CANDIDO PERDOMO

VERSUS

RKC, LLC AND LWCC

NO. 17-CA-112

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE OFFICE OF WORKERS' COMPENSATION,
DISTRICT 7
STATE OF LOUISIANA
NO. 15-6083
HONORABLE SHANNON BRUNO BISHOP, JUDGE PRESIDING

November 29, 2017

MARC E. JOHNSON
JUDGE

Panel composed of Judges Marc E. Johnson,
Robert A. Chaisson, and Jessie M. LeBlanc, Judge Pro Tempore

REVERSED IN PART

MEJ

CHAISSON, J., CONCURS IN PART WITH REASONS

RAC

LEBLANC, J., CONCURS IN PART WITH REASONS ASSIGNED BY JUDGE CHAISSON

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JOHNSON, J.

Plaintiff/Appellant, Candido Perdomo, appeals the reduction of his workers' compensation indemnity benefits as motioned by Defendants/Appellees, RKC, L.L.C. (hereinafter referred to as "RKC") and Louisiana Workers' Compensation Corporation (hereinafter referred to as "LWCC"), in the Office of Workers' Compensation (hereinafter referred to as "OWC"), District "7". For the following reasons, we reverse in part.

FACTS AND PROCEDURAL HISTORY

On September 25, 2015, Mr. Perdomo filed a Disputed Claim for Compensation against RKC and its insurer, LWCC, disputing the reduction of his benefits by Defendants on September 1, 2015. In his claim, Mr. Perdomo alleged he sustained multiple crushing injuries when he was pinned under a garbage truck on May 11, 2010 after the collapse of a road. He claimed he was entitled to retroactive payments of indemnity benefits, and penalties, costs and interests for the arbitrary and capricious reduction and untimely payments of his benefits.

In an Answer filed on November 9, 2015, Defendants admitted Mr. Perdomo was performing services arising out of and in the course and scope of his employment at the time of the accident, and they paid him medical and indemnity benefits. Defendants contended that Mr. Perdomo's average weekly wage at the time of the accident was $630, and his compensation rate was $420; however, they asserted that his post-accident weekly wage earning capacity of $145 had been established, and his compensation rate was $323.33. Defendants asserted all rights to reduce Mr. Perdomo's benefits as provided for in La. R.S. 23:1206 and 1225.

The trial on the merits for Mr. Perdomo's disputed claim was held on July 20, 2016. The OWC judge took the matter under advisement and allowed post-trial memoranda. In a judgment rendered on October 4, 2016, the OWC found that

Mr. Perdomo's benefits were properly reduced on September 1, 2015 from $420 to $323.33. The OWC also found that Defendants did not act arbitrarily and capriciously and did not subject them to penalties, attorney's fees, interests and costs. In its written reasons for judgment, although it acknowledged that Mr. Perdomo could not secure employment at any of the recommended jobs, the OWC found that Defendants' burden was to show that Mr. Perdomo was physically able to perform a certain job, and that the job was offered to him or that the job was available to him in his community or geographic location. Despite Mr. Perdomo's inability to secure employment, the OWC further found that "allowing otherwise would require an employer to pay indemnity benefits indefinitely due to a Claimant's undocumented status." The OWC also reasoned that Mr. Perdomo failed to meet his burden of proving that his injury resulted in his inability to earn wages, and that he could not rely on his undocumented status as a reason for not obtaining employment. Mr. Perdomo's appeal of that judgment followed.

ASSIGNMENTS OF ERROR

On appeal, Mr. Perdomo alleges the OWC was legally and manifestly erroneous in determining Defendants' reduction of his indemnity benefits was proper, and the OWC was manifestly erroneous in determining the he was not entitled to costs, interests, penalties, and attorney's fees for Defendants' arbitrary and capricious reduction of and failure to timely pay his compensation.

LAW AND ANALYSIS

Reduction of Indemnity Benefits

Mr. Perdomo alleges the OWC erred in finding that his workers' compensation benefits were properly reduced by Defendants from $420 to $323.33 on September 1, 2015. Mr. Perdomo argues that Defendants failed to properly prove his earning capacity under the standard set forth in *Banks v. Indus. Roofing & Sheet Metal Works*, 96-2840 (La. 7/1/97); 696 So.2d 551. He contends that

none of the jobs identified for him by Defendants through their vocational rehabilitation counselor, Allan Crane, were suitable for him because of his undocumented status, and that his particular situation does not apply to the "one-size-fits-all" check list used by the OWC. Mr. Perdomo further argues the OWC erroneously deemed the reduction of his benefits as proper because it conflicted with the noted recognition by the court that he could not secure any employment at any of the recommended jobs. He maintains that RKC benefitted from his labor while turning a blind eye towards his undocumented status for four years.

Notwithstanding his undocumented status, Mr. Perdomo also argues that the jobs presented by the vocational counselor were not suitable because his physician, Dr. William Knight, opined that he could not work at all and did not approve of any of the jobs. Additionally, he maintains that the description of the Taco Bell job, in particular, was not suitable for him because it involved duties contrary to his medical restrictions, *e.g.*, sweeping, and was not clarified with Dr. Karen Ortenberg, Mr. Perdomo's physician of choice, prior to her approval of the job.

Conversely, Defendants aver that the evidence presented to the OWC demonstrated their compliance with the standards set forth in *Banks*. They assert that Mr. Crane's testimony verified that he took the proper steps to confirm a suitable job for Mr. Perdomo. They argue that Mr. Perdomo never attempted to apply for the Taco Bell food service worker position that indicated only rare-to-occasional bending or stooping and failed to present anything other than self-serving testimony suggesting that his pain precluded him from working at any of the sedentary jobs identified on his behalf. In addition to Mr. Crane's testimony, Defendants assert that the testimony of Ravena Budwine, LWCC's Senior Claims Adjuster, showed that they properly reduced Mr. Perdomo's benefits based upon the lowest paying physician-approved job, the Taco Bell position.

"The purpose of the Workers' Compensation Act is to set up a court-administered system to aid injured workmen by relatively informal and flexible proceedings that are to be interpreted liberally in favor of workmen." *Rhodes v. Lewis*, 01-1989 (La. 5/14/02); 817 So.2d 64, 69. One of the primary purposes of the Workers' Compensation Act is to provide protection to workers; and a policy behind the Act is to keep the injured employee and his or her family from destitution. *Breaux v. Hoffpauir*, 95-2933 (La. 5/21/96); 674 So.2d 234, 237. Undocumented workers/illegal aliens are not excluded from securing worker's compensation benefits, when justified, under the Louisiana Workers' Compensation Act. *Artiga v. M.A. Patout & Son*, 95-1412 (La. App. 3 Cir. 4/3/96); 671 So.2d 1138, 1139.

Entitlement to supplemental earning benefits is governed by La. R.S. 23:1221(3) and is awarded for a maximum of 520 weeks. In order to recover, the employee must first prove by a preponderance of the evidence that he is unable to earn wages equal to ninety percent (90%) or more of the wages he earned before the accident. *Tuckerson v. Holiday Ret. Corp.*, 04-957 (La. App. 5 Cir. 12/28/04); 892 So.2d 626, 631-32. "Initially, the injured employee bears the burden of proving, by a preponderance of the evidence, that the injury resulted in his or her inability to earn that amount under the facts and circumstances of the individual case." *Id*. at 632, citing *Freeman v. Poulan/Weed Eater*, 93-1530 (La. 1/14/94); 630 So.2d 733, 739.

Once the employee's burden is met, the burden of proof then shifts to the employer, who, if he wishes to contend that the employee is earning less than he is able to earn so as to defeat or reduce supplemental earnings benefits, bears the burden of proving by a preponderance of the evidence that the employee is physically able to perform a certain job and that the job was offered to the employee, or that a job was available to the employee in his or the employer's

community or reasonable geographic region. *Id*. at 633, citing *Seal v. Gaylord Container Corp*. 97-688 (La. 12/2/97); 704 So.2d 1161, 1166. An employer may discharge its burden of proving job availability by establishing, at a minimum, the following by competent evidence: 1) the existence of a suitable job within claimant's physical capabilities and within claimant's or the employer's community or reasonable geographic region; 2) the amount of wages that an employee with claimant's experience and training can be expected to earn in that job; and 3) an actual position available for that particular job at the time that the claimant received notification of the job's existence. *Banks v. Industrial Roofing & Sheet Metal Works*, 96-2840 (La. 7/1/97); 696 So.2d 551, 557. "Suitable job" means a job that the claimant is not only physically capable of performing, but one that also falls within the limits of claimant's age, experience, and education, unless of course, the employer or potential employer is willing to provide any additional necessary training or education. *Id*. As part of the determination of whether an employer has carried its burden under La. R.S. 23:1221(3)(c)(i) of proving work is available to the claimant, courts must consider ***all*** factors that affect the claimant's ability to engage in the offered or available employment. *Daugherty v. Domino's Pizza*, 95-1394 (La. 5/21/96); 674 So.2d 947, 953.

The appellate court's review of the worker's compensation judge's findings of fact is governed by the manifest error or clearly wrong standard. *Tuckerson*, 892 So.2d at 631. A court of appeal may not overturn a judgment of the worker's compensation judge absent an error of law or a factual finding that is manifestly erroneous or clearly wrong. *Id*.

Here, the OWC found in its judgment that Mr. Perdomo suffered an injury as a result of the accident, and his average weekly wage at the time of the accident was $630. The OWC also found that Mr. Perdomo's benefits were properly reduced from $420 to $323.33, and that Defendants did not act arbitrarily and

capriciously in their reduction of the benefits. In its "Written Reasons for Judgment," the OWC acknowledged Mr. Perdomo's undocumented status and the fact that he could not secure employment at any of the recommended jobs because of his status. The court then focused on the evidence presented by Defendants to prove their entitlement for a reduction of Mr. Perdomo's benefits. The OWC found that Mr. Perdomo could not rely upon his undocumented status as the reason he cannot obtain employment, he was not entitled to TTD benefits, and his benefits were properly reduced.

Because there was an assertion that there were jobs available for Mr. Perdomo in his community or reasonable geographic region that were suitable under his circumstances, we will consider whether Defendants presented any suitable jobs for Mr. Perdomo.

Undocumented Status and Job Suitability

In addressing Mr. Perdomo's undocumented status, Defendants assert that Mr. Perdomo's position amounts to arguing his own turpitude in order to obtain a greater compensation benefit than that to which a lawful citizen is entitled. Contrary to Mr. Perdomo's argument, Defendants contend that the OWC's decision actually treats him, an undocumented worker, as any other employee by holding him to the same vocational rehabilitation process and job search analysis.

At trial, Allen Crane, the licensed vocational rehabilitation counselor assigned to Mr. Perdomo, was accepted as an expert in the field of vocational rehabilitation. Mr. Crane testified that three labor market surveys were conducted, and he offered Mr. Perdomo assistance with applying for the approved job from the first survey; however, he did not meet with Mr. Perdomo to discuss the jobs approved by Mr. Perdomo's choice of physician, Dr. Karen Ortenberg, from the

second labor market survey.[1] Mr. Crane stated he assessed the continued availability of the jobs and sent Mr. Perdomo's attorney correspondence advising him of the jobs that were approved and additional job assistance. A third labor market survey was performed for Mr. Perdomo, but Mr. Crane neither received any medical approvals for that survey nor met with Mr. Perdomo to discuss the jobs.

Mr. Crane testified that he gathered from Dr. Ortenberg's notes in the January 27, 2015 functional capacities evaluation ("FCE") that Mr. Perdomo's capabilities/physical demand was sedentary, and he completely deferred to Dr. Ortenberg's opinion regarding Mr. Perdomo's physical abilities and restrictions.[2] In his opinion, Mr. Crane thought that "sedentary" was somewhat unclear in terms of Mr. Perdomo's functional capabilities because Mr. Perdomo may have had a greater physical ability due to his submaximal efforts.

When questioned about Mr. Perdomo's undocumented status, Mr. Crane verified that Mr. Perdomo informed him that he did not have a green card and was not eligible to work in the United States; however, he attested Mr. Perdomo's attorney indicated Mr. Perdomo had a tax identification card and advised Mr. Perdomo was legally able to work in the United States.

Defendants introduced labor market surveys, one of which was completed by Mr. Crane and dated September 1, 2015. The survey listed five descriptions of job openings identified on the behalf of Mr. Perdomo and noted that "Mr. Perdomo's employability in these positions is contingent upon his ability to legally work in the United States."[3] The survey was sent to Dr. Karen Ortenberg, Ravena Budwine, and Mr. Perdomo's attorney. One of the positions identified was a Food Service Worker at Taco Bell. The position was described as having a sedentary-

[1] Mr. Crane testified that he also sent a copy of the second labor market survey to Dr. William Knight, a physician Mr. Perdomo also treated with but was not the choice of physician. However, Mr. Crane did not receive a response to the survey from Dr. Knight.
[2] Dr. Ortenberg placed the physical limitations of no bending, stooping, crouching or kneeling on Mr. Perdomo. These were permanent restrictions.
[3] The other positions identified were a Custodial Worker Level I, Housekeeper, Room Attendant, and Cashier.

light physical demand level requiring lifting up to ten pounds, frequent standing/short distance walking, rare to occasional bending and stooping, and cleaning of the kitchen area. The position also considered Spanish as a first language candidates. The survey stated that the Food Service Worker position was approved by Dr. Ortenberg on June 24, 2015.[4]

Ravena Budwine, a Senior Claims Adjuster for LWCC, testified that Mr. Perdomo's indemnity benefits had been reduced from $420 to $323.33 based upon a calculation that used the lowest paying job on the list approved by Dr. Ortenberg, which was the Taco Bell position.[5] Although the job description listed that a rare occasion of bending or stooping was required, Ms. Budwine did not clarify with Mr. Crane whether the job complied with Dr. Ortenberg's physical restrictions for Mr. Perdomo. She stated that she did not personally ensure the job was available prior to reducing Mr. Perdomo's benefits but relied upon Mr. Crane's report of available jobs.

Mr. Perdomo testified he did not have a social security card or green card, and he had not applied for U.S. citizenship. He also testified that he had been employed with RKC for four years and suffered a broken pelvis as a result of the accident on May 11, 2010. Although Dr. Ortenberg gave the opinion that he did not need further therapy, Mr. Perdomo attested that he needed additional therapy to help him walk. He stated that he still used the assistance of a wheelchair and crutches to move around daily. Mr. Perdomo testified that he attempted to find work but was unsuccessful. When asked about the Taco Bell position, Mr. Perdomo did not recall being told about the position and stated he had not gone to Taco Bell to inquire about applying for work.

In reviewing the laws applicable to these facts, we have found that Louisiana

[4] On the June 24, 2015 description of job openings, Dr. Ortenberg checked "Yes" when answering the question "Is Mr. Perdomo physically capable of performing this job on a full time basis?"
[5] This position paid $7.25 per hour.

courts have yet to address the issue before us. However, we have found similar cases from other jurisdiction to glean guidance.

In *Campos v. Daisy Constr. Co.*, 107 A.3d 570, 2014 Del. LEXIS 543 (Del. Super. November 13, 2014), the Delaware Supreme Court considered a case where an undocumented worker, Jose Campos (hereinafter referred to as "Campos"), who spoke almost no English, was hired by Daisy Construction Company (hereinafter referred to as "Daisy"). Daisy did not verify his ability to legally work in the United States prior to Campos' hiring. After Campos sustained permanent injuries as a result of being thrown off the back of a truck while working on a traffic crew and initially receiving workers' compensation benefits, Daisy investigated Campos' immigration status. Subsequently, Daisy discharged Campos after he could not provide a valid social security number. Daisy hired a doctor to re-evaluate Campos' condition, and the doctor concluded that although Campos was still impaired, he was physically capable of returning to light duty work with restrictions. Daisy then filed a petition with its workers' compensation board seeking the termination of Campos' total disability benefits because he was physically capable of returning to work. *Id*. at 573.

The board in that matter found Daisy met its burden to show that Campos had no decrease in earning capacity because Daisy's risk manager testified that light duty jobs were available at the same wage rate that Campos had previously earned, and that Campos would be eligible for these jobs if he could provide a social security number. The board found that Campos was not entitled to partial disability benefits because Campos could have returned to work at the same wage rate but for his status as an undocumented worker, and immigration status was not to be taken into account when determining his entitlement to benefits. The appellate court affirmed the workers' compensation board's decision. *Id*. at 573-74.

On appeal to the Delaware Supreme Court, Daisy argued that the appellate court was correct in concluding Campos was ineligible for partial disability benefits because a job was available to him at his pre-injury wage if he could get a valid social security card; thus, Daisy demonstrated that work was available within Campos' restrictions. Daisy contended that allowing Campos to collect partial disability benefits would allow him to receive a windfall because of his status as an undocumented worker. Conversely, Campos argued he was being denied partial disability benefits due to his immigration status. *Id*. at 574 and 580.

In reversing the appellate court and the board, the Delaware Supreme Court held that the "theoretically available" employment argument was unavailing for employers seeking to meet their burden to terminate benefits under Delaware's workers' compensation act. In determining whether Daisy met its burden of proving whether Campos had no decrease in earning power[6] following his workplace injury in order to avoid paying Campos' partial disability payments, the court stated:

> In light of Campos' inability to secure new work legally, Daisy may find it difficult to demonstrate job availability, as a labor market survey or some other form of proof may not identify jobs that are actually available to Campos. But any difficulty in proving job availability is properly borne by the employer, who must take the worker as it hired him. We thus hold that if Daisy cannot prove by reliable evidence that jobs are ***in fact available*** to Campos as an injured undocumented worker, then Daisy must continue to pay partial benefits until it shows that Campos has been re-employed.

Id. at 577-78. (Emphasis added).

When discussing the factors considered in its decision, the court found:

> First and most important, this interpretation is the one most faithful to the Worker's Compensation Act, as reflected in its plain terms and the judicial precedent applying the Act over many decades. Second, by ensuring that undocumented workers are given equal treatment under the Workers' Compensation Act, this interpretation

[6] Similar to Louisiana courts' determination of job suitability, Delaware courts determine "earning power" by considering other relevant factors in addition to the claimant's injury, including the claimant's age, education, general background, occupational and general experience, the nature of the work that can be performed by a worker with the physical impairment, and the availability of that work. *Campos*, 107 at 575.

> reduces the incentives for employers to hire undocumented workers, and thus minimizes the overall incentive for illegal immigration, which is the primary goal of federal immigration law. Third and finally, this reading of the Act ensures that all workers in Delaware are not exposed to excessive risk because employers are required to bear the full cost of operating an unsafe workplace.

Id. at 578.

Disagreeing with Daisy's argument concerning windfalls to undocumented workers, the court further found, "[a]llowing Daisy to avoid making payments that would otherwise be required under the Workers' Compensation Act would award Daisy itself a windfall for hiring an undocumented worker…." *Id*. at 581. The Delaware Supreme Court further found that

> Placing the burden of proving job availability on employers of undocumented workers following a workplace injury is thus most consistent with the purpose of the IRCA ["Immigration Reform and Control Act of 1986"] itself. The IRCA seeks to "close the back door on illegal immigration" through the use of employer sanctions, which Congress determined was the "most human, credible and effective way to respond to the large-scale influx of undocumented aliens."[7]

In another case, *Gonzalez v. Performance Painting, Inc.*, 2013-NMSC-021, 303 P.3d 802, the Supreme Court of New Mexico considered a case involving an undocumented worker, Jesus Gonzalez (hereinafter referred to as "Gonzalez") who was hired to be a painter's helper by Performance Painting, Inc. (hereinafter referred to as "Performance Painting"). Gonzalez fell off of a ladder while at work, injured his shoulder, and became temporarily totally disabled and unable to work. Gonzalez eventually reached maximum medical improvement and was assigned permanent restrictions in the type of work he could perform. He briefly returned to work but had to stop working, which was partially due to Performance Painting's inability to accommodate his injury-related work restrictions. Gonzalez subsequently filed a workers' compensation complaint against Performance Painting. *Id*. at 803.

[7] Under the IRCA, it is illegal for an employer "to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien…." 8 U.S.C. § 1324a(a)(1)(A); *Campos, supra*.

After the filing of the complaint, Performance Painting offered Gonzalez employment for modified duty, taking into account his injury-related restrictions; however, the new position required him to fill out a new application that included verification of his eligibility for employment. Upon being unable to produce a social security card for the application, Gonzalez left Performance Painting's office and never returned. *Id*. at 803-04.

During the proceedings before New Mexico's Workers' Compensation Administration, Performance Painting argued that Gonzalez's failure to prove eligibility to work constituted an unreasonable refusal to return to work, thereby limiting his benefits to the base impairment rating without any modifier benefits. The workers' compensation judge in that matter agreed with Performance Painting and found Gonzalez was only entitled to the basic impairment rating because he "'could not accept a bona fide return to work offer made by [Performance Painting]' due to his immigration status, and therefore '[Gonzalez] unreasonably refused a return-to-work offer from [Performance Painting].'" The court of appeal affirmed the workers' compensation judge's decision in that matter for slightly different reasons, and Gonzalez appealed. *Id*. at 804.

In reversing of the lower courts' decisions, the New Mexico Supreme Court focused on whether Gonzalez's status as an undocumented immigrant prevented him from receiving permanent partial disability modifier benefits. The court found that refusing modifier benefits to undocumented workers would create a perverse incentive for employers to hire undocumented workers, knowing that in the event of injury, they would likely pay a much lower amount in workers' compensation benefits due to undocumented workers' ineligibility for modifier benefits; and ultimately, that result would upset the balance the legislature created in the workers' compensation laws—tipping the law in favor of the employer as opposed to the worker. *Id*. at 807.

The Supreme Court of New Mexico then elaborated,

> Whether an employer knew or should have known, before the worker was injured, that a worker was undocumented determines whether an employer's [employment offer] was legitimate and should be the focus of our inquiry and the basis of determining whether the injured worker is entitled to modifier benefits. Such a focus maintains the appropriate neutrality between employers and workers and in doing so stays true to the original intent of the Legislature.

The court went on to state that the Immigration Reform and Control Act of 1986 seeks to discourage illegal immigration by making it unlawful to hire undocumented workers, and an employer who does not properly comply with the federal requirements either should have known or is deemed to have known that the worker would likely be undocumented and ineligible for rehire in the event of injury and is imputed with knowledge of the worker's immigration status for purposes of workers' compensation. The court further held that under the circumstance where an employer knowingly hired an undocumented worker and that worker is injured on the job, the employer should fairly bear the responsibility for that predicament and fairly owe modifier benefits to the worker; and in any case, an employer can protect itself from owing modifier benefits to an undocumented worker by simply following the law. *Id*. at 807-08.

In the case at bar, the OWC found that Mr. Perdomo's workers' compensation benefits were properly reduced by Defendants. In its written reasons for judgment, the OWC recognized Mr. Perdomo's inability to legally secure employment and found that he could not rely upon his undocumented status for his inability to obtain employment. Defendants' argument to this Court mainly focuses on whether Mr. Perdomo is physically capable to perform the duties of the Taco Bell position coupled with the facts that Dr. Ortenberg (the choice of physician) approved the position, the position was within Mr. Perdomo's geographic region, and Spanish as a first language candidates were accepted. However, discussion of whether Mr. Perdomo *may* be able to physically perform

the duties of the Taco Bell position (or any other position on the labor market survey) would be wholly superfluous because we would ultimately have to discuss whether that job was actually suitable for Mr. Perdomo after considering *all* of the factors affecting his ability to engage in the available employment, particularly his undocumented status.

Similar to the undocumented workers in *Campos* and *Gonzalez*, Mr. Perdomo cannot legally obtain employment in the United States, and employers are prohibited from hiring him due to his immigrant status.[8] Defendants in this matter failed to present any evidence that Mr. Perdomo was eligible to work in the United States or that he fraudulently represented he could legally work at the time he was hired. Thus, like the employer in *Gonzalez*, *supra*, because Defendants failed to show that RKC properly complied with the requirements of the IRCA, 8 U.S.C. § 1324a and La. R.S. 23:992, we find that RKC is imputed with having knowledge of Mr. Perdomo's undocumented status upon hiring.[9] Since RKC knew of Mr. Perdomo's undocumented status, it also had knowledge or should have known of Mr. Perdomo's ineligibility for rehiring in the event of an injury within the scope and course of his employment. Accordingly, Defendants should fairly

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[8] La. R.S. 23:992 states, "No person, either for himself or on behalf of another, shall employ, hire, recruit, or refer, for private or public employment within the state, an alien who is not entitled to lawfully reside or work in the United States."

[9] The Louisiana Legislature has contemplated penalties and exceptions for the hiring of undocumented workers. While there is no law directly addressing the issue before this Court, we are guided by La. R.S. 23:995 in considering whether fault or sanctions should imposed for employers who knowingly hire an undocumented worker. La. R.S. 23:995 provides, in pertinent part:

> A. No person, either for himself or on behalf of another, shall employ, hire, recruit, or refer, for private or public employment within the state, an alien who is not entitled to lawfully reside or work in the United States.
> B. No person shall be subject to civil penalties pursuant to the provisions of this Part upon a showing of either of the following:
> (1) The citizenship or work authorization status of every employee has been verified by the United States Citizenship and Immigration Services E-Verify system, hereinafter referred to as E-Verify.
> (2) Each employee has provided a picture identification and one of the following documents of which the employer has retained a copy for his records:
> (a) United States birth certificate or certified birth card.
> (b) Naturalization certificate.
> (c) Certificate of citizenship.
> (d) Alien registration receipt card.
> (e) United States immigration form I-94 (with employment authorized stamp).
> C. Any employer who has utilized the E-Verify system to determine the employment eligibility of an employee is presumed to have been in good faith and is not subject to any penalty as a result of the reliance on the accuracy of the E-Verify system.

bear the responsibility for Mr. Perdomo's current predicament.[10] Thus, placing the burden of proving job availability for Mr. Perdomo on Defendants is consistent with the purpose of the IRCA. *See Campos, supra*.

Placing the burden of proving job availability on Defendants also encompasses the purpose of the Louisiana Workers' Compensation Act and the protections intended for injured workers. Employers should not be allowed to profit from illegally hiring undocumented workers by not being required to pay substantiated workers' compensation benefits for those employees. Obligating Defendants to bear fair responsibility for Mr. Perdomo's current predicament prevents him from being denied the same benefits other workers are entitled to when suitable jobs are not available for them.

After review of the applicable laws, jurisprudence and facts of this case, we find that Defendants failed to discharge their burden of proving job availability for Mr. Perdomo. Considering all of the factors that affect Mr. Perdomo's ability to engage in the offered or available employment pursuant to *Daugherty, supra*, we find that Defendants failed to present suitable jobs for Mr. Perdomo, primarily due to the fact that all of the jobs on the labor market survey (and any other job that could have possibly been listed on the survey) required that Mr. Perdomo be legally eligible to work in the United States. Mr. Perdomo's injury and continued need for workers' compensation benefits are substantiated by the record. Consequently, Defendant will be required to pay benefits to Mr. Perdomo until either they can prove valid job availability for Mr. Perdomo (*i.e.*, he becomes legally eligible to work in the United States) or the expiration of the 520 weeks for his supplemental benefits.

[10] Although Defendants argue that the OWC's decision holds Mr. Perdomo to the same standard as any other employee by holding him to the same vocational rehabilitation process and job search analysis, that contention completely disregards the fact that the vocational rehabilitation process and job search analysis are totally inapplicable to the circumstances of undocumented workers.

Therefore, we find that the OWC was manifestly erroneous in finding the Defendants properly reduce the benefits of Mr. Perdomo on September 1, 2015.

Denial of Costs, Interests, Penalties and Attorney's Fees

Mr. Perdomo alleges he is entitled to costs, interests, penalties and attorney's fees because Defendants failed to timely pay his compensation. He contends that Defendants were unreasonable in relying upon the vocational rehabilitation performed by Mr. Crane because Mr. Crane did not consider Mr. Perdomo's unique circumstance in his assessment. Additionally, Mr. Perdomo contends Mr. Crane failed to clear up the discrepancies between Dr. Ortenberg's approval and her work restrictions for Mr. Perdomo with the jobs presented. Because of these dilemmas, he maintains that Defendants did not make a good-faith, legitimate attempt to secure work for him.

Defendants assert that the facts of this matter do not warrant the imposition of any penalties and attorney's fees because the reliance on the vocational efforts of Mr. Crane was not arbitrary, capricious or without probable cause.

The determination of whether an employer or insurer should be cast with penalties and attorney's fees in a worker's compensation action is essentially a question of fact. *Authement v. Shappert Eng'g*, 02-1631 (La. /25/03); 840 So.2d 1181, 1188. Factual findings are subject to the manifest error or clearly wrong standard of review. *Id*. at 1188-89.

In its judgment, the OWC found that Defendants did not act arbitrarily and capriciously and did not subject them to penalties, attorney's fees, interest and costs. Although we have found that Defendants improperly reduced Mr. Perdomo's from $420 to $323.33, we cannot find that the OWC was erroneous in its denial of costs, interests, penalties and attorney's fees to Mr. Perdomo. The evidence does not support Mr. Perdomo's assertion that Defendants acted arbitrarily and capriciously in reducing Mr. Perdomo's benefits.

DECREE

For the foregoing reasons, we reverse the judgment of the OWC, in part, and reinstate Mr. Perdomo's workers' compensation benefits to the weekly amount of $420, retroactive to September 1, 2015 (the date the benefits were erroneously reduced). Defendants are assessed the costs of this appeal.

REVERSED IN PART

CANDIDO PERDOMO	NO. 17-CA-112
VERSUS	FIFTH CIRCUIT
RKC, LLC AND LWCC	COURT OF APPEAL
	STATE OF LOUISIANA

CHAISSON, J., CONCURS IN PART WITH REASONS

I concur in the decision to reverse the trial court's October 4, 2016 judgment regarding the reduction of Mr. Perdomo's benefits, but for reasons different from those stated in the opinion.

Under a simple application of the test set forth in *Banks v. Indus. Roofing & Sheet Metal Works*, 96-2840 (La. 7/1/97), 696 So.2d. 551, the defendants failed to show by a preponderance of the evidence the existence of a suitable job in the geographic region that met Mr. Perdomo's physical limitations. A "suitable" job is one that the claimant is clearly physically capable of performing, as evidenced by approval of the job by the claimant's treating physician. Mr. Perdomo's benefits were reduced based on his alleged earning capacity at a position which would have him work in food service at a Taco Bell restaurant. The evidence and testimony in this case that Mr. Perdomo was physically capable of performing the work required under the Taco Bell job is controverted and insufficient to meet the requirements set forth in *Banks*.

Mr. Allen Crane, the vocational rehabilitation counselor, testified that, prior to conducting a labor market survey to identify suitable jobs, he reviewed Mr. Perdomo's file, including his functional capacity evaluation and Dr. Ostenberg's notes. According to the functional capacity evaluation, Mr. Perdomo's injuries from his work related accident were debilitating enough for the following permanent work restrictions: no lifting greater than 20 pounds; no pushing or

pulling of more than 25 pounds; no operating heavy equipment or dangerous machinery; no standing or walking for more than two and one-half hours a day; no bending or stooping; no use of ladders; no crouching or kneeling; only occasional climbing of stairs; and walking only with crutches or a cane.

Following the labor market survey, Mr. Crane crafted a description of the Taco Bell job based on his discussion with the employer and his knowledge of what food service workers do at Taco Bell. The job description crafted by Mr. Crane is inconsistent with some of the notes from his discussion with the employer: it fails to mention trash removal or sweeping as part of the job duties. The job description notes that rare to occasional bending or stooping is required, as would frequent standing or walking for a four to six hour shift, which is inconsistent with the permanent work restrictions noted in the functional capacity evaluation. Mr. Crane did not point out this discrepancy to Dr. Ostenberg. Additionally, the claimant provided evidence from another treating physician, Dr. William Knight, that Mr. Perdomo was not physically capable of performing the jobs identified by Mr. Crane due to the permanent disabilities from his work injury.

Both sides make much of Mr. Perdomo's immigration status, and more specifically, whether he is legally authorized to work in the United States. Mr. Perdomo argues that the vocational rehabilitation counselor should consider a claimant's legal authorization to work when determining whether a job is “suitable” for the claimant and/or whether the jobs identified are, in fact, “available” to the claimant as required under *Banks*. Defendants argue that the use of an immigrant's undocumented status to preclude the applicability of the *Banks*’ test would result in an undocumented claimant obtaining greater benefits than those to which a United States citizen or documented immigrant would be entitled.

Though dealing with disputes over payments of workers' compensation benefits for employees unauthorized to work, the cases cited by Mr. Perdomo in

support of his position are factually distinct from the case *sub judice*. In *Campos v. Daisy Construction Co*., 107 A.3d 570 (Del. 2014), the employer cut off the injured employee's benefits, then purported to itself offer a light duty job that was contingent upon the employee producing a Social Security number. The Delaware court in that case found that offer to be a disingenuous attempt by the employer to reduce the injured worker's benefits, knowing that the employee could not legally accept the offer.

Similarly, in *Gonzalez v. Performance Painting, Inc.*, 2013-NMSC-021, 303 P.3d 802, the Supreme Court of New Mexico considered a case where the employer made an offer of employment for modified duty, taking into account the employee's injury-related restrictions, but required a new job application that included verfication of his eligibility for employment. In that case, the court held that the worker's benefits had been improperly reduced because the employer knowingly hired an unauthorized worker and, when that worker was injured on the job, the employer should fairly bear the responsibility for that predicament which it would not otherwise be in had it followed the law.

In *Visoso v. Cargill Meat Solutions*, 826 N.W.2d 845 (Neb. 2013), the employer attempted to use labor market data from Chichihualco, Mexico as a basis for the injured employee's reduction in benfits even though the claimant resided in Shuyler, Nebraska at the time of the injury.

In disputes of this kind, to allow consideration of an injured employee's undocumented status by either the employee or the employer could result in unwarranted advantages and disadvantages to either the employee or employer. On the one hand, a claimant unauthorized to work in the United States could use his status to his advantage to prevent the termination or reduction of benefits by arguing that a job that otherwise meets all of the criteria for availability, is nonetheless "unavailable" to him because of his undocumented status. On the

other hand, an employer could obtain the termination or reduction of benefits by ficticiously creating a job for the employee that meets all of his physical limitations, and is thus "available," with full knowledge that the employee cannot accept the job because of his undocumented status.

Consequently, the Louisiana Worker's Compensation Act makes no distinction between workers authorized to work in the United States and those who are not authorized. Its provisions, and the jurisprudence interpreting them, including *Banks*, are applicable to all workers injured in the course and scope of their employment, regardless of immigration status. For the purposes of applying the test set forth in *Banks*, a claimant may not use his lack of authorization to work in the United States to prevent a termination or reduction in benefits by arguing that an otherwise available job is not available to him because of his undocumented status. Conversely, an employer may not use an injured worker's unauthorized work status to reduce or deny payment of benefits by offering an otherwise suitable job to the worker conditioned upon his ability to legally accept the job. In other words, Mr. Perdomo's legal status to work in the United States is irrelevant for purposes of application of the *Banks*' test.

Finally, I take note of the following language from the trial court's written reasons for judgment:

> Claimant bears the burden of proving, by a preponderance of the evidence that the injury resulted in his inability to earn wages. The Court listened to the testimony and observed the demeanor of the Claimant and the witnesses. After considering the pleadings, testimony, and the law and the evidence, the Court finds that the Claimant was unable to meet his burden. Claimant cannot rely on his undocumented status as the reason he cannot obtain employment. Claimant cannot prove that he is disabled from work and as such, he is not entitled to TTD benefits. Claimant is entitled to SEB benefits as calculated using the jobs located and approved by his treating physician. Claimant's benefits were properly reduced…

As stated above, I agree that a claimant may not use his unauthorized status as a way of obtaining unemployment benefits to which a similarly situated citizen or work-authorized immigrant would not be entitled. However, despite this correct statement of the law, it appears that the trial court misapplied the *Banks'* test and placed an undue burden on Mr. Perdomo to prove he is authorized to work in the United States in order to prevent reduction of his benefits. The purpose of the Workers' Compensation law is to compensate an injured employee for his injuries.

Defendants concede that Mr. Perdomo suffered severe injuries when a garbage truck fell on top of him and crushed his legs and pelvis, and that he was working in the course and scope of his employment while that injury occurred. Following his accident, Mr. Perdomo was disabled from work, and at that time he was entitled to temporary total disability benefits. Under La. R.S. 23:1221(1)(d), "[a]n award of benefits based on temporary total disability shall cease when the physical condition of the employee has resolved itself to the point that a reasonably reliable determination of the extent of disability of the employee may be made and the employee's physical condition has improved to the point that continued, regular treatment by a physician is not required." Here, the employer is seeking to convert Mr. Perdomo's temporary total disability benefits to supplement earnings benefits. When reducing benefits, the burden of proof shifts to the employer. The burden is not on the employee to prove that he still suffers from his injuries and therefore cannot work, but rather on the employer to show that the claimant has recovered sufficiently from his injuries to return to work and the employer has made meaningful, considered efforts to secure gainful employment for the injured employee commensurate with his physical capabilities, education, and skills. In my opinion, a proper application of the *Banks*' test clearly shows that the defendants did not meet their burden of proof in this case, and, for that reason, the trial court erred in reducing Mr. Perdomo's benefits.

With regard to the assignment of error concerning the denial of costs, interests, penalties, and attorney's fees, I agree with the trial court's finding that the defendants did not act arbitrarily and capriciously in reducing the claimant's benefits. I agree also with the decree reversing the judgment of the OWC in part, reinstating Mr. Perdomo's worker compensation benefits to the weekly amount of $420, retroactive to September 1, 2015, the date on which they were erroneously reduced, and assessing defendants the costs of this appeal.

CANDIDO PERDOMO	NO. 17-CA-112
VERSUS	FIFTH CIRCUIT
RKC, LLC AND LWCC	COURT OF APPEAL
	STATE OF LOUISIANA

LEBLANC, J., CONCURS IN PART WITH REASONS ASSIGNED BY JUDGE CHAISSON

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **NOVEMBER 29, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

17-CA-112

E-NOTIFIED
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