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a separate element from the element requiring that the visual depiction in the pornography be that of a child.[23] Reinpold, however, did not object to jury instruction No. 3 at the time of trial. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice.[24] Thus, we need not address this issue further on appeal. Accordingly, Reinpold's convictions should be upheld.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

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[23] Brief for appellant at 40. See § 28-1463.02(1).

[24] *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

RICARDO MOYERA, ALSO KNOWN AS DAVID GUTIERREZ, APPELLEE, V. QUALITY PORK INTERNATIONAL, APPELLANT.

825 N.W.2d 409

Filed January 4, 2013. No. S-12-208.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict, and an appellate court will not disturb those findings unless they are clearly wrong.
3. ____: ____. An appellate court independently reviews questions of law decided by a lower court.
4. **Statutes.** Statutory interpretation presents a question of law.
5. **Workers' Compensation: Statutes: Appeal and Error.** The Nebraska Workers' Compensation Act provides benefits for employees who are injured on the job, and an appellate court broadly construes the act to accomplish this beneficent purpose.

6. **Statutes: Appeal and Error.** Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
7. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous.
8. **Workers' Compensation: Contracts.** The Nebraska Workers' Compensation Act applies to undocumented employees under a contract of hire with a covered employer in this state.
9. **Workers' Compensation.** Under Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010), the Workers' Compensation Court cannot order vocational retraining without determining that a worker's postinjury physical restrictions and vocational impediments prevent the worker from complying with all of the statute's lower work priorities.
10. ____. An employee's illegal residence or work status does not bar an award of indemnity for permanent total loss of earning capacity.
11. **Workers' Compensation: Proximate Cause.** Whether an employee's scheduled member loss has caused a whole body impairment is properly resolved under a proximate cause inquiry at the point of the employee's maximum medical improvement, when the employee's permanent impairment is assessed.
12. **Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred.
13. **Workers' Compensation: Proximate Cause.** If, by the point of maximum medical improvement, an employee has developed a whole body impairment in addition to a scheduled member injury, the question is whether the work-related injury proximately caused the whole body impairment. If both injuries arose from the same work-related injury, because the scheduled member injury resulted in the whole body impairment in a natural and continuous sequence of events and the whole body impairment would not have occurred but for the work-related injury, then the claimant is entitled to disability benefits for the whole body impairment.
14. **Workers' Compensation.** Whether an employee's compensable scheduled member injury has resulted in a whole body impairment and loss of earning power is a question of fact.
15. **Workers' Compensation: Expert Witnesses: Presumptions.** The opinion of a court-appointed vocational rehabilitation expert regarding loss of earning power has a rebuttable presumption of validity.

Appeal from the Workers' Compensation Court. Affirmed.

Joseph W. Grant, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellant.

Michael P. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

I. SUMMARY

In this workers' compensation case, the primary issue is whether the appellee, Ricardo Moyera, an illegal alien, is entitled to benefits for permanent total loss of earning power. The trial judge awarded these benefits, and the review panel affirmed. We conclude that because the Nebraska Workers' Compensation Act (Act)[1] applies to illegal aliens working for a covered employer in this state, these employees are entitled to permanent total disability benefits (PTD benefits) for work-related injuries. We affirm.

II. BACKGROUND

The parties stipulated that Moyera was injured in an accident arising out of and in the course of his employment with Quality Pork International (QPI). Moyera is from Mexico and cannot speak English. He is not a legal resident. He started working for QPI in March 2007. His other work history consisted of working as a laborer on a roofing crew and working with his father in Mexico as a crop fertilizer. He purchased papers to obtain work at QPI, which was the first time that he used the name "David Gutierrez."

In August 2008, Moyera's right foot was run over by a forklift. He was age 29. The forklift broke several bones across the top of his foot. QPI placed him in a light-duty janitorial position, cleaning the cafeteria, which allowed him to elevate his foot above his waist whenever it swelled. A personnel officer testified that she knew of no other regularly performed position in the plant that would allow an employee to elevate his feet like this; most of the jobs were for production, and QPI expected employees to meet a quota and work at a required pace. Moyera performed the light-duty work until May 2010, when QPI discharged him.

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[1] See Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2010).

After the accident, QPI had directed Moyera to see Dr. Alan Jensen. The initial x rays did not show fractures. But an MRI and bone scan later revealed multiple bone fractures. Jensen and other physicians diagnosed Moyera with complex regional pain syndrome to the right foot, which syndrome is also called reflex sympathetic dystrophy and is a type of nerve disorder. Nerve blocks failed to relieve Moyera's pain, which required him to take narcotic pain medications. The pain resulted in a moderate gait derangement, which caused him pain in his hips and lower back. He walked with a crutch, and then a cane. No surgical treatment of the foot was indicated.

On May 18, 2010, Jensen responded to a questionnaire from Moyera's attorney that Moyera's injury, and its resulting nerve disorder and gait derangement, had resulted in a permanent 10-percent whole body impairment. He recommended a functional capacity evaluation. About this same time, QPI's insurance carrier informed QPI that on May 21, it would terminate payments for Moyera's temporary partial disability benefits and start paying permanent partial disability benefits.

After QPI learned this information, its personnel manager audited QPI's employment files and determined that Moyera did not have proper immigration documents. QPI discharged Moyera on May 28, 2010, after he could not produce proper documentation to show that he could legally work in the United States. The personnel manager denied that the immigration audit was related to learning that its insurance carrier would start paying Moyera permanent disability benefits; she stated that QPI also discharged other employees for lack of documentation. She claimed that Moyera's work restrictions were consistent with the work that he was performing (cleaning the cafeteria tables) when QPI discharged him and that if he had produced the proper documents, he would have been retained in that position.

But in response to the judge's questions, the personnel manager admitted that the cafeteria cleaning position had only existed as a temporary position for employees recovering from

an injury. And she admitted that the night shift janitor who was currently cleaning the cafeteria performed other janitorial duties.

In July 2010, a physical therapist performed a functional capacity evaluation of Moyera. The test results put Moyera in the sedentary work category, with a 10-pound maximum lift limit. The therapist noted that Moyera used a cane and walked with a limp. On August 6, Jensen opined that Moyera had reached his maximum medical improvement as of that date. He concluded that Moyera had sustained a permanent 20-percent whole body impairment, which restricted him to sedentary work.

In October 2010, a rehabilitation consultant, Karen Stricklett, performed a loss of earning capacity analysis for Moyera. She concluded that Moyera did not possess transferable skills that would qualify him for sedentary jobs in the Omaha labor market. Because of his permanent restrictions and his inability to speak English, she concluded that he was not competitively employable and had experienced a 100-percent loss of earning capacity.

QPI then produced counteropinions from a different physical therapist and physician. Its physical therapist performed another functional capacity evaluation. He believed that Moyera could stand for 30 to 40 minutes before needing to sit and that he could stand or walk for 4 to 5 hours in an 8-hour day. He stated that Moyera could perform work in the medium physical demand category. QPI's physician concluded that while Moyera still had pain in his foot, it was ongoing pain from his healed fractures, and that he no longer had any symptoms associated with the nerve disorder. She concluded that Moyera had a 3-percent impairment to his right foot and that his gait derangement should not be considered in combination with more specific impairment ratings for making a whole body impairment determination.

After Stricklett received these opinions, she issued a supplemental analysis of Moyera's loss of earning capacity. She stated in the report that the personnel manager had told her that Moyera could perform a meat-trimming job that provided

flexibility to stand or sit. But the new information did not change her opinion that Moyera would need to learn to communicate in English before he would qualify for jobs that would be physically appropriate for his physical impairment and not require prolonged standing or walking.

At his trial in March 2011, Moyera reported that because his foot would swell, he could no longer walk very far or for very long. He stated that if he supports himself on his foot for more than 15 minutes, he still feels strong pain traveling from the bottom of his foot to his back. He described the pain as a "stabbing" or "kicking" pain in his lumbar area and stated that it felt as if someone were pulling on his leg. He has to wear a larger shoe equipped with a plastic bottom on his right foot, and he uses a cane to walk. When he sits, the pain is limited to his foot, but he still has to elevate it about every 15 minutes. He continues to take pain medication.

On cross-examination, he admitted that "David Gutierrez" was not his real name and that he was not a legal resident. When he was asked whether he had plans to become a legal resident, he responded, through an interpreter, "Right now I'm not working, and if I could, I will do it."

1. Trial Judge's Award

The trial judge relied on Jensen's opinion of Moyera's physical impairments. And he relied on Stricklett's opinion of Moyera's employability. The judge found that Moyera had sustained a permanent total loss of earning power. He awarded Moyera future medical care for treatment of his injury and secondary gait disturbance. He rejected QPI's argument that Moyera was not entitled to benefits for loss of earning capacity because of his illegal residency status. The judge noted that in the Act, the Legislature had excluded certain domestic servants and agricultural employees from coverage and could have also excluded illegal aliens if that had been its intent. Instead, the judge noted that the definition of an employee includes "aliens" and does not distinguish between legal and illegal aliens. He awarded Moyera indemnity for permanent total loss of earning power.

2. Review Panel's Judgment

QPI appealed to the review panel. The panel stated that there are multiple cases in other jurisdictions to support either party's position, but that it was not necessary to choose between those cases. It concluded that in *Visoso v. Cargill Meat Solutions*,[2] the Nebraska Court of Appeals had already determined that an alien, whether legal or illegal, is covered by the Act and entitled to disability benefits. The panel rejected QPI's argument that the trial judge erred in finding that Moyera sustained a whole body impairment because an altered gait is not sufficient to establish such impairment. The panel stated that the evidence showed Moyera's altered gait caused him to have strong pain in his lower back and pain in his hips. It affirmed the award.

III. ASSIGNMENTS OF ERROR

QPI assigns, condensed and reordered, that the review panel erred in affirming the award for the following reasons:

(1) The trial judge erred as a matter of law in awarding Moyera benefits for permanent loss of earning capacity when he is an illegal alien who had no plans to return to his native country and had taken no action to become a legal resident; and

(2) no competent evidence existed to support the trial judge's finding that Moyera had sustained a whole body impairment instead of an injury to a scheduled member.

IV. STANDARD OF REVIEW

[1] A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or

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[2] *Visoso v. Cargill Meat Solutions*, 18 Neb. App. 202, 778 N.W.2d 504 (2009).

award; or (4) the findings of fact by the compensation court do not support the order or award.[3]

[2-4] On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict, and we will not disturb those findings unless they are clearly wrong.[4] But we independently review questions of law decided by a lower court.[5] Statutory interpretation presents a question of law.[6]

V. ANALYSIS

1. Disability Benefits Are Available to Undocumented Employees

QPI contends that Moyera is not entitled to disability benefits because he is an illegal alien. It relies on *Ortiz v. Cement Products*,[7] in which we held that the claimant, who was an illegal alien, was not entitled to vocational rehabilitation benefits. QPI recognizes that in *Visoso*,[8] the Court of Appeals held that aliens working illegally in the United States are covered by the Act and are entitled to its benefits. And it does not dispute that undocumented employees are entitled to medical payments and temporary total disability benefits (TTD benefits), the award of which was upheld in *Visoso*. But it contends that temporary disability benefits are different from permanent disability benefits because temporary benefits are limited to an employee's healing period. In contrast, QPI contends that benefits for permanent loss of earning power should be barred—the same as vocational rehabilitation benefits—because they depend upon an employee's ability to obtain lawful employment in the United States.

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[3] *Becerra v. United Parcel Service, ante* p. 414, 822 N.W.2d 327 (2012).

[4] See *Bassinger v. Nebraska Heart Hosp.*, 282 Neb. 835, 806 N.W.2d 395 (2011).

[5] *Spitz v. T.O. Haas Tire Co.*, 283 Neb. 811, 815 N.W.2d 524 (2012).

[6] *Bassinger, supra* note 4.

[7] *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005).

[8] *Visoso, supra* note 2.

(a) The Act Covers Illegal Aliens

Because we have not decided the coverage issue,[9] we first clarify that we agree with the Court of Appeals that the Act covers illegal aliens.

[5-7] The Act provides benefits for employees who are injured on the job, and we broadly construe the Act to accomplish this beneficent purpose.[10] Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[11] And we will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous.[12]

Section 48-115(2) defines employees, or workers, who are covered by the Act. It includes "[e]very person in the service of an employer who is engaged in any trade, occupation, business, or profession as described in section 48-106 under any contract of hire, expressed or implied, oral or written, *including aliens* and also including minors." (Emphasis supplied.) Section 48-106(1) provides that the Act applies to the following employers: the State, state agencies, and "every resident employer in this state and nonresident employer performing work in this state who employs one or more employees in the regular trade, business, profession, or vocation of such employer." Section 48-106(2) excludes specified employees in some occupations from coverage under the Act, but it does not exclude illegal aliens.

[8] As the Court of Appeals concluded, the word "alien" ordinarily means a foreign-born resident who has not been naturalized in the host country and is still a subject or citizen of the foreign country.[13] So we agree that the ordinary meaning of "aliens" is broad enough to include both legal and illegal

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[9] See *Ortiz, supra* note 7.

[10] See *Bassinger, supra* note 4.

[11] *In re Interest of Erick M., ante* p. 340, 820 N.W.2d 639 (2012).

[12] *Id.*

[13] See, *Visoso, supra* note 2, quoting Black's Law Dictionary (9th ed. 2009); Webster's Encyclopedic Unabridged Dictionary of the English Language 37 (1994).

aliens, with or without work authorization.[14] Moreover, "[i]f it was the intent of the Nebraska Legislature to exclude illegal aliens from the definition of covered employees or workers, it could have easily included a modifier doing so in the statute, but the Legislature did not, and has not, done so."[15] Additionally, we note the Legislature has explicitly excluded some aliens from eligibility for unemployment benefits.[16] This exclusion illustrates that the Legislature would have excluded illegal aliens from the Act's coverage if that had been its intent. We conclude that under the ordinary meaning of the terms used, the Act applies to undocumented employees under a contract of hire with a covered employer in this state.

(b) *Ortiz* Does Not Preclude an Award of PTD Benefits

As noted, QPI relies on our decision in *Ortiz*[17] to argue that Moyera is not entitled to benefits for permanent total loss of earning capacity. In *Ortiz*, we assumed without deciding that the Act covered illegal aliens but affirmed the review panel's determination that the undocumented employee was not entitled to vocational rehabilitation benefits. Like Moyera, the injured employee in *Ortiz* was an illegal alien from Mexico who could not speak English. He sought disability benefits, medical payments, and vocational rehabilitation benefits.

The trial judge awarded the employee benefits, including vocational rehabilitation, despite his illegal status. The judge found that the employer did not have any jobs for the employee within his physical restrictions and that he was unable to perform the work required by other employers or that other employers paid inadequate wages compared to his previous wages. Although the employee could not be legally employed in the United States, the judge concluded that he was entitled to vocational rehabilitation because his limitations would also

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[14] See *id.*, citing *Economy Packing v. Illinois Workers' Comp.*, 387 Ill. App. 3d 283, 901 N.E.2d 915, 327 Ill. Dec. 182 (2008).

[15] *Id.* at 209, 778 N.W.2d at 511.

[16] See Neb. Rev. Stat. § 48-628(10) (Reissue 2010).

[17] *Ortiz, supra* note 7.

prevent him from doing work in Mexico for which he had experience. In this context, the term "vocational rehabilitation" meant retraining.[18] The review panel reversed only that part of the award granting the employee vocational retraining.

In deciding the availability of vocational retraining, we stated that under § 48-162.01(3),

> an employee is entitled to vocational rehabilitation services when he or she is unable to perform suitable work for which he or she has previous training or experience. The purpose of vocational rehabilitation under workers' compensation is to restore an injured employee to suitable gainful employment. See § 48-162.01(3); *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001). In order to effectuate this purpose, the employee must be eligible and willing to return to some form of employment.
>
> At trial, [the employee] testified that he will not be returning to Mexico, but, rather, intended to remain in this country, where he may not be lawfully employed because of his illegal status. See 8 U.S.C. § 1324a (2000). Awarding [the employee] vocational rehabilitation services in light of his avowed intent to remain an unauthorized worker in this country would be contrary to the statutory purpose of returning [him] to suitable employment. Therefore, we hold that based upon the facts of this case, [the employee] is not entitled to vocational rehabilitation services.[19]

QPI argues that Moyera, like the undocumented employee in *Ortiz*, had no plans at trial to return to his home country or to become a legal resident of the United States. Thus, QPI argues that Moyera has no earning capacity to lose because he has no legal right to be employed in the United States.

We recognize that an award of PTD benefits and an award of vocational retraining benefits are closely related. We have stated that vocational rehabilitation benefits are properly awarded when an injured employee cannot return to the work

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[18] See § 48-162.01(3).

[19] *Ortiz, supra* note 7, 270 Neb. at 790-91, 708 N.W.2d at 613.

for which he or she has previous training or experience.[20] But we take this opportunity to clarify why the award of vocational rehabilitation in *Ortiz* is distinguishable from the PTD benefits awarded here.

Under § 48-162.01(3), an award of vocational retraining depends on whether the employee cannot satisfy the lower work priorities:

> No higher priority may be utilized unless all lower priorities have been determined by the vocational rehabilitation counselor and a vocational rehabilitation specialist or judge of the compensation court to be unlikely to result in suitable employment for the injured employee that is consistent with the priorities listed in this subsection.

[9] Under § 48-162.01(3), we have held that the Workers' Compensation Court cannot order vocational retraining without determining that a worker's postinjury physical restrictions and vocational impediments prevent the worker from complying with all of the statute's lower work priorities.[21] The statutory work priorities are set out in the following order:

> (a) Return to the previous job with the same employer;
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> (b) Modification of the previous job with the same employer;
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> (c) A new job with the same employer;
>
> (d) A job with a new employer; or
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> (e) A period of formal training which is designed to lead to employment in another career field.[22]

So before awarding vocational retraining, a trial judge must determine that the worker's postinjury restrictions and vocational impediments preclude all four of the lower work priorities—in order from (a) to (d). If an injured employee is ineligible for the four lower priorities because the employee cannot be legally placed with the same employer or a new employer, then a workers' compensation judge cannot order retraining for a new career.

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[20] See, e.g., *Becerra, supra* note 3.

[21] See *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008).

[22] § 48-162.01(3).

In *Ortiz*, we did not discuss whether the worker's postinjury restrictions and vocational impediments alone would have precluded him from being placed with his former employer or a new employer (as required by the lower work priorities), and we do not comment on the availability of retraining benefits in that circumstance. We recognize that our emphasis in *Ortiz* on the worker's intent to stay in the United States could be read to mean that an undocumented employee is entitled to receive vocational retraining only if the employee plans to return to his home country. But under § 48-162.01(3), when an undocumented worker could have been placed with an employer but for his illegal status, it is irrelevant whether the employee plans to stay in the United States or return to his home country. In either circumstance—staying or leaving—his illegal work status precludes him from satisfying the lower work priorities. So the employee would be ineligible for retraining.

Thus, the statutory work priorities under § 48-162.01(3) constrained our holding in *Ortiz*. But unlike vocational retraining benefits, there are no prioritized goals that must be satisfied before a court can award indemnity for an employee's total loss of earning capacity.

In characterizing disability benefits, we have stated that "'[t]emporary' and 'permanent' refer to the duration of disability, while 'total' and 'partial' refer to the degree or extent of the diminished employability or loss of earning capacity."[23] The primary distinction between temporary total disability and permanent total disability is that the latter rests on a determination that the employee has reached the point when his or her medical condition will not further improve.[24]

But both before and after an employee's maximum medical improvement, an award of total disability benefits depends on a determination that the employee cannot perform the work for which he or she was trained or accustomed to performing or cannot perform other work which a person of the

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[23] *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 761, 707 N.W.2d 232, 237 (2005).

[24] See *id.*

same mentality and attainments could perform.[25] And both before and after an employee's maximum medical improvement, an employee's disability as a basis for compensation under § 48-121(1) and (2) is determined by the employee's diminution of employability or impairment of earning power or earning capacity.[26] These determinations do not depend on a finding that the employee cannot be placed in a job with the same employer or in a job with a different employer.

Instead, in awarding PTD benefits, a compensation court must generally determine only two issues: (1) that the employee can no longer earn wages doing the same kind of work for which he or she was trained or accustomed to performing and (2) that the employee lacks the skills needed to perform other work that is within the employee's physical limitations and for which a stable market exists.[27] And as this case illustrates, vocational specialists can assess an employee's loss of earning power by determining the type of work the employee would have been qualified to do before the injury and eliminating those occupations that are incompatible with the employee's postinjury restrictions. The specialist can then use market surveys to determine the employee's loss of access to jobs in a labor market based on the employee's postinjury physical restrictions and vocational impediments.

As stated, in *Visoso*,[28] the Court of Appeals affirmed an award of TTD benefits, which are awarded for periods that the worker is unable to work before reaching his or her maximum medical improvement. But because a finding of total disability depends on the same inquiry whether the disability is temporary or permanent,[29] the difference between TTD benefits and PTD benefits is not a valid reason for distinguishing *Visoso*. Moreover, its conclusion is consistent with what many other state courts have held. Among the numerous state courts that

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[25] See *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

[26] *Id.*

[27] See, *id.*; *Roan Eagle v. State*, 237 Neb. 961, 468 N.W.2d 382 (1991).

[28] *Visoso, supra* note 2.

[29] See *Frauendorfer, supra* note 25.

have held that undocumented employees are covered by their state's workers' compensation statutes and entitled to disability benefits,[30] some have specifically affirmed an award of PTD benefits.[31]

These courts have concluded that even if undocumented employees cannot legally work in the United States, they could have worked elsewhere but for their work-related injury.[32] And they have reasoned that excluding undocumented workers from receiving disability benefits creates a financial incentive for employers to continue hiring them, in contravention of federal law.[33] Furthermore, allowing an employer to escape liability for the work-related injuries that its undocumented employees sustain gives the employer an unfair advantage relative to competitors who follow the law.[34]

In addition to these concerns, many state courts have held that illegal aliens can sue in tort for personal injuries that they sustained while working for an employer in the United States.[35] In contrast, we have previously explained that

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[30] See, e.g., *Abel Verdon Const. v. Rivera*, 348 S.W.3d 749 (Ky. 2011); *Design Kitchen v. Lagos*, 388 Md. 718, 882 A.2d 817 (2005); *Mendoza v. Monmouth Recycling Corp.*, 288 N.J. Super. 240, 672 A.2d 221 (1996); *Rajeh v. Steel City Corp.*, 157 Ohio App. 3d 722, 813 N.E.2d 697 (2004); *Cherokee Industries, Inc. v. Alvarez*, 84 P.3d 798 (Okla. Civ. App. 2003); *Reinforced Earth Co. v. W.C.A.B.*, 749 A.2d 1036 (Pa. Commw. 2000); *Dominquez v. Gottschalk Bros. Roofing*, No. 105985, 2012 WL 2715618 (Kan. App. June 29, 2012) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 279 P.3d 147 (Kan. App. 2012)). See, also, 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 66.03 (2011); Jessica A. Moland, *Illegal Aliens and Worker's Compensation Issues*, 53 Res Gestae 19 (2010).

[31] See, *HDV Const. Systems, Inc. v. Aragon*, 66 So. 3d 331 (Fla. App. 2011); *Economy Packing, supra* note 14; *Ruiz v. Belk Masonry Co., Inc.*, 148 N.C. App. 675, 559 S.E.2d 249 (2002).

[32] See, e.g., *Economy Packing, supra* note 14; *Mendoza, supra* note 30; *Rajeh, supra* note 30.

[33] See, e.g., *id.*

[34] See *HDV Const. Systems, Inc., supra* note 31.

[35] See, *Rosa v. Partners in Progress, Inc.*, 152 N.H. 6, 868 A.2d 994 (2005); *Mendoza, supra* note 30; *Commercial Standard Fire and Marine Co. v. Galindo*, 484 S.W.2d 635 (Tex. Civ. App. 1972).

workers' compensation laws reflect a compromise between employers and employees. Under the Act, employees give up the complete compensation that they might recover under tort law in exchange for no-fault benefits that they quickly receive for most economic losses from work-related injuries.[36] So it makes little sense—and defeats the Act's incentives—to conclude that undocumented employees can fully recover damages in tort but cannot recover workers' compensation benefits.[37]

[10] Finally, courts have also raised a significant policy concern. They have concluded that workers' compensation laws reflect a policy choice that employers bear the costs of their employees' work-related injuries because they are in the best position to avoid the risk of loss by improving workplace safety.[38] We agree that public policy weighs against allowing employers to avoid the costs of their workplace hazards. And we must reasonably or liberally construe a statute to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose.[39] Most important, interpreting the Act to preclude PTD benefits here would be plainly inconsistent with the Act's coverage of illegal aliens. We hold that an employee's illegal residence or work status does not bar an award of indemnity for permanent total loss of earning capacity.

2. Evidence Supported Award of PTD Benefits

QPI contends that Moyera failed to show a whole body impairment. It argues that although Moyera's gait derangement was a symptom of his injury, his injury was limited to his right foot and leg.

We have stated that a claimant is not entitled to an award for loss of earning power when the injury is limited to a

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[36] *Bassinger, supra* note 4.

[37] See *Mendoza, supra* note 30.

[38] See, *HDV Const. Systems, Inc., supra* note 31; *Mendoza, supra* note 30; *Ruiz, supra* note 31.

[39] *Blakely v. Lancaster County, ante* p. 659, 825 N.W.2d 149 (2012).

specific body member, unless some unusual or extraordinary condition as to other members or parts of the body develops as the result of the injury.[40] In contrast, we have stated that the test for determining whether a disability is to a scheduled member or to the body as a whole is the location of the residual impairment, not the situs of the injury.[41] And we have held that "[w]hen a whole body injury is the result of a scheduled member injury, the member injury should be considered in the assessment of the whole body impairment."[42] Thus, we have recognized that an injury to a scheduled member can cause a whole body impairment, which entitles the employee to indemnity for loss of earning power.[43] In that circumstance, the work-related injury has caused both the scheduled member injury and the whole body impairment.[44]

Moreover, we have recognized that scheduled member injury can result in a compensable whole body impairment in a case with similar facts. In *Madlock v. Square D Co.*,[45] the parties disputed whether the employee's foot injury had resulted in a back injury. The employee claimed that her gait was altered because of the foot injury, resulting in a low-back condition. In determining the employee's loss of earning capacity, the trial judge considered the impact of her foot injury on her back, a whole body impairment. But the judge also awarded her a separate recovery for her scheduled member loss because the evidence showed that the employee's foot injury caused her pain and restrictions distinct from her back impairment. The review panel reversed the separate award for the scheduled member injury, and we affirmed. We concluded that the foot injury had caused the back injury and had already

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[40] *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009).

[41] *Stacy, supra* note 21.

[42] See *Bishop v. Speciality Fabricating Co.*, 277 Neb. 171, 178, 760 N.W.2d 352, 357-58 (2009).

[43] See, *Bishop, supra* note 42; *Stacy, supra* note 21.

[44] See *Bishop, supra* note 42.

[45] *Madlock v. Square D Co.*, 269 Neb. 675, 695 N.W.2d 412 (2005).

been considered in the award of disability benefits for loss of earning capacity.

It is true that in *Madlock*, the parties did not dispute whether the back injury was an unusual or extraordinary condition resulting from the foot injury. But the more important point is that we held both the whole body impairment and the scheduled member injury arose from the same accident:

> [T]he whole body injury cannot be separated from the scheduled member injury. Both arose from the same accident. If [the employee] had not injured her foot, she would not have sustained a back injury that was compensable under Nebraska's workers' compensation statutes. Under these circumstances, the trial court was required to, and did, consider the scheduled member injury in awarding benefits because [the employee's] loss of earning capacity could not be fairly and accurately assessed without such consideration.[46]

[11] We recognize that a tension exists between our cases permitting benefits for a whole body impairment to rest on whether a scheduled member injury has caused the whole body impairment and cases denying benefits for a whole body impairment unless a scheduled member injury resulted in some unusual or extraordinary condition in other parts of the body. But the modern trend in these cases has been for courts to hold that employees are not limited to benefits for a scheduled member injury when the effects of that injury have extended to other parts of the employee's body in a manner that impairs the employee's ability to work.[47] So we now clarify that whether an employee's scheduled member loss has caused a whole body impairment is properly resolved under a proximate cause inquiry at the point of the employee's maximum medical improvement, when the employee's permanent impairment is assessed.

[12,13] A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the

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[46] *Id.* at 682, 695 N.W.2d at 417-18.

[47] See 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 87.02 (2011).

result would not have occurred.[48] If, by the point of maximum medical improvement, an employee has developed a whole body impairment in addition to a scheduled member injury, the question is whether the work-related injury proximately caused the whole body impairment. If both injuries arose from the same work-related injury, because the scheduled member injury resulted in the whole body impairment in a natural and continuous sequence of events and the whole body impairment would not have occurred but for the work-related injury, then the claimant is entitled to disability benefits for the whole body impairment.[49]

[14,15] Whether an employee's compensable scheduled member injury has resulted in a whole body impairment and loss of earning power is a question of fact.[50] And the opinion of a court-appointed vocational rehabilitation expert regarding loss of earning power has a rebuttable presumption of validity.[51]

As the review panel stated, evidence exists to support the trial judge's conclusion that Moyera's gait derangement had caused pain in his hips and his lower back. Both Jensen and a specialist physician opined that Moyera's disability was not limited to his foot. In May 2010, Jensen opined that Moyera's hip pain resulted from the work-related injury. And in December 2010, Jensen specifically noted that Moyera had tenderness and limited range of motion in his lumbar spine. Moyera testified that he experiences strong low-back pain traveling up from his foot if he supports himself on his foot for more than 15 minutes. The trial judge could have obviously concluded that Moyera's back pain has contributed to his inability to stand and walk for more than short periods. And QPI does not contest the rehabilitation specialist's employability findings. The judge's finding of total permanent disability was not clearly wrong.

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[48] *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009).

[49] See *Bishop, supra* note 42.

[50] See *Ideen v. American Signature Graphics*, 257 Neb. 82, 595 N.W.2d 233 (1999).

[51] See *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

VI. CONCLUSION

We conclude that the Act covers illegal aliens under a contract of hire with a covered employer in Nebraska. We also conclude that the Act does not preclude an award of PTD benefits for illegal aliens. Finally, we conclude that the trial judge was not clearly wrong in finding that Moyera's injury to his foot had resulted in pain to his back that interfered with his ability to perform the work he had previously performed. Thus, the trial judge's finding of permanent total disability was not clearly wrong.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM B. PEREIRA, APPELLANT.
824 N.W.2d 706

Filed January 4, 2013. No. S-12-438.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Sentences: Words and Phrases.** Allocution is an unsworn statement from a convicted defendant to the sentencing judge in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence.
3. **Verdicts: Sentences.** Before a sentence is pronounced, the defendant must be informed by the court of the verdict and asked whether he or she has anything to say why judgment should not be passed against him or her.
4. **Constitutional Law: Evidence: Sentences.** A defendant must be afforded a forum and the right to question the constitutional propriety of the information utilized by the sentencing judge, to present countervailing information, and to test, question, or refute the relevance of information on which the judge may rely in determining the sentence to be imposed.
5. **Sentences.** Allocution is an opportunity to address the court, not to speak to spectators in attendance.
6. ____. The time of imposition of sentence is not a public forum to be used by either a defendant or his or her attorney for that purpose.
7. **Sentences: Waiver: Appeal and Error.** Generally, where no objection is made at a sentencing hearing when a defendant is provided an opportunity to do so, any claimed error is waived and is not preserved for appellate review.