

The New York Sun

February 22, 2006

## Court Rules Illegal Immigrants Eligible for Lost Wages

By DANIELA GERSON, Staff Reporter of the Sun

New York's top court ruled yesterday that illegal immigrants are eligible to recover lost wages that result from workplace injuries.

At issue was whether under state and federal immigration law undocumented workers should be afforded the same labor rights as legal workers. The Court of Appeals concluded yesterday, in a 5-2 decision, that illegal immigrants can receive personal injury compensation. Not providing it would actually hurt the enforcement of immigration laws, the court said.

"Limiting a lost wages claim by an injured undocumented alien would lessen an employer's incentive to comply with the Labor Law and supply all of its workers the safe workplace that the Legislature demands," Judge Victoria Graffeo wrote for the court.

New York's high court is among the first to consider the issue; the case has been closely followed around the nation. It took on a higher profile in New York when Attorney General Eliot Spitzer joined as an intervener on behalf of the plaintiffs.

The ruling is based on two cases of illegal immigrant laborers, a Mexican and a Pole, who alleged they were injured while working on construction sites and sued for lost wages.

The Mexican plaintiff, Gorgonio Balbuena, fell when pushing a wheelbarrow up a ramp in 2000. Having sustained severe head trauma that will prevent him from working the rest of his life, he sued his employer for lost wages.

The third-party defendant, Taman Management Corporation, argued that under federal immigration laws, Mr. Balbuena is not eligible for future lost wages because of his status as an illegal immigrant.

In response, the New York Supreme Court took an unusual approach, concluding that Mr. Balbuena could not receive wages he had illegally earned in America but should be compensated with what he could have earned in his native Mexico.

Yesterday's decision says he may be compensated with lost future American wages.

Because the case of the Polish immigrant, Stanislaw Majlinger, addressed a similar injury to an undocumented worker, the Court of Appeals folded the two cases together to address the central issue of "whether an undocumented alien injured at a work site as a result of state Labor Law violations is precluded from recovering lost wages due to immigration status."

Noting that "the power to regulate immigration rests exclusively with the federal government," Judge Graffeo concluded that state Labor Law "applies to all workers in qualifying employment situations - regardless of immigration status - and nothing in the relevant statutes or our decisions negates the universal applicability of this principle."

Moreover, she wrote, by not providing compensation to illegal immigrants, the state would encourage their employment, deterring federal objectives.

Judge George Smith wrote in the dissenting opinion that providing such benefits to undocumented immigrant workers is a violation of federal and state law, as both bar recovery of the "loss of an opportunity to work illegally."

Because the undocumented immigrants are benefiting from illegal employment, their "claims thus put at risk the duty of courts in our legal system to avoid the promotion of illegality," Judge Smith wrote. While he maintained this rule is not absolute, he wrote that Messrs. Balbuena and Majlinger fall into this category because they are seeking compensation for work that would have been performed illegally. "Federal immigration law preempts any New York law which would otherwise permit a lost earnings award in these cases," Judge Smith concluded.

An attorney for Taman Management, Reed Podell, said his client is considering whether it will appeal to the U.S. Supreme Court. In the meantime, he warned, the decision will likely provoke increased litigation because of its narrow scope that does not include other types of injuries, such as slips and falls, or those that are not permanently debilitating.