

Defendants from discovering information concerning the Claimant's citizenship or immigration status. Claimant's most persuasive argument is that compelling Claimant to disclose information relevant to his immigration status over his assertion of his privilege against self-incrimination under the Fifth Amendment violates his constitutional rights, and that public policy warrants granting his motion for a protective order. Claimant also requests a hearing before the Commissioners for oral argument.

Defendants argue that the Commission should not grant Claimant's requested protective order, as Claimant's immigration status is relevant to consideration of Claimant's access to the labor market for calculation of his entitlement to PPD benefits. Further, Claimant's claim for PPD is voluntarily made. Defendants note that had Claimant simply filed a claim for medical benefits or for physical impairment, Claimant's immigration status would not be relevant. Defendants argue that they have not failed to timely raise illegality as an affirmative defense, because Claimant bears the burden of proof concerning his immigration status. That is, Defendants argue that the burden of proof does not switch from Claimant to Defendants—Claimant must prove lost earning capacity by loss of access to the labor market, and Claimant must answer their reasonable discovery requests. Defendants argue that they have only requested information that has bearing on whether Claimant is lawfully present and whether Claimant may lawfully work in the United States. Defendants contend that nothing in their requests for information asks Claimant to identify information that would demonstrate fraud or other criminal activity.

THE COMMISSION HAS AUTHORITY TO CONSIDER THE MOTION

As a preliminary matter, Claimant has challenged an interlocutory order from a Commission referee. Under Idaho Code § 72-506(2), an order made by a referee is not an order of the Commission unless it is “approved and confirmed” by the Commission. This statute establishes the Commission’s authority to review the orders of a referee; otherwise, the Commission would not be able to approve and confirm such orders. The process by which a party may seek Commission review of a referee’s order is not expressly outlined by statute or rule. Review may be sought by means of a motion for reconsideration filed after the Commission has issued its decision in the case. *See Wheaton v. ISIF*, 129 Idaho 538, 928 P.2d 42 (1996) and *Simpson v. Louisiana-Pacific Corp.*, 134 Idaho 209, 998 P.2d 1122 (2000). Generally, however, the Commission prefers that challenges to interlocutory orders of a referee be made in the parties’ post-hearing briefs, before the final decision has been issued.

There are some circumstances that justify earlier consideration of a challenge to a referee’s order. These circumstances are similar to those that would compel the Idaho Supreme Court to consider an interlocutory appeal. Pre-hearing review is appropriate where the challenge “involves a controlling question of law as to which there is substantial grounds for difference of opinion,” and when immediate consideration of the challenge “may materially advance the orderly resolution of the litigation.” *See Kindred v. Amalgamated Sugar Co.*, 118 Idaho 147, 149, 795 P.2d 309, 311 (1990).

Such circumstances exist in this case. Claimant’s motion raises a significant question about the propriety of Defendants’ requested discovery. Furthermore, the Commission’s decision to confirm or overturn the Referee’s Order could have a substantial impact on the type of evidence presented at hearing. Thus, Claimant’s motion is best addressed before the hearing occurs. The Commission has authority to consider Claimant’s motion under Idaho Code § 72-

506(2) and J.R.P. 3(E)(1), which permits an “application to the Commission for an order.” The Commission will now discuss the arguments from the parties.

DISCUSSION

In another recent case, the Commission has found that the refusal to disclose legal status in Claimant’s workers’ compensation proceeding for permanent partial disability (PPD) benefits may result in the Commission striking PPD as a hearing issue, as a sanction against Claimant for refusing to comply with a reasonable discovery request. Claimant criticizes our *Serrano* order which held that claimant was not entitled to additional protections relating to disclosure of his legal status, because deportation is a civil matter. *See, Serrano v. Four Seasons Framing, Inc.*, 2004 IIC 501845. Claimant’s argument is that the Commission neglected to address the additional criminal prosecution risks he faces beyond civil deportation, i.e. criminal prosecution for false use of a Social Security number, identity fraud, etc. Therefore, Claimant believes that the hazard of self-incrimination is real and appreciable.

Defendants argue that the requests for information do not give rise to the risk of criminal prosecution against the Claimant. Defendants have produced the following interrogatories to show that their questions are narrowly tailored to discover information about Claimant’s ability to work in the United States. Defendants argue that their requests are appropriately centered on whether Claimant is lawfully present and whether Claimant may lawfully work in the United States.

As a preliminary matter, the Commission is not persuaded that Defendants have waived an affirmative defense regarding Claimant’s PPD benefits. Claimant has the burden of proving

his entitlement to PPD benefits in excess of impairment. The Commission does not require Defendants to plead the immigration status of Claimant in its original answer.

In order to have compensable disability under the workers' compensation laws, an employee must have a work-related injury that has caused him to "suffer a decrease in 'wage-earning capacity' as that capacity is affected by the pertinent medical and non-medical factors."

McCage v. JoAnn Stores, Inc., 145 Idaho 91, 97, 175 P. 3d 780, 786 (2007). Whether an employee's wage-earning capacity is permanently diminished and the extent of such diminishment are determined by an analysis of several factors, including the impact of the employee's injury on the employee's ability to procure and hold employment and ability to compete in an open labor market within a reasonable geographical area. Idaho Code § 72-430; *Davaz v. Priest River Glass Co.*, 125 Idaho 33, 870 P. 2d 1292 (1994).

In *Diaz v. Franklin Building Supply*, IC 2006-50799 (2009), Diaz sought PPD benefits in excess of his physical impairment. Diaz openly acknowledged that he was present illegally in the U.S. and had no legal access to the Idaho or U.S. labor markets. The Commission ruled that Diaz was foreclosed from pursuing a claim for disability benefits in excess of permanent partial impairment due, in part, to the fact that he could not be legally employed in the United States. As explained by the Commission's decision in *Otero v. Briggs Roofing Company*, IC 2007-16876 (filed August 12, 2011), Diaz's illegal status *was a factor that entirely eclipsed his injury-related impairment*. Thus, Diaz sustained no disability in excess of impairment. Second, when conducting a disability analysis, the Commission would not take into account the potential for illegal conduct.

At no point in the decision did the Commission hold that Mr. Diaz was not entitled to permanent disability benefits simply because he was an undocumented worker. Rather, Mr. Diaz was not entitled to permanent disability benefits because

another factor, which happened to be illegal working status, “overshadowed and essentially rendered moot” his impairment.

Otero, supra, at 16.

Every disability analysis requires consideration of an injured worker’s relevant non-medical factors, and these factors have an important effect on the calculation of disability in excess of impairment. The Commission finds it inappropriate to ignore evidence of Claimant’s immigration status, or any other non-medical factors influencing Claimant’s capacity to work, for that matter, relevant to evaluating Claimant’s disability in excess of impairment.

As stated in Rule 7 of the Judicial Rules of Practice and Procedure under the Idaho Workers’ Compensation Law (JRP), “Procedural matters relating to discovery, except sanctions, shall be controlled by the appropriate provisions of the Idaho Rules of Civil Procedure.” Rule 26(b)(1) of the Idaho Rules of Civil Procedure allows parties to obtain discovery regarding any matter, not privileged, which is *relevant* to the subject matter involved in the pending action.

The Fifth Amendment, in relevant part, states that “no person shall . . . be compelled in any criminal case to be a witness against himself.” The central standard for the privilege’s application has been whether the claimant is confronted by substantial and ‘real,’ and not merely trifling or imaginary, hazards of incrimination.” Marchetti v. U.S., 390 U.S. 39, 53, *see Hill v. Department of Employment*, 108 Idaho 583 (1985). It has long been held that this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also “privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.” Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38

L.Ed.2d 274, 281 (1973). Minnesota v. Murphy, 465 U.S. 420, 426, 104 S.Ct. 1136, 1141, 79 L.Ed.2d 409, 418 (1984).

“In determining whether such a real and appreciable danger of incrimination exists, a trial judge must examine the ‘implications of the question[s] in the setting in which [they are] asked’ [Citations.] He ‘ “[m]ust be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.” ’ [Citations.] If the trial judge decides from this examination of the questions, their setting, and the peculiarities of the case, that no threat of self-incrimination exists, it then becomes incumbent ‘upon the defendant to show that answers to [the questions] might criminate him.’ [Citations.] This does not mean that the defendant must confess the crime he has sought to conceal by asserting the privilege. The law does not require him ‘ “to prove guilt to avoid admitting it.” ’ [Citations.] But neither does the law permit the defendant to be the final arbiter of his own assertion's validity. ‘The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself-his say-so does not of itself establish the hazard of incrimination. It is for the court to decide whether his silence is justified’ [Citations.]”

Idaho State Tax Commission v. Peterson, 107 Idaho 260, 262, 688 P.2d 1165, 1167 (1984).

The Commission will address each interrogatory and request for production of documents.

INTERROGATORY NO. 1: Please identify whether you are a citizen of the United States, and if not, whether you entered the United States legally.

As to the first aspect of Defendants’ interrogatory, “[p]lease identify whether you are a citizen of the United States . . .,” the Commission has found that Claimant’s immigration status is relevant to the determination of his request for permanent partial disability (PPD) benefits. Claimant’s disclosure of his citizenship is relevant, but not without risks. While the Fifth Amendment protects individuals from being compelled to give a statement that may be used against them, the Fifth Amendment does not apply in circumstances where a claimant wishes to conceal her legal status to avoid deportation. *See, United States v. Balsys*, 542 U.S.

666, 671 (Balsys agrees that the risk that his testimony might subject him to deportation is not a sufficient ground for asserting the privilege, given the civil character of a deportation proceeding); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1043-44 (1984); *People v. Bolivar*, 643 N.Y.S.2d 205 (1996). In fact, a claimant's silence on his immigration status does not protect him in an immigration proceeding.

Silence is often evidence of the most persuasive character . . . [T]here is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak. . . . A person arrested on the preliminary warrant is not protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case. There is no provision which forbids drawing an adverse inference from the fact of standing mute.

INS v. Lopez-Mendoza, 468 U.S. at 1043-44 (quoting *United States es rel. Bilokumsky v. Tod*, 263 U.S. at 153-54.)

The Commission does not prosecute criminal actions, and we are primarily concerned with Claimant's workers' compensation case—particularly the Claimant's relevant medical and non-medical factors for calculation of the PPD benefits. The Commission is not the appropriate place to address long-standing federal and state laws about undocumented workers or immigration, although Claimant has certainly presented interesting policy concerns. The Commission has taken into account the peculiarities of this workers' compensation case and weighed the threat of self-incrimination. After reviewing the scenarios that Claimant has set forth, the Commission still finds that Claimant is not sufficiently implicated in any crimes by stating his immigration status as to warrant invoking the Fifth Amendment privilege, particularly taking into account the setting in which they are asked.

As discussed above, Claimant's legal ability to work is a necessary and relevant component of his request for PPD benefits. Claimant has not adduced sufficient evidence or case law to show that deportation is a criminal proceeding entitled to the protections of the Fifth Amendment rather than a civil proceeding. Again, there is no presumption of citizenship. Claimant has not shown any specific hazard of incrimination or Fifth Amendment protection that would prevent the disclosure of his legal status to Defendants in this workers' compensation proceeding. Claimant may offer a simple response to the question, *without* commentary on ancillary matters. The Commission finds that this part of Defendants' first interrogatory is appropriate and relevant.

The Commission finds the second part of the interrogatory questionable. Defendants ask whether "Claimant entered the United States legally." The Commission does not need this information to determine Claimant's entitlement to disability benefits. The Commission is concerned about how this discovery request might expose Claimant to risks related to criminal matters, which are not germane to the workers' compensation proceeding. In an abundance of caution, the Commission will strike the second part of Defendant's interrogatory as follows:

INTERROGATORY NO. 1: Please identify whether you are a citizen of the United States, and if not, whether you entered the United States legally.

INTERROGATORY NO. 2: Please identify and describe in detail whether you are legally entitled to work in the United States, including whether you have a work permit and the dates such work permit was in place.

Defendants' interrogatory is meant to ascertain whether Claimant has access to the labor market in the future, which is a relevant inquiry, given the benefits Claimant is seeking. The

question is whether the second interrogatory presents a substantial and ‘real’ risk of incrimination.

Hypothetically, a claimant might be concerned that this question exposes him or her to prosecution for using a fraudulent work permit or fraudulent use of a Social Security number. However, Defendants’ second interrogatory is broadly worded and intended to discern whether Claimant can access the labor market *in the future*, as needed to calculate the disability benefits to which Claimant may be entitled. The Commission does not find that this question forces Claimant to produce falsified documents or evidence of fraud.

Defendants’ second interrogatory is narrowly tailored to Claimant’s ability to work in the United States, and does not inappropriately delve into the elements characteristic of a criminal proceeding. Claimant may answer this interrogatory about his future access to the labor market without detailing or addressing past documents or actions. Therefore, the Commission will not alter Defendants’ Interrogatory No. 2.

Defendants’ last request for documents supporting Claimant’s legal ability to work in the United States is included below:

REQUEST FOR PRODUCTION NO. 1: Please provide any documents demonstrating your ability to legally work in the United States.

Again, Claimant should produce any documents showing that he may legally access the labor market. Defendants’ request does not assume that Claimant produced fraudulent documents, or require that Claimant produce evidence of fraudulent or criminal actions. Claimant may produce appropriate documents, or he may decline the pursuit of PPD benefits which are based, in part, on Claimant’s future access to the labor market.

In defending the claim for disability benefits, Defendants are entitled to conduct discovery necessary to assess how Claimant's permanent partial impairment, combined with other non-medical factors, may have influenced his loss of earning capacity. Claimant's immigration status is a relevant factor, among many, that the Commission considers in evaluating Claimant's permanent disability. Claimant is aware, based on Commission precedent, that he will need to divulge his immigration status, if he wishes a Commission decision on his permanent partial disability. Defendants' request for the production of documents is appropriate, and does not violate Claimant's Fifth Amendment rights.

Even under Commissioner Baskin's dissent in *Diaz v. Franklin Building Supply*, IC 2006-50799 (2009), Claimant's immigration status and his legal entitlement to hold employment in the United States matter, and would need to be disclosed. The *Diaz* dissent argued that the Commission should examine the labor market for undocumented workers in this state for the calculation of permanent partial disability, rather than find a claimant ineligible for permanent partial disability benefits due to the claimant's status as an undocumented worker.

The Commission has reviewed the file with a focus on the concerns that Claimant has raised and we maintain that the legal analysis supports the order compelling discovery. Although Claimant disagrees, the Commission finds that Claimant has not presented persuasive argument to disturb the order compelling discovery.

//

//

ORDER

Based upon the foregoing reasons, Claimant's Motion is **DENIED**.

I

Defendants' first interrogatory is changed as follows:

INTERROGATORY NO. 1: Please identify whether you are a citizen of the United States, and if not, whether you entered the United States legally.

Defendants' second interrogatory and Defendants' first request for production of documents are appropriate, as they concern Claimant's ability to access the labor market, and do not present a real and substantial risk to Claimant.

II

Claimant is hereby **ORDERED** to comply with Defendants' reasonable discovery requests.

III

Claimant's request for oral argument and a hearing is **DENIED**.

IT IS SO ORDERED.

DATED this 23rd day of September, 2011.

INDUSTRIAL COMMISSION

/s/ _____
Thomas E. Limbaugh, Chairman

/s/ _____
Thomas P. Baskin, Commissioner

/s/ _____
R.D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 23rd day of September, 2011, a true and correct copy of the foregoing **ORDER DENYING MOTION FOR RECONSIDERATION** was served by regular United States Mail upon each of the following:

BRECK SEINIGER
942 W MYRTLE STREET
BOISE ID 83702

MARK PETERSON
MOFFAT THOMAS BARRETT ROCK & FIELDS
101 SOUTH CAPITOL BLVD, 10TH FLOOR
BOISE ID 83701-0829

cs-m/mw

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUBEN CORONEL,)
)
 Claimant,)
)
 v.)
)
 FLEETWOOD HOMES OF IDAHO,)
)
 Employer,)
)
 and)
)
 INSURANCE COMPANY OF STATE)
 OF PENNSYLVANIA,)
)
 Surety,)
 Defendants.)
 _____)

IC 2008-026353

**ERRATUM ON
ORDER DENYING MOTION
FOR RECONSIDERATION**

Filed September 30, 2011

On September 23, 2011, the Order Denying Motion for Reconsideration was filed by the Commission in the above-entitled case. The following typographical errors should be changed as follows:

On the Order Denying Motion for Reconsideration, Page 1, the IC number, “IC 2008-029252” should be changed to read “IC 2008-026353.”

DATED this 30th day of September, 2011.

INDUSTRIAL COMMISSION

/s/ _____
Thomas E. Limbaugh, Chairman

/s/ _____
Thomas P. Baskin, Commissioner

R.D. Maynard, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of September, 2011 the foregoing **Erratum on Order Denying Motion for Reconsideration** was served by regular United States Mail upon each of the following:

BRECK SEINIGER
942 W MYRTLE STREET
BOISE ID 83702

MARK PETERSON
101 SOUTH CAPITOL BLVD, 10TH FLOOR
BOISE ID 83702-0829

amw

_____/s/_____
