



No. 33261-6-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Leon Valdez,
Appellant.

v.

Department of Labor & Industries
Respondent

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. MR. VALDEZ DID PRESENT PROOF OF TOTAL DISABILITY

The Department and the employer both argue, without any factual support, that Mr. Valdez did not present evidence that he was temporarily and totally disabled during the period of July 10, 2012 through September 13, 2012. The fatal flaw in the Department and employer's argument is that it is inconsistent with the actual evidence. Dr. Lefors testified about a multitude of restrictions that Mr. Valdez had because of his injury. CP 178-79. He noted that Mr. Valdez was limited to performing the following on a seldom basis: climbing ladders, climbing stairs, squatting, kneeling, and crawling. *Id.* He limited Mr. Valdez to twisting, bending and stooping on a seldom to occasional basis. *Id.* He also testified that Mr. Valdez was limited to only occasionally sitting, standing, and walking. *Id.* He testified that Mr. Valdez was limited to only lifting 15 to 20 pounds on an occasional basis, and only carrying 20 pounds on a seldom basis. *Id.* He limited Mr. Valdez's pushing and pulling to 20 pounds on a seldom basis. *Id.* He also testified that those restrictions were proximately caused by the industrial

injury, and would have been appropriate restrictions for Mr. Valdez during the period of September 10, 2012 through September 3, 2012. CP 180-81. Dr. Lefors also specifically testified that Mr. Valdez would not have been capable of performing reasonably continuous gainful employment in his job of injury from July 10, 2012 through September 3, 2012. CP 182. He also testified that the cause of that inability was the industrial injury. *Id.*

Finally, and perhaps most importantly in regards to this issue, Dr. Lefors specifically testified that Mr. Valdez was not capable of reasonably continuous gainful employment from July 10, 2012 through September 3, 2012 in any work generally available in the labor market. CP 183. He also testified that the cause of that inability was the industrial injury. *Id.* His testimony in this regard was as follows:

Q: Do you have an opinion as to whether or not Mr. Valdez would have been capable of gainful employment on a reasonably continuous basis in work generally available in his labor market aside from a light-duty type of job, like a conveyor monitor, during the time period July 10, 2012, through September 3, 2012?

A: I don't believe he would have.

Q: Okay. And did you have an opinion as to whether or not that inability was proximately caused by his August 6, 2010, industrial injury?

A: I believe it was from the injury.

Q: In forming your opinion about his inability to work in generally available work on a gainful basis, are his education

level and those sorts of things one of the factors that are taken into account?

A: Well, they are. Because of his lack of education, he is relegated to a laboring – type market that requires critical parts, legs, you know, including knees and back.

CP 183-184 (underline added).

The Department and employer¹ did not present any medical evidence regarding the issue of Mr. Valdez's ability to engage in reasonably continuous gainful employment in generally available work. As a result, there is no dispute that the testimony of Dr. Lefors outlined above establishes a preponderance of the evidence that Mr. Valdez was not capable of gainful employment in work generally available in his labor market. Since Mr. Valdez established that he was not capable of reasonably continuous gainful employment, it then became the burden of the Department and/or the employer to prove the elements of valid light duty job offer under RCW 51.32.090 (4)(b) had been met and that as a result of such an offer there was actually a light-duty job/modified job (or what is sometimes referred to as an "odd lot" job) available to Mr. Valdez during the period of July 10, 2012 through September 3, 2012. Young v. Labor & Indus. 81 Wn. App. 123, 131 (1996) (citations omitted). As will be seen in

¹ The employer did not participate in this case at the Board level, but rather appeared for the first time at the superior court level.

the discussion in the next section, neither the Department nor the employer presented any evidence establishing that there was a valid light duty job offer made, let alone that there was actually a light duty job available to Mr. Valdez during the period of July 10, 2012 through September 3, 2012.

B. CORRECT PLACEMENT OF BURDEN OF PROOF REGARDING AVAILABILTY OF LIGHT DUTY/MODIFIED JOB/ODD LOT JOB

Since Mr. Valdez established that he was not capable of reasonably continuous gainful employment in generally available work, the burden then shifted to the Department and/or the employer to prove a valid light duty job offer under RCW 51.32.090 (4)(b). Since neither the Department nor the employer could prove that a valid light duty job offer under RCW 51.32.090(4)(b) was made to Mr. Valdez during the period of July 10, 2012 to September 3,2012, they instead made a straw man argument which misstates the law regarding the burden of establishing the ability to perform and availability of a light duty or modified job.

The Department made their straw man argument as follows, “[t]he burden was on Valdez to prove he was incapable of reasonably continuous gainful employment. He failed to provide any evidence that a light-duty job was not available in the job market, so he failed to meet his burden.” Brief of Department, pg. 8 (emphasis added). The employer made this same straw

man argument by arguing that in their view Mr. Valdez could not prove he was totally disabled because: as follows, "Mr. Valdez offered no testimony indicating his job as conveyor monitor was not otherwise available in the labor market." Brief of Employer, pg. 9-10 (emphasis added).

The fatal problem with this straw man argument is that it confuses work of a light physical demand level that is generally available in the labor market with a "light duty" or "modified duty" or "odd lot" job. There is a vast distinction between work of a light physical demand level which is generally available in the labor market, and a specific "light duty" or "modified duty" job.

The court of appeals described this important distinction as follows in the case of *Young v. DLI*:

“General work means work even light or sedentary work, if it is reasonably continuous, within the range of the claimant’s capabilities, training, and experience, and generally available on the competitive labor market. A worker who cannot perform general work is totally disabled. Once a claimant has carried the burden of proving he or she cannot perform general work, the ‘odd lot’ doctrine shifts the burden to the employer to prove that the claimant can obtain and perform special work (work not generally available on the competitive labor market). Young v. Labor & Indus., 81 Wn. App. 123, 131 (1996) (citations omitted).

In another case at the court of appeals involving a self-insured employe,r the court explained that the injured worker has the burden of proving that he or she is totally disabled, “but that burden is met by proving

that he or she cannot perform general work. The worker has no burden of proving inability to perform special work. An employer wishing to rely on the odd lot doctrine has the burden of proving that the worker can both perform and obtain special work.” Graham v. Weyerhaeuser Comp., 71 Wn. App. 55, 62-63 (1993) (citations omitted).² The *Graham* court also explained that general work is work, including light or sedentary work that is generally available in the competitive labor market. Special work is work, including light or sedentary work, “not generally available on the competitive labor market.” *Id.* pg. 60.

The Department’s argument that Mr. Valdez failed to meet his burden of proof because he did not “provide any evidence that a light-duty job was not available in the job market” inappropriately flips the burden of proof with regards to a light duty or “odd lot” jobs upside down, and places on Mr. Valdez a burden that in reality the employer and/or Department have. It is the Department and employer that must prove Mr. Valdez is capable of performing a light duty job, modified job, or odd lot job, and that the job is available to Mr. Valdez during the relevant time period.

² Both the *Young* and *Graham* cases involved facts addressing the question of permanent total disability as opposed to temporary total disability. However, the only difference between temporary total disability and permanent total disability is the duration of the disability. Herr v. Dept. of Labor & Indus., 74 Wn. App. 632, 635 (1994). The character of the disability is the same, so the *Young* and *Graham* cases are applicable to the question in the case at bar.

The Department's reliance on the case of Butson v. DLI is illustrative of their confusion of the concept of generally available light level work with a light duty job, modified duty job, or odd lot job. The *Butson* case involved testimony by an attending medical provider that the injured worker was capable of performing work in the light physical demand level that was generally available in the labor market such as answering phones. Butson v. DLI, 198 Wn. App. 288, 189 P 3rd 924, 930 (2015). That is entirely different than the case at bar where the testimony is limited to approval of a specific modified or light-duty job—stamper assistant. CP 182-83. The *Butson* case is therefore not applicable to the case at bar and is irrelevant.

In addition, although less importantly, the *Butson* case involved an entirely different procedural context than the case at bar. It involved whether a trial court had properly granted a CR 50 motion. Such a motion is not involved in the case at bar.

The employer tries to support the above straw man argument by building a smaller but related supporting straw man alongside as well. They argue that, "it is undisputed that Mr. Valdez provided no testimony indicating that the conveyor monitor [stamper assistant] job was not otherwise available in his labor market." Brief of Employer, 10. In support of this argument they argued that because "Ms. Gutierrez testified the job

would have still been available to Mr. Valdez from July 10, 2012 through September 3, 2012. Mr. Valdez did not, and could not provide any testimony establishing that his position as conveyor monitor [stamper assistant] was not otherwise available in his labor market, or that he was not physically capable of performing light-duty work during the period of July 10, 2012 through September 3, 2012." *Id.* 10-11.

The fatal flaw in this attempted supporting straw man argument is that the arguments made in support of the proposition are irrelevant to the proposition. The assertion that because Ms. Gutierrez testified that the job of stamper assistant would still be available to Mr. Valdez at Matson Fruit from July 10, 2012 through September 3, 2012 is irrelevant to the question of whether the job is available in the general labor market--with other employers. Likewise, whether Mr. Valdez presented testimony regarding his physical inability to perform light-duty work during the period of July 10, 2012 through September 3, 2012 is also irrelevant to the question of whether the light duty/modified job of stamper assistant is available in the general labor market.

In addition, the evidence did in fact establish that the stamper assistant job was in fact a "light duty" or "modified job" rather than merely a generally existing job in the labor market at the light physical demand level. Exhibit 1 (the May 27, 2011 job offer letter) specifically notes that the job was

a “transitional job” and that it was a “modified position” specifically for Mr. Valdez. CP 151. The job offer letter also notes that the “physical demands of the transitional job may be changed, as permitted by your [Mr. Valdez’s] medical provider.” *Id.* This makes it clear that it was a specially created modified job rather than a generally available job in the labor market.

Likewise, the job title contained on the job description itself states the job title for the job was “Stamper Assistant-New Position.” CP 152. The fact that the job title itself indicates that the job was a new position establishes that the job is a specially created or modified job rather than merely a light level physical demand job generally available in the labor.

Finally, the testimony of Ms. Gutierrez herself establishes that it was a “modified job” rather than a light physical demand level job generally available in the labor market. When asked what the modified job description (exhibit 1) was, she described it as follows: “[t]his is just the job description that he had, with restrictions for his medical disabilities through L&I.” CP 136. Her description of the job as “the job description that he [Mr.Valdez] had” makes it clear it was a job created for Mr. Valdez specifically, and that it was based on the specific physical restriction he had as a result of his injury. Ms. Gutierrez also confirmed later in her testimony the job was “a light duty” job. *Id.* 140

As noted in Mr. Valdez's initial brief, in reality there was no dispute between the parties about the job being a light duty job not generally available in the labor market. It should therefore be no surprise that there was not a witness asked that specific question. The lack of dispute over this issues is also shown by the fact the Department relied upon the light duty job offer as the basis for issuing their overpayment order. If the job had been a job generally available in the labor market the Department would not have needed to rely RCW 51.32.090(4)(b) as the basis for the overpayment. Instead, they could have simply concluded Mr. Valdez was capable of gainful employment generally available in the labor market under subsection (3)(a) of RCW 51.32.090 rather than relying on subsection (4)(b) regarding light duty job offers.

C. TRUE SIGNIFICANCE OF THE FINAL AND BINDING JULY 10, 2012 DEPARTMENT ORDER PAYING TIME LOSS FROM AUGUST 15, 2011 THROUGH JULY 9, 2012

The Department raised another straw man argument in their brief when they argued that Mr. Valdez, "is wrong with arguing that the Department's finding that Valdez was totally temporarily disabled from August 15, 2001, through July 9, 2012, means that it is final and binding

that he was totally temporarily disabled from July 10, 2012 through September 3, 2012.” Brief of Department, pg. 12.

The argument is a straw man argument, because Mr. Valdez did not make that argument. The relevance of the final and binding order paying time loss compensation from August 15, 2011 through July 9, 2012 is not that it somehow automatically establishes that Mr. Valdez was temporarily and totally disabled for the subsequent time loss period of July 10, 2012 through September 3, 2012. The relevance of the final and binding order paying time loss from August 15, 2011 through July 9, 2012 is that it establishes that Mr. Valdez had become a temporarily and totally disabled again as of August 15, 2011, which is subsequent to the termination of his light-duty job with Matson Fruit on August 12, 2011. In other words, it establishes that as of August 15, 2011 Mr. Valdez was again temporarily and totally disabled, and any light-duty job offer under RCW 51.32.090(4)(b) would need to be a valid light-duty job offer extended after August 15, 2011. That is different than arguing that the order means it has been determined with finality that Mr. Valdez was totally disabled between July 10, 2012 through September 3, 2012. Had there been a valid light duty job offer after July 9, 2012, or had there been evidence that Mr. Valdez was capable of gainful employment in work generally available in his labor market during the period of July 10, 2012 through September 3, 2012 he

would not be totally disabled during that time period. However, as outlined above and in Mr. Valdez's initial brief he did prove he could not engage in gainful employment in generally available work from July 10, 2012 through September 3, 2012, and there was no valid light duty job offer extended during that time period.

D. IRCA ISSUE NOT BEFORE THE COURT

Whether the Immigration Reform and Control Act (IRCA) has any application in this case is not before the court. Neither the Board of Industrial Insurance Appeals, nor the superior court, issued findings of facts or conclusions of law addressing the application of IRCA, so that issue is not before the court. As noted in the case of Hill v. DLI, 161 Wn. App. 286 (2011), the court of appeal's review in a case under RCW 51 is "limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review [of the Board of Industrial Insurance Appeals decision], and whether the court's conclusions of law flow from the findings." *Id.* 292. Since there was no finding of fact in the superior court decision, nor in the Board decision for that matter, regarding the application of IRCA, the court cannot review the record to determine if there is substantial evidence to support a fact addressing the application of IRCA. Likewise, since there is no conclusion of law regarding IRCA the court cannot examine whether a conclusion of law on

that issue flows from the findings of fact. However, should the court disagree and conclude that the application of IRCA is properly before the court, an analysis of that issue is included below.

E. THE IRCA DOES NOT PRECLUDE MR. VALDEZ FROM RECEIVING TIME LOSS BENEFITS

The employer attempts to use IRCA as a basis to deny Mr. Valdez's time loss benefits, and argue for the affirming of the overpayment order in this case. They attempt to do this using three separate sub arguments. First, they argue it would violate the IRCA directly. Second, they argue that the IRCA would prohibit payment of time loss on the basis of preemption. Third, they argue that it would violate public policy to allow illegal aliens to receive workers' compensation benefits. All three arguments are without merit, and will each be addressed separately below.

1. Payment of time loss to Mr. Valdez does not Violate IRCA

In analyzing this issue it helpful to look at the actual language of IRCA. The applicable language regarding the obligations of employers, which is alluded to in the Employer's brief reads as follows:

"(1) IN GENERAL. -- It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States --

1. "(A) an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment, or

2. "(B) an individual without complying with the requirements of subsection (b).

"(2) CONTINUING EMPLOYMENT. -- It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

3. "(3) DEFENSE. -- A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

8 USC 1324a

With this statutory language in mind it is next helpful to look at the intent of the statute. In the early 1980's Congress entertained testimony

supporting the argument that the opportunity for employment was one of the most important magnets attracting illegal immigrants to the United States. The proponents of this argument argued that the federal government was unable to fully appreciate the magnitude of immigration on the United States' economy, because the United States lacked a credible system to monitor and penalize those employers who allowed unauthorized workers to remain in their employ. So, in 1986 Congress passed IRCA.

By passing IRCA, Congress for the first time levied penalties against all employers who willingly and knowingly employed individuals who were ineligible to work in the United States. The act required that by November 6, 1986, all employers verify the employment eligibility and identity of those the employer sought to hire to work in its United States operation(s). The tool used to measure the employer's compliance with the act was the I-9 Employment Verification Form. Few modifications have been made to the verification process and sanctions program since 1986 and the I-9 form remains in use to the present.

IRCA is not aimed at impairing existing state labor protections. *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 329 (Minn. 2003). As shown in H.R. Rep. No. 99-682(I), 99th Cong. 2nd Sess. 45, 58, reprinted in 1986 U.S.C.C.A.N. 5649, 5662, the IRCA does not "undermine or diminish in any way labor protections in existing law" or "limit the

powers of federal or state labor relations boards . . . to remedy unfair practices committed against undocumented employees.” As written, IRCA does not explicitly or implicitly prohibit illegal aliens from receiving state workers’ compensation benefits. *Id.*

2. Preemption does not preclude payment of time loss to Mr. Valdez

Federal preemption of state law may occur if Congress passes a statute that expressly preempts state law, if Congress preempts state law by occupation of the entire field of regulation, or if the state law conflicts with federal law due to impossibility of compliance with both the state and the federal law or when state law acts as an obstacle to the accomplishment of the federal purpose. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 326, 858 P.2d 1054 (1993) (citing *Wisconsin Pub.Intervenor v. Mortier*, 501 U.S. 597, 604-6, 111 S.Ct. 2476, 2481-82 (1991)). Washington courts have repeatedly emphasized that there is a strong presumption against finding preemption in an ambiguous case and that the burden of proof is on the party claiming preemption. *Fisons*, at 327. State laws are not superseded by federal law unless that is the clear and manifest purpose of Congress. *Id.*

The question of whether federal immigration laws preempt state workers’ compensation laws has been addressed by the United States

Supreme Court. In the case of *De Canas V. Bica*, 424 U.S. 351 (1976) the court advised that they have “never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted” by federal immigration law. *De Canas*, pg. 355. The Court went on to specifically hold that “[s]tates poses broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and *worker’s compensation laws* are only a few examples.” *Id.* (emphasis added). The United States Supreme Court has consequently held that federal immigration law does not preempt the receipt of workers’ compensation benefits. *Id.*

There is no Washington case law on point regarding the issue of whether IRCA preempts the payment of time loss benefits under RCW 51 to undocumented workers. However, decisions from other states have held that federal immigration law does not preclude workers’ compensation benefits being paid to illegal aliens. See *Design Kitchen and Baths v. Lagos*, 388 Md. 718, 882 A.2d 817 (2005); *Safeharbor Employer Servs. I, Inc. v. Cinto Velazquez*, 860 So. 2d 984 (Fla. Dist. Ct. App. 2003); *Reinforced Earth Co. v. W.C.A.B. (Astudillo)*, 749 A.2d 1036 (Pa. Commw. Ct. 2000), *aff’d* 810 A.2d 99 (2002); *Ruiz v. Belk Masonry Co., Inc.*, 559 S.E.2d 249 (N.C. Ct. App. 2002); *Dowling v. Slotnik*, 244 Conn. 781, 712 A.2d 396

(1998); *Farmers Brothers Coffee v. Workers' Compensation Appeals Board*, 133 Cal. App. 4th 533 (2005); *Amoah v. Mallah Mgmt. LLC*, 57 A.D.3d 29 (NY App. 2008); *Cont'l Pet Techs v. Palacias*, 269 Ga.App. 561 (2004); *Economy Packing Co. v. IWCC*, 387 Ill.App.3d 283 (2008); *Crespo v. Evergo Corp.*, 366 N.J. Super. 391 (2004); *Silva v. Martin Lumber Co.*, No. M2003-00490-WC-R3-CV, 2003 Tenn. LEXIS 1047 (Tenn. Sup. Ct. Nov. 5 2003); *Cherokee Industries, Inc. v. Alvarez*, 2004 OK Civ App 15, 84 P.3d 798 (OK App. 2004); *Ortiz v. Cement Products Inc.*, 270 Neb. 787 (2005); *Curiel v. Env. Manag. Serv.* 376 S.C. 23 (2007).

3. Public policy does not support denying Mr. Valdez time loss benefits because of his legal status.

Taking away protections from undocumented workers does not further the intent of Congress' various immigration regulations, but rather it does the opposite. If undocumented workers are excluded from receiving compensation benefits under RCW 51 state fund employers would not be liable for paying workers' compensation premiums for those workers, and self-insured employers would not be liable for payment of the workers' compensation benefits. This would result in lower workers' compensation costs for employers who hired undocumented workers. Such lower workers' compensation costs would be a very enticing incentive to employers to hire undocumented workers.

Also, denying injured workers who are illegal aliens coverage under RCW 51 would then open up the door to private causes of action against employers by those injured workers.³ This would result in an increase in other costs such as court costs and time to address those causes of action. Although admittedly this cost would likely be small since the number of cases would likely be small as outlined below.

The likelihood of many such actions being filed is low since these illegal alien workers general lack access to legal resources, they have a general lack of sophistication with the legal system. In addition, employers would possess the ultimate “stick” to dampen the filing of such a suit--a tip off to Federal Immigration and Customs Enforcement. Given all of these barriers to pursue damages that undocumented workers would have there would not likely be many such suits. This would therefore result in an even greater incentive for employer’s to hire undocumented worker because the workers would be excluded from workers’ compensation benefits. Employers would therefore not be required to pay industrial insurance premiums or benefits for those workers, and the likelihood of being sued privately would be relatively low. Such a result would be foreseeable and

³ Excluding undocumented workers in this state from the no-fault industrial insurance system would logically place these workers outside of the “grand compromise” envisioned by the IIA and described in *Stertz v. Industrial Ins. Comm'n*, 91 Wn. 588, 590-91, 158 P. 256 (1916), and thus free from the exclusive remedies provided therein.

against public policy as it would lead to increased incentives for employer to ignore the IRCA, and would also lead to a greater likelihood of abuse of workers by employers because there would be little incentive to avoid working conditions that would result injury.

Courts in other states have come to the same conclusion. See *Design Kitchen v. Lagos*, 388 Md. 718, 733. (“without the protections of the statute, unscrupulous employers could, and perhaps would, take advantage of this class of persons and engage in unsafe practices with no fear of retribution, secure in the knowledge that society would have to bear the cost of caring for these injured workers”); *Dowling v. Slotnik*, 244 Conn. 781, 712 A.2d 396 (1998) (if employers realized they could be relieved of the burden of providing workers’ compensation coverage with an illegal alien workforce, they would have a strong incentive to hire such individuals); *Mendoza v. Monmouth Recycling Corp.*, 288 N.J. Super. 240, 672 A.2d 221 (App. Div. 1996) (denying compensation to illegal aliens may have the effect of encouraging employers to hire more illegal aliens and take less care to provide safe workplaces); *Fernandez-Lopez v. Jose Cervino, Inc.*, 288 N.J. Super. 14, 671 A.2d 1051 (App. Div. 1996) (public policy against illegal immigration may actually be subverted by refusing to grant undocumented alien workers’ compensation benefits; employers might be anxious to hire

illegal aliens rather than citizens or legal residents because they will not be forced to insure against or absorb the cost of industrial accidents).

The case at bar is a perfect example of such a situation. The employer of injury (Matson Fruit) hired Mr. Valdez without really taking any actions to verify his legal status because “[t]hat was just the—what the owners wanted the process to be, working at that time.” CP 135. Yet after Mr. Valdez’s injury, and just a year after originally hiring Mr. Valdez without a concern about his papers, those same business owners sought to offer Mr. Valdez a light duty job, but all of the sudden they were very concerned about check eligibility to work and used e-verify. CP 134-136. It is clear as well that Matson Fruit likely had already used e-verify to check Mr. Valdez’s social security number prior to even making the job offer to Mr. Valdez. Mr. Gutierrez testified that when she discovers a problem with the Social Security number of an employee of Matson Fruit she gives the employee “three months to fix the problem. . . .” CP 138. Yet, Mr. Valdez started the job on June 13, 2011, which is when Ms. Gutierrez testified she discovered the problem with his Social Security number.” CP 127-138. However, Mr. Valdez was not terminated 3 months after June 13, 2011, which would have been in September of 2011, but rather only two months later on August 12, 2011. Exhibit 2. Interestingly, and certainly not coincidentally, there was approximately a three-month period between the

date that the job offer letter was sent to Mr. Valdez on May 27, 2011 and the date he was terminated by Matson Fruit on August 11, 2011. Exhibit 1 & 2. It would appear therefore that prior to Mr. Valdez even starting the job, and at the time the job offer was made, Matson Fruit already knew there were problems with Mr. Valdez's social security number. The reality is that the discovered problem with the social security number is the very reason they offered the light duty job so that they could use the social security number issues as an excuse to immediately fire Mr. Valdez and try to avoid the impact on their L&I premiums for Matson Fruit that would result from payment of time loss benefits under the claim.

Public policy does not require exclusion of undocumented workers from the protections of RCW 51. In fact, the opposite is true. Only by ensuring employers bear the true cost of employing their workers, specifically through the payment of premiums or benefits for all of their workers, legal or otherwise, does employing undocumented workers become less attractive, and thus promote the true public policy of the IRCA.

II. CONCLUSION

Mr. Valdez has proved by a preponderance of the evidence, through the testimony of Dr. Lefors, that he was not capable of reasonably continuous gainful employment in jobs available in the general labor market. Following

his termination from employment with Matson Fruit on August 12, 2011, Mr. Valdez became a temporarily and totally disabled worker again effective August 15, 2011 because of the July 10, 2012 order paying time loss from August 15, 2011 through July 9, 2012 was a final and binding order. Neither the Department nor the employer met their burden of proof to show that there was a valid light-duty job offer for a “light duty,” “modified duty” or “odd lot” job under RCW 51.32.090(4)(b), and that such a job was actually offered to and available to Mr. Valdez during the time period at issue in this case July 10, 2012 through September 13, 2012. The prior job offer from May 2011 is irrelevant because subsequent to it ending Mr. Valdez became totally disabled again. Finally, the issue of whether IRCA bars the payment of time loss to Mr. Valdez is not before the court, and even if it were before the court IRCA does not preclude the payment of time loss compensation to Mr. Valdez. He therefore requests that the court issue a decision finding there is not substantial evidence to support findings of fact 9, 10, and 11 of the trial court’s decision.

DATED this 22 day of November, 2015



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Attorney for Appellant Mr. Valdez

NO. 33261-6-III

**COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON**

LEON VALDEZ PADILLA,)
)
 Appellant,)
 vs.)
)
 DEPARTMENT OF)
 LABOR & INDUSTRIES,)
 Respondent.)
 _____)

**DECLARATION OF
SERVICE**

STATE OF WASHINGTON)
) ss.
 County of Yakima)

I, Susan Little, do hereby certify that I am an employee of Smart, Connell, Childers & Verhulp, PS, attorneys for the Respondent. That I am a citizen of the United States and competent to be a witness herein. That on the 20th day of November, 2015, I sent, via United States Mail at Yakima, Washington, first class postage prepaid addressed as follow:

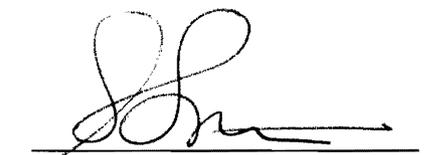
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Paul Crisalli, AAG
Office of the Attorney General
800 Fifth Ave Ste 2000
Seattle, WA 98104

an envelope containing the true and correct copy of the following documents:

Appellant's Reply Brief and Declaration of Service, in the above entitled case.



Susan Little, Legal Assistant to
Michael V. Connell