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knowingly, and voluntarily admits that he does not contest the allegations being made against him. The court accepts respondent's voluntary surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

ODILON VISOSO, ALSO KNOWN AS ADAM RODRIGUEZ, APPELLANT, V. CARGILL MEAT SOLUTIONS, APPELLEE.

826 N.W.2d 845

Filed February 22, 2013. No. S-12-038.

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. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
3. ____: ____. On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict and will not be disturbed unless clearly wrong.
4. **Workers' Compensation: Proof.** In a proceeding to modify a prior workers' compensation award, the employer has the burden of establishing a decrease of incapacity and the employee has the burden of establishing an increase.
5. **Workers' Compensation.** Temporary disability benefits should be paid only to the time when it becomes apparent that the employee will get no better or no worse because of the injury.

6. ____. Temporary disability benefits are discontinued at the point of maximum medical improvement, because a disability cannot be both temporary and permanent at the same time.
7. **Workers' Compensation: Words and Phrases.** An undocumented employee is an "employee" or "worker" who is covered under the Nebraska Workers' Compensation Act.
8. **Workers' Compensation.** The Workers' Compensation Court cannot order vocational retraining without determining that the worker's postinjury physical restrictions and vocational impediments prevent the worker from complying with all of the lower work priorities in Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010).
9. ____. If an injured employee is ineligible for the lower work priorities in Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010) because the employee cannot be legally placed with the same employer or a new employer, then the compensation court cannot order retraining for a new career.
10. ____. Unlike vocational retraining benefits, there are no prioritized goals that must be satisfied before a court can award indemnity for an employee's loss of earning capacity.
11. ____. Both before and after an employee's maximum medical improvement, an employee's disability as a basis for compensation under Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 2010) is determined by the employee's diminution of employability or impairment of earning power or earning capacity.
12. ____. An employee's impairment of earning capacity does 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.
13. ____. An employee's illegal residence or work status does not bar an award of indemnity for permanent loss of earning capacity.
14. ____. For purposes of workers' compensation, the risk of hiring an undocumented alien falls on the employer to cover the associated costs if that worker is injured during the scope of employment.
15. ____. The Nebraska Workers' Compensation Act is designed to compensate an injured worker for two distinct losses resulting from a work-related injury or occupational disease: the loss of earning capacity based on the concept of disability and medical and other costs associated with the injury or disease.
16. ____. Because the purpose of the Nebraska Workers' Compensation Act is to compensate injured workers for injuries regardless of immigration status, the act can be applied to all workers, whether legally hired or not.
17. ____. If a workers' compensation claimant in good faith relocates to a new community, the new community may serve as the hub community from which to assess the claimant's loss of earning power.
18. ____. The first step in identifying the relevant labor market for assessing a worker's loss of earning power is to determine whether the hub community is where the injury occurred, or where the claimant resided when the injury occurred, or where the claimant resided at the time of the hearing.
19. ____. The Nebraska Workers' Compensation Act should be construed to accomplish its beneficent purposes.

20. ____. If sufficient credible data exists for a determination of an undocumented worker's loss of earning capacity in his or her community of origin and the worker has moved for legitimate purposes, and not to increase workers' compensation benefits, then the community of origin may serve as the hub community.
21. ____. A workers' compensation award cannot be based on possibility or speculation, and if an inference favorable to the claimant can be reached only on the basis thereof, then the claimant cannot recover.

Appeal from the Workers' Compensation Court: RONALD L. BROWN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Ryan C. Holsten, of Atwood, Holsten, Brown & Deaver Law Firm, P.C., L.L.O., for appellant.

Caroline M. Westerhold and Colin A. Mues, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

WRIGHT, J.

NATURE OF CASE

In 2006, Odilon Visoso, an undocumented worker, was injured in the course and scope of his employment with Cargill Meat Solutions (Cargill). Following a trial in 2008, he was awarded temporary total disability benefits.

In 2011, Cargill petitioned the Nebraska Workers' Compensation Court to discontinue the temporary total disability benefits, because Visoso had reached maximum medical improvement. While the action was pending in the compensation court, Visoso returned to Mexico, his country of origin. Vocational rehabilitation experts who testified at the hearing on Cargill's petition were unable to provide credible evidence of Visoso's loss of earning capacity based upon prospective employment in Mexico. The compensation court concluded that Cargill's obligation to pay Visoso temporary total disability should cease because Visoso had reached maximum medical improvement. The court declined to award Visoso benefits for his claim of permanent impairment and loss of earning capacity. Visoso appealed.

SCOPE 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 award; or (4) the findings of fact by the compensation court do not support the order or award. *Sellers v. Reefer Systems*, 283 Neb. 760, 811 N.W.2d 293 (2012).

[2] With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Lovelace v. City of Lincoln*, 283 Neb. 12, 809 N.W.2d 505 (2012).

[3] On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Bassinger v. Nebraska Heart Hosp.*, 282 Neb. 835, 806 N.W.2d 395 (2011).

FACTS

Visoso, also known as Adam Rodriguez, began working for Cargill in Schuyler, Nebraska, in March 2006. On May 9, Visoso suffered an injury when a 200-pound quarter of beef fell off an overhead conveyor and landed on his head. He was initially treated with numerous noninvasive treatments but eventually had surgery on his neck on October 4, 2007. Shortly after his surgery, he was fired by Cargill when it discovered he was an undocumented alien not authorized to work in the United States.

Following a trial, the compensation court found that Visoso sustained a compensable injury that rendered him temporarily totally disabled and awarded him a running award of temporary total indemnity and payment for future medical care. No determination was made regarding Visoso's loss of earning capacity or eligibility for permanent indemnity benefits. The Nebraska Court of Appeals affirmed the award of temporary total disability. See *Visoso v. Cargill Meat Solutions*, 18 Neb. App. 202, 778 N.W.2d 504 (2009).

On March 8, 2011, Cargill petitioned the compensation court for modification of the award. It stated that more than 6 months had elapsed since the entry of the award and that Visoso had reached maximum medical improvement. Visoso admitted that he had reached maximum medical improvement, but denied that he experienced a decrease in incapacity and denied that he should no longer receive temporary total disability. The parties agreed to the appointment of Karen Stricklett as the vocational rehabilitation counselor to provide a report of Visoso's loss of earning capacity, if any.

Stricklett prepared a preliminary loss of earning capacity analysis regarding Visoso's loss of earning power in the Schuyler area. She prepared a followup report in which she noted Visoso's imminent return to Mexico and her attempt to conduct a loss of earning capacity analysis for Chilpancingo, Guerrero, Mexico, the largest city near Chichihualco, which is the town where Visoso would be living and which is also in Guerrero. Stricklett concluded she needed outside help to better analyze the labor market in Mexico. Visoso moved to compel labor market research, because Stricklett was unable to perform such research in Chilpancingo without outside help and Cargill refused to pay for the additional research. Visoso relocated to Mexico in July 2011.

Following a hearing, the compensation court denied Visoso's motion for labor market research. It determined Chilpancingo, together with communities within a reasonable geographic area around it, was the "hub community" for a loss of earning capacity analysis, citing *Giboo v. Certified Transmission Rebuilders*, 275 Neb. 369, 746 N.W.2d 362 (2008).

Visoso had reported to Stricklett that Chilpancingo is about 1½ hours north of Acapulco, Guerrero, Mexico, and 2 hours south of Mexico City. Stricklett contacted Dr. Penelope Caragonne, who provides vocational services to clientele in the United States, Mexico, and Latin America. Caragonne was familiar with the Chilpancingo area, which she characterized as being an area run by a drug cartel. Due to safety concerns, she was not able to contact individual employers to ascertain the availability of employment in the area. The compensation court questioned whether adequate foundational facts or data existed

which would be sufficient for Stricklett to form an expert opinion on Visoso's loss of earning power.

In her final loss of earning capacity analysis, dated September 16, 2011, Stricklett used three separate scenarios. Her first two analyses involved the Schuyler/Columbus/Fremont area in Nebraska, the restrictions outlined by Visoso's treating physician, and the restrictions required by an independent doctor retained in the case. Finally, Stricklett attempted to perform an analysis for the Chilpancingo area. However, she did not "feel capable of providing a loss of earning capacity estimate taking into account [Visoso's] current labor market area." She did not think that any opinion she provided could "be expressed with a reasonable degree of vocational certainty."

Visoso retained Helen Long as a vocational rehabilitation expert. She computed Visoso's ability to work and earn wages in Nebraska and concluded that he sustained a 100-percent loss of his earning capacity in Schuyler. Next, she performed an analysis based on Visoso's move to Chichihualco. She concluded that regardless of his location, Visoso was "permanently and totally disabled" and had sustained a 100-percent loss of earning power.

At the hearing on Cargill's "Petition for Modification of Award," the parties stipulated that Visoso achieved maximum medical improvement on February 25, 2009. They did not agree on a change in the extent of his disability. Pursuant to the compensation court's July 14, 2011, order, Chilpancingo was used as the hub community for purposes of determining loss of earning capacity.

In its order of December 22, 2011, the compensation court concluded that Visoso had reached maximum medical improvement and that any physical restrictions thereafter were permanent, although the degree or extent of his permanent physical restrictions remained in dispute. Based on the evidence presented, the court found that Visoso was no longer temporarily totally disabled and had experienced a material and substantial decrease of physical incapacity. It concluded that Cargill, the moving party, had the burden of proof to terminate the temporary total disability payments, but that

Visoso retained the burden to establish entitlement to permanent indemnity.

It found that Visoso moved from Schuyler to Chichihualco in good faith and not to manipulate his loss of earning power. It concluded that Chichihualco was the appropriate hub community and that Chilpancingo was within a reasonable geographic distance around the hub community. The agreed-upon vocational rehabilitation counselor, Stricklett, was not able to provide a credible report on loss of earning power, because she could not find sufficient evidence for the hub community. Therefore, the court found that the evidence was insufficient to quantify Visoso's loss of earning power to award permanent indemnity and that Cargill had no further liability to Visoso. It terminated Visoso's payments for temporary total disability.

Visoso timely appealed, and we moved the case to our docket pursuant to our authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENTS OF ERROR

Visoso assigns that the Workers' Compensation Court erred by (1) finding that Cargill met its burden of proof for modification of the award pursuant to Neb. Rev. Stat. § 48-141 (Reissue 2010) and (2) finding that Visoso was not entitled to permanent disability benefits corresponding to his loss of earning capacity.

ANALYSIS

Termination of Temporary Disability

The first question is who had the burden of proof on Cargill's motion to terminate the temporary total disability payments to Visoso. Visoso contends that Cargill had the burden to prove Visoso's decrease in disability and his degree of permanent loss of earning capacity. Cargill argues that it had to prove only that Visoso had reached maximum medical improvement, and that therefore, the running award of temporary total disability benefits should cease.

As the party seeking modification, Cargill had the burden to prove the allegations in its petition to modify the running award of temporary total disability benefits to Visoso. See, § 48-141; *U S West Communications v. Taborski*, 253 Neb. 770, 572 N.W.2d 81 (1998). Cargill petitioned the compensation court for an order terminating temporary total disability payments because Visoso had reached maximum medical improvement. It alleged that Visoso reached maximum medical improvement on February 25, 2009; that Visoso was no longer temporarily totally disabled; and that his indemnity benefits on that basis should cease. Visoso admitted that he had reached maximum medical improvement, but he did not agree that there was a change in his disability.

Visoso argues that because Cargill sought the modification of his temporary total disability benefits, it also had the burden to show a decrease in his disability. He asserts that because his loss of earning power could not be ascertained, it was plain error to grant Cargill's application for modification. We disagree.

Visoso relies upon *Bronzynski v. Model Electric*, 14 Neb. App. 355, 707 N.W.2d 46 (2005). *Bronzynski* involved an application to modify a prior award of permanent partial disability benefits, wherein the employee must demonstrate an increase in his existing disability. The employee showed a change in impairment but failed to satisfy his burden of proof, because he did not also demonstrate that he sustained an increase in disability. *Bronzynski* does not apply, because Visoso has no prior award of permanent disability benefits. Had Cargill sought to reduce an award of permanent benefits, then it would have had the burden to show that Visoso had a decrease of impairment which caused a decrease in Visoso's loss of earning capacity.

[4] Section 48-141 provides, in pertinent part, that "at any time after six months from the date of the agreement or award, an application [to modify the award] may be made by either party on the ground of increase or decrease of incapacity." The employee has the burden of proving that his injury caused permanent impairment of his body as a whole as a predicate to an award for permanent disability, i.e., loss of earning capacity.

See *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002). In a proceeding to modify a prior award, the employer has the burden of establishing a decrease of incapacity and the employee has the burden of establishing an increase. *U S West Communications, supra*.

[5,6] Cargill was not required to address permanent disability payments. Temporary disability benefits should be paid only to the time when it becomes apparent that the employee will get no better or no worse because of the injury. *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232 (2005). Simply stated, when an injured employee has reached maximum medical improvement, any remaining disability is, as a matter of law, permanent. *Id*. Temporary disability benefits are discontinued at the point of maximum medical improvement, because a disability cannot be both temporary and permanent at the same time. See *id*. Temporary payments do not continue after maximum medical improvement has been reached by the employee. Because Cargill established that Visoso reached maximum medical improvement, Cargill satisfied its burden of proof that Visoso's temporary total disability payments should cease.

Indemnity for Permanent Impairment

The question is what, if any, permanent disability payments Cargill should pay to Visoso. Permanent disability is an essential element of an employee's claim in workers' compensation, and therefore, the burden rests with the employee to prove the elements of his or her compensation claim. See *Green, supra*. After reaching maximum medical improvement, Visoso has the burden of proving that his injury caused permanent impairment of his body as a whole and that this permanent impairment resulted in a loss of earning capacity.

Determining Loss of Earning Power

In *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 825 N.W.2d 409 (2013), the primary issue was whether the employee, an undocumented alien, was entitled to indemnity

benefits. We held that the Nebraska Workers' Compensation Act (Act) applied to undocumented aliens working for a covered employer in Nebraska and that such employees were entitled to permanent indemnity benefits for work-related injuries.

[7] Cargill does not contest that Visoso is a covered employee under the Act. In *Visoso v. Cargill Meat Solutions*, 18 Neb. App. 202, 778 N.W.2d 504 (2009), the Court of Appeals concluded that an undocumented employee is an "employee" or "worker" who is covered under the Act. In *Moyera, supra*, the employer claimed the trial judge erred as a matter of law in awarding the employee, Ricardo Moyera, benefits for permanent loss of earning capacity, because Moyera was an illegal alien who had no plans to return to his native country and had taken no action to become a legal resident of the United States. The employer claimed that temporary disability benefits were different from permanent disability benefits, because temporary benefits are limited to an employee's healing period. It claimed that benefits for permanent loss of earning power should be barred for the same reason that vocational rehabilitation benefits are not allowed—because they depend upon an employee's ability to obtain lawful employment in the United States.

Moyera held that the Act covered undocumented aliens and that our decision in *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005), did not preclude an award of benefits to an undocumented alien for permanent disability. The employer argued that Moyera, like the undocumented employee in *Ortiz*, had no plans to return to his home country or to become a legal resident of the United States. Therefore, the employer claimed that Moyera had no earning capacity to lose because he had no legal right to be employed in the United States.

[8-10] We clarified why in the case of an undocumented alien vocational rehabilitation benefits are distinguishable from permanent disability benefits. The Workers' Compensation Court cannot order vocational retraining without determining that the worker's postinjury physical restrictions and vocational impediments prevent the worker from complying with all of

the lower work priorities in Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010). See *Moyera, supra*. If an injured employee is ineligible for the statute's lower work priorities because the employee cannot be legally placed with the same employer or a new employer, then the compensation court cannot order retraining for a new career. See *id*. But unlike vocational retraining benefits, there are no prioritized goals that must be satisfied before a court can award indemnity for an employee's loss of earning capacity. *Id*.

[11-13] Both before and after an employee's maximum medical improvement, an employee's disability as a basis for compensation under Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 2010) is determined by the employee's diminution of employability or impairment of earning power or earning capacity. *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 825 N.W.2d 409 (2013). An employee's impairment of earning capacity does 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. *Id*. Therefore, an employee's illegal residence or work status does not bar an award of indemnity for permanent loss of earning capacity. See *id*.

[14] For purposes of workers' compensation, the risk of hiring an undocumented alien falls on the employer to cover the associated costs if that worker is injured during the scope of employment. See 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 66.03[4][a] at 66-21 (2011) ("with a few exceptions, illegal aliens are treated as covered employees"; under that "general workers' compensation scheme, the employer is generally responsible for paying indemnity to an injured worker as long as he or she is unable to return to work"). See, also, *Moyera, supra*.

[15,16] Such coverage conforms with the purpose of the Act: "The [A]ct is designed to compensate an injured worker for two distinct losses resulting from a work-related injury or occupational disease: the loss of earning capacity based on the concept of disability and medical and other costs associated with the injury or disease." *Foote v. O'Neill Packing*, 262 Neb. 467, 474, 632 N.W.2d 313, 320 (2001). Because the purpose is to compensate injured workers for injuries

regardless of immigration status, the Act can be applied to all workers, whether legally hired or not.

In the case at bar, Cargill petitioned the compensation court to make a determination that Visoso had reached maximum medical improvement. Visoso returned to Mexico, his country of origin, while the matter was pending. Because the court determined Visoso's move was made in good faith and not for an improper motive, the court attempted to determine his loss of earning capacity based on evidence obtained in Mexico.

The trial proceeded on the basis that Visoso was eligible to pursue his claim for loss of earning power benefits. The compensation court's denial of benefits was not based upon Visoso's status as an undocumented worker. But it denied benefits because it concluded there was no reliable evidence regarding Mexico labor markets from which to base a determination of loss of earning power. Whether Visoso was eligible to recover a permanent award for loss of earning capacity was not decided by the court because of a lack of credible evidence for which to base a determination of Visoso's loss of earning capacity.

Having concluded that Visoso is eligible for workers' compensation benefits, both temporary and permanent, we examine the location upon which to base those benefits: the place where the injury occurred or the place where Visoso now resides. Visoso moved to Chichihualco in July 2011, and the compensation court determined that Chichihualco, together with Chilpancingo, the largest city in the area and the state capital, would serve as the hub community for calculation of Visoso's loss of earning power. Chilpancingo is 45 to 60 minutes from Chichihualco and the only large community within 50 miles. The area is rural and mountainous, high in crime, and controlled by a drug cartel.

Although Stricklett, the agreed-upon vocational rehabilitation expert, attempted to find data to perform an analysis of loss of earning capacity in Chilpancingo, she was ultimately unable to do so. She could not perform a permanent loss of earning power analysis due to a lack of reliable foundational information customarily used to make the assessment. Long,

Visoso's rebuttal expert, experienced similar problems. Neither expert had previously attempted to perform a loss of earning power analysis in Mexico, so neither had the base of knowledge they had in Nebraska. They both had to rely on Internet resources that could not be verified, and neither attempted to contact employers in Mexico by telephone.

Based on the lack of sufficient information and reliable data, the compensation court determined there was no foundation to render an opinion regarding loss of earning power for the hub community of Chilpancingo. We agree; however, this does not end the analysis of Visoso's loss of earning capacity.

[17] This court has addressed which community to use as the hub community when an injured employee relocates to a new location for a legitimate purpose. See *Giboo v. Certified Transmission Rebuilders*, 275 Neb. 369, 746 N.W.2d 362 (2008). We have recognized that either the community where the injury occurred or the community where the employee has moved can serve as the hub community to establish loss of earning power. If a claimant in good faith relocates to a new community, the new community may serve as the hub community from which to assess the claimant's loss of earning power. See *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

[18] In *Money*, the employee moved from the Lincoln, Nebraska, area to the smaller community of Table Rock, Nebraska. The employer claimed that the employee should have to prove loss of earning capacity in both the Lincoln and Table Rock areas. We stated that "the first step in identifying the relevant labor market for assessing a worker's loss of earning power is to determine whether the hub is where the injury occurred, or where the claimant resided when the injury occurred, or where the claimant resided at the time of the hearing." *Id.* at 611, 748 N.W.2d at 59. We concluded that because the employee's move was for a legitimate purpose as determined by the compensation court, her hub community was Table Rock and not Lincoln.

In *Giboo, supra*, we confronted the question of what market to use to measure earning capacity when an employee, after suffering an injury while living and working in one

community, relocates to a new community with fewer employment opportunities. The employer urged the court to adopt a rule that would include both the market where the injury occurred and any new market where the employee relocates as hub communities. Having surveyed the various approaches other jurisdictions used to identify the hub community, we concluded that the best rule was one which regarded the employee's new community as the hub community, provided that the move was made for legitimate reasons. This was the hub community used by the court in the case at bar.

Giboo did not address whether the place of the injury could be used as the hub community if no reliable data was available regarding the place where the employee has moved.

> Courts and commentators uniformly agree that a "labor market" does not refer to a single community, but encompasses employment opportunities within a reasonable geographic area. It would seem, therefore, that the first step in identifying a labor market is to identify "the hub from which the spokes of a 'reasonable geographic area' radiate, whether it [is] from the place the injury occurred, the place the claimant resided at the time the injury occurred, or the place the claimant resides at the time of [the workers' compensation] hearing."

Id. at 375, 746 N.W.2d at 368. *Giboo* required the employee to show loss of earning capacity based only on the new location where the employee lived at the time of the hearing. However, we did not conclude that such location would be the only location allowed to show loss of earning capacity.

[19] The Act is designed to compensate an injured worker for the loss of earning capacity caused by the injury. *Powell v. Estate Gardeners*, 275 Neb. 287, 745 N.W.2d 917 (2008). As a general rule, the Act should be construed to accomplish its beneficent purposes. *Becerra v. United Parcel Service*, 284 Neb. 414, 822 N.W.2d 327 (2012). Undocumented workers are eligible for permanent total disability payments, and a vocational specialist can 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. See *Moyera v. Quality Pork Internat.*, 284

Neb. 963, 825 N.W.2d 409 (2013). When an undocumented worker in good faith returns to his or her country of origin, the workers' compensation court in assessing the worker's permanent impairment of earning capacity should initially determine which location is the proper hub community.

[20] If sufficient credible data exists for a determination of the loss of earning capacity in the community of origin and the undocumented worker has moved for legitimate purposes, and not to increase workers' compensation benefits, then the community of origin may serve as the hub community. See, *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008); *Giboo v. Certified Transmission Rebuilders*, 275 Neb. 369, 746 N.W.2d 362 (2008).

If the undocumented worker has returned to the worker's country of origin but no reliable data is available in his place of origin, the place where the injury occurred can be considered for the purpose of a determination of impairment of earning capacity.

Visoso was unable to present competent evidence regarding his percentage of loss of earning capacity because there was no credible evidence upon which to base a determination. In order to achieve the purposes of the Act, the compensation court should have allowed Visoso the opportunity to attempt to prove permanent loss of earning capacity using the data from the place where the injury occurred. Because neither vocational expert was able to provide sufficient credible evidence for a determination of Visoso's loss of earning capacity in Mexico, the court should have permitted Visoso to use the place of injury for such determination, if any. Failure to do so frustrated the purpose of the Act.

We do not require an employee to prove loss of earning capacity in two locations and have allowed an injured employee to show loss of earning capacity in the location to which the employee moved. See *Giboo, supra*. The opposite situation should also apply. If there is a lack of reliable and competent data available regarding Chilpancingo, Visoso should be allowed to use Schuyler, where the injury occurred, for purposes of asserting his claim for permanent indemnity.

Some states have passed legislation to address compensation claims of undocumented aliens who reside outside the United States. The Court of Appeals of New York has noted that New York's Workers' Compensation Law § 17 provided, in pertinent part, that "'[c]ompensation . . . to aliens not residents or about to become nonresidents of the United States or Canada, shall be the same in amount as provided for residents.'" *Ramroop v. Flexo-Craft Printing, Inc.*, 11 N.Y.3d 160, 168, 896 N.E.2d 69, 72, 866 N.Y.S.2d 586, 589 (2008) (emphasis omitted). The court stated, "[S]ection 17 is concerned solely with the treatment of aliens (not just undocumented aliens) who reside, or are about to reside, somewhere other than the United States or Canada." *Id.* The statute was meant to ensure that an alien's relocation outside the United States would not result in diminished compensation to the alien. *Id.*

In *Republic Waste Services, Ltd. v. Martinez*, 335 S.W.3d 401 (Tex. App. 2011), the Court of Appeals of Texas, in a wrongful death proceeding, allowed a jury to use Texas wages, rather than El Salvador wages, to determine loss of future earnings to a deceased worker. The deceased worker was an immigrant living and working illegally in Texas. He was killed in the scope of his employment, and his wife sought death benefits. The court concluded that the loss of future earnings of the immigrant was to be determined based on the income the immigrant was making at his job in the United States, rather than wages he would have made had he returned to El Salvador. *Martinez* was a wrongful death proceeding, but the reasoning of the court is analogous because data regarding wages did not exist in Visoso's country of origin.

In *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 825 N.W.2d 409 (2013), we allowed permanent indemnity even though the undocumented worker remained in the United States. We rejected the employer's argument that Moyera was not entitled to benefits for permanent indemnity because of his illegal residency. Because the Act made no distinction between legal and illegal aliens, we concluded it should be broadly construed to accomplish its beneficent purpose. Both before and after an employee has reached 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 in employability or impairment of earning power or earning capacity. *Moyera, supra*. An employee's illegal residence or work status does not bar an award of indemnity for permanent total loss of earning capacity. *Id*.

Other states have held that undocumented employees are covered by their state's workers' compensation statutes. See *Moyera, supra*. In *Economy Packing v. Illinois Workers' Comp.*, 387 Ill. App. 3d 283, 901 N.E.2d 915, 327 Ill. Dec. 182 (2008), the court held that an injured undocumented worker who was totally and permanently disabled was eligible for permanent total disability payments even if the worker was an undocumented alien who remained illegally in the United States. The court allowed evidence of loss of earning capacity from the place where the injury occurred.

Visoso moved from Schuyler to Chichihualco during the time his workers' compensation action was pending. And because of such move, neither vocational expert was able to provide evidence helpful to the compensation court regarding Visoso's loss of earning power in Mexico. Stricklett admitted she could not perform a permanent loss of earning power analysis. Long was also unable to offer reliable foundational information. Had Visoso remained in the United States, Schuyler would have been used as the hub community.

[21] Although the compensation court suspected that Visoso had some permanent disability, in the absence of a credible permanent loss of earning power evaluation from a professional vocational rehabilitation counselor, the court was left to guess or speculate the amount of permanent indemnity. A workers' compensation award cannot be based on possibility or speculation, and if an inference favorable to the claimant can be reached only on the basis thereof, then the claimant cannot recover. *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).

However, there was evidence that both experts were able to give a credible evaluation of Visoso's loss of earning capacity if the place of Visoso's injury was considered. Stricklett had performed at least two analyses using the Schuyler area as the

hub community. Allowing Visoso the opportunity to prove his loss of earning capacity based on the data of the community where the injury occurred achieves the goal of the Act to compensate employees for on-the-job injuries.

Allowing an undocumented worker to establish loss of earning capacity based on data in the community where the injury occurred reduces the incentive to hire undocumented workers so as to avoid paying workers' compensation benefits. If an employer were able to end its obligation to the impaired worker because no reliable data existed in the undocumented worker's country of origin, employers would be encouraged to hire undocumented workers to avoid paying workers' compensation benefits. This would result in an employment situation of hire, fire, report, deport, and forget the employee. This type of result conflicts with the purposes of the Act.

If an undocumented worker returns to his or her country of origin in good faith and there is sufficient and credible data to establish proper foundation for a loss of earning capacity analysis, then the community of origin may be considered as the hub community. Because no data existed for Visoso's hub community in Mexico, then the place where the injury occurred, Schuyler, should serve as the hub community.

There was evidence in the record that both experts were able to make a credible determination of loss of earning power using Schuyler as the hub community. Because of the lack of credible data from Visoso's hub community in Mexico, the compensation court should have considered Visoso's loss of earning capacity based on Schuyler as the hub community. Allowing such community to be considered would permit Visoso to attempt to meet his burden to establish permanent disability benefits.

CONCLUSION

Cargill petitioned to end payment of temporary total disability. It had the burden of proof in establishing that Visoso had reached maximum medical improvement. The compensation court correctly determined that Cargill sustained its burden, and we affirm the court's conclusion on that issue.

Visoso retained the burden to prove his permanent disability and the impairment of his earning capacity. Visoso had returned to his country of origin, and the compensation court concluded there was no credible evidence which could be used to determine his loss of earning capacity in his new community. When no credible data exists for the community to which the employee has relocated, the community where the injury occurred can serve as the hub community. Therefore, we remand the cause to the Workers' Compensation Court to allow Visoso to attempt to establish permanent impairment and loss of earning capacity using Schuyler as the hub community.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CASSEL, J., not participating.

LARRY BLASER ET AL., APPELLEES, V. COUNTY OF MADISON, NEBRASKA, A POLITICAL SUBDIVISION, APPELLANT.

826 N.W.2d 554

Filed February 22, 2013. No. S-12-558.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong.
2. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.
4. **Negligence: Appeal and Error.** Whether a defendant breaches a duty is a question of fact for the fact finder, which an appellate court reviews for clear error.
5. **Statutes.** Statutory interpretation presents a question of law.
6. **Judges: Recusal: Waiver.** A party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings.
7. **Appeal and Error: Words and Phrases.** Plain error is error uncomplained of at trial and is plainly evident from the record and of such a nature that to leave it