

## Chapter 5: Focus on Worker Health and Safety: Equal Access to Workers' Compensation Benefits

- Alfonso Alvarez, from Mexico, was only 17 years old when he died in 2002 while laying water pipe for a Texas construction company. A trench cave-in buried him to his waist. After rescue, he died later the same day of asphyxia and other injuries.<sup>1</sup>
- In 2000, a 30 year old Latino worker died after he fell 21 feet to a concrete floor while working for a siding and framing company in Georgia. His employer had failed to install guardrails that would have saved his life.<sup>2</sup>
- In 2001, Pedro Velasquez, a worker from Mexico laboring in Maryland, fell four stories from his workstation on the roof of a townhouse he was building, shattering his spine, wrist and leg.<sup>3</sup>

Immigrant workers toil in some of the most hazardous employment in this country. Injuries and deaths of Latino workers engaged in hazardous employment are extremely high and increasing. The numbers of fatal work injuries among white and black workers were lower in the year 2000, but in that year, there was a 24% jump in construction fatalities involving Latino workers. Total Latino employment was up only six percent in 2000.<sup>4</sup>

In California in 2001, 49 agricultural workers were killed on the job. A recent death of a farm worker in California resulted in a manslaughter charge against the farm owner for an egregious violation of the health and safety code.<sup>5</sup> Agriculture is second only to construction and mining in accident rates. Construction is also an industry hiring large numbers of immigrant workers.

**New York has the nation's highest rate of immigrants killed on the job, with foreign-born workers accounting for three of every ten deaths.**

New York has the nation's highest rate of immigrants killed in the workplace, with foreign-born workers accounting for three of every 10 deaths. In a recent accident, five immigrant workers were killed and 14 workers injured in an accident in Manhattan in October 2001.<sup>6</sup>

<sup>1</sup> Jim Hopkins, *Fatality rates increase for Hispanic workers*, USA TODAY (Mar 13, 2003) available at <[http://www.usatoday.com/money/workplace/2003-03-12-hispanic-workers\\_x.htm](http://www.usatoday.com/money/workplace/2003-03-12-hispanic-workers_x.htm)>

<sup>2</sup> Jim Hopkins, *Deaths of Hispanic workers soar 53%*, USA TODAY (Mar 24, 2002), available at <<http://www.usatoday.com/money/general/2002/03/25/workplace-deaths-hispanics.htm>>

<sup>3</sup> Nurith C. Aizenman, *Harsh Reward for Hard Labor*, WASHINGTON POST (Dec. 29, 2002) available at <<http://www.washingtonpost.com/ac2/wp-dyn/A49092-2002Dec28?language=printer>>

<sup>4</sup> U.S. Department of Labor, Bureau of Labor Statistics, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2000 (Aug. 14, 2001).

<sup>5</sup> Andy Furillo, *Farm death sparks manslaughter charge*, SACRAMENTO BEE (Dec. 18, 2001).

<sup>6</sup> Thomas Maier, *Death on the Job: Immigrants at Risk*, NEWSDAY (Dec. 16, 2001).

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Economist Paul Leigh has quantified the overall costs of occupational injuries and deaths.<sup>7</sup> Leigh's findings include that the occupations in which immigrants are overrepresented, including heavy truck drivers, non-construction laborers, machine operators, janitors, nursing orderlies, construction laborers, assemblers, retail sales workers (not elsewhere specified), miscellaneous machine operators, and carpenters, are also those that contribute the most to total costs.

## State Workers' Compensation Laws

All 50 states have state laws that give workers' compensation benefits to workers who are injured on the job.

Workers' compensation legislation arose out of conditions produced by the modern industrial workplace and the inability of common-law remedies to address injuries suffered by workers. Under workers' compensation, workers give up the right to sue their employers for workplace injuries. In return, they get the swift and sure, if smaller, remedy of medical coverage and some compensation, in the form of time loss benefits, permanent partial disability awards, and pensions. The basic test of workers' compensation liability is work connection, rather than fault, and liability is imposed as an incident of the employment relationship, a cost to be borne by the business enterprise.

Workers' compensation programs vary from state to state. The programs are typically financed through payroll taxes. Workers' compensation generally covers an injured worker's medical costs, and provides some portion of wage replacement for periods that a worker is unable to perform his or her job duties. Finally, they provide for compensation for disabilities and fatalities on the job. They provide benefits to the individual worker and his family, and the overall community similar to other social insurance programs.

The majority of the states' workers' compensation laws include "aliens" in the definition of covered employees.<sup>8</sup> Entitlement to lost wages under state workers' compensation laws turns on state statutes and their definition of "worker" or "employee." State courts in California, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, Nevada, New Jersey, New York, Pennsylvania, and Texas have specifically held that undocumented workers are covered under their state workers' compensation laws.<sup>9</sup>

<sup>7</sup> J. P. Leigh, and Miller, T. R., *Ranking occupations based upon the costs of job-related injuries and diseases*, J OCCUP. ENVIRON. MED (1997). 39:(12)1170-1182.

<sup>8</sup> See, ARIZ. REV. STAT. § 23-901(5)(b) (Matthew Bender, LEXIS); CAL. LAB. CODE § 3351(a) (Deering, LEXIS); FLA. STAT. ch. 440.02(14)(a) (LEXIS); IL COMP. STAT. 820/305(1) b (West 2002); KY. REV. STAT. ANN. § 342-0011(21) (Matthew Bender, LEXIS); MICH. STAT. ANN. § 17.237(161)(1)(l) (Michie, LEXIS); MINN. STAT. § 176.011 subd.9(1) (LEXIS); MISS. CODE ANN. § 71-3-27 (LEXIS); MONT. CODE ANN. § 39-71-118(1)(a) (LEXIS); NEB. REV. STAT. § § 48-115(2), 48-144 (Matthew Bender, LEXIS); NEV. REV. STAT. ANN. § 616A.105 (Matthew Bender, LEXIS); N.M. STAT. ANN. 52-3-3 (Matthew Bender, LEXIS); N.C. GEN. STAT. 97-2(2) (Matthew Bender, LEXIS); N.D. CENT. CODE § 65-01-02(17)(a)(2) (Matthew Bender, LEXIS); OHIO REV. CODE ANN. 4123.01(A)(1)(b) (Anderson, LEXIS); S.C. CODE ANN. § 42-1-130 (LEXIS); TEX. LAB. CODE § § 401.011, 406.092 (LEXIS); UTAH CODE ANN. § 34A-2-104(1)(b) (Matthew Bender, LEXIS); VA. CODE ANN. 65.2-101 (Matthew Bender, LEXIS).

<sup>9</sup> See, *Champion Auto Body v. Gallegos*, 950 P.2d 671 (Colo. Ct. App. 1997); *Gene's Harvesting v. Rodriguez*, 421 So.2d 701, 701 (Fla. Dist. Ct. App. 1982); *Pablo D. Artiga v. M.A. Patout and Son*, 671 So.2d 1138, 1139 (La. Ct. App. 1996); *Lang v. Landeros*, 1996 Ok Civ. App. 4; 918 P.2d 404 (Okla. Ct. App. 1996); *Gayton v. Gage Carolina Metals Inc.*, 560 S.E.2d 870 (N.C. Ct. App. 2002); *Ruiz v. Belk Masonry Co.*, 559 S.E.2d. 249 (N.C. Ct. App. 2002); *Rivera v.*

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## Model State Legislation

In 1999, the Supreme Court of Virginia held that an undocumented immigrant was not entitled to workers' compensation benefits.<sup>10</sup> Virginia is the only state in which a court has reached this conclusion in the absence of a clear statutory mandate to exclude undocumented immigrants from a state's worker compensation system. Virginia employers soon realized that the prospect of being sued in tort for workplace injuries was much less appealing than paying workers' compensation premiums. Employers, concerned about facing huge judgments in tort litigation, went back to the legislature to amend state law so that it specifically includes, "Every person, including aliens and minors, in the service of another under any contract of hire or apprenticeship, written or implied, whether lawfully or unlawfully employed."<sup>11</sup> When the governor vetoed the inclusive legislation, the bill had enough support in the legislature to override the veto. Surprisingly, Virginia has thus become one of the model states to cover immigrant workers under its workers' compensation system. (the relevant section of the Virginia statute is available on the NELP website)

**Twelve state courts have specifically held that undocumented workers are covered under their state workers' compensation laws.**

Like Virginia, a number of other states also explicitly provide for workers' compensation benefits for "lawfully or unlawfully employed" employees. They are: Arizona, California, Colorado, Florida, Montana, North Carolina, South Carolina, and Utah.<sup>12</sup> There is only one state, Wyoming, which has a statute specifically limiting coverage to documented "aliens."<sup>13</sup>

The workers' compensation laws in most states have special provisions for nonresident alien dependents, with some expressly including them on equal terms with other dependents, some excluding them from benefits altogether, some providing for reduced benefits or the commutation of benefits to a lump sum on a reduced basis, and many restricting the classes of beneficiaries. In 1993, a Kansas court held that a statute that limited workers'

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*Trapp*, 519 S.E.2d 777 (N.C. Ct. App 1999); *Mendoza v. Monmoth Recycling Corp.*, 672 A.2d 221 (N.J. Super. Ct. 1996); *The Reinforced Earth Company v. Workers' Compensation Appeal Board*, 749 A.2d 1036, 1038 (Pa. Commw. Ct. 2000); *Dowling v. Slotnik*, 712 A.2d 396, 403 (Conn. 1998); *Dynasty Sample Company v. Beltrain*, 224 479 S.E.2d 773 (Ga. 1996); *Commercial Standard Fire and Marine Co. v. Galindo*, 484 S.W.2d 635, 637 (Tex. Civ. App. 1972); *Fernandez-Lopez v. Jose Cervino, Inc.*, 288 N.J. Super 14, 20; 671 A.D.2d 1051, 1054 (N.J. Super. Ct. App. Div. 1996). See, also, *Iowa Erosion Control v. Sanchez*, 599 N.W.2d 711 (Iowa, 1999) ("The employer has furnished no authority to support its view that, on grounds of policy or morality, [decedent worker's surviving mother's] immigration status has any bearing on her entitlement to benefits." *Id.*, at 715); *Del Taco v. Workers' Compensation Appeals Board*, 79 Cal. App. 4th 1437 (Cal. Ct. App. 2000) (Holding that the California workers' compensation laws apply to aliens but do not "expressly authorize vocational rehabilitation benefits for an 'illegal worker' who is not otherwise 'medically eligible.'" *Id.*, at 1439 –1442).

<sup>10</sup> *Granados v. Windson Dev. Corp.*, 509 SE2d 290 (1999).

<sup>11</sup> VA. CODE ANN. 65.2-101 (Matthew Bender, LEXIS).

<sup>12</sup> ARIZ. REV. STAT. § 23-901; CAL LAB CODE § 3351 (2001); C.R.S. 8-40-202; FLA. STAT. § 440.02; MONT. CODE ANNO., § 39-71-118; N.C. GEN. STAT. § 97-2; S.C. CODE ANN. § 42-1-130 (2001); UTAH CODE ANN. § 34A-2-104; VA. CODE ANN. § 65.2-101

<sup>13</sup> WYO. STAT. ANN. § 27-14-102 (a)(vii) (LEXIS).

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compensation nonresident alien dependents' death benefits to \$750, while all other dependents, including resident alien dependents, were entitled to compensation benefits of up to \$200,000, was unconstitutional.<sup>14</sup>

## Undocumented Workers and Vocational Rehabilitation

Vocational rehabilitation benefits are paid during retraining of an injured worker. They generally include payment for retraining so the worker can perform a new job. Courts in two states, California and Nevada, have found that undocumented workers are not entitled to vocational rehabilitation benefits under certain circumstances. In both cases, state law established a hierarchy of benefits to be offered to an injured worker, which focused first on return to the prior job, then other employment that would accommodate the injury or limitations of the worker, then the more expensive training. In both cases, the employer had innocently discovered the worker's status and could not rehire the worker because to do so would violate the immigration laws. In both cases, the courts found that the workers' compensation system should not have to provide more expensive vocational rehabilitation benefits to a worker who does not qualify for the other, less expensive remedies, only by reason of his immigration status.<sup>15</sup>

## Undocumented Workers and Time Loss after *Hoffman*

Since *Hoffman*, two state courts have placed limitations on the availability of time loss recovery for injured workers based on immigration status. A worker in Pennsylvania was rendered unconscious after being struck with a steel beam in the head, neck and back, and sustained a concussion, head injury and back strain and sprain. He was ill for many months before being terminated by his employer. Apparently after the injury, the employer verified with the INS that he was unlawfully in the United States. It claimed that he was not entitled to workers' compensation. Although the Pennsylvania Supreme Court held that the worker is entitled to medical benefits, it found that illegal immigration status would justify terminating benefits for temporary total disability.<sup>16</sup> In a second case, decided January 7, 2003, the Michigan Court of Appeals held that wage loss compensation could be suspended for an undocumented worker from the date that the employer "discovered" that the worker did not have authorization to be employed, under a specific state law that allows suspension of wage loss benefits if a worker commits a "crime" that prevents him or her from working or obtaining work.<sup>17</sup> In neither case did the court engage in a meaningful discussion of the prime cause of the workers' inability to work: the injury, rather than the use of false documents to obtain a job in the first place.

There have also been more favorable state court decisions. In Arizona, an employer of an undocumented worker who sustained an eye injury while working as a mechanic argued that the worker was not entitled to workers' compensation because he was not documented. The Court of Appeals held that disqualifying undocumented workers from workers' compensation benefits would create an incentive for a business to

<sup>14</sup> *Jurado v Popejoy Constr. Co.*, 853 P2d 669 (Kan. Sup. Ct. 1993).

<sup>15</sup> See *Tarango v. State Industrial Insurance System*, 25 P.3d 175 (Nev. Sup. Ct. 2001); *Foodmaker v. Workers' Compensation Appeals Board*, 78 Cal. Rptr.2d 767 (Cal Ct. Apps, Div 2 1999).

<sup>16</sup> *The Reinforced Earth Company v. Workers' Compensation Appeal Board*, 2002 WL 31476901, \_\_ A. 2d \_\_ (Pa, 2002).

<sup>17</sup> *Vazquez v. Eagle Alloy*, 2003 WL 57544, \_\_ N.W.2d \_\_ (Mich. Ct. Apps. 2003).

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hire them, “knowing that it would not be responsible for their injuries.”<sup>18</sup> In Minnesota, a worker injured his back lifting heavy boxes in his work producing and packaging meats and gifts. This injury required surgery and therapy. The employer turned the worker in to the INS and argued that he was not entitled to wage loss benefits because of his undocumented status. The Minnesota Supreme Court disagreed, holding that the IRCA was not intended to preclude the authority of states to award workers’ compensation benefits to undocumented workers.<sup>19</sup> In Florida, the Court of Appeals held that “[t]he Florida legislature’s right to enact workers’ compensation benefits for illegal [sic] aliens is not preempted by federal action,”<sup>20</sup> and therefore that an injured undocumented worker was eligible for benefits under Florida’s workers’ compensation system.

It is likely that other cases will come up around the country as employers learn that hiring an undocumented worker could mean that if the worker is injured, the employer gets a “free pass” on the time loss portion of her bill, yet faces no tort liability. (See Discussion of *Hoffman* in Chapter 4, *supra*.) However, *Hoffman* does not stand for the proposition that undocumented workers have no right to time loss benefits under workers’ compensation statutes. There are many reasons to distinguish the discretionary federal NLRA remedy of back pay from a mandatory payout of insurance under state law. It is important in the first instance to resist discovery requests aimed at an injured workers’ immigration status, and to resist any argument that undocumented workers’ compensation rights are diminished by *Hoffman*.

***Highlighted Campaign: New York: workers file NAFTA complaint against the U.S. and the New York State Workers’ Compensation Board***

In October, 2001, injured and concerned workers leading the National Mobilization Against Sweatshops’ “It’s About TIME!” Campaign for Workers’ Health and Safety exposed to the world New York State’s violations of workers’ human rights by filing a complaint based on the labor rights agreement of the North American Free Trade Agreement (NAFTA). A delegation went to Mexico City to initiate the NAFTA complaint against the United States and the New York State Workers’ Compensation Board.

The NAFTA complaint charges that the New York State Workers’ Compensation violates workers’ rights by allowing endless delays to injured workers’ cases, forcing injured workers into poverty and worsened health, and permitting insurance companies to profit from millions of dollars of unpaid benefits. Additionally, the complaint holds New York State guilty of not protecting the health and safety of all working people. Under the labor side agreement to NAFTA, called the North American Agreement on Labor Cooperation (NAALC), the Mexican government must review the complaint and make recommendations for its resolution.

***Legislative Fix: Michigan***

On November 5, 2003, Michigan State Representative Steve Tobocman introduced legislation to remedy the effect of the *Eagle Alloy* decision. The proposed legislation would amend the existing workers’ compensation

<sup>18</sup> *Tiger Transmissions v. Industrial Commission of Arizona*, No. 1 CA-IC 02-0100 (May 29, 2003).

<sup>19</sup> *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324 (2003).

<sup>20</sup> *Safeharbor Employer Services I, Inc. v. Juan Cinto Valazquez*, No. 1D02-3380, 2003 Fla. App. LEXIS 15281, at \*4 (October 13, 2003).

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statute to provide that: “[a]s used in this subsection, “commission of a crime” does not include an alien’s working without employment authorization or an alien’s use of false documents to obtain employment or to seek work.”<sup>21</sup> If enacted, this legislation would prevent a court from coming to the conclusion that an undocumented worker was ineligible for wage replacement benefits under workers’ compensation simply because of his or her immigration status. This is a unique type of fix, specific to the Michigan law, which has an unusual provision limiting availability of wage replacement benefits for people who are unable to work because of “commission of a crime.”

### **What Can Advocates Do?**

- √ Make sure that undocumented workers are entitled to workers’ compensation in your state.
- √ Make sure that undocumented workers continue to have workers’ compensation protection after *Hoffman* by getting state agencies to adopt policies such as those outlined in Chapter 5.
- √ Make sure that LEP workers have access to translations and interpretations.
- √ Study the efficiency of your workers’ compensation system and consider filing legal claims, including additional NAFTA claims.

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<sup>21</sup> H.B. No. 5256 (MI 2003)