

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JESUS DIAZ,)
)
 Claimant,)
)
 v.)
)
 FRANKLIN BUILDING SUPPLY,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST INSURANCE)
 CORPORATION,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2006-507999

**FINDINGS OF FACT,
CONCLUSION OF LAW,
AND RECOMMENDATION**

Filed: November 20, 2009

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise, Idaho, on April 10, 2009. Claimant, Jesus Diaz, was present in person and represented by Brett Fox, of Boise. Defendant Employer, Franklin Building Supply (Franklin), and Defendant Surety, Liberty Northwest Insurance Corporation, were represented by Kent Day, also of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on September 20, 2009.

ISSUE

The issue to be decided is Claimant’s permanent disability in excess of impairment.

CONTENTIONS OF THE PARTIES

Claimant relies upon the opinion of vocational expert Barbara Nelson and contends that he suffers permanent disability of 40%, inclusive of 6% permanent impairment, attributable to his industrial accident and resulting permanent physical restrictions.

Defendants acknowledge Claimant's industrial accident and have paid medical and permanent partial impairment benefits related thereto. However, Defendants assert that Claimant is not entitled to any permanent partial disability beyond impairment because his loss of earning capacity is due to his status as an undocumented worker, rather than to any impairment or restrictions resulting from his industrial accident. Defendants' vocational expert, Mary Barros-Bailey, Ph.D., opined hypothetically that Claimant suffers 23% disability, including impairment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant, Claimant's wife, Esperanza Teran Enriquez, and Richard Lierz, taken at the April 10, 2009, hearing;
3. Claimant's Exhibits 1 through 7, admitted at hearing;
4. Defendants' Exhibits A through M, admitted at hearing; and
5. Franklin's Supervisor's Injury Investigation Report dated October 6, 2006, offered by Claimant on April 15, 2009, admitted into evidence pursuant to the Commission's May 5, 2009 Order on Claimant's Motion to Augment Record, and hereby re-designated as Claimant's Exhibit 8.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in 1958 and was 51 years old at the time of the hearing. He is right hand dominant. He does not speak, read, or write English. Claimant is married and has four children. He was raised in Sonora, Mexico, where he is known as Victor Manuel Lopez-Bizcarra. He completed high school in Mexico and then obtained a technical degree in diesel mechanics. He worked on the family farm planting, irrigating, weeding, and harvesting. In Sonora, Claimant also worked for three years as the Commander of Public Safety, performing the work of a police officer: checking documents and jailing lawbreakers. He earned approximately \$800 per month. Claimant then returned to working at the family farm, where he earned \$600 to \$700 per month.

2. Franklin is a building supplier in Boise that, at times, employs up to 100 people in its truss plant. Rick Lierz is Franklin's Boise regional manager. James Gill is the production supervisor for Franklin's truss plant and is responsible for hiring and discipline. Abel Lima is the working lead man in the truss plant. Lima is bilingual and communicates Gill's decisions and instructions to Franklin's Spanish-speaking employees.

3. Lierz testified that Franklin follows the U.S. Department of Justice guidelines in hiring employees by requiring prospective employees to fill out an I-9 Form and provide proof of their ability to legally work in the U.S. Franklin inspects the prospective employee's original INS card and evaluates whether it appears authentic and unaltered. Franklin retains a photocopy of the card. Franklin hires only applicants whose documents look genuine; applicants whose documents look suspicious or altered are not considered. Franklin does not otherwise conduct any type of investigation, believing that to look further into an applicant's legal documents when they appear genuine could be deemed discriminatory. Franklin does not knowingly hire undocumented applicants.

4. Claimant came to the United States illegally in approximately 2004. On the street, Claimant bought a fictitious resident alien card and a fictitious permanent resident card bearing the name of Jesus Diaz-Nevarez and containing the false declaration that Claimant had been a U.S. resident since February 9, 1992. Since then Claimant has been known as Jesus Diaz. He lived in Phoenix for one year and performed landscaping work. He then moved to Idaho where he worked in painting preparation for about one year. Claimant testified his ability to obtain work was not hampered by his undocumented status.

5. In early 2005, Claimant applied for work at Franklin. A friend of Claimant's filled out the application, falsely representing that Claimant was legally available for work in the U.S. Claimant did not read the application, but he signed it. Claimant admitted at hearing that he did not tell the truth about his identity or his real name when he applied at Franklin. Gill reviewed Claimant's application, examined Claimant's fictitious resident alien card, and finding nothing altered or suspicious, hired Claimant. In March 2005, Claimant began working at Franklin in the truss plant earning \$7.50 per hour. Gill spoke only English and thus did not interact extensively with Claimant. Abel Lima provided or relayed most instructions to Claimant regarding his daily work assignments. Claimant believed that Lima was his supervisor. Claimant testified that Franklin employed 40 to 50 undocumented workers in 2006 and that Lima was aware that many or most of these, including Claimant himself, were undocumented. Claimant enjoyed working at Franklin and was named employee of the month on two occasions.

6. On March 23, 2006, Claimant was working at Franklin when he tripped and fell from a table, injuring his left shoulder, knee, and spine. At the time of his accident, he was earning \$7.50 per hour. Defendants' Exhibit J, p. 137. Claimant received medical treatment, including physical therapy and injections, without significant improvement. In January 2007, Michael Curtin, M.D., performed left shoulder subacromial decompression with Mumford

procedure. Defendants paid for Claimant's medical treatment. Dr. Curtin rated Claimant's permanent impairment at 4% of the whole person. Rodde Cox, M.D., rated Claimant's permanent impairment at 6% of the whole person due to his industrial accident. Defendants have paid Claimant permanent partial impairment benefits. Dr. Curtin has permanently restricted Claimant to lifting no more than 10 pounds above shoulder level and lifting no more than 40 pounds between waist and shoulder level. Claimant has no lifting restrictions from the ground to waist level. Dr. Cox concurred in these restrictions.

7. After Claimant's accident, Surety notified Franklin that Claimant's name and social security number did not match. Franklin asked Claimant for clarification of the discrepancy. Claimant provided nothing to resolve the discrepancy and Franklin then terminated Claimant's employment as he could not establish his capacity to legally work in the U.S.

8. At hearing, Claimant testified that he continued to experience shoulder and neck pain limiting his activities of daily living. He testified that he has difficulty changing his clothes, washing, putting on a belt, or shaving. He testified that he could not return to his prior work duties at Franklin given his shoulder pain and the permanent restrictions Dr. Curtin imposed. Claimant also testified he could not return to work on his family farm in Mexico because of his arm.

9. Claimant has not looked for work since his accident at Franklin. He testified that he has been offered work painting and hanging sheetrock, but could not accept such work because of his shoulder. Claimant has not applied for a change in status to legally work or remain in the U.S.

10. Having observed Claimant at hearing and reviewed the evidence, the Referee finds that Claimant is generally credible. However, his prior false representations about his identity and legal employability are clearly established.

DISCUSSION AND FURTHER FINDINGS

11. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

12. **Permanent Disability.** "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant.

13. Claimant herein argues that he is entitled to disability in excess of impairment; first, because Franklin's lead man, Abel Lima, was effectively Claimant's supervisor and knew

that Claimant was an undocumented worker and ratified his ongoing employment and thus his right to disability benefits; and second, by virtue of the statutory definition of an employee.

14. Lima's knowledge. Lierz's testimony establishes that Franklin would not have hired Claimant but for Claimant's illegal conduct in presenting fraudulent identification. However, Claimant asserts he reasonably believed Abel Lima was his supervisor at Franklin and that Lima knew Claimant was undocumented and could not legally work at Franklin. He argues that Franklin is thus charged with notice of his undocumented status and cannot now deny his claim for permanent disability benefits. However, regardless of Franklin's knowledge subsequent to Claimant's hiring, Claimant's permanent disability must still satisfy statutory requirements. Even if Defendants were estopped from contesting Claimant's alleged permanent disability, this would not automatically validate Claimant's assertions of permanent disability, nor relieve the Commission of its duty to administer the Idaho Workers' Compensation Act according to statutory mandates.¹

15. Statutory definition and mandates. Claimant asserts, and Defendants do not dispute, that Idaho's Workers' Compensation Act provides benefits for illegal workers. Idaho Code § 72-204(2) declares: "The following shall constitute employees in private employment and their employers subject to the provisions of this law: ... (2) A person, including a minor, whether lawfully or unlawfully employed, in the service of an employer..." (Emphasis supplied.) Defendants acknowledge this definition and have paid Claimant medical benefits and permanent impairment benefits for his work injury. However, Defendants assert that no permanent disability in excess of impairment is due Claimant because his undocumented status entirely precludes him from work in the U.S. labor market. Claimant asserts that his claim for

¹ Even after the entry of a default, the Commission reviews the evidence to determine whether a claimant has satisfied his burden of proving a prima facie case. JRP 6(B).

permanent disability is not barred because Defendants have failed to show a causal connection between his illegal conduct and his work injury. However, Defendants bear no burden of proof on the issue herein. Claimant bears the burden of proving permanent disability in excess of impairment. McCabe v. JoAnn Stores, Inc., 145 Idaho 91, 175 P.3d 780 (2007).

16. As noted above “‘permanent disability’ ... results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected.” Idaho Code § 72-423 (emphasis supplied). “‘Evaluation (rating) of permanent disability’ is an appraisal of the injured employee’s present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors.” Idaho Code § 72-425 (emphasis supplied). As the Idaho Supreme Court has noted: “[T]he test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is ‘whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant’s capacity for gainful activity.’” Graybill v. Swift & Company, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988), quoting Bennett v. Clark Hereford Ranch, 106 Idaho 438, 440-441, 680 P.2d 539, 541-542 (1984) (emphasis supplied). Thus, the permanent impairment from an industrial accident must cause, at least in part, claimant’s reduced earning capacity to be recognized as a permanent disability under the statutory scheme.

17. The Commission, on occasion, encounters circumstances where a claimant suffers permanent impairment from an industrial accident, but the impairment does not cause any actual reduced earning capacity. Thus, there is no permanent disability beyond impairment. A common illustration is when the functional limitations from a claimant’s permanent impairment caused by an industrial accident are overshadowed and essentially rendered moot by equally or more limiting non-industrial factors.

18. In Colby v. WalMart Stores, Inc., 2007 IIC 0065, the Commission addressed Colby's claim for permanent disability due to her industrial low back injury beyond her 4% permanent impairment. The Commission found no permanent disability in excess of impairment noting: "[T]he medical restrictions arising from Claimant's congenital hip dysplasia exclude her from the same positions excluded by the restrictions arising from her industrial back injury. Thus Claimant's restrictions from her industrial injury have no effective impact on her actual ability to engage in gainful employment." Similarly, in Casper v. Idaho Falls Care Center, 2006 IIC 0683, the Commission found no permanent disability in excess of impairment where "Claimant's most onerous limitations arise from her non-industrial gynecological condition. The restrictions imposed ... due to Claimant's gynecological condition entirely eclipse and exceed the restrictions imposed due to Claimant's industrial back injury."

19. Even more relevant to the present controversy is Ruiz v. Blaine Larsen Farms, Inc., 2006 IIC 0314. In Ruiz, the Commission determined that an undocumented worker was not entitled to permanent disability benefits beyond impairment noting:

By his own testimony, Claimant has not actively sought work in the U.S. since his return in 2004. His decision not to look for work had nothing to do with his injury or the impairment that resulted from the injury. Claimant's reasons for not looking for work were either that he was thinking about going back to Mexico or that he knew he did not have the documents needed in order to work in the U.S. Both of those reasons constitute volitional decisions made by Claimant to remove himself from the labor market. Claimant's loss of earning capacity at the time of hearing was not related in any way to his injury or his impairment.

20. Idaho labor market. In the present case, Claimant openly acknowledges that he is present illegally in the U.S. and has no legal access to the Idaho or U.S. labor markets. Claimant has made no effort to find employment since his accident and admits that he has not applied to obtain the legal right to work in the U.S. As in Ruiz, Claimant's loss of earning capacity herein

is related to his volitional decisions arising from his undocumented status and not to his industrial injury or impairment.

21. Claimant urges the Commission to consider his probable future earning capacity as if he had access to the U.S. labor market, or at least a portion thereof.² However, Claimant offers no assertion, let alone assurance, that he will legally access the U.S. labor market in the reasonably foreseeable future, and the Commission will not presume future illegal access.

22. The foundational assumption implicit in all of the Commission's permanent disability determinations is that future earning capacity is evaluated according to a claimant's ability to engage in lawful—rather than unlawful—gainful activity. Past Commission decisions do not discuss any claimant's earning capacity by means of shop-lifting, drug trafficking, identity theft, illicit gambling, internet fraud, poaching, Ponzi schemes, or similarly illegal but potentially gainful activities—all of which the Commission recognizes exist. The Commission does not evaluate permanent disability based upon presumptions of future illegal conduct. To do otherwise would offend justice, condone illegal activity, and dramatically alter the meaning and evaluation of disability.

23. Claimant argues that Defendants are rewarded for hiring undocumented workers and effectively obtain a windfall if permanent disability is denied. However, allowing permanent disability in these circumstances effectively rewards Claimant's illegal conduct based upon the presumption of his continued illegal conduct and perhaps the illegal conduct of future employers.

24. Mexico labor market. Claimant also argues that he has suffered permanent disability in his labor market in Mexico, for which he should be compensated by Defendants.

² Claimant was earning \$7.50 per hour at the time of his industrial accident. The current Idaho and Federal minimum wage rate is \$7.25 per hour—a difference of approximately 3%.

25. In Davaz v. Priest River Glass Co. Inc., 125 Idaho 333, 870 P.2d 1292 (1994), the Court considered whether the “open labor market within a reasonable geographic area considering all the personal and economic circumstances of the employee...” Idaho Code § 72-430(1), should be determined “from the place the injury occurred, the place the claimant resided at the time the injury occurred, or the place the claimant resides at the time of hearing.” Davaz at 336, 870 P.2d at 1295. The Court concluded that generally, “under Idaho Code § 72-430(1), the Industrial Commission should consider the market in which a claimant resides at the time of the hearing as the axis from which the scope of a ‘reasonable geographic area’ is defined.” Davaz, at 338, 870 P.2d at 1297.

26. At hearing, Claimant herein testified that Boise is his home and that he plans to stay in Boise. Sonora, Mexico is not a labor market “within a reasonable geographical area” as contemplated by Idaho Code § 72-430 given Claimant’s industrial accident in Boise and his continued residence in Boise.³

27. When a claimant produces no significant evidence of disability in excess of permanent impairment, an award in excess of impairment may not be sustained. Graybill v. Swift & Company, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). Claimant herein has failed to bear his burden of proof.

CONCLUSION OF LAW

Claimant has not proven he suffers any permanent disability in excess of impairment.

³ Even if Claimant’s permanent disability were to be evaluated by reference to a labor market in Mexico, Claimant has provided little evidence regarding that labor market. The Commission professes no expertise concerning labor markets in Mexico and neither of the parties’ vocational experts provided any useful information regarding any labor market in Mexico. Claimant provided very limited and dated information that he could not return to his prior farm work or law enforcement work in Mexico.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this 28th day of October, 2009.

INDUSTRIAL COMMISSION

/s/ _____
Alan Reed Taylor, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 2009, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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sc

/s/ _____

/s/
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

Dissenting Opinion of Thomas P. Baskin

For the reasons set forth below, I respectfully dissent:

The parties have conceded, and the majority has found, that Claimant is a covered employee subject to the provisions of the Act under Idaho Code § 72-204, notwithstanding that his employment is “unlawful.” I agree with this conclusion despite the fact that there is some difficulty in ascertaining what the Legislature intended in crafting the provisions of Idaho Code § 72-204. That section provides:

“72-204. Private employment – Coverage. – The following shall constitute employees in private employment and their employers subject to the provisions of this law:

(1) A person performing service in the course of the trade, business, profession or occupation of an employer.

(2) A person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied, and all helpers and assistants of employees whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer.

(3) An officer of a corporation.

(4) “Employment,” in the case of private employers, includes employment only in that trade, business, profession or occupation which is carried on by the employer and also includes any of the pursuits specified in section 72-212, Idaho Code, when the employer shall have elected to come under the law as provided in section 72-213, Idaho Code. [I.C., § 72-204, as added by 1971, ch 124, § 3, p. 422; am. 2006, ch. 231, § 1, p. 688.]

(Emphasis added.)

With respect to the provisions of Idaho Code § 72-204(2), there is some difficulty in ascertaining whether the language “whether lawfully or unlawfully employed” is intended to

modify “a minor” or “a person.” If the former, then the parties, and the majority, have correctly discerned the intention of the Legislature, and the provisions of the Act apply to all employments generally, whether lawful or unlawful. However, if the language in question is intended only to modify the term “a minor,” then the provisions of Idaho Code § 72-204 do not lend support to the proposition that the Act applies to all employments, regardless of whether they are lawful or not.

If it was the Legislature’s intent that the modifying language apply only to minors, it could have crafted the statute differently to make this clear. For example, the Legislative could have stated: “a person, including a minor lawfully or unlawfully employed,” That the Legislature intended the modifying language to apply to all employments, is also suggested by the provisions of Idaho Code § 72-212. That section exempts certain employments from coverage under the Act, such as casual employment, the employment of domestic servants, etc. If the language “whether lawfully or unlawfully employed” was intended by the Legislature to only modify the term “a minor,” then Idaho Code § 72-204 provides no guidance on the question of whether other unlawful employments are subject to the provisions of the Act. This would have provided the Legislature with the opportunity to address whether other unlawful employments are exempt from coverage pursuant to Idaho Code § 72-212. This, the Legislature failed to do, which further supports the conclusion that the modifying language of Idaho Code § 72-204(2) was intended to apply to all employees, and not just minors. For these reasons, I agree with the majority that under the provisions of Idaho Code § 72-204(2) Claimant’s unlawful employment is a covered employment under the Act. However, as developed below, I disagree with the majority in its treatment of Claimant’s status as an undocumented worker in assessing his entitlement to an award of disability benefits.

Defendants argue that as a prerequisite to the Commission’s consideration of permanent partial disability, Claimant bears the burden of first demonstrating that the disability is, at least in

part, referable to the accident produced permanent partial impairment. I believe this is a correct reading of the provisions of Idaho Code §§ 72-423 and 72-425. However, Defendants further argue that since Claimant's immigration status leaves him altogether unemployable in the United States, he cannot meet his burden of demonstrating that his loss of earning capacity is, in some respect, caused by his permanent partial impairment.

Referee Taylor accepted this argument, concluding that whatever accident produced disability Claimant may have suffered as a result of his permanent partial impairment and related limitations is subsumed by the fact that he has no legal access to the labor market on a post-injury basis. Adopting Referee Taylor's decision, the majority reasons that if Claimant cannot legally work in the United States subsequent to the subject accident, then the physical impairment which would otherwise cause some additional disability is rendered irrelevant.¹

The majority opinion is premised on the assumption that Claimant's lack of legal access to the labor market equates to an actual lack of access to the labor market. This, I believe, ignores facts taught by common experience, facts of which the Industrial Commission must take notice; a real and significant labor market exists for undocumented workers in this state.

One need look no further than the facts of the instant matter to find the confirmation of this conclusion. Claimant, who admits to being an undocumented worker, came to the United States in approximately 2004. He lived in Phoenix for one year and found employment performing landscaping work. He then moved to Idaho, where he worked in painting preparation for about a year. In early 2005, Claimant applied for and obtained employment at Franklin Building Supply. Claimant testified that his immigration status has never prevented him from getting a job since he moved to the United States in 2004.

¹ It is tempting to search for an explanation for the decision to award Claimant 0% disability in the assertion that he did not apply himself to a job search after his industrial injury, and therefore his loss of earning capacity is entirely "volitional." In fact, Claimant testified that he did look for work following his industrial injury, but that he was hampered in this search by his limitations. More to the point, if this case really is like Ruiz v. Blaine Larson Farms, Inc., 2006 IIC 0314, then the Commission's lengthy discussion of the legality of Claimant's employment in the United States would be unnecessary. Clearly, this case was decided not on the basis of Claimant's work search, but rather on the basis of his status as an undocumented worker.

In support of its decision, the Majority has held that in evaluating disability exposure, the Commission is limited to considering the injured worker's ability to engage in lawful activity. The majority reasons that in assessing disability, no one would argue that consideration should be given to an injured worker's ability to work as a hit man, or traffic in illegal drugs, even though such gainful opportunities assuredly exist. By analogy, neither should the Commission consider the fact that undocumented workers may be able to find gainful employment, since such employment is illegal. I would distinguish the hiring of illegal aliens for otherwise lawful work, from the other illegal activities discussed in the majority opinion. These "employments" are illegal due to the nature of the activity involved. The employment of Claimant is illegal, not because of any impropriety associated with the gainful activity, but rather, because of Claimant's status as an illegal alien. In performing its assessment of Claimant's disability, for the Commission to recognize that Idaho employers, wittingly or not, employ undocumented workers does not "offend justice, condone illegal activity and dramatically alter the meaning and evaluation of disability."² (*See*, majority opinion at 10). Indeed, I believe that to ignore the facts plainly before us, in favor of the fiction that illegal aliens have no labor market in this state, does more to imperil our obligation to fairly administer the workers' compensation laws. Within the ambit of our narrow jurisdiction, the Commission must treat all facts relevant to the determination of Claimant's loss of earning capacity.

Idaho Code § 72-425 provides:

² Although it is not within the statutory authority of the Industrial Commission to enforce the provisions of the Immigration Reform and Control Act of 1986 (IRCA), it is worth noting that the majority decision may do more damage to the policy behind that Act, and actually incentivize employers to continue to hire undocumented workers. If, as the majority has found, undocumented workers are not entitled to disability beyond impairment, one is forced to recognize that these savings will be enjoyed by someone, i.e. the employer, or its surety. Instead of discouraging the hiring of undocumented workers (if that is part of the majority's intent in adopting the Referee's decision) the decision actually provides an additional incentive to perpetuate the status quo. Similarly, it seems quite plausible that in specifying that the Workers' Compensation Laws of this state apply to all employees "whether lawfully or unlawfully employed," the Legislature actually intended to discourage employers from engaging in unlawful employment. *See*, Idaho Code § 72-204(2). If those who are unlawfully employed enjoy the same benefits as the lawfully employed, then, arguably, employers will not enjoy any savings by virtue of the unlawful employment of another.

“Permanent disability evaluation. – “Evaluation (rating) of permanent disability” is an appraisal of the injured employee’s present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors as provided in section 72-430, Idaho Code.”

As the majority has found, Claimant’s status as an undocumented worker must be included among those “nonmedical” factors which the Commission is required to consider when assessing the vocational impact of Claimant’s permanent partial impairment. However, I believe the majority erred when it concluded that Claimant’s status as an undocumented worker forecloses consideration of whether he has a labor market in this state notwithstanding his immigration status. The fact that undocumented workers are employed in this state is, as well, a nonmedical factor which the Industrial Commission must grapple with when assessing Claimant’s disability.

How then should Claimant’s status as an undocumented worker be treated by the Commission in evaluating Claimant’s disability? Some jurisdictions that have addressed this issue have determined to evaluate the injured worker’s disability by ascertaining what employment opportunities would be available to the undocumented worker “but for” his or her immigration status. *See, Gayton v. Gage Carolina Metals, Inc.*, 149 N.C. App. 346, 560 S.E.2d 870 (2002); *Economy Packing Company v. Illinois Workers’ Compensation Commission*, 387 Ill. App. Ct. 3d, 283, 901 N.E.2d 915 (2008). Under this approach, the Commission would ignore Claimant’s immigration status and evaluate his disability under the assumption that Claimant is legally entitled to hold employment in the United States. The same criticism I have made of the majority opinion could as well be made against this approach; in both cases, the fact that Claimant is an illegal alien, and the fact that a labor market exists for illegal aliens, is ignored in favor of an all-or-nothing approach.

An approach to evaluating disability in these cases that is more consistent with the humane purposes of the Act requires recognition of the fact that Claimant’s status as an illegal

alien limited (but did not foreclose) his access to the labor market on both a pre-injury and a post-injury basis.

Claimant is an unskilled laborer. He does not speak English. The vocational evidence adduced at hearing, and discussed in the reports of Barbara Nelson and Mary Barros-Bailey, suggests that Claimant is not possessed of education or transferrable job skills that would allow him to compete for anything but unskilled labor in the United States. Certainly, his pre-injury employment history in the state of Idaho supports this conclusion. As such, Claimant's pre-injury labor market in Idaho consisted of those unskilled jobs which Claimant was physically capable of performing and which were available to Claimant, his status as an undocumented worker notwithstanding.

Obviously, on a pre-injury basis, Claimant's labor market did not include all unskilled work which he was physically capable of performing. Some of the work that Claimant was otherwise qualified to perform on a pre-injury basis was unavailable to him simply because Claimant's false documentation would not have survived vetting by some potential employers.

As a result of the work accident, Claimant suffered certain permanent limitations/restrictions which will impact his ability to engage in gainful activity. Claimant is no longer physically capable of performing all of the jobs in his pre-injury labor market. Therefore, Claimant's post-injury labor market consists of those unskilled jobs which are consistent with his permanent limitations/restrictions, and which he might have been able to obtain from employers who either do not care about Claimant's immigration status or who can be fooled by the documentation Claimant has provided in the past. The difference in the size of Claimant's pre-injury labor market, as compared to his post-injury labor market, equals his loss of labor market access reasonably attributable to the work injury.

Wage loss and loss of labor market access are factors frequently, but not always, considered by the Commission in evaluating whether Claimant has suffered disability in excess

of physical impairment. The weight be given to each of these factors will vary from case to case.³ The statutory mandate, again, is to evaluate the extent to which the work injury decreased Claimant's ability to engage in gainful activity. To do this the Commission must take into consideration Claimant's impairment, as well as various non-medical factors personal to Claimant. This case presents to the Commission, for the first time, the issue of how Claimant's immigration status impacts Claimant's ability to engage in gainful activity.

As noted above, the vocational evidence at issue suggests that Claimant has suffered something in the range of 13% wage loss as a consequence of the accident. (*See*, report of Barbara Nelson, Claimant's exhibit 1 at 00007). Ms. Nelson has also commented on the impact of the work accident on Claimant's access to the labor market. What is less clear is whether Ms. Nelson considered Claimant's immigration status when defining the size of Claimant's pre-injury and post-injury labor markets. In this regard, Ms. Nelson stated:

"Labor Market: Mr. Diaz resides in the Treasure Valley. For many years, there has been a reasonable labor market within the Treasure Valley for workers without documentation. Because these workers are generally willing to work for below-market wages, they have routinely been able to find employers willing to employ them. Among other things, they have been hired to mow lawns, do landscaping, paint houses, cook, work in construction, do agricultural work, work in beef processing plants, work in fast food, and perform jobs in hospitality. Both the Caldwell and Nampa Walmarts hire monolingual Spanish speakers in janitorial positions. The Great American Appetizers, a Nampa employer, is currently recruiting for production work. They produce breaded and battered products, and the majority of their workforce is monolingual Spanish speaking workers. Homestyle industries, which manufactures upholstered household furniture, curtains and drapery fixtures, household furnishings, box spring mattresses and draperies and curtains for manufactured homes also hire some monolingual Spanish speaking workers.

EMPLOYABILITY/DISABILITY ANALYSIS

Ability to Access Jobs

Prior to Mr. Diaz's industrial injury, he was not restricted physically. He would have been able to access any *medium to heavy* job within his personal labor

³ It is the rare case in which a claimant's ability to engage in gainful activity following a work accident can be based solely upon a comparison of claimant's actual pre-injury and post-injury wages. *See*, Baldner v. Bennett's, Inc., 103 Idaho 458, 649 P.2d 1214 (1982).

market, as long as he had the necessary skills to perform the work. It is my opinion that he had the pre-injury ability to access approximately 3% of the jobs in his regional labor market. Following his industrial injury, Mr. Diaz has acquired significant restrictions in regard to his left upper extremity. Based on these restrictions, it is my opinion that Mr. Diaz currently has access to approximately 1% of the jobs in his personal regional labor market. This represents a 67% personal loss of access to his labor market.”

It is possible that Ms. Nelson’s labor market analysis includes consideration of the impact of Claimant’s immigration status on his ability to access the labor market on both a pre-injury and a post-injury basis. In other words, it is possible that when defining Claimant’s “personal labor market” Ms. Nelson has taken into account the fact that Claimant’s immigration status limits his access to the labor market. However, a definitive answer to this important consideration is not found in her report, or elsewhere in the record.

The report of Defendants’ expert, Mary Barros-Bailey, is less instructive. Ms. Barros-Bailey concluded that because a claimant is unemployable in the United States, he has suffered no accident produced disability. For the reasons stating above, I would reject this conclusion. However, Ms. Barros-Bailey also stated that if one were to assume “hypothetically” that Claimant could legally work in the United States, his disability would be in the range of 23% of the whole person, inclusive of impairment. How Ms. Barros-Bailey got to this number is unclear from her report. (*See*, Defendants’ exhibit K at 152). However, the larger criticism is that Ms. Barros-Bailey’s 23% disability figure is evidently reached by assuming that Claimant can legally work in the United States. This is the same approach that appears to have been adopted by the Illinois and North Carolina Courts in the cases discussed above, but which I find problematic.

On balance, the report of Ms. Nelson is the most valuable, even though there is some difficulty in understanding whether her labor market access calculations incorporated the fact that Claimant’s immigration status limited his access to the labor market on both a pre-injury and post-injury basis.

Claimant's accident produced limitations/restrictions are not insignificant. It seems reasonable to conclude that he will no longer be able to perform a significant fraction of those jobs that constituted his pre-injury labor market. However, it is more significant that the jobs which Claimant can still compete for on a post-injury basis probably do not pay a great deal less than the class of jobs he could compete for prior to his injury. In other words, although Claimant's labor market is likely smaller as a result of the work accident, he probably has not suffered significant wage loss. In this case, and on the basis of the vocation evidence presented, I believe Claimant's probable post-accident wage loss is the best evidence of the extent and degree of his accident produced disability. I would award Claimant a 13% disability inclusive of impairment.

In conclusion, the statutory scheme anticipates that the Commission will consider all relevant non-medical factors when assessing disability in a particular case. This, the majority has failed to do. By failing to recognize that a labor market exists for undocumented workers, the majority opinion denies Claimant the compensation to which he is entitled under the Act. Claimant's status as an undocumented worker should not, as a matter of law, foreclose consideration of the issue of disability.

INDUSTRIAL COMMISSION

/s/
Thomas P. Baskin, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 2009, a true and correct copy of the foregoing **ORDER AND DISSENTING OPINION** was served by regular United States Mail upon each of the following:

BRETT R FOX
355 W MYRTLE ST STE 100
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KENT W DAY
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cs/cjh

_____/s/_____