

# THE VERDICT



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A QUARTERLY PUBLICATION OF THE WISCONSIN ASSOCIATION FOR JUSTICE

**When Insult is Added  
to Injury:  
A Client's Options for  
Handling Debt**

**The Attack on Injured  
Employees' Right to  
Competent Counsel in  
§ 102.29 Claims.**

**The Rights of Undocumented  
Workers Under The Wisconsin  
Worker's Compensation Act**

**The Jury is Out: The Money is in  
Mediation**

*Fighting to ensure justice  
for all in the court  
of public opinion*

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# The Rights of Undocumented Workers Under The Wisconsin Worker's Compensation Act

## I. INTRODUCTION

The rights of injured employees to compensation under state worker's compensation statutes vary widely across the United States. Some statutes expressly condition the right to seek such benefits on an employee's legal presence in the country, such as in Idaho, where the employee must be lawfully admitted for permanent residence in order to claim benefits. Idaho Code Ann § 72-1366(19)(a). Other states, including Illinois, explicitly include "aliens" as entitled to make a claim for worker's compensation benefits. 820 Ill. Comp. Stat. § 305/1(4)(b)2. Much more frequent, however, are statutes that are completely silent regarding the right of an undocumented worker (used here to connote someone with no legal permission, whether temporary or permanent, to work in the United States) to pursue a claim for benefits arising out of a work injury.

Professor Arthur Larson, the foremost academic authority regarding worker's compensation law in the United States, has expressed his views regarding undocumented workers' eligibility for benefits as follows:

If the employee in question is a legal resident of the United States, he or she, for Constitutional reasons, is treated the same as a citizen insofar as workers' compensation is concerned. However, the outcome may be different when illegal aliens are involved. The Federal Immigration Reform and Control Act of 1986 (IRCA) makes it unlawful to knowingly hire undocumented (illegal) aliens. The Act also makes it unlawful for an employer to continue to employ an illegal alien once the employer learns of the employee's illegal status. Thus it is not a foregone conclusion that such employees are entitled to workers' compensation. Various state statutes and court decisions have addressed this question, as discussed above. The usual outcome has been to permit compensation to be awarded to illegal aliens, although there are some exceptions.

A variety of arguments have been made

as to why illegal aliens cannot or should not be afforded the protections of state workers' compensation laws: 1) that the IRCA preempts state workers' compensation laws, 2) the invalidity of the contract for employment; and 3) the public policy concern that the availability of workers' compensation benefits would act as an incentive to draw illegal aliens into the United States.

Given that illegal aliens are entitled to access to the courts and have the ability to file both contract and tort claims, it would seem illogical to bar illegal alien workers from seeking compensation benefits long considered a substitute for damages. The other obvious implication is that a lack of coverage can expose an employer to tort liability. [Footnotes omitted.]

3-66 *Larson's Workers' Compensation Law* § 66.03 (2009, Matthew Bender & Company, Inc.)

Wisconsin's worker's compensation statute, Wis. Stat. Ch. 102, like that of the majority of states, contains no express language concerning whether an "illegal alien" has the right to claims benefits for a work injury. As such, all legal precedent relating to this question is found in the decisions of the Wisconsin Labor and Industry Review Commission (LIRC) and Wisconsin appellate courts reviewing appeals from LIRC decisions. This precedent will be discussed below. Before doing so, however, it is worth reviewing some provisions of the Wisconsin worker's compensation statute, one section of Wisconsin's unemployment insurance statute, and one Wisconsin Supreme Court decision, that may provide guidance on how LIRC and the courts should interpret Chapter 102, Wis. Stats., with respect to undocumented workers' rights to compensation for work injuries.



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## II. GENERAL PRINCIPLES UNDER WISCONSIN STATUTES AND CASE LAW RELEVANT TO THE RIGHTS OF UNDOCUMENTED WORKERS.

### a. Conditions of Liability under the Wisconsin Worker's Compensation Act and the Act's Definition Of "Employee"

In order to prove an employer's liability under the Wisconsin worker's compensation state an injured worker must prove five elements:

- a. The employee sustained an injury;
- b. The employer and the employee were subject to Chapter 102 at the time of the injury;
- c. The injury grew out of and was incidental to the employment;
- d. The injury was not self-inflicted;
- e. The injury arose out of the employment.

As noted above, some states' workers compensation statutes expressly state that undocumented workers are allowed to claim worker's compensation benefits. Some, such as Nebraska, do so by including "aliens" within the definition of "every person" who is allowed to claim benefits. Neb. Rev. Stat. § 48-115(2). While Wisconsin's statute is silent regarding whether an undocumented worker is included within the definition of an "employee," it is noteworthy that undocumented workers are not within the definition of persons excluded from the definition of "employee," defined in Wis. Stat. § 102.07:

"Employee" as used in this chapter means:

(4)(a) Every person in the service of another under any contract of hire, express or implied, all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer, including minors, who shall have the same power of contracting as adult employees, but not including the following:

1. Domestic servants.
2. Any person whose employment is not in the course of a trade, business, profession or occupation of the employer, unless as to any of said classes, the employer has elected to include them.

(Emphasis added).

The statute also specifically excludes from its coverage farmers and certain family members (§102.07(5)); independent contractors (§102.07(8)); volunteers (§102.07(11m)); and members of

qualified religious sects (§102.28)(3). The statute does not list undocumented workers as persons excluded from the definition of an "employee."

### b. The Wisconsin Unemployment Insurance Statute's Explicit Prohibition of Benefits for Undocumented Workers.

Under the Wisconsin unemployment insurance statute, unlike in the worker's compensation context, the Wisconsin legislature has explicitly made undocumented employees ineligible to receive benefits. Specifically, in Wis. Stat. § 108.04(18)(a) – entitled "Illegal Aliens" – the Legislature provided:

(a) The wages paid to an employee who performed services while the employee was an alien shall, if based on such services, be excluded from the employee's base period wages for purposes of sub. (4) (a) and ss. 108.05 (1) and 108.06 (1) unless the employee is an alien who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for the purpose of performing such services, or was permanently residing in the United States under color of law at the time such services were performed, including an alien who was lawfully present in the United States as a result of the application of the provisions of section 212 (d) (5) of the federal immigration and nationality act (8 USC 1182 (d) (5)). All claimants shall be uniformly required to provide information as to whether they are citizens and, if they are not, any determination denying benefits under this subsection shall not be made except upon a preponderance of the evidence (emphasis added).

Notwithstanding substantial litigation over the last two decades concerning whether – and, if so, to what extent – undocumented workers may legally claim benefits under the Worker's Compensation Act, the Legislature has chosen not to amend Chapter 102 to include a prohibition such as that found in Wis. Stat. § 108.04(18)(a), *supra*.

### c. The Wisconsin Supreme Court's Decision in *Arteaga v. Literski*, Holding that it is Unconstitutional to Deny Undocumented Persons Access to the Courts

Although the Wisconsin Supreme Court has never reviewed a case granting or denying benefits to an injured undocumented worker,

40 years ago it directly decided an analogous question in *Arteaga v. Literski*, 83 Wis.2d 128, 265 N.W.2d 148 (1978). In *Arteaga*, the plaintiffs, described by the Court as “being in the country illegally,” sought compensation for personal injuries caused by their landlord’s alleged negligence. The circuit court had held that the plaintiffs “lacked the capacity to bring a civil action for personal injuries and were barred from maintaining their action in the courts of the State of Wisconsin as a matter of law ... .” 83 Wis.2d at 130.

The Wisconsin Supreme Court stated the question before as: “Do illegal aliens have the right to sue in the courts of Wisconsin for injuries negligently inflicted upon them?” *Id.* at 129. The Court decided that the plaintiffs did have the right to bring their negligence claims in the Wisconsin courts, reasoning as follows, in part:

...[I]f the policy is to discourage illegal immigration, that policy is not furthered by refusing aliens access to the courts. It cannot be seriously argued that people enter this country illegally so they can recover for an injury that will be inflicted upon them later. Moreover, landlords will not be discouraged from providing housing for aliens they know to be here illegally if the landlords can negligently injure the aliens and bear no responsibility for their negligence.

There is no public policy that is served by refusing access to our courts to illegal aliens who are injured through the negligence of another. The sources of our basic concepts of justice between people is that there should be even handed justice meted out to all. ...

\* \* \* \* \*

Our law permits recovery for injuries negligently inflicted on one’s person. The Constitution says every person, it does not limit its protection to citizens or aliens lawfully admitted.

We hold that illegal aliens have the right to sue in the courts of the State of Wisconsin for personal injuries negligently inflicted upon them. To the extent that Coules may be interpreted as holding that illegal aliens have no access to the courts, it is overruled.

*Arteaga*, 83 Wis.2d at 132-33 (emphasis added).

The Court has never been called on to decide whether the denial of worker’s

compensation benefits would implicate these same constitutional principles. However, in *Nefri Gomez-Sandoval v. Amalga Composites, Inc.*, WC Claim No. 2009-022418 (LIRC, 10/29/2015), *reversed on other grounds sub. nom Amalga Composites, Inc. v. LIRC*, 2017 WI App 56, LIRC did cite *Arteaga*, including quoting several of the above-quoted passages, in reasoning in favor of the employee’s right to pursue a claim for refusal to rehire under the Wisconsin worker’s compensation statute. See *Nefri Gomez-Sandoval*, WC Claim No. 2009-022418 at 7.

### III. SELECT LIRC DECISIONS UNDER CHAPTER 102 REGARDING RIGHTS OF UNDOCUMENTED WORKERS.

Beginning in 1999 and continuing for well over a decade, LIRC decided a number of cases in which it rejected insurance carriers’ and employers’ claims that injured workers were ineligible for benefits because of their immigration status. In *Arista Rea v. Kenosha Beef Int’l*, WC Claim No. 1990070904 (LIRC, 5/5/1999), the carrier argued that it had work available for the applicant, Mr. Arista Rea, within his limitations, but that because it could not employ him due to his illegal alien status, it should not have to pay him temporary total disability (TTD). LIRC awarded TTD, permanent partial disability (PPD) and medical expenses reasoning as follows:

The court [*Brakebush Brothers, Inc. v. LIRC*, 110 Wis.2d 623, 549 N.W.2d 287] (Ct. App. 1996)] also upheld the commission’s finding that even a termination for good cause does not act to deprive a disabled former employee from receiving worker’s compensation for disability which is the result of a work injury. (*Id.* at 634.) Neither is there a provision in the Act which provides for the withholding of temporary disability benefits to a disabled employee whose ability to work is compromised by an illegal alien status; nor, from an employer’s perspective, is there any practical difference between an individual who has been terminated for good cause and one who has been terminated due to an illegal alien status. Neither of such individuals will be rehired by the employer.

The employer might argue that an illegal alien occupies a different position, because he is legally precluded from obtaining employment in this country until he rectifies his immigration status. However, this is an 

equitable argument which would be properly presented to the Wisconsin Legislature, because there is no provision in the Act which would allow the withholding of temporary disability benefits due to illegal alien status. In this context it is significant to note, again from a practical standpoint, that illegal aliens routinely find new employment in this country after losing a job. In fact, the applicant found employment as a restaurant cook on or about December 21, 1995, and continued in that employment until sometime in March of 1996 [footnote omitted]. The employer's argument that temporary disability should be denied due to the applicant's illegal alien status must be rejected.

In a footnote, LIRC cited with approval a New Jersey appellate decision in which that court stated: "Surely, the effect on the worker of his injury has nothing to do with his citizenship or immigration status. If his capacity to work has been diminished, that disability will continue whether his future employment is in this country or elsewhere." *Luis Castro Mendoza v. Monmouth Recycling Corp.*, 288 N.J. Super, 240, 672 A.2d 221, 224 (1996).

In both 2003 and 2005, LIRC reiterated the rationale it employed in *Arista Rea*, in deciding *Geraldo Oliva v. Schmidt Engineering Co.*, WC Claim No. 2000040319 (LIRC, 6/30/2003), and *Juan Ramos Vasquez a/k/a Pedro Ramirez v. Empak Foods*, WC Claim No. 2002041629 (LIRC, 6/10/2005).

#### **IV. WISCONSIN APPELLATE COURT REVIEW OF LIRC DECISIONS INVOLVING UNDOCUMENTED WORKER' RIGHTS.**

To date, Wisconsin's appellate courts have not yet issued a published opinion addressing the question whether an injured worker's right to compensation is in any way dependent on his or her immigration status. However, two unpublished opinions, issued in 2016 (District IV) and 2017 (District I), respectively, give no reason to believe that the courts are inclined to limit a worker's eligibility for benefits because of his or her undocumented status.

##### **a. Antonio Zalvidar v. Hallmark Drywall Inc.**

###### *i. Relevant Facts*

Antonio Zaldivar was employed as a union

drywaller when he fell off stilts and injured his back. Mr. Zaldivar was an undocumented worker who came to the United States in 1998 and used a "made up" social security number. He had a separate Individual Taxpayer Identification Number (ITIN) that he used to file his income tax returns. Zaldivar's workplace fall caused a disc herniation at L4-5. His doctor performed a L4-5 hemilaminectomy, facetectomy, foraminotomy, and discectomy, but Zaldivar continued to experience numbness in his right leg.

Zaldivar had a very basic education, and he had worked as an agricultural laborer, dishwasher, roofer, cleaning person (a second job), in assembly at a semi-trailer manufacturer, and as a dry waller. He was relatively young with many years of potential wage earning ability ahead of him, had limited English language skills, and did not qualify for vocational rehabilitation training due to his undocumented status.

The insurance carrier argued that Zaldivar's loss of earning capacity (LOEC) assessment should be based only on his prospects for employment in Mexico because he could not legally obtain employment in the United States. The carrier argued that this method would be consistent with Wis. Admin Code § DWD 80.34, which lists "other pertinent evidence" as a factor to be considered in assessing LOEC. The carrier also argued that using a Mexican employment model would support one of the central policies underlying the 1986 Immigration Reform and Control Act (IRCA); namely, to prevent employment of undocumented workers. The carrier's vocational expert compared Zaldivar's pre-injury earning capacity in Mexico with his post-injury earning capacity in that country, and, if only the Mexican labor market were considered, her restrictions would have assessed LOEC at 5%-10%.

The ALJ found a 65% LOEC based on the opinion of Zaldivar's vocational expert.

###### *ii. The Initial LIRC Decision*

In *Antonio Zaldivar v. Hallmark Drywall Inc.*, WC Claim No. 2010-010154 (LIRC, 3/6/2014), LIRC held that federal law does not preempt LIRC's authority to assess the LOEC suffered by an undocumented worker in accordance with the provisions of the Wisconsin statutes and administrative code. However, as of the date of hearing, Zaldivar could not legally obtain work in the United States, and the LIRC found that this fact had to be taken into account in assessing the extent of his LOEC. LIRC held that residency/worker status is one relevant factor to be

considered in assessing LOEC, and one that the LIRC will weigh in accordance with the facts and circumstances of each case. However, LIRC also found that Zaldivar had credibly testified he had begun the residency application process. If and when he were to achieve legal working status, LIRC said it would reassess his LOEC claim.

LIRC held that while Zaldivar lacked the legal right to work, he nonetheless had sustained a significant LOEC, regardless of whether it was assessed based upon employment in this country or in Mexico. Wherever he would be living, he would have a permanent back condition that would preclude him from performing a large number of jobs requiring physical activity. The Commission found that he had sustained a 20% LOEC, although its decision failed to articulate how it arrived at that figure.

*iii. The Court of Appeals' Decision*

In *Zaldivar v. LIRC*, 2016 WI App 57, in a *per curiam* decision, the Wisconsin Court of Appeals reversed LIRC. In doing so, the Court first held that LIRC's commentary and analysis with respect to Zaldivar's immigration status "appears to have been relying on public policy concerns when it asserted that Zaldivar's LOEC ... must be 'substantially reduced due to his current inability to legally obtain employment in the United States.'" 2016 WI App 57, ¶1. However, the Court stated, "LIRC has not been given authority to make such policy determinations; here, it is charged solely with calculating the difference between the claimant's pre-injury and post-injury earning capacities." ¶10.

The Court went on to state that while LIRC is not precluded from taking into account an injured worker's immigration status in assessing LOEC, "so far as we can see, the only rational way to view the impact of Zaldivar's lack of legal resident status upon his future earnings would be as a potential obstacle that would increase, rather than decrease, his LOEC." (emphasis added). ¶13. This is so, LIRC stated, because Zaldivar would be ineligible for federally-funded vocational rehabilitation monies, and because his immigration status might interfere with his ability to find work. ¶11.

The Court also held that LIRC's 20% LOEC finding was premised on the opinions of an expert witness who did not hold herself out as an expert on Mexico's job market and, further, that there was no substantial or material evidence in the record to support that rating. ¶¶8-9.

The Court remanded the case to LIRC to make an explicit determination of Zaldivar's LOEC

and to specify the evidentiary basis for that determination.

*iv. The LIRC Decision on Remand*

On remand, LIRC acknowledged that Zaldivar's ability to find work, both pre- and post-injury was impeded by his immigration status. *Antonio Zaldivar v. Hallmark Drywall Inc.*, WC Claim No. 2010-010154 (LIRC, 12/28/2016) at 3. However, LIRC also found that there was "no persuasive evidence about how his immigration status affected his earning capacity, whether before or after the work injury, as contrasted with other workers with similar permanent restrictions. *Id.* As such, LIRC adopted the 45% LOEC opinion of Zaldivar's expert, who had offered a 45%-50% LOEC opinion.

**b. Nefri Gomez-Sandoval v. Amalga Composites, Inc.**

*i. Relevant Facts*

Ms. Gomez-Sandoval suffered hip and back injuries that later required surgery. When Gomez-Sandoval's doctor permitted her to return to work with restrictions in May 2012, she contacted Amalga Composites and informed the company of her availability for work. On August 29, 2012, the attorney for the employer's insurance carrier emailed Gomez-Sandoval's attorney, stating that no work was available "due to a downturn in the economy." On November 2012, Gomez-Sandoval called the company again a couple of months later, again indicating her interest in work, but was told that two years had passed since she worked there and that her position was no longer available. She was released to return to work without restrictions as of December 12, 2012.

Gomez-Sandoval filed a claim for refusal to rehire under Wis. Stat. § 102.35(3) – the Wisconsin worker's compensation statute's equivalent of a wrongful discharge claim – on July 9, 2013. Eight days later, Amalga offered Gomez-Sandoval employment, effective July 29, 2013, and she worked for about two months before being terminated because of a no-match letter the company received from the Social Security Administration and Gomez-Sandoval's failure to address the apparent problem with her Social Security number.

After a hearing on the merits of her refusal to rehire claim, an administrative law judge awarded her lost wages for the period December 12, 2012, and July 28, 2013.



## ii. LIRC's Decision

In its petition for review to LIRC, Amalga argued that the Immigration and Control Act of 1986 (IRCA) precluded an award of back pay to Gomez-Sandoval, because to do so would contravene the policies and purposes underlying federal immigration law. Amalga asserted that both the United States Supreme Court's application of IRCA, in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (a case arising under the National Labor Relations Act), and the Wisconsin Court of Appeals' application of the same federal statute, in *Burlington Graphic Sys. v. DWD*, 2015 WI App 11 (arising under the Wisconsin FMLA), prohibited the ALJ and LIRC from making such an award to Gomez-Sandoval.

LIRC rejected Amalga's arguments, reasoning that while under the NLRA and the WFMLA, the remedies to be awarded for a violation of the respective statutes lay in the discretion of the ALJ, by contrast, under the Wisconsin Worker's Compensation Act, an award of lost wages for a refusal to rehire was mandatory:

The commission does not have 'remedial discretion' in awarding the lost wages under Wis. Stat. § 102.35(3). Rather, the award of lost wages is a statutory mandate. ... Because the commission does not have the discretion to decline to award lost wages under Wis. Stat. § 102.35(3), the commission concludes the *Hoffman* and *Burlington* cases do not apply and cannot provide the basis for reversing the ALJ's decision.

*Nefri Gomez-Sandoval v. Amalga Composites, Inc.*, WC Claim No. 2009-022418 (LIRC, 10/29/2015).

## iii. The Wisconsin Court of Appeals' Decision

As in *Zaldivar*, in another *per curiam* decision, the Wisconsin Court of Appeals reversed LIRC. *Amalga Composites v. LIRC*, 2017 WI App 56. The Court held that to the extent that Gomez-Sandoval's immigration status was relevant to the refusal to rehire claim, the burden of proof was on Amalga to prove that Gomez-Sandoval was an undocumented worker. The Court found, however, that neither the ALJ nor LIRC had made a factual finding whether she was an undocumented worker. , 2017 WI App 56, ¶¶16-17. Appellate courts are to decide cases "on the narrowest possible grounds," the Court observed, and "unless it is determined that Amalga has met

its burden of establishing that Gomez-Sandoval is an undocumented worker, this is not the appropriate case to address whether Gomez-Sandoval's claim for benefits pursuant to Wis. Stat. § 102.35(3)" is barred. *Id.*, ¶20.

The Court remanded the case to LIRC for a determination of whether Amalga has met its burden of proving that Gomez-Sandoval is an undocumented worker, on the records as it exists should LIRC decide to do so. *Id.*, ¶21.

## iv. The LIRC Decision on Remand

On remand from the Court of Appeals, LIRC did not remand to the ALJ for the taking of additional evidence. Rather, LIRC held that there was no direct evidence in the record regarding Gomez-Sandoval's immigration status, and that because Amalga had the burden of proving any defense related to such status it had failed to carry that burden. *Nefri Gomez-Sandoval v. Amalga Composites, Inc.*, WC Claim No. 2009-022418 (LIRC, 9/14/2017). As such, LIRC held that its prior decision remained in effect and that Amalga was liable for its refusal to rehire Gomez-Sandoval.

## V. CONCLUSION

The Wisconsin Worker's Compensation Act is silent regarding whether the term "employee" encompasses an undocumented worker, but the Legislature did not list such persons as excluded from the statute's coverage despite its delineation of many other persons not entitled to the statute's benefits. Further, the Legislature has specifically excluded such workers from eligibility for unemployment insurance benefits, in the plain language of Chapter 108, Wis. Stats.

The Wisconsin Supreme Court has said that denying a person access to the state's courts for redress for personal for personal injuries would violate the state constitution. To date, there is not a single LIRC or Wisconsin appellate decision that denies benefits to an undocumented worker under Chapter 102, and, to the contrary, every LIRC decision not later reversed by the courts has fully upheld such workers' rights to the same benefits available to all injured workers. 🛠️