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Marquez v. Pierce Painting, Inc. Respondent's Brief Dckt. 45415

Case No. 45415-2017

IN THE SUPREME COURT OF THE STATE OF IDAHO

ELFEGO MARQUEZ,

Claimant/Respondent,

vs.

PIERCE PAINTING, INC., Employer, and STATE INSURANCE FUND, Surety,

Defendants/Appellants.

RESPONDENT'S BRIEF

Appeal from the Industrial Commission of the State of Idaho

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STATEMENT OF THE CASE

I. Nature of the Case

Claimant Elfego Marquez was injured on the job while working for an employer who was always aware of his status as an undocumented worker. The Idaho Workers' Compensation Act expressly applies to any "person...whether lawfully or unlawfully employed..." I.C. § 72-204(2). Mr. Marquez's employer and its surety have conceded that Mr. Marquez is a covered employee and accepted his claim under the Idaho Workers' Compensation Act, notwithstanding his status as an undocumented worker. As required by the Idaho Workers' Compensation Act, Mr. Marquez's employer and its surety have paid his medical bills, total temporary disability, and permanent partial impairment.

Despite having paid these benefits, Mr. Marquez's employer and surety are refusing to pay any permanent disability benefits because of his status as an undocumented worker. Mr. Marquez's employer and surety have taken this position in contravention of the express language of the Idaho Workers' Compensation Act which provides permanent disability benefits to all Idaho employees whether lawfully or unlawfully employed.

In its Order below, the Idaho Industrial Commission agreed that undocumented workers are entitled to pursue permanent disability benefits under the Idaho Workers' Compensation Act without reference to immigration status. Mr. Marquez's employer and its surety have appealed this Order.

II. Statement of the Facts

Mr. Marquez is a 47-year-old individual born and raised in Mexico.[1] After obtaining a teaching degree and teaching elementary age students in Mexico, Mr. Marquez's income was a paltry $300 per month.[2] This was not enough to support his wife and daughter.[3]

In or about 2000, Mr. Marquez left Mexico for the United States to look for better employment.[4] Mr. Marquez was undocumented and did not enter the United States legally.[5] Mr. Marquez initially traveled to California, where he purchased a fake social security card and used it to obtain a job washing dishes and performing busboy duties at a restaurant.[6] With his restaurant income, Mr. Marquez was able to have his wife and daughter join him in the United States.[7] After working in California for approximately eight months, Mr. Marquez moved to Emmett, Idaho, where he and his family have now resided for approximately eighteen years.[8]

After arriving in Idaho, Mr. Marquez obtained a job with Pierce Painting, Inc.[9] Mr. Marquez told the owner of Pierce Painting, Rick Pierce, about his immigration status and about his status as an undocumented worker.[10] Mr. Pierce was aware that Mr. Marquez did not have a legal right to work in the United States and that the social security card used by Mr. Marquez

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[1] Tr. p. 41, ll. 12-24.
[2] Tr. p. 42, l. 13 to p. 43, l. 12; Tr. p. 44, ll. 3-10.
[3] Tr. p. 46, ll. 10-16.
[4] *Id.*
[5] R. at pp. 18-19 (Stipulation of Facts).
[6] Tr. p. 46, ll. 17-23; Tr. p. 47, ll. 19-20; Tr. p. 48, ll. 5-10; Tr. p. 51, ll. 10-18.
[7] Tr. p. 51, l. 10 to p. 52, l. 22.
[8] *Id.*; Tr. p. 68, ll. 5-11.
[9] Tr. p. 53, ll. 11-17.
[10] Tr. p. 50, l. 22 to p. 51, l. 5.

was fake.[11] Not long after beginning at Pierce Painting, Mr. Pierce received a garnishment notice associated with the fake social security number used by Mr. Marquez.[12] Mr. Pierce instructed Mr. Marquez to get a different fake social security number.[13] Mr. Marquez complied by purchasing a different fake social security card and giving it to Mr. Pierce.[14]

On May 20, 2010, while working for Pierce Painting, Mr. Marquez was in the process of preparing a house for painting.[15] His employer was in a hurry to have the house ready, but there was a shortage of ladders.[16] Mr. Marquez was told to do the best he could.[17] In order to reach an elevated area of the house, Mr. Marquez stacked two buckets on top of each other and was standing on these buckets working.[18] The buckets tipped, and he fell to the cement floor.[19] In the fall, he injured the shoulder and wrist of his dominant right arm.[20]

Mr. Marquez was treated by Dr. Hassinger.[21] Despite multiple surgeries on his right shoulder. Mr. Marquez has very limited use of his dominant right arm.[22] He is totally unable to lift his right arm above his shoulder.[23] Use of his right arm often requires that he hold his right

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[11] Tr. p. 51, ll. 3-5.
[12] Tr. p. 49, l. 12 to p. 50, l. 14.
[13] *Id.*
[14] *Id.*
[15] Tr. p. 56, l. 9 to p. 58, l. 3.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] Tr. p. 58, ll. 4-25; Tr. p. 59, ll. 1-4.
[21] Tr. pp. 59-60. *See also* Hearing Exhibits 1-19 (medical records).
[22] Tr. p. 60, ll. 23-25; Tr. p. 61, ll. 1-10. *See also* Hearing Exhibits 1-19 (medical records).
[23] Tr. p. 62, ll. 4-13. *See also* Hearing Exhibits 1-19 (medical records).

elbow against his side to stabilize the arm and allow some use of the lower arm.[24] He is unable to perform the duties of his job with Pierce Painting.[25] His ability to write with his dominant hand has been severely compromised.[26] He experiences constant pain in his shoulder.[27] This pain prevents him from sleeping more than four hours at night.[28] Standing with his arm at his side for more than twenty minutes causes his pain to increase significantly.[29] Washing dishes or sweeping the floor for as little as a few minutes leaves him in pain.[30] Even walking is difficult as he cannot swing his right arm to counterbalance his stride.[31] In addition to his shoulder pain and limitations, Mr. Marquez continues to suffer from additional pain and weakness in his wrist, hand, and forearm from the injuries to his lower arm.[32]

It is Dr. Hassinger's opinion that Mr. Marquez's shoulder will not improve.[33] Dr. Hassinger rated Mr. Marquez's right shoulder impairment at 5% of the whole person and recommended permanent restrictions to avoid overhead activity with the right arm.[34] Dr. Hassinger specifically recommended that Mr. Marquez not return to his time-of-injury job.[35]

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[24] Tr. p. 61, ll. 11-25. *See also* Hearing Exhibits 1-19 (medical records).
[25] Tr. p. 64, ll. 5-10. *See also* Hearing Exhibits 1-19 (medical records).
[26] Tr. p. 59, ll. 5-15. *See also* Hearing Exhibits 1-19 (medical records).
[27] Tr. p. 62, ll. 9. *See also* Hearing Exhibits 1-19 (medical records).
[28] Defendants' Hearing Exhibit 19 (Marquez Deposition at p. 34, ll. 1-4 and p. 36, ll. 8-22).
[29] Defendants' Hearing Exhibit 19 (Marquez Deposition at p. 34, ll. 2-11 and p. 35, ll. 2-25).
[30] Tr. p. 63, ll. 5-14.
[31] Defendants' Hearing Exhibit 19 (Marquez Deposition at p. 36, ll. 8-22).
[32] Tr. p. 60, ll. 2-22.
[33] Defendants' Hearing Exhibit 19 (Marquez Deposition at p. 24, ll. 12-19).
[34] Claimant's Hearing Exhibit 5 at pp. 000072-000073.
[35] *Id.*

In July 2010, Mr. Marquez was referred to the Industrial Commission Rehabilitation Division (IRCD) by the State Insurance Fund. IRCD consultant Ken Halcomb was assigned to the case.[36] Mr. Holcomb interviewed Mr. Marquez about his education, past work history, and transferable skills.[37] When it became evident that Mr. Marquez would not be able to return to his time-of-injury job, Mr. Halcomb assisted Mr. Marquez in identifying other potential employment opportunities more consistent with his restrictions and within his geographic area.[38] Eventually, Mr. Halcomb closed the file without placing Mr. Marquez with another employer.[39] The labor market survey prepared by Mr. Halcomb at the time of closure suggested that Mr. Marquez would probably not be able to find employment that would replace his time-of-injury wage of $12.00 per hour with benefits including insurance, since most of the jobs identified by Mr. Halcomb were paid in a range of only $7.00 per hour to $9.00 per hour.[40]

At no time prior to closure of the file did Mr. Halcomb learn that Mr. Marquez was an undocumented worker.[41] In later testimony, Mr. Halcomb acknowledged that there is a labor market for undocumented workers in the Treasure Valley.[42]

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[36] Tr. p. 22, ll. 15-16. *See also* Defendants' Hearing Exhibit 6.
[37] Tr. p. 24, ll. 12-16. *See also* Defendants' Hearing Exhibit 6.
[38] Tr. p 19, ll. 8-14. *See also* Defendants' Hearing Exhibit 6.
[39] Defendants' Hearing Exhibit 6.
[40] Tr. p. 33, ll. 8-13; Tr. p. 56, ll. 1-3.
[41] Tr. p. 33, ll. 16-18.
[42] Tr. p. 36, l. 36 to p. 37, l. 24.

III. Course of Proceedings

On April 14, 2015, Mr. Marquez filed a Workers' Compensation Complaint.[43] On May 1, 2015, he filed an Amended Workers' Compensation Complaint.[44] On May 14, 2015, Pierce Painting and the State Insurance Fund (collectively "Surety") filed an Answer to the Amended Complaint.[45] In the Answer to the Amended Complaint, the Surety admitted the occurrence of the accident, the existence of the employment relationship, and the fact that the parties were subject to the Idaho Workers' Compensation Act.

Following the filing of the Workers' Compensation Complaint, the Surety conceded that Mr. Marquez was a covered employee subject to the Idaho Workers' Compensation Act and accepted the claim notwithstanding his status as an undocumented worker. Based on this concession, the Surety paid Mr. Marquez's medical bills pursuant to I.C. § 72-432, his total temporary disability pursuant to I.C. § 72-408, and his permanent partial impairment pursuant to I.C. § 72-428. Despite having paid Mr. Marquez's medical bills, total temporary disability, and permanent partial impairment, notwithstanding his status as an undocumented worker, the Surety refused to pay any permanent disability benefits because of his status as an undocumented worker.

Following a hearing by a referee, the Idaho Industrial Commission issued an Order on July 10, 2017, concluding that Mr. Marquez "is entitled to pursue a claim for permanent disabil-

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[43] R. pp. 1-5.
[44] R. pp. 6-10.
[45] R. pp. 13-14.

ity without reference to his immigration status."[46] On July 28, 2017, the Surety filed a Motion to Reconsider.[47] On August 28, 2017, the Idaho Industrial Commission entered an Order, denying the Motion to Reconsider.[48]

On August 29, 2017, the Surety filed a Motion for Immediate Appeal, which was granted on September 21, 2017, by the Idaho Industrial Commission.[49] On October 4, 2017, the Surety filed a Notice of Expedited Appeal pursuant to I.A.R. 12.4.[50]

ISSUE PRESENTED ON APPEAL

The singular issue presented on appeal to the Idaho Supreme Court is as follows:

1. Whether the Idaho Industrial Commission correctly determined that Mr. Marquez is entitled to pursue permanent disability benefits under the Idaho Worker's Compensation Act without reference to his immigration status.

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[46] R. pp. 21-50.
[47] R. pp. 60-72.
[48] R. pp. 73-79.
[49] R. pp. 80-85.
[50] R. pp. 86-90.

STANDARD OF REVIEW

The issue presented on appeal concerns the construction of the Idaho Workers' Compensation Act. With respect to the interpretation of the Idaho Workers' Compensation Act, this Court has established the standard of review as follows:

> A construing court's primary duty is to give effect to the legislative intent and purpose underlying a statute. Moreover, the court must construe a statute as a whole, and consider all sections of applicable statutes together to determine the intent of the legislature. It is incumbent upon the court to give the statute an interpretation that will not deprive it of its potency. In construing a statute, not only must we examine the literal wording of the statute, but we also must study the statute in harmony with its objective. We also must take account of all other matters such as the reasonableness of the proposed interpretations and the policy behind the statute.
>
> More specifically, we must liberally construe the provisions of the workers' compensation law in favor of the employee, in order to serve the humane purpose for which the law was promulgated. The purpose of the workers' compensation law is to provide sure and certain relief for injured workmen and their families and dependents. I.C. § 72-201.

Davaz v. Priest River Glass Co., 125 Idaho 333, 336-37, 870 P.2d 1292, 1295-96 (1994) (internal citations omitted).

"When reviewing a decision by the Industrial Commission, this Court exercises free review over the Commission's conclusions of law, but will not disturb the Commission's factual findings if they are supported by substantial and competent evidence." *Kelly v. Blue Ribbon Linen Supply, Inc.*, 159 Idaho 324, 326-27, 360 P.3d 333, 335-36 (2015). *See also* I.C. § 72-732.

ARGUMENT

I. The Idaho Workers' Compensation Act unambiguously provides coverage and benefits to all Idaho employees without regard to immigration status.

The Idaho Industrial Commission's Order holding that Mr. Marquez is entitled to pursue a claim for permanent disability without reference to his immigration status is in harmony with the express language of the Idaho Workers' Compensation Act (IWCA) which provides coverage and benefits to all Idaho employees without regard to whether they are lawfully or unlawfully employed.

IWCA's scope and definitional terms are drafted very broadly to include all employment and all employees without regard to the lawfulness of the employment. Idaho Code § 72-203 provides that the IWCA "shall apply to *all public employment and to all private employment* including farm labor contracting not expressly exempt by the provisions of section 72-212." (Emphasis added). Idaho Code § 72-102(12) defines "employee" as "*any person who has entered into the employment* of, or who works under contract of service or apprenticeship with, an employer. It does not include any person engaged in any of the excepted employments enumerated in section 72-212." (Emphasis added). The language of I.C. §§ 72-102(12), 72-203, and 72-212 contain no exclusion or exemption based upon the lawfulness of employment.

Specifically, with respect to private employment, the IWCA declares that the lawfulness of employment is irrelevant. Idaho Code § 72-204(2) provides: "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 em-

ployer under any contract of hire or apprenticeship, express or implied...." (Emphasis added). This unambiguous definition of "employee" for purposes of the IWCA clearly expresses the Idaho legislature's intent that IWCA coverage and benefits be available to all private employees without regard to the lawfulness of their employment.

The Surety does not dispute that Mr. Marquez is covered by the IWCA and is entitled to *at least some* of its benefits without regard to the lawfulness of his employment as an undocumented worker. In its Answer to the Amended Complaint, the Surety admitted that Mr. Marquez was subject to the IWCA.[51] The Surety has further conceded that Mr. Marquez, as an undocumented worker, is covered by the IWCA and entitled to its benefits by paying his medical bills under I.C. § 72-432, his total temporary disability under I.C. § 72-408, and his permanent partial impairment under I.C. § 72-428.

Although the Surety concedes that an undocumented worker is entitled to these particular IWCA benefits, the Surety nevertheless argues on appeal that an undocumented worker like Mr. Marquez is not entitled to permanent disability benefits under the IWCA. The Surety's argument should be rejected, because it contravenes the express language of IWCA granting permanent disability benefits.

Idaho Code § 72-423 provides that "permanent disability" occurs "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." (Empha-

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[51] R. pp. 13-14.

sis added). Idaho Code § 72-425 provides: "Evaluation (rating) or 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."[52] (Emphasis added). "The central focus of [I.C. § 72-425] is on the 'ability to engage in gainful activity.'" *Page v. McCain Foods, Inc.*, 145 Idaho 302, 308, 179 P.3d 265, 271 (2008) (quoting *Smith v. Payette County*, 105 Idaho 618, 621, 671 P.2d 1081, 1084 (1983)).

With respect to permanent disability benefits, I.C. §§ 72-423 and 72-425 broadly include any reduction in an employee's ability to engage in gainful activity without any limitation on that gainful activity with respect to the lawfulness of employment. Moreover, I.C. §§ 72-423 and 72-425 expressly apply to any Idaho "employee," which is defined by I.C. § 72-204(2) as "any person...whether lawfully or unlawfully employed." Therefore, I.C. §§ 72-423 and 72-425 unambiguously apply to all injured employees without regard to the lawfulness of the employment.

From the language of I.C. §§ 72-204(2), 72-423, and 72-425, it is apparent that the Idaho legislature intended for permanent disability benefits under the IWCA to be available to Idaho workers without regard to the lawfulness of employment. In other words, the Idaho legislature

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[52] Similarly, I.C. § 72-102(11) of the IWCA defines "disability" for purposes of determining total or partial disability income benefits as "a *decrease in wage-earning capacity* due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430(1), Idaho Code." (Emphasis added). Just as I.C. § 72-425 does not limit "gainful activity" to only lawful employment, I.C. § 72-102(11) does not limit "wage-earning capacity" to only lawful employment.

intended that undocumented workers receive all benefits available under the IWCA, including permanent disability benefits provided for in I.C. §§ 72-423 and 72-425.

Contrary to the Surety's argument on appeal, the language of I.C. § 72-430(1) does not exclude or exempt an employee from permanent disability benefits based upon the lawfulness of the employment. Idaho Code § 72-430(1) provides:

> (1) Matters to be considered. In determining percentages of permanent disabilities, account shall be taken of the nature of the physical disablement, the disfigurement if of a kind likely to limit the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the afflicted 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....

Just like all other statutes contained within the IWCA, I.C. § 72-430(1) is devoid of any language, express or implied, prohibiting an employee from receiving permanent disability benefits based upon the lawfulness of employment.

In construing the consideration factors contained in I.C. § 72-430(1), it must be remembered that these factors are considered for the singular purpose of determining under I.C. § 72-425 whether claimant's capacity for "gainful activity" has been reduced because of the claimant's injury. *See Seese v. Ideal of Idaho*, 110 Idaho 32, 34, 714 P.2d 1, 3 (1985) (The test...is...whether the physical impairment...has reduced the claimant's capacity for gainful employment."). Under I.C. § 72-425, only "pertinent" factors in I.C. § 72-430(1) are considered.

The factors in I.C. § 72-430(1) are "pertinent" only if they are relevant to the claimant's capacity for "gainful activity" under I.C. § 72-425.

The first group of factors under I.C. § 72-430(1) when determining an employee's capacity for "gainful activity" under I.C. § 72-425, include (a) the nature of the physical disablement, (b) disfigurement likely to limit the employee's ability to procure or hold employment, (c) the cumulative effect of multiple injuries, (d) the occupation of the employee, (e) the employee's age, and (f) any manifestation of the occupational disease. With respect to Mr. Marquez's circumstances, this first group of factors readily suggest that he would be entitled to permanent disability benefits. The Surety does not contend otherwise. This first group of factors does not include any reference to the lawfulness of employment.

The second group of factors under I.C. § 72-430(1) when determining an employee's capacity for "gainful activity" under I.C. § 72-425, include "the diminished ability of the afflicted employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee." With respect to this second group of factors, this Court has construed the term "open labor market within a reasonable geographic area" as "the market in which the claimant was living at the time of hearing." *Davaz*, 125 Idaho at 337, 870 P.2d at 1296. *See also Brown v. Home Depot*, 152 Idaho 605, 608, 272 P.3d 577, 580 (2012). Mr. Marquez lives in Emmett, Idaho. Under I.C. § 72-430(1), consideration would be given to Mr. Marquez's diminished ability to compete for employment in and around Emmett, Idaho. Despite his status as an undocumented worker, it is undisputed that he actively competed and obtained employment for nearly two decades in and around Emmett, Idaho. It is also undis-

puted that Mr. Marquez's ability to compete in that same market has been diminished because of his injury. The Surety does not contend otherwise. This supports an award of permanent disability benefits to Mr. Marquez.

The Surety focuses upon the third group of factors to be considered under I.C. § 72-430(1) determining an employee's capacity for "gainful activity" under I.C. § 72-425, which includes "all the personal and economic circumstances of the employee." This Court has construed this third group of factors as including "age, sex, education, economic and social environment, training and usable skills." *Kindred v. Amalgamted Sugar Co.,* 114 Idaho 284, 291, 756 P.2d 401, 408 (1988). This Court has never construed this third group of factors as including consideration of an employee's immigration status or its effect upon the lawfulness of employment. Nor would such consideration be appropriate given the language in I.C. § 72-204(2) expressly excluding consideration of the lawfulness of employment. Any suggestion by the Surety that the lawfulness of employment should be considered under I.C. § 72-430(1) is contrary to the express language of I.C. § 72-204(2) and would improperly make the "whether lawfully or unlawfully employed" language in I.C. § 72-204(2) superfluous. *See Golub v. Kirk-Scott, Ltd.*, 157 Idaho 966, 974, 342 P.3d 893, 901 (2015) ("Effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant.")

Again, there is no language in I.C. § 72-430(1), or anywhere else in the IWCA, prohibiting consideration of both lawful and unlawful employment – there is only the language of I.C. § 72-204(2) defining "employee" as any person employed in Idaho without regard to whether the person is "lawfully or unlawfully employed." Given the express legislative mandate of I.C. § 72-

204(2) and its application throughout the IWCA, the only reasonable interpretation is that the lawfulness of employment is never considered under the IWCA and that all IWCA benefits, including permanent disability, are available to all Idaho workers whether lawfully or unlawfully employed. Given the unambiguous language of the IWCA, the Idaho legislature's intent in this respect is clear.

Had the Idaho legislature intended to exclude consideration of unlawful employment with respect to permanent disability benefits, the legislature knows how to do so. Title 72 of the Idaho Code provides a perfect example. Title 72 includes not only the IWCA but also the Idaho Employment Security Act ("IESA"), I.C. § 72-1301 *et. seq.*[53] The IESA provides certain unemployment benefits to certain unemployed workers. Under the IESA, the Idaho legislature expressly excluded unemployment benefits for undocumented workers. Idaho Code § 72-1366(19)(a) of the IESA provides: "Benefits shall not be payable on the basis of services performed by an alien unless the alien was lawfully admitted for permanent residence at the time such services were performed or was permanently residing in the United States under color of law at the time the services were performed." Had the Idaho legislature intended to exclude undocumented workers from coverage and benefits under the IWCA, the legislature would have simply included an express exclusion similar to the one it included in the IESA. No such exclusion is found in the IWCA.

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[53] The Idaho Industrial Commission has jurisdiction over workers' compensation benefits under the IWCA as well as the unemployment benefits under the IESA. Consequently, the Idaho Industrial Commission is familiar with the requirements of both Acts.

The broadly inclusive language of the IWCA provides coverage and benefits, including permanent disability benefits, to all injured Idaho employees without consideration of the lawfulness of employment. The IWCA contains no language excluding undocumented workers from its coverage and benefits, including permanent disability benefits. Any other interpretation of the IWCA would contravene the well-established principle that "workers' compensation laws are liberally construed in favor of the employee [whether lawfully or unlawfully employed], in order to serve the humane purpose behind the law." *Estate of Aikele v. City of Blackfoot*, 160 Idaho 903, 908, 382 P.3d 352, 357 (2016). *See also Davaz*, 125 Idaho at 336-37, 870 P.2d at 1295-96; I.C. § 72-204(2).

II. Legislative history supports interpreting the IWCA as providing coverage and benefits to all Idaho employees without regard to immigration status.

A. Legislative history surrounding the enactment of the IWCA reveals that immigration status is irrelevant for purposes of permanent disability benefits.

Because undocumented workers are a significant contributor to Idaho's economy, the Idaho legislature has seen fit to provide coverage and benefits to undocumented workers. The legislative policy for the enactment of the IWCA is set forth in I.C. § 72-201. As stated therein, the principal upon which the entire IWCA rests is that "[t]he welfare of the state depends upon its industries *and even more upon the welfare of its wageworkers*." I.C. § 72-201 (Emphasis added). It cannot be disputed that undocumented workers are "wageworkers" in the State of Idaho and that the "welfare" of undocumented workers is therefore paramount under the IWCA.

In 2012, it was estimated that there were approximately 8.1 million undocumented workers in the United States comprising approximately 5.1% of the nation's labor force. *See Roos Foods v. Guardado,* 152 A.3d 114, 120 n.31 (Del. 2016) (citing Jeffrey S. Passel & D'Vera Cohn, *Pew Research Ctr.'s Hispanic Trends Project, Unauthorized Immigrant Total Rise in 7 States, Fall in 14: Decline in Those From Mexico Fuels Most State Decreases*, 29 tbl. A3 (2014)(hereinafter "Pew Research")).[54] This same Pew Research indicated that Idaho's undocumented worker population was one of the fastest growing in the nation and that, in 2012, there were approximately 35,000 undocumented workers in Idaho comprising approximately 4.6% of Idaho's labor market. *See* Pew Research at Table A3. It cannot be disputed that undocumented workers represent a significant portion of Idaho's total labor force. The Idaho Industrial Commission has found that "illegal aliens comprise a significant fraction of the agricultural workforce."[55] The Surety has not challenged this factual finding by the Commission. As a significant portion of Idaho's labor market, undocumented workers play an equally significant role in the overall economy of the State of Idaho.

Because of the impact upon the State's economy, it was sound public policy as stated in I.C. § 72-201 for the Idaho legislature to enact the IWCA with broadly inclusive language protecting the "welfare" of undocumented workers. Not only does I.C. § 72-201 express the legislative intent that the IWCA should be construed in a manner protecting the "welfare" of all workers, including undocumented workers, it also expresses the legislative intent that the IWCA

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[54] http://www.pewhispanic.org/files/2014/11/2014-11-18_unauthorized-immigration.pdf.
[55] R. at p. 31 (Idaho Industrial Commission Order).

should be construed in a manner providing "sure and certain relief" for those workers and their families. I.C. § 72-201.

In this respect, it is important to remember how the enactment of the IWCA protected the welfare of all workers in the State. Prior to the enactment of the IWCA, the only legal recourse available to injured employees in the State of Idaho was to sue their employers in tort which required consideration of the negligence of both the employer and the employee. With the enactment of the IWCA, Idaho employees were provided injury benefits "regardless of questions of fault" but "to the exclusion of every other remedy." I.C. § 72-201. In other words, the coverage and benefits of the IWCA came with a *quid pro quo* eliminating tort relief for injured employees. *See Venters v. Sorrento Del., Inc.*, 141 Idaho 245, 251, 108 P.3d 392, 398 (2005) ("[T]his liability for payment of workers' compensation benefits comes with a *quid pro quo*, in the form of tort immunity."). As a *quid pro quo* exchange, it must be assumed that the Idaho legislature intended for the IWCA to be construed in a manner providing benefits to injured Idaho workers that are at least as valuable, albeit different, than those that had previously been available under common law tort principles.

The tort remedies originally available to undocumented workers in Idaho were addressed by this Court in the case of *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1234 (1986). In that case, an undocumented agricultural worker brought a tort claim against his employer for the loss of his

hand in a potato harvester.[56] The jury awarded $1,350,000 in damages. On appeal, the employer argued that evidence of the worker's status as an illegal alien should not have been excluded at trial. This Court rejected the employer's argument, because the effect that the worker's status as an illegal alien might have on his future wage loss as a result of deportation or otherwise was "merely speculative," particularly given that the worker had already been in the United States for more than six years at the time of trial. *Id.* at p. 624, 733 P.2d at 1249. This Court commented that "it is anomalous for [the employer] to complain about [the undocumented worker] being compensated on the basis of the wages he was receiving" after the employer "accepted the benefits of his labors as an illegal alien." *Id.*

The judicial directive in the *Sanchez* case was clear. With respect to a tort claim filed by an injured undocumented worker against an employer, the injured worker was entitled to pursue future lost wages without regard to the injured worker's immigration status. Consequently, this Court held that it was appropriate calculate an undocumented worker's future wage loss based upon the wage rate that the worker had been receiving in the United States. *Id.* at p. 624, 733 P.2d at 1249.

Although tort remedies were eliminated by the IWCA, the Idaho legislature nevertheless drafted the IWCA to provide a benefit for probable future wage loss to injured workers in the form of IWCA permanent disability benefits. *See* I.C. § 72-425 (defining the evaluation of permanent disability as being an "appraisal of the injured employee's present and probable future

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[56] At the time of this case, agricultural workers were exempted from the IWCA. As discussed below, the IWCA was amended in 1996 to include agricultural workers.

ability to engage in gainful activity"). This was a critical component of the *quid pro quo* substitution of common law tort with IWCA benefits for Idaho employees.

Just as immigration status was irrelevant to a future wage loss claim under common law tort, it is equally irrelevant to a permanent disability claim under the IWCA. It would be unreasonable to construe the IWCA any other way, particularly given the legislative and judicial mandate that it be construed liberally to ensure sure and certain relief to all Idaho workers, including undocumented workers. *See* I.C. 72-201 ("The welfare of the state depends...upon the welfare of its wageworkers...sure and certain relief for injured workmen and their families and dependents is hereby provided."); *Davaz,* 125 Idaho at 336-37, 870 P.2d at 1295-96 ("[W]e must liberally construe the provisions of the workers' compensation law in favor of the employee, in order to serve the humane purpose for which the law was promulgated.").

B. Legislative history surrounding the 1996 repeal of the agricultural exemption from the IWCA further reveals that immigration status is irrelevant for purposes of permanent disability benefits.

Prior to 1996, all agricultural employment in Idaho was exempted from the IWCA, allowing agricultural employees to sue their employers in tort for work-related injuries. *See* pre-1996 version of I.C. § 72-212 at 1994 Idaho Session Laws ch. 293 § 14, p. 916.[57] During the 1996 legislative session, the Idaho legislature repealed this agricultural exemption. In so doing, the Idaho legislature held several hearings in January and February 1996, where the legislative

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[57] Subsection (8) of the pre-1996 version of I.C. § 72-212 provided: "None of the provisions of this law [IWCA] shall apply to the following employments...Agricultural pursuits...[which] shall include the raising or harvesting of any agricultural or horticultural commodity...[and] shall include the loading and transporting...of any agricultural or horticultural commodity...."

committees heard from many groups with a special interest in undocumented workers, including the Migrant Farm Workers Law Unit of Idaho Legal Aid Services, the Idaho Migrant Counsel, the Idaho Farm Workers Association, the Dairymen's Association, the Idaho Hispanic Caucus, and the Mujeres Unidas de Idaho. From these hearings, it is clear that the Idaho legislature was fully aware that the repeal of the agricultural exemption would provide IWCA benefits to undocumented agricultural workers. With this awareness, had it been the Idaho legislature's intention to exclude undocumented agricultural from IWCA, the Idaho legislature would have simply included an exemption for undocumented workers in its 1996 amendment of I.C. § 72-712. The fact that the Idaho legislature did not include an exemption for undocumented workers in its 1996 amendment, knowing full well that the 1996 amendment would result in IWCA benefits being provided to undocumented workers, is a clear expression of the legislature's intention that undocumented workers receive all benefits provided by the IWCA, including permanent disability benefits.

III. The IWCA's coverage of undocumented workers is not preempted by the federal Immigration Reform and Control Act of 1986.

On appeal, the Surety is arguing that an award of permanent disability benefits under the IWCA is preempted by the federal Immigration Reform and Control Act of 1986 ("IRCA"), which IRCA makes it unlawful for employers to knowingly hire undocumented workers and for employees to use fraudulent documents to establish employment eligibility. 8 U.S.C.S. §§ 1324a & 1324c. In support of its argument, the Surety relies upon *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002) (hereinafter "*Hoffman*"), in which the United States Supreme Court

held that an undocumented worker was not entitled to "backpay" under the National Labor Relations Act as an optional remedy for his unlawful termination. *Hoffman*, 535 U.S. at 149-150.

The Idaho Supreme Court has not yet considered whether the IRCA preempts the IWCA with respect to undocumented workers in Idaho. However, many jurisdictions that have directly considered this issue have uniformly held that the IRCA does not preempt disability benefits provided to undocumented workers under state workers' compensation laws notwithstanding the *Hoffman* decision. *See Delaware Valley Field Services. v. Ramirez,* 105 A.3d 396 (Del. Super. Ct. 2012); *Abel Verdon Constr. v. Rivera*, 348 S.W.3d 749 (Ky. 2011); *Asylum Co. v. D.C. Department of Employment Services*, 10 A.3d 619 (D.C. 2010); *Economy Packing Co. v. Illinois Workers' Compensation Commission*, 901 N.E.2d 915 (Ill. App. Ct. 2008); *Affordable Hous. Found., Inc. v. Silva*, 469 F.3d 219 (2d Cir. 2006); *Cont'l PET Techs. v. Palacias*, 604 S.E.2d 627 (Ct. App. Ga. 2004); *Dowling v. Slotnik*, 712 A.2d 396 (Conn. 1998).

There are numerous reasons for holding that the IRCA does not preempt permanent disability benefits provided to undocumented workers under state workers' compensation laws.

First, the IRCA does not expressly preempt state laws providing disability benefits, including permanent disability benefits, to injured workers. *See Asylum Co.*, 10 A.3d at 631; *Economy Packing*, 901 N.E.2d at 921; *Affordable Hous. Found., Inc*, 469 F.3d at 239. Rather, the IRCA contains an express preemption clause which provides that "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions...upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). Workers'

compensation benefits are not sanctions; they are designed to compensate an employee for work-related injuries regardless of fault. *Economy Packing*, 901 N.E.2d at 921.

Second, although the IRCA addresses the hiring of undocumented aliens, nothing in the IRCA indicates that Congress sought to supersede state law providing workers' compensation benefits to injured employees, whether undocumented or otherwise. *Asylum Co.*, 10 A.3d at 631; *Economy Packing*, 901 N.E.2d at 922. To the contrary, the IRCA's legislative history suggests that the statute was not intended "to undermine or diminish in any way labor protections in existing law." H.R. Rep. No. 99-682(I), at 58 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.

Third, there is no conflict between the IRCA and providing permanent disability benefits to undocumented workers for work-related injuries. *Asylum Co.*, 10 A.3d at 631-33; *Economy Packing*, 901 N.E.2d at 922. An award of permanent disability benefits for a work-related injury is fundamentally different than the backpay for an unlawful termination as addressed in *Hoffman.* Permanent disability benefits under I.C. § 72-425 for diminished present and future ability to engage in gainful activity is a substitute remedy for common law tort, as opposed to backpay in *Hoffman* which simply addresses a statutory violation of federal law. Also, unlike the backpay in *Hoffman*, permanent disability benefits are "not designed to make a worker whole for what he would have earned if he had not continued working for his employer during the disability period," but rather are wage loss benefits "predicated upon the loss of wager-earning capacity" with the purpose to compensate the injured worker for inability to earn a living at any job because of the work-related injury. *Asylum Co.*, 10 A.3d at 631-33. *See also* I.C. § 72-425 ("probable future ability to engage in gainful activity"). And, unlike the undocumented alien in *Hoffman*, an in-

jured undocumented worker suffers a loss of earning capacity unrelated to her violation of the IRCA. *Economy Packing*, 901 N.E.2d at 922.

Fourth, it is not illegal for an undocumented worker to seek or engage in unauthorized employment under the IRCA. This was addressed by the United States Supreme Court in *Arizona v. United States*, 567 U.S. 387 (2012) as follows:

> The legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment. A commission established by Congress to study immigration policy and to make recommendations concluded these penalties would be "unnecessary and unworkable." ... Proposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting IRCA. ... But Congress rejected them. ... In the end, IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work – aliens who already face the possibility of employer exploitation because of their removable status – would be inconsistent with federal policy and objectives....
>
> ...The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose. ...

Id. at 405-06. Because it is not illegal for illegal aliens to seek or engage in unauthorized employment under the IRCA, an award of permanent disability benefits to an undocumented worker does not conflict with the IRCA or its purposes.

Fifth, providing permanent disability benefits to an undocumented worker does not contravene the primary purpose of the IRCA to reduce illegal entry into the United States. *Economy Packing*, 901 N.E.2d at 923. The eligibility for workers' compensation benefits in the event of a

work-related accident cannot "reasonably be described as an incentive for undocumented aliens to unlawfully enter the United States." *Economy Packing*, 901 N.E.2d at 922. *See also Abel Verdon Constr.*, 348 S.W.3d at 755; *Asylum Co.*, 10 A.3d at 633.

Sixth, refusing to provide workers' compensation benefits, including permanent disability, to undocumented workers would contravene the purpose of the IRCA "by providing a financial incentive for unscrupulous employers to hire unauthorized workers and engage in unsafe practices, leaving the burden of caring for injured workers and their dependents to the residents of the [state]." *Abel Verdon Constr.*, 348 S.W.3d at 755. "[D]enying compensation coverage to undocumented aliens creates powerful incentives for employers to hire such individuals." *Asylum Co.*, 10 A.3d at 619 (citation omitted). "To refuse to allow recovery against a person responsible for an illegal alien's employment who knew or should have known of the illegal alien's status would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions." *Affordable Hous. Found., Inc. v. Silva*, 469 F.3d at 248 (quoting *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1000 (N.H. 2005)).

Seventh, the Surety's reliance in this appeal on the case of *Cherokee Industries, Inc. v. Alvarez,* 84 P.3d 798 (Okla. Civ. Ct. App. 2003) is misplaced.[58] The issue before the Court is whether Mr. Marquez is entitled to pursue permanent disability under the IWCA. *Cherokee Industries* does not address permanent disability and provides no authority with respect to the ap-

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[58] *See* Appellants' Brief at pp. 22-23.

propriateness of permanent disability benefits. *Cherokee Industries* only addresses temporary total disability benefits (TTD) and whether TTD benefits are precluded by the IRCA. The appropriateness of TTD is not presently before this Court given that the Surety has already paid TTD benefits to Mr. Marquez.

Eighth, the Surety's reliance in this appeal on the case of *Salas v. Sierra Chemical Co.*, 327 P.3d 797 (Cal. 2014) is also misplaced.[59] The *Salas* case was not a workers' compensation case and therefore has no application to the issue before this Court. In *Salas*, an undocumented worker sued his employer for unlawful termination and sought relief under the California Fair Employment and Housing Act. The circumstances were uncannily similar to those in *Hoffman*. Not surprisingly the California Supreme Court held that the undocumented worker's claim for lost wages during the post-discovery period was preempted by the IRCA. *Id.* at 807. However, the California Supreme Court held that the undocumented worker's claim for lost wages during the pre-discovery period was not pre-empted by the IRCA. *Id.* at 807-08.

For these reasons which have been addressed in the above-referenced authority, the IRCA does not preempt permanent disability benefits provided to undocumented workers under state workers' compensation laws. In other words, the IRCA does not preclude Mr. Marquez from seeking permanent disability benefits under the IWCA.

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[59] *See* Appellants' Brief at p. 23.

IV. The Surety's argument on appeal must be rejected because it is based upon the fiction that undocumented workers are unable to engage in gainful activity in an open labor market in Idaho.

The Surety's argument on appeal must be rejected, because the argument is dependent upon the Surety's oft-repeated and fictitious contention that Mr. Marquez, as an undocumented worker, does not have access to a labor market. As discussed above, there are approximately 35,000 illegal aliens working in Idaho. These 35,000 undocumented workers are clearly engaged in gainful activities in Idaho. These undocumented workers represent a significant portion of Idaho's total labor force and economy. This is the reality in Idaho. The IRCD consultant Mr. Halcomb admitted as much when he testified at the hearing that there was a labor market for undocumented workers in the Treasure Valley.[60] Idaho Code § 72-425 requires that permanent disability be determined by appraising an injured employee's "present and probable future ability to engage in gainful activity." This statute requires that an injured employee's ability to engage in gainful activity be assessed based upon truthful facts and not based upon a fiction. Therefore, the Surety's fictitious contention that no labor market exists for undocumented workers must be rejected. Likewise, the Surety's argument that undocumented workers are not entitled to permanent disability must also be rejected.

Lastly, the Surety's oft-repeated suggestion that the Idaho Industrial Commission's Order "created" a system for providing permanent disability benefits to undocumented workers where none had previously existed must also be rejected. It was not the Industrial Commission's Order

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[60] Tr. p. 36, l. 36 to p. 37, l. 24.

that "created" benefits for undocumented workers – it was the Idaho legislature who "created" those benefits when it enacted the IWCA in 1917 for basically all Idaho workers and expanded those benefits to agricultural workers in 1996. Just because the Industrial Commission did not award permanent disability benefits to undocumented workers from 2009 through 2017 does not mean that undocumented workers were not entitled to permanent disability benefits under the IWCA during that time period. The Idaho Industrial Commission did not stop awarding permanent disability benefits to undocumented workers until its decision in 2009 in *Jesus Diaz v. Franklin Building* Supply, I.C. 2006-507999 (Idaho Ind. Com. Nov. 20, 2009).

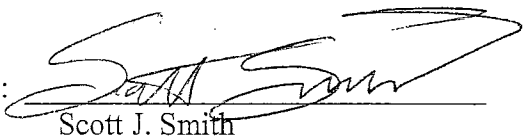
Note should be taken of this Court's decision in *Serrano v. Four Seasons Framing*, 157 Idaho 309, 336 P.3d 242 (2014). In *Serrano*, this Court affirmed the denial of permanent disability benefits to an injured undocumented worker based exclusively upon a lack of causation evidence. Because the undocumented worker failed to satisfy his burden of proof, the Court did not have an opportunity in *Serrano* to address the appropriateness of permanent disability benefits for undocumented workers. Nevertheless, Justice Jones penned a concurrence in *Serrano* joined by Justice Burdick that quoted the entirety of a dissent from the prior Industrial Commission's decision of *Diaz*, which argued that undocumented workers should be entitled to permanent disability benefits under the IWCA. The Industrial Commission's Order at issue in the present case tracks the analysis contained in the dissent in *Diaz* quoted in the concurrence in *Serrano*. Notably, the Industrial Commissioner that drafted the dissent in *Diaz* in 2009 is the same Commissioner that drafted the majority opinion in the Idaho Industrial Commission's Order in 2017 that is now before this Court on appeal.

CONCLUSION

For the reasons discussed above, it is respectfully requested that the Idaho Supreme Court hold that undocumented workers, like Mr. Marquez, are entitled to pursue permanent disability benefits under the Idaho Workers' Compensation Act without to immigration status.

DATED this 16th day of January 2018.

RACINE OLSON NYE & BUDGE, CHARTERED

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of January 2018, I served two true and correct copies of the above and foregoing document to the following person(s) as follows:

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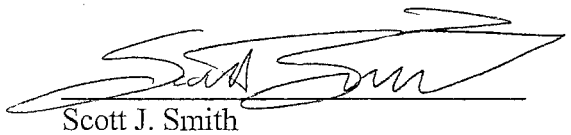

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