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

7 **ELIZABETH GRIEGO-MELENDZ,**

8 Worker-Appellant,

9 v.

NO. 29,719

10 **SOUPER SALAD, INC. and**
11 **AIG DOMESTIC CLAIMS, INC.,**

12 Employer/Insurer-Appellee.

13 **APPEAL FROM THE NEW MEXICO WORKERS' COMPENSATION**
14 **ADMINISTRATION**

15 **Gregory D. Griego, Workers' Compensation Judge**

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1 **MEMORANDUM OPINION**

2 **WECHSLER, Judge.**

3 Worker-Appellant Elizabeth Griego-Melendez (Worker) appeals from a
4 compensation order denying her claims. We issued a notice of proposed summary
5 disposition, proposing to uphold the decision of the Workers' Compensation Judge
6 (WCJ). Worker has filed a memorandum in opposition, which we have duly
7 considered. Because we remain unpersuaded, we affirm.

8 To briefly summarize the subject of this appeal, Worker's claims were denied
9 as a result of the WCJ's determination that her injuries were from an accident that did
10 not arise out of her employment. [RP 100, 103] Worker challenges this determination
11 on appeal.

12 As we observed in the notice of proposed summary disposition, there are
13 several published authorities that provide substantial guidance: *Williams v. City of*
14 *Gallup*, 77 N.M. 286, 421 P.2d 804 (1966); *Luvaul v. A. Ray Barker Motor Co.*, 72
15 N.M. 447, 384 P.2d 885 (1963); and *Christensen v. Dysart*, 42 N.M. 107, 76 P.2d 1
16 (1938), *overruled on other grounds recognized by Sanchez v. Bd. of County Comm'rs*,
17 63 N.M. 85, 92, 313 P.2d 1055, 1060 (1957). In each of those cases, as in this case,
18 the claimants sustained serious injuries after idiopathic falls to the ground at their
19 places of work.

1 As the *Williams* court explained, “[f]or an injury to ‘arise out of’ the
2 employment, there must be a showing that the injury was caused by a risk to which
3 the plaintiff was subjected by his employment. The employment must contribute
4 something to the hazard of the fall.” 77 N.M. at 289, 421 P.2d at 806. “The basic
5 rule, on which there is now general agreement, is that the effects of such a fall are
6 compensable if the employment places the employee in a position increasing the
7 dangerous effects of such a fall, such as on a height, near machinery or sharp corners,
8 or in a moving vehicle.” *Id.* (internal quotation marks and citation omitted).

9 In both *Williams* and *Christensen*, the injuries suffered in the course of the falls
10 were held to be compensable because work-place conditions increased the harmful
11 effects of the falls. Specifically, in *Christensen* the employee was on an elevated
12 platform, 42 N.M. at 108, 76 P.2d at 2; in *Williams*, the worker was seated on a
13 motorized scooter which was positioned on a ramp, 77 N.M. at 288, 421 P.2d at 806.

14 In *Luvaul*, by contrast, the employee experienced a dizzy spell, fell, and
15 suffered a skull fracture when he hit the floor. 72 N.M. at 448, 384 P.2d at 886. Our
16 Supreme Court observed, “we have a case in which the employee falls, while at work,
17 on an ordinary ground-level, concrete floor, and, in the course of the fall, hits no
18 machinery or other objects, nor does he fall from a platform or roof to the ground.”
19 *Id.* at 453, 384 P.2d at 889. Because “[a]ny person who falls . . . will strike the ground

1 or floor,” the employment contributed nothing to the hazard of the fall. *Id.* at 455, 384
2 P.2d at 890. The *Luvaul* court therefore held that the injury did not arise out of the
3 employment and was not compensable. *Id.*

4 As we explained in the notice of proposed summary disposition, we share the
5 WCJ’s opinion [RP 104] that this case is essentially controlled by *Luvaul*, rather than
6 either *Williams* or *Christensen*. Unlike *Williams* and *Christensen*, Worker did not fall
7 from a platform or some instrumentality that increased the risk of harm. Instead, as
8 in *Luvaul*, she appears to have simply fallen from a standing position to the level
9 floor. Under such circumstances, the employment could not be said to have
10 contributed anything to the hazard of the fall.

11 Throughout her memorandum in opposition, Worker now takes the position that
12 she hit her head on a table, rather than merely falling to the floor. [MIO 1-4, 6, 9, 14]
13 Worker argues that this circumstance renders *Luvaul* inapplicable and her injuries
14 compensable. [MIO 8-9] We are unpersuaded.

15 First, we note that Worker did not take a clear position below with respect to
16 the table. Instead, she consistently adopted an either/or approach, contending that she
17 might have hit her head on the table or merely have fallen to the floor. [DS 1-2; RP
18 84, 88] As such, Worker arguably waived any argument with respect to this matter
19 on appeal. *See Sec. Pac. Fin. Servs. v. Signfilled Corp.*, 1998-NMCA-046, ¶ 18, 125

1 N.M. 38, 956 P.2d 837 (observing that a party waived any appellate argument with
2 respect to an issue upon which he failed to submit specific findings at the district court
3 level). Moreover, even if Worker’s ambiguous request for a finding could be said to
4 have adequately presented the question, the WCJ’s failure to enter a finding in
5 Worker’s favor and its ultimate determination on the merits signify implicit rejection.
6 *See Carpenter v. Ark. Best Corp.*, 112 N.M. 22, 27-28, 810 P.2d 1242, 1247-48 (Ct.
7 App. 1990) (observing that when a WCJ does not make a specific finding on an issue,
8 despite a request, the legal effect is a finding against the party with the burden of
9 proof), *rev’d on other grounds*, 112 N.M. 1, 2, 810 P.2d 1221, 1222 (1991);
10 *Pennington v. Chino Mines*, 109 N.M. 676, 679, 789 P.2d 624, 627 (Ct. App. 1990)
11 (holding that “express rejection of findings not adopted and . . . failure to include
12 findings [on an issue] indicate rejection of the factual basis for [the] claimant’s
13 argument”).

14 Second, we disagree with Worker’s repeated assertions that the evidence
15 indicating that she had hit her head on a table was “uncontroverted” and “undisputed.”
16 [MIO 1, 3, 14] As support for her assertions in this regard, Worker relies on the
17 deposition testimony of a witness, Pedro Hernandez-Barcaldo. [MIO 1-2, 6]
18 However, the WCJ expressly stated that the deposition testimony of Mr. Hernandez-
19 Barcaldo was “not considered” below because it was objectionable in some sense.

1 [RP 80] Worker has neither supplied any information about the basis for the WCJ's
2 evidentiary ruling, nor challenged that ruling on appeal. As a consequence, we
3 presume that the deposition testimony was properly excluded. *See Sandoval v. Baker*
4 *Hughes Oilfield Ops., Inc.*, 2009-NMCA-095, ¶ 65, 146 N.M. 853, 215 P.3d 791
5 (“Upon a doubtful or deficient record, every presumption is indulged in favor of the
6 correctness and regularity of the trial court’s decision, and the appellate court will
7 indulge in reasonable presumptions in support of the order entered.” (internal
8 quotation marks and citation omitted)).

9 Moreover, it appears that the evidence supported conflicting inferences.
10 Several witnesses appear to have reported that Worker simply fell to the floor. [DS
11 1; RP 15, 91] Based on this evidence “and the reasonable inferences arising
12 therefrom,” the WCJ could reasonably have determined that Worker merely stuck her
13 head on the floor, without having hit her head on a table, such that her injury did not
14 arise out of her employment. *Garcia v. Borden, Inc.*, 115 N.M. 486, 491-92, 853 P.2d
15 737, 742-43 (Ct. App. 1993); *see also Tom Growney Equip. Co. v. Jouett*,
16 2005-NMSC-015, ¶ 13, 137 N.M. 497, 113 P.3d 320 (“Where the testimony is
17 conflicting, the issue on appeal is not whether there is evidence to support a contrary
18 result, but rather whether the evidence supports the findings of the trier of fact.”
19 (internal quotation marks and citation omitted)). We will not disturb this implicit

1 determination on appeal. *See Meyers v. W. Auto*, 2002-NMCA-089, ¶ 22, 132 N.M.
2 675, 54 P.3d 79 (“Unless clearly erroneous or deficient, findings of the trial court will
3 be construed so as to uphold a judgment rather than to reverse it.” (internal quotation
4 marks and citation omitted)); *Gallegos v. City of Albuquerque*, 115 N.M. 461, 464,
5 853 P.2d 163, 166 (Ct. App. 1993) (observing that it is for the WCJ, not the appellate
6 court, to weigh the evidence).

7 In her memorandum in opposition, Worker also renews her argument that this
8 case should be distinguished from *Luvaul* on grounds that she did not have a prior
9 history of dizzy spells. [MIO 8] However, as we previously observed in the notice
10 of proposed summary disposition and as the foregoing discussion indicates, this is a
11 distinction without a difference. Worker’s prior history is not material to our analysis.
12 Rather, it is the existence of some enhanced or increased hazard to which the claimant
13 was subjected by virtue of the employment which is critical.

14 Worker also continues to argue that this case should be controlled by *Williams*
15 because in both cases the injuries were suffered after an idiopathic fall to the floor at
16 the workplace. [MIO 5-6] However, as previously stated, the distinguishing feature
17 in *Williams* was the use of the motor scooter on the ramp, which “contributed
18 something to the hazard of the fall,” such that the accident could be said to have arisen
19 out of the employment. 77 N.M. at 290, 421 P.2d at 807. In this case, as previously

1 stated, there was no instrumentality or condition at the workplace that could be said
2 to have contributed to the hazard of the fall. This state of affairs renders *Williams*
3 distinguishable and *Luvaul* applicable.

4 Finally, in reliance on numerous out-of-state authorities, we understand Worker
5 to encourage the Court to abandon the principles articulated in *Williams*, *Luvaul*, and
6 *Christensen*, and instead to adopt the position that any idiopathic fall at the workplace
7 should be compensable, regardless of whether any condition or instrumentality could
8 be said to have contributed to the risk of the fall. [MIO 9-14] We are not inclined to
9 depart from our long-standing jurisprudence, particularly in light of the fact that the
10 controlling authorities were decided by the New Mexico Supreme Court. *See*
11 *Aguilera v. Palm Harbor Homes, Inc.*, 2002-NMSC-029, ¶ 6, 132 N.M. 715, 54 P.3d
12 993 (stating that the Court of Appeals remains bound by Supreme Court precedent).

13 Accordingly, for the reasons stated, we affirm.

14 **IT IS SO ORDERED.**

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16 **JAMES J. WECHSLER, Judge**

17 **WE CONCUR:**

18 _____
19 **JONATHAN B. SUTIN, Judge**

1

2 **LINDA M. VANZI, Judge**