Hot Topics in Workers' Compensation: Benefits for Undocumented Workers and Obstacles in the Way

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In the past couple of years, as the issue of immigration has remained unresolved at a national level, questions surrounding undocumented workers and their entitlement to workers' compensation has continued to percolate in a number of states. The fundamental question of whether undocumented workers are covered by workers' compensation laws is still being raised in several states. And, even when undocumented workers are generally covered, thorny questions regarding eligibility for particular types of benefits, discovery disputes, and the ethical rules often arise. This paper reviews several recent decisions concerning undocumented immigrants and workers' compensation that illustrate these varied issues.

1. Workers' Compensation Coverage of Undocumented Workers

Since the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), defendants have repeatedly challenged the eligibility of undocumented workers for benefits on the theory that they cannot be awarded under the federal Immigration Reform and Control Act of 1986 ("IRCA"). A 2008 decision by an Illinois Appellate Court joined the great majority of courts that have rejected this theory.

In *Economy Packing Co. v. Illinois Workers' Compensation Commission*, 901 N.E.2d 915 (Ill. Ct. App. 2008), defendants appealed an award of permanent total disability benefits that was granted to an undocumented worker. It was undisputed that the worker had violated IRCA by using false documents to obtain work with defendant-employer. *Id.* at 921. The court

examined whether the award of benefits was preempted by IRCA, either as a matter of express, field, or conflict preemption. IRCA's express preemption clause clearly does not cover workers' compensation laws. *Id.* There is no evidence that Congress intended IRCA to supersede state workers' compensation laws, and the legislative history, if fact, shows that it did not. *Id.* at 922. Finally, unlike the NLRA back pay benefits at issue in *Hoffman Plastic*, the award of disability benefits "is separate and distinct from any continuing violation of the IRCA and, therefore, does not conflict with federal immigration policy." *Id.* at 923.

The court also put to rest the idea that workers' compensation benefits attract aliens to work in the United States illegally. It concluded that "benefits in the event of a work-related accident [cannot] realistically be described as an incentive for undocumented aliens to unlawfully enter the United States." *Id.* "Rather, excluding undocumented aliens from receiving certain workers' compensation benefits would relieve employers from providing benefits to such employees, thereby contravening the purpose of the IRCA by creating a financial incentive for employers to hire undocumented workers." *Id.* Accordingly, the court joined the consensus rejecting the argument that IRCA preempts benefits. *Id.* (collecting cases).

In 2007, South Carolina also joined this consensus in *Curiel v. Enviromental Management Services*, 655 S.E.2d 482 (S.C. 2007). In a short, but efficient decision, the South Carolina Supreme Court rejected the IRCA preemption argument, finding persuasive the North Carolina Court of Appeals in *Ruiz v. Belk Masonry Co.*, 559 S.E.2d 249 (N.C. Ct. App. 2002) (holding that undocumented workers are covered by the state's act), as well as the other states to have ruled the same way.

Besides IRCA preemption, the other commonly litigated issue about general eligibility is whether a state statute's definition of "employee" includes undocumented workers. In 2005, the

Maryland Court of Appeals issued a decision comprehensively discussing the issue. *Design Kitchen & Baths v. Lagos,* 882 A.2d 817 (Md. 2005). Although Maryland's statute did not specifically include "aliens" in its definition of employee, the court had little trouble concluding that aliens, like all others hired to work for an employer, are encompassed within the definition. *Id.* at 824. This interpretation was consistent with the language, legislative history, and purposed of the act. *Id.* at 824-26. The decision joined the overwhelming majority of courts that have ruled the same way, regardless of whether (1) the state statute does not expressly mention aliens, as in Maryland; (2) the statute expressly includes aliens, but does not distinguish between illegal and legal aliens; or (3) the statute expressly covers aliens, "whether lawfully or unlawfully employed." *Id.* at 826 (collecting cases).[1]

One former exception to this consensus was Virginia. In 1999, the Virginia Supreme Court held that undocumented aliens were not covered under its act in *Granados v. Windson Development Corp.*, 509 S.E.2d 290, 293 (1999). The Virginia legislature quickly responded, however, amending its definition of covered employees to include "aliens and minors . . . whether lawfully or unlawfully employed." Courts have since recognized that the legislature effectively overturned *Granados*. *See, e.g.*, *Marblex Design Int'l, Inc. v. Erie Ins. Prop.-Cas. Co.*, 678 S.E.2d 276, 279 (Va. Ct. App. 2009) ("[I]t is clear the legislature was aware of the decision in *Granados* and specifically chose to change the law with respect to the availability of workers' compensation benefits to illegal aliens.").

Finally, one potential exception is Arizona, where in 2006, a lone concurrence not accepted by the majority of the Arizona Court of Appeals held that the state statute did not cover

[1] The lone outlier amongst the states is Wyoming, where undocumented aliens can be excluded from coverage because the state statute defines employees to only include "legally employed minors and aliens authorized to work by the United States department of justice, immigration and naturalization service." *Felix v. State ex rel., Wyoming Workers' Safety and Compensation Div.*, 986 P.2d 161, 164 (Wyo.1999).

undocumented workers. *Gamez v. Indus. Comm'n of Az.*, 141 P.3d 794, 796-805 (Ariz. Ct. App. 2006) (Barker, J., concurring). The concurring opinion is somewhat of a stretch, though, as the act's definition of employees includes "aliens and minors whether legally or illegally permitted to work." Ariz. Rev. Stat. § 23-901(6)(b).

2. Eligibility for Particular Benefits

While undocumented workers may be covered by workers' compensation, their entitlement to particular types of benefits may still be affected by their immigration status. One issue that frequently arises is how to apply a disability standard that normally is satisfied by showing that an injured worker cannot find a job in the marketplace. As an undocumented worker cannot legally find another job, the standard cannot be applied in the typical fashion.

The Illinois court in *Economy Packing* addressed this issue as well. The court held that in order to demonstrate an inability to work, "an undocumented alien has the initial burden of proving that she cannot sustain regular employment in a well-known branch of the labor market without regard to her undocumented status." *Economy Packing*, 901 N.E.2d at 925. "The burden then shifts to the employer to produce sufficient evidence that suitable jobs would be regularly and continuously available to the undocumented alien but for her legal inability to obtain employment." *Id.* (emphasis added). The court borrowed this standard for undocumented workers from North Carolina, which adopted it in 2002. *See Gayton v. Gage Carolina Metals Inc.*, 560 S.E.2d 870, 873 (N.C. Ct. App. 2002).

Arguably consistent with that standard is a recent case from Georgia. In *Martines v. Worley & Sons Construction*, 628 S.E.2d 113 (Ga. Ct. App. 2006), the Georgia Court of Appeals confronted the situation where an undocumented, injured worker was offered a position driving a truck and that required a driver's license, which the worker could not qualify for. The court held

that because it was the worker's illegal immigration status that caused him not to take the proffered employment, his refusal was not "justified" under the statute, and the worker was therefore not entitled to further disability benefits. *Id.* at 117. The court indicated, however, that if the worker "had a physical limitation or a lack of ability or skill which prevented him from physically performing the job," the result would have been different. *Id.*

A second issue that often arises is whether undocumented workers are entitled to vocational rehabilitation benefits. In *Ortiz v. Cement Products, Inc.*, 708 N.W.2d 610 (Neb. 2005), the Nebraska Supreme Court held that an undocumented worker was not entitled to vocational rehabilitation services because he intended to remain in the United States and could not be lawfully employed. *Id.* at 613. In *Ramroop v. Flexo-Craft Printing, Inc.*, 896 N.E.2d 69 (N.Y. 2008), the New York Court of Appeals went one step further. Additional disability benefits under the state statute's section 15(3)(v) are dependent on the worker participating in a vocational rehabilitation program. *Id.* at 71. The court held that because the worker was undocumented, he could not participate in an rehabilitation program, and could not receive the additional disability benefits. *Id.* at 72.

On the other hand, not all courts see the issue of vocational rehab in such simple terms. For instance, the North Carolina Court of Appeals agreed with defendants that vocational rehabilitation for undocumented workers may not include recruitment for or referrals to actual jobs if such actions would violate IRCA. *Gayton*, 560 S.E.2d at 873. But, other forms of rehabilitation, such as teaching an employee new work skills, teaching an employee to speak and read English, counseling, job analysis, analysis of transferable skills, job-seeking skills training, or vocational exploration would still be viable. *Id.* These types of rehabilitation may be required

because the "employer still has the burden of returning the employee to a state where 'but for' the illegal status, the employee could obtain employment." *Id.* at 874.

3. Discovery of Citizenship Status

Once cases are initiated on behalf of undocumented workers, defendants may ask workers in discovery about their citizenship status, social security number, and use of false documents. Often, these same employers were not very interested in knowing the worker's true immigration status while she was working, but their attention tends to get more focused when a workers' compensation claim is filed. Special care must be taken in responding to these discovery requests because it certainly may not be in the client's best interest to voluntarily disclose her status. Such disclosures may result in both deportation and criminal prosecution.

These types of discovery disputes have been addressed by a number of courts in the contexts of employment laws other than workers' compensation. A recent decision on the topic was recently issued by a New Jersey appellate court in *Serrano v. Underground Utilities Corp.*, 970 A.2d 1054 (N.J. Super. Ct. App. Div. 2009). The case involved a potential class action lawsuit under the state's wage and hour law. The trial court had allowed discovery of the plaintiffs' status and use of citizenship-related documents. *Id.* at 1061. On appeal, the court noted that undocumented workers were covered by the states wage and hour law, just as they were covered by the state's workers' compensation system. *Id.* at 1064. Nonetheless, defendants sought the status-related information on the grounds that obtaining work with false documents was a valid basis for attacking the plaintiffs' credibility. *Id.* at 1067.

In response, the court concluded that status-related inquiries for immigrant plaintiffs "may have a chilling effect on those litigants when they attempt to vindicate their legal interests in the courts of our nation." *Id.* at 1065. Surveying litigated cases of employer retaliation, the

court found that the fear that disclosures could lead to deportation or prosecution to be "realistic concerns." *Id.* Thus, other courts had denied defendants' requests to discover the addresses, Social Security numbers, and driver's license numbers of plaintiffs in employment actions. *Id.* at 1066 (collecting cases and law review articles). The court also noted that such evidence could be unduly prejudicial if presented during trial. *Id.* at 1067. Therefore, striking a balance in the case before it, the court barred the defendants from making any status-related inquiries unless they could proffer a compelling basis for the inquiries. *Id.* at 1071. On remand, there would be a presumption against such inquiries. *Id.* at 1071 n.8.

Applying these principles to workers' compensation, it should certainly be argued that a plaintiff's citizenship status and use of false documents is irrelevant to the proceedings, and any status-related inquiries should be disallowed. As shown in Section 1, *supra*, a plaintiff's status will be irrelevant in awarding benefits in many, if not most cases. Defendants may still try to bring in status evidence on credibility grounds, but the undue prejudice and legitimate concerns about disclosure should outweigh such arguments.

More difficult situations arise when particular benefits do depend on status. *See* Section 2, *supra*. In that case, careful deliberation will probably be needed to determine whether the potential value of seeking such benefits outweigh the potential costs of disclosure. Protective orders can be sought when faced with status-related requests so that a ruling on relevance can be had before deciding whether to disclose status, plead the Fifth Amendment, or modify the claim for benefits.

4. Ethical Quandaries for Lawyers Representing Undocumented Workers

When bringing cases on behalf of undocumented workers, lawyers often face very tricky situations under the ethics rules. As undocumented workers work under names and with social

security numbers not their own, the difficult ethical situations often revolve around the use of the assumed names and social security numbers during the litigation. A recent formal ethics opinion by North Carolina State Bar sheds a little light on these issues, but leaves many questions open.

On April 25, 2008, the North Carolina State Bar issued a formal ethics opinion that responded to the following inquiry: "In a workers' compensation action, what duties does a lawyer have to the court if the lawyer learns that his client, who is an undocumented worker, has been using an alias and that the court documents have been filed under the alias rather than the client's legal name?"[2] The inquiry raises competing concerns between the lawyer's duty to protect client confidentiality and the duty of candor to a tribunal.

The opinion concluded that, under Rule 3.3(a)(1), "If the client's name is an issue of material fact in the workers' compensation action, then the lawyer has a duty to correct the filed court documents." While the committee noted that a worker's status may not affect her right to compensation, it also noted that it may raise a question of credibility. But, ultimately, deciding whether the client's use of an alias is a material fact was outside the purview of the Ethics Committee.

On the other hand, the opinion also concluded that materiality does not affect the lawyer's duty to refrain from offering false evidence in the future under Rule 3.3(a)(3). "Therefore, the lawyer would be prohibited from introducing any evidence in support of the proposition that the alias is the client's true name, including the client's own testimony."

North Carolina courts have not yet addressed the materiality of a client's name in a workers' compensation action, but other state courts have. In *Doe v. Kansas Department of Human Resources*, 90 P.3d 940 (Kan. 2004), the Kansas Supreme Court held that the plaintiff's identity was a material fact because knowledge of her identity was needed by the defendants to

[2] The opinion, 2008 Formal Ethics Opinion 1, can be found at http://www.ncbar.gov/ethics/.

obtain and verify her medical and work history. *Id.* at 948. The court affirmed the imposition of penalties on the plaintiff because she misrepresented her identity during the workers' compensation proceedings, even though the employer knew or should have known that she was an undocumented worker. *Id.* at 950. Similarly, in *Rodriguez v. Bollinger Gulf Repair*, 985 So. 2d 305 (La. Ct. App. 2008), a Louisiana appellate court affirmed the dismissal of an undocumented worker's lawsuit against his employer because the worker had misrepresented his name and place of birth during the lawsuit. *Id.* at 308.

So, while the client's name may be a material fact, there is some authority that a social security number should not be considered material because it cannot be required in the first place for a claim. In *Florida Division of Workers' Compensation v. Cagnoli*, 914 So. 2d 950 (Fla. 2005), the Florida Supreme Court addressed the question of whether a claimant must provide a social security number in a claim for workers' compensation. The court summarily held that such a requirement is barred by Section 7 of the federal Privacy Act of 1974. *Id.* at 950. With exceptions not applicable in the case, the Act prohibits any government agency from denying "any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." *Id.* (citing 5 U.S.C. § 552a(a)(1)). Thus, the plaintiff's claim had to be reinstated. *Id.*; *but see Arreola v. Admin. Concepts*, 2009 Fla. App. LEXIS 11323 (Fl. Ct. App. Aug. 14, 2009) (affirming that an undocumented worker was barred from benefits because his use of a false social security number in getting medical treatment constituted fraud for the purpose of obtaining workers' compensation benefits). Armed with this protection, it may be advisable for lawyers, as a matter of course, to resist any attempt to have a client provide a social security number, thus avoiding any difficulties when the client is an undocumented worker.

The flip side of these issues is the question of whether defendants can report undocumented worker plaintiffs to the immigration authorities. First, such conduct is probably unlawful if it is undertaken because a plaintiff has filed a workers' compensation claim. The anti-retaliation provisions of the National Labor Relations Act and Fair Labor Standards Act have been interpreted to outlaw retaliatory reporting of workers to immigration authorities. *See, e.g., Sure-Tan v. NLRB*, 467 U.S. 883, 895-96 (1984) (NLRA); *Contreras v. Corinthian Vigor Ins. Co.*, 25 F. Supp 2d 1053, 1058-59 (N.D. Cal. 1998) (FLSA). Workers' compensation laws that protect against unlawful retaliation should be interpreted in the same manner.

Second, such conduct is likely unethical if undertaken to gain an advantage in the workers' compensation proceedings. For instance, in 2005, the North Carolina State Bar issued a formal ethics opinion that "a lawyer may not use the threat of reporting an opposing party or a witness to immigration officials in settlement negotiations on behalf of a client in a civil matter" because the "threat to expose a party's undocumented immigration status serves no other purpose than to gain leverage in the settlement negotiations for a civil dispute and furthers no legitimate interest of our adjudicative system."[3] This reasoning applies with equal force to all stages of a workers' compensation case.

Conclusion

While courts may generally be protecting workers' compensation rights of undocumented workers, litigating their cases still presents a host of issues that conscientious lawyers need to think through. In addition to this paper, very useful resources on the topic are provided by the National Employment Law Project (www.nelp.org) and National Immigration Law Center (www.nilc.org). Of particular note is NELP's recent report entitled "Broken Laws, Unprotected

[3] The opinion, 2005 Formal Ethics Opinion 3, can be found at http://www.ncbar.gov/ethics/.

Workers," which found, amongst many other troubling findings, that many low-wage workers are retaliated against for filing workers' compensation claims, including the employer calling immigration authorities.

Finally, handling the case of an undocumented worker presents additional difficulties when the worker has returned to their native country. These difficulties can range from finding a doctor, to getting interrogatories signed, to transferring money from a settlement. An organization that can help with such issues for clients in Mexico is the Centro do los Derechos del Migrante (www.cdmigrante.org). CDM is a transnational workers' rights law center based in Mexico that focuses on United States workplace rights. CDM can provide litigation advice and support within Mexico.