
EXAMINING THE ADMISSIBILITY OF AN UNDOCUMENTED WORKER'S STATUS IN IOWA TORT AND WORKERS' COMPENSATION CASES

ABSTRACT

Today, immigration is one of the most hotly contested and discussed issues across the country. The United States, including the State of Iowa, is home to a large immigrant population. Though many of these immigrants entered the country legally, over half of these immigrants in Iowa remain undocumented. Undocumented immigrants have access to the courts in the State of Iowa, including the ability to make workers' compensation claims. With such a large population of undocumented immigrants, lawsuits and claims are inevitable. As such, evidentiary issues involving an immigrant's undocumented status are bound to arise, specifically when damages or awards for loss of future earnings or loss of future earning capacity are claimed.

This Note proposes that the undocumented status of a plaintiff or claimant should be admissible for the limited purpose of calculating and awarding damages for loss of ability to earn income in civil suits, and loss of future earnings under Iowa's Workers' Compensation Act. Allowing the consideration of this evidence will permit the fact finder to consider all relevant information when awarding these damages, subject to the limitations discussed herein.

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I. INTRODUCTION

“Immigrants are important to Iowa and its economy.”¹ Recent estimates show that Iowa is home to about 130,000 immigrants.² Of those immigrants, almost 75,000 of them are undocumented, representing about 2.5 percent of the state’s population.³

Living within the borders of the United States, undocumented immigrant workers are entitled to, and have, access to the courts.⁴ “[A] well-established body of law holds that illegal aliens have rights of access to the courts and are eligible to sue therein to enforce contracts and redress civil wrongs such as negligently inflicted personal injuries.”⁵ Undocumented immigrants’ access to the courts is not limited and extends to workers’ compensation in most states.⁶ In Iowa, an undocumented worker meets the

1. Heather Gibney & Peter S. Fisher, EXECUTIVE SUMMARY: IMMIGRANTS IN IOWA: WHAT NEW IOWANS CONTRIBUTE TO THE STATE ECONOMY: EXECUTIVE SUMMARY 1 (2014), <http://www.iowapolicyproject.org/2014docs/140702-Immigration-xs.pdf>.

2. *Id.*

3. *Id.*

4. *See, e.g.*, *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 997 (N.H. 2005); *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221, 225 (N.J. Super. Ct. App. Div. 1996); *Arteaga v. Literski*, 265 N.W.2d 148, 150 (Wis. 1978).

5. *Rosa*, 868 A.2d at 997 (alteration in original) (quoting *Mendoza*, 672 A.2d at 225).

6. *See, e.g.*, *Bollinger Shipyards Inc. v. Dir., Office of Worker's Comp. Programs*, 604 F.3d 864, 878 (5th Cir. 2010); *Campos v. Daisy Constr. Co.*, 107 A.3d 570, 578 (Del. 2014); *Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 644 (Iowa 2013); *Design Kitchen & Baths v. Lagos*, 882 A.2d 817, 830 (Md. 2005); *but see Ortiz v. Cement Prods., Inc.*, 708 N.W.2d 610, 790–91 (Neb. 2005) (finding an employee ineligible for vocational rehabilitation

broad definition of “employee” under the Workers’ Compensation Act and is therefore permitted to file a claim and recover benefits under the Act.⁷

This Note will examine the admissibility of the immigrant worker’s undocumented status in Iowa. The scope of this analysis will be limited to economic damages, specifically loss of future earnings in civil suits and benefits recoverable under Iowa’s workers’ compensation system. Part II will focus on loss of ability to earn income in civil suits and will discuss the relevance of a plaintiff’s immigration status using the Iowa Rules of Evidence and court decisions from other jurisdictions to argue that this undocumented status should be admissible for the limited purpose of the calculation of these damages. Part III will examine Iowa’s workers’ compensation system, specifically the loss of future earning capacity analysis for unscheduled permanent partial disabilities, and it will propose that evidence of a claimant’s immigration status should be a consideration in the awarding of these permanency benefits.

II. ECONOMIC DAMAGES: LOSS OF FUTURE EARNING CAPACITY, LOSS OF VALUE OF ESTATE, AND LOSS OF SUPPORT IN CIVIL SUITS

In certain civil cases, damages for loss of earning capacity may be appropriate to compensate an injured plaintiff. Loss of future earning capacity is the reduction of a plaintiff’s ability to work and earn money generally—rather than the reduction of the ability to work a particular job⁸—and courts regularly consider a variety of factors when making determinations regarding these damages.⁹ “There is no requirement such loss need be measured in a vacuum: ordinarily considered are plaintiff’s poor health, education and opportunity for education, age, intelligence, industriousness, manner of living, sobriety or temperance, frugality or lavishness or other personal characteristics which affect ability to secure business or earn money.”¹⁰

services when the employee is not authorized to return to work in the United States).

7. *Jimenez*, 839 N.W.2d at 648–49; see IOWA CODE ANN. § 85.61(11) (West 2017).

8. IOWA CIV. JURY INSTRUCTIONS § 200.9 (IOWA STATE BAR ASS’N 2015).

9. See, e.g., *Iowa-Des Moines Nat’l Bank v. Schwerman Trucking Co.*, 288 N.W.2d 198, 201–02 (Iowa 1980); *Truscheff v. Abell-Howe Co.*, 239 N.W.2d 116, 122–23 (Iowa 1976) (citing 22 Am. Jur. 2d *Damages* § 175 (2017)), *abrogated by Van Fossen v. Midamerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009); *Ehlinger v. State*, 237 N.W.2d 784, 792 (Iowa 1976).

10. *Ehlinger*, 237 N.W.2d at 792.

While damages for loss of future earning capacity may be appropriate in cases involving an injured plaintiff, damages for loss of value of a decedent's estate and loss of decedent's support are the functional equivalent in cases involving death. Loss of value of a decedent's estate is expressed as "the present value of the additional amounts (decedent) would reasonably be expected to have accumulated as a result of [decedent's] own effort" if he or she would not have died.¹¹ The factors that drive this analysis are similar to those used in calculating loss of future earning capacity in suits in which the plaintiff is injured: the ability of the decedent to earn money, the amount of income that would have been used in support of the decedent's family, "the uncertainties of life" such as employment, ill health, and the potential increase or decrease of earning capacity as age advances, and all other facts or circumstances bearing on the amount the decedent would have accumulated.¹² Damages for loss of support are similar—they encompass "[t]he present value of the amount of financial support" decedent would have provided,¹³ and factfinders are to consider the decedent's age, health, life expectancy, and previous earnings when these determining damages.¹⁴

Because of the definitions of these economic damages and their focus on the ability of the plaintiff or decedent to earn money, the admissibility of a plaintiff's undocumented status has the potential to play a significant role in a civil trial.¹⁵ The analysis of the admissibility of this evidence in Iowa will focus on the Iowa Rules of Evidence and various decisions from other jurisdictions.

A. Iowa Rules of Evidence

The admissibility of evidence in Iowa is governed by the Iowa Rules of Evidence.¹⁶ Iowa Rule of Evidence 5.401 states, "Evidence is relevant if: [(a)] It has any tendency to make a fact more or less probable than it would be without the evidence; and [(b)] The fact is of consequence in determining

11. IOWA CIV. JURY INSTRUCTIONS § 200.15.

12. *Iowa-Des Moines Nat'l Bank*, 288 N.W.2d at 201; IOWA CIV. JURY INSTRUCTIONS § 200.21(A).

13. IOWA CIV. JURY INSTRUCTIONS § 200.17.

14. IOWA CIV. JURY INSTRUCTIONS § 200.21(B).

15. *See, e.g., Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 997–1001 (N.H. 2005); *Ayala v. Lee*, 81 A.3d 584, 597–99 (Md. Ct. Spec. App. 2013).

16. IOWA R. EVID. 5.101.

the action.”¹⁷ All relevant evidence is admissible unless prohibited by constitution (federal or state), by statute, or by a different rule of evidence.¹⁸ Although evidence may be relevant, it may be excluded “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”¹⁹

B. *Cases in Other Jurisdictions*

Iowa tort law is unsettled on the issue of whether an undocumented immigrant’s status is admissible for loss of ability to earn income claims. However, various other courts and jurisdictions have considered the issue, with a large number using the relevance and prejudicial–probative analysis similar to the Iowa Rules of Evidence.

1. *Cases Opposing the Admissibility of Plaintiff's Undocumented Status*

Courts outside of Iowa have shown deference to the danger of the undocumented status of a plaintiff possibly inflaming the jury and the potential legal consequences for the plaintiff when deeming this evidence inadmissible.²⁰ The Washington Supreme Court recently considered this issue in *Salas v. Hi-Tech Erectors*.²¹ At the trial court level, evidence of the plaintiff’s immigration status was admitted because he was seeking lost future income, and his status was probative of whether or not the future income would be in U.S. currency; this was weighed against the prejudicial effect the evidence would have with the jury.²² The Washington Supreme Court, employing the traditional relevance analysis using plaintiff’s labor market as a consequential fact, found this evidence relevant because his “immigration status create[d] a greater likelihood that his labor market [would] not be the United States than if [he] legally resided here.”²³ Although relevant, the supreme court found that the prejudicial effect substantially outweighed the low probative value of the evidence, noting the significant danger of a passionate immigration response from the jury

17. *Id.* at 5.401.

18. *Id.* at 5.402.

19. *Id.* at 5.403.

20. *See, e.g., Republic Waste Servs., Ltd. v. Martinez*, 335 S.W.3d 401, 408 (Tex. App. 2011); *Salas v. Hi-Tech Erectors*, 230 P.3d 583, 587 (Wash. 2010).

21. *Salas*, 230 P.3d at 587.

22. *Id.* at 584.

23. *Id.* at 585–86.

conflicting with their duty of impartial deliberation.²⁴

The court in *Republic Waste Servs., Ltd. v. Martinez* found a similar result regarding relevance, stating that because plaintiff's illegal status had a tendency to make the fact that he would have continued to make his current salary in the United States less probable, and made the fact that he would have earned his wages in El Salvador more probable, the evidence was relevant.²⁵ Although relevant, the court excluded the evidence and found that the probative value of the evidence was slight given the speculative nature of the possibility of deportation and the danger of unfair prejudice.²⁶

2. Cases Supporting the Admissibility of Plaintiff's Undocumented Status

"Immigration status is relevant to a claim for lost wages for the simple reason that the legal ability to work affects the likelihood of future earnings in the United States."²⁷ In the case of *Ayala v. Lee*, the Maryland Court of Special Appeals considered whether the plaintiff's undocumented immigrant status was admissible in a personal injury suit.²⁸ The court held that the plaintiff's immigration status was relevant in determining lost wages, noting that if a court found that the evidence was not unduly prejudicial, the evidence was relevant to whether the plaintiff was entitled to wages lost at the U. S. rate or the plaintiff's home country rate.²⁹ The court did not employ the probative-prejudicial analysis for other evidentiary reasons but did give guidance on future questions about immigration status, stating that the issue of appropriate pay is a question of fact for the jury and that the judge is to monitor questioning that leans on the side of prejudice.³⁰ *Ayala* states an inquiry based upon out-of-state case law:

Facts for the jury to weigh include: whether there is an imminent risk of deportation; how long the party has been in the United States; his or her work history in the United States; whether he or she has a family in the United States; what the United States wage rate is; and what the comparable home country wage rate would be³¹

24. *Id.* at 586–87.

25. *Republic Waste Servs., Ltd.*, 335 S.W.3d at 408.

26. *Id.* at 411.

27. *Ayala v. Lee*, 81 A.3d 584, 597 (Md. Ct. Spec. App. 2013).

28. *Id.* at 590.

29. *Id.* at 598.

30. *Id.* at 598–600.

31. *Id.* at 599.

The court recommended limiting questioning of plaintiff's experts and economists strictly to which country's wage rate their figures were based on, noting anything further would be irrelevant and that the defendants can remedy this by securing their own expert to testify about costs in plaintiff's home country.³²

An illegal alien's status is irrelevant pertaining to liability but relevant on the issue of lost earnings.³³ The New Hampshire Supreme Court, after finding the plaintiff's status relevant, employed the prejudicial-probative analysis, stating, "Though evidence of [an illegal immigrant's] status may well be prejudicial, such evidence . . . is essential should an illegal alien wish to pursue a claim for lost earning capacity measured at United States wage levels."³⁴ The court's reasoning was centered on the belief that most of the time, undocumented workers could not recover lost wages at U.S. pay rates, and that when the plaintiff attempted to recover damages based on that rate, the probative value of the plaintiff's immigration status outweighed any prejudicial effect it would have on the jury.³⁵ The court created a general rule that a plaintiff could not recover at U.S. pay rates but then created an exception that the plaintiff could recover at U.S. rates if the plaintiff could prove the employer knew or should have known of the plaintiff's illegal status but still hired or continued to employ him illegally.³⁶

The Indiana Supreme Court recently considered this issue in *Escamilla v. Shiel Sexton Co.*³⁷ The supreme court, in overturning the court of appeals, found that a plaintiff's immigration status is relevant but held that the undocumented status is admissible only if the proponent of the evidence could show by a preponderance of the evidence—i.e., that it is more likely than not—that a plaintiff will be deported.³⁸ The court took this limited

32. *Id.*

33. *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1002 (N.H. 2005).

34. *Id.*

35. *Id.*

36. *Id.* at 1001–02. The court also noted that a plaintiff who submitted fraudulent documents to obtain employment was not barred from recovery for lost wages generally, but could be barred if the employer reasonably relied upon these documents. *Id.*

37. *Escamilla v. Shiel Sexton Co.*, 73 N.E.3d 663, 664–65 (Ind. 2017).

38. *Id.* at 670, 675–76. The court of appeals held that plaintiff's immigration status was "relevant to a claim of lost earning capacity *only if*: (1) [plaintiff] claims lost earning capacity in United States wages, *and* (2) [plaintiff's] immigration status leaves [plaintiff] with any risk of deportation." *Escamilla v. Shiel Sexton Co.*, 54 N.E.3d 1013, 1022 (Ind. Ct. App. 2016), *rev'd*, 73 N.E.3d 663 (Ind. 2017). The court noted that it was not clear how the trier of fact could accurately determine plaintiff's loss of future earning capacity

approach reasoning that the evidence was inadmissible generally due to the dangers of confusing the issues and some risk of unfair prejudice.³⁹ The focus of the Indiana Supreme Court was on the constantly shifting immigration policy in the United States, the opportunity of many plaintiffs to adjust their immigration status, and the burden imputed to plaintiffs if they were required to prove a negative (i.e., that they were *not* likely to be deported).⁴⁰

The Michigan Court of Appeals took a more lenient approach when it considered the admissibility of a plaintiff's status as an illegal alien in a personal injury claim.⁴¹ The plaintiff moved in limine⁴² to exclude the defendant from bringing up the plaintiff's status as an illegal alien.⁴³ The trial court granted the motion but noted that the defendant could still bring up the plaintiff's background, his birth country, his date of birth, and when and whence he came.⁴⁴ The appellate court found the trial court's order unduly restrictive, noting, "While the matter of plaintiff's status as an illegal alien was clearly irrelevant on the question of liability, it was material and relevant to the issue of damages, specifically the present value of future lost earnings."⁴⁵ The court found that because the plaintiff's expert assumed that the plaintiff would remain in the United States for his lifetime, the jury had the right to know his illegal status, as he was subject to deportation at any time.⁴⁶ The case was remanded; the appellate court required that the proceedings be bifurcated, with the jury first considering liability *without* the defendant's ability to bring up plaintiff's illegal status, and then subsequently considering damages *with* the defendant's ability to mention plaintiff's illegal status.⁴⁷

C. Proposal Under Iowa Law

The evidence of a plaintiff's undocumented status should be admissible

without the knowledge of immigration status, because it had to determine at what country's wage rates these damages should be awarded. *Id.*

39. *Escamilla*, 73 N.E.3d at 670–75.

40. *Id.* at 675–76.

41. *Melendres v. Soales*, 306 N.W.2d 399, 400–01 (Mich. Ct. App. 1981).

42. Preliminarily; presented to only the judge, before or during trial. *In limine*, BLACK'S LAW DICTIONARY (10th ed. 2014).

43. *Melendres*, 306 N.W.2d at 401.

44. *Id.*

45. *Id.* at 402.

46. *Id.*

47. *Id.*

in Iowa so that a jury can accurately assess and award appropriate economic damages. With the knowledge of the admissibility of this evidence, a plaintiff's counsel could strategically avoid pleading these damages, request a limiting instruction that need be granted under the Iowa Rules of Evidence, or petition that the trial be bifurcated into a liability phase and damages phase.

1. *Application to Iowa Law*

As stated above in Part II.A, "Evidence is relevant if: [(a)] It has any tendency to make a fact more or less probable than it would be without the evidence; and [(b)] The fact is of consequence in determining the action."⁴⁸ Applying this evidentiary standard to damages based on loss of ability to earn income, the question is: Does the undocumented immigration status of a plaintiff have any tendency to make the plaintiff's ability to earn money more probable or less probable than it would be without the evidence of the plaintiff's undocumented status?⁴⁹

A majority of the cases from other jurisdictions considering this issue have decided the admissibility of such evidence based upon an analysis of the prejudicial or probative effect of the introduction of such evidence.⁵⁰ Iowa has adopted and employs the probative–prejudicial analysis prescribed by the Federal Rules of Evidence.⁵¹ The argument favoring the probative value of such evidence centers on the inability of an undocumented immigrant to be lawfully employed in the United States.⁵² Under federal statutory law, the Immigration Reform and Control Act (IRCA) governs the employment of undocumented immigrants.⁵³ Under the IRCA, it is unlawful to employ an illegal alien in the United States.⁵⁴ The IRCA requires applicants to provide the necessary documentation of lawful status or permission to lawfully work within the United States and prohibits employers from hiring applicants absent this documentation.⁵⁵ Additionally,

48. IOWA R. EVID. 5.401.

49. *See id.*; IOWA CIV. JURY INSTRUCTIONS §§ 200.9, 200.15.

50. *See, e.g.,* Ayala v. Lee, 81 A.3d 584, 597 (Md. Ct. Spec. App. 2013); Rosa v. Partners in Progress, Inc., 868 A.2d 994, 1002 (N.H. 2005).

51. *See* FED. R. EVID. 403; Iowa R. Evid. 5.403; *supra* Part II.A.

52. *See, e.g.,* Melendres, 306 N.W.2d at 402.

53. 8 U.S.C. § 1324a (2012).

54. *Id.* § 1324a(a)(1); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002) (citing 8 U.S.C. § 1324a).

55. 8 U.S.C. §§ 1324a(a)(1), 1324a(b); Hoffman Plastic Compounds, Inc., 535 U.S.

the IRCA makes it a crime for illegal aliens to provide potential employers with fraudulent documentation to gain employment.⁵⁶

On the other side of the analysis is the observation that this evidence may be extremely prejudicial or may significantly increase a jury's likelihood of confusing the issues.⁵⁷ The court in *Republic Waste* stated, "Undeniably, the issue of immigration is a highly charged area of political debate."⁵⁸ As exemplified in the recent 2016 presidential campaigns and election, immigration is at the forefront of domestic policy discussion in the United States.⁵⁹ The *Salas* court noted, "Issues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation."⁶⁰ However, although this evidence may carry the potential for prejudice, it should be admitted so the fact finder is not deprived of all relevant information.⁶¹ Rather than the relevance "wax[ing] and wan[ing] with the chances of deportation" as the Indiana Supreme Court observed, if the evidence of a plaintiff's status were admitted, the jury would be able to accurately assess loss of future earnings without speculating as to earnings a plaintiff is not legally entitled to receive.⁶²

Although there is certainly the possibility this evidence could confuse the issues for a jury, the evidence should be admitted because our court system "maintain[s] . . . 'strong faith in the ability of the jury to decide such complex questions.'"⁶³ Rather than a "collateral mini-trial on immigration"

at 148 (citing 8 U.S.C. §§ 1324a(a)(1), 1324a(b)).

56. 8 U.S.C. § 1324c(a) (2012); *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 148 (citing 8 U.S.C. § 1324c(a)).

57. See, e.g., *Salas v. Hi-Tech Erectors*, 230 P.3d 583, 585–87 (Wash. 2010).

58. *Republic Waste Servs., Ltd. v. Martinez*, 335 S.W.3d 401, 409 (Tex. App. 2011).

59. See, e.g., Tal Kopan, *What the Immigration Battle Could Look Like Under Trump*, CNN POL. (Dec. 27, 2016), <http://www.cnn.com/2016/12/27/politics/donald-trump-administration-immigration/>. A recent poll conducted near Election Day 2016 showed that 20 percent of Hillary Clinton voters and 79 percent of President Donald Trump voters consider illegal immigration to be a "very big" problem in the United States. *A Divided and Pessimistic Electorate*, PEW RES. CTR. (Nov. 10, 2016), <http://www.people-press.org/2016/11/10/a-divided-and-pessimistic-electorate/>.

60. *Salas*, 230 P.3d at 586.

61. J.J. Knauff, *A Defense Primer for Suits by Illegal Aliens*, 61 BAYLOR L. REV. 542, 572–73 (2009); see *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1002 (N.H. 2005).

62. Knauff, *supra* note 61, at 566–67; *contra Escamilla v. Shiel Sexton Co.*, 73 N.E.3d 663, 675–76 (Ind. 2017).

63. *Contra Escamilla*, 73 N.E.3d at 674 (quoting *Mayhue v. Sparkman*, 653 N.E.2d

resulting if the evidence were admitted, a jury would simply be able to consider whether an employee can legally be hired to work in the United States.⁶⁴ In fact, trial judges could easily limit the testimony on the issue, and the mini-trial risk would be almost completely alleviated if the trial were bifurcated into a liability and damages phase, as discussed below.⁶⁵

2. Considerations for a Plaintiff's Attorney: Whether to Claim Damages for Loss of Future Earning Capacity

A plaintiff's attorney could take multiple approaches if a plaintiff's undocumented status were a concern heading into trial. First, the attorney could simply not make a claim for damages of loss of future earning capacity.⁶⁶ A plaintiff is the master of his or her claim and could determine not to seek these damages.⁶⁷

This is not to say that undocumented immigrants' access to the courts would be diminished. Plaintiffs would still have the opportunity to file suit and claim the damages to which they and their attorneys think they are entitled to recover.⁶⁸ In any given case, a plaintiff, along with counsel, must make several determinations: Is there sufficient factual evidence to support the loss of future earning capacity claim? Has their economist accurately and fully considered the undocumented status in rendering an opinion? Is the claim credible in light of the undocumented status? These are all questions that need to be addressed. These types of strategy decisions should not bear on the admissibility of evidence that the jury is otherwise entitled to hear to make a clear and informed decision about what and in what amount damages should be ordered.

1384, 1389 (Ind. 1995)).

64. *Contra id.* Contrary to its claim that it is "not saying that juries *cannot* make myriad immigration determinations," the Indiana Supreme Court is effectively saying just that. *Contra id.*

65. Knauff, *supra* note 61, at 572.

66. See David P. Weber, (*Unfair*) *Advantage: Damocles' Sword and the Coercive Use of Immigration Status in a Civil Society*, 94 MARQ. L. REV. 613, 661–62 (2010) ("At the other end of the spectrum is simply counseling the client to refrain from pursuing his or her claim." (footnote omitted)).

67. See *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

68. See, e.g., *Ayala v. Lee*, 81 A.3d 584, 599 (Md. Ct. Spec. App. 2013) (discussing facts for the jury to weigh in determining earning capacity where plaintiff-immigrant's undocumented status is admissible evidence); see also IOWA CIV. JURY INSTRUCTIONS §§ 200.1–200.40 (IOWA STATE BAR ASS'N 2015).

Furthermore, whether one is legally entitled to work in this country should be an essential element in determining loss of future earning capacity. As noted above, these damages are defined as the reduction in the ability to earn money generally, and they encompass a variety of social, personal, and educational factors.⁶⁹ The alleged emotional charge of the subject should not keep this vital element from the jury.⁷⁰ For example, no one would argue that a plaintiff claiming loss of future earning capacity based on the inability to drive a truck should be able to keep out evidence of any underlying inability to drive a truck due to, say, a license revocation or health condition keeping them from obtaining a CDL. The jury would be entitled to know that fact and weigh it against plaintiff's claim and evidence.⁷¹ Plaintiff and counsel would have to make a determination whether to assert that particular claim in light of the evidence to the contrary.

The same is true of immigration status. If a plaintiff decides to make the loss of future earning capacity claim, the jury should not be precluded from hearing evidence questioning that claim based on the fact that plaintiff may not be eligible for employment in the very job market in which plaintiff and counsel are basing their alleged loss.⁷² Withholding that evidence is essentially misleading the jury and allowing the plaintiff's claim to be presented based on a fundamental falsehood.

3. Procedural and Evidentiary Options Should a Plaintiff Claim Loss of Future Earning Capacity

If a plaintiff decides to make a claim for these damages, a plaintiff's attorney still has two additional evidentiary tools that he or she could employ. Firstly, a plaintiff's attorney could seek a limiting instruction.⁷³ The limiting instruction would have to state that the plaintiff's status as an undocumented immigrant could only be considered with regard to damages for loss of future earning capacity, loss of value to the estate, and loss of support; in other words, it could be used strictly for the determination of damages and not for the determination of liability of the merits of the

69. See IOWA CIV. JURY INSTRUCTIONS § 200.9; *Iowa-Des Moines Nat'l Bank v. Schweman Trucking Co.*, 288 N.W.2d 198, 201 (Iowa 1980); *Ehlinger v. State*, 237 N.W.2d 784, 792 (Iowa 1976).

70. *Contra Escamilla v. Shiel Sexton Co.*, 73 N.E.3d 663, 675 (Ind. 2017).

71. See IOWA R. EVID. 5.401.

72. See *id.*; Knauff, *supra* note 61, at 562–63.

73. Knauff, *supra* note 61, at 564; see also LAURIE KRATKY DORÉ, EVIDENCE § 5.104:2, in 7 IOWA PRACTICE SERIES (2017 ed.).

plaintiff's claim.⁷⁴ A limiting instruction is appropriate because “[t]he law assumes that jurors follow the instructions given to them.”⁷⁵ Although some studies have shown that limiting instructions are ineffective and that juries disregard them, these instructions are a practical necessity of our legal system and without the presumption that juries listen to such instructions, “our jury system would have little meaning or purpose.”⁷⁶

Lastly, if the plaintiff's attorney were not satisfied with the limiting instruction, the attorney could ask that the trial be bifurcated, with the liability and damages portions to be decided separately.⁷⁷ The jury would then only hear the evidence of a plaintiff's undocumented status during the damages phase of the trial, provided the jury ruled in the plaintiff's favor with respect to liability. Bifurcation would alleviate the risk of prejudice from the fact finder using the undocumented status evidence for an improper purpose.⁷⁸

The above three modest proposals are far less extreme than the blanket recovery bar set out by the court in *Rosa v. Partners in Progress, Inc.*⁷⁹ As will be noted further below, those types of absolute rules are more appropriate for an agency setting where the risk of prejudice is far less substantial—where an administrative law judge and not a layperson jury renders decisions.⁸⁰

74. See *Affordable Hous. Found. Inc. v. Silva*, 469 F.3d 219, 225 (2d Cir. 2006); Knauff, *supra* note 61, at 564. For example, an improper purpose would be using this evidence to find against the plaintiff on the issue of liability, because a juror might not believe plaintiff is entitled to compensation due to the fact that he or she is not a U.S. citizen, an element independent of the merits of plaintiff's claim. *Ayala v. Lee*, 81 A.3d 584, 597 (Md. Ct. Spec. App. 2013) (citing *United States v. Amaya-Manzanares*, 377 F.3d 39, 45 (1st Cir. 2004)).

75. ABA, TRYING A CASE TO A JURY: DOS AND DON'TS 7 (2016), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2016_insurance_coverage_litigation_committee/written_materials/1_trying_a_case_to_a_jury-dos_and_donts.authcheckdam.pdf (quoting Trisha Renaud, *Curative Instructions May Backfire*, EYE ON JURY (Dec. 1, 2010), <https://web.archive.org/web/20160326151110/http://www.trialadvantage.net/?cat=24>); accord *State v. Hanes*, 790 N.W.2d 545, 558 (Iowa 2010) (Cady, J., dissenting) (citing *State v. Morrison*, 368 N.W.2d 173, 176 (Iowa 1985)).

76. *Hanes*, 790 N.W.2d at 558; accord David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 408–09 (2013).

77. Knauff, *supra* note 61, at 572.

78. *Id.* at 572.

79. *Contra Rosa v. Partners in Progress, Inc.* 868 A.2d 994, 1002 (N.H. 2005).

80. See *infra* Part III.D.

III. IOWA WORKERS' COMPENSATION

Workers' compensation law in Iowa is governed by Iowa Code chapters 85, 85A, and 85B—the Workers' Compensation Act.⁸¹ The Act states, “‘Worker’ or ‘employee’ means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer.”⁸² Under the Act, undocumented immigrants are considered employees under this broad definition and are therefore entitled to make claims under the Act.⁸³ The Iowa Supreme Court recently stated, “If the legislature intended the definition of a worker or employee to exclude undocumented workers, it would have done so by adding undocumented workers to the excluded list in section 85.61(11)(c).”⁸⁴ Therefore, undocumented workers are entitled to seek compensation for work-related injuries.⁸⁵

Additionally, in the same opinion of *Staff Management v. Jimenez*, the Iowa Supreme Court decided that the federal IRCA neither impliedly, nor expressly, preempts an undocumented worker from being awarded workers' compensation benefits.⁸⁶ As discussed earlier, IRCA makes it illegal for undocumented immigrants to fraudulently obtain employment and for employers to hire these undocumented immigrants.⁸⁷ Thus, many employers have attempted to rely on the IRCA to bar undocumented workers from receiving benefits under workers' compensation statutes.⁸⁸ The court's analysis in *Jimenez* focused on the purpose of healing period benefits—to replace lost wages and compensate employees for injuries caused by work, thus satisfying the purpose of the workers' compensation scheme—and distinguished healing period benefits from vocational rehabilitation and back pay.⁸⁹ Although the holding in *Jimenez* was limited to the awarding of

81. IOWA CODE ANN. §§ 85.1–85B.15 (West 2017).

82. *Id.* § 85.61(11); accord *Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 649 (Iowa 2013).

83. *Jimenez*, 839 N.W.2d at 648–49 (citing IOWA CODE ANN. § 85.61(11)(c)).

84. *Id.* at 649.

85. *Id.*

86. *Id.* at 652–53.

87. 8 U.S.C. §§ 1324a(a)(1), (b) (2012).

88. See, e.g., *Jimenez*, 839 N.W.2d at 652–53; *Safeharbor Emp'r Servs. I, Inc. v. Velazquez*, 860 So. 2d 984, 985 (Fla. Dist. Ct. App. 2003). These preemption arguments usually rely on the limited Supreme Court holding of *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), which declined to award back pay for the termination of an undocumented worker in light of the IRCA. See, e.g., *Jimenez*, 839 N.W.2d at 652; *Velazquez*, 860 So. 2d at 985.

89. *Id.* at 652–53.

healing-period benefits under the Iowa Workers' Compensation Act and the Iowa Supreme Court has not yet ruled or considered whether the IRCA preempts a worker from recovering permanency benefits, the same logic should flow from that decision.⁹⁰

However, the scope of this Part will not linger on the prospect of the Iowa Supreme Court ruling on the preemption of permanency benefits. Rather, accepting the notion that Iowa would likely find permanency benefits are not preempted, following the rationale in *Jimenez*,⁹¹ the analysis of this Part is much smaller in scope—focusing on whether an undocumented worker's illegal status should be admissible and be considered by administrative law judges in workers' compensation cases.

A. *Structure of Iowa's Workers' Compensation Act*

Under the Act, if an undocumented worker proves the injury arose out of and in the course of employment, that worker is entitled to pursue and recover one or more of seven different types of benefits.⁹² One of the ways of measuring benefits (damages) given to the injured employee is through permanent partial disability (PPD).⁹³ An employee has suffered PPD when that employee is able to return to work, but has suffered some permanent impairment resulting from the work injury.⁹⁴

The Act divides PPD into scheduled losses and unscheduled losses.⁹⁵ Scheduled injuries (losses) are specifically defined in the Iowa Code.⁹⁶ The Code section lists these injuries, such as the loss of a thumb or eye, and sets the compensation payable for such injuries.⁹⁷ Compensation for scheduled injuries is “limited to the loss of the physiological capacity of the body or body part” and is “arrived at by determining the impairment of the

90. See *Jimenez*, 839 N.W.2d at 648–50.

91. See *id.* at 648–50.

92. Arthur C. Hedberg, Jr. & Phillip Vonderhaar, *An Overview of the Iowa Workers' Compensation Act*, 30 DRAKE L. REV. 809, 824 (1980).

93. IOWA CODE ANN. § 85.34(2) (West 2017). The other ways of measuring benefits in Iowa include temporary total disability, temporary partial disability, and permanent total disability. See *id.* §§ 85.32–.34.

94. Hedberg, Jr. & Vonderhaar, *supra* note 92, at 827.

95. IOWA CODE ANN. § 85.34(2); *Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 605 (Iowa 2005) (citing *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 653 (Iowa 2000)).

96. IOWA CODE ANN. § 85.34(2)(a)–(t).

97. *Id.*; *Sandberg v. Rubbermaid Home Prods.*, No. 08–0191, 2008 WL 5234378, at *3 (Iowa Ct. App. Dec. 17, 2008).

employee's body function"—i.e., the functional impairment.⁹⁸ Compensation for scheduled losses is not related to the employee's earning capacity.⁹⁹

On the other hand, unscheduled injuries (losses) are compensated by making a determination as to the employee's industrial disability.¹⁰⁰ Industrial disability benefits resulting from an unscheduled injury are intended to compensate an employee for lost earning capacity.¹⁰¹ There are a variety of factors that are considered in determining an employee's industrial disability and loss of future earning capacity.¹⁰² These factors include "the employee's functional impairment, age, education, intelligence, work experience, qualifications, ability to engage in similar employment, and adaptability to retraining."¹⁰³ These factors are used to determine the extent to which the work injury impairs the ability of the employee to earn wages.¹⁰⁴ Although the employee's functional disability is indeed important in determining industrial disability it is not the sole factor.¹⁰⁵ Rather, "The focus is 'on the ability of the worker to be gainfully employed.'"¹⁰⁶

For scheduled injuries, an employee's immigration status is of little or no consequence in the action. The injuries and compensation benefits payable are listed and defined in the statute, and compensation is not related to the earning capacity of the employee.¹⁰⁷ However, compensation for

98. *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 14 (Iowa 1993) (citing *Simbro v. Delong's Sportswear*, 332 N.W.2d 886, 887 (Iowa 1983)).

99. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 320 (Iowa 1998) (citing *Honeywell, II v. Allen Drilling Co.*, 506 N.W.2d 434, 437 (Iowa 1993)).

100. *Id.* at 320–21.

101. *Greenfield v. Cincinnati Ins. Co.*, 737 N.W.2d 112, 122 (Iowa 2007) (citing *Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 265 (Iowa 1995)).

102. *Keystone Nursing Care Ctr. v. Craddock*, 705 N.W.2d 299, 306 (Iowa 2005) (citing *Myers v. F.C.A. Servs., Inc.*, 592 N.W.2d 354, 356 (Iowa 1999)).

103. *Id.* (citing *Myers*, 592 N.W.2d at 356).

104. *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 14–15 (Iowa 1993) (citing *Simbro v. Delong's Sportswear*, 332 N.W.2d 886, 887 (Iowa 1983)).

105. *Keystone Nursing Care Ctr.*, 705 N.W.2d at 306 (citing *Myers*, 592 N.W.2d at 356).

106. *Id.* (quoting *Myers*, 592 N.W.2d at 356).

107. *Cf. IOWA CODE ANN.* § 85.34(2)(a)–(t) (West 2017) (listing compensation determined by type of injury, independent of other factors); *Sherman v. Pella Corp.*, 576 N.W.2d 312, 320 (Iowa 1998) (citing *Honeywell, II v. Allen Drilling Co.*, 506 N.W.2d 434, 437 (Iowa 1993)) ("Compensation for scheduled injuries is not related to earning capacity.").

unscheduled injuries is based on the employee's industrial disability and the lost earning capacity of the employee.¹⁰⁸ As defined above, the assessment of the lost earning capacity of the employee deals with the ability of an injured worker to earn wages in a competitive and open labor market.¹⁰⁹

B. *Iowa Decisions*

The admissibility of an undocumented claimant's status in Iowa's workers' compensation system has not been addressed by statute and has been sparingly examined by the Iowa courts. There are two Iowa decisions worth mentioning, one by the supreme court and the other by the Iowa workers' compensation commissioner, each of which contain a brief discussion of the interplay between a claimant's undocumented status and his or her entitlement to workers' compensation benefits.¹¹⁰

In *Iowa Erosion Control, Inc. v. Sanchez*, the Iowa Supreme Court examined the eligibility for and interpretation of survivorship benefits under the Iowa Code.¹¹¹ Specifically, the court analyzed whether a particular claimant—an undocumented mother whose son was killed in the course of his employment—was appropriately awarded such survivorship benefits.¹¹² The court noted that the prevailing view is that the mother's immigration status had no bearing on her entitlement to benefits, as she was an Iowa resident and the defendant cited no authority to the contrary.¹¹³ The defendant-employer's arguments did not focus on the fact that the mother was legally incapable of working due to her undocumented status, but rather pointed out that she was not dependent on her son.¹¹⁴ The employer argued employers routinely hire undocumented immigrants like the mother, and that her inability to read, write, or become a citizen of the United States were work impediments of her own making.¹¹⁵ The court rejected these arguments

108. *Greenfield v. Cincinnati Ins. Co.*, 737 N.W.2d 112, 122 (Iowa 2007) (citing *Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 265 (Iowa 1995)).

109. *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614, 617 (Iowa 1995).

110. *Iowa Erosion Control, Inc. v. Sanchez*, 599 N.W.2d 711, 715 (Iowa 1999); *Alvarez v. Iowa Bridge & Culvert*, No. 5040527, 2016 WL 695779, at *6 (Iowa Workers' Comp. Com'n Feb. 18, 2016).

111. *Iowa Erosion Control, Inc.*, 599 N.W.2d at 712–13.

112. *Id.* The claimant in the case was a mother seeking survivorship benefits after her son was killed in the course of his employment. *Id.* at 712.

113. *Id.* at 715.

114. *Id.* at 712–13.

115. *Id.* at 715.

and upheld the mother's award of survivorship benefits, as her incapacity of earning was ongoing at the time of trial.¹¹⁶

The Iowa workers' compensation commissioner issued an appeal decision in which the defendants argued that claimant's undocumented status provided a legal impediment to return to the workforce and thus temporary total disability (TTD) benefits should be precluded.¹¹⁷ In the decision, the commissioner pointed out that there is no authority—including statutory authority—that includes the consideration of legal status.¹¹⁸ The commissioner relied on his finding that claimant was medically precluded from returning to work due to his work restrictions and ruled that this medical preclusion remains, regardless of claimant's legal status.¹¹⁹

These two Iowa decisions do not directly address the underlying question posed in this Note. The focus of this Note, and on this Part specifically, is not whether a claimant's undocumented status should act as a bar to receiving benefits, but rather, whether it should be admissible for the fact finder to consider when awarding benefits. The logical inference extending from the *Jimenez* and *Sanchez* opinions is that undocumented claimants are entitled to compensation.¹²⁰ Although the Iowa Supreme Court has not ruled, other jurisdictions have considered the issue of whether a claimant's undocumented status should be considered when awarding permanency benefits.

C. Workers' Compensation Decisions from Other Jurisdictions

In *Visoso v. Cargill Meat Solutions*, the Nebraska Supreme Court considered whether an injured worker was entitled to claim permanency benefits and what "hub community" the loss of future earning capacity determination should be made from.¹²¹ While the proceeding was pending,

116. *Id.* at 715–16.

117. *Alvarez v. Iowa Bridge & Culvert*, No. 5040527, 2016 WL 695779, at *6 (Iowa Workers' Comp. Com'n Feb. 18, 2016).

118. *Id.*

119. *Id.* The court also decided that to any extent that defendant's argument was directed at preemption of the IRCA as a bar against TTD benefits, that issue was decided in *Staff Management v. Jimenez*, 839 N.W.2d 640 (Iowa 2013). *Alvarez*, 2016 WL 695779, at *6.

120. *See Jimenez*, 839 N.W.2d at 650; *Iowa Erosion Control, Inc.*, 599 N.W.2d at 715.

121. *See Visoso v. Cargill Meat Sols.*, 826 N.W.2d 845, 856 (Neb. 2013). The Nebraska Supreme Court previously used the term "hub community" to explain that "a 'labor market' does not refer to a single community, but encompasses employment

the undocumented claimant returned to his home country of Mexico.¹²² After determining that undocumented workers such as the claimant are covered by the state's workers' compensation laws, the court held that the claimant was entitled to pursue permanency benefits including loss of future earning capacity.¹²³ The remaining question was which hub community the loss of future earning capacity should be measured by: one derived from the claimant's country of origin, or one derived from the area in Nebraska where the claimant was employed.¹²⁴ The experts in the case attempted to determine the lost earning capacity at wage levels in the claimant's country of origin, but there was not any reliable data readily available.¹²⁵ The court held that the lack of data did not mean the claimant was precluded from recovering loss of future earning capacity benefits at wage levels in the Nebraska community where the injury occurred.¹²⁶ The court noted, "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."¹²⁷

In *Ramroop v. Flexo-Craft Print, Inc.*, the New York Court of Appeals considered whether an undocumented claimant could recover additional compensation for the impairment of the claimant's wage earning capacity from a permanent partial disability.¹²⁸ Under New York workers' compensation law, the worker was required to participate in a retraining and rehabilitation program approved by the workers' compensation board in order to qualify for additional compensation.¹²⁹ The court determined the claimant did not qualify for additional compensation because, as an undocumented immigrant and therefore legally unemployable, no rehabilitation program was available to the claimant.¹³⁰

opportunities within a reasonable geographic area." *Giboo v. Certified Transmission Rebuilders*, 746 N.W.2d 362, 375 (Neb. 2008).

122. *Visoso*, 826 N.W.2d at 855.

123. *Id.* ("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.")

124. *Id.* at 855-56.

125. *Id.* at 856-58.

126. *Id.* at 858.

127. *Id.* at 859.

128. *See Ramroop v. Flexo-Craft Printing, Inc.*, 896 N.E.2d 69, 69-70 (N.Y. 2008).

129. *Id.* at 71 (citing N.Y. WORKERS' COMP. LAW § 15(3)(v) (McKinney 2017)).

130. *Id.* at 71-72.

D. *Analysis and Proposal Under Iowa Workers' Compensation Law*

The undocumented status of a claimant should be admissible with regard to PPD benefits in light of the factors that are used to determine industrial disability.¹³¹ The question is about the employee's ability to earn wages and the loss of access to the job market.¹³² Due to the federal statutory prohibition on hiring an undocumented immigrant, a claimant's immigration status should be admissible to allow the fact finder to weigh the uncertainty of that claimant obtaining another job in the United States.¹³³

Additionally, in the workers' compensation context, the prejudicial effect that such evidence would have on the jury is absent here. In Iowa, workers' compensation cases are not decided by juries, but rather by administrative law judges known as deputy workers' compensation commissioners.¹³⁴ Appeal of a deputy's decision, subject to de novo review, is therefore to the Iowa workers' compensation commissioner and then to the district court and the Iowa appellate courts.¹³⁵ In other words, the fact finders are impartial, law-trained individuals with expertise in workers' compensation matters.¹³⁶ Given the fact that impartial deputies decide these cases, it should be assumed that they could properly use evidence of a claimant's immigration status for a limited purpose. The danger that the fact finder would use this evidence for an improper purpose—a purpose other than strictly the calculation of compensation for loss of future earning capacity—is limited. In fact, the workers' compensation system trusts these trained administrative law judges to follow the law that they have sworn to administer.¹³⁷ The notion of “agency expertise” is well grounded in Iowa law.¹³⁸

The deputy workers' compensation commissioners in Iowa should be allowed to assess the individual facts of each specific case and determine the weight to give undocumented status. For instance, if the particular facts of a

131. See *Keystone Nursing Care Ctr. v. Craddock*, 705 N.W.2d 299, 306 (Iowa 2005).

132. *Id.*

133. See, e.g., *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1002 (N.H. 2005).

134. IOWA CODE ANN. § 86.17(1) (West 2017).

135. *Id.* §§ 17A.15, 17A.19, 17A.20, 86.24(1).

136. See *id.* § 86.17(1).

137. See *Second Injury Fund of Iowa v. Braden*, 459 N.W.2d 467, 471 (Iowa 1990) (citing *Morrison v. Century Eng'g*, 434 N.W.2d 874, 876 (Iowa 1989)).

138. *Id.* at 468 (“[W]e defer to the expertise of the agency but reserve for this court the final interpretation and construction of pertinent statutes.”) (citing *Graves v. Eagle Iron Works*, 331 N.W.2d 116, 117 (Iowa 1983)).

case show that a worker has little or no likelihood of deportation and that the worker could and would qualify for a working visa or green card if an application were filed, then the deputy commissioner should give little or no weight to the claimant's undocumented status. This individual would legally be able to hold employment in the United States and the commissioner could then appropriately award loss of future earning capacity based on U.S. wages.¹³⁹ Although this process might lengthen the proceeding, it would allow the commissioner to issue awards at the appropriate wage level.

On the other hand, if the claimant were subject to immediate deportation or intended to return to his or her country of origin (like the claimant in *Visoso*), the deputy commissioner should be able to consider this undocumented status when awarding permanency benefits for loss of future earning capacity.¹⁴⁰ Not allowing the deputy commissioner to consider this information deprives the fact finder of all of the relevant facts when awarding benefits to a claimant.¹⁴¹ The deputy commissioner in this example could use this information, along with all other relevant facts in the case, to make an individualized determination on the permanency benefits and the loss of future earning capacity benefits to award a claimant.

The Iowa Supreme Court in *Jimenez* noted that construing an employment agreement with an undocumented worker as outside the scope of the Workers' Compensation Act would undermine the purpose of the act—"to make statutory compensation available to employees when the employees sustain injuries as a result of the hazards of the business."¹⁴² Allowing a deputy workers' compensation commissioner to consider the claimant's undocumented status would not thwart this purpose of making statutory compensation available to employees.¹⁴³ Undocumented workers are considered "employees" under the Act and should not be denied compensation.¹⁴⁴ However, in order to fairly compensate these employees, the workers' compensation commissioner needs to be able to consider the undocumented status of a claimant as a factor in the loss of future earning capacity analysis, without creating a fiction that these employees can legally

139. *See Ayala v. Lee*, 81 A.3d 584, 598 (Md. Ct. Spec. App. 2013).

140. *See Visoso v. Cargill Meat Sols.*, 826 N.W.2d 845, 857 (Neb. 2013).

141. *See id.*

142. *Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 650 (Iowa 2013) (citing *Crooke v. Farmers' Mut. Hail Ins. Ass'n*, 218 N.W. 513, 514 (Iowa 1928)).

143. *See id.* (citing *Crooke*, 218 N.W. at 514).

144. *Id.* at 648–49.

work in the United States.¹⁴⁵

In *Acuity Ins. v. Foreman*, a permanent total disability (PTD) case, despite the fact that the claimant was still working and earning money, the Iowa Supreme Court stated, “The pertinent question is whether ‘there [are] jobs in the community that the employee can do for which the employee can realistically compete.’”¹⁴⁶ The court noted that earning capacity should be evaluated based on the competitive job market without consideration of the accommodations provided by claimant’s present employer and also noted the increase in claimant’s earnings was of relatively minor importance.¹⁴⁷ “If post-injury earnings do not reflect [the] ability to compete with others for wages, they are not a proper measure of earning capacity.”¹⁴⁸ It is intellectually dishonest to claim one is measuring the inability of the claimant to engage in similar employment and is viewing the loss in terms of the competitive job market without considering the fact that the claimant is not legally entitled to compete in that job market.

1. Policy Concerns from Other Jurisdictions

There are various courts across the country that have considered this issue and come out on the other side, holding that administrative law judges and their functional equivalents should not be able to consider the undocumented status of a claimant.¹⁴⁹ Part of the logic of these courts is that allowing mention of immigration status would encourage employers across the country to employ undocumented workers due to increased economic incentives.¹⁵⁰ The reasoning is that by potentially having to pay fewer benefits due to the undocumented status of a claimant, employers would be incentivized to hire undocumented employees, especially in high-risk jobs.¹⁵¹

Although deterring employers from hiring undocumented immigrants

145. See *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 331 (Minn. 2003) (Gilbert, J., dissenting).

146. *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 219 (Iowa 2004) (alteration in original) (quoting *Second Injury Fund of Iowa v. Shank*, 516 N.W.2d 808, 815 (Iowa 1994)) *abrogated by* *Hohlhaas v. Hog Salt, Inc.*, 777 N.W.2d 387 (Iowa 2009).

147. *Id.* at 220.

148. *U.S. W. Commc’ns, Inc. v. Overholser*, 566 N.W.2d 873, 876 (Iowa 1997) (quoting *Peoples v. Cone Mills Corp.*, 342 S.E.2d 798, 805–06 (N.C. 1986)).

149. See, e.g., *Campos v. Daisy Constr. Co.*, 107 A.3d 570, 582–83 (Del. 2014); *Correa*, 664 N.W.2d at 331 n.4.

150. *Campos*, 107 A.3d at 582; *Correa*, 664 N.W.2d at 331 n.4.

151. *Campos*, 107 A.3d at 582; *Correa*, 664 N.W.2d at 331 n.4.

is a sound policy argument, there are already deterrents in place aimed at preventing this practice.¹⁵² First, it is illegal under the IRCA to knowingly hire undocumented immigrants.¹⁵³ Thus, because it is a criminal offense to hire undocumented workers, it would run contrary to established law to effectively incentivize employers to hire undocumented workers.¹⁵⁴ Additionally, it is illegal under the IRCA to continue employing an undocumented immigrant once the employer has learned of the illegal status.¹⁵⁵ The IRCA provisions are “enforced through criminal penalties and an escalating series of civil penalties tied to the number of times an employer has violated the provisions.”¹⁵⁶ Recently, the Department of Justice boosted the penalty for the hiring of undocumented workers to increase the deterrent effects of this illegal practice.¹⁵⁷

Furthermore, if the discovery of a claimant’s undocumented status is allowed in a workers’ compensation proceeding and it is revealed that the employer knowingly hired an undocumented immigrant or did not perform its due diligence as mandated under the IRCA, the workers’ compensation commissioner could turn this information over to the proper authorities.¹⁵⁸ Unlike the IRCA, the Iowa Workers’ Compensation Act was never intended to deter the criminal conduct of hiring undocumented workers.¹⁵⁹ Moreover, the claim that employers will be encouraged to hire undocumented workers

152. See, e.g., 8 U.S.C. § 1324a(a)(1) (2012); *DOJ Increasing Penalty for Hiring Illegal Immigrants*, FOXNEWS POL. (June 30, 2016), <http://www.foxnews.com/politics/2016/06/30/doj-increasing-penalty-for-hiring-illegal-immigrants.html> [hereinafter *DOJ Increasing Penalty*].

153. 8 U.S.C. § 1324a(a)(1).

154. See *id.*

155. *Id.* § 1324a(a)(2).

156. *Palma v. NLRB*, 723 F.3d 176, 185 (2d Cir. 2013) (emphasis omitted) (quoting *Arizona v. United States*, 567 U.S. 387, 404 (2012)).

157. *DOJ Increasing Penalty*, *supra* note 152.

158. See *Immigration: Enforcing Employee Work Eligibility Laws and Implementing a Stronger Employment Verification System: Hearing Before the Subcomm. on Emp’r-Emp. Relations of the H. Comm. on Educ. and the Workforce*, 109th Cong. (2006) (statement of John Chawkings, Special Agent in Charge, Immigration and Customs Enf’t), <https://www.gpo.gov/fdsys/pkg/CHRG-109hhr28875/html/CHRG-109hhr28875.htm>.

159. See *Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 650 (Iowa 2013) (“The purpose of the IRCA was to inhibit employment of undocumented workers. . . . The purpose of the Iowa Workers’ Compensation Act is to make statutory compensation available to employees when the employees sustain injuries as a result of the hazards of the business.”).

is nothing more than an unsupported assertion that simply does not stand up to scrutiny. To believe the assertion, one would have to believe that employers in the state of Iowa will risk criminal punishment, fines, and sanctions all in an effort to avoid a theoretical workers' compensation claim.¹⁶⁰

Just like the proposals above, the proposal herein is far more modest than other approaches. Certainly, a legitimate argument can be made for an adoption of the *Rosa* standard in the workers' compensation context.¹⁶¹ As noted above, the *Rosa* court adopted a general rule that a plaintiff could not recover at U.S. pay rates, but it did create an exception if the plaintiff could prove that the employer knew or should have known about the plaintiff's illegal status but continued to employ them illegally.¹⁶² This approach makes far greater sense in an agency setting where the risk of prejudice is far less substantial due to the experience and legal training of the fact finder.

IV. CONCLUSION

There is no doubt that the debate over illegal immigration is at the forefront of conversation in the United States. Although evidence of status can be prejudicial, the illegal status of a plaintiff should be admissible against a plaintiff attempting to claim loss of future earnings at U.S. wage levels. With the proposals laid out throughout this Note, such as the bifurcation of the trial or a limiting instruction, the increased risk that a jury would use this information for improper purposes is diluted.¹⁶³

Furthermore, in Iowa worker's compensation cases, the undocumented status of a claimant should be admissible because there is a reduced risk that this evidence would be used for improper purposes due to the impartiality of the presiding workers' compensation commissioner and deputy commissioners.¹⁶⁴ Additionally, this information is clearly relevant on the issue of future earnings when the undocumented status of a claimant prevents that claimant from legally seeking employment in the United States.¹⁶⁵

Relevant evidence is always admissible if the probative value

160. See 8 U.S.C. § 1324a(a)(1) (2012).

161. See *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1002 (N.H. 2005).

162. *Id.*

163. *Supra* Part II.C.

164. *Supra* Part III.D.

165. *Supra* Part III.

outweighs its prejudicial effect. As demonstrated, the probative value of an undocumented worker's status outweighs its prejudicial effect when calculating loss of future earning capacity and lost future earnings, and therefore, should be admissible within the constraints defined herein.

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