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1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **NO. 32,868**

3 **EVER LUIS NUÑEZ,**

4 Worker-Petitioner,

5 v.

6 **ARMSTRONG GENERAL CONTRACTORS**
7 **and BUILDERS TRUST OF NEW MEXICO,**

8 Employer/Insurer-Respondents.

9 **ORIGINAL PROCEEDING ON CERTIORARI**

10 **Gregory D. Griego, Workers Compensation Judge**

11 Benito Sanchez, P.A.

12 Benito Sanchez

13 Albuquerque, NM

14 for Petitioner

15 Christina Bartosh Goodrow

16 Albuquerque, NM

17 for Respondents

1 **DISPOSITIONAL ORDER OF REVERSAL**

2 {1} In this companion case to *Gonzalez v. Performance Painting, Inc.*, 2013-
3 NMSC-____, ____ P.3d ____, we are once again asked to determine if an undocumented
4 worker, Ever Luis Nuñez (Worker), is eligible to receive Workers' Compensation
5 Permanent Partial Disability Modifier benefits. For the reasons that follow, we
6 reverse summary judgment and remand to the Workers' Compensation Administration
7 for a factual determination of whether the employer, Armstrong General Contractors,
8 knew or should have known that Worker was undocumented.

9 **BACKGROUND**

10 {2} Worker was injured on April 13, 2007 when he fell off a scaffold while working
11 for Employer. Ultimately, Worker and Employer entered into a stipulated settlement
12 which resolved all of the issues regarding Worker's claim with the exception of
13 Permanent Partial Disability (PPD) modifier benefits.

14 {3} Both parties filed cross-motions for summary judgment before the Workers'
15 Compensation Administration. Employer argued that the inability of Worker to
16 accept a legitimate return-to-work offer due to his undocumented status should
17 prevent Worker from receiving modifier benefits. Based on the statutory language,
18 Worker argued that he is entitled to modifier benefits until he actually returns to work,
19 or in the alternative, that Employer knew of his undocumented status. The Workers'
20 Compensation Judge (WCJ), relying on *Connick v. County of Bernalillo*, 1998-
21 NMCA-060, 125 N.M. 119, 957 P.2d 1153, concluded that Worker's undocumented
22 status meant that he had "voluntarily removed himself from the workforce" and

1 granted summary judgment in Employer’s favor.

2 {4} The Court of Appeals ultimately issued a memorandum opinion in favor of
3 Employer. *Nuñez v. Armstrong General*, No. 29,522, slip op. (N.M. Ct. App. Jan. 10,
4 2011). That Court, citing its opinion in *Gonzalez v. Performance Painting, Inc.*, 2011-
5 NMCA-025, 150 N.M. 306, 258 P.3d 1098, affirmed summary judgment in favor of
6 Employer. *Nuñez*, No. 29,522, slip op. at 1. We granted certiorari. 2011-NMCERT-
7 003, 150 N.M. 620, 264 P.3d 521.

8 **DISCUSSION**

9 {5} In *Gonzalez v. Performance Painting*, we recently stated that “[w]hether an
10 employer knew or should have known, before the worker was injured, that a worker
11 was undocumented determines whether an employer’s rehire offer was legitimate and
12 should be the focus of our inquiry.” 2013-NMSC-____, ¶ 26. We also suggested that
13 the best evidence of whether an employer “knew or should have known” may be an
14 inquiry into whether the employer followed appropriate hiring procedures required by
15 federal law, including a properly completed I-9 form. *Id.* ¶¶ 29-31.

16 {6} But we never said that an I-9 form is necessarily conclusive as to whether an
17 employer knew or should have known of an undocumented worker. For instance,
18 even though an I-9 form is properly completed and the undocumented worker presents
19 false documents, the employer could learn of the worker’s undocumented status by
20 other means. The worker could freely tell the employer of his status. The employer
21 could overhear conversations between workers regarding the worker’s status. The

1 employer could learn of a worker’s status from federal officials. While we cannot
2 recount all the ways an employer could learn of a worker’s undocumented status (and
3 we affirm that often the best evidence of this is the I-9 form), we reiterate that the
4 ultimate inquiry is whether the employer knew or should have known that the worker
5 was undocumented.

6 {7} Turning to the facts of this case, there is evidence in the record that Worker
7 presented false documents when he was initially hired by Employer. The record
8 contains copies of what appear to be false Resident Alien and Social Security cards
9 that Worker presented to Employer when he was initially hired. In addition, the I-9
10 form itself was attached to Worker’s cross-motion for summary judgment.

11 {8} Despite this evidence, Worker alleges that Employer knew he was
12 undocumented. In an affidavit submitted with his cross-motion for summary
13 judgment, Worker claims that “Employer’s Superintendent, Mr. Javier Aldaba, knew
14 that [he] did not have proper proof of eligibility to be employed in the United States
15 for the entire course of [his] employment.” The affidavit also claims that Mr. Aldaba
16 would warn Worker and others “about ICE raids before the immigration officers
17 arrived at the workplace.” Employer rebutted these allegations with an affidavit from
18 Mr. Aldaba denying that he knew Worker was undocumented and denying that he
19 warned Worker about ICE raids.

20 {9} Despite these competing affidavits, the Workers’ Compensation Judge made no
21 findings regarding whether Employer knew or should have known of Worker’s

1 undocumented status. Instead, the Worker’s Compensation Judge ruled that under
2 *Connick* Worker had voluntarily taken himself out of the workforce and therefore was
3 not entitled to modifier benefits, a decision we reverse for the reasons set forth in
4 *Gonzalez*. In fairness, it was not clear then that what the Employer knew and when
5 did he know it would become such a pivotal issue. After *Gonzalez*, the importance
6 of that question is now self-evident, and therefore, the parties and the WCJ should be
7 afforded an opportunity to develop a full record on that question.

8 **CONCLUSION**

9 {10} This case is reversed and remanded to the Worker’s Compensation
10 Administration.

11 {11} **IT IS SO ORDERED**

12 _____
13 **PETRA JIMENEZ MAES, Chief Justice**

14 _____
15 **RICHARD C. BOSSON, Justice**

16 _____
17 **EDWARD L. CHÁVEZ, Justice**

18 _____
19 **CHARLES W. DANIELS, Justice**

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BARBARA J. VIGIL, Justice