No. 09-60095

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BOLLINGER SHIPYARD, INC.,
and
AMERICAN LONGSORE MUTUAL ASSOCIATION, LTD.,

Petitioners,

v.

JORGE RODRIGUEZ
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Review of a Final Order
Of the Benefits Review Board

BRIEF FOR THE FEDERAL RESPONDENT


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## STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 28.2.2, the Director, OWCP, requests oral argument, which he believes would assist the Court.

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Of the Benefits Review Board

BRIEF FOR THE FEDERAL RESPONDENT

## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arises from a claim filed by Jorge Rodriguez for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (2006) ("Longshore Act" or "Act"). The Administrative Law Judge ("ALJ") had

jurisdiction to hear the claim pursuant to sections 19(c) and (d) of the Longshore Act. 33 U.S.C. § 919(c), (d).[1] The ALJ's Decision and Order Granting Benefits ("ALJ Decision") was issued March 24, 2008, and became effective when filed in the office of the District Director on March 25, 2008. Record Excerpts ("RE"), Tab A, pp. 1, 17; 33 U.S.C. § 921(a). Bollinger Shipyard, Inc. and American Longshore Mutual Association, Ltd. (collectively, "Employer" or "Bollinger") filed a Notice of Appeal of the ALJ's decision with the Benefits Review Board on April 3, 2008, within the thirty-day period provided by section 21(a) of the Longshore Act. The appeal invoked the Board's review jurisdiction pursuant to section 21(b)(3) of the Act.

The Board issued its Decision and Order affirming the ALJ's decision on December 19, 2008. RE Tab B. Section 21(c) of the Act provides that any party aggrieved by a final decision of the Board can obtain judicial review in the United States Court of Appeals in which the injury occurred by filing a petition for review within sixty days of the Board's order. Here, Bollinger filed its Petition for

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[1] Unless otherwise noted, all statutory references are to the Longshore Act, with section xx, for example, referring to 33 U.S.C. § 9xx.

Review with this Court on February 11, 2009, within the prescribed sixty-day period. The Board's order is final pursuant to section 21(c) because it completely resolved all issues presented. *See Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406 (5th Cir. 1984) (en banc). The Claimant sustained his injury in Louisiana, within this Court's jurisdiction. Thus, pursuant to section 21(c), this Court has jurisdiction over Bollinger's petition for review.

## STATEMENT OF THE ISSUE

Is Rodriguez, an undocumented alien injured while engaged in maritime employment, covered by the Longshore Act?

## STATEMENT OF THE CASE

Rodriguez sought benefits under the Longshore Act for an injury incurred while working for Bollinger on October 22, 2003. In a decision dated March 24, 2008, an ALJ awarded him compensation for temporary total disability from the date of his injury forward. Bollinger appealed to the Board, which affirmed the ALJ's decision in a Decision and Order dated December 19, 2008. Bollinger timely petitioned this Court for review on February 11, 2009.

## STATEMENT OF FACTS

### A. Rodriguez's employment and injury.

Rodriguez entered the United States unlawfully in 1990. Tr. 55. He worked for approximately eight years in Texas. Tr. 55-56. In 1998 he came to Louisiana,

and worked as a fitter or welder for various employers for another five years until his injury. Tr. 56-57. He began working for Bollinger as a pipefitter in March 2003. Tr. 50-52. On October 22, 2003, he was injured when he fell while welding a joint on a vessel under repair. Tr. 33, 34. He continued to perform light duty work until approximately November 18, 2003, when persistent pain caused him to stop. Tr. 63.

Bollinger paid temporary total disability compensation to Rodriguez from November 19, 2003 to November 1, 2005. RE Tab A at 3 (Stipulations). Bollinger also paid some medical benefits, but refused to authorize surgery recommended by Dr. Hamsa, an orthopedist treating Rodriguez. RE Tab B at 2. Bollinger ceased paying any compensation after November 1, 2005, when Rodriguez declined to meet with its vocational expert. Tr. 146. Rodriguez then filed this claim seeking additional compensation. Bollinger did not discover that Rodriguez was an undocumented alien and had presented a false social security number when hired until it deposed him in July 2007. EX 11 at 10, Tr. 107, 153.

**B. The ALJ's decision.**

The ALJ ruled that Rodriguez was temporarily totally disabled by a back injury from the date of his injury and continuing. RE Tab A at 10, 15. This ruling was based on the ALJ's determination that Rodriguez was a credible witness, Dr. Hamsa's medical opinion, Rodriguez's treatment history, and evidence of disc

herniation and limited motion. *Id.* at 9. Bollinger argued that suitable alternative employment was available to Rodriguez and its vocational expert identified several jobs he believed Rodriguez could perform. *Id.* The ALJ considered this evidence, but ultimately found that Rodriguez was currently unable to perform any work due to pain from his injury. *Id*. at 10.

The ALJ found that Rodriguez had an average weekly wage of $568, resulting in a weekly compensation rate of $378.67. *Id*.[2] Bollinger argued that Rodriguez had no legal wage-earning capacity to lose because he was an undocumented alien. *Id*. at 8. The ALJ noted that Bollinger's reliance on *Hernandez v. M/V Rajaan*, 841 F.2d 582, *amended after rehearing*, 848 F.2d 498 (5th Cir. 1988), was inapposite because Bollinger had not presented evidence that Rodriguez would soon be deported. RE Tab A at 13. Relying on *Rivera v. United Masonry, Inc*., 948 F.2d 774 (D.C. Cir. 1991), for the proposition that it is a legal fiction to assert that an undocumented alien has no earning capacity, the ALJ

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[2] Longshore compensation is based on an injured worker's average weekly wage at the time of the injury. 33 U.S.C. § 910. Claimants who are totally disabled, whether temporarily or permanently, receive 2/3 of their average weekly wage as compensation. 33 U.S.C. § 908(a)-(b).

found that Rodriguez's immigration status did not affect his compensation rate. *Id*. at 13-14.

**C. The Board's decision.**

Bollinger appealed to the Benefits Review Board. The Board rejected Bollinger's argument that its vocational evidence showed the availability of suitable alternative employment. It found that "[s]ubstantial evidence supports the administrative law judge's finding that claimant is incapable of performing any work," RE Tab B at 4, and concluded that, where a claimant cannot perform any work, vocational evidence regarding the availability of other jobs is "moot." *Id*. at 5.

The Board also rejected Bollinger's argument that an undocumented alien has no wage-earning capacity because he cannot legitimately obtain employment. RE Tab B at 4. The Board relied in part on the same grounds cited by the ALJ. *Id*. at 5-6. The Board also found that undocumented aliens are eligible for compensation based on two provisions in the Act. First, it noted that the definition of the term "employee" in section 2(3) of the Act includes "any person engaged in maritime employment," and that none of the exceptions to that definition precludes coverage based on immigration or citizenship status. *Id*. at 6-7. Second, it cited to section 9(g) of the Act, 33 U.S.C. § 909(g), and 20 C.F.R. § 702.142, which provide that nonresident aliens and aliens who are about to become

nonresidents are generally entitled to compensation "in the same amount as provided for residents." Based on these provisions, the Board concluded that "the Act does not differentiate between the disability compensation paid to illegal aliens and that paid to legal residents and/or citizens of the United States." *Id*. at 7.

## SUMMARY OF ARGUMENT

Undocumented aliens are covered by the Longshore Act. This is apparent from the text of the Act, this Court's precedents, and the Act's origin as a substitute for tort claims. First, the text of the Act defines "employee" as "any person engaged in maritime employment," does not exclude undocumented aliens from this definition despite excluding other specific classes of individuals, and specifically provides that aliens are entitled to compensation. Second, this Court affirmed that undocumented aliens have the right to bring third-party negligence suits under section 5(b) of the Act in *Hernandez*. This strongly supports the Director's view that undocumented aliens are covered by the Longshore Act, because only "a person covered under [the Act]" may bring a 5(b) claim. 33 U.S.C. § 905(b). Third, the Longshore Act, like most workers' compensation acts, is a substitute for tort claims. Because it is well-established that undocumented aliens have the right to sue in tort, they logically have the right to file Longshore Act claims.

The fact that undocumented aliens are covered by the Act fatally undermines Bollinger's argument that Rodriguez could not suffer a compensable injury because he had no wage-earning capacity to lose. As the ALJ properly recognized, workers covered by the Act are entitled to compensation based on their actual wages "at the time of the injury." 33 U.S.C. § 910 (an injured employee's compensation rate is based on his "average weekly wage . . . *at the time of the injury*"). There is no dispute that Rodriguez was earning wages at the time of his injury. Nor does *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), in any way undermine the Director's interpretation of the Act.

## STANDARD OF REVIEW

In reviewing a decision of the Board, this Court's "only function is to correct errors of law and to determine if the BRB has adhered to its proper scope of review – *i.e.*, has the Board deferred to the ALJ's fact-finding or has it undertaken de novo review and substituted its views for the ALJ's." *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 1119 n.1 (5th Cir. 1980). With regard to questions of law, the Court's review of the Board's decisions is de novo. *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 483 (5th Cir. 2003). However, the Director's interpretation of the Longshore Act is entitled to deference. *Id.* at 483.

## ARGUMENT

### A. The plain text of the Longshore Act demonstrates that it covers undocumented aliens.

"The construction of a statute begins with the text of the statute itself." *Smith v. City of Jackson, Miss.*, 351 F.3d 183, 188 (5th Cir. 2003). As the Board recognized, the plain text of the Act demonstrates that it covers undocumented aliens. RE Tab B at 5-7. While the Act does not explicitly address the issue, its broad definition of covered employees and its failure to include undocumented aliens among its specifically-enumerated exclusions leaves little room for doubt on this score. This conclusion is further supported by the Act's express recognition that nonresident and soon-to-become nonresident aliens are entitled to compensation.

Section 2(3), which defines who is an "employee" covered by the Act, not only broadly encompasses "any person engaged in maritime employment" but also specifically includes "a ship repairman." 33 U.S.C. § 902(3). There can be no dispute that Rodriguez – a pipefitter injured while repairing a ship – is an "employee" covered by the Longshore Act unless he is otherwise excluded from coverage. Tr. 33, 34, RE Tab A at 3.

Congress expressly excluded several specific categories of maritime workers from the Act's coverage. Section 2(3) itself excludes, *inter alia*, clerical

workers, retail outlet employees, aquaculture workers, and crew members of a vessel who are eligible for state workers' compensation benefits. 33 U.S.C. § 902(3)(A)-(H). In addition, section 3(b) excludes federal, state, and foreign government employees from coverage, and section 3(c) excludes maritime employees injured solely by their own intoxication or their own attempt to injure themselves or others. 33 U.S.C. § 903(b)-(c).

Nowhere in the Act, however, did Congress exclude undocumented aliens from coverage. The Court should decline Bollinger's invitation to graft an additional exception to the Longshore Act. *See Mellen v. H.B. Hirsch & Sons*, 159 F.2d 461 (D.C. Cir. 1947) (refusing to "add an exception covering cases in which the injured employee is employed . . . in violation of the child labor law" to the Longshore Act's exclusivity provision, 33 U.S.C. § 905(b), because that provision had only one exception, and "[t]here is no reason to suppose that Congress did not mean what it plainly said."). The Supreme Court and this Court have similarly refused to exempt undocumented aliens from the coverage of other federal labor and employment laws. *See*, *e.g.*, *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 981-92 (1984) ("Since undocumented aliens are not among the few groups of workers expressly exempted by Congress [from the NLRA], they plainly come within the broad statutory definition of 'employee'"); *In re Reyes*, 814 F.2d 169, 170 (5th Cir. 1987) ("[I]t is well-established that the protections of the Fair Labor

Standards Act are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant.”).[3]

Nor did Congress simply overlook the question of whether aliens are covered by the Act. The Act explicitly provides that nonresident aliens, and soon-to-become nonresident aliens, are entitled to the same basic compensation as residents. 33 U.S.C. § 909(g) (“Aliens: Compensation under this chapter[4] to aliens not resident (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents[.]”).[5] While section 9(g) does not specifically refer to “illegal” or “undocumented” aliens, courts interpreting similar state workers’ compensation statutes have concluded that the

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[3] *See generally Ventas, Inc. v. United States*, 381 F.3d 1156, 1161 (Fed. Cir. 2004) (“Where Congress includes certain exceptions to a statute, the maxim *expressio unius est exclusion alterius* presumes that those are the only exceptions Congress intended.”) (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 158, 188 (1978)).

[4] The “chapter” section 9(g) refers to, Chapter 18 of Title 33 of the United States Code, is the Longshore Act in its entirety.

[5] There are two exceptions to the rule that a nonresident alien is entitled to the same compensation as a resident. The Secretary has the option to commute future compensation payments (allowing an employer to end its liability for future payments by paying a claimant one-half of the amount of those future payments as a lump sum). 33 U.S.C. § 909(g). In addition, the types of dependents eligible for benefits is more limited. *Id.* The Act does not extend these limitations to resident aliens.

unmodified term 'alien' encompasses both documented and undocumented aliens. *See*, *e.g.*, *Correa v. Waymouth Farms, Inc.,* 664 N.W.2d 324, 329 (Minn. 2003) ("the clear language of the [Minnesota workers' compensation statute, which defines 'employee' as including 'an alien'] does not distinguish between authorized and unauthorized aliens. Following our rules of statutory construction, when the words of a law are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing its spirit."); *Economy Packing Co. v. Illinois Workers' Compensation Commission,* 901 N.E.2d 915, 920 (Ill. App. 2008) (The term 'aliens' "includes not only foreign-born citizens that can legally work in the United States, but also those that cannot. Had the legislature intended otherwise, it could have defined the term or modified it with more specific language."); *Rajeh v. Steel City Corp*., 813 N.E.2d 697, 700-01 (Ohio Ct. App. 2004) (same).

These three sections of the Act teach a clear lesson. Rodriguez, injured while repairing a ship, is a maritime employee covered by the Act under section 2(3). Sections 2(3)(A)-(H) and 3 demonstrate that Congress knew how to exclude categories of maritime employees from the Act's coverage. Section 9(g) shows Congress' awareness that issues related to the alien and residency status of a claimant were relevant to the Act. Despite this knowledge, Congress did not exclude undocumented aliens from the Act's coverage. The only reasonable

conclusion to draw from these facts is that Congress intended the Act to apply to undocumented aliens.[6]

### B. This Court recognized that undocumented aliens are covered by the Longshore Act in *Hernandez v. M/V Rajaan.*

This Court has already recognized, at least implicitly, that undocumented aliens are covered by the Longshore Act. The plaintiff in *Hernandez v. M/V Rajaan*, 841 F.2d 582, *amended after rehearing*, 848 F.2d 498 (5th Cir. 1988), an undocumented alien employed as a longshore worker, was permanently paralyzed when a defective winch caused a sack of rice to fall on him. 841 F.2d at 585. He sued the vessel and its owner for negligence under section 5(b), 33 U.S.C. § 905(b), and the district court awarded him damages, including damages for lost wages based on his prior earnings in the United States. The vessel owner argued that Hernandez "should be deemed ineligible to recover lost future United States wages and United States medical expenses because he was not entitled to be present and employed in the United States for the remainder of his life." 848 F.2d

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[6] Even if the plain language of the Act did not compel this result, the Director's view that the Act covers undocumented aliens is consistent with the Supreme Court's teaching that the Act's coverage provisions should be interpreted broadly. *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977). This Court should defer to that construction as a reasonable one. *New Orleans Stevedores*, 317 F.3d at 483.

at 500. This Court rejected that argument, and affirmed an award of damages based on Hernandez's earnings in the United States prior to his injury.

*Hernandez* involved a section 5(b) negligence claim rather than the straightforward compensation claim presented here. This distinction, however, is irrelevant as far as coverage under the Act is concerned, because only a "person covered under [the Longshore Act]" may file a section 5(b) negligence claim. 33 U.S.C. § 905(b). If undocumented longshore workers have the right to bring negligence claims under section 5(b), they necessarily have the right to bring compensation claims.

Bollinger attempts to distinguish *Hernandez*, arguing that "the question in *Hernandez* was whether the claimant's 'continuous residency' as defined by Section 1255a(a)(2)(A) of the Immigration Reform and Control Act ("IRCA") qualified him to receive LHWCA benefits." Emp. Br. at 19-21. It is true that the Court's initial opinion in *Hernandez* suggested that the plaintiff "likely" qualified for permanent residency based on that provision. 841 F.2d at 588. However, the Court later withdrew this section of its opinion as improper. 848 F.2d 498, 499. It was replaced by an analysis of the parties' respective burdens of proof in computing damages in section 5(b) negligence claims. *Id.* at 500. The Court concluded that Hernandez properly met his initial burden of establishing his lost wages by pointing to his prior wages while his employer presented no proof that

his wages were likely to decrease in the future. *Id.* Thus, *Hernandez* supports both the proposition that undocumented aliens are covered by the Longshore Act and the proposition that their compensation should be based on the wages they earned in the United States at the time they were injured. *See infra* at 20-22.

### C. Because undocumented aliens have the right to bring tort claims, they have the right to bring claims under the Longshore Act, a substitute for recovery in tort.

That undocumented aliens injured in the course of maritime employment are entitled to Longshore Act compensation is also evident from the basic purpose of the Act. A claim under the Longshore Act replaces the tort action an injured employee could otherwise bring. Because it is well-established that undocumented aliens have the right to sue in tort, it is logical to conclude that they are covered by the Longshore Act, a replacement for that right.

At its core, the Longshore Act, like most workers' compensation statutes, embodies a quid pro quo. Employees give up their right to sue their employers "at law or in admiralty" for workplace injuries by operation of the Act's exclusivity provision. 33 U.S.C. § 905(a). In return, they receive a more limited, but faster and more certain, compensation remedy. *See, e.g.*, *Lockheed Aircraft Corp. v. United States,* 460 U.S. 190, 194 (1983); *Taylor v. Bunge Corp.*, 845 F.2d 1323, 1326 (5th Cir. 1988).

Aliens, even those who enter and work in the United States unlawfully, have the right to sue in tort. This Court affirmed an undocumented alien's right to sue for negligence in *Hernandez*, 848 F.2d 498. It has done so outside the Longshore context as well. *See Rojas v. Richardson*, 703 F.2d 186, 191 (*"Rojas I"*), *reh'g granted on other grounds,* 713 F.2d 116 (5th Cir. 1983) ("*Rojas II*") (tort plaintiff's "status as an 'illegal' alien was completely irrelevant to the negligence claims the jury was to evaluate");[7] *Arteaga v. Allen*, 99 F.2d 509, 510 (5th Cir.

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[7] *Rojas II* did not disturb *Rojas I's* observation that an alien's immigration status is not relevant to his right to recover in negligence, and this Court has subsequently treated *Rojas I* as good law. *See, e.g.*, *Reddin v. Robinson Property Group, Ltd.*, 239 F.3d 756, 760 (5th Cir. 2001); *Marcel v. Placid Oil Co.*, 11 F.3d 563, 567 (5th Cir. 1994); *Peveto v. Sears, Roebuck & Co.*, 807 F.2d 486, 489 (5th Cir. 1987); *Doucet v. Gulf Oil Corp.*, 783 F.2d 518, 524 (5th Cir. 1986). The undocumented alien plaintiff in *Rojas* was employed as a ranch hand and sued his employer for negligence after being thrown from a horse that was allegedly inadequately broken and equipped with a dangerous bridle. *Rojas I*, 703 F.2d at 187. The defense referred to Rojas as an "illegal alien" in its closing argument. *Id.* at 190-91. Rojas did not object to this reference during the trial but, after the jury found against him, appealed the decision, arguing that the remark was unsupported, irrelevant, and prejudicial. *Id.* at 188. The Court ruled that the defendant's closing was an "obvious and blatant appeal . . . to racial and ethnic prejudice" and ordered a new trial, under the plain error rule, despite Rojas' failure to object below. *Id.* 192. On rehearing, the Court learned that the jurors already knew that Rojas was an illegal alien well before the closing arguments. *Rojas II,* 713 F.2d at 118. While reiterating its view that the closing argument was improper, the Court granted the defendant's rehearing request because Rojas failed to object below and the closing argument was not, in light of the jury's prior knowledge, prejudicial enough to constitute plain error. *Id.* at 118.

1938) (negligent homicide claim not barred by victim's alleged illegal status, "if it be assumed that [the victim's] entry was illegal, it could not possibly follow that by such illegal entry he was made an outlaw, whose death any could compass without legal accountability"); *cf. Moreau v. Oppenheim*, 663 F.2d 1300, 1307 (5th Cir. 1981) (noting, in affirming tortuous interference with prospective business relations award to French citizens allegedly in the country unlawfully, "[w]e seriously doubt whether illegal entry, standing alone, makes outlaws of individuals, permitting their contracts to be breached without legal accountability").

Because undocumented aliens may recover in tort, and Longshore Act compensation is a substitute for tort, undocumented aliens should logically be entitled to – and bound by – the Act's compensation scheme. Unsurprisingly, the overwhelming majority of courts that have considered the issue have concluded that undocumented aliens are covered by workers' compensation laws. *See, e.g., Economy Packing Co.,* 901 N.E.2d at 920 (Ill. App. 2008) (undocumented workers covered by state workers' compensation act); *Design Kitchen and Baths v. Lagos*, 882 A.2d 817, 826 (Md. 2005) (same); *Rajeh*, 813 N.E. 2d at 707 (same); *Wet Walls, Inc. v. Ledezma*, 598 S.E.2d 60, 63-64 (Ga. Ct. App. 2004) (same); *Correa* 664 N.W.2d at 329 (Minn. 2003) (same); *Safeharbor Employer Services I, Inc. v. Cinto Velazquez*, 860 So.2d 984, 986 (Fla. Dist. Ct. App. 2003) (same); *Mendoza*

*v. Monmouth Recycling Corp.*, 672 A.2d 221, 225 (N.J. Super. 1996) (same, explaining "it would not only be illogical but it would also serve no discernable public purpose to accord illegal aliens the right to bring affirmative claims in tort for personal injury but deny them the right to pursue the substitutionary remedy for personal injuries sustained in the workplace"); *Artiga v. M.A Patout & Son*, 671 So.2d 1138, 1139 (La. App. 1996) (undocumented alien who obtained job after providing false resident card "cannot be denied workers' compensation because of his status as an illegal alien"); *Lang v. Landeros*, 918 P.2d 404, 406 (Okla. Ct. App. 1996) ("there is no provision in the Oklahoma [Workers' Compensation] Act which precludes compensation for an employee who is an illegal alien").[8]

It is important to recognize that, if Bollinger's position were accepted, both sides of the quid pro quo underlying the Longshore Act would be voided. Undocumented aliens would not have access to the Act's compensation remedy. However, they would also no longer be bound by the Act's exclusivity provision,

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[8] *But see Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510 (Mich. Ct. App. 2003). (denying compensation based on state provision forbidding compensation where claimant is unable to work due to commission of a crime).

and therefore would be free to sue their employers in tort.[9] *See Design Kitchen and Baths*, 882 A.2d at 826 (excluding undocumented aliens from workers' compensation coverage would leave them "with only two options, receive no relief for work related injuries or sue in tort."). As a result, an undocumented alien injured on the job could receive a much larger recovery in tort than an identically-situated citizen or legal resident would receive under the Act. The Act should not be construed to allow such a result.[10]

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[9] The undocumented alien plaintiffs in *Hernandez* and *Rojas* brought negligence actions on the basis of workplace injuries. However, it was not their undocumented status that placed their claims outside the reach of the relevant exclusivity provisions. Hernandez did not sue his employer but a third-party shipowner, which is explicitly permitted by section 5(b) of the Act. Rojas was a rancher, *Rojas I*, 703 F.2d at 187, and "farm and ranch laborers" were not covered by Texas' workers' compensation act at the time. Tex. Rev. Civ. Stat. Ann. art. 8306, § 2 (Vernon Supp. 1982-1983). *See also U.S. Fire Ins. Co. v. Alvarez*, 657 S.W.2d 463 (Tex. App. 1983).

[10] Courts have applied the exclusive remedy of workers' compensation – and thus protected employers from tort liability – in other situations where the underlying employment relationship was unlawful. In *Noreen v. William Vogel & Bros., Inc.*, 231 N.Y. 317, 319, 322 (1921), the employee, a minor who lied about his age to obtain employment, brought a personal injury suit against his employer. Despite the illegal employment relationship, New York's high court held that the employer was protected from tort liability because the employee was covered by the state's workers' compensation statute. This decision is particularly relevant because much of the Longshore Act, including its exclusivity provision, was copied from New York's workers' compensation law. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 275-76 (1980) (Longshore Act provision should

### D. The ALJ properly based Rodriguez's compensation rate on the wages he was earning at the time of his injury.

Bollinger argues that Rodriguez is not entitled to compensation because, as an undocumented worker, he cannot be legitimately employed. *See, e.g.,* Emp. Br. at 15, 18, 24. This is nothing more than a thinly-veiled attempt to argue that undocumented aliens are not covered by the Longshore Act, and is undermined by the same considerations supporting the Director's view. *Supra* at 9-19. Most obviously, it is difficult to reconcile with *Hernandez*, which awarded damages based on an undocumented alien's pre-injury earnings. 842 F.2d at 499-500.

Bollinger points to no provision in the Act, or the caselaw interpreting it, to support its novel proposition that an injured employee's compensation should be based on anything other than the employee's actual wages at the time he was injured. In any event, this proposition is difficult to harmonize with the Act's

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(. . . continued)

"receive the same construction as the substantially identical language of its New York ancestor."). When faced with the same question under the Longshore Act, the District of Columbia Circuit, citing *Noreen*, also concluded that illegally-employed minors could not bring tort actions against their employers because they were covered by the Longshore Act and its exclusivity provision. *Mellen*, 159 F.2d 461 (D.C. Cir. 1947).

compensation provisions. Under section 8 of the Act, compensation is paid to injured workers for disability. 33 U.S.C. § 908. "Disability" is defined as "incapacity because of injury to earn the wages *which the employee was earning at the time of injury*[.]" 33 U.S.C. § 902(10) (emphasis added). Section 10 provides that an injured employee's compensation rate shall be based upon his "average weekly wage . . . *at the time of the injury,*" 33 U.S.C. § 910, and section 8 sets compensation for total disability at two-thirds of that average weekly wage. 33 U.S.C. § 908(a), (b). There is no dispute that Rodriguez was earning wages averaging $568 per week at the time of his injury. RE Tab A at 13. Because of his injury, he is now unable to earn the same wages. He is therefore disabled under the Act and entitled to compensation based on those wages.

Bollinger's remaining arguments are equally unavailing. Its contention that the ALJ "ignored" its vocational expert's testimony about other jobs he believed Rodriguez could obtain, Emp. Br. at 16-17, is both unsupported and, in light of the ALJ's reasonable conclusion that Rodriguez cannot currently perform any work because of his continuing back pain, irrelevant. RE Tab A at 5-6, 9-10. Bollinger's complaint that it cannot prove Rodriguez's post-accident earning capacity without violating immigration law, Emp. Br. at 17-19, 25, is based on the premise that it is required to obtain a job for Rodriguez to prove his ability to work. This is simply false; an employer need only show that jobs are available in

the claimant's area that he is physically capable of performing. *See* RE Tab B at 4 (*citing Ledet v. Phillips Petroleum Co*., 163 F.3d 901 (5th Cir. 1998); *P & M Crane Co. v. Hayes*, 930 F.2d 424, *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1991)). If Rodriguez's condition improves to the extent that he is physically able to work, he may not deny the existence of suitable alternative employment on the ground that no work is available to him because of his immigration status. *Rivera*, 948 F.2d at 775. Thus, despite its repeated suggestions to the contrary, *e.g.*, Emp. Br. at 24-25, Bollinger is in the same position it would be in any Longshore Act case.[11]

Bollinger wisely refrains from any reliance on *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) ("*Hoffman*"). That decision, which set aside the NLRB's award of backpay to an undocumented alien who was unlawfully terminated for engaging in protected union activity, is not opposed to the Director's position in this case. To the contrary, in *Hoffman* the Supreme Court supported that position by reaffirming its earlier holding that "the NLRA applied

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[11] Bollinger's arguments against the ALJ's awards of attorney's fees, interest and medical benefits are unsupported and unfounded. Emp. Br. at 26-29. Employees entitled to compensation are entitled to attorney's fees, 33 U.S.C. § 928, interest, *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1229-30 (5th Cir. 1971), and reasonable medical care arising from their injury. *See* 33 U.S.C. § 907(a).

to undocumented workers." *Id.* at 144 (citing *Sure-Tan*, 467 U.S. 883). *Hoffman* also endorsed the other remedies the NLRB imposed on the employer for its NLRA violations, including cease-and-desist orders backed by contempt sanctions. *Id.* at 152.

While the *Hoffman* Court overturned the Board's backpay award, workers' compensation benefits are not backpay, but compensation for injury. Since *Hoffman* was decided in 2002, the large majority of courts to consider whether *Hoffman* prevents undocumented workers from receiving workers' compensation benefits has concluded that it does not. *See supra* at 17-18 and n.8.[12] The same result should be reached here.

*Hoffman* does not address workers' compensation, and its reasoning is inapplicable to Longshore Act claims for at least four reasons, two of which have

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[12] Courts have also generally rejected arguments that *Hoffman* bars undocumented aliens from the protections of other employment laws. *See, e.g.*, *Zavala v. Wal-Mart Stores, Inc*. 393 F. Supp.2d 295, 321-25 (D.N.J. 2005) (Fair Labor Standards Act) (citing *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988)); *Rivera v. NIBCO, Inc*. 364 F.3d 1057, 1069 (9th Cir. 2004) (expressing "serious doubt" that *Hoffman* is relevant to Title VII claims); *Chellen v. John Pickle Co*., 446 F. Supp.2d 1247, 1286 (N.D. Okla. 2006) (FLSA, Title VII, and 42 U.S.C. § 1981) *Reyes v. Van Elk, Ltd*., 56 Cal. Rptr.3d 68, 71-75 (Cal. App. 2008) (state prevailing wage law); *Coma v. Kansas Dept. of Labor*, 154 P.3d 1080, 1087 (Kan. 2007) (state wage payment law).

already been addressed. First, the NLRA has no provision analogous to section 9(g) of the Longshore Act, which specifically states that aliens are eligible for compensation. *See supra* at 11-12. Second, the NLRA, unlike the Longshore Act, was not enacted as a substitute for tort law. *Supra* at 15-19. *Hoffman* does not address, much less disturb, the rights of undocumented aliens to sue and recover damages for personal injuries. It has little bearing on the question of whether undocumented aliens may bring workers' compensation claims.

Third, as the *Hoffman* decision points out, backpay is a discretionary remedy under the NLRA, which provides the NLRB with other "traditional remedies sufficient to effectuate national labor policy regardless of whether the spur and catalyst of backpay accompanies them." *Id.* at 144. In contrast, compensation is not a discretionary remedy under the Longshore Act. Compensation awards are the very heart of the Act, which is designed to swiftly compensate maritime employees for work-related disabilities regardless of fault. *Temporary Employment Services v. Trinity Marine Group, Inc.*, 261 F.3d 456, 458-59 (5th Cir. 2001). There is no other remedy within the Act that can fulfill that policy.

Fourth, the backpay award at issue in *Hoffman* was effectively conditioned on continuing violations of immigration law. The Court heavily relied on this point, explaining the undocumented employee's right to backpay would cease if he

returned to his home country, *id.* at 150, and that NLRB backpay recipients are obligated to mitigate their damages by working, which an undocumented alien could not do without triggering new IRCA violations, either by himself or his employer. *Id*. at 150-51. Longshore claimants, in contrast, are not required to mitigate their damages by working, though their compensation rate may be reduced if their employer demonstrates that they are able to work. *Supra* at 21-22. Nor does anything in the Longshore Act require claimants to remain in the United States. To the contrary, it specifically provides for payments to nonresident aliens. 33 U.S.C. § 909(g).

In sum, the text of the Longshore Act, this Court's recognition that undocumented aliens can bring suits under section 5(b) of the Act in *Hernandez*, and the Act's fundamental nature as a replacement for personal injury tort suits compel the conclusion that undocumented aliens are covered by the Act. Nothing in Bollinger's brief or the *Hoffman* decision undermines this result.

## CONCLUSION

For the foregoing reasons, the Court should affirm the Board's decision that Rodriguez was covered by the Longshore Act at the time of his injury.

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2009, two paper and one electronic copy of the foregoing document were served by mail, postage prepaid, on the following:

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.Proc. 32(a)(7)(B) and (C), I hereby certify that this brief has been prepared using Microsoft Word, fourteen-point proportionally spaced typeface (Times New Roman), and that, exclusive of the certificates of compliance and service, the brief contains 6,024 words.

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