FILED

OCT 23, 2015

Court of Appeals
Division III
State of Washington

NO. 33261-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LEON VALDEZ,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondents.

BRIEF OF RESPONDENT CASCADE VIEW FRUIT AND COLD STORAGE

Aaron K. Owada, WSBA #13869
Sean Walsh, WSBA #39735
Attorneys for Respondent

AMS LAW, P.C.
975 Carpenter Road NE #201
Lacey, WA 98516
Tel: (360) 459-0751
Fax: (360) 459-3923

TABLE OF CONTENTS

I. INTRODUCTION 1
II. CASCADE VIEW'S COUNTER STATEMENT OF FACTS 2
III. ISSUES 5
IV. ARGUMENT 3
- A. Standard of Review 6
- B. Burden of Proof 6
- C. Mr. Valdez's Motion for Summary Judgment is Not Supported by the Facts in The Certified Appeal Board Record 7
- D. Mr. Valdez Failed to Meet His Burden of Proving That He Was Not Capable of Obtaining and Maintaining Gainful Employment in his Labor Market from July 10, 2012 through September 13, 2012 8
- E. A Valid Light Duty Job Offer Was Made to Mr. Valdez that Terminated His Time Loss Compensation Benefits During the Period of July 10, 2012 through September 3, 2012 11
- F. Mr. Valdez's Argument That He Was Again Determined To Be Temporarily and Totally Disabled Effective August 15, 2011, After His Termination For Cause, Pursuant to a Department Order, Dated July 10, 2012, Is Without Merit 16
- G. The Department and the Board are preempted by the Immigration Reform and Control Act of 1986 in paying time loss compensation to Mr. Valdez, as an undocumented worker, for the Period of July 10, 2012 through September 3, 2012, because the State May Not Pursue Policies that Conflict with Federal Law 18
  1. Subject Matter Jurisdiction Can Be Attacked Any Time Prior to Final Judgment 18
  2. Neither the Department nor the Board can take any action that would interfere with the Federal Government's Exclusive Power Over Immigration 19
  3. Neither the Board Nor the Department Can Take Any Action That Would Conflict With Or Undermine The Immigration Reform and Control Act of 1986 20

V. CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Arizona v. United States, 567 U.S. ____, 132 S. Ct. 2492, 2498, 183 L.Ed.2d 351 (2012) 19
Boeing Co. v. Heidy, 147 Wn.2d 78, 87, 51 P.3d 793 (2002) 6
Crosby v. National Foreign Trade Council, 530 U.S. 363, 372 (2000) 20
Cyr v. Dep't of Labor & Indus.,47 Wn.2d 92, 96, 286 P.2d 1038 (1955) 7
Energy Northwest v. Hartje, 148 Wn. App. 454, 463, 199 P.3d 1043 (2009) 8
Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) 19
Hines v. Davidowitz, 312 U.S. 52, 67 (1941) 20
Hoffman Plastics Compounds, Inc. v. NLRB, 535 U.S. 137, 147-48 (2002) 21, 23, 24, 25
Hubbard v. Dep't of Labor & Indus., 140 Wn.2d 35, 43, 992 P.2d 1002 (2000) 8
Hunter v. Bethel School Dist., 71 Wn. App. 501, 508, 859 P.2d 652 (1993) 9
Jennifer K. Soesbe, BIIA 02-19030 (2003) 12, 13, 16, 17
*Kuhnle v. Dep't of Labor & Indust.,*12 Wn.2d 191, 197, 120 P.2d 1003 (1942) 8
Leeper v. Dep't of Labor & Indus., 123 Wn.2d 803, 813, 872 P.2d 507 (1994) 9
Lenk v. Dep't of Labor & Indust., 3 Wn. App. 977, 982, 478 P.2d 761 (1970) 6
Matthews v. Diaz, 426 U.S. 67, 84 (1976) 19
*McClelland v. ITT Rayonier,*65 Wn. App. 386, 390, 828 P.2d 1138 (1992) 6
Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) 20
Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999) 6
Sean Murphy, BIIA 95 5987 (1997) 13
Skagit Surveyors and Engineers, LLC v. Friends of Skagit County, 135 Wn.2d 542, 556, 958 P.2d 962 (1998) 18
Toll v. Moreno, 458 U.S. 1, 10 (1982) 19
Van Noy v. State Farm Mut. Auto Ins. Co., 142 Wn.2d 784, 790, 286 P.2d 1038 (2001) 7

STATE STATUTES

RCW 51.04.010 6
RCW 51.08.160 8
RCW 51.32.090(4) 5
RCW 51.32.090(4)(b) 11, 12, 13, 14, 15
RCW 51.52.050 5
RCW 51.52.100 6
RCW 51.52.110 6
RCW 51.52.115 6

WASHINGTON ADMINISTATIVE CODE

WAC 296-20-01002 8

U.S.C.

8 USC §§ 1255(c)(2), (c)(8) 22
8 U.S.C. § 1324(a) 20, 21, 22
8 U.S.C. § 1324(a)(b) 3, 10, 15, 22, 24
8 U.S.C. § 1324(a)(2) 3, 22
8 U.S.C.A. §1324(a)(e)(4)(A) 15, 22
8 U.S.C. § 1324a(a)(1)(A) 21
8 U.S.C. § 1324a(h)(3) 21, 24
8 U.S.C. § 1324(a)(f)(1) 22
8 U.S.C. §§ 1324(c)(a)(1)-(3) 22, 24

U.S. CONSTITUTION

U.S. Const., Art. I, § 8, cl. 4 19
U.S. Const. Art 6, cl. 2 20

CIVIL RULES

CR 56(c) 7

I. INTRODUCTION

The matter before the Court is a worker's compensation case involving Leon Valdez. Mr. Valdez fell from a ladder in August 2010. His worker's compensation claim was accepted by the Department. After his work ended at Cascade View, he was placed on time loss compensation. He received a modified light duty work from Matson Fruit Company in June 2013. After starting his light duty work, he was terminated because he could not provide lawful authority to work as required by federal Immigration Laws. The Department terminated entitlement to time loss compensation as of August 11, 2011, the date that Valdez was terminated by Mattson Fruit.

Mr. Valdez appealed the Department's order terminating time loss compensation. The Board denied his appeal. Mr. Valdez then appealed to the Yakima County Superior Court. The Employer, Cascade Fruit & Cold Storage (Cascade View), and the Department filed Motions for Summary Judgment asserting that the Board of Industrial Insurance Appeals and the Department were correct.

The Yakima County Superior Court granted the Department's Motion for Summary Judgment from which Valdez has now filed the present appeal.

II. CASCADE VIEW'S COUNTER STATEMENT OF FACTS

Mr. Valdez was hired by the employer of injury, Cascade View, on June 11, 2010. Gutierrez Tr. at 25.[1] Mr. Valdez provided Cascade view with an invalid Social Security number when hired, but he was never advised that there were any problems with his documentation. Valdez Tr. at 13. Mr. Valdez was thinning apples for Cascade View in August 2010. Valdez Tr. at 7. On August 6, 2010, Mr. Valdez fell from the eighth rung of a ladder, which resulted in an injury to his left knee. Valdez Tr. at 7. Mr. Valdez returned to work at Cascade View, in his normal position, after only three days off from work, where he remained until his employment ended in November 2010. Valdez Tr. at 8-9.

On approximately May 27, 2011, Mr. Valdez received a modified light-duty position letter from Mattson Fruit Company ("Mattson Fruit"), while he was living in California. Valdez Tr. at 9; Exhibit 1. Mr. Valdez spoke with an attorney to have the letter explained to him, as the document was written in English. Valdez Tr. at 10. Thereafter, Mr. Valdez accepted the modified position, which was approved by his attending physician in California, and Mr. Valdez moved back to Washington. Valdez Tr. at 11-12; Exhibit 1. On June 13, 2011, Mr. Valdez started his light-duty position with Mattson Fruit. Valdez Tr. at 11. Mr. Valdez testified that he was

[1] References to the "Tr" are the Certified Appeal Board Record transcripts.

physically capable of doing the job, as he was able to sit and stand as needed. Valdez Tr. at 20.

Mattson Fruit terminated Mr. Valdez from his light-duty position on August 12, 2011 because he failed to provide a valid Social Security number as required by federal immigration laws. *See* 8 U.S.C. § 1324a(b); *see also* Gutierrez Tr. at 27-28. Specifically, Mattson Fruit requested that Mr. Valdez provide valid documentation regarding his eligibility to work. Valdez Tr. at 13. Mr. Valdez then provided the same invalid Social Security number that he provided to Cascade View in June 2010. Valdez Tr. at 13. Mr. Valdez testified that after the first or second day of working in his light-duty position, he was notified, and understood, that there was a problem with his Social Security number. Valdez Tr. at 14. Thereafter, Mattson Fruit gave Mr. Valdez 60 days, from June 13, 2011 to August 12, 2011, to provide a valid Social Security number, or else Mattson Fruit would terminate his employment. 8 U.S.C. § 1324(a)(2); Valdez Tr. at 14.

On August 12, 2011, Mattson Fruit sent Mr. Valdez a letter terminating his employment because he did not provide a valid Social Security number. Exhibit 2. Ms. Diana Gutierrez, human resources for Mattson Fruit, testified that termination would have been administered to any other employee who had been involved in a similar situation. Gutierrez Tr. at 29. In fact, Ms. Gutierrez testified that Mattson Fruit has terminated

other employees in similar situations. Gutierrez Tr. at 29. Mattson Fruit made it clear that Mr. Valdez would have been able to continue working his light-duty position, for the period of July 10, 2012 through September 3, 2012, if he had provided a valid Social Security number. Gutierrez at 30. Mr. Valdez testified that after his termination, he never received a light-duty job offer from Mattson Fruit. Valdez Tr. at 16.

Dr. Larry Lefors, claimant's attending physician, treated Leon Valdez from July 10, 2012 through September 3, 2012. Lefors Dep. at 15. Dr. Lefors testified that, in his opinion, Mr. Valdez would not have been capable of gainful employment on a reasonably continuous basis in his job-of-injury as a harvest worker or farm worker from July 10, 2012 through September 3, 2012. Lefors Dep. at 26. Dr. Lefors believed that this was a result of the August 2010 industrial injury. Lefors Dep. at 26. Dr. Lefors opined, however, that claimant was capable of performing light-duty positions, such as a conveyor monitor, during the time period of July 10, 2012 through September 3, 2012. Lefors Dep. at 27.

Finally, the Board of Industrial Insurance Appeals took judicial notice of the following facts:

1. On July 10, 2012, the Department of Labor & Industries ("Department") issued a payment order paying time loss compensation benefits to Mr. Valdez for the time period of

August 15, 2011 through July 9, 2012.

2. The July 10, 2012 time loss payment order contained protest language as required by RCW 51.52.050.

3. No protest of the July 10, 2012 time loss payment order was ever received by the Department.

4. The July 10, 2012 order paying time loss from August 15, 2011 through July 9, 2012 was a final and binding order pursuant to RCW 51.52.050.

III. ISSUES

A. **Whether the Board of Industrial Insurance Appeals Decision and Order was correct when it affirmed the Department's Order, dated October 1, 2012, assessing an overpayment against Mr. Valdez for time loss benefits paid for the period of July 10, 2012 through September 3, 2012 when:**

(1) Mr. Valdez was capable of obtaining and maintaining gainful employment generally available in his labor market during the aforementioned period;

(2) Mr. Valdez received a valid light-duty job offer under RCW 51.32.090(4) and was subsequently terminated for cause; and

(3) The Department and the Board are preempted, by federal immigration policy, to pay time loss benefits to an undocumented worker not entitled to work within the United States?

IV. ARGUMENT

A. Standard of Review.

This court's jurisdiction over matters arising under the Industrial Insurance Act is limited by the terms of the act. RCW 51.04.010; RCW 51.52.110; RCW 51.52.115. Original jurisdiction over matters arising under the Industrial Insurance Act resides with the Department of Labor and Industries. *See Lenk v. Dep't of Labor & Indust.,* 3 Wn. App. 977, 982, 478 P.2d 761 (1970). The Board reviews a Department order de novo, hearing testimony in the matter and entering findings of fact and conclusions of law. RCW 51.52.100. The superior court is an appellate court with respect to appeals from the Board, and it is bound by the same constraints that apply to all appellate courts. *See Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). Superior court review of a Board decision is de novo on the record developed by the Board. RCW 51.52.115.

B. Burden of Proof.

The plaintiff, Leon Valdez, bears the burden of proving, by "a fair preponderance of credible evidence," that the decision of the Board was incorrect. *See McClelland v. ITT Rayonier,*65 Wn. App. 386, 390, 828 P.2d 1138 (1992). The Board's findings and decision are presumed to be correct. RCW 51.52.115; *see Ruse v. Dep't of Labor & Indus.,* 138 Wn.2d 1, 5, 977 P.2d 570 (1999). By appealing the Board's decision, the plaintiff

assumes the burden of producing "sufficient, substantial, facts, as distinguished from a mere scintilla of evidence" that overcome the presumption of correctness enjoyed by the Board's decision. *See Cyr v. Dep't of Labor & Indus.*,47 Wn.2d 92, 96, 286 P.2d 1038 (1955).

C. Mr. Valdez's Motion for Summary Judgment is Not Supported by the Facts in The Certified Appeal Board Record.

Motions for summary Judgment are allowed under CR 56. CR 56(c) states:

> "...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Summary judgment is appropriate if the court finds, after viewing all the evidence and making all reasonable inferences in the light most favorable to the nonmoving party, that (1) there is no genuine issue of material fact, (2) reasonable persons could only reach one conclusion, and (3) a party is entitled to judgment as a matter of law. *See Van Noy v. State Farm Mut. Auto Ins. Co.,* 142 Wn.2d 784, 790, 286 P.2d 1038 (2001). In the present matter, both sides seek summary judgment upon a record that reveals no factual dispute. The questions presented for resolution are issues

of law, making summary judgment appropriate for deciding this matter. Because the Plaintiff has not proven he is entitled to judgment as a matter of law, the court should deny his motion and grant the Defendant's cross-motion.

D. Mr. Valdez Failed to Meet His Burden of Proving That He Was Not Capable of Obtaining and Maintaining Gainful Employment in his Labor Market from July 10, 2012 through September 3, 2012.

The determination of whether an injured worker is totally disabled is set forth in RCW 51.08.160. A worker is permanently totally disabled when a condition proximately caused by work permanently incapacitates the worker from performing any work at any gainful occupation. RCW 51.08.160; *see also* WAC 296-20-01002. Total disability does not mean, however, that the "workman must be absolutely helpless or physically broken and wrecked for all purposes except merely to live." *See Kuhnle v. Dep't of Labor & Indust.,*12 Wn.2d 191, 197, 120 P.2d 1003 (1942). Temporary total disability is a condition that temporarily incapacitates a worker from performing or obtaining any work at any gainful employment. *See Energy Northwest v. Hartje,* 148 Wn. App. 454, 463, 199 P.3d 1043 (2009). Temporary total disability differs from permanent total disability only in the duration of the disability, not its character. *See Hubbard v. Dep't of Labor & Indus.,* 140 Wn.2d 35, 43, 992 P.2d 1002 (2000).

The appropriate measure of disability requires a study of the whole person, which includes his or her weaknesses and strengths, age, education, training and experience, reaction to the injury, loss of function, and other factors relevant to whether the worker is, as a result of the injury, disqualified from employment generally available in the labor market. *See Leeper v. Dep't of Labor & Indus.,* 123 Wn.2d 803, 813, 872 P.2d 507 (1994). Moreover, a worker is incapable of performing any work at any gainful occupation if the worker's injury, combined with his or her age, education, and training, has rendered the worker unable to obtain any kind of work within a reasonable degree of occupational continuity and fit only for odd jobs and special work, which are not generally available in the open job market. *See Hunter v. Bethel School Dist.,* 71 Wn. App. 501, 508, 859 P.2d 652 (1993).

In the present matter, Mr. Valdez cannot meet his burden of proving that he was entitled to time loss compensation because he was capable of obtaining and maintaining gainful employment in his labor market from July 10, 2012 through September 3, 2012. The undisputed record establishes that, (1) Mr. Valdez had a job with Mattson Fruit as conveyor monitor that he was physically capable of performing, and (2) Mr. Valdez offered no testimony indicating his job as conveyor monitor was not

otherwise available in his labor market.

First, it is undisputed that Mr. Valdez had a job that he was physically capable of performing. Mr. Valdez worked in his modified light-duty position for two months before being terminated because he could not provide a valid social security to work, as required by the Immigration Reform and Control Act of 1986 ("IRCA"). *See* U.S.C. § 1324a(b). Dr. Lefors, Mr. Valdez's medical expert, testified that Claimant could perform a light-duty type job, such as a conveyor monitor, during the period of July 10, 2012 through September 3. 2012. Lefors Dep. p. 26, 4-9; p. 27, 6-16. Additionally, Mr. Valdez testified that he performed his position at Mattson Fruit without any physical problems, as he was able to sit and stand as needed. Valdez Tr. p. 20, 8-13. Therefore, it is not disputed that Mr. Valdez was physically capable of obtaining and maintaining gainful employment in his labor market from July 10, 2012 through September 3, 2012.

Secondly, it is undisputed that Mr. Valdez provided no testimony indicating that his Mattson Fruit job as conveyor monitor was not otherwise available in his labor market. Ms. Guiterrez, human resources for Mattson Fruit, testified that had Mr. Valdez been eligible for employment under federal immigration laws, he would have been allowed to work in this position from July 10, 2012 through September 3, 2012. As such, Mr.

Valdez did not, and could not provide any testimony establishing that his position as conveyer monitor was not otherwise available in his labor market, or that he was not physically capable of performing the light duty work during the period of July 10, 2012 through September 3, 2012.

As a result of the above, the Board correctly found that Mr. Valdez was able to perform and obtain gainful employment on a reasonably continuous basis from July 10, 2012 through September 3, 2012. PDO p. 10, 1-3. Therefore, the Board was correct in affirming the Department's order, dated October 1, 2012, assessing an overpayment against Mr. Valdez for time loss benefits paid from July 10, 2012 through September 3, 2012. PDO p. 10, 4-5.

E. A Valid Light Duty Job Offer Was Made to Mr. Valdez that Terminated His Time Loss Compensation Benefits During the Period of July 10, 2012 through September 3, 2012.

When an injured worker cannot perform his job of injury, time loss compensation ends if a modified light duty job is offered to the worker that he is physically able to perform. RCW 51.32.090(4)(b) governs the offering of light duty jobs by an employer of injury. This statute provides in relevant part as follows:

> Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician or licensed advanced registered nurse

> practitioner as able to perform available work other than his or her usual work, the employer shall furnish to the physician or licensed advanced registered nurse practitioner, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician or licensed advanced registered nurse practitioner to relate the physical activities of the job to the worker's disability. The physician or licensed advanced registered nurse practitioner shall then determine whether the worker is physically able to perform the work described. The worker's temporary total disability payments shall continue until the worker is released by his or her physician or licensed advanced registered nurse practitioner for the work, and begins the work with the employer of injury.

Accordingly, a worker who cannot return to the job of injury is not entitled to temporary total disability if his attending physician certifies that an alternate job with the employer of injury is within the worker's capacity to perform, and the employer has made the job available to the worker. *See In re Jennifer K. Soesbe*, BIIA 02-19030 (2003).

If the employer terminates the modified light duty position before the injured worker is able to return to his job of injury or some other light duty work offered by the employer, then the injured worker is entitled to receive time loss compensation. RCW 51.32.090(4)(b). However, the

injured worker is not entitled to time loss compensation when a job an injured worker has been certified to do ends for disciplinary or other reasons unrelated to the industrial injury, and provided the same action would have been taken against other similarly situated workers. *See In re Jennifer K. Soesbe,* BIIA 02-19030 (2003). In these circumstances, the court will find that the employer has continued to make qualified work available to the injured employee, under RCW 51.32.090(4), but for the actions of the worker. *See In re Sean Murphy*, BIIA 95 5987 (1997); *see also In re Chad Thomas*, BIIA 00-10091 (2001). Because the modified work is still available, the injured worker is ineligible to receive time loss compensation, as an employer is not required to tolerate actions by an injured worker that it would not tolerate from a non-injured worker. *See In re Jennifer K. Soesbe*, BIIA 02-19030 (2003).

In the present matter, Mr. Valdez cannot meet his burden of proving that he did not receive a valid light-duty job offer that could terminate his time loss compensation benefits during the period of July 10, 2012 through September 3, 2012 because (1) Mr. Valdez received a valid light-duty job offer from Mattson Fruit; (2) Mr. Valdez was terminated for failing to provide a valid Social Security number, which was unrelated to his industrial injury; and (3) Mr. Valdez's termination would be taken against other similarly situated workers at Mattson Fruit.

First, there is no dispute that Mr. Valdez received a valid light-duty job offer from Mattson Fruit. Valdez Tr. at 9; Exhibit 1. Although Claimant argues that Mattson Fruit is not the employer of injury and, accordingly, the requirements of RCW 51.32.090(4)(b) were not met, the Board declared that, "nothing in RCW 51.32.090(4)(b) precludes a light duty job offer by another company." PDO p. 7, 23-26. Instead, the Board stated that RCW 51.32.090(4)(b), "merely establishes the parameters when an employer of injury does offer a light duty job," and the Board further stated that, "[t]he requirements of the statute were met by Mattson Fruit." PDO p.7, 26-27; p. 8, 3-4. The Board was of the opinion that, "it would be an absurd result to preclude a non-employer of injury from offering a light duty job that an injured worker can perform, particularly when the purpose of the statute is to return an injured worker to work as soon as a worker is able." PDO p. 7-8, 27-1. The Board reasoned that this is particularly true "where claimant was released to perform the job... by his then attending physician, and was able to perform the job without any physical problems." PDO p. 8, 1-4. Therefore, the Board was correct in finding the light-duty job offer my Mattson Fruit was a valid job offer. PDO p. 8, 4-5.

Secondly, it is undisputed that Mr. Valdez was terminated for failing to provide a valid Social Security number. See Gutierrez Tr. 29-30. The Board acknowledged that, "[t]he requirement to provide eligibility to

work documentation is a requirement placed on all workers in this country... and is unrelated to the claimant's injury." PDO p.8, 16-18; see also 8 U.S.C. § 1324a(b). The Board also acknowledged that, "Mattson Fruit could have been fined had it continued to allow claimant or any other employee in the same situation continue to work." PDO p. 8, 18-19; see also 8 U.S.C.A. §1324a(e)(4)(A). Therefore, when Mr. Valdez was unable to resolve the invalidity of his Social Security number and, as a result, was terminated by Mattson Fruit, the Board correctly found that his termination was unrelated to his industrial injury, and therefore was not proximately caused by the industrial injury. PDO p. 9, 21-29.

Thirdly, it is undisputed that Mr. Valdez's termination would have been taken against other similarly situated workers at Mattson Fruit. Ms. Gutierrez testified that this disciplinary action would have been administered to any other employee who failed to provide a valid social security number. See Tr. 29, 13-17. Ms. Gutierrez further testified that Mattson Fruit had terminated other employees involved in similar situations at Mattson Fruit. See Gutierrez Tr. 29, 18-20.

Therefore, because approved modified work was available to Mr. Valdez pursuant to RCW 51.32.090(b)(4), but for his failure to provide a valid Social Security Number, the Board was correct in determining that Mr. Valdez's termination was unrelated to his industrial injury, and

therefore was not proximately caused by his injury. PDO p. 9, 21-28. As a result, the Board was also correct in determining that the Department correctly assessed an overpayment of $2,376.08, for the time period of July 10, 2012 through September 3, 2012 in this matter. [2] PDO p. 10, 4-5.

F. Mr. Valdez's Argument That He Was Again Determined To Be Temporarily and Totally Disabled Effective August 15, 2011, After His Termination For Cause, Pursuant to a Department Order, Dated July 10, 2012, Is Without Merit.

A worker who cannot return to the job of injury is not entitled to temporary total disability when a physician certifies that an alternate job with the Employer is within the worker's capacity to perform and the Employer has made the job available to the worker. *See In re Jennifer K. Soesbe*, BIIA 02-19030 (2003). When a job an injured worker has been certified to do ends for disciplinary reasons unrelated to the industrial injury and in accord with action that would be taken against other workers similarly situated, the injured worker's entitlement to time loss benefits terminates. *See id.* However, it has been held that when an injured worker is ***subsequently*** determined to be totally disabled by his attending physician, then his time loss benefits are to be reinstated upon the date of the attending physician's determination. *See id.*

[2] On July 10, 2012, the Department awarded time loss compensation to Mr. Valdez from August 15, 2011 through July 9, 2012. This order was not appealed by any party and is not before the court. The period before the court is from July 10, 2012 through September 3, 2012, a period after the unprotested award of time loss compensation.

Mr. Valdez asserts that, after his termination for cause, he was again determined to be temporarily and totally disabled effective August 15, 2011 when the Department issued an order, dated July 10, 2012, awarding him time loss compensation for the period of August 15, 2011 through July 9, 2012. *See In re Jennifer K. Soesbe*, BIIA 02-19030 (2003)(determining that claimant was again entitled to time loss benefits, after her termination for cause from her light-duty position, once her attending physician subsequently determined she was not capable of gainful employment). In *Soesbe*, Ms. Soesbe was not a totally temporarily disabled worker after her termination on March 1, 2002, Ms. Soesbe was not precluded from gainful employment, and Ms. Soesbe was not entitled to time loss compensation. *See id.* However, the court determined that Ms. Soesbe's circumstances changed on June 3, 2002 because her physician's uncontroverted declaration established that she could no longer perform gainful employment; thus, Ms. Soesbe was entitled to time loss from June 3, 2002 through July 26, 2002. *See id.*

In the present case, Mr. Valdez argues that because the Department awarded time loss compensation from August 15, 2011 through July 9, 2012, he should be entitled to time loss compensation after July 9, 2012. However, Mr. Valdez's physician did not determine that Mr. Valdez could

no longer perform gainful employment on August 15, 2011. Instead, Mr. Valdez relies on the issuance of a Department order, dated July 10, 2012, which ***retroactively*** awarded him time loss compensation from August 15, 2011 through July 9, 2012. The Board did not find Mr. Valdez's argument persuasive because, "there may be numerous reasons why time loss compensation benefits were paid during that time." PDO p. 8, 20-23. Moreover, there was no testimony from Mr. Valdez's attending physician that he was totally temporarily disabled after September 3, 2012. As such, the award of time loss compensation for a prior period provides no relief to Mr. Valdez's claim for a subsequent period.

G. The Department and the Board are preempted by the Immigration Reform and Control Act of 1986 in paying time loss compensation to Mr. Valdez, as an undocumented worker, for the Period of July 10, 2012 through September 3, 2012, because the State May Not Pursue Polices that Conflict with Federal Law.

1. Subject Matter Jurisdiction Can Be Attacked Any Time Prior to Final Judgment.

Any party may raise a lack of subject matter jurisdiction at any time during a proceeding, even during an appeal. RAP 2.5(a)(1); *see also See Skagit Surveyors and Engineers, LLC v. Friends of Skagit County,* 135 Wn.2d 542, 556, 958 P.2d 962 (1998).

2. Neither the Department nor the Board can take any action that would interfere with the Federal Government's Exclusive Power Over Immigration.

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. *See Arizona v. United States*, 567 U.S. ____, 132 S. Ct. 2492, 2498, 183 L.Ed.2d 351 (2012); *see also Toll v. Moreno*, 458 U.S. 1, 10 (1982). This authority rests, in part, on the National Government's constitutional power to, "establish an uniform Rule of Naturalization." U.S. Const., Art. I, § 8, cl. 4. The United States Supreme Court has affirmed this authority by recognizing the power as plenary, or "largely immune from judicial inquiry and interference." *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). Moreover, The Supreme Court of the United States has held that, "it is the business of the political branches of the Federal Government, rather than that of either the States or the federal judiciary, to regulate the conditions of entry and residence of aliens." *See Matthews v. Diaz*, 426 U.S. 67, 84 (1976).

Accordingly, the Department and Board cannot make their own discretionary remedies regarding whether an unauthorized alien should be allowed to receive workers' compensation benefits because these decisions touch upon an unauthorized aliens' immigration status, which clearly lies in the Federal Government's broad, undoubted power over the subject of

immigration, and, therefore, must be free from judicial interference. As a result, the state's interest must give way to the Federal Government's passage of The Immigration Reform and Control Act of 1986. 8 U.S.C. § 1324a.

3. Neither the Board Nor the Department Can Take Any Action That Would Conflict With Or Undermine The Immigration Reform and Control Act of 1986.

The Supremacy Clause provides a clear rule that federal law shall be the supreme law of the land. U.S. Const. Art 6, cl. 2. Under this rule, Congress has the power to preempt state law. *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000). State laws are preempted when they conflict with federal law, which includes those instances where challenged state law stands as an obstacle towards the accomplishment and execution of the full purposes and objectives of congress. *See* U.S. Const. Art 6, cl. 2; *see also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and its intended effects. *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000). In a preemption analysis, courts should assume that, "the historic police powers of the States" are not superseded, "unless that was the clear manifest purpose of Congress." *See Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

In 1986, Congress enacted the Immigration Reform and Control Act ("IRCA"), a comprehensive scheme prohibiting the employment of unauthorized aliens in the United States. *See Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 147-48 (2002). As the Supreme Court of the United States stated, "IRCA forcefully made combating the employment of illegal aliens central to the policy of immigration laws." *See id.* Specifically, IRCA makes it "unlawful for a person or other entity to hire, or to recruit or refer for a fee, an alien knowing the alien is an unauthorized alien." *See* 8 U.S.C. § 1324a(a)(1)(A). IRCA, under U.S.C. § 1324a(h)(3) defines an unauthorized alien as follows:

> [T]he term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either
>
> (A) an alien lawfully admitted for permanent residence, or
>
> (B) authorized to be so employed by this chapter or by the Attorney General.

To effectuate the law, IRCA created an employment verification system. *See* 8 U.S.C. § 1324a; *see also Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 147-48 (2002). Under the system, Employers must attest to the identity and the eligibility of all new hires by examining certain

documents before the potential employees start work. *See* 8 U.S.C. § 1324a(b)(stating that the required documentation consists of a valid Social Security card, driver's license, or other documentation or evidence that authorizes employment in the United States). If the potential employee is unable to present valid documentation, the person cannot be hired. See 8 U.S.C. §1324a. Moreover, if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. 8 U.S.C. § 1324(a)(2). Employers who violate IRCA are punished by civil fines, 8 U.S.C. § 1324a(e)(4)(A), and may also be subject to criminal prosecution. 8 U.S.C. § 1324(a)(f)(1).

Similarly, under IRCA, employees must also attest to their eligibility for employment in the United States. *See* 8 U.S.C. § 1324a(b). Employees using fraudulent documentation violate IRCA's provisions. 8 U.S.C. § 1324a. That is, IRCA makes it unlawful for persons to tender, as proof of documented status for purposes of obtaining employment in the United States, fraudulent documents that are forged, counterfeit, altered, falsely made, or documents of another person. 8 U.S.C. §§ 1324c(a)(1)-(3). IRCA provides for civil penalties on aliens who seek, or engage in, unauthorized employment. *See* 8 USC §§ 1255(c)(2), (c)(8).

In regards to the impossibility of reconciling employment for unauthorized aliens and IRCA, The Supreme Court of the United States has explained that:

> "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 Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 148-49 (2002).

As a result of the above, this Court must rule that IRCA preempts any workers' compensation benefits Mr. Valdez may receive because the allowance directly conflicts with IRCA as (1) Mr. Valdez clearly fell into IRCA's definition of an "unauthorized alien"; (2) Mr. Valdez unlawfully tendered fraudulent documentation for the purpose of obtaining unauthorized employment within The United States; and (3) Mr. Valdez's allowance of workers' compensation benefits would effectively reward Mr. Valdez for violating IRCA.

First, it is undisputed that Mr. Valdez was an "unauthorized alien" under IRCA, as he was not an alien lawfully admitted for permanent residence, or authorized to be so employed by IRCA or the Attorney General. See 8 U.S.C. § 1324a(h)(3). Therefore, Mr. Valdez's unauthorized employment clearly undermines IRCA's objective of prohibiting the employment of unauthorized aliens in The United States. *See Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 147-48 (2002).

Secondly, there is no dispute that Mr. Valdez's use of an invalid Social Security number, on two separate occasions, to obtain unauthorized employment clearly violated IRCA. See 8 U.S.C. §§ 1324c(a)(1)-(3). As a result, Mr. Valdez's use of an invalid Social Security number clearly frustrates IRCA's effect of having employees attest to their eligibility to work by submitting valid documentation. *See* 8 U.S.C. § 1324a(b). More importantly, Congress has expressly made it unlawful for an unauthorized alien to obtain employment with false documents under IRCA; thus, there is no reason to believe that Congress nonetheless intended to permit any type of benefits to unauthorized aliens for engaging in unlawful activity. *See Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 149-150 (2002)(determining that far from accommodating IRCA, IRCA is subverted by allowing back pay to unauthorized aliens because IRCA did not expressly make them ineligible for securing unauthorized employment secured by unlawful means).

Finally, any Department or Board award of workers' compensation benefits, despite Mr. Valdez's unauthorized status, clearly trivializes immigration laws and rewards his illegal behavior in direct conflict with IRCA, which is an award that lies beyond the Department or Board's remedial discretion. Allowing Mr. Valdez to receive workers compensation benefits, despite his inability to work in the United States, provides a perverse incentive for illegal entry and employment within the United States. *See Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 150 (2002)(determining that awarding back pay in a case where a claimant was not legally authorized to work in this country and gained employment by tendering the birth certificate of someone else not only trivializes immigration laws, but also condones and encourages future violations). That is, the state should not encourage unauthorized aliens to gain the benefits of our workers' compensation system by blatantly violating our laws.

Therefore, neither the Department nor the Board can award any workers' compensation benefits to Mr. Valdez because it clearly conflicts with IRCA, and a state may not pursue policies that undermine federal law.

V. CONCLUSION

For all of the above reasons, this Court should deny Mr. Valdez's appeal. He has not demonstrated substantial facts to meet his burden of proof of further entitlement to time loss compensation benefits. His modified light duty work was terminated because of his inability to comply with federal Immigration Laws. As such, the Department lacked jurisdiction to provide time loss compensation benefits as Mr. Valdez was not lawfully entitled to work in the United States and providing time loss benefits would violate the Supremacy Clause of the U. S. Constitution.

Respectfully submitted this 23rd day of October, 2015.

s/ Aaron K. Owada

Aaron K. Owada, Attorneys for Respondent
WSBA No. 13869
AMS Law, PC
975 Carpenter Road NE, Suite 201
Lacey, WA 98516
Telephone: (360) 459-0751
Fax: (360) 459-3923
Email: aowada@amslaw.net

CERTIFICATE OF SERVICE

I certify that on October 23, 2015, I caused the original of the Employer's/Respondent's Response Brief to be filed via Electronic Filing with the Court of Appeals, Division III and that I further served a true and correct copy of same, on:

(X) Facsimile and U.S. Mail, Postage Prepaid:

Counsel for Appellant:

Mr. Michael V. Connell
Smart, Connell, Childers & Verhulp, P.S.
501 N. 2nd Street
PO Box 228
Yakima, WA 98907

(X) Facsimile and U.S. Mail, Postage Prepaid:

Counsel for Respondent/Washington State Department of Labor and Industries:

Mr. Paul Crisalli
Assistant Attorney General
Office of the Attorney General
800 Fifth Avenue, Suite 200
Seattle, WA 98104

DATED this 23rd day of October, 2015, in Lacey, Washington.

s/ Donna Perkins

Donna Perkins
AMS Law, PC
975 Carpenter Road NE, Suite 201
Lacey, WA 98516
Telephone: (360) 459-0751
Fax: (360) 459-3923
Email: donna.perkins@amslaw.net