



IN THE
Supreme Court of the State of Delaware

JOSE CAMPOS,

Appellant-Below, Appellant,

v.

DAISY CONSTRUCTION
COMPANY,

Appellee-Below, Appellee.

No. 33,2014

APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE IN AND
FOR NEW CASTLE COUNTY

C.A. No. N13A-07-002

APPELLANT'S OPENING BRIEF

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Dated: March 10, 2014

TABLE OF CONTENTS

TABLE OF CITATIONS iii

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 3

STATEMENT OF FACTS 4

 A. Mr. Campos Suffered Injuries From An Accident Related To
 His Job With Daisy Construction Company 4

 B. Mr. Campos Began Receiving Total Disability Benefits..... 4

 C. Daisy Construction Company Investigated Mr. Campos After
 His Work Accident And Terminated Him Because He Did Not
 Supply A Valid Social Security Number 5

 D. Daisy Informed Mr. Campos That No Jobs Were Available And
 Advised Him To Look Elsewhere For Work 6

 E. The Industrial Accident Board’s June 26, 2013 Decision 7

 F. The Superior Court’s January 16, 2014 Memorandum Opinion
 Affirming The Board’s Decision..... 8

ARGUMENT 9

I. THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN
 AFFIRMING THE BOARD’S TERMINATION OF DISABILITY
 BENEFITS TO MR. CAMPOS..... 9

 A. Question Presented 9

 B. Scope Of Review 9

 C. Merits Of Argument 10

 1. Under Delaware Law, Illegal Aliens Are Entitled To
 Disability Benefits 10

 2. Employers Cannot Divest Employees Of Accrued And
 Fixed Benefits 11

3.	Delaware Valley Field Services v. Ramirez Controls	14
4.	The Superior Court’s Decision Contravenes Public Policy And Encourages Employers To Engage In Unscrupulous Practices	17
	CONCLUSION	20

EXHIBITS:

- (1) Exhibit A: Campos v. Daisy Construction Co., Hearing No. 1369894 (Industrial Accident Board June 26, 2013) (Decision), Denying Appellant Jose Campos Partial Disability Benefits
- (2) Exhibit B: Campos v. Daisy Construction Co., C.A. No. N13A-07-002 (Del. Super. Ct. Jan. 16, 2014) (Memorandum Opinion), Affirming Industrial Accident Board Decision

TABLE OF CITATIONS

	Page(s)
CASES	
<u>Abrahams v. Chrysler Group, LLC</u> , 44 A.3d 921 (Del. 2012).....	9
<u>Asylum Co. v. D.C. Dep’t of Employment Servs.</u> , 10 A.3d 619 (D.C. 2010).....	11
<u>Del. Valley Field Servs. v. Ramirez</u> , 2012 Del. Super. LEXIS 622 (Del. Super. Ct. Sept. 13, 2012)	passim
<u>Del. Valley Field Servs. v. Ramirez</u> , 61 A.3d 617 (Del. 2013).....	11, 14
<u>Dowling v. Slotnik</u> , 712 A.2d 396 (Conn. 1998).....	11, 18
<u>Ebersole v. Evans Builders</u> , 15 A.3d 217 (Del. 2011).....	9
<u>Johnson Controls, Inc. v. Fields</u> , 758 A.2d 506 (Del. 2000)	12, 13, 15
<u>Olney v. Cooch</u> , 425 A.2d 610 (Del. 1981)	9
<u>Rajeh v. Steel City Corp.</u> , 813 N.E.2d 697 (Ohio 2004).....	18
<u>San Juan v. Mountaire Farms</u> , 2007 Del. Super. LEXIS 277 (Del. Super. Ct. Sept. 18, 2007)	9
<u>Torres v. Allen Family Foods</u> , 672 A.2d 26 (Del. 1995).....	16, 17
<u>Vincent v. E. Shore Mkts.</u> , 970 A.2d 160 (Del. 2009)	9
STATUTES	
19 <u>Del. C.</u> § 2301(10).....	10, 11

19 <u>Del. C.</u> § 2304	10
19 <u>Del. C.</u> § 2325	12

NATURE OF PROCEEDINGS

This appeal centers on the Superior Court of the State of Delaware's (the "Superior Court") erroneous affirmance of an Industrial Accident Board (the "Board") decision that denied partial disability benefits to an employee because he does not have a valid social security number with which to gain employment.

In November 2011, employee and Appellant Jose Campos ("Appellant," or "Mr. Campos") began receiving total disability benefits from Daisy Construction Company ("Daisy") due to injuries he suffered in a work-related accident. On September 6, 2012, Daisy filed a Petition for Review, alleging that Mr. Campos's total disability benefits should be terminated because he is physically capable of returning to work. On December 6, 2012, Mr. Campos filed a Petition to Determine Additional Compensation Due, alleging permanent impairment to the left upper extremity as a result of his work-related injury. The Board consolidated the petitions for a hearing.

On May 24, 2013, the Board convened a hearing in Campos v. Daisy Construction Company, IAB Hearing No. 1369894, to determine whether Mr. Campos should continue to receive total disability benefits. On June 26, 2013, the Board granted both parties' petitions. In doing so, the Board awarded Mr. Campos permanent impairment benefits, but held that Mr. Campos is not totally disabled because he is physically capable of working, and denied his entitlement to partial

because he is unable to provide a valid social security number.

On July 2, 2013, Mr. Campos appealed the Board's Decision to the Superior Court insofar as it disqualified him from receiving partial disability benefits because of an invalid social security number. Mr. Campos filed his Opening Brief regarding the appeal on September 19, 2013. On October 9, 2013, Daisy filed its Answering Brief, to which Mr. Campos filed a reply on October 22, 2013.

On January 16, 2014, the Honorable Judge Andrea L. Rocanelli of the Superior Court issued a Memorandum Opinion affirming the Board's decision ("Opinion" or "Mem. Op."). On January 24, 2014, Mr. Campos appealed the Superior Court's Opinion to this Court. This is the Opening Brief of Mr. Campos in support of his appeal.

SUMMARY OF ARGUMENT

1. The Superior Court erred in holding that the Industrial Accident Board properly denied Mr. Campos partial disability benefits because his lack of social security number precludes him from obtaining employment. Delaware law provides that a worker's use of false information to become an employee does not remove him from coverage for job-related injuries, nor does his illegal status affect his eligibility for benefits. Further, an employer cannot alter the fixed and accrued nature of an injured employee's benefits by subsequently finding a basis to discharge the employee. To allow Daisy to avoid paying disability benefits to Mr. Campos due to his inability to provide a valid social security number undermines the goal of Delaware's Workers' Compensation statute to foster a workplace safe for all workers, and incentivizes employers to engage in unscrupulous practices to reduce expenses.

STATEMENT OF FACTS

A. Mr. Campos Suffered Injuries From An Accident Related To His Job With Daisy Construction Company

Daisy is a highway and site development construction company with approximately 150 employees in Delaware and Maryland. A21-22.¹ In September 2008, Daisy hired Mr. Campos as a heavy equipment operator. A22. Mr. Campos primarily operated a milling machine to remove old road surfaces, but rotated through other jobs as well, because milling work was often unavailable. A22-23. On June 3, 2011, while working on a traffic crew that was setting up cones, Mr. Campos was thrown off the back of a truck that stopped suddenly, striking his left thigh and falling on his left shoulder. A8, A16. As a result, Mr. Campos suffered injuries to his left shoulder and lower back. A16. After missing three or four days of work due to his injuries, Mr. Campos returned to work at Daisy on light duty (per doctor's orders) with no wage loss. A23-24. During this time, Mr. Campos still drove construction equipment and took medication to manage his pain, which he rated at seven out of ten. A17-18.

B. Mr. Campos Began Receiving Total Disability Benefits

In November 2011, Mr. Campos underwent shoulder surgery and did not return to work, as he was placed on total disability at a compensation rate of \$474.30 per week. A17, 24. Shortly thereafter, in April 2012, Mr. Campos had

¹ Citations to Appellant's Appendix are identified by numbers with the prefix "A."

surgery on his back. A18. Despite the surgeries, Mr. Campos's injuries did not resolve, as he continues to have pain and limited range of motion in his shoulder and lower back, with pain and numbness radiating down into his right leg. A117-19. Presently, Mr. Campos takes a number of pain medications, goes to physical therapy, and receives injections to reduce his pain. A41-44.

At the May 24, 2013 hearing before the Board (the "Hearing"), an expert for Mr. Campos testified that his shoulder was permanently impaired. A11-14. In addition, the doctor who performed surgery on his back noted that Mr. Campos "would never be a hundred percent," but offered Mr. Campos the option of a second back surgery to try to reduce his pain. A124. Mr. Campos has not decided whether to undergo a second back procedure because he did not feel much better from the first one. A41. Mr. Campos's doctor testified that Mr. Campos was totally disabled until a decision was made regarding a second surgery. A37-38, 85. Daisy's expert doctor, on the other hand, testified Mr. Campos could return to work, but with restrictions. A19-21, 126-27. Daisy did not offer testimony from a labor market expert.

C. Daisy Construction Company Investigated Mr. Campos After His Work Accident And Terminated Him Because He Did Not Supply A Valid Social Security Number

Edward Stepp, Daisy's risk manager, testified that, in November 2011 – four months after the work accident – *Daisy's insurance carrier* questioned the validity

of Mr. Campos's social security number. A29-30, 36. At its request, Daisy checked the social security number Mr. Campos supplied at new hire orientation in the Department of Homeland Security's e-verify system, and discovered that the number did not match Mr. Campos's name. A25. In providing this testimony, Mr. Stepp noted that Mr. Campos was hired prior to Department of Homeland Security's e-verify system going into place. Id. Daisy subsequently sent Mr. Campos a letter requesting his correct social security number, but Mr. Campos did not supply a new number. Id. By letter dated December 16, 2011, Daisy terminated Mr. Campos. A26. According to Mr. Stepp, Daisy could no longer employ Mr. Campos due to immigration requirements. Id. Mr. Stepp further testified that Daisy would offer Mr. Campos modified duty² work if Mr. Campos supplied a valid social security number. A32.

As of the date of the Hearing, Daisy had not checked the social security numbers of any of its other employees, except for new hires. A30.

D. Daisy Informed Mr. Campos That No Jobs Were Available And Advised Him To Look Elsewhere For Work

In August 2012, counsel for Daisy sent Mr. Campos a letter that stated Daisy did not have any jobs available and advised him to look elsewhere for work. A28, 62-63. In contradiction to the August 2012 letter from Daisy's counsel, Mr. Stepp testified that light duty work actually was available in August 2012, as Mr.

² Mr. Stepp used the terms "light duty" and "modified duty" interchangeably.

Campos could have worked in the yard or with the maintenance crew, but that a valid social security number would be required first. A32.

Mr. Campos would like to return to work for Daisy but feels discriminated against, as he knows five or six other employees who are in the same immigration situation and still work for Daisy. A44-45. Mr. Stepp confirmed that Daisy has had other employees who do not have valid social security numbers. A30-31.

E. The Industrial Accident Board's June 26, 2013 Decision

Before the Board for consideration at the Hearing were two consolidated petitions: Daisy's Petition for Review, seeking to terminate Mr. Campos's total disability benefits, and Mr. Campos's Petition to Determine Additional Compensation Due, alleging permanent impairment to his left shoulder.

In its June 26, 2013 Decision, the Board, among other things, granted Daisy's petition to terminate Mr. Campos's total disability benefits, finding that Mr. Campos "is physically capable of returning to work." See Exhibit A at 11-12. The Board further determined that Mr. Campos is not qualified to receive partial disability benefits, finding as follows:

The crux of this case is whether the Claimant is actually displaced from the labor market, or to put it another way can the Employer show job availability given Claimant's immigration status. . . . The Employer has offered to accommodate the Claimant's restrictions and bring him back to work in a modified duty position. The Employer did in fact already accommodate Claimant's restrictions prior to his shoulder surgery. The problem of course is

that the Employer cannot actually hire the Claimant legally without evidence of a valid immigration status.

Id. at 13.

F. The Superior Court's January 16, 2014 Memorandum Opinion Affirming The Board's Decision

On January 16, 2014, the Superior Court issued a Memorandum Opinion, affirming the Board's holding that Mr. Campos is not entitled to partial disability benefits. See Mem. Op. at Exhibit B. In doing so, the Court held that Mr. Campos does not qualify for partial disability benefits because his inability to work stems not from a work-related injury, but his lack of a valid social security number. Mem. Op. at 4-6.

For the reasons set forth below, the Superior Court's January 16, 2014 decision should be reversed.

ARGUMENT

I. THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN AFFIRMING THE BOARD'S TERMINATION OF DISABILITY BENEFITS TO MR. CAMPOS

A. Question Presented

Under Delaware law, a worker's use of false information to become an employee does not remove him from coverage for job-related injuries, nor does his illegal status affect his eligibility for benefits. The Superior Court affirmed the Industrial Accident Board's decision that Mr. Campos is not entitled to partial disability benefits because his invalid social security number makes him unemployable. Did the Superior Court err in its holding? A136, 141-47, 224-28.

B. Scope Of Review

"On appeal, the Supreme Court reviews decisions of the Industrial Accident Board only to determine if the decision is free from legal error, and whether the agency's decision was supported by substantial evidence on the record before the agency." Abrahams v. Chrysler Group, LLC, 44 A.3d 921 (Del. 2012) (quotations omitted); see also Ebersole v. Evans Builders, 15 A.3d 217 (Del. 2011).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Olney v. Cooch, 425 A.2d 610, 614 (Del. 1981). Errors of law are reviewed *de novo*. Vincent v. E. Shore Mkts., 970 A.2d 160, 163 (Del. 2009). *De novo* review requires the Court "to determine whether the Board erred in formulating or applying legal precepts." San Juan v. Mountaire

Farms, 2007 Del. Super. LEXIS 277, at *7 (Del. Super. Ct. Sept. 18, 2007).

C. Merits Of Argument

1. Under Delaware Law, Illegal Aliens Are Entitled To Disability Benefits

Delaware's Workers' Compensation Statute provides compensation to employees for "personal injury or death by accident arising out of and in the course of employment." 19 Del. C. § 2304. Section 2301(10) of the statute defines "employee" very generally, excluding only casual employees, inmates participating in correctional programs, certain sports officials, and farm employers' immediate relatives:

"Employee" means every person in service of any corporation (private, public, municipal or quasi-public), association, firm or person, excepting those employees excluded by this subchapter, under any contract of hire, express or implied, oral or written, or performing services for a valuable consideration, excluding spouse and minor children of a farm employer unless the spouse or minor child is a bona fide employee of a farm employer and is named in an endorsement to the farm employer's contract of insurance, and excluding any person whose employment is casual and not in the regular course of the trade, business, profession or occupation of his or her employer, and not including persons to whom articles or materials are furnished or repaired, or adopted for sale in the worker's own home, or on the premises not under the control or management of the employer. . . . Inmates in the custody of the Department of Correction or inmates on work release who participate in the Prison Industries Program or other programs sponsored for inmates by the Department of

Correction pursuant to Chapter 65 of Title 11 or other applicable Delaware law shall not be considered employees of the State for purposes of this title or otherwise be eligible for workers' compensation benefits unless said inmate is employed by an employer other than the State or a political subdivision thereof. Any person providing services as a sports official at a sports event in which the players are not compensated shall not be considered employees under this title. . . .

Id. (emphasis added). Illegal aliens can be considered employees under the statute and are eligible to receive benefits for work-related injuries. Id.; see Del. Valley Field Servs. v. Ramirez, 2012 Del. Super. LEXIS 622, at *15-17 (Del. Super. Ct. Sept. 13, 2012), affirmed at 61 A.3d 617 (Del. 2013), (employee who supplied a false social security number and resident alien number, and was later deported, was an "employee" under 19 Del. C. § 2301(10) and entitled to continued payment of total disability benefits); see also Asylum Co. v. D.C. Dep't of Employment Servs., 10 A.3d 619, 625-26 (D.C. 2010) (undocumented worker was an "employee" for purposes of workers' compensation statute that broadly defined "employee" and did not exclude illegal aliens); Dowling v. Slotnik, 712 A.2d 396, 408-09 (Conn. 1998) (same). Accordingly, Mr. Campos became entitled to disability benefits immediately after he sustained injuries in the June 3 accident.

2. Employers Cannot Divest Employees Of Accrued And Fixed Benefits

By permitting Daisy to avoid paying partial disability benefits to Mr. Campos by way of its late investigation into and discovery of his invalid social

security number, the Superior Court improperly allowed Daisy to control the flow of workers' compensation benefits. Johnson Controls, Inc. v. Fields, 758 A.2d 506 (Del. 2000), a case fully vetted in the briefing below and wholly ignored in the Superior Court's Opinion, provides that an employer cannot, through its own actions, divest workers of the rule of law that employers workers compensation benefits accrue and fix at the time of injury.

In Johnson, the claimant injured his back at work and his employer agreed to provide total disability benefits, but subsequently fired him for insubordination. Id. at 507-08. The claimant later sought ongoing partial disability benefits, as he earned less in a new job that he obtained within his doctor's work restrictions. Id. at 509. The Industrial Accident Board held that the claimant was not entitled to partial disability benefits because, but for his termination, he could have returned to work for the original employer under a light duty assignment without any loss of earning capacity. Id. at 508.

On appeal, the Delaware Superior Court reversed and remanded the Board's holding. Id. On remand, the Board granted the claimant's petition for partial disability benefits, and this decision was affirmed by both the Delaware Superior Court and the Delaware Supreme Court. Id. In its affirmance, the Supreme Court held that none of the bases for forfeiture pursuant to 19 Del. C. § 2325 applied. Johnson, 758 A.2d at 509. The Court further held that the claimant's benefits

accrued at the time of the accident, and his entitlement to benefits was fixed – it could not be altered by later events:

Nor are we persuaded that forfeiture of workers' compensation benefits should, as a matter of policy, be implied. It is well settled in Delaware that the provisions of the Workers' Compensation Act are to be liberally construed to effectuate the statute's intended goal of compensation to the injured employee. The entitlement to benefits accrues to the injured employee at the time of the accident or event that causes injury. To the extent that injury results in a permanent impairment of bodily condition, the entitlement to benefits is fixed, subject to later evaluation of the extent of the impairment and the earnings capability of the employee. To permit the employer to claim a forfeiture of compensation through its disciplinary process works a deprivation of benefits already fixed at the time of injury. The employer is of course free to discharge an employee for cause under its disciplinary system; but it cannot thereby transfer the legislatively determined process for the payment of workers' compensation, in the absence of express statutory authority.

Id. at 509-10 (emphasis added) (citations omitted).

Simply put, employers cannot alter the fixed and accrued nature of an injured employee's benefits by subsequently finding a basis to discharge the employee. Yet, Daisy sought – and the Superior Court allowed Daisy – to do just that. Daisy was permitted to divest Mr. Campos of disability benefits by investigating his social security number, at the urging of its insurer nonetheless, and finding the number invalid four months after the work-related accident. The Superior Court justifies its holding with the very same argument that was rejected

in Johnson – but for Mr. Campos’s failure to provide a valid social security number, Daisy would have re-employed him in a light-duty capacity at his pre-injury wage rate. Mem. Op. at 4. As in Johnson, this argument is unavailing. Employers are not permitted to affect the flow of workers’ compensation benefits through devices employed after the accrual and fixation of benefits.

3. Delaware Valley Field Services v. Ramirez Controls

The Superior Court erred in concluding that Delaware Valley Field Services v. Ramirez, 2012 Del. Super. LEXIS 622 (Del. Super. Ct. Sept. 13, 2012), affirmed in its entirety by the Supreme Court, is inapplicable to the present case. See Ramirez, 61 A.3d 617 (Del. 2013); Mem. Op. at 5. The Ramirez case established that a claimant who is receiving benefits under Delaware’s Workers’ Compensation Statute can continue to receive those benefits if his employer later discovers that he is an illegal alien.

In Ramirez, the claimant, an illegal alien, was awarded total disability benefits after a fall at the workplace. Ramirez, 2012 Del. Super. LEXIS 622, at *1, 5. After the claimant began receiving benefits, the employer discovered that the claimant supplied a false social security number, alien resident number, and other information to gain employment. Id. at *1, 3-4. The claimant was later deported to Honduras and excluded from the United States. Id. at *1. Seeking to terminate the claimant’s benefits, the employer argued, *inter alia*, that the claimant could not

receive benefits due to his illegal alien status. Id. at *8-9. The Board denied the petition, and the Delaware Superior Court and Delaware Supreme Court affirmed on appeal. The Superior Court held in particular that the claimant’s “use of false information to become an employee does not remove him from coverage for job related injuries, nor does his illegal status effect [sic] his eligibility for benefits.” Id. at *2, 7.

Similar to the claimant in Ramirez, Mr. Campos’s use of an invalid social security number does not remove him from coverage for job-related injuries, and his status as an illegal alien does not affect his disability benefits. See also Johnson, 758 A.2d at 509-10 (“The entitlement to benefits accrues to the injured employee at the time of the accident or event that causes injury. To the extent that injury results in a permanent impairment of bodily condition, the entitlement to benefits is fixed, subject to later evaluation of the extent of the impairment and the earnings capability of the employee”).

In its Opinion, the Superior Court attempts to distinguish this case from Ramirez by stating that, here, Mr. Campos is able to return to work, and Daisy’s basis for termination of benefits is Mr. Campos’s physical condition, not his immigration status. Mem. Op. at 5. These purported distinctions miss the mark.

First, regardless of whether the claimant in Ramirez was able to return work, the unequivocal holding in Ramirez – namely, that “use of false information to

become an employee does not remove him from coverage for job related injuries, nor does his illegal status effect [sic] his eligibility for benefits” – cleanly applies to this case. Daisy sought to use Mr. Campos’s lack of a valid social security number to affect his workers’ compensation coverage, to terminate any disability benefits. Ramirez prohibits this result.

Second, to hold that Daisy’s basis for termination of benefits is not Mr. Campos’s immigration status ignores Daisy’s key argument on appeal before the Superior Court – Mr. Campos should be denied benefits because his lack of a social security number prevents him from obtaining employment. Thus, the practical effect of terminating Mr. Campos’s benefits on this basis is to deny him benefits because he is an illegal alien. Again, Ramirez proscribes this outcome.

The Superior Court further erred by likening this case to Torres v. Allen Family Foods, 672 A.2d 26 (Del. 1995). Mem. Op. at 5-6. In Torres, the employer sought to terminate the partial disability benefits of a claimant who sustained a carpal tunnel condition in the course of her employment. Id. at 28. The employer retained a vocational rehabilitation specialist, who provided the claimant with a number of unsuccessful job leads, and later conducted a labor market survey. Id. at 29. The claimant continued to seek work by applying to employers listed on an old labor market survey her attorney obtained on behalf of other clients. Id. In most of her application attempts, the claimant did not establish whether the

potential employers had current openings, nor inform them of her injury. Id. The employer sought to terminate the claimant's benefits, and provided the results of the labor market survey to the Industrial Accident Board. Id. The Board granted the employer's request, finding that the claimant did not conduct a reasonable job search that was unsuccessful due to work-related injuries, and the decision was affirmed on later appeals. Id. at 29, 31.

Unlike the employer in Torres, Daisy neither provided labor market testimony nor sought to terminate benefits based on a careless job search. Instead, after Mr. Campos began collecting workers' compensation benefits for his injury, Daisy researched only Mr. Campos's social security number and, upon finding it invalid, used it as a basis to claim that Mr. Campos should not be receiving benefits. The situations are markedly different. In the latter, termination of benefits should be precluded in light of the Delaware Supreme Court's express proscription of using a person's illegal alien status as a basis to exclude him from workers' compensation coverage.

4. The Superior Court's Decision Contravenes Public Policy And Encourages Employers To Engage In Unscrupulous Practices

In its Opinion, the Superior Court held that the termination of Mr. Campos's benefits did not violate public policy because "Daisy is not under any obligation to continue to provide benefits to Appellant once the disability has ceased." Mem.

Op. at 6. The Superior Court then cited the purpose of Delaware’s Workers’ Compensation Statute:

The dual purpose of Delaware’s Workers’ Compensation statute is [to] provide prompt payment of benefits without regard to fault; and to relieve employers and employees of the burden of civil litigation. The purpose of the statute is not to provide benefits to an employee who cannot gain employment for reasons independent of the work injury.

Conspicuously absent from this recitation is the statute’s “goal of encouraging employers to foster a workplace safe for all workers.” Ramirez, 2012 Del. Super. LEXIS 622, at *15 (emphasis added) (citation omitted). It is especially important to provide benefits to illegal aliens where injury has occurred, as unscrupulous employers might otherwise hire undocumented aliens because they would not have to compensate them if injured:

Potential eligibility for workers’ compensation benefits in the event of a work-related injury realistically cannot be described as an incentive for undocumented aliens to enter this country illegally. More important, excluding such workers from the pool of eligible employees would relieve employers from the obligation of obtaining workers’ compensation coverage for such employees and thereby contravene the purpose of the Immigration Reform Act by creating a financial incentive for unscrupulous employers to hire undocumented workers. .

..

Ramirez, 2012 Del. Super. LEXIS 622, at *26-27 (quoting Dowling, 712 A.2d at 401-05); see also Rajeh v. Steel City Corp., 813 N.E.2d 697, 731 (Ohio 2004)

(public policy supports allowing illegal alien employees to collect workers' compensation because, if not, "underhanded" employers may become lax in workplace safety, knowing it would suffer no consequences if its illegal alien employees were injured at work).

The Superior Court's decision essentially approves the very behavior that this public policy principle seeks to avoid – it incentivizes employers to hire an illegal alien and, after the alien is injured on the job, to use his undocumented status as a basis to cease benefits. Such a result undermines the goal of the Workers' Compensation Statute to foster a workplace safe for all workers and should be reversed.

CONCLUSION

For the reasons stated above, Appellant Jose Campos respectfully requests that the Superior Court's January 16, 2014 Memorandum Opinion affirming the termination of benefits to Mr. Campos be reversed.

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