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Illegal Aliens and North Carolina Workers' Compensation Benefits

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President Barack Obama's recent Executive Action on immigration has stirred quite the political controversy. This recent debate brings to mind a question more employers and carriers are asking: Are illegal aliens entitled to workers' compensation benefits, and if so, how does their immigration status impact return-to-work issues and termination of benefits?

In North Carolina, illegal aliens are entitled to workers' compensation benefits. *Rivera v. Trapp,*135 N.C. App. 296 (1999). The Court of Appeals reached this holding due to the fact that illegal aliens possess an earning capacity based on their pre-injury wages and because the Workers' Compensation Act sought to include illegal aliens. Id. at 303. As such, illegal aliens are treated no differently than U.S. citizens when determining their right to North Carolina workers' compensation benefits.

The question that naturally arises is how to stop paying an illegal alien temporary total or temporary partial (TTD or TPD) benefits? One way to stop payment of indemnity compensation is to file a Form 24 (Application to Terminate Payment of Compensation) once the claimant is released to work with no restrictions. But what if the claimant is never released to work with no restrictions? What if he receives permanent restrictions? How do you return an illegal alien to work when he does not have the lawful right to work in America?

This exact question arose in *Gayton v. Gage Carolina Metals, Inc.,* 149 N.C. App. 346, 349 (2002). In *Gayton*, the defendants argued that the claimant's illegal alien status prevented him from initiating vocational rehabilitation services, and therefore the claimant's indemnity compensation should be terminated. The North Carolina Court of Appeals disagreed. It held that in "cases involving illegal aliens, it is the employer's burden to produce sufficient evidence that there are suitable jobs [the illegal alien] is capable of getting, 'but for' his illegal alien status."*Gayton v. Gage Carolina Metals, Inc.*, 149 N.C. App. 346, 349 (2002).

So, how does an employer prove there are suitable jobs a claimant is capable of getting "but for" his illegal alien status? The most common method is to hire a vocational rehabilitation specialist to search for jobs within the claimant's restrictions, educational background, employment skills, and earnings. If a vocational rehabilitation specialist can produce a list of jobs within these categories, then this may satisfy the employer's burden of proof.

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The defendants in *Fredis Espana-Diaz v. Old North State Masonry* hired a vocational rehabilitation specialist who found 30-plus jobs the claimant could perform within his restrictions in the construction, landscaping, and restaurant industries. Id., I.C. No. W37994, Deputy Commissioner Phillip Holmes (May 2, 2012). The defendant's vocational rehabilitation specialist considered the claimant's educational and work history, the fact he only spoke Spanish, and his pre-injury wages when looking for jobs. The claimant hired a vocational rehabilitation specialist who testified the claimant may need to speak English for some of the jobs, but on cross-examination she conceded the claimant's inability to speak English was not a major impediment. Deputy Commissioner Holmes sided with the defendants' vocational rehabilitation specialist and noted that defendants are not required to produce a specific job that has already been offered to the claimant in order to terminate his benefits.

The location of the claimant's residence is also an important fact to consider in this type of case. North Carolina General Statute 97-2(22)(ii) holds that once the claimant reaches maximum medical improvement, any job offer must be within 50 miles of his current residence. If the claimant lives in a remote or rural area, it can be difficult to find suitable jobs for a claimant who does not speak English and has work restrictions.

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