

IAIABC Anniversary Special

Vocational Rehabilitation and the Illegal Alien

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Illegal aliens are certainly not a new topic of concern within the area of workers' compensation. Most jurisdictions have determined whether or not illegal aliens are covered under the applicable workers' compensation law. Whether immigration status affects the claimant's right to vocational rehabilitation is a question where the law seems to be unsettled.

In some states, like Illinois, in order to receive vocational rehabilitation, the claimant must be a likely candidate to obtain employment after the vocational rehabilitation.¹ It is fairly unlikely that this factor can be satisfied by an illegal alien. Adding to this frustration is the unlikelihood of a favorable cost/benefit analysis after the completion

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¹ *National Tea Co. v. Indus. Comm'n.*, 97 Ill.2d 424, 432, 454 N.E.2d 672, 73 Ill.Dec. 575 (1983).

of vocational rehabilitation. Clearly, the cost of rehabilitating someone that cannot legally enter the work force outweighs the potential benefits of the training the person receives. If a person is rehabilitated to enter a job market they cannot legally enter, the person is left with skills that are of no practical use. Some states have decided not to award vocational rehabilitation to illegal aliens, reasoning it is the illegal alien's status and not the work related injury which is the disabling factor.²

If vocational rehabilitation is to be awarded, the question of what standard to use comes into play. Because the person is not legally employable in the United States, should they be held to a different standard to qualify for vocational rehabilitation? One possibility is to require the person show that they would not be employable in any capacity in a jurisdiction where they could be legally employed. With this standard, the employer would likely be required to offer the employee vocational rehabilitation for employment within the jurisdiction that they would be legally employable.

While this is an issue that the state courts are dealing with right now, the question may be resolved in the future by the Federal Courts or by legislation. Recently, President George W. Bush announced a proposal for a new temporary worker program.³ This program would allow illegal aliens to acquire a temporary work card in order to be lawfully employed in the United States.⁴ If such a policy were enacted, it seems that illegal aliens would be entitled to vocational rehabilitation as set forth in the various workers' compensation statutes.

² See, e.g.: *Del Taco v. WCAB*, 79 Cal.App.4th 1437 (2d Dist. 2000); *Ruvera v. United Masonry, Inc.*, 948 F.2d 774 (D.C. Cir. 1991); *Reinforced Earth Company v. WCAB*, 570 Pa. 464 (2002).

³For entire proposal see: The White House: President George W. Bush, "President Bush Proposes New Temporary Worker Program: Remarks by the President on Immigration Policy" at:

http://www.whitehouse.gov/news/releases/2004/01/20040107_3.html

⁴ *Id.*

The U.S. Supreme Court held in *Hoffman Plastic Containers, Inc. v. NLRB*, 535 U.S. 137, 152, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002), that the National Labor Relations Board (NLRB) was prohibited from awarding back-pay to illegal aliens under the National Labor Relations Act (NLRA) because it would “unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.”⁵ One article suggested that in this decision the Supreme Court ruled illegal aliens are not afforded the same protections as other employees because they entered the country and obtained employment illegally.⁶ Thus, if the Supreme Court continues in this trend, employers may not be required to offer illegal aliens vocational rehabilitation.

Illegal aliens have been a difficult issue for courts and legislatures throughout our history. It will be interesting to see how the issue of vocational rehabilitation for work related injuries will be resolved, whether by the states or by the federal government.

⁵ The Immigration and Reform Act of 1986 (IRCA) makes it unlawful to knowingly hire an undocumented worker. The IRCA also makes it a crime to falsify documents in order to obtain employment in the U.S. (8 U.S.C.S. § 1234 et al.) (Lexis).

⁶ DiLoretto, “Supreme Court Sets Standard for Benefits to Illegal Aliens,” *The Legal Intelligencer*, March 27, 2003, Vol. 228, No. 59, pg. 5.