BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ELFEGO MARQUEZ, Claimant, v. PIERCE PAINTING, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2010-012699** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AND DISSENTING OPINION** Filed July 10, 2017

This matter came before Referee Alan Taylor for hearing on July 28, 2016. Appearing for Claimant was Clinton Miner, Esq. Appearing for Defendants was Clinton O. Casey, Esq. At hearing, testimony was adduced from Ken Halcomb of the Industrial Commission Rehabilitation Division and Claimant. The singular issue before the Commission is whether, as a matter of law, Claimant is entitled to permanent disability in excess of permanent impairment. (Trans. 8/15-9/25). More specifically, the issue before the Commission is whether it should continue to hew to the rule first announced in *Diaz v. Franklin Building Supply*, 2009 IIC 0652, that illegal aliens are not entitled to an award of permanent disability under Idaho law. On May 1, 2017, the Referee submitted his Findings of Fact, Conclusions of Law, and Recommendation to the Commission. In his proposed decision, the Referee concluded that per *Diaz*, Claimant is not entitled to the payment of "disability in excess of impairment," although he is entitled to the payment of medical benefits and "permanent impairment" as defined at Idaho Code § 72-422. Referee Taylor also cogently articulated a number of additional objections to the award of

permanent disability benefits to an illegal alien, arguments that were not fully explored in *Diaz*, *supra*, or *Otero v. Briggs Roofing Co*., 2011 IIC 0056. Referee Taylor is to be commended for the careful thought he gave to the consideration of this consequential issue. However, as explained herein, the Commission concludes that both *Diaz* and *Otero* were wrongly decided and that illegal aliens, as other workers, are entitled to the full measure of "permanent disability" guaranteed by the Idaho Worker's Compensation law (the Act), as calculated pursuant to Idaho Code § 72-428 and Idaho Code § 72-429. The decision we issue today is not unanimous. As expressed by Referee Taylor and Commissioner Limbaugh, there are valid arguments supporting continued adherence to *Diaz* and *Otero*. However, the majority perceive that in treating this issue, it must first be determined whether Idaho law endorses differential treatment of those legally and illegally in the country, and then whether federal immigration law, specifically the Immigration Reform and Control Act of 1986 (IRCA), supersedes or preempts Idaho law. We have concluded that the Act anticipates equal treatment for both classes of injured workers, and that federal law does not preempt the provisions of the Act which provide for the payment of permanent disability.

FINDINGS OF FACT

1. Prior to hearing, the parties stipulated to the following facts:

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

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

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

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

e. Defendants have paid medical bills.

f. Defendants have paid permanent partial impairment in full.

g. The parties dispute Claimant's entitlement to disability in excess of his impairment. (*See* July 28, 2016 Stipulation of Facts).

2. At hearing, the parties further stipulated that during Claimant's period of recovery, he was paid TTD benefits pursuant to Idaho Code § 72-408 at the applicable rate. As well, Claimant has received payment for the 5% permanent physical impairment rating given by Dr. Hassinger for Claimant's injuries. (Trans. 11/24-12/15).

3. Claimant is a Mexican national who has resided in Idaho since approximately 2000. He resides with his wife and two children. Claimant's youngest child is a U.S. citizen. Claimant testified that although he was educated as a teacher, he found that he and his family could not survive on what he could earn as a teacher in Mexico, approximately $150 bimonthly. He came to the United States because of the opportunity to earn a better living for his family. (Trans. 46/3-16). Claimant took up residence in southern California and initially explored what it would take to become a teacher in the U.S. Daunted by the additional schooling and certifications required, he obtained employment as a dishwasher after obtaining a forged social security card. (Trans. 47/19-49/3). He worked in the restaurant for only six or seven months before joining his wife and daughter in Idaho, where his wife had family.

4. Very soon after moving to Idaho, Claimant obtained employment with Pierce Painting, Inc., Defendant herein.

5. In connection with his hiring, Claimant apparently used the same social security number he had purchased in California, but testified that at some point it became necessary to obtain a new number after Rick Pierce notified Claimant that he (Mr. Pierce) had received notice of garnishment of Claimant's wages for back child support. Evidently, the individual to whom the Claimant's social security number had been legally issued had an outstanding child support delinquency.

6. Mr. Pierce requested of Claimant that he obtain another social security card with a different number. Claimant purchased another forged card and gave it to his employer who advised him that all was well. (Trans. 49/7-50/14).

7. The uncontroverted evidence of record establishes that Mr. Pierce was well aware of Claimant's immigration status during Claimant's employment:

> Q. (By Mr. Miner) Did you ever talk with Mr. Pierce about your immigration status?
> A. Yes.
> Q. And did you tell him that you were not in the country with documentation?
> A. Yes, of course. We talked about that. My coworkers did it too.
> Q. And so was Mr. Pierce aware that you did not have a legal right to work in the United States?
> A. Yes.
> Q. And he was aware that this new Social Security card was simply one that you had purchased?
> A. Well, I think so.

(Trans. 50/21-51/8)

8. On the day of the accident giving rise to this claim, Claimant was assisting other workers doing prep work for a painting job. Claimant needed to prepare an area located above a tall doorway. All of the ladders on site were in use, so after talking with his boss, he used available materials to do the best he could. He stacked two five-gallon paint buckets, one on top

of the other, to use as a makeshift ladder. This arrangement proved unstable, causing Claimant to topple from his perch to the concrete floor. (Trans. 56/13-58/3).

9. As a consequence of the accident, Claimant suffered injuries to his right wrist and right shoulder. He eventually underwent multiple right shoulder surgeries by Dr. Hassinger. Dr. Hassinger eventually rated Claimant's right shoulder impairment at 5% of the whole person. He recommended permanent restrictions for Claimant to avoid overhead activity with the right arm. Dr. Hassinger specifically recommended that Claimant not return to his time of injury job.

10. In July of 2010, Claimant was referred to the Industrial Commission Rehabilitation Division (ICRD) by the State Insurance Fund. ICRD consultant Ken Halcomb was assigned to Claimant's case. Halcomb testified that following the assignment of the file he first met with Claimant's employer, since the primary objective of the ICRD is to preserve Claimant's time of injury job and to return him to that job following recovery from the work accident. He then met with Claimant to conduct an initial interview which included, *inter alia*, questions about Claimant's education, past work history, and transferable job skills. Notably, the interview did not include inquiries about Claimant's immigration status. When it became evident that Claimant would not be able to return to his time of injury profession, Halcomb assisted Claimant in identifying other potential employment opportunities consistent with his restrictions and within his geographic area. (*See* Def. Exhibit 6). Eventually, Halcomb closed Claimant's file without placing him with another employer. Claimant was referred to the Idaho Department of Labor for additional placement services. The labor market survey prepared by Halcomb at the time of closure suggested that Claimant would probably not be able to find

employment that would replace his time of injury wage. Most of the jobs identified by Halcomb were paid in the seven to nine dollar per hour range.

11. At no time prior to file closure did Halcomb learn that Claimant is an illegal alien. He testified that since it is the purpose of the ICRD to return injured workers to their time of injury job, or failing that, to some other suitable job in their geographic area, it is ICRD policy that such placement services cannot be offered to illegal aliens. (Trans. 25/16-26/24; 36/6-18). Halcomb acknowledged that there is a labor market for illegal aliens in the Treasure Valley. (Trans. 36/19-21). However, he was unable to characterize the size and components of that labor market. (Trans. 36/22-37/24). In Halcomb's opinion, Claimant's access to the labor market is limited by virtue of both his immigration status and the permanent effects of his work injury. He would not speculate as to which factor, if either, was more significant in Claimant's case. (Trans. 34/10-25).

DISCUSSION AND FURTHER FINDINGS

12. As noted, the narrow issue before the Commission is whether Claimant is entitled to compensation for "permanent disability" in excess of permanent impairment. In *Diaz*, as reiterated in *Otero*, the Commission has previously ruled that an illegal alien is not entitled to an award of permanent disability owing to the fact that such a worker, having no legal access to his labor market either before or subsequent to the accident at issue, cannot be said to have suffered disability as a consequence of the work accident. Claimant urges the Commission to revisit this holding, arguing that it is inconsistent with the humane purposes of the Act and the admonition that the Act is to be liberally construed in support of a finding of compensation. Defendants

argue that *Diaz* and *Otero* control and that Claimant is not entitled to an award of permanent disability.

13. Both *Diaz* and *Otero* are based on the Commission's acceptance that federal law, specifically the Immigration Reform and Control Act of 1986 (IRCA), makes it illegal to employ undocumented workers. The legal inability to work in the United States, both before and after the work injury, renders moot whatever disability might independently arise from a work accident. As we said in *Otero*:

> 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.

Implicit in this argument is that the provisions of IRCA prevail over the Act; the legal inability to work supersedes (preempts) the physical inability to work caused by an industrial injury. As developed below, the Act anticipates that illegal aliens are entitled to the same protections as those legally employed in the state. Only if federal law preempts operation of the Act are we obliged to conclude that an illegal alien is not entitled to the entirety of protections afforded by the Act.

14. Let us first examine the coverage available to illegal aliens under the Act, independent of federal immigration law. Before doing so, however, it is worth pausing for a moment to recall, in this centennial year of the passage of the Act, that the Act is the end product of a compromise, a "grand bargain," between labor and industry, by which employees gave up their right to pursue a common law remedy for workplace injuries in exchange for a sure, but

limited, right to a statutory slate of benefits payable independent of employer fault. In turn, employers were shielded from potentially ruinous civil verdicts. This compromise is elegantly expressed in the current Idaho Code § 72-201:

> **Declaration of police power. –** The common law system governing the remedy of workmen against employers for injuries received and occupational diseases contracted in industrial and public work is inconsistent with modern industrial condition. The welfare of the state depends upon its industries and even more upon the welfare of its wageworkers. The state of Idaho, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as is otherwise provided in this act, and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as is in this law provided.

Therefore, workers' compensation is a substitute remedy for a right that existed at common law. It must be assumed that the rights workers received were at least as valuable (albeit different) as the ones they gave up. This underlying premise of the grand bargain was the basis of the Commission's decision in *Parrott v. Gem Linen Supply*, 1988 IIC 0636 (1988). In *Parrott*, during part of Claimant's period of entitlement to TTD benefits, he was incarcerated. Surety argued that Claimant was not entitled to the payment of TTD benefits during the time of his incarceration on the grounds that Claimant should not be paid wage replacement benefits during a time when he would not have been able to work if uninjured. In other words, the fact of incarceration supersedes work related disability. This is essentially the same argument made in the instant matter: the inability to legally work in the United States supersedes the fact that the illegal alien's injuries result in a diminishment of his physical ability to work. Rejecting surety's argument the Commission stated:

> In the instant case, claimant suffered an industrial injury for which he has a lawful right to compensation. He gave up the right to sue his employer in exchange for this worker's compensation. He would not have lost the right to sue his employer by being jailed. He should not now lose his right to worker's compensation benefits. Therefore, the Commission concludes that there is no statutory exception which eliminates benefits when a claimant is in prison, and the claimant is entitled to total temporary disability benefits even though he is incarcerated.

15. The treatment given to the disability claims of illegal aliens in *Diaz* and *Otero* denied those workers the full measure of benefits guaranteed by the Act. Illegal aliens retain full access to the Courts of this state for redress of other wrongs, yet *Diaz* and *Otero* deny them remedies available to other injured workers, remedies that were substituted for the right to sue an employer in the Courts of this state. As stated in *Reinforced Earth Co., v. WCAB*, 749 A.2d 1036, 1039-1040 (2000):

> A well established body of law holds that illegal aliens have rights to access to the courts and are eligible to sue therein to enforce contracts and redress civil wrongs such as negligently inflicted personal injures. We fully subscribe to that proposition. As we have pointed out, workers' compensation rests upon both contract and tort principles – the contract right in effect substitutes for the tort right an employee would otherwise have. It would not only be illogical but it would also serve no discernible public purpose to accord illegal aliens the right to bring affirmative claims in tort for personal injury but to deny them the right to pursue the substitutionary remedy for personal injuries sustained in the work place.

For illegal aliens, *Diaz* remade the historic compromise and substituted a new remedy that undermines the historic *quid pro quo*.

16. It is clear that illegal aliens are covered employees subject to the provisions of the Act, notwithstanding that their employment in the state of Idaho may be "unlawful." Idaho Code § 72-204 provides in pertinent part:

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

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

17. With respect to the provisions of Idaho Code § 72-204(2), there is some difficulty in ascertaining whether the language "whether lawfully or unlawfully employed" is intended to modify "a minor" or "a person." If the former, then the provisions of the Act apply to all employments generally, whether lawful or unlawful. However, if the language in question is intended only to modify the term "a minor," then the provisions of Idaho Code § 72-204 do not lend support to the proposition that the Act applies to all employments, regardless of whether they are lawful or not.

18. If it was the Legislature's intent that the modifying language apply only to minors, it could have crafted the statute differently to make this clear. For example, the Legislative could have stated: "a person, including a minor lawfully or unlawfully employed,. . . ." That the Legislature intended the modifying language to apply to all employments, is also suggested by the provisions of Idaho Code § 72-212. That section exempts certain employments from coverage under the Act, such as casual employment, the employment of domestic servants, etc. If the language "whether lawfully or unlawfully employed" was intended by the Legislature to only modify the term "a minor," then Idaho Code § 72-204 provides no guidance on the question of whether other unlawful employments are subject to the provisions of the Act. This would have provided the Legislature with the opportunity to address whether other unlawful employments are exempt from coverage pursuant to Idaho Code § 72-212. This, the Legislature failed to do, which further supports the conclusion that the

modifying language of Idaho Code § 72-204(2) was intended to apply to all employees, and not just minors.

19. It is also notable that illegal aliens are not among those exempted from the Act's coverage pursuant to the provisions of Idaho Code § 72-212. The lack of an exemption for illegal aliens in Idaho Code § 72-212 is quite telling in light of the repeal of the agricultural pursuits exemption in 1996.

20. In 1996, after several years of study, the Idaho legislature amended Idaho Code § 72-212 to repeal the agricultural pursuits exemption. Until the repeal, agricultural workers were exempt from coverage under the Act. In 1996, as now, it was assuredly known by those who had more than a passing familiarity with the Idaho economy, that illegal aliens comprised a significant fraction of the agricultural workforce. We have carefully reviewed the legislative history of the debate over the repeal of the exemption. At several hearings before the Senate Commerce and Human Resources Committee and the House Human Resources Committee in January and February of 1996, the committees heard from a variety of individuals and entities with an interest in the proposed repeal, including, *inter alia*, Ernesto Sanchez, Executive Director of Idaho Legal Aid Services; Eric Johnson, Director of Migrant Farm Worker Law Unit, Idaho Legal Aid Services; Arnold Hernandez of the Idaho Migrant Counsel; Rogelio Valdez of the Idaho Farm Workers Association; Lewis Eilers, Director of the Dairymen's Association; Maria Nava of the Idaho Hispanic Caucus; Ana Maria Schactell of the Mujeres Unidas de Idaho; Humberto Fuentes, Executive Director of the Idaho Migrant Counsel; and Jen Ray, Executive Director of the Idaho Women's Network. From the testimony adduced at these hearings, committee members heard that many agricultural workers exempted from coverage were Spanish

speaking migrant laborers either directly employed by farmers, or indirectly through the intermediary of farm labor contractors. It is hard to give credit to the notion that the legislators entertaining the adoption of Senate Bill 1377 did not understand that many of the workers who would stand to benefit from the expansion of coverage were illegal aliens. And yet, no effort was made to deny coverage to illegal aliens as part of the general grant of coverage to agricultural workers. This leads the Commission to conclude that in extending the Act's protections to agricultural workers, the legislature did not intend to limit that coverage to only agricultural workers who were legally in the United States. Had it been the intention of the legislature to safeguard the 1996 expansion of coverage from the claims of illegal aliens, 1996 was the year, and Senate Bill 1377 was the place, to do so.

21. The failure of the legislature to exclude illegal aliens from the expansion of coverage suggests a legislative intention to include such individuals in the expansion. The maxim *expressio unius est exclusio alterius* may be applied to a statute when it lists one or more of a number of possible subjects, the inference being that the unlisted items were not intended to fall within the statutes purview. (*See Wright v. Brady*, 126 Idaho 671, 889 P.2d 105 (1995)). Although subsequent cases suggest that the application of the maxim as a tool of statutory construction is not mandatory, it nevertheless seems to lend itself to Idaho Code § 72-212 and suggests that by failing to identify illegal aliens as an exempt class of workers, particularly at the time of the 1996 amendment to Idaho Code § 72-212, the legislature intended to include such individuals for coverage under the Act. (*See St. Alphonsus Diversified Care, Inc. v. MRI Associates, LLP*, 148 Idaho 479, 224 P.3d 1068 (2009)). In short, we believe the 1996 repeal of the agricultural pursuits exemption, not because of what it did, but rather, because of what it did

not do, makes it even more clear that illegal aliens are covered employees for purposes of the Act.

22. It is also telling that while Idaho Code § 72-102(1) does define "alien," and while Idaho Code § 72-1366(19)(a) does deny unemployment compensation to aliens not legally admitted to this country, no similar provision was adopted for the purpose of denying workers' compensation benefits to illegal aliens.

23. In considering the treatment of illegal aliens under the Act, it is also important to recall an axiom of workers' compensation that is repeated so frequently in case law it tends to fade into the noise instead of standing out, as it should; the Act is to be liberally construed in favor of a finding of compensation. As stated in *Haldiman v. American Fine Foods,* 117 Idaho 955, 956, 793 P.2d 187 (1990):

> The statutory basis for the principle of liberal construction of the worker's compensation laws in favor of claimants is I.C. Section 72-201 (1989). This declaration of the purpose of the worker's compensation system in Idaho states that "sure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy proceeding or compensation, except as otherwise provided in this act."
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> For almost seventy years this Court has adhered to the principle that the worker's compensation law should be liberally construed in favor of the claimant in order to affect the object of the law and to promote justice. *E.g*., McNeil v. Panhandle Lumber Co., 34 Idaho 773, 203 P. 1068 (1921); Miller v. Amalgamated Sugar Co., 105 Idaho 725, 672 P.2d 1055 (1983). In McNeil, the first case in which this principle was announced, we said:
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> *The workmen's compensation law, like other laws of this state, is to be liberally construed with a view to effect its object and promote justice. This does not mean that the courts should endeavor by construction to extend its provisions to persons not intended to be included by it, but that it shall be so construed as to carry out its purposes and, so far as is reasonably possible, secure its benefits to all those who were intended to receive them.*

24. The liberal construction that must be afforded the interpretation of the Act is intended to advance the remedial and humane purposes of workers' compensation, and we detect nothing in the Act which reflects a legislative intention to apply the Act preferentially to workers who legally reside in the United States. Indeed, as developed above, the Act specifically affords coverage to those unlawfully employed. In *Diaz* and *Otero*, it was conceded that because of this language, the Act covers illegal aliens, and that it affords at least some of the protection enjoyed by other workers such as medical benefits and permanent impairment, but not retraining benefits or disability in excess of physical impairment.[1] However, we now conclude that without reference to external federal law, there is nothing in the Act that warrants the denial to illegal aliens of worker's compensation benefits, including "permanent disability" payable pursuant to Idaho Code § 72-428 and Idaho Code § 72-429 and the assistance of the Industrial Commission Rehabilitation Division pursuant to the provisions of Idaho Code § 72-501A.

25. We come then to the real issue in this case, i.e. whether a federal law which makes it a crime to knowingly hire illegal aliens preempts state law that would afford such an injured worker the payment of permanent disability to compensate for loss of earning capacity, as contemplated by Idaho Code § 72-425 and Idaho Code § 72-430. Generally, IRCA makes it a

[1] Referee Taylor, who authored the decision adopted by the majority in *Diaz*, as well as the proposed decision in this matter, draws a distinction between permanent impairment and permanent disability that is not recognized by statute. As we recently explained in *Dickinson v. Adams County*, 2017 IIC 00007 (2017), the Act does not provide for the payment of "permanent impairment." Rather the Act only provides for the payment of "permanent disability" pursuant to the provisions of Idaho Code § 72-408, Idaho Code § 72-428, and Idaho Code § 72-429. Viewed as such, impairment is simply a measure of disability, although it is not infrequently the case that it is deemed to not adequately represent the full measure of disability. Additional disability may be awarded after considering the factors enumerated at Idaho Code § 72-425 and Idaho Code § 72-430. The distinction drawn by Referee Taylor between the payment of impairment and the payment of disability is a distinction that does not exist in Idaho law. If it is indeed the law that IRCA preempts Idaho law on the payment of permanent disability, then neither can an illegal alien's "impairment rating" be paid as an entity distinct from an award of permanent disability. There is no such thing as the payment of "permanent impairment," characterized as such.

crime for employers to knowingly hire, and retain in their service, illegal aliens. By the same token, IRCA makes it a crime for illegal aliens to use fraudulent documentation in an effort to obtain employment. The argument that was accepted in *Diaz* and *Otero* is that since permanent disability is a measure of the extent to which an accident has caused loss of earning capacity, there can be no permanent disability payable to an illegal alien since such individuals cannot legally be employed in the United States in the first place. Although not couched as such by the Commission in *Diaz* and *Otero*, or by Referee Taylor in his proposed decision in this case, we believe that the issue is clearly one of federal preemption, and other jurisdictions that have considered this issue have treated it as such.

26. The principal that a federal law may prohibit the enforcement of state law is grounded upon the supremacy clause of the United States Constitution, which provides that the laws of the United States, made pursuant to the national constitution, "shall be the supreme law of the land." U.S. Constitution Article VII. Any state law that conflicts with federal legislation, either expressly, or impliedly, is without effect and cannot be enforced. However, since federal preemption derives from the supremacy clause of the United States Constitution, the Idaho Industrial Commission does not have jurisdiction to consider whether federal law preempts Idaho law in this instance. Generally, the Idaho Supreme Court has held that the Industrial Commission does not have jurisdiction to address constitutional challenges. The constitutionality of a provision of the workers' compensation law is properly addressed only by the courts. (*See Tupper v. State Farm Insurance*, 131 Idaho 724, 963 P.2d 1161 (1998); *State Insurance Fund v. Van Tine*, 132 Idaho 902, 980 P.2d 566 (1999)). Therefore, the first criticism that might be leveled against *Diaz*, *Otero*, and the proposed decision is that they wade into an area of

constitutional law reserved for the courts. The path forward in this matter should probably be as follows: 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. The case could then be remanded to the Commission with instructions to proceed this way or that, depending on how the preemption issue is resolved. The problem is that we do not know whether our decision will be appealed.[2] In order to evaluate how best to administer the Act until higher authority decides the preemption issue, it seems advisable for the Commission to make some effort to understand whether it is Idaho or Federal law that controls this issue.

27. The 50 states each have state-run workers' compensation systems, and each of the 50 states are inhabited, to greater or lesser degrees by aliens who are engaged in illegal employment, and who, from time to time suffer work related injuries. So, it is no surprise that the issue of IRCA and federal preemption come up not infrequently. There is a good deal of case law on the question of whether IRCA preempts state workers' compensations laws that make provision for the award of disability benefits based on loss of earning capacity. Although there is no uniformity of result, the majority of jurisdictions that have considered the matter have concluded that IRCA does not preempt state workers' compensation law in wholesale fashion. 7 Lex. K. Larson, Larson's Worker's Compensation § 66.03 (Matthew Bender, Rev. Ed.)

28. The decision proposed by the Referee relies heavily on the Supreme Court decision in *Hoffman Plastic Compounds, Inc., v. NLRB*, 535 U.S. 137 (2002) in support of the

[2] We believed that both *Diaz* and *Otero* would be appealed. They were not.

conclusion that an illegal alien is not entitled to an award of permanent disability based on loss of earning capacity, because the illegal alien has no access to legal employment in the United States. In *Hoffman*, the back pay that was awarded to the illegal alien pursuant to the NLRA was in direct conflict with IRCA because the wages represented by that back pay could not lawfully have been earned, and were for a job obtained in the first instance by criminal fraud. The proposed opinion concludes that the same analysis applies to an award of Idaho workers' compensation benefits.[3] In *Hoffman*, the issue was how to reconcile two conflicting federal statues, IRCA and the NLRA. Here, the tension is between a federal statute and state workers' compensation law, and involves a very different analysis than that employed in *Hoffman*. In the instant matter, principles of federal preemption must guide the resolution of the apparent conflict. (*See Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219 (2006)). Preemption may be expressly stated in the federal statute's language or implicitly contained in its structure or purpose. (*See Fidelity Federal Savings and Loan Assn. v. De La Cuesta*, 458 U.S. 141 (1982)). Implied preemption may be further delineated into the subcategories of "field preemption" and "conflict preemption." Field preemption occurs when a federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it. (*See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504

[3] The U.S. Supreme Court has not addressed the question of whether, or to what extent, IRCA preempts state workers' compensation law. However, it has declined to entertain the question of whether *Hoffman* should be read to stand for the proposition that IRCA preempts state workers' compensation law. In *Rodriguez v. Integrity Contracting*, 38 SO.3d 511 (2010), Vaughn Roofing, the statutory employer of Rodriguez, argued that it could not be held responsible for the payment of workers' compensation on the theory that *Hoffman* makes it clear that IRCA preempts state workers' compensation law. The lower Court ruled that *Hoffman* does not suggest that the U.S. Supreme Court intended to supplant state workers' compensation law. Vaughn filed a writ of Certiorari with the U.S. Supreme Court on the question of whether IRCA "preempts state law awards of workers' compensation benefits to illegal aliens, particularly payments for replacement of wages that could not have been lawfully earned." *Vaughn Roofing and Sheet Metal v. Rodriguez* 2010 WL 5399203 (U.S.) (Appellate petition, motion, and filing) S.C. Certiorari was denied. 131 S. Ct. 1572.

(1992)). Conflict preemption exists "where compliance with both federal and state regulations is a physical impossibility . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978)).

29. As respects the issue of express preemption, IRCA does not expressly preempt state laws allowing illegal aliens who have sustained work related injuries from receiving workers' compensation benefits. Rather, IRCA contains an express preemption clause which provides that "the 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 USC § 1324a(h)(2)(2000). Workers' Compensation benefits are not a "sanction." Rather, they are intended to compensate an injured worker for the effects of a work related injury or occupational disease. Other courts that have considered this question have uniformly concluded that there is no express preemption of state workers' compensation laws contained in IRCA. (*See Economy Packing Co. v. Illinois Workers' Compensation Commission*, 387 Ill. App. 3d 283, 901 N.E.2.d 915 (2008); *Staff Management v. Jimenez*, 839 NW2d 640 (2013); *Asylum Co. v. District of Columbia Dept. of Employment Services*, 10 A. 3d 619 (2010); *Dowling v. Slotnik*, 244 Conn. 781, 712 A 2.d 396 (1998)).

30. "Field preemption" occurs where federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it. However, "the historic police powers of the states are not to be superseded by federal act unless that is the clear and manifest purpose of Congress." (*See Cipollone v. Liggett Group, Inc.*, *supra).* In the house report on IRCA it was specifically stated, "It is not the intention of the

Committee that the employer sanctions provision of the bill be used to undermine or diminish in any way the labor protections in existing law." H.R. Rep. No. 99-682 at 58 (1966). (*See* also *Staff Management v. Jimenez*, *supra* and *Asylum Co. v. District of Columbia Dept. of Employment Services*, *supra*).

31. By far, most of the attention that has been devoted to analyzing whether IRCA conflicts with state workers' compensation law relates to the issue of conflict preemption. Again, conflict preemption arises where compliance with both federal and state regulations is a physical impossibility, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (*See Ray v. Atlantic Richfield Co.*, *supra*).

32. At first blush, *Hoffman* appears to lend some support to the proposition that compliance with IRCA and state workers' compensation laws relating to the payment of disability based on loss of earning capacity is an impossibility. In *Hoffman*, the award of back pay to an aggrieved illegal alien, discharged for supporting a union organizing effort, was found to be antithetical to the provisions of IRCA, which makes the hiring of an illegal alien illegal. The Court reasoned that awarding back pay to undocumented workers violates IRCA by condoning prior violations of immigration law. Referee Taylor concluded that the same reasoning applies to the award of permanent disability benefits to an illegal alien. If the illegal alien cannot be employed in the United States, then an award of permanent disability representing his diminished ability to engage in future gainful activity, cannot be endorsed. This is the most plausible argument for federal preemption of Idaho disability law. The argument is that like the back pay at issue in *Hoffman*, an award of permanent disability presumes that had

the illegal alien not suffered a work injury, his employment would have continued. The award of disability therefore presupposes the continuation of illegal employment. However, it can be argued with equal conviction that an award of permanent disability simply presumes that had the illegal alien not suffered a work injury, his physical capacity for work would have continued. ICRA does not prohibit an award compensating an illegal alien for loss of functional capacity related to a work injury. Many courts and commentators that have considered this issue have ruled that IRCA does not preempt state workers' compensation law awarding disability based on loss of earning capacity. (*See* cases collected at *Madeira., supra*). It is not "physically impossible" for employers and those illegally employed to comply with both IRCA and the provisions of Idaho law providing for the evaluation and payment of permanent disability. The evaluation of permanent disability does not require of employers that they knowingly hire illegal aliens any more than such evaluation requires of illegal aliens that they execute fraudulent documents to be used in pursuit of employment. The Act simply requires the payment of permanent disability as a measure of the impact of a physical injury on an individual's ability to perform gainful activity. As several courts have observed, the "back pay" at issue in *Hoffman* cannot be equated with the payment of permanent disability. As explained in *Economy Packing Co. v. Illinois Workers' Compensation Commission*, *supra* at 291:

> The [permanent disability] benefits awarded in this case are fundamentally distinct from the back pay at issue in *Hoffman*. Had the employer in *Hoffman* not terminated the undocumented worker for attempting to unionize, the IRCA effectively required that the worker be discharged. Accordingly, the undocumented worker in *Hoffman* was not legally entitled to wages during the period for which back pay was awarded. See *Hoffman*, 535 U.S. at 149, 122 S.Ct. at 1283, 152 L.Ed.2d at 282. Unlike the undocumented alien in *Hoffman*, the claimant in this case has suffered a loss of earning unrelated to her violation of the IRCA. Although the IRCA prevents the claimant from legally working in the United States, she would still be able to work elsewhere had she not sustained a

> work-related injury. As a consequence, the award of [permanent disability] benefits to the claimant is separate and distinct from any continuing violation of the IRCA and, therefore, does not conflict with federal immigration policy.

To the same effect is the following discussion in *Asylum Co. v. District of Columbia Dept. of Employment Services*, *supra* at 631:

> The backpay award was for the period from the date the worker was fired until the date the employer first learned of his undocumented status. *Id*. The Court reasoned that "awarding backpay to illegal aliens runs counter to policies underlying IRCA" and "condone[s] prior violations of the immigration laws." *Id*. at 140, 149, 151, 122 S.Ct. 1275. As courts have recognized in a variety of contexts, the purpose of backpay "is to … place the grievant in the position that the grievant would have been absent a violation."
>
> . . .
>
> In contrast – and contrary to the Employer's assertion – the award in issue here is not an award of back pay, but instead is an award of wage-loss benefits. Wage-loss benefits are "predicated upon the loss of wage-earning capacity." *Logan v. District of Columbia Dep't of Emp't Servs*., 805 A.2d 237, 242 (D.C. 2002). Their purpose is to compensate a worker for inability "to earn a living … because of a work-related injury or illness.
>
> . . .
>
> In short, the average-weekly-wage award here was not designed to pay Claimant what he would have earned as part of Employer's workforce from June 30, 2005 to January 26, 2006. Accordingly, unlike the back pay award in *Hoffman*, the award in this case did not conflict with IRCA by requiring the employer to pay "wages that [the undocumented worker] could not lawfully have … earned." *Hoffman*, 535 U.S. at 149, 122 S.Ct. 1275. For that reason, we agree with courts that have held that Hoffman does not preclude awards of workers'-compensation-type wage-loss benefits to undocumented aliens.

Commentators, too, have perceived that there is a distinction to be drawn between the back pay at issue in *Hoffman*, and disability benefits paid for a loss of earning capacity under state workers' compensation laws:

> At first glance, Hoffman Plastic can be read as suggesting that income compensation awarded in workers' compensation claims – like backpay awarded in NLRA, claims - - is preempted by the IRCA. However, income compensation is distinguishable from backpay on two bases. First, income compensation serves as a substitute remedy for a common law tort, as opposed to back pay, which addresses statutory violations. In developing workers' compensation schemes,

> traditional tort remedies were severely curtailed in exchange for the application of a strict liability standard. This places additional importance on income compensation as a relief for injured workers who cannot bring separate torts suit to recover general compensatory or punitive damages.

(Working in the Shadows: Illegal Aliens' Entitlement to State Workers' Compensation, 89 Iowa Law Review 709, 736 (2004)).

> Excluding undocumented immigrants from workers' compensation may also distort the deterrent function of state workers' compensation laws. As the Massachusetts Department of Industrial Accidents observed in Medellin v. Cashman, "[t]here would be a windfall to the insurer in premiums collected for workers not covered, and a windfall to the employer for a work injury that would not affect its experience modification and increase its policy premiums." This is another way in which backpay under the NLRA can be distinguished from workers' compensation. In Hoffman, the Supreme Court found it significant that the employer would not "get[] off scot-free," and that failure to comply with the NLRA's order would subject Hoffman to contempt proceedings and other sanctions. The Court ultimately concluded that the purpose of the NLRA could still be served even if the NLRB was restricted from awarding backpay to an undocumented worker. In contrast, the deterrent purpose of workers' compensation is fundamentally compromised when a large segment of the working population in certain industries is removed from its protections.

(Immigrant Workers and Workers' Compensation After Hoffman Plastic Compounds, Inc. v. N.L.R.B., 30 N.Y.U. Rev. L. & Soc. Change 299, 315 (2006)).

33. Under Idaho Code § 72-423, "permanent disability" results when the "actual or presumed" ability to engage in gainful activity is reduced. The evaluation of permanent disability under Idaho Code § 72-425 anticipates an appraisal of the injured employee's "present and probable future ability to engage in gainful activity." 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. For an illegal alien, there may be a time or place where his injuries still impact his ability to engage in gainful activity yet, for whatever reason, he is not subject to IRCA. Such a worker is entitled to compensation for a life-long disability even though, at the time and place of hearing, he cannot be legally employed. Courts have agreed that IRCA should not be so broadly read to foreclose these benefits:

> We agree with respondent DOES that, under the Act, "the fact that an employee may be unable to work for reasons beyond his injury does not affect his entitlement to benefits, as long as the injury independently causes that disability." To be sure, Claimant's termination prevented him from working for the Employer and his undocumented status prevented other employers in the United States from lawfully employing him. But 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. v. District of Columbia Dept. of Employment Services*, *supra* at 630).

> Packers attempts to sidestep our law's inclusive language with the concession that Cecilia's undocumented status may not preclude her from getting treatment for her shoulder, but it is the reason she cannot work going forward and the reason why they should not have to pay her temporary total-disability benefits. This is not persuasive, and as pointed out by courts that have addressed this argument head-on, ignores the fact that people in Cecilia'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.*, v. *Quintanilla*, - S.W. 3d - - (2017); 2017 WL 1277440).

34. Finally, in connection with conflict preemption, most jurisdictions that have considered the issue have determined that state workers' compensation laws do not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the IRCA. To the contrary, and as expressed in the dissent to *Diaz* and *Otero*, to deny

illegal aliens the full measure of protection afforded by the Act actually incentivizes unscrupulous employers to hire illegal aliens who they will never be made to compensate for work related injuries, and who can be discharged as soon as they become a liability to the employer.[4] The savings enjoyed by employers in the form of monies that would otherwise have been paid to illegally employed aliens as disability benefits, only encourages further mischief. Further, if illegal aliens are not subject to the same protections as other workers under the workers' compensation system, premiums, which are calculated on the basis of experience and severity, will be unfairly skewed in favor of employers and sureties of illegal workers. This, too, incentivizes employers to recruit illegal workers. Suffice it to say that enabling employers and sureties to avoid responsibility for the payment of workers' compensation benefits to illegal aliens actually encourages the hiring of illegal aliens, perpetuates the shadow economy, and thwarts the policies underlying IRCA.[5] Finally, it cannot be seriously asserted that to allow the payment of permanent disability benefits to an injured illegal alien will encourage illegal immigration to the United States. (*See Dowling v. Slotnik, supra*; *Asylum Co. v. District of Columbia Dept. of Employment Services, supra*). The abstract potential for the payment of workers' compensation benefits in Idaho cannot realistically be regarded as a "magnet" that draws illegal aliens to the United States.

[4] For those employers who hire illegal aliens with a purpose in mind to escape liability for work related injuries due to IRCA preemption, the provisions of Idaho Code § 72-318 may thwart such an effort. That section provides, *inter alia*, that no contract or "device whatever designed to relieve the employer in whole or in part from any liability created by this law, shall be valid." An employer who knowingly hires an illegal alien should not be heard to defend a claim for workers' compensation on the basis of the illegal hire, such illegal contract of hire constitutes the "device" intended to relieve employer of obligations under the Act.

[5] For a timely, if anecdotal, illustration of these abuses in the poultry industry, see Michal Grabell, Cut to the Bone, The New Yorker, March 8, 2017, at 46.

35. For these reasons, we conclude that IRCA does not preempt Idaho workers' compensation law relating to the payment of disability and that injured workers who happen to be illegal aliens are entitled to permanent disability benefits payable under that law.[6] There remains the somewhat vexatious question of exactly how permanent disability should be measured for such workers. In both *Diaz* and *Otero*, the dissent suggested that an injured worker's immigration status was but one of the many non-medical factors that should be considered by the Commission in evaluating permanent disability pursuant to Idaho Code § 72-425 and Idaho Code § 72-430. Such an approach would recognize that an illegal alien's pre-injury labor market consisted of those jobs he was physically and otherwise capable of performing, offered by employers who either could be fooled about his immigration status, or did not care. Obviously, this is a smaller labor market than would be available to a similarly situated documented worker. As of the date of medical stability following his industrial injury, an illegal alien might be given certain permanent limitations/restriction. Because of the nature of his labor market, any limitations/restrictions assigned to an illegal alien are likely to have a significant impact. For example, if such an individual is given permanent limitations against lifting more than 20 pounds, this will likely have a significant impact on his ability to compete for work in his time of injury labor market, since most of these jobs were unskilled and involved heavy manual labor. Therefore, under this approach, an illegal alien is likely entitled to greater permanent

[6] We reserve for another day the question of whether IRCA preempts IC 72-501A. That section creates the Industrial Commission Rehabilitation Division (ICRD) and specifies that, with the aim of returning an injured worker to gainful activity, the ICRD shall provide injured workers with "physical and vocational rehabilitation, the latter of which shall include job placement." Since it is illegal to knowingly hire illegal aliens, to the extent the ICRD provides job placement services, that function may impossibly conflict with IRCA. However, ICRD services that do not involve job placement may not conflict with IRCA. Such services might include aptitude and transferable skills analysis, labor market surveys and the like.

disability than a similarly situated documented worker. This seems as inappropriate as relying on immigration status to deny permanent disability.

36. There are also a number of practical problems associated with measuring disability in this fashion. Permanent disability is typically evaluated by identifying an injured worker's pre-injury and post-injury access to the labor market. Such forensic assessments are easily accomplished for documented workers by vocational experts, and are relied on by the Commission in most cases where permanent disability is contested. However, the labor market for illegal aliens is a shadow labor market, and while we may take judicial notice that it exists, its nature, scope, and constituency are difficult to plumb. Therefore, analysis of an illegal alien's access to the market for illegal labor will be less reliable than it should be.

37. We now conclude that for an illegal alien, the most appropriate way to measure permanent disability based on a loss of earning capacity per Idaho Code § 72-425 and Idaho Code § 72-430 is to evaluate disability without reference to such injured worker's immigration status. This treatment necessarily follows from our conclusion that IRCA does not preempt the application of state workers' compensation law to injuries suffered by illegal aliens. If federal law does not preempt the Act, then it can play no part in the determination of the workers' compensation benefits payable to an injured worker, be he legal or illegal. Other courts, as well, have endorsed the evaluation of permanent disability without reference to immigration status. (*See Gayton v. Gage* 149 N.C. App. 346, 560 S.E.2d 870 (2002); *Economy Packing, supra; Hernandez v. SAIF Corp.*, 178 Or. App. 82, 35 P.3d 1099 (2001); *Moyera v. Quality Pork*, 284 Neb. 963, 825 N.W.2d 409 (2013); *Asylum Co. v. District of Columbia Department of Employment Services, supra*).

38. This approach places the evaluation of an illegal alien's permanent disability on par with that of a documented worker. The dissent argues that this approach will nevertheless result in inflated awards for illegal aliens, and cites the facts of this case as illustrative of that proposition. However, it is clear that the approach we adopt would not have this result. Claimant was a teacher in Mexico. He had neither the time nor resources to undertake the additional education that might allow him to teach in the U.S. (Trans. 46/24-47-18). Per Claimant's testimony, he could qualify for a teaching position of some sort if he could complete additional training. If Claimant's disability is evaluated without regard to his immigration status, these facts are neither more nor less relevant to the evaluation of his disability then they would be for a similarly situated documented worker. In both cases, the fact that the injured worker has a retraining potential will be an element that informs disability analysis, but does not result in inflated disability for the illegal worker.

39. In his proposed decision, Referee Taylor raised other objections to making an award of permanent disability to illegal aliens. First, it is argued that the treatment we give today to the evaluation of permanent disability for illegal aliens makes it impossible to give meaning to the provisions of Idaho Code § 72-403. That section provides:

> **Penalty for malingering – Denial of compensation. -** If an injured employee refuses or unreasonably fails to seek physically or mentally suitable work, or refuses or unreasonably fails or neglects to work after such suitable work is offered to, procured by or secured for the employee, the injured employee shall not be entitled to temporary disability benefits during the period of such refusal or failure.

Idaho Code § 72-403 relates to the payment of temporary total disability, not permanent disability. The statutory provisions relating to an injured worker's entitlement to TTD benefits, and an employer's defenses to the payment of the same, exists separate and apart from the

statutory authority relating to the evaluation and payment of permanent disability benefits. Idaho Code § 72-403 may be preempted by IRCA; since it is illegal for an employer to knowingly hire an illegal alien, it may be physically impossible for an employer to seek curtailment of TTD benefits by making an offer of suitable work to an illegal alien. On the other hand, IRCA does not prohibit the making of an offer of suitable work to an illegal alien, only the knowing hire of an illegal alien. Regardless, even if it be assumed that IRCA preempts Idaho Code § 72-403, in whole or in part, that does not mean that IRCA preempts Idaho law on the payment of permanent disability. The payment of permanent disability is not dependent on an employee's acceptance or rejection of an offer of suitable employment by his time of injury employer.

40. Referee Taylor has also argued that the rule of *Malueg v. Pierson Enterprises,* 111 Idaho 789, 727 P.2d 1217 (1986), is inconsistent with IRCA's proscription against the knowing employment of illegal aliens. The answer to this objection, too, is that *Maleug* deals not with the payment of permanent disability, but rather, with the payment of temporary total disability. *Maleug* authorizes, *inter alia*, the termination of TTD benefits upon proof of a legitimate offer of employment by employer. IRCA does not prohibit the making of such an offer, so *Maleug* can still operate in the post IRCA environment; employer may seek curtailment of TTD benefits by demonstrating that it made a legitimate offer of suitable employment to an illegal alien consistent with such individual's light duty release. The illegal alien will not be able to accept such offer, but employer will still be able to justify curtailment of TTD benefits.

41. Referee Taylor has also pointed out that the rule we adopt today would have some impact on the treatment of odd-lot workers who happen to be illegal aliens. Currently, 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. As explained in *Carey v. Clearwater County Road Dept*., 107 Idaho 109, 686 P.2d 54 (1984) in order to meet this 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.

(*Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977) (emphasis supplied)).

42. Again, this 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.

43. Finally, Referee Taylor argues that to rule as we have today means that in evaluating permanent disability pursuant to Idaho Code § 72-425 and Idaho Code § 72-430 the Commission impermissibly measures disability by considering lawful and unlawful employments in an injured worker's labor market. 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.

44. As noted at the outset, the Commission has struggled with this issue like few others that come before us. IRCA has been on the books since 1986. The State of Idaho is not responsible for its enforcement, but had it been enforced by those with the authority to do so, we would not now be struggling with how or whether to apply state workers' compensation law to what common experience tells us is a shadow economy of some consequence. We believe that it is our responsibility only to administer the workers' compensation laws of this state, and in so doing, we cannot, in good conscience, create a two-tiered system of compensation, when all workers are intended to be protected under the Act. It is not within our jurisdiction to decide whether federal law preempts state workers' compensation law. If it does, so be it, but this is a determination that must ultimately be made by higher authority.

CONCLUSIONS OF LAW AND ORDER

1. Claimant is entitled to pursue a claim for permanent disability, to be evaluated without reference to immigration status.

2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 10th day of July, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Thomas P. Baskin, Commissioner

___/s/_____
R.D. Maynard, Commissioner

ATTEST:

___/s/_____
Assistant Commission Secretary

Dissent by Chairman, Thomas E. Limbaugh:

After reviewing the record and relevant case law, I respectfully dissent from the majority's decision finding Claimant entitled to an award of permanent physical disability (PPD) in excess of impairment. 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.

I endorse the approach of past Idaho precedent that illegal aliens or undocumented workers are covered by the Idaho 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 perceive 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.

A claimant's permanent physical disability (PPD) measures whether the claimant's "actual or presumed ability to *engage in gainful activity* is reduced or absent because of permanent impairment." There is no express statutory directive to interpret "gainful activity" as being permissive of illegal access to employment. The focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995). The Commission considers the nature of the physical disablement; the disfigurement, if of a kind likely to handicap the employee in procuring or holding employment; the cumulative effect of multiple injuries; the occupation of the employee; and his or her age at the time of accident causing the injury, or manifestation of the occupational disease. Consideration should also be given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. Idaho Code §§ 72-425, 72-430(1).

Of these many factors the Commission considers, loss of labor market access and wage earning capacity are unquestionably problematic for the undocumented worker who cannot legally access the labor market. As discussed by Referee Taylor in his recommendation, 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 defies IRCA, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations."

Here, there is no dispute that Claimant is an undocumented worker, and cannot legally work in the United States.

> Although Claimant herein lightly passes over this reality, employment of an undocumented worker in the U.S. is illegal, violating IRCA and subjecting the undocumented worker, those knowingly assisting in his work search, and every would-be employer to federal criminal prosecution.[7] Idaho Code § 72-430(1) requires the Commission to evaluate permanent disability by taking account of an injured worker's personal circumstances—including whether it is illegal for him to work in the U.S. and whether it is illegal for any employer to hire him to work in the U.S. An undocumented worker has no legal wage earning capacity in the U.S.

Referee's Recommendation, pp. 15-16.

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. The majority has proposed evaluating the claimant's PPD under the legal fiction that ignores the claimant's status, rather than the illegal labor market as proposed in the Diaz dissenting opinion. 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

[7] Claimant testified at hearing that Idaho Department of Labor personnel declined to assist him in his post-accident work search because he did not have a valid Social Security card. Similarly, the Commission's rehabilitation consultant could not assist Claimant in return to work efforts upon learning he was an undocumented worker. This is not surprising as to do otherwise would have been contrary to IRCA.

the application of the "but-for" test, Claimant's undocumented status lends itself to a higher disability rating.

Further, because Claimant's undocumented status makes it illegal for Claimant to obtain employment, Employer cannot restore Claimant to his time-of-injury employment or utilize vocational services to lessen the extent of Claimant's PPD or TTD entitlement. For example, a claimant is entitled to temporary total or temporary partial disability benefits during his period of recovery. The employer may offer suitable work within restrictions to the claimant, which allows the claimant to return to work and also lessens the employer's responsibility to pay these income benefits. However, with an undocumented worker, both claimant and employer are legally prohibited from offering or accepting suitable work. Unlike documented workers, undocumented workers could not make a diligent job search or accept reasonable offers of employment. Either the claimant's status undocumented status should be considered a refusal of suitable work when the same is offered, or the undocumented claimant will receive TTD/TPD benefits beyond those awarded to a legal worker. The same problematic scenario limits the parties' options with respect to the PPD determination. The Industrial Commission Rehabilitation Division helps injured workers determine a job's physical requirements, develops job modifications to accommodate restrictions, works with the time-of-injury employer to develop alternative work opportunities, communicates with physicians about the appropriateness of jobs, and helps develop new vocational goals if returning to work is not expected. None of these rehabilitation services are available to the undocumented worker. The undocumented status would necessarily limit the Commission's ability to gather information on the claimant's true functionality, promote re-employment or develop transferrable skills to a new line of work.

When you consider the limitations of undocumented status as a nonmedical factor, the undocumented worker more closely resembles a totally and permanently disabled worker. As a result, the majority's approach will likely result in a greater award of PPD to undocumented workers over legal workers, because once the injured worker's undocumented status is known, there is no legal way for an employer, vocational rehabilitation counselor or other party to obtain employment or retraining for the claimant to remedy his or her loss.[8]

I do not believe that the principles inherit in the grand bargain establishing the Idaho workers' compensation system were intended to extend this social welfare system, without limitation, to undocumented workers. It does not serve the humane purposes of the Act for an undocumented worker to receive a higher award of disability in excess of impairment or other workers' compensation benefits than other injured workers. An employee's undocumented status should not deprive them of *all* workers' compensation benefits when they have a job-related injury. However, the employee's undocumented status does not entitle the undocumented worker to *enhanced* benefits.

In this case, Employer has paid Claimant's medical bills and permanent partial impairment (PPI)[9] benefits in full. I think this is the correct approach, and would also endorse the payment of TTD benefits, based on the claimant's known lost wages while he is in a period of recovery.

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[8] *See Idaho Code 72-428(6).* "Following the period of recovery, a permanently disabled employee who has been afforded vocational retraining under a rehabilitation program shall be rated for permanent impairment only until completion of the vocational retraining program at which time he shall be rated for permanent disability, deducting from any monetary award therefore amounts previously awarded for permanent impairment only."

[9] Because "permanent physical impairment' as a medical appraisal of the claimant's loss is included in the measure of a claimant's permanent physical disability, and not separately awarded by statute, I would characterize this payment of PPI as "disability."

For these reasons, I would find that Claimant's undocumented statute is a more limiting factor that entirely eclipses his injury-related impairment; Claimant should not be awarded any permanent physical disability in excess of impairment. I respectfully dissent.

DATED this 10th day of July, 2017.

___/s/_____
Thomas E. Limbaugh, Chairman

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of July, 2017, a true and correct copy of the foregoing CONCLUSIONS OF LAW AND ORDER AND DISSENTING OPINION was served by regular United States Mail upon each of the following:

CLINTON E. MINER
412 S KINGS AVE STE 105
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CLINTON O'CASEY
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ka ___/s/_____