BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ELFEGO MARQUEZ, Claimant, v. PIERCE PAINTING, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2010-012699** **ORDER ON DEFENDANTS' MOTION FOR RECONSIDERATION** **Filed 8/25/17**

On or about July 28, 2017, Defendants filed their timely motion for reconsideration in the matter above referenced, raising a number of arguments in support of their position that the Commission erred in concluding that Claimant's disability should be evaluated without regard to his immigration status. Claimant did not respond. For the reasons set forth below, the Commission continues to abide by its July 10, 2017 decision.

First, Defendants argue that while the Commission correctly ruled that it does not have jurisdiction to consider the constitutionality of the provisions of the workers' compensation law, it inexplicably did exactly what it said it could not do when it evaluated the issue of whether IRCA preempts certain provisions of the Idaho workers' compensation law relating to the evaluation of disability. As explained in its July 10, 2017 decision, the Commission recognizes that review of the constitutionality of provisions of the workers' compensation law is reserved to the Courts of this state. However, we must make some judgment as to how to best administer the

Idaho workers' compensation law in the absence of guidance from the Courts. It would be derelict of the Commission to consider a path forward by turning a blind eye to matters which we know have an impact on the issue before us. However, we would reach the same conclusion in this matter had we confined our analysis to the consideration of state law. The Idaho workers' compensation law recognizes the applicability of that law to the claims of those "unlawfully employed." The statutory scheme evidences no legislative intention to prohibit illegal aliens from pursuing claims for disability. The workers' compensation laws of this state do not specify that, having given up his right to pursue a remedy at common law for work related injuries, an illegal alien is entitled to a lesser (or greater) statutory remedy than a documented laborer.

Next, Defendants argue that illegal aliens cannot be treated on par with those legally employed since Idaho Code § 72-430 clearly anticipates that a worker's immigration status is one of the "personal and economic circumstances" that must be considered by the Commission in evaluating disability. In this regard, it is again worth noting that the workers' compensation laws apply to all employments, both legal and illegal. *See* Idaho Code § 72-204. Further, although the Idaho legislature has had ample opportunity over the years to explicitly carve out separate treatment for illegal aliens, it has failed to do so. While we recognize that immigration status is a "personal" circumstance of an injured worker, the available evidence does not suggest that this circumstance was intended by the legislature to diminish an injured worker's entitlement to redress for workplace injuries. To do as Defendants urge invites all the undesirable consequences alluded to in the original decision.

Further, we disagree with the example offered by Defendants to illustrate their assertion that the Commission's solution results in a windfall to illegal aliens. Let us suppose that an unskilled undocumented worker has access to five percent of the entire labor market. Experience

tells us that this labor market consists of unskilled heavy manual labor jobs offered by a class of employers who either harbor no reservations about, or who can be fooled into, the hiring of illegal workers. Let us say that following a work injury for such an employer, the illegal alien is given work restrictions which limit him from performing any job requiring lifting of over 20 pounds. The impact of such an injury on the worker's access to his pre-injury labor market is profound, since all of the jobs in this pre-injury labor market likely required lifting in excess of his work related limitations/restrictions. Remember, the pre-injury labor market for such an individual is small, and probably consists of the meanest type of unskilled manual labor. Therefore, if disability is measured by considering the actual pre-injury and post-injury labor markets for an illegal alien, it seems likely that higher disability awards will result than would be the case for a similarly situated documented laborer. Such an unskilled documented worker would have much broader access to the labor market at large on both a pre-injury and post-injury basis. Such a worker would have the ability to compete for a wider range of heavy, medium and light work offered by employers who would never knowingly entertain employment for an illegal alien. Therefore, measuring an illegal alien's disability based on his actual pre-injury and post-injury access to the labor market increases such a worker's disability simply by virtue of the worker's illegal immigration status. This strikes us as just as undesirable as employing the fiction relied on in *Diaz* and *Otero* that illegal aliens are not entitled to disability because they cannot demonstrate a loss of access to the labor market following an industrial accident. The only acceptable course, though one not without its own difficulties, is to evaluate disability without reference to immigration status. This solution, too, employs a fiction, but one that is consonant with the historic *quid pro quo*, in which the rights of workers at common law for

redress of personal injuries incurred in the workplace were exchanged for a sure and certain statutory remedy.

The common law remedy, if still extant, would draw no distinction between the rights of legal versus illegal workers to be compensated for work caused injuries. In *Sanchez* v. *Galey*, 112 Idaho 609, 733 P.2e 1234 (1986), plaintiff suffered grievous injuries while employed in an exempt agricultural pursuit. At trial, defendants were precluded from questioning plaintiff's expert about the impact of plaintiff's status as an illegal alien on his damages. On appeal, defendants argued that since plaintiff was subject to deportation there was no guarantee that absent the work injury he would have continued to enjoy wages paid at the rate enjoyed by U.S. farm laborers. Therefore, it was error for the Court to have prohibited evidence regarding the likelihood of deportation, and the difference in wages between farm workers in Mexico and the U.S. Citing to *Patino* v. *Grigg & Anderson Farms*, 97 Idaho 251, 542 P.2d 1170 (1975), the Supreme Court held that in view of the fact that plaintiff had resided in the U.S. for six years at the time of trial, it would invite pure speculation to measure his damages on the possibility that he would not continue to remain in the U.S. workforce. The Court also noted:

> "The fact is that Bennett Creek accepted the benefits of his labors as an illegal alien and it is anomalous for defendant to complain about his being compensated on the basis of the wages he was receiving."

On rehearing, it was noted that since the issuance of the original opinion, IRCA had been passed into law. Since IRCA provided a path to legalization for certain illegal aliens, the majority concluded that it would invite even more speculation to allow discussion of Claimant's immigration status, since he would presumably be in line for the legalization process. Dissenting on the denial of the petition for rehearing, Justice Bakes argued that IRCA was hardly a king's X for plaintiff since there was no evidence that he qualified for the legalization process. Therefore,

per Justice Bakes, the passage of IRCA added no support to the majorities' conclusion that it would be even more speculative to consider plaintiff's prospects for future employment in the United States. Regardless, Justice Bakes' observation does nothing to denigrate the majority holding that plaintiff's status as an illegal alien does not preclude calculation of damages based on plaintiff's access to the U.S. labor market.

Arguably, *Sanchez* is consistent with measuring disability under the worker's compensation law by considering a claimant's actual pre-injury and post-injury access to the labor market, as discussed above. However, we reject this approach for the reasons stated; because disability is the measure of Claimant's diminished ability to engage in gainful activity, focusing on Claimant's actual accident produced loss of access to his actual pre-injury labor market invites inflated disability awards which we deem contrary to the good of the system.

The solution employed by the Commission will not result in a windfall to the injured illegal alien. Such a worker's pre-injury labor market access will be evaluated regardless of immigration status, as will his post-injury access to the labor market. Therefore, evaluation of disability will be on par with that of legally employed workers.

Next, even though Claimant's entitlement to TTD benefits is not at issue in this proceeding, Defendants correctly note that the Commission devoted some attention to this ancillary issue in speculating about the impact of its solution on other aspects of the statutory scheme. Defendants argue that while IRCA does not make it a crime for an employer to make an offer of employment to an illegal alien, the common law would make such an offer a criminal offense. The rule of *Maleug v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986) specifies that TTD benefits are payable to an injured worker unless and until an employer makes a "reasonable and legitimate" offer of employment to such worker that is consistent with his

limitations and restrictions and is likely to continue through the period of recovery. As we indicated in the July 10, 2017 decision, all that employer would be required to do to satisfy the *Maleug* test in the case of an illegal alien is to demonstrate to the satisfaction of the Commission that but for the injured worker's immigration status, Employer had a job for claimant consistent with his limitations and restrictions and which would have continued through his period of recovery. In no wise would such an employer be required to violate federal or common law.

Having considered the arguments raised by Defendants, we decline to revisit the July 10, 2017 decision.

DATED this 25th day of August, 2017.

INDUSTRIAL COMMISSION

Dissented to July 10, 2017 Decision
_____
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 the 25th day of August, 2017, a true and correct copy of the foregoing ORDER ON DEFENDANTS' MOTION FOR RECONSIDERATION was served by regular United States Mail upon each of the following:

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