule 7-701 (“[A] written judgment and sentence shall be signed by the judge and filed.”). While some courts tend to merge trial prejudice (trial process) into double jeopardy protections (trial result), it is more faithful to the doctrine to differentiate between an acquittal that would terminate jeopardy (and implicate the highest level of double jeopardy protection) from a judge’s management of the process of a trial. An example of a trial process concern is where a judge’s oral statements lead a defendant to believe a charge or element of the case is not in play prior to presentation of defense witnesses or argument. Such prejudicial errors during the process of a trial are best dealt with through existing guarantees of fundamental trial fairness, such as the doctrine of fundamental error, and not via double jeopardy doctrine. *See State v. Barber*, 2004-NMSC-019, ¶ 16, 135 N.M. 621, 92 P.3d 633 (explaining that the doctrine of fundamental error acts as a check on the judicial process, and that an error in the trial process that shocks the conscience may require a reversal regardless of the apparent guilt of the accused).

(30) We conclude that neither the trial court’s oral comments nor its interlocutory order subjected Defendant to the harassment of a second prosecution after a verdict of acquittal. Therefore, the double jeopardy clause of the United States Constitution was not violated.
The Trial Court’s Oral Ruling Did Not Constitute Fundamental Error

31 Defendant’s final argument regarding double jeopardy seems to be that he was prejudiced at trial by the oral ruling on June 3, 2003, because he understood the court’s oral ruling to be an acquittal of the refusal theory and therefore did not address refusal in his motion for reconsideration. This claim is weak because refusal had been part of the original charge, and Defendant addressed refusal in his case-in-chief when he testified that he had difficulty hearing the instructions given to him and did not refuse to blow into the device. As noted, the fact-finder did not find Defendant credible. Defendant also undertook research to find any relevant case law to support his argument on refusal, even after the oral statements by the trial court, and Defendant continued to argue against the refusal basis, both before and after the purported oral acquittals.

32 As described above, the doctrine of fundamental error is the more appropriate tool to guard against prejudice from oral rulings during trial. In such an analysis, Defendant would have to show that the oral statements by the trial court caused “fundamental unfairness” in his trial. Barber, 2004-NMSC-019, ¶¶ 18-20 (internal quotation marks omitted). The record here shows there was no prejudice to Defendant because his defense on refusal was not curtailed in fact, nor was his trial fundamentally unfair.

The Implied Consent Act, the DWI Statutes, and Applicable Regulations

33 Defendant contends the trial court incorrectly interpreted the aggravated DWI statute, Section 66-8-102(D), and the Implied Consent Act, NMSA 1978, § 66-8-107 (1993), when it held that Defendant refused to comply with the test after he had provided one breath sample. We review issues of statutory interpretation de novo. Rowell, 121 N.M. at 114, 908 P.2d at 1382; Bd. of Comm’rs of Doña Ana County v. Las Cruces Sun-News, 2003-NMCA-102, ¶ 19, 134 N.M. 283, 76 P.3d 36. The primary goal is to ascertain legislative intent, indicated by the plain language of the statute. Id. When “the statute’s language is clear and unambiguous, we give the statute its plain and ordinary meaning and refrain from further interpretation.” Id. A statute defining criminal conduct must be strictly construed, Santillanes v. State, 115 N.M. 215, 221, 849 P.2d 358, 364 (1993), and agency rules and regulations are construed in the same manner as statutes. Bokum Res. Corp. v. N.M. Water Quality Control Comm’n, 93 N.M. 546, 549, 603 P.2d 285, 288 (1979) (applying rules of statutory construction to agency regulations); N.M. Dep’t of Health v. Ulibarri, 115 N.M. 413, 416, 852 P.2d 686, 689 (Ct. App. 1993) (applying rules of statutory construction to administrative agency rules). All portions of statutes are read in connection with every other part to produce a harmonious whole. Gen. Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985).

34 The question presented is whether the legislature intended that a driver could provide one breath sample and still be guilty of refusing to comply with the testing regime established by the Implied Consent Act and the implementing SLD regulations. Although this result may seem counterintuitive, we conclude that it was clearly intended by the legislature.

35 The DWI statute, Section 66-8-102(D)(3), references testing under the Implied Consent Act. § 66-8-107. The Implied Consent Act then refers to the Public Health Act, NMSA 1978, § 24-1-22 (2003), which directs the SLD to establish testing procedures. The SLD has promulgated regulations for alcohol testing of blood and breath pursuant to the Implied Consent Act. 7 NMAC 33.2.1 to -18 (2001).

36 The DWI statute states, in pertinent part, that a person commits aggravated DWI if he “refuse[s] to submit to chemical testing, as provided for in the Implied Consent Act . . . . and in the judgment of the court, based upon the evidence of intoxication presented to the court, was under the influence of intoxicating liquor or drugs.” § 66-8-102(D) (emphasis added). The Implied Consent Act then states that any driver in the state has consented “to chemical test[s] of his breath or blood or both, approved by the scientific laboratory division . . . pursuant to the provisions of [the Public Health Act] . . . for the purpose of determining the drug or alcohol content of his blood if arrested for [DWI].” § 66-8-107 (emphasis added). The SLD regulations contain these definitions:

[A] “sample” [is] a quantity of a subject’s blood or exhaled breath to be analyzed for the presence of alcohol . . . . All samples should be of sufficient volume so that complete analysis . . . may be performed. The breath test operator should make a good faith attempt to collect and analyze at least two (2) samples of breath.

7 NMAC 33.2.7(Q)(emphasis added).

“Test” . . . [i]n the case of breath, “test” means the analysis of breath samples for alcohol or other chemical substances or both.

7 NMAC 33.2.7(R) (emphasis added).

37 The definitions portion of the SLD regulations clearly anticipate two breath samples, either expressly or by use of the plural “samples.” Similarly, the breath sample collection regulation envisions either two or three samples, yet allows one sample to be analyzed, stating:

(1) Two breath samples shall be collected and analyzed by certified Operators. . . . The two breath samples shall be taken not more than 15 minutes apart. If the difference in the results of the two samples exceeds 0.02 grams per 210 liters (BrAC), a third sample of breath or blood shall be collected and analyzed. If the subject declines or is physically incapable of consent for the second or third samples, it shall be permissible to analyze fewer samples.

(2) Samples of the subject’s breath shall be collected and analyzed pursuant to the procedures prescribed by, and employing only devices approved and certified by, [SLD].

7 NMAC 33.2.12(B)(1), (2) (emphasis added).

38 It is clear from the SLD definitions and procedures that a correctly administered breath test will consist of two samples or, in some cases, three samples. The provision allows analysis of “fewer” samples (one sample) in the case of inability or refusal, but the directive to the operator is clear that two samples are to be collected. It is reasonable to conclude that the requirement for two samples is for greater accuracy, but if only one can be obtained, the process is deemed sufficiently accurate to analyze that one sample. This is in order to allow for effective prosecution of those drunk drivers who will provide only one sample; if the suspect is injured or unconscious the State may obtain a blood sample under the Implied Consent Act. NMSA 1978, § 66-8-108 (1978) (stating that a suspect who physically cannot refuse due to injury, unconsciousness, or death has consented to testing). See also State v. Munoz, 2004-NMCA-103, ¶ 5, 136 N.M. 235, 96 P.3d 796 n.1 (“In New Mexico, a single breath test consists of two samples. . . . If the subject declines or is un-
able to give two samples, fewer are permitted for a valid test.” (emphasis added)).

{39} Defendant contends that the words “[a driver consents] to chemical tests of his breath or blood or both” in the Implied Consent Act must be read together with the later-occurring phrase “[a test of blood or breath or both . . . shall be administered at the direction of a law enforcement officer.” § 66-8-107 (emphasis added). He contends the plural “tests” refers not to multiple samples, but rather to the option of the police officer to seek both blood or breath tests. It would be a counterintuitive reading for the word “tests” to refer not to “breath or blood” yet refer to “both”—had the Legislature intended only one test of each type at the option of the police, it could have easily said “[a driver consents] to a test] of his breath or blood or [a test of] both.” Defendant’s reading is also countered by the express language of the SLD regulations which mandates two samples, 7 NMAC 33.2.12(B), and this Court’s observation that the word “test” of breath under the SLD regulations actually consists of multiple samples, so the use of the singular “test” does not refer to one sample. Munoz, 2004-NMCA-103, ¶ 5.

{40} Finally, Defendant argues that because the SLD regulations allow the analysis of a single sample, providing just one sample results in compliance with the statutes and regulations. This runs counter to the language of the aggravated DWI provision that a person is guilty if he “refuse[s] to submit to chemical testing, as provided for in the Implied Consent Act.” § 66-8-102(D)(3) (emphasis added). Since the Implied Consent Act references the authority of SLD to define testing, and SLD has clearly defined correct testing of breath as the collection of two samples, providing one sample is not submitting to testing “as provided for” in the Act or as designated by SLD. The plain language of the relevant statutes and regulations indicate legislative intent to motivate suspects to take the test and to punish those who do not take the breath test correctly. § 66-8-102(D), (E) (punishing an intoxicated driver who refuses to submit to chemical testing). Those who provide one sample therefore have refused to take the test as designed by the SLD. The legislature has made it clear that in those cases the single sample can still be used against Defendant. 7 NMAC 33.2.12(B)(1). As noted, here the fact-finder believed the officer’s testimony that Defendant wilfully evaded a second sample, unlike a situation where injury to mouth or lungs could prevent a suspect from providing a breath sample, in which case, presumably, the police would seek a blood sample. See generally In re Abel G. Suazo, 117 N.M. 785, 787, 877 P.2d 1088, 1090 (1994) (stating that where suspect had failed to produce enough air for breath sample readings, subsequently blaming injury to his mouth, but later agreed to a blood test, that the later consent did not cure the initial refusal).

{41} Our conclusion is also supported by similar cases in which this Court has held that anything short of full and unequivocal consent is a refusal except in very limited circumstances. Fugere v. State, Taxation & Revenue Dep’t, 120 N.M. 29, 34, 897 P.2d 216, 221 (Ct. App. 1995) (stating that any type of conditional consent is a refusal to take the test, and collecting cases on conditional consent); In re Abel G. Suazo, 117 N.M. at 793, 877 P.2d at 1096 (defining a five-part test for when an initial refusal can be cured by a later consent and holding that such consent must be given within a matter of minutes). While criminal statutes must be construed against the State, the plain language of the statutes here indicates the legislature’s intent to require that DWI suspects provide two breath samples and that those who, without reasonable justification, provide one sample have failed to take the test “as provided for in the Implied Consent Act.” § 66-8-102(D)(3).

Due Process

{42} Defendant claims it violates the due process clauses of both the federal and state constitutions to convict him of refusing to provide a sample when a sample is used against him. Defendant makes this claim in one sentence without any citation to authority or analysis on how due process was violated by the facts of this case. This Court will not consider an argument that lacks citation to any legal authority in support of that argument. Santa Fe Exploration Co. v. Oil Conservation Comm’n, 114 N.M. 103, 108, 835 P.2d 819, 824 (1992); State v. Chandler, 119 N.M. 727, 733, 895 P.2d 249, 255 (Ct. App. 1995). Where a party cites no authority to support an argument, we may assume no such authority exists. In re Adoption of Doe, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984).

CONCLUSION

{43} For the foregoing reasons, we affirm Defendant’s conviction.

{44} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

I CONCUR:
A. JOSEPH ALARID, Judge
IRA ROBINSON, Judge (concurring in result only).
In this appeal, we address NMSA 1978, § 3-18-5 (1977), which allows municipalities to deal with ruins, rubbish, wreckage or debris, by requiring the owner to clean up the property. Under the statute, if the owner fails to ameliorate any problem, the municipality may do so and obtain a lien against the property. See § 3-18-5(F)(3). The City of Tucumcari was not satisfied with Plaintiffs’ efforts and cleaned up Plaintiffs’ property. Plaintiffs sued, contending that the City was overzealous and removed everything, including cars Plaintiffs contend are valuable because they are “antique,” “collectible,” “vintage,” or “restorable.” The district court dismissed Plaintiffs’ complaint for failure to state a claim under Rule 1-012(B)(6) NMRA, ruling that Plaintiffs failed to comply with statutory deadlines. We address whether the failure to follow the time deadlines in Section 3-18-5 requires dismissal. We also address issues concerning the statute of limitations under the Tort Claims Act, NMSA 1978, §§ 41-4-1 to 41-4-27 (1976, as amended through 2004) (TCA). We reverse, holding that the time deadlines in Section 3-18-5 do not apply to this action and that, on the current state of the record, Plaintiffs’ lawsuit is not barred by the statute of limitations.

**Background**

Section 3-18-5(A) provides:

> Whenever any building or structure is ruined, damaged and dilapidated, or any premise is covered with ruins, rubbish, wreckage or debris, the governing body of a municipality may by resolution find that the ruined, damaged and dilapidated building, structure or premise is a menace to the public comfort, health, peace or safety and require the removal from the municipality of the building, structure, ruins, rubbish, wreckage or debris.

A copy of the resolution must be served on the owner or occupant of the property or an agent (of the owner). See § 3-18-5(B). The owner then has ten days either to begin ameliorating the problem or to file a written objection to the resolution with the municipal clerk, asking for a hearing. See § 3-18-5(C). If an objection is filed, the governing body must set a hearing and act on the objection. See § 3-18-5(D)(1). “Any person aggrieved by the determination of the governing body may appeal to the district court . . . within twenty days after the determination.” Section 3-18-5(E)(2). If the owner does not timely begin ameliorating the problem, the governing body may do the work and obtain a lien against the property for the “reasonable cost” of doing the work, and may foreclose the lien. See § 3-18-5(F)(3). The statute requires that the premises be left in a “clean, level and safe condition, suitable for further occupancy or construction.” See § 3-18-5(H).

Plaintiffs owned an automobile salvage business. Their home, which was also on the property, burned down. The City, under the aegis of Section 3-18-5, passed a resolution on March 23, 2000, declaring the property to be a menace. Plaintiffs did not dispute the City’s determination or the necessity of cleaning up the property. Plaintiffs made some efforts to comply, but assert that the City was not satisfied with their efforts.

Plaintiffs contend that they had salvaged materials from the fire-damaged building that could be reused. They also contend that sidewalks, a cement slab floor, and a gas pipeline from a propane tank remained. Plaintiffs claim that during the last week of July and the first week of August 2001, approximately sixteen months after the resolution, the City brought dump trucks and a large tractor with a front-end loader to the property. They claim that the City then removed everything, including topsoil, leaving nothing behind.

The list of removed items is lengthy. It includes personal property such as hoods from 1955-57 pickup trucks, one hundred hubcaps, ten axles from Model T Fords, and a wide variety of other, similar items. Plaintiffs contend that the City removed property worth over $69,000.

Plaintiffs posit the question on appeal as “whether a municipality can take top soil, usable improvements or valuable merchandise along with wreckage, ruins, rubbish or debris.” Their view is that “[t]he law giving a city power to do a condemnation and then remove ruins, wreckage, rubbish or debris does not remove the duty to use care in doing so.” The City likely believes that having declared the entire property a menace, it had the right to remove all of the items. We do not determine the merits of Plaintiffs’ issue, nor do we address any defenses or other potential arguments the City may have. Although the parties briefed the issue of immunity under the TCA, the issue is premature for decision in this appeal of the grant of a motion to dismiss on unrelated grounds.

**Standard of Review**

The plain language of the statute. See Key v. Chrysler Motors Corp., 121 N.M. 764, 768-69, 918 P.2d 350, 354-55 (1996) (stating that when interpreting statutes, a reviewing court must seek to give effect to the intent of the legislature). Our starting point is "because Plaintiffs "failed to comply with any of the deadlines provided in the New Mexico Statutes." See State ex rel. Helman v. Gallegos, 117 N.M. 346, 352, 871 P.2d 1352, 1358 (1994) (noting the general rule that if the meaning of a statute is clear it must be applied as written).

The statute is easily understood and its purpose is clear. It deals with blighted or hazardous property and gives the owner the first opportunity to address any problems. See § 3-18-5(A), (B). If the owner does not comply with a governing body’s request to ameliorate the problems, the statute allows the governing body to address the problem. See § 3-18-5(F). It provides for a process, allowing the owner to request a hearing on the governing body’s resolution declaring the property to be a menace to the public comfort, health, peace, or safety. See § 3-18-5(A), (D)(1). After that hearing, any aggrieved person may appeal the governing body’s “determination” to the district court within twenty days. See § 3-18-5(E)(2).

Reading Sections 3-18-5(A), (B), and (C) together, it is obvious that the first step in the process that must be appealed to the governing body within ten days is a governing body’s resolution declaring a property to be a menace. The governing body then must set a hearing and “determine if its resolution should be enforced or rescinded.” Section 3-18-5(D)(1), (3). The governing body’s “determination” may then be appealed to the district court within twenty days. Section 3-18-5(E)(2). Consequently, the time limits in Section 3-18-5 apply to a limited and well-defined set of circumstances: the adoption of the initial resolution declaring the property to present a blight or hazard, and the governing body’s subsequent “determination,” after a hearing, on the correctness of the initial resolution. In this narrow context, the statute’s procedures, and short time deadlines, make perfect sense.

Because Plaintiffs did not contest the City’s resolution, there was no reason to follow the procedure in Section 3-18-5. The avenue provided for Plaintiffs in Section 3-18-5 was not the sole and exclusive avenue for any problems or complaints Plaintiffs had about the City’s actions, regardless of the time of the actions or the type of problems involved. The decisions made by workers during the remediation project do not constitute the “resolution” mentioned in Sections 3-18-5(A), (B), (C), or (D). Nor do the decisions made by the workers during the remediation project constitute a “determination,” as that term is narrowly used in Section 3-18-5(E) or (F). Plaintiffs’ lawsuit is one of negligence, which is not the subject of Section 3-18-5. Consequently, the time deadlines in Section 3-18-5 are inapplicable, Plaintiffs were not late, and they could properly file their action in district court, where negligence claims are commonly heard.

Plaintiffs’ lawsuit also claimed that the amount of the lien imposed by the City was unreasonable and overcharged by $2010. Plaintiffs complained that the City charged them for work that was done on adjoining property they did not own. They complain they should not have been charged for work performed in taking their valuable property that they assert should not have been taken. They also complain that the City had not charged based on the actual cost of doing the work, but rather on the customary rental value of the machinery used.

Once again, we disagree that the City’s setting of the amount of the lien is a “resolution” or “determination” that is governed by the time limits in Section 3-18-5. Section 3-18-5(F)(3) allows for a lien but does not discuss any procedures for dealing with a claim that a lien is unreasonable or incorrectly calculated. The City argues that Section 3-18-5 provides the sole remedy because Plaintiffs could contest the amount of the lien if and when the City sought to foreclose on the property under Section 3-18-5(F)(3), following the procedures of the statutory foreclosure process of NMSA 1978, §§ 3-36-4 to 3-36-5 (1965) and § 3-36-6 (1977). However, the procedures of Sections 3-36-4 through 3-36-6, by which a city may attach and foreclose upon a lien, do not provide a procedure to challenge the amount of the lien imposed. Nothing in these procedures indicates that the legislature intended that property owners should have to wait for foreclosure before being able to address alleged problems with a lien. We agree with Plaintiffs that they can contest the amount of the lien in the district court action, especially because the lien issues are linked with the negligence issues.

**Statute of Limitations**

Plaintiffs filed their lawsuit on July 31, 2003. The City argues that the lawsuit was late because it was filed more than two years after the “occurrence” resulting in damage. See § 41-4-15(A) (requiring lawsuits brought under the TCA to be “commenced within two years of date after the occurrence resulting in loss, injury or death”). Plaintiffs’ complaint alleges that the work took place in the last week of July and into the last week of August 2001. The City does not appear to dispute this factual claim, but argues that the clean-up work was “commenced” in the last week of July 2001 and therefore the trigger for the statute of limitations was the date the work began and no other date.

We do not agree with the City’s argument. Under the TCA, the statute of limitations begins to run when the injury manifests itself and is ascertainable. See Long v. Weaver, 105 N.M. 188, 191, 730 P.2d 491, 494 (Ct. App. 1986). Plaintiffs’ allegation about the time the work was performed and when the injury manifested itself presents a factual matter that must be resolved. See id. at 191-92, 730 P.2d at 494-95; Eoff v. Forrest, 109 N.M. 695, 699, 789 P.2d 1262, 1266 (1990) (indicating that summary judgment is not appropriate when genuine issues of fact are present). The record does not suggest that the court resolved these factual issues. If Plaintiffs are correct that the work and its alleged damage continued into August, Plaintiffs’ lawsuit may have been timely. See Aragon & McCoy v. Albuquerque Nat’l Bank, 99 N.M. 420, 424, 659 P.2d 306, 310 (1983) (stating that a cause of action may sometimes accrue on several different dates, and it is the last event that starts the statute of limitations period running). It is not clear whether the court dismissed this action based on a failure to follow the time deadlines in Section 3-18-5 or the statute of limitations, or both. However, if the court based its ruling on the failure to comply with the statute of limitations, its dismissal would be inappropriate on the current state of the record.

**Conclusion**

We conclude that Plaintiffs’ lawsuit is timely. We reverse and remand for further proceedings.

WE CONCUR:

JAMES J. WECHSLER,
Judge

MICHAEL D. BUSTAMANTE,
Chief Judge

JONATHAN B. SUTIN, Judge

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Law office seeking experienced general practicing attorney to supervise law firm division. Must have 5 plus years practice experience, be current and in good standing with the NM Bar, have no record of public discipline and have excellent Customer Service and organizational skills. Excellent benefits. Email resume to jaffelawfirm@qwest.net or mail to Administrator, The Jaffe Law Firm, P.O.Box 809, Albuquerque, NM 87103-0809.

Vacancy Notice - N.M. Supreme Court Assistant Staff Attorney
The Supreme Court is recruiting for the position of Assistant Staff Attorney. Annual Salary is $58,500, not negotiable. Medical, dental, life ins., legal, and other benefits available (value = approx. 33% of salary). Hours are 8:00 a.m. - 5:00 p.m. Start date to be negotiated. The successful candidate must possess above-average attention to detail & organizational skills, have criminal law experience, including knowledge and application of habeas corpus law, be able to manage multiple projects and produce statistics concerning workload, and develop pro se forms to be used for filing in the Supreme Court. Do you meet these qualifications? Possess a Juris Doctor degree from an ABA accredited law school; A member of the New Mexico bar in good standing; 1+ years of experience practicing law or as a judicial law clerk; Demonstrated ability to effectively communicate both orally and in writing; Thorough knowledge of New Mexico case law, constitution & statutes, Rules of Court Procedures, applicable federal law; Code of Judicial Conduct, Code of Professional Responsibility, and court structure and operations; Demonstrated ability to perform manual and electronic legal research; Ability to use initiative and judgment in working independently with supervision, while recognizing matters that should be referred to others; Maintain standards of courtesy, confidentiality, accuracy, and completeness during periods of frequent interruption; Experience with WordPerfect 8.0 and automated docketing system (FACTS); Experience interacting with elected officials and their staff. A Judicial Branch Employment Application, Letters of Interest, and Resumes should be sent to Kathleen Jo Gibson, Chief Clerk of Court, P.O. Box 848, Santa Fe, New Mexico 87504-0848. Deadline for submission is July 27, 2005, at 5:00 p.m. The Judicial Branch of Government is an Equal Opportunity Employer.

Attorney Wanted
Small AV-rated firm seeks experienced attorney interested in civil litigation, including insurance defense, employment, real estate, plaintiff cases. Must do high-quality work, use good judgment, possess strong work ethic, work efficiently, and take initiative. Send resume to Nathan H. Mann, Gallagher, Casados & Mann, P.C., 317 Commercial NE, Second Floor, Albuquerque, New Mexico 87102.
**Associate Attorneys**

We are seeking associate attorneys with three to five years of experience in civil litigation who want to broaden their litigation skills while working in a collegial, growing, mid-sized, AV rated firm. Initially, tasks will include researching the law, developing facts, writing briefs, arguing motions, and taking depositions. We are looking for attorneys with a sincere interest in the defense of employment, health, commercial, or professional liability litigation. Please send a resume and succinct writing sample to Bannerman & Williams, P.A., 2201, San Pedro NE, Building 2 Suite 207, Albuquerque, NM 87110 or Fax to 837-1800. To learn more about us, visit www.NMCounsel.com.

**Attorney - Santa Fe**

Seeking an intelligent, motivated individual with excellent research and writing skills, to work primarily in the areas of business, real estate, and insurance defense litigation. Candidate must be able to perform under pressure and to work as a positive team member. Experience preferred, but not required. Santa Fe area resident preferred. Please reply via email to freyes@simonsfirm.com or by fax to (505) 982-0185. All responses will be kept in confidence.

**Notice of Visiting Faculty Position Low Income Taxpayer Clinic University of New Mexico School of Law**

The University of New Mexico School of Law is seeking to hire a qualified tax expert to assist in teaching in the Clinical Law Program as part of a Low Income Taxpayer grant. This will be a non-tenure track visiting faculty position for the Fall semester of 2005-06 with the possibility of an extension through the Fall of 2006, depending on funding. The successful candidate will work with the clinic faculty in supervising students in contested tax cases with the IRS. In addition, the applicant will conduct training sessions for students and lawyers interested in taking pro bono low income tax cases in exchange for the training. Minimum qualifications are a J.D. degree or equivalent legal degree, a license to practice in tax court, and federal income tax training. Preferred qualifications are an LL.M. in tax; experience in state and federal tax disputes; experience and/or training in teaching, especially clinical teaching; and interest and potential in producing scholarship. To apply, send a signed letter of interest that addresses your qualifications, a curriculum vitae, and names, addresses and phone numbers of three references to: Gloria Gomez, UNM School of Law, MSC11 0670, 1 University of New Mexico, Albuquerque, NM 87131-0001. For best consideration, please submit application by July 22, 2005. Recruitment will continue until opening is filled. The University of New Mexico is an Equal Opportunity/Affirmative Action employer and educator.

**Associate Trial Attorney**

The Sixth Judicial District Attorney’s Office has an opening for an Associate Trial Attorney or Senior Trial Prosecutor for our Deming office, commencing no earlier than July 1, 2005. Applicants will be interviewed throughout June and, if necessary, into July. Salary range is expected to be approximately $38,000 to $42,000 per year, depending on experience and skills. New Mexico bar admission required. Prefer attorney with prosecution or relevant trial experience, but will consider other candidates with appropriate commitment and skills. Deming is a very enjoyable small town within easy reach of great outdoor recreational opportunities, plus good highway access to Las Cruces, El Paso, and Tucson. Interested applicants please submit your resume with a cover letter, ASAP to: Mary Lynne Newell, District Attorney, P.O. Box 1025, Silver City, New Mexico 88062; fax: 505-388-5184, attn: Mary Lynne; email mnewell@da.state.nm.us.

**Children’s Court Attorney**

The Children, Youth and Families Department is seeking to fill a vacant Children’s Court Attorney position in Albuquerque, NM. The attorney will represent the department in abuse/neglect and termination proceedings and related matters in the Albuquerque area. The ideal candidate will have experience in the practice of law totaling at least four years. New Mexico licensure required. Benefits include medical, dental, vision, paid vacation, and a retirement package. The salary range is $37,866K annually, depending on experience and qualifications. Contact Simon Romo at (505) 841-7989 or e-mail Sromo@cyfd.state.nm.us. The state of New Mexico is an EOE. Applicants need to contact their local Department of Labor office for a DOL job order number. All applications must be forwarded to Simon Romo, Managing Attorney, 1031, Lambertson Place, NE, Albuquerque, NM, 87107.

**Indian Law Attorney**

Law Office of Craig J. Dorsay seeks attorney with Indian law experience. Knowledge of employment law, business law and real estate transactions a plus. Office specializes in representing tribal governments and some individuals on a wide variety of issues, including gaming, treaty rights, natural resources, government affairs, ICWA; must have or be willing to obtain appropriate bar admissions. Appearance in a variety of federal, tribal and state courts. Substantial travel required. Small office, friendly working conditions, partnership potential. Contact Craig Dorsay at (503) 790-9060, 2121, SW Broadway, Suite 100, Portland, OR 97201, e-mail: cdorsay@involved.com.

**Associate**

Associate wanted for a medium size, Santa Fe law firm for commercial transactions. Minimum three years experience. Send resume to Office Manager, P.O. Box 1984, Santa Fe, NM 87504-1984.

**Associate Attorney**

The Albuquerque office of Lewis and Roca LLP, a southwest regional law firm, is seeking one or more associates with at least one year of commercial litigation and/or transactional experience. Compensation will be commensurate with experience as well as the regional market. Please send cover letter, resume, transcript, and representative writing sample to: Ro Saavedra, Lewis and Roca Joint Dawe LLP, 201 Third Street NW, 19th Floor, Albuquerque, NM 87102, rsaavedra@lrlaw.com or Fax to 505-764-5483.

**Paralegal**

Experienced in family law for a developing practice in Santa Fe. Bilingual preferred. Part-time leading to full-time. Please email cover letter or resume, along with salary requirements and schedule preferences to dvdesq@comcast.net.

**NOTE**

**SUBMISSION DEADLINES**

All advertising must be submitted by e-mail or fax by 5 p.m. Wednesday, two weeks prior to publication (Bulletin publishes every Monday). Advertising will be accepted for publication in the Bar Bulletin in accordance with standards and ad rates set by the editor and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The editor reserves the right to review and edit classified ads, to request that an ad be revised prior to publication or to reject any ad. Cancellations must be received by 10 a.m. on Thursday, two weeks prior to publication. For more advertising information, contact: Marcia C. Ulibarri at 505.797.6058 or e-mail ad to ads@nmbar.org or fax 505.797.6075.
Certified Paralegal Position
Insurance defense firm seeks reliable, experienced Certified Paralegal. Must be hard working, a self-starter, able to work independently and efficiently with all personnel. Please send resume with references to PO Box 92860, Abq., NM 87199-2680, Attn: Box E.

Request for Applications
City of Albuquerque
Paralegal Position
Paralegal Position - Litigation Division: This is a para-professional position requiring considerable knowledge of legal terminology and Federal and State court procedures. The position requires the ability to perform legal research, assist with trial preparation, draft memoranda, correspondence, briefs, opinions and discovery. Must have Associate of Applied Science in Paralegal Studies plus (3) years experience as a Paralegal OR National certification in Paralegal Studies plus (5) years experience as a legal secretary. Entry level salary: $32,905.60. Please apply online at www.cabq.gov. Application deadline is July 15, 2005.

Legal Support
High Desert Legal Staffing seeks legal secretaries and paralegals with strong computer skills for both temporary and permanent positions with leading firms in Albuquerque and Santa Fe. E-mail: LBrown@highdesertstaffing.com; fax (505) 881-9089; or call (505) 881-3449 for immediate interview.

Legal Secretary
Small, busy law firm is looking to hire one full time legal secretary. Our practice is primarily in the areas of Estate Planning, Probate and Elder Law. Microsoft Word experience is necessary. Excellent benefits. Please fax resume to 505-237-9440, or send to: Swaim, Schrandt & Miller, P. C., 4830 Juan Tabo NE, Suite F, Albuquerque NM 87111.

OFFICE SPACE

North Valley
Casita-Style Office Space
Quick access to downtown. Charming sole proprietor space in intimate compound setting. Over 800 SF: office, reception area, storage & copy space. For lease or sale. Only a few spaces available. Red Sky Realty owner/broker 247-3424 (office), 235-7667 (cell).

Office Space Available
Two blks. from Courthouses. 6th and Tijeras NW. Elevators, Janitorial and Utilities pd. Suite 300 @1632 sf incl 4 offices, reception and lg conf rm, skyline views. Suite 200A, 1024 sf includes 5 offices, with reception rm. Call Ernest J. Orona, broker. $13.75 psf 604-0364 or 266-8055.

Downtown
Beautiful adobe building near MLK on north I-25 on-ramp. Convenient to courthouses with free adequate parking for staff and clients. Conference room, reception room, employee lounge. Utilities and janitor service included. Broadband access, copy machine available. From $350 per month. Call Orville, (505) 867-6566; or Jon, (505) 507-5145. Oak Street Professional Bldg., 500 Oak NE.

For Rent: North Valley Offices or Entire Building
Newly renovated office suites, shared conference room, reception area, kitchen, waiting area, security system. 5 minutes from Courthouses. Rent all or part (2500”). 1901 Candelaria NW (near Rio Grande Blvd., NW) Kathleen or Adam: 459-4528.

Convenient Uptown Location
Office space for rent in business law firm suite in the City Place building. Spectacular 8th floor view of the west side with a separate secretarial workspace and filing area. Phone, conference room and kitchen facilities. 884-2400

BUSINESS OPPORTUNITIES

Taos - Solo General Practice for Sale
Well established solo practice with an 8 year track record for sale. Practice has included real estate, commercial work, civil litigation, minor criminal matters, probate and estate planning. The sale includes: excellent advertising in Names & Numbers and US West, telephone numbers, client files and list, office equipment, forms files, and great lease on office location right on main street. If interested please call (505) 737-5468 or send inquiries to D. Todd Lazar, Attorney-At-Law, P.C., P.O. Box 3228, Taos, New Mexico 87571.

American Limousine

Art Gallery Invite
James Rawley invites you to a show of his paintings in his gallery at 1014 Central SW on August 5, 2005 at 5:00 p.m. Please come!
Bill Kitts Mentor Program
Creating Partnerships for Professional Development

Who was Bill Kitts?

Albuquerque lawyer Bill Kitts was a professional who loved and respected the law. He committed time and expertise in assisting young and new lawyers. A great loss to the community, Bill Kitts was killed in an automobile accident in 1982. The Bill Kitts Mentor Program was formed in the fall of 1992 to remember and honor this dedicated attorney.

Visit www.nmbar.org and select “Attorney Services/Practice Resources,” then “Mentorship Program” to obtain mentor practice area and contact information. For more assistance, or to become a mentor, contact the State Bar at membership@nmbar.org; or call (505) 797-6033.

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