11-28-2017

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

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.	)	Supreme Court No. 45415

APPELLANTS' BRIEF

Appeal from the Industrial Commission of the State of Idaho

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STATEMENT OF THE CASE

(i) Nature of the Case

Elfego Marquez is an undocumented worker from Mexico, who sustained an industrial accident while working for Pierce Painting, Inc. ("Pierce Painting") on May 20, 2010. Mr. Marquez filed a claim for workers compensation. The State Insurance Fund ("SIF") has paid medical, temporary disability, and permanent partial impairment benefits to Mr. Marquez. SIF denied permanent disability benefits because Mr. Marquez's status as an undocumented worker eclipses his injury-related impairment, pursuant to Idaho Code § 72-425 and § 72-430 and precedent set forth in Idaho Industrial Commission rulings in *Diaz v. Franklin Building Supply*, 2009 WL 5850572 (2009 Idaho Ind. Com.) and *Otero v. Briggs Roofing Co.*, 2011 WL 4429193 (2011 Idaho Ind. Com.).

Mr. Marquez filed a claim with the Idaho Industrial Commission seeking permanent disability benefits. At the hearing before Referee Alan Taylor, the parties stipulated to most relevant facts. The only issue that was determined by Referee Taylor was whether Mr. Marquez was entitled to permanent partial disability in excess of impairment, but not the extent of his permanent disability.

Referee Taylor determined Mr. Marquez had not proven that due to his industrial accident he was entitled to permanent disability in excess of impairment, since his undocumented status eclipsed his all other factors. This appeal arises from the State Industrial Commission's refusal to adopt Referee's Findings of Fact, Conclusions of Law, and Recommendations dated May 1, 2017, and decision to award Mr. Marquez permanent disability in excess of impairment, overruling precedent set forth in *Diaz* and *Otero*, and concluding that examination of an injured worker's

entitlement to permanent disability can no longer include consideration of the worker's immigration status.

(ii) Course of Proceedings

On April 14, 2015, Mr. Marquez filed a Workers' Compensation Complaint, claiming injury to his wrist and right shoulder. R., pp. 1-5. On May 1, 2015, Mr. Marquez filed an Amended Workers' Compensation Complaint. R., pp. 6-10. On May 5, 2015, Pierce Painting and SIF filed and Answer to Complaint, stating that SIF has paid $8,487.60 in PPI, $30,985.87 in TTD, and $87,526.64 in medical expenses. R., pp. 11-12. On May 14, 2015, Pierce Painting and SIF filed an Answer to Amended Complaint. R., pp. 13-14.

On July 28, 2016, counsel for Claimant and counsel for Defendants filed a Stipulation of Facts, stipulating that:

1. Claimant Elfego Marquez is not legally in the United States.

2. Claimant Elfego Marquez has no legal access to the Idaho or United States Labor Markets.

3. The Defendants acknowledge that Claimant sustained an industrial injury on May 20, 2010.

4. Claimant injured his right wrist and his right shoulder in the industrial accident on May 20, 2010.

5. Defendants have paid medical bills.

6. Defendants have paid permanent partial impairment in full.

7. The parties dispute Claimant's entitlement to disability in excess of his impairment.

R., pp. 18-20.

Also on July 28, 2016, a hearing was held before Referee Alan Taylor. See *Additional Document: Referee Taylor's Recommendation, dated May 1, 2017,* p. 1. The sole issue determined

at the hearing was whether Mr. Marquez was entitled to permanent disability in excess of impairment, but not the extent of his permanent disability. See *Id.*, pp. 1-2. After considering all the facts presented, Referee Taylor determined that Mr. Marquez was covered under Idaho's Workers' Compensation Act. However, since Mr. Marquez was and is an undocumented worker, Referee Taylor concluded his "pre-existing undocumented status entirely eclipses his permanent impairment and extinguishes his present and probable future lawful wage earning capacity in Idaho and the U.S.", and therefore, "Claimant has not proven that due to his industrial accident he is entitled to permanent disability in excess of impairment." See *Id.*, p. 29.

On July 10, 2017, the Industrial Commission issued its Findings of Fact, Conclusions of Law, and Order and Dissenting Opinion. R., pp. 21-56. The Commission, by a 2-1 majority, determined that Mr. Marquez's claim for permanent disability in excess of impairment must be evaluated without reference to his immigration status. R., p. 50. Chairman Limbaugh filed his dissenting opinion, and like Referee Taylor, concluded that Mr. Marquez's "undocumented statute [sic] is a more limiting factor that entirely eclipses his injury-related impairment" and therefore, "Claimant should not be awarded any permanent physical disability in excess of impairment." R. p. 56.

On July 28, 2017, Pierce Painting and SIF filed a Motion to Reconsider with a supporting memorandum. R., pp. 60-72. On August 25, 2017, the Industrial Commission entered an Order on Defendants' Motion for Reconsideration, denying said motion. R., pp. 73-79.

On August 29, 2017, Pierce Painting and SIF filed a Motion for Immediate Appeal. R., pp. 80-83. The Industrial Commission entered an Order Granting Immediate Appeal on September 21, 2017. R., pp. 84-85. On October 4, 2017, Pierce Painting and SIF filed their Notice of Expedited Appeal, pursuant to Idaho Appellate Rule 12.4. R., pp. 86-90.

(iii) Statement of Facts

The following is a statement of undisputed facts developed through discovery, Rule 10 disclosures, the Deposition of Elfego Marquez, the Stipulation of Facts dated July 28, 2016 (R. pp. 18-20), the hearing testimony of Ken Halcomb of the Industrial Commission Rehabilitation Division, and the hearing testimony of Elfego Marquez dated July 28, 2016.

Elfego Marquez Rivera is a 47 year old individual who was born in Ixtlahuaca, Mexico and grew up in Santo Domingo de Guzmán. Tr., p. 41. Mr. Marquez currently lives in Emmett, Idaho and has lived there for the past seventeen years. Tr., pp. 41, 68. Mr. Marquez is married and has two children, a son and a daughter. Tr., pp. 70-71.

Mr. Marquez attended school in Mexico and received a university degree. Tr., p. 42. He worked as a teacher in Mexico for seven years before coming to the United States in 1999 or 2000. Tr., pp. 42-43. Mr. Marquez testified that he earned approximately 1500 pesos every fifteen days, which he equated to approximately $150.00. Tr., p. 44. When Mr. Marquez arrived in the United States, he attempted to find employment as a teacher, but was unable to do so due to language barriers. Tr., p. 47. Mr. Marquez began working as a dish washer at a restaurant in Escondido, California. Tr., p. 48. He did not have a visa, resident alien card, or Social Security number when he arrived in the United States. Tr., pp. 47-48. While in California, Mr. Marquez purchased a fake Social Security number in order to secure employment. Tr., p. 48. Mr. Marquez was promoted to busboy at the same restaurant in Escondido, where he worked for seven or eight months. Tr., p. 51.

Mr. Marquez was married with a daughter at the time he moved to the United States. Tr., p. 46. He initially moved to the United States by himself, but during his employment with the restaurant, he was able to send money to his wife and daughter so they could join him in the United

States. Tr., p. 52. After living a short while in California, Mr. Marquez's wife and daughter moved to Idaho because his wife has family in Idaho. Tr., p. 52. After approximately eight months of working in California, Mr. Marquez moved to Idaho to join his family. Tr., p. 52.

Once in Idaho, Mr. Marquez began working in painting for Don Currier. Tr., pp. 52-53. Shortly thereafter, Mr. Marquez began working for Pierce Painting. Tr., p. 53. He performed preparation work, prepared wood, sanded frames, cleaned houses, and covered everything. Tr., pp. 54-55. Mr. Marquez made $9.00 per hour when he started working for Pierce Painting. Tr., p. 55. The highest wage Mr. Marquez earned with Pierce Painting was $14.00 per hour, though he was making $12.00 per hour at the time of his accident. Tr., pp. 55-56.

Mr. Marquez testified that Rick Pierce, his supervisor at Pierce Painting told him to get another Social Security card. Tr., pp. 49-50. Mr. Marquez stated that he purchased a new Social Security card and in three days, they gave it to his boss, and he said it was okay. Tr., p. 50. In response to the question of whether Mr. Pierce was aware if Mr. Marquez's new social security card was one that he had purchased, Mr. Marquez testified "Well, I think so." Tr., p. 51.

Mr. Marquez worked for Pierce Painting for approximately nine years before his accident. On May 20, 2010, Mr. Marquez was injured when he fell from a couple of buckets that he had stacked to reach a frame of a door. Tr., pp. 57-58. He broke his wrist and injured his right shoulder in the fall. Tr., p. 58. Mr. Marquez was treated by Dr. Hassinger for his wrist and shoulder injuries. Tr., pp. 59-60. Mr. Marquez testified that he still suffers from loss of strength in his right arm, pain in his wrist, and pain and reduced range of motion in his shoulder. Tr., pp. 60-62. Mr. Marquez had two surgeries performed on his right shoulder. Tr., pp. 60-62. He has not received treatment for his shoulder since 2012. Tr., p. 62. Mr. Marquez has not worked since 2012 when he last saw Dr. Hassinger. Tr., pp. 62-63.

Mr. Marquez met with Industrial Commission rehabilitation consultant Ken Halcomb, who helped determine Mr. Marquez's medical status, his treatment plan, what type of work history he had, and what his intentions were on returning to work. Tr., p. 24. Mr. Halcomb assisted Mr. Marquez in determining his transferable skills and other interests he may have had. Tr., p. 25. Mr. Halcomb was unaware that Mr. Marquez was an undocumented worker, so he worked with him to find out when he would be able to go back to work, what he would be able to do, and where he was planning to go to work. Tr., p. 26. In June 2012, Mr. Halcomb referred Mr. Marquez to several available positions that he believed Mr. Marquez would be able to perform with his physical restrictions. Tr., pp. 28-29. Mr. Marquez went to the Department of Labor in Emmett to seek job leads, but was told they could not help him and he could not apply for any jobs if he did not have a Social Security number and card. Tr. pp. 34, 69. Mr. Halcomb was not aware that Mr. Marquez was undocumented, but testified that if he had been aware, he would have proceeded to case closure, would not have referred him to the Department of Labor for job leads, and would not have provided him with job leads during the case because Mr. Halcomb is not allowed to participate in sharing job leads with someone who is not documented. Tr., p. 26.

Mr. Marquez claims he once attempted to obtain legal status in the United States by talking to an immigration attorney, but was told that there was no law that would allow him to fix his legal status. Tr., pp. 69-70. Mr. Marquez's meeting with an immigration attorney was the extent of his attempt to obtain legal status. Tr., p. 70. Mr. Marquez has not indicated that he plans to leave Emmett, Idaho; he likes it there. Tr., p. 68.

ISSUES PRESENTED ON APPEAL

1. Did the Industrial Commission commit reversible error by holding that the most appropriate way to measure permanent partial disability ("PPD") under Idaho Code § 72-425 and § 72-430 is to evaluate disability without reference to Claimant's immigration status, and finding that Mr. Marquez met his burden of establishing permanent disability?

(a) Did the Industrial Commission majority contradict the plain language of Idaho Code §§ 72-425 and 72-430, which requires consideration of "pertinent nonmedical factors"?

(b) Is an employee's legal right to work, as set forth in the Immigration Reform and Control Act of 1986 ("IRCA"), a pertinent nonmedical factor which must be considered?

(c) Did the Industrial Commission majority commit error in overruling precedent set in Diaz and Otero?

(d) Did the Industrial Commission majority create a two-tiered system where undocumented workers are evaluated differently than documented workers?

(e) Did the Industrial Commission majority commit error by creating a system that can provide enhanced benefits to undocumented workers over documented workers?

(f) Does the Industrial Commission's ruling, resulting in an award of future wage loss to an undocumented worker, contravene precedent set in *Hoffman* and *Brown*?

ARGUMENT

I. Standard of Review

"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. *Knowlton v. Wood River Med. Ctr.*, 151 Idaho 135, 140, 254 P.3d 36, 41 (2011). Idaho Code § 72-732 provides:

> Upon hearing the court may affirm or set aside such order or award, or may set it aside only upon any of the following grounds:
>
> (1) The commission's findings of fact are not based on any substantial competent evidence;
>
> (2) The commission has acted without jurisdiction or in excess of its powers;
>
> (3) The findings of fact, order or award were procured by fraud;
>
> (4) The findings of fact do not as a matter of law support the order or award.

"[The Court is] not bound by conclusions of law drawn by the Commission; an order of the Commission must be set aside where the law is misapplied to the evidence." *Combs v. Kelly Logging*, 115 Idaho 695, 697, 769 P.2d 572, 574 (1989).

II. The Industrial Commission committed reversible error by holding that the most appropriate way to measure PPD under Idaho Code § 72-425 and § 72-430 is to evaluate disability without reference to Claimant's immigration status, and finding that Mr. Marquez met his burden of establishing permanent disability.

(a) *The plain language of Idaho Code §§ 72-425 and 72-430 requires consideration of "pertinent nonmedical factors"*

It is the claimant's burden to prove entitlement to permanent disability in excess of impairment. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 34, 714 P.2d 1, 3 (1986). The Commission,

by ruling that Mr. Marquez is entitled to permanent disability in excess of impairment, and that immigration status cannot be considered, overruled the Commission's prior precedent set forth in *Diaz* and *Otero*. The Commission determined that the Immigration Reform and Control Act of 1986 ("IRCA") does not preempt Idaho Code §§ 72-425 and 72-430 and ruled that permanent disability in excess of impairment now be decided without consideration of a claimant's immigration status. This ruling contradicts the plain meaning of Idaho's workers' compensation laws set forth in the Idaho Code.

When interpreting a statute, interpretation begins with the statute's plain language. *Bright v. Maznik*, 162 Idaho 311, 314, 396 P.3d 1193, 1196 (2017) citing *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). "That language is to be given its plain, obvious and rational meaning." *Id*. "If that language is clear and unambiguous, 'the Court need merely apply the statute without engaging in any statutory construction." *Id*., 162 Idaho at 315, 396 P.3d at 1197 quoting *Burnight*, 132 Idaho at 659, 978 P.2d at 219. "To determine the meaning of a statute, the Court applies the plain and ordinary meaning of the terms and, where possible, every word, clause and sentence should be given effect." *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 210, 76 P.3d 951, 954 (2003) citing *Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 153 (1995); *In re Permit No. 36-7200*, 121 Idaho 819, 822, 828 P.2d 848, 851 (1992).

Idaho Code § 72-425 provides, "'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." (Emphasis added). Idaho Code § 72-430(1) provides (with emphasis added):

> 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, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The Commission's ruling contradicts the plain language of Idaho Code §§ 72-425 and 72-430. The Commission's new rule that an award of PPD must be appraised without consideration of a claimant's immigration status amounts to the Commission reading words into the statute that are not in the plain meaning of the text. Pertinent nonmedical factors must be considered, including "all the personal and economic circumstances of the employee." The Commission has determined that only lawful employment will be considered when determining PPD. R., p. 49. If only lawful employment is considered, then all factors affecting Mr. Marquez's access to the legal labor market are not being considered under the Commission's proposed system, in contravention of Idaho Code §§ 72-425 and 72-430.

Appellants recognize that Mr. Marquez is entitled to some workers' compensation benefits. Appellants' position is that he is not entitled to permanent disability in excess of impairment, because the fact that Mr. Marquez does not have legal access to the labor market eclipses all other pertinent factors that must be considered under Idaho Code §§ 72-425 and 72-430. Appellants paid Mr. Marquez's medical expenses, temporary total disability ("TTD") benefits, and permanent partial impairment ("PPI") benefits. Idaho Code sections relating to the payment of medical expenses (Idaho Code § 72-432), TTD (Idaho Code § 72-408), and PPI (Idaho Code § 72-424) do not require the same analysis of pertinent nonmedical factors as do PPD determinations. SIF has

in fact paid over $127,000.00 in workers' compensation benefits to Mr. Marquez, as noted in the parties' stipulated facts.

(b) ***An employee's legal right to work, as set forth in IRCA, is certainly a pertinent nonmedical factor, which under Idaho law, must be considered***

IRCA sets forth the basis under which it is illegal for an employer to hire and employ an undocumented worker. Under IRCA, "it is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C. § 1324a(a)(1)(A). "It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment. 8 U.S.C. § 1324a(a)(2). "Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) shall be fined not more than $3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels." Pursuant to 8 U.S.C. § 1324c(a):

> It is unlawful for any person or entity knowingly –
>
> (1) to forge, counterfeit, alter, or falsely make any document for purpose of satisfying a requirement of this chapter or to obtain a benefit under this chapter,
>
> (2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this chapter or to obtain a benefit under this chapter,
>
> (3) to use or attempt to use or to provide or attempt to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of satisfying a requirement of this chapter or obtaining a benefit under this chapter,
>
> (4) to accept or receive or to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual)

for the purpose of complying with section 1324a(b) of this title or obtaining any benefit under this chapter, or

(5) to prepare, file, or assist another in preparing or filing, any application for benefits under this chapter, or any document required under this chapter, or any document submitted in connection with such application or document, with knowledge or in reckless disregard of the fact that such application or document was falsely made or, in whole or in part, does not relate to the person on whose behalf it was or is being submitted, or

(6) (A) to present before boarding a common carrier for the purpose of coming to the United States a document which relates to the alien's eligibility to enter the United States, and (B) to fail to present such document to an immigration officer upon arrival at a United States port of entry.

Regardless of the Commission's decision that IRCA does not preempt Idaho's workers' compensation laws, it remains undisputed that IRCA makes it illegal for an employer to hire or continue to employ a known undocumented worker. As such, a claimant's legal employability is clearly a pertinent nonmedical factor that must be considered when determining permanent disability. IRCA does not need to preempt Idaho Code §§ 72-425 and 72-430 in order for the finder of fact to consider a claimant's access to the legal labor market.

(c) ***The Industrial Commission's decision to overrule Diaz and Otero was unwarranted***

In *Diaz,* the Commission determined that an undocumented claimant was not entitled to disability in excess of impairment because there was no legal labor market available to him. "'[P]ermanent disability'… results when the actual or presumed ability to engage in gainful activity is reduced or absent <u>because of permanent impairment</u> and no fundamental or marked change in the future can reasonably be expected." *Diaz*, 2009 WL 5850572, at ¶ 16. "'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 <u>affected by the medical factor of permanent impairment and by pertinent nonmedical factors.</u>" *Id*. citing Idaho Code § 72-425.

> 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.

Id., at ¶ 17. The Commission in *Diaz* further stated, "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." *Id*., at ¶ 22. The *Diaz* decision also addressed the argument that employers are essentially rewarded for hiring undocumented workers if permanent disability is denied, by stating, "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." *Id*., at ¶ 23.

In *Diaz*, Commissioner Baskin dissented, arguing that there is a difference between a lack of legal access versus lack of actual access to the labor market. *Id*., at p. 9. Commissioner Baskin further distinguished illegal conduct of working as an undocumented immigrant from other illegal conduct which is illegal due to the nature of the activities involved, stating, "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." *Id*.

In 2011, the same issue was raised before the Commission in *Otero*. In *Otero*, the Commission recognized the two part precedent set in *Diaz* as: "First, the claimant's illegal status eclipsed his impairment; thus, the claimant had 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." *Otero*, 2011 WL 4429193 at ¶ 46. The Commission addressed

Commissioner Baskin's dissent in *Diaz* by pointing out, "the entire Commission agrees that a claimant's illegal status is a relevant factor in analyzing disability. The disagreement concerns whether this factor is a nonmedical factor acting *in conjunction* with the impairment to increase disability, or whether this factor is so extensive as to render any impairment moot." *Id*., at ¶ 47.

In *Otero*, the Commission held,

> Under the precedent set in *Diaz*, it is irrelevant whether Employer knew about Claimant's illegal status. What matters is whether a personal factor, in this case, Claimant's illegal status, so limits Claimant's ability to engage in gainful activity that Claimant's accident-related impairment is essentially rendered moot. We find that such a factor exists. Before the accident, Claimant had no access to the labor market. The same is true after the accident. In effect, the accident, while it did affect Claimant's physical capacities, has not affected his ability to engage in gainful activity in his relevant labor market. He did not possess that ability in the first place. Thus, Claimant is not entitled to benefits for permanent disability, whether total or less than total.

Id., at ¶ 49. Commissioner Baskin again issued a dissent in *Otero*, largely reaffirming his position in *Diaz*.

In the case before this Court, Referee Taylor issued his Recommendation, dated May 1, 2017, in which he determined that Mr. Marquez's "pre-existing undocumented status entirely eclipses his permanent impairment and extinguishes his present and probable future lawful wage earning capacity in Idaho and the U.S." *Referee Taylor's Recommendation, dated May 1, 2017*, p. 29. Referee Taylor cited precedent set forth in *Diaz* and *Otero*, but also considered the ruling in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002) as relevant in his analysis. Chairman Limbaugh also felt that permanent disability was unwarranted, and likewise stated, "Because I believe that Claimant's undocumented status is a more limiting factor that entirely eclipses his injury-related impairment, Claimant should not be awarded permanent physical disability (PPD) in excess of impairment." R., p. 51.

Referee Taylor points out that in *Hoffman*, the Supreme Court considered the effect of IRCA on the issue of whether an undocumented immigrant was entitled to an award of backpay after he was illegally fired by his employer for supporting union activity. The Court determined that awarding backpay to undocumented immigrants would conflict with IRCA, stating:

> Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.

Hoffman, 535 U.S. at 149, 122 S.Ct. at 1283. The Court held, "We therefore conclude that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA." *Id*., 535 U.S. at 151, 122 S.Ct. at 1284.

The Commission, in declining to accept Referee Taylor's recommendation, held that Mr. Marquez "is entitled to pursue a claim for permanent disability, to be evaluated without reference to immigration status." R., p. 50. This decision reverses *Diaz* and *Otero* and presents a drastic shift from recent, established Industrial Commission precedent. As stated by Chairman Limbaugh in his dissent,

> I endorse the approach of past Idaho precedent that illegal aliens or undocumented workers are covered by the Idaho's Workers' Compensation Act, but that certain benefits, i.e., permanent partial disability (PPD), may not be available because of a claimant's illegal status. *Diaz v. Franklin Building Supply*, 2009 WL 5850572 (2009 Idaho Ind. Com.) and *Otero v. Briggs Roofing Company*, 2011 WL 4429193 (2011 Idaho Ind. Com.). Although the Idaho Supreme Court has not reviewed those cases on appeal, I can find no principled argument in this case for disregarding the principles of stare decisis and reversing precedent. In the eight years since the Commission's decision in *Diaz*, supra, the Idaho Legislature has not amended the statute to address any perceived misinterpretation of the undocumented worker's entitlement to an award of permanent partial disability. Absent any legislative or judicial direction, I think it appropriate to avoid drastic shifts in statutory

> application. After all, it is legislators, not judges or Commissioners, who are tasked with making those rules and policies.

R., pp. 51-52.

The Commission majority now establishes a system where a pertinent nonmedical factor, the right to legally work, must be ignored. R., pp. 46, 49. The Commission considered the effect of IRCA on Idaho's workers' compensation law and concluded that "IRCA does not preempt application of state workers' compensation law to injuries suffered by illegal aliens." R., p 46. The Commission considered both express and implied preemption, and determined that neither applied in regard to IRCA and Idaho's workers' compensation law. R., pp. 35-44. Though the Commission also states, "The Commission should limit its inquiry to determining whether Idaho law endorses the payment of permanent disability to illegal aliens. (It does). Whether Idaho law is preempted by IRCA is an issue reserved for the Idaho Supreme Court on appeal of our decision endorsing disability benefits." R. p. 36. Even though the Commission determined that IRCA did not preempt Idaho's workers' compensation law, the Commission also argues that its decision in this case actually promotes the policies of IRCA, in that an opposite decision would incentivize employers to recruit illegal workers since employers would know that they would not be required to pay permanent disability in the event of an injury to an undocumented worker. R., p. 44.

The Commission's position is problematic for several reasons: 1) The system of ignoring immigration status in determining awards of permanent disability creates both a legal fiction and a two-tiered system that asks the finder of fact to ignore relevant evidence, contrary to Idaho Code §§ 72-425 and 72-430; 2) An award of permanent disability to an undocumented worker can actually result in enhanced benefits to an undocumented worker compared to a documented worker; and 3) An award of permanent disability to an undocumented worker would be an award

of future wage loss, contradicting the U.S. Supreme Court precedent set in *Hoffman* and the Idaho Supreme Court decision in *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012).

(d) ***The Industrial Commission majority has now created a legal fiction and a two-tiered system***

The Commission indicates that it does not want to create a two-tiered system, one for documented workers and another for undocumented workers, and that all workers should be treated the same. This is impossible under the proposed method. The Commission's decision clearly creates its own two-tiered system that creates separate standards for undocumented workers not found in the Idaho Code. As argued by Chairman Limbaugh in his dissent, "In order to address Claimant's entitlement to PPD, the Commission would be forced to create a new set of rules and exceptions for undocumented workers – none of which can be found anywhere in the plain language or expressed policies in the Act." R., p. 53 (emphasis added). For consideration of PPD for documented workers under Idaho Code §§ 72-425 and 72-430, all pertinent, nonmedical limiting factors affecting employability must be considered. However, under the new majority rule, not all factors regarding employability can be considered for undocumented workers as the claimant's undocumented status must be ignored. For all documented workers, all pertinent limiting factors affecting an individual's ability to work are considered. In concluding that Mr. Marquez is "entitled to pursue a claim for permanent disability, to be evaluated without reference to immigration status", the Commission majority created a carve-out exception for a particular class of workers where pertinent factors must be ignored. It must be noted that the broad nature of the majority's conclusion of law means that from now on, the actual labor market for an undocumented worker cannot not be considered at all.

The New York Court of Appeals considered the issue of creating a two-tiered system in *Ramroop v. Flexo-Craft Printing, Inc.*, 11 N.Y.3d 160, 896 N.E. 69, 866 N.Y.S.2d 586 (2008). In *Ramroop*, the claimant was an undocumented worker who was injured in an industrial accident. *Id*., 11 N.Y.3d at 165-166, 896 N.E. at 70-71, 866 N.Y.S.2d at 587-588. The claimant sought benefits for impairment of wage earning capacity due to permanent partial disability. *Id*. As in the case before this Court, the claimant was referred to a work rehabilitation program, but the agency found that he was ineligible for services because he is an undocumented worker. *Id*. The New York Court of Appeals considered New York's workers' compensation law, which requires that in order for a claimant to be eligible for additional compensation for impairment of wage earning capacity, the claimant must show 1) that the impairment is due solely to the compensable injury sustained, and 2) that the claimant participate in a board approved rehabilitation. *Id*., 11 N.Y.3d at 166-167, 896 N.E. at 71, 866 N.Y.S.2d at 588. The court held that granting additional compensation, but not requiring the undocumented worker to participate in a work rehabilitation program, would "effectively place the instant claimant, and others similarly situated, in a more favorable position than claimants who must meet all statutory requirements." *Id*., 11 N.Y.3d at 167, 896 N.E. at 72, 866 N.Y.S.2d at 589. The court also noted some workplace protections and primary workers' compensation benefits are still available to injured workers who cannot demonstrate legal immigration status. *Id*., 11 N.Y.3d at 168, 896 N.E. at 72-73, 866 N.Y.S.2d at 589-590.

Although Idaho does not have the same workers' compensation statutes as New York, the *Ramroop* court's concern about creating a two-tiered system is applicable to the case at hand. Even though the *Ramroop* decision would result in undocumented workers being ineligible for additional compensation, the court recognized that an opposite decision would create a system

where documented workers were required to participate in work rehabilitation while undocumented workers would not. Similarly, the system proposed by the Commission majority in *Marquez* creates a standard where all factors regarding employability are considered for documented workers while a primary and significant factor must not be considered for undocumented workers.

Appellants do not contend that there should be a blanket rule that undocumented workers are never entitled to PPD. Idaho Code §§ 72-425 and 72-430 provide that pertinent nonmedical factors affecting a claimant's employability must be considered. The language of these statutes must be given full effect, and be applied consistently to both documented and undocumented workers. The ability to engage in legal employment is clearly a pertinent factor. Consideration of a claimant's access to the legal labor market must be considered in all cases, and not just some instances as proposed by the Commission majority. Appellants recognize that there may be circumstances where an undocumented worker can prove that they have future legal opportunities, but that proof must be put forth at hearing.

(e) ***The Industrial Commission majority has created a system that can provide enhanced benefits to undocumented workers***

The Commission states:

> We agree that Idaho Code § 72-425 and Idaho Code § 72-430 anticipate that disability should be evaluated by considering only lawful employments. However, since we have concluded that IRCA does not preempt Idaho law relating to the evaluation of permanent disability for an illegal alien, the rule we announce today does not presume future illegal employment on the part of an illegal alien; disability must be evaluated without reference to immigration status.

R., p. 49. This determination is problematic in the instant case as it creates a two-tiered system where an employability factor is ignored for undocumented workers. As stated in *Ramroop*, such a system places undocumented workers "in a more favorable position than claimants who must

meet all statutory requirements." The ability to engage in lawful employment is one factor that the Commission must consider in every case and in various ways.

The Commission majority creates a beneficial impact on the treatment of odd-lot workers who are undocumented immigrants. R., pp. 48-49. The Commission notes that "once an injured worker establishes a *prima facie* odd-lot case, the burden shifts to the employer or the Industrial Special Indemnity Fund to demonstrate that some kind of suitable work is regularly and continuously available to the claimant. The majority then cites to *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984), which states that in order to meet the burden, an employer must prove that there is:

> An actual job within a reasonable distance from [claimant's] home which [claimant] is able to perform or for which [claimant] can be trained. In addition, the [employer or ISIF] must show that [claimant] has a reasonable opportunity to be employed at that job. It is of no significance that there is a job [claimant] is capable of performing if he would in fact not be considered for the job due to his injuries, lack of education, lack of training, or other reasons.

R., p. 49. The Commission majority omitted the preceding sentences from *Carey*, which perhaps puts the quote in better context; "In meeting its burden, it will not be sufficient for the Fund to merely show that [claimant] is able to perform some type of work. Idaho Code § 72-425 requires that the Commission consider the economic and social environment in which the claimant lives." *Carey*, 107 Idaho at 113, 686 P.2d at 58 (emphasis added). The Commission majority states that this particular objection "can be handled by requiring of the employer only that it show that there is an actual job that would have met these requirements but for the injured worker's status as an illegal alien."[1] R., p. 49.

[1] The Commission's new proposal of ignoring immigration status entirely is actually a reversal of a proposal set forth by Commissioner Baskin in his dissenting opinion in *Diaz*. Commission Baskin previously proposed a consideration of the illegal labor market as a measure of the jobs available to the injured undocumented worker. R., p. 53. Now, however, the Commission majority proposes evaluating only the legal labor market under the fiction that the claimant would be able to obtain work, but for his undocumented status.

This direction by the Commission majority directly contradicts the *Carey* principle, by requiring that the finder of fact ignore a relevant determining factor. The employer or surety must show that the claimant has a reasonable opportunity to be employed. If there is a job that the claimant would be physically capable of performing, but due to other pertinent nonmedical factors, such as lack of education, the claimant would not be considered for the job, such a job is clearly insufficient for the employer or surety to meet its burden. The job is in effect irrelevant if the claimant would not be considered. The majority's rule does not comport with the *Carey* standard.

In fact, Mr. Marquez arguably benefits over an employee who was working legally, if all other underlying facts were the same. Mr. Marquez has a university education from Mexico and worked for several years as a teacher in Mexico, before coming to the United States. As explained by Chairman Limbaugh in his dissent:

> Here, Claimant is a well-educated individual, who earned a university degree in Mexico where he became a teacher and taught first and third year elementary school for seven years. A similarly educated documented worker with Claimant's credentials would easily be able to secure employment at or above Claimant's time-of-injury wages of only $9.00/hour, and likely incur no PPD in excess of PPI. However, because Claimant is here without the appropriate credentials and has no known intention of remedying the legal hurdles to employment, he cannot do so. Therefore, even with the application of the "but-for" test, Claimant's undocumented status lends itself to a higher disability rating.

R., p. 54.

The Commission's proposed system creates a situation where the plain language of the Idaho Code and the *Carey* principle are ignored, in favor of creating a legal fiction that presumes legal employment for an undocumented worker. In doing so, the Commission has created a system where undocumented workers do not need to meet the same statutory requirements as documented workers. Such a system can actually provide for enhanced benefits to an undocumented worker when compared to a documented worker.

(f) ***An award of permanent disability to Mr. Marquez is an award of future wage loss, contrary to precedent set in*** **Hoffman** ***and*** **Brown**

The Commission states that there is a distinction to be drawn between backpay at issue in *Hoffman* and disability benefits paid for loss of earning capacity. R., p. 41. Although the term "backpay" is used in *Hoffman*, the "backpay" that was initially awarded in the case constituted earnings that the employee would have presumably earned had he not been fired. He had not actually earned the pay through work. The Court points out an award of backpay to an undocumented immigrant in the case would be to award "an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud." *Hoffman*, 535 U.S. at 149, 122 S.Ct. at 1283. The backpay in *Hoffman* could not have been lawfully earned since the employee was an undocumented immigrant. Mr. Marquez cannot lawfully earn wages in the future in Idaho either. To claim that an award of permanent disability in excess of impairment is something other than compensation for future wage loss is to ignore the reality of the benefit. Similar to the backpay issue in *Hoffman*, permanent disability benefits can be viewed as an award for income not actually earned.

The Oklahoma Court of Civil Appeals considered the *Hoffman* ruling in regard to the issue of workers' compensation benefits for an undocumented worker. *Cherokee Industries, Inc. v. Alvarez*, 84 P.3d 798 (Okla.Civ.Ct.App. 2003). The court recognized that an undocumented worker may be entitled to worker's compensation, but that some benefits might not be available to undocumented workers. *Cherokee Industries*, 84 P.3d at 801. The court stated:

> IRCA makes employers criminally liable for hiring an unauthorized alien, or continuing to employ the worker after the status is discovered. The unauthorized worker also faces criminal penalties if he tenders fraudulent documents to the employer. The Supreme Court [in *Hoffman*] held that while employer conduct with

> respect to illegal aliens was covered by the National Labor Relations Act, that benefits awarded by the NLRB may be circumscribed by IRCA.
>
> We do not disagree with this approach, i.e., that illegal aliens are covered by the Workers' Compensation Act, but that certain benefits may not be available because of a claimant's illegal status.

Id.

> The California Supreme Court similarly held:
>
> Because under federal immigration law an employer may not continue to employ a worker known to be ineligible (8 U.S.C. § 1324a(a)(2)), any state law award that compensates an unauthorized alien worker for loss of employment during the post-discovery period directly conflicts with the federal immigration law prohibition against continuing to employ workers whom the employer knows are unauthorized aliens.

Salas v. Sierra Chemical Co., 59 Cal.4th 407, 424, 327 P.3d 797, 807, 173 Cal.Rptr.3d 689, 700 (2014).

IRCA does not need to preempt Idaho's workers' compensation laws in order for access to the legal labor market to be considered as a pertinent nonmedical factor when determining PPD. Rather, the effect of IRCA needs to be considered in determining a claimant's access to the labor market. What results from such an analysis in the present case is that most worker's compensation benefits are available to Mr. Marquez, just not PPD due to the pertinent nonmedical factor of his undocumented status, and because there is no evidence that his status or access to the legal labor market will change.

The Commission majority in *Marquez* also seems to believe that Mr. Marquez's disability evaluation must consider the effect of the injury on his ability to work for the remainder of his life. The Commission states:

> Although disability evaluation should ordinarily be made based on Claimant's time of hearing labor market (*Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012)), the statutory scheme also anticipates that account must be taken of the "actual or presumed" and "present and probable future" ability to engage in gainful

> activity. Therefore, disability evaluation contemplates consideration of the impact of the accident not only on Claimant at the time and place of hearing, but at future times and places. In other words, disability evaluation must attempt to measure the impact of the accident for the balance of Claimant's life.

R. pp. 42-43. The Commission majority apparently relies upon *Asylum Co. v. District of Columbia Dept. of Employment Services*, 10 A.3d 619 (2010) and *Packers Sanitation Services, Inc. v Quintanilla*, 518 S.W.3d 701 (2017). In *Asylum Co.*, the court held "…it was the work-related injury to Claimant's eye, and the time required from Claimant to recover from that injury and to adjust to his impaired vision, that made him physically unable to return to comparable wage-earning anywhere, thereby rendering him 'disabled' within the meaning of the Act." *Asylum Co.*, 10 A.3d at 330. In *Packers Sanitation Services, Inc.*, the court stated that "…people in [claimant's] position would still be able to lawfully work in their own countries or possibly another country but for their compensable on-the-job injuries." *Packers Sanitation Services, Inc.*, 518 S.W.3d at 706.

In presuming that Mr. Marquez may be able to lawfully work in his own country or possibly another country, the Commission is asking us to ignore the precedent set in *Brown v. Home Depot*, as well as relevant facts in the case before this court. In *Brown*, the Court held, "it is the claimant's personal and economic circumstances at the time of the hearing, not at some earlier time, that are relevant to the disability determination." *Brown*, 152 Idaho at 609, 272 P.3d at 581 citing *Davaz v. Priest River Glass Co., Inc.*, 125 Idaho 333, 337, 870 P.2d 1292, 1296 (1994). "Therefore, we hold that the relevant labor market for evaluating the nonmedical factors under I.C. § 72-430 and in determining a claimant's odd-lot worker status is the labor market at the time of hearing." *Brown*, 152 Idaho at 609, 272 P.3d at 581.

Based on the "locale rule" set forth in *Brown* and *Davaz*, it is not proper for the Commission to consider possible future labor markets that Mr. Marquez theoretically might one day return to. Although the Commission cites *Brown*, the precedent set forth in that case contradicts the argument

by the Commission. The relevant labor market at the time of Mr. Marquez's hearing was, and is, southwest Idaho. To presume that Mr. Marquez might someday leave the country and seek legal employment is contrary to the standard set in *Davaz* and endorsed in *Brown*.

Further, in considering the possibility that Mr. Marquez may one day leave the country, the Commission is ignoring the undisputed evidence in the case. Mr. Marquez testified that he has no intention to leave the United States or seek legal employment. Even if he did leave the country and return to Mexico with a permanent physical impairment, Mr. Marquez would be employable as a teacher and his industrial injury would not preclude employment. When the undisputed facts show that the claimant does not anticipate any future legal employment, the Commission is asking the finder of fact to presume another fiction and disregard pertinent factors.

Finally, the Commission also argues that an award of permanent disability to an undocumented immigrant actually promotes the policies underlying IRCA, in that employers will not benefit from hiring undocumented workers with the presumption that they will not have to pay permanent disability in the event of an industrial injury. R., p. 44. However, the Supreme Court in *Hoffman* declined to accept this reasoning, stating:

> …Congress has expressly made it criminally punishable for an alien to obtain employment with false documents. There is no reason to think that Congress nonetheless intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities. Far from "accommodating" IRCA, the Board's position, recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts it.

Hoffman, 535 U.S. at 149-150, 122 S.Ct. at 1283-1284. "Indeed, awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations." *Id*., 535 U.S. at 150, 122 S.Ct. at 1284.

CONCLUSION

The precedent set in *Diaz* and *Otero* applies to the case at hand and should not have been overturned by the Commission. In doing so, the Commission, creates a two-tiered system where certain pertinent nonmedical factors are considered for documented workers while others are not considered for undocumented workers. The system proposed by the Commission creates a fictional standard which is not found in the text of Idaho Code §§ 72-425 and 72-430. The Commission's decision also ignores the "locale rule" set forth in *Brown*.

It is undisputed that Mr. Marquez is an undocumented worker who does not possess the ability to legally work in the United States. Mr. Marquez lives in Emmett and has lived in Idaho for approximately the past seventeen years. Mr. Marquez's injury and place of residence are in the Treasure Valley, and therefore, such location must be considered his labor market. There is no opportunity for Mr. Marquez to engage in lawful, gainful activity in the Treasure Valley, in Idaho, or in the United States. Mr. Marquez had no legal access to the labor market prior to the accident, and the same is true following the accident. All evidence in this case points only to Mr. Marquez continuing to live in the United States as an undocumented immigrant. While Mr. Marquez suffered a permanent impairment as the result of an industrial accident, for which we was paid, any further disability is eclipsed by the more limiting nonmedical factor of an inability to legally work in the United States.

For the reasons described in the Argument above, Pierce Painting and SIF respectfully request that this Court grant their appeal and reverse the ruling of the Industrial Commission.

DATED this 28th day of November, 2017.

CANTRILL SKINNER LEWIS CASEY
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By:_____
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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of November, 2017, I served two true and correct copies of the above and foregoing instrument, by method indicated below, upon:

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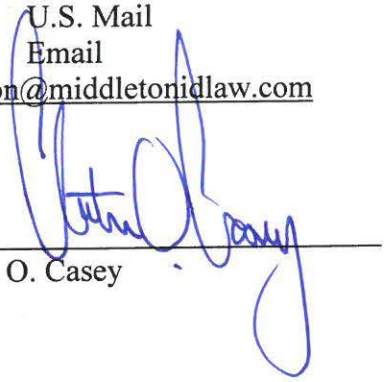

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