

1 SENATE BILL 233

2 **51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013**

3 INTRODUCED BY

4 John M. Sapien

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10 AN ACT

11 RELATING TO WORKERS' COMPENSATION; AMENDING SECTIONS OF THE  
12 WORKERS' COMPENSATION ACT AND A SECTION OF THE NEW MEXICO  
13 OCCUPATIONAL DISEASE AND DISABLEMENT LAW TO RAISE LIMITS FOR  
14 ATTORNEY FEES; PROVIDING FOR A PARTY WHO ACTS IN BAD FAITH IN A  
15 LEGAL ACTION TO PAY ONE HUNDRED PERCENT OF THE ADDITIONAL FEES  
16 FOR THE PREVAILING PARTY.

17  
18 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

19 SECTION 1. Section 52-1-54 NMSA 1978 (being Laws 1987,  
20 Chapter 235, Section 24, as amended) is amended to read:

21 "52-1-54. FEE RESTRICTIONS--APPOINTMENT OF ATTORNEYS BY  
22 THE DIRECTOR OR WORKERS' COMPENSATION JUDGE--DISCOVERY COSTS--  
23 OFFER OF JUDGMENT--PENALTY FOR VIOLATIONS.--

24 A. It is unlawful for any person to receive or  
25 agree to receive any fees or payment directly or indirectly in

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1 connection with any claim for compensation under the Workers'  
2 Compensation Act except as provided in this section.

3 B. In all cases where the jurisdiction of the  
4 workers' compensation administration is invoked to approve a  
5 settlement of a compensation claim under the Workers'  
6 Compensation Act, the director or workers' compensation judge,  
7 unless the claimant is represented by an attorney, may in [~~his~~]  
8 the director's or judge's discretion appoint an attorney to aid  
9 the workers' compensation judge in determining whether the  
10 settlement should be approved and, in the event of an  
11 appointment, a reasonable fee for the services of the attorney  
12 shall be fixed by the workers' compensation judge, subject to  
13 the limitation of Subsection I of this section.

14 C. In all cases where the jurisdiction of the  
15 workers' compensation administration is invoked to approve a  
16 settlement of a compensation claim under the Workers'  
17 Compensation Act and the claimant is represented by an  
18 attorney, the total amount paid or to be paid by the employer  
19 in settlement of the claim shall be stated in the settlement  
20 papers. The workers' compensation judge shall determine and  
21 fix a reasonable fee for the claimant's attorney, taking into  
22 account any sum previously paid, and the fee fixed by the  
23 workers' compensation judge shall be the limit of the fee  
24 received or to be received by the attorney in connection with  
25 the claim, subject to the limitation of Subsection I of this

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1 section.

2 D. The cost of discovery shall be borne by the  
3 party who requests it. If, however, the claimant requests any  
4 discovery, the employer shall advance the cost of paying for  
5 discovery up to a limit of three thousand dollars (\$3,000). If  
6 the claimant substantially prevails on the claim, as determined  
7 by a workers' compensation judge, any discovery cost advanced  
8 by the employer shall be paid by that employer. If the  
9 claimant does not substantially prevail on the claim, as  
10 determined by a workers' compensation judge, the employer shall  
11 be reimbursed for discovery costs advanced according to a  
12 schedule for reimbursement approved by a workers' compensation  
13 judge.

14 E. In all cases where compensation to which any  
15 person is entitled under the provisions of the Workers'  
16 Compensation Act is refused and the claimant thereafter  
17 collects compensation through proceedings before the workers'  
18 compensation administration or courts in an amount in excess of  
19 the amount offered in writing by an employer five business days  
20 or more prior to the informal hearing before the  
21 administration, the compensation to be paid the attorney for  
22 the claimant shall be fixed by the workers' compensation judge  
23 hearing the claim or the courts upon appeal in the amount the  
24 workers' compensation judge or courts deem reasonable and  
25 proper, subject to the limitation of Subsection I of this

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1 section. In determining and fixing a reasonable fee, the  
2 workers' compensation judge or courts shall take into  
3 consideration:

4 (1) the sum, if any, offered by the employer:

5 (a) before the worker's attorney was  
6 employed;

7 (b) after the attorney's employment but  
8 before proceedings were commenced; and

9 (c) in writing five business days or  
10 more prior to the informal hearing;

11 (2) the present value of the award made in the  
12 worker's favor; and

13 (3) any failure of a party to participate in a  
14 good-faith manner in informal claim resolution methods adopted  
15 by the director.

16 F. After a recommended resolution has been issued  
17 and rejected, but more than ten days before a trial begins, the  
18 employer or claimant may serve upon the opposing party an offer  
19 to allow a compensation order to be taken against ~~[him]~~ the  
20 employer or claimant for the money or property or to the effect  
21 specified in ~~[his]~~ the offer, with costs then accrued, subject  
22 to the following:

23 (1) if, within ten days after the service of  
24 the offer, the opposing party serves written notice that the  
25 offer is accepted, either party may then file the offer and

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1 notice of acceptance together with proof of service thereof,  
2 and thereupon that compensation order may be entered as the  
3 workers' compensation judge may direct. An offer not accepted  
4 shall be deemed withdrawn, and evidence thereof is not  
5 admissible except in a proceeding to determine costs. If the  
6 compensation order finally obtained by the party is not more  
7 favorable than the offer, that party shall pay the costs  
8 incurred by the opposing party after the making of the offer.  
9 The fact that an offer has been made but not accepted does not  
10 preclude a subsequent offer;

11 (2) when the liability of one party to another  
12 has been determined by a compensation order, but the amount or  
13 extent of the liability remains to be determined by further  
14 proceedings, the party adjudged liable may make an offer, which  
15 shall have the same effect as an offer made before trial if it  
16 is served within a reasonable time not less than ten days prior  
17 to the commencement of hearings to determine the amount or  
18 extent of liability;

19 (3) if the employer's offer was greater than  
20 the amount awarded by the compensation order, the employer  
21 shall not be liable for ~~[his]~~ the employer's fifty percent  
22 share of the attorney fees to be paid the worker's attorney and  
23 the worker shall pay one hundred percent of the attorney fees  
24 due to the worker's attorney; and

25 (4) if the worker's offer was less than the

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1 amount awarded by the compensation order, the employer shall  
2 pay one hundred percent of the attorney fees to be paid the  
3 worker's attorney, and the worker shall be relieved from any  
4 responsibility for paying any portion of the worker's attorney  
5 fees.

6 G. In all actions arising under the provisions of  
7 Section 52-1-56 NMSA 1978 where the jurisdiction of the  
8 workers' compensation administration is invoked to determine  
9 the question whether the claimant's disability has increased or  
10 diminished and the claimant is represented by an attorney, the  
11 workers' compensation judge or courts upon appeal shall  
12 determine and fix a reasonable fee for the services of the  
13 claimant's attorney only if the claimant is successful in  
14 establishing that [~~his~~] the claimant's disability has increased  
15 or if the employer is unsuccessful in establishing that the  
16 claimant's disability has diminished. The fee when fixed by  
17 the workers' compensation judge or courts upon appeal shall be  
18 the limit of the fee received or to be received by the attorney  
19 for services in the action, subject to the limitation of  
20 Subsection I of this section.

21 H. In determining reasonable attorney fees for a  
22 claimant, the workers' compensation judge shall consider only  
23 those benefits to the worker that the attorney is responsible  
24 for securing. The value of future medical benefits shall not  
25 be considered in determining attorney fees.

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1           I. Attorney fees, including, but not limited to,  
2 the costs of paralegal services, legal clerk services and any  
3 other related legal services costs on behalf of a claimant or  
4 an employer for a single accidental injury claim, including  
5 representation before the workers' compensation administration  
6 and the courts on appeal, shall not exceed [~~sixteen thousand~~  
7 ~~five hundred dollars (\$16,500)] twenty-two thousand five  
8 hundred dollars (\$22,500). This limitation applies whether the  
9 claimant or employer has one or more attorneys representing  
10 [~~him~~] the claimant or employer and applies as a cumulative  
11 limitation on compensation for all legal services rendered in  
12 all proceedings and other matters directly related to a single  
13 accidental injury to a claimant. The workers' compensation  
14 judge may exceed the maximum amount stated in this subsection  
15 in awarding a reasonable attorney fee if [~~he~~] the judge finds  
16 that a claimant, an insurer or an employer acted in bad faith  
17 with regard to handling the injured worker's claim and the  
18 injured worker or employer has suffered economic loss as a  
19 result. However, in no case shall this additional amount  
20 exceed [~~two thousand five hundred dollars (\$2,500)] five  
21 thousand dollars (\$5,000). As used in this subsection, "bad  
22 faith" means conduct by the claimant, insurer or employer in  
23 the handling of a claim that amounts to fraud, malice,  
24 oppression or willful, wanton or reckless disregard of the  
25 rights of the worker or employer. Any determination of bad~~~~

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1 faith shall be made by the workers' compensation judge through  
2 a separate fact-finding proceeding. Notwithstanding the  
3 provisions of Subsection J of this section, the party found to  
4 have acted in bad faith shall pay one hundred percent of the  
5 additional fees awarded for representation of the prevailing  
6 party in a bad faith action.

7 J. Except as provided [~~for~~] in Paragraphs (3) and  
8 (4) of Subsection F of this section, the payment of a  
9 claimant's attorney fees determined under this section shall be  
10 shared equally by the worker and the employer.

11 K. It is unlawful for any person except a licensed  
12 attorney to receive or agree to receive any fee or payment for  
13 legal services in connection with any claim for compensation  
14 under the Workers' Compensation Act.

15 L. Nothing in this section applies to agents,  
16 excluding attorneys, representing employers, insurance carriers  
17 or the subsequent injury fund in any matter arising from a  
18 claim under the Workers' Compensation Act.

19 M. No attorney fees shall be paid until the claim  
20 has been settled or adjudged.

21 N. Every person violating the provisions of this  
22 section is guilty of a misdemeanor and upon conviction shall be  
23 fined not less than fifty dollars (\$50.00) or more than five  
24 hundred dollars (\$500), to which may be added imprisonment in  
25 the county jail for a term not exceeding ninety days.

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1           O. Nothing in this section shall restrict a  
2 claimant from being represented before the workers'  
3 compensation administration by a nonattorney as long as that  
4 nonattorney receives no compensation for that representation  
5 from the claimant."

6           SECTION 2. Section 52-3-47 NMSA 1978 (being Laws 1987,  
7 Chapter 235, Section 41, as amended) is amended to read:

8           "52-3-47. FEE RESTRICTIONS--APPOINTMENT OF ATTORNEYS BY  
9 THE DIRECTOR OR WORKERS' COMPENSATION JUDGE--DISCOVERY COSTS--  
10 OFFER OF JUDGMENT--PENALTY FOR VIOLATIONS.--

11           A. It is unlawful for any person to receive or  
12 agree to receive any fees or payment directly or indirectly in  
13 connection with any claim for compensation under the New Mexico  
14 Occupational Disease Disablement Law except as provided in this  
15 section.

16           B. In all cases where the jurisdiction of the  
17 workers' compensation administration is invoked to approve a  
18 settlement of a compensation claim under the New Mexico  
19 Occupational Disease Disablement Law, the director or workers'  
20 compensation judge, unless the claimant is represented by an  
21 attorney, may in ~~his~~ the director's or judge's discretion  
22 appoint an attorney to aid the workers' compensation judge in  
23 determining whether the settlement should be approved. In the  
24 event of such an appointment, a reasonable fee for the services  
25 of the attorney shall be fixed by the workers' compensation

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1 judge, subject to the limitation of Subsection I of this  
2 section.

3 C. In all cases where the jurisdiction of the  
4 workers' compensation administration is invoked to approve a  
5 settlement of a compensation claim under the New Mexico  
6 Occupational Disease Disablement Law and the claimant is  
7 represented by an attorney, the total amount paid or to be paid  
8 by the employer in settlement of the claim shall be stated in  
9 the settlement papers, and the workers' compensation judge  
10 shall determine and fix a reasonable fee for the claimant's  
11 attorney, taking into account any sum previously paid. The fee  
12 fixed by the workers' compensation judge shall be the limit of  
13 the fee received or to be received by the attorney in  
14 connection with the claim, subject to the limitation of  
15 Subsection I of this section.

16 D. The cost of discovery shall be borne by the  
17 party who requests it. If, however, the claimant requests any  
18 discovery, the employer shall advance the cost of paying for  
19 discovery up to a limit of [~~one thousand dollars (\$1,000)~~]  
20 three thousand dollars (\$3,000). If the claimant substantially  
21 prevails on the claim, as determined by a workers' compensation  
22 judge, any discovery cost advanced by the employer shall be  
23 paid by that employer. If the claimant does not substantially  
24 prevail on the claim, as determined by a workers' compensation  
25 judge, the employer shall be reimbursed for discovery costs

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1 advanced according to a schedule for reimbursement approved by  
2 a workers' compensation judge.

3 E. In all cases where compensation to which any  
4 person is entitled under the provisions of the New Mexico  
5 Occupational Disease Disablement Law is refused and the  
6 claimant thereafter collects compensation through proceedings  
7 before the workers' compensation administration or courts in an  
8 amount in excess of the amount offered in writing by an  
9 employer five business days or more prior to the informal  
10 hearing before the administration, ~~[then]~~ the compensation to  
11 be paid the attorney for the claimant shall be fixed by the  
12 workers' compensation judge hearing the claim or the courts  
13 upon appeal in the amount the workers' compensation judge or  
14 courts deem reasonable and proper, subject to the limitation of  
15 Subsection I of this section. In determining and fixing a  
16 reasonable fee, the workers' compensation judge or courts shall  
17 take into consideration:

18 (1) the sum, if any, offered by the employer:

19 (a) before the employee's attorney was  
20 employed;

21 (b) after the attorney's employment but  
22 before proceedings were commenced; and

23 (c) in writing five business days or  
24 more prior to the informal hearing;

25 (2) the present value of the award made in the

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1 employee's favor; and

2 (3) the failure of a party to participate in a  
3 good-faith manner in informal claim resolution methods adopted  
4 by the director.

5 F. After a recommended resolution has been issued  
6 and rejected, but more than ten days before a trial begins, the  
7 employer or claimant may serve upon the opposing party an offer  
8 to allow a compensation order to be taken against ~~him~~ the  
9 employer or claimant for the money or property or to the effect  
10 specified in ~~his~~ the offer, with costs then accrued, subject  
11 to the following:

12 (1) if, within ten days after the service of  
13 the offer, the opposing party serves written notice that the  
14 offer is accepted, either party may then file the offer and  
15 notice of acceptance together with proof of service thereof,  
16 and thereupon that compensation order may be entered as the  
17 workers' compensation judge may direct. An offer not accepted  
18 shall be deemed withdrawn, and evidence thereof is not  
19 admissible except in a proceeding to determine costs. If the  
20 compensation order finally obtained by the party is not more  
21 favorable than the offer, that party ~~must~~ shall pay the costs  
22 incurred by the opposing party after the making of the offer.  
23 The fact that an offer has been made but not accepted does not  
24 preclude a subsequent offer;

25 (2) when the liability of one party to another

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1 has been determined by a compensation order, but the amount or  
2 extent of the liability remains to be determined by further  
3 proceedings, the party adjudged liable may make an offer, which  
4 shall have the same effect as an offer made before trial if it  
5 is served within a reasonable time not less than ten days prior  
6 to the commencement of hearings to determine the amount or  
7 extent of liability;

8 (3) if the employer's offer was greater than  
9 the amount awarded by the compensation order, the employer  
10 shall not be liable for [~~his~~] the employer's fifty-percent  
11 share of the [~~attorneys'~~] attorney fees to be paid the worker's  
12 attorney and the worker shall pay one hundred percent of the  
13 [~~attorneys'~~] attorney fees due to the worker's attorney; and

14 (4) if the worker's offer was less than the  
15 amount awarded by the compensation order, the employer shall  
16 pay one hundred percent of the [~~attorneys'~~] attorney fees to be  
17 paid the worker's attorney, and the worker shall be relieved  
18 from any responsibility for paying any portion of the worker's  
19 attorney fees.

20 G. In all actions arising under the provisions of  
21 Section 52-3-35 NMSA 1978, where the jurisdiction of the  
22 workers' compensation administration is invoked to determine  
23 the question of whether the claimant's disablement has  
24 terminated and the claimant is represented by an attorney, the  
25 workers' compensation judge or courts upon appeal shall

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1 determine and fix a reasonable fee for the services of the  
2 claimant's attorney only if the employer is unsuccessful in  
3 establishing that the claimant's disablement has terminated.  
4 The fee when fixed by the workers' compensation judge or courts  
5 upon appeal shall be taxed as part of the costs against the  
6 employer and shall be the limit of the fee received or to be  
7 received by the attorney for services in the action, subject to  
8 the limitation of Subsection I of this section.

9 H. In determining reasonable [~~attorneys'~~] attorney  
10 fees for a claimant, the workers' compensation judge shall  
11 consider only those benefits to the employee that the attorney  
12 is responsible for securing. The value of future medical  
13 benefits shall not be considered in determining [~~attorneys'~~]  
14 attorney fees.

15 I. [~~Attorneys'~~] Attorney fees, including, but not  
16 limited to, the costs of paralegal services, legal clerk  
17 services and any other related legal services costs on behalf  
18 of a claimant or an employer for a single disablement claim,  
19 including representation before the workers' compensation  
20 administration and the courts on appeal, shall not exceed  
21 [~~twelve thousand five hundred dollars (\$12,500)]~~ twenty-two  
22 thousand five hundred dollars (\$22,500). This limitation  
23 applies whether the claimant or employer has one or more  
24 attorneys representing [~~him~~] the claimant or employer and  
25 applies as a cumulative limitation on compensation for all

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1 legal services rendered in all proceedings and other matters  
2 directly related to a single occupational disease of a  
3 claimant. The workers' compensation judge may exceed the  
4 maximum amount stated in this subsection in awarding a  
5 reasonable [~~attorneys'~~] attorney fee if [~~he~~] the judge finds  
6 that a claimant, an insurer or an employer acted in bad faith  
7 with regard to handling the disabled employee's claims and the  
8 employer or disabled employee has suffered economic loss as a  
9 result thereof. However, in no case shall this additional  
10 amount exceed [~~two thousand five hundred dollars (\$2,500)]~~ five  
11 thousand dollars (\$5,000). As used in this subsection, "bad  
12 faith" means conduct by the claimant, insurer or employer in  
13 the handling of a claim that amounts to fraud, malice,  
14 oppression or willful, wanton or reckless disregard of the  
15 rights of the employee or employer. Any determination of bad  
16 faith shall be made by the workers' compensation judge through  
17 a separate fact-finding proceeding. Notwithstanding the  
18 provisions of Subsection J of this section, the party found to  
19 have acted in bad faith shall pay one hundred percent of the  
20 additional fees awarded for representation of the prevailing  
21 party in a bad faith action.

22 J. Except as provided [~~for~~] in Paragraphs (3) and  
23 (4) of Subsection F of this section, the payment of a  
24 claimant's [~~attorneys'~~] attorney fees determined under this  
25 section shall be shared equally by the employee and the

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1 employer.

2 K. It is unlawful for any person except a licensed  
3 attorney to receive or agree to receive any fee or payment for  
4 legal services in connection with any claim for compensation  
5 under the New Mexico Occupational Disease Disablement Law.

6 L. Nothing in this section applies to agents,  
7 excluding attorneys, representing employers, insurance carriers  
8 or the subsequent injury fund in any matter arising from a  
9 claim under the New Mexico Occupational Disease Disablement  
10 Law.

11 M. No [~~attorneys~~] attorney fees shall be paid  
12 until the claim has been settled or adjudged.

13 N. Every person violating the provisions of this  
14 section [~~shall be~~] is guilty of a misdemeanor and upon  
15 conviction shall be fined not less than fifty dollars (\$50.00)  
16 or more than five hundred dollars (\$500), to which may be added  
17 imprisonment in the county jail for a term not exceeding ninety  
18 days.

19 O. Nothing in this section shall restrict a  
20 claimant from being represented before the workers'  
21 compensation administration by a nonattorney as long as that  
22 nonattorney receives no compensation for representation from  
23 the claimant."