COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 033243-00**
Guillermo Medellin	Employee
Cashman KPA	Employer
National Union Fire Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Maze-Rothstein, Carroll and Costigan)

APPEARANCES

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MAZE-ROTHSTEIN, J. After recent United States Supreme Court pronouncements, can undocumented immigrant workers[1] receive Massachusetts workers' compensation benefits? The insurer argues they cannot. It appeals from a decision awarding Guillermo Medellin such benefits. Specifically, the insurer submits that Mr. Medellin cannot receive benefits for his incapacitating work injury because his admitted status as an undocumented immigrant worker bars him from receiving benefits under the recent United States Supreme Court decision of Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, 535 U.S. 137 (2002). It is the insurer's contention that Hoffman overrules the reviewing board decision, Brambila v. Chase-Walton Elastomers, Inc., 11 Mass. Workers' Comp. Rep. 410 (1997), by preempting our law on this point. In Brambila, we concluded that an employee's status as an undocumented worker, unauthorized to be employed in the United States under 8 U.S.C. § 1324a,[2] does not bar him/her from receiving workers' compensation benefits otherwise due. Brambila, supra at 416. For the reasons that follow, we consider Hoffman inapposite, and we decline to overrule Brambila. We therefore affirm the decision.

Guillermo Medellin is a fifty-one year old native of Mexico where he trained and worked as an engineer. (Dec. 3.) After arrival to the United States,

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[1] As there are multiple means of describing the status Mr. Medellin presents, and as the United States is a composite of immigrants, we use the term, "undocumented immigrant worker" or "undocumented worker" versus the more pejorative, "illegal alien."

[2] 8 U.S.C. § 1324a(a)(1)(A) reads:

> Making employment of unauthorized aliens unlawful
> (1) In general
> It is unlawful for a person or other entity—
> (A) to hire, or to recruit or refer for a fee, for employment in the United States an alien *knowing* the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment. . . .

(Emphasis supplied).

There is no allegation of a "knowing" employer hire here.

now nine years ago, he attended two months of school until economic demands required that he instead, pursue full time work as a cleaner and construction laborer. (Dec. 3-4). On August 12, 2000, at work, Mr. Medellin was excavating poles with a jackhammer when the ground crumbled beneath his feet and he dropped, still grasping the jackhammer, into an eight foot deep hole. He felt an immediate onset of pain in his right arm and shoulder, right major hand and right knee. (Dec. 4.) Despite surgeries, the placement and removal of pins and extensive physical therapy, Mr. Medellin's right major upper extremity remains impaired from his shoulder to his hand. (Dec. 4-5.) The employee claimed workers' compensation benefits, which the insurer resisted. During the § 11 hearing on the claim, the employee admitted that, though he had come with a ten year visitor's visa, he was working in the United States illegally under a false social security number. (Tr. 35-36.) The judge awarded the employee continuing G. L. c. 152, § 34, temporary and total incapacity benefits. (Dec. 6.)

Following our decision in Brambila, would cause us to disregard the insurer's assertion that the employee's status as an undocumented worker bars his receipt of workers' compensation benefits. The relevant facts of Brambila are like those of the present case: An employee, unauthorized to work in the United States, presented false documents proving eligibility to be employed and was hired. Mr. Brambila's employer had duly requested the proof of eligibility, thereby fulfilling its obligations under 8 U. S. C. § 1324a, and hired the employee without knowledge of his actual immigration status. The employer did not learn that the employee's immigration status was illegal until well after the industrial accident had occurred. Brambila, supra at 411-412. We reasoned that an employee's misrepresentation as to his eligibility to be employed in the United States did not nullify, ab initio, the contract of employment under G. L. c. 152, § 1(4), which defines "employee" as "every person in the service of another under any contract of hire, express or implied, oral or written . . . ."

> "A contract induced by fraudulent misrepresentations is voidable, not void. [Citation omitted.] The rule applies in the employment context as well." Shaw's Supermarkets, Inc. v. Delgiacco, 410 Mass. 840, 842 (1991). "[U]nless rescinded, 'a voidable contract imposes on the parties the same obligations as if it were not voidable.' " Berenson v. French, 262 Mass. 247, 260-261 (1928), quoting Williston, Contracts, § 15. " 'Voidable' imports an act which may be avoided, rather than an invalid act which may be confirmed. . . ." Rothberg v. Schmiedeskamp, 334 Mass. 172, 176 (1956). As of the occurrence of the industrial accident, the employer had not rescinded the contract of hire. The rights incident to Mr. Brambila's status under the contract of hire were intact. Hence, that unrescinded contract was still enforceable at the time of the injury. One of the rights incident to the employment status was coverage under the Act. See Pierce's Case, 267 Mass. 208, 211-212 (1929)(illegal employment contract of minor at fireworks factory not void ab initio and still enforceable as of death of minor occurring at work; death therefore compensable).

Brambila, supra at 413-414.[3] Moreover, we were persuaded that a proximate causal connection between the employee's misrepresentation of his immigration status at the time of being hired, and the work injury that he later suffered was absent.

> There is no evidence before us that Mr. Brambila's misrepresentation caused his injury. (July 11, 1996, Findings and Order.) The injury "might have happened in the same way whatever the [employee's status] had been. His bodily presence was an essential condition of his injury; but it does not follow that it must have been a cause thereof." Moran v. Dickenson, 204 Mass. 559, 562 (1910).

Brambila, supra at 415.

[3] There could be a differential analysis between an unknowing and knowing employer – one which is in the dark as to the employee's undocumented status (as here), and one which is in pari delicto – regarding the voidability of the employment contract. See Dowling v. Slotnick, 244 Conn. 781, 807-808 (1998)(generally, even though enforcement of contract tainted by illegality will be regarded as against public policy, where parties are in pari delicto as to illegal purpose of contract, "the law will leave them where it finds them"). However, given our disposition of this case on broader grounds, we need not address that possible distinction.

Basis for the Hoffman Challenge

The insurer in the present case argues that Brambila has been effectively overturned by the Supreme Court's Hoffman decision. Before addressing the merits of that contention, we must briefly respond to the procedural background that gives rise to the argument. The employee rightly points out that, at the § 11 hearing, the insurer did not challenge the employee's claim on the basis of his unauthorized status. However, we do not see this as a waiver under the circumstances of this case. While the insurer certainly could have challenged our Brambila decision without the ammunition that Hoffman arguably supplies, it avers in its appeal that Hoffman has vastly changed the legal landscape for undocumented immigrant employees. Waiver does not necessarily apply where supervening decisions emanating during the direct appeal result in a change in the law, and therefore present new arguments unavailable at the time of hearing. See Rosenblatt v. Baer, 383 U.S. 75, 77, 87-88 (1966)(failure to adduce evidence in trial of point of law redefined in Supreme Court decision rendered while direct appeal pending warranted remand); Pilgrim v. MacGibbon, 313 Mass. 290, 296-298 (1943)(Supreme Judicial Court applied decisional law rendered after trial of matter on review, to reverse a judgement notwithstanding the verdict in accordance with the reformulation of the law that intervened). See generally Attorney General v. Book Named "Naked Lunch," 351 Mass. 298, 306-308 (1966)(Reardon, J., dissenting)(discussion of waiver limitations where there is intervening change in the law while case on appeal). The insurer's failure to challenge Brambila at the hearing, based on the evidence of the employee's illegal immigrant status adduced at hearing, does not operate as a bar in the instant case.

Moreover, the reach of Hoffman is arguable given aspects of its reasoning. In Hoffman, the Supreme Court concluded that the National Labor Relations Board's award of backpay to undocumented immigrant workers for violations of the federal labor law it administers "would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA

[Immigration Reform and Control Act of 1986]." Hoffman, 535 U.S. at 151. The statutory prohibitions adverted to are those governing the employment relationship between the undocumented worker and the employer. "Congress has expressly made it criminally punishable for an alien to obtain employment with false documents." Id. at 149. Distinguishing an award of backpay to an employee who committed perjury in the course of National Labor Relations Board (NLRB) proceedings, ABF Freight System, Inc v. NLRB, 510 U.S. 317 (1994), the court reasoned, "[T]he employee misconduct at issue [in that case], though serious, was not at all analogous to misconduct that renders an underlying employment relationship illegal under explicit provisions of federal law." Hoffman, supra at 146.

Nonetheless, the Supreme Court still allowed the "traditional" sanctions under the National Labor Relations Act (NLRA) against the employer – cease and desist order and conspicuously posted notice of employee rights – to stand. "Lack of authority to award backpay does not mean that the employer gets off scot-free." Id. at 152. Many of the amici curiae briefs, arguing for the employee, state the significance to be read into this: that the NLRA still protects undocumented workers, the prohibition of backpay notwithstanding. That protection is based on the necessary recognition of undocumented workers as "employees" under a contract of hire with the employer within the meaning of NLRA. Brief of Amici Curiae, Greater Boston Legal Services, et al, 92-93; Brief of Amici Curiae, AFL-CIO & Massachusetts AFL-CIO, 12-13; Brief of Amicus Curiae, New England Painting & Glazing Industries, 2. Indeed, federal district courts construing Hoffman in the context of the Fair Labor Standards Act have reached the same conclusion. See, e.g., Singh v. Jutla, 214 F. Supp. 2d. 1056, 1060-1061 (N. D. Cal. 2002)("Hoffman Court reaffirmed . . . that undocumented aliens are employees under the NLRA").

However, we are not convinced by the interpretation of Hoffman submitted by the amici curiae. Just as arguably, the Hoffman court's holding and conclusion

did not, in fact, include the recognition of the employment relationship between the undocumented worker and the employer, because the employer did not contest the imposition of the non-back pay sanctions against it. "The Board here has already imposed other significant sanctions against Hoffman – *sanctions Hoffman does not challenge."* Hoffman, supra at 152 (emphasis added). The employer thereby waived any potential argument that the employment relationship under NLRA was rendered null under IRCA; acceptance of NLRA sanctions necessarily carried with it the acceptance of the employment relationship under NLRA upon which such sanctions are based. We do not therefore consider that Hoffman unequivocally supports the employee's position on this seminal issue for workers' compensation in the present case. Moreover, the tenor of its discussion – referring to the employment relationship as "illegal under explicit provisions of federal law," id. at 146 – is noteworthy. It quite possibly indicates the Hoffman majority's willingness to work that legal conclusion into a holding, if the issue is more squarely presented in a future case. At the least, the next time the Court visits the issue of a contract of employment between an undocumented worker and an employer, its opinion in Hoffman need not be controlling precedent on this question. As such, we will assume, for the purposes of the following analysis, that the present employment contract is indeed illegal for the purposes of § 1324a of the IRCA.[4] We therefore look further to the question, not wholly addressed by

[4] We do note that the question of whether illegality under IRCA should affect, in any way, analysis of employee status under any other labor laws, federal or state, could certainly be determined in the employee's favor.

> [The IRCA] did not purport to amend the NLRA or any other labor act. Indeed, the IRCA's legislative history indicates this was a deliberate choice. The House Judiciary Committee Report on the IRCA specifically states that the IRCA was "not intended to limit in any way the scope of the term 'employee' " under the NLRA, or the "rights and protections stated in Sections 7 and 8 [of that Act]." H.R. REP.NO. 99-682(1) 99th Cong., 2d Sess. at 58, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.

Brambila, of whether federal illegality means that the contract of employment under G. L. c. 152, § 1(4), is also illegal, and void ab initio, as a matter of federal preemption.

Illegality of Contract

First, however, we revisit the foundation of our decision in Brambila, namely, that the § 1(4) contract of employment is not rendered a nullity – void ab initio – as an illegal contract under the law of the Commonwealth. In Brambila we set out the law regarding the fraudulent inducement to enter a contract, which yields a *voidable* contract – one which the defrauded party (here the employer) – can repudiate upon such knowledge. That repudiation does not in any way operate retroactively, to capture an event – such as the industrial accident – prior to it. See id. at 413-424 and cases cited. We stand by our analysis of this aspect of the contract illegality issue.[5]

Adding now to that analysis, the enforceability of a contract tainted by illegality is governed in Massachusetts by the following analysis:

> [A]ll of the circumstances are to be considered and evaluated: what was the nature of the subject matter of the contract; what was the extent of the illegal behavior; was that behavior a material or only an incidental part of the performance of the contract . . . ; what was the strength of the public policy underlying the prohibition; how far would effectuation of the policy be defeated by denial of an added sanction; how serious or deserved would be the forfeiture suffered by the plaintiff, how gross or undeserved the defendant's windfall.

N.L.R.B. v. Kolkka, 170 F. 3d 937, 941 (9th Cir. 1999). Kolkka, of course, is a pre-Hoffman case. We merely adopt the worst case scenario for the employee's claim of a compensable injury under G. L. c. 152 in order to address the difficult questions raised in this appeal.

[5] We acknowledge the dissent's criticism of one paragraph in Brambila, supra at 415, dealing with the illegality of the employment contract, above and beyond the question of an employee's fraudulent misrepresentation to enter the contract. However, as our present decision addresses that very issue, that paragraph in Brambila is now superceded by what we say today.

Town Planning and Eng'g Assoc., Inc. v. Amesbury Specialty Co., Inc., 369 Mass. 737, 745 (1976)(footnotes omitted). See Hastings Assoc., Inc. v. Local 369 Building Fund, Inc., 42 Mass. App. Ct. 162, 173-176 (1997)(reiterating and applying Amesbury Specialty analysis); Yankee Microwave, Inc. v. Petricca Communications Sys., Inc., 53 Mass. App. Ct. 497, 511 n. 16 (2002)(same).[6]

Applying the Amesbury Specialty analysis to the present case, we find the following: the nature of the employment contract was affected by the illegal conduct of the employee insofar as Mr. Medellin sought and attained the employment by fraudulent means. However, that illegal behavior was, at most, an incidental part of the contract performance; the bargained-for exchange of the job duties, and their dutiful performance, for payment of wages shared no characteristics with the underlying illegal immigration status of the employee.[7]

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[6] The Supreme Judicial Court clearly weighed the policy considerations, in an abbreviated version of the above, when it held that the policy against hiring minors, thwarted in an illegal contract of employment accomplishing just that, would not bar recovery under the Act. Garnhum's Case, 348 Mass. 87, 89-90 (1964). Underlying the court's refusal in that case to render the contract of employment a nullity is this well-stated proposition:

> Although it could be argued technically that a requirement of a "contract of hire" can be satisfied only by a [sic] showing a legal contract, the cases have generally drawn a distinction between contracts that are illegal in the sense that the making of the contract itself violates some prohibition, and contracts that call for the performance of acts that are themselves violations of penal laws.
>
> *The former will ordinarily support an award of compensation; the latter will not.*

A. Larson, Law of Workmen's Compensation, § 66.01 at 66-2 – 66-3 (2000)(emphasis added). Like Garnhum, supra, the present contract of hire presents the "making of the contract" type of illegality, which withstands judicial scrutiny and remains enforceable, thereby supporting an award of compensation.

[7] The dissent's argument that we are presuming a legislative intent to include illegal employment into the § 1(4) "contract of hire" miscasts our reasoning. The point is that, *as a matter of common law governing private contractual relations*, the illegality at issue here does not render the employment contract void ab initio. We do not gainsay that the Legislature could enact a specific provision barring coverage under the Act for undocumented workers. In this regard, we also find the dissent's allusions to other

The policy against illegal immigration is, of course, a strong one, but it is juxtaposed against the policy of c. 152 that ensures that legitimate work injuries are compensated under the contract of workers' compensation insurance, which remedy is an integral component of the contract of employment.[8] See LeClair v. Silberline Mfg. Co., Inc., 379 Mass. 21, 27 (1979). The denial of benefits to the employee would have a minimal impact on the policy against illegal immigration. On the other hand, denial of the sanction of voiding the employment contract for illegality – i.e. deeming the injury compensable – also would not have a discernible impact on the effectuation of immigration policy.[9] Leaving the employee without the benefits of the Act, even medical treatment, obviously constitutes a serious forfeiture. There would be a windfall to the insurer in premiums collected for workers not covered, and a windfall to the employer for a

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statutes in the General Laws less than persuasive. These provisions only serve to show 1) that it is unlawful for *employers* in the Commonwealth to *knowingly* hire undocumented aliens and 2) that the Legislature knows how to draft exclusions when it deems it appropriate to do so. In comparison, its silence on the issue of undocumented workers in c. 152 actually supports our position.

[8] Included among the "parties" to a compensation insurance policy is the employee as third-party beneficiary to the contract between the employer and the insurer. See Rae v. Air-Speed, Inc., 386 Mass. 187, 192 (1982). This private contract status also distinguishes the undocumented worker in the context of workers' compensation from the undocumented workers in Hoffman, whose backpay claim was entirely the creature of the NLRA, and took in no private rights of action whatsoever.

Moreover, an equally important societal goal is accomplished through c. 152: "The private-sector responsibility for payment of workers' compensation also serves the significant public purpose of encouraging employers to take steps to advance and promote workplace safety." Mendoza, supra. See Briefs of Amici Curiae, Greater Boston Legal Services, et al., pp. 7-12, and AFL-CIO, pp. 7-12.

[9] "We agree that [prior to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996] eligibility for public benefits such as welfare, food stamps, and public housing operate[d] as an incentive to enter or remain in this country illegally. We do not agree that requiring an illegal alien who has sustained a work-related injury to forego his right to bring a tort claim and to accept, instead, workers' compensation benefits as compensatory damages for his injury provides a similar incentive." Dowling v. Slotnick, 244 Conn. at 813-814 n. 17.

work injury that would not affect its experience modification and increase its policy premiums.[10] As expansively and eloquently discussed by the amici, undocumented workers perform essential employer labor, and the route to dissuading these work relationships is not to eliminate the responsibility for injuries to such workers. Briefs of Amici Curiae, Greater Boston Legal Services, et al., 1-7 and AFL-CIO, 2-6.

Implied Federal Preemption

But for the underlying importance of the policy against illegal immigration, we consider that all of the Amesbury Specialty factors weigh in favor of enforcing the contract of employment, thus affording the employee coverage under the contract of compensation insurance. Accordingly, under Massachusetts law, we do *not* consider this contract illegality under the IRCA as a bar to compensation. This conclusion sets up the conflict between the IRCA and G. L. c. 152 that triggers, in turn, the preemption issue. We state it again: does Federal immigration law dictating that the contract of employment is illegal preempt, by implication, our state common law construction of § 1(4) as still supporting an enforceable contract of employment? We conclude that it does not.

As an initial matter, it is important to note that the Supreme Court has recognized, essentially throughout the history of the republic, the "great latitude [of the States] under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.' " Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985), quoting Slaughter-house Cases,

[10] See G. L. c. 152, § 53A. The precept underlying experience modification supports the inclusion of undocumented workers within the Act. An employer's premiums should obviously reflect the risk that the employer presents to the insurer for coverage. Increased premiums, as we all know from automobile insurance surcharges, are an incentive to behave in a manner that reduces risk. In the context of c. 152, this plays out as the overall policy concern for increasing workplace safety, reducing injuries and premiums, thereby increasing industrial well-being for all parties. The exclusion of undocumented workers (whose ranks are necessarily undetermined but cannot reasonably be said to be insignificant) from coverage under the Act would thwart the policy of workplace safety egregiously.

16 Wall. 36, 62 (1873)(internal quote omitted). Mandatory insurance schemes, including workers' compensation, are within these police powers:

> "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples." Decanas v. Bica, 424 U. S. 351, 356, 96 S. Ct. 933, 937, 47 L. Ed. 2d 43 (1976). *State laws requiring that employers contribute to unemployment and workmen's compensation funds,* laws prescribing mandatory state holidays, and those dictating payment to employees for time spent at the polls or on jury duty all have withstood scrutiny.

Metropolitan Life, supra (emphasis added.)

Following the path forged by the amicus brief of Harvard Legal Aid Bureau, we conclude that the instant case presents a factual/legal potential preemption scenario that requires application of the McCarran-Ferguson Act, 15 U. S. C. § 1011 et seq. (1945). Brief of Amici Curiae, Greater Boston Legal Services, Harvard Legal Aid Bureau, et al., 67-83. That Act

> transformed the legal landscape by overturning the normal rules of pre-emption. Ordinarily, a federal law supercedes any inconsistent state law. The first clause of § 2(b) [15 U. S. C. 1012(b)] reverses this by imposing what is, in effect, a clear-statement rule, a rule that state laws enacted "for the purpose of regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.

United States Dep't of Treasury v. Fabe, 508 U.S. 491, 507 (1993). In essence, the McCarran-Ferguson Act permits states to regulate the business of insurance "free from inadvertent preemption by federal statutes of general applicability." Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F. 3d 1486, 1488-1489 (9th Cir. 1995). The insurer does not dispute that workers' compensation insurance is subject to McCarran-Ferguson application. See, e.g., Uniforce Temp. Pers., Inc. v. National Council on Comp. Ins., Inc., 87 F. 3d 1296, 1299-1300 (11th Cir. 1996).

The McCarran-Ferguson Act states, in pertinent part:

> Sec. 1011. Declaration of Policy
>
> The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> Sec. 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948.
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> (a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which related to the regulation or taxation of such business.
> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair or supercede any law enacted by any State for the purpose of regulating the business of insurance . . . .

15 U. S. C. §§ 1011, 1012. The recent definitive case governing the analysis under the McCarran-Ferguson Act is Fabe, supra. That case involved the conflict between the federal priority law respecting an insolvent insurance company's obligations, 31 U. S. C. § 3713, which accorded the United States first place, and an Ohio statute, which conferred on the United States only fifth priority. Id. at 493. The Court held that the Ohio statute "escap[ed] preemption to the extent that it protect[ed] policyholders" of the insolvent insurer. Id.

The Court's analysis can be tracked quite closely for the purposes of construing the dissonant relationship between the federal IRCA and our G. L. c. 152. The Fabe court started with a point of reference – wisely stipulated by the parties in that case – which we adopt for the purposes of the present case:

> [A]pplication of the federal [immigration] statute would "invalidate, impair, or supercede" [G. L. c. 152, § 1(4)] and . . . the federal [immigration] statute does not "specifically relat[e] to the business of insurance." All that is left for us to determine, therefore, is whether [G. L. c. 152, §1(4)] is a law enacted "for the purpose of regulating the business of insurance."

Id. at 501. As we established in Brambila, supra, and elaborated above, undocumented immigrant workers are included within the § 1(4) definition of

"employee" as a matter of our state law regulating workers' compensation. The imposition of IRCA onto that definition therefore would "invalidate, impair, or supercede" that statute. Likewise, there can be no reasonable debate that IRCA is *not* a law specifically related to the business of insurance.

Next, we explain why there can be no dispute that the great social contract between Massachusetts employers and labor since 1913, codified in G. L. c. 152 (and with increasing intensity as the Act moved toward a mandatory scheme), has largely provided[11] the sole means of regulating the "business of insurance" for work injuries. The Court in Fabe started its analysis of whether the subject state priority law was for the "purpose of regulating the business of insurance" with the following quote:

> "The relationship between the insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder."

Fabe at 501, quoting SEC v. National Securities, Inc., 393 U.S. 453, 460 (1969). The Court then identified the three criteria, formulated, utilized and refined in Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979), and Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982), as determinative of whether a disputed practice or activity constitutes the "business of insurance" under McCarran-Ferguson: 1) whether the practice has the effect of transferring or spreading a policyholder's risk; 2) whether the practice is an integral part of the policy relationship between the insurer and insured; and 3) whether the practice is limited to entities within the insurance industry. Fabe, supra at 497-498.

The Fabe Court stated:

> There can be no doubt that the actual performance of an insurance contract falls within the "business of insurance," as we understood that phrase in Pireno and Royal Drug. To hold otherwise would be mere formalism. The Court's statement in Pireno that the "transfer of risk from the insured to insurer is effected by means of the contract between the parties . . . and . . . is complete at the time that the contract is entered," 458 U. S. at 130, 102 S. Ct. at 3009, presumes that the insurance contract in fact will be enforced. Without performance of the terms of the insurance policy, there is no risk transfer at all. Moreover, performance of an insurance contract also satisfies the remaining prongs of the Pireno test: It is central to the policy relationship between insurer and insured and is confined entirely to entities within the insurance industry.

Id. at 503-504.

While the Fabe court relied upon the three-prong analysis in Pireno and Royal Drug, it distinguished the facts of those cases. In Pireno, the Court concluded that a peer review process for determining the reasonableness and necessity of chiropractic charges that fall within health insurance coverage was *not* part of the business of insurance for McCarran-Ferguson purposes. Id. at 134. Likewise, in Royal Drug, the Court held that an insurer's maintaining of a preferred pharmacy list where insured persons could obtain prescriptions at lower cost was also not the business of insurance within McCarran-Ferguson. Id. at 214. Unlike the comparatively minor considerations of utilization review, (Pireno), or a preferred pharmacy agreement, (Royal Drug), the present case addresses the performance of the insurance contract in a manner much closer to Fabe: it is the very bargained-for exchange between the insurer and the insured that our interpretation of G. L. c. 152 protects. "Because it is integrally related to the performance of [workers' compensation] insurance contracts," Fabe, supra at 504, G. L. c. 152, § 1(4), as a statute inclusive of all employees, is one "enacted by any

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11 Not all employers, however, are subject to the Act. The limited exceptions are specifically listed in § 1(5).

State for the purpose of regulating the business of insurance." 15 U. S. C. § 1012(b).

Explaining further, we identify G. L. c. 152's mandatory coverage for work-related injuries of all employees "under any contract of hire, express or implied" – whether legal or illegal under the IRCA, under our construction of § 1(4) – as the "practice" that is the focus of the McCarran-Ferguson analysis in this case. Coverage of all employees contemplated within a workers' compensation insurance policy is the paramount concern in the transfer of risk between the insurer and the employer/policyholder. Reduced to its essence, an employer seeks workers' compensation coverage for all of the "warm bodies" performing work within certain job classifications, at or about reported wages. If that employer inadvertently runs afoul of IRCA by having within its employ some undocumented workers, it still reasonably anticipates *performance* of the contract executed for the transfer of the risk of work injuries to all of those "warm bodies," be they legal or illegal under IRCA. Certainly, Mr. Medellin's inclusion as an employee for whom the employer sought and received risk-transferring coverage speaks to the reliability, interpretation and enforcement – i.e. the "actual performance" – of the policy of insurance between the employer and the insurer. Fabe, supra at 503; National Securities, supra at 460.

Moreover, there is another side to the risk-transfer concept at play here. The risk transferred is, of course, the exposure that the employer, itself would have to bear if the undocumented immigrant worker were not an "employee" covered for payment of c. 152 benefits by its compensation carrier. That is the risk of a common law tort action. If the undocumented worker is not within the scope of the Act – which he would not be if he is not an "employee" – then his failure to reserve his common law right of action under § 24 is of no account. A work injury must be of a compensable class under workers' compensation to be subject to the exclusivity bar. Green v. Wyman-Gordon Co., 422 Mass. 551, 558-559 (1996); Pell v. New Bedford Gas & Edison Light Co., 325 Mass. 239, 241

(1950). Such would simply not be the case, if Mr. Medellin were not an employee.[12]

Finally, based on all that has now been discussed, we note that the "practice" of including undocumented workers within the § 1(4) definition of "employee" is, indeed, "an integral part of the policy relationship between the insurer and the insured," and "is limited to entities within the insurance industry." Pireno, supra at 129. Thus, the second and third elements of the three-prong Pireno test for "business of insurance" under McCarran-Ferguson are met.

We conclude that the risk-transfer function of the § 1(4) definition of "employee" is an undeniable part of the business of workers' compensation insurance. Insofar as our construction of Massachusetts law indicates that Mr. Medellin's status as an undocumented immigrant worker does not render his employment contract void ab initio, as discussed above, we conclude that IRCA does not preempt § 1(4) by operation of the McCarran-Ferguson Act, and that Mr. Medellin is therefore covered as an "employee" under c. 152.[13]

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[12] It is interesting to note that when the Virginia Supreme Court held that undocumented immigration status was a bar to compensation benefits, Granados v. Windson Dev., 257 Va. 103, 108-109 (1999), the Legislature lost no time in overruling the decision by amending the statute to include undocumented aliens as employees. Employers and the American Insurance Association backed the legislation, largely due to the tort liability risk that would have arisen with the exclusion. Amicus Curiae Brief of Greater Boston Legal Services, et al., 17-19.

[13] We need not address the issue of how Hoffman might impact earning capacity analysis under § 35D, given our disposition of the case on the grounds that there can be no preemption here. We addressed this issue in Brambila, in any event. See id. at 416. To the extent that an argument might be made along the lines of analogy, we would not agree. The employee's disability, stemming from an event occurring when the employment relationship was valid, "reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings, perhaps for the rest of his life." Gunderson's Case, 423 Mass. 642, 644 (1996). "[T]he right to workers' compensation is as much an incident of the employment as the right to receive salary, and has been earned once the labor has been performed." Mendoza, 288 N.J. Super. at 248. Most earning capacity assignments under G. L. c. 152, § 35D, are made on conjectured outcomes involving nothing more than residual medical disability and the employee's vocational profile given the realities of the job market for such an

Accordingly, as there is a strong, and statutorily protected, (see 15 U. S. C. §§ 1011, 1012), state insurance regulatory prerogative and, at best, a neutral statutory, (see G. L. c. 152, 1(4), and IRCA), position as to the disputed employee status issue for work injuries, we will not overturn the Massachusetts common law as expressed on point in Brambila.

The decision in favor of compensating Mr. Medellin for his work injuries is affirmed.

Pursuant to § 13A(6), employee's counsel is awarded a fee of $ 1,276.27.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

Filed: December 23, 2003

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individual. See Scheffler's Case, 419 Mass. 251, 256 (1994). The same is and can be true for injured undocumented immigrant employees. Even an employee's jurisdictional presence or absence can not thwart an earning capacity assignment up to and including elimination of benefits via a bona fide § 35D job offer. See Major v. Raytheon Corp., 7 Mass. Workers' Comp. Rep. 90 (1993)(employee's move from Massachusetts to Vermont does not defeat § 35D suitable job offer).

Finally, the bar of a *backpay* award in Hoffman has nothing to do with this incapacity assessment under c. 152. See post-Hoffman Fair Labor Standards Act opinions, e.g., Singh v. Jutla , 214 F. Supp. 2d. 1056 (N. D. Cal. 2002)(illegal alien entitled to pursue claim for retaliation under FLSA; court awarded damages and unpaid wages for work performed); Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d. 191 (S. D. N. Y. 2002)(plaintiffs' immigration status irrelevant to claim under FLSA for overtime pay and liquidated damages).

COSTIGAN, J. (dissenting). Although illuminating, it was not the Hoffman decision itself, 535 U.S. 137 (2002), that significantly changed the "legal landscape" of immigration law, but rather the Immigration and Reform Control Act of 1986 (IRCA), described by the Court as "a comprehensive scheme that made combating the employment of illegal aliens in the United States central to the policy of immigation law." Id. at 147, quoting INS v. National Center for Immigrants' Rights, Inc., 502 U.S. 183, 194 & n. 8 (1991). Based not on Hoffman and hindsight, but rather on what Congress did in 1986, I believe that the reviewing board wrongly decided Brambila in 1997 and, six years later, follows that decision to the wrong result here. Accordingly, I dissent.

The majority assumes *arguendo*, for the purposes of its analysis, that the "employment contract" between Mr. Medellin and Cashman, Kiewit, Atkinson, is illegal for the purposes of § 1324a of the IRCA.[14] I think that proposition is beyond *rationem argumentum*. One would be hard-pressed to find a more aggressive articulation of statutory policy than that which infuses the Hoffman reasoning with regard to the primacy of the IRCA's ban on the employment of illegal aliens:

> What matters here . . . is that Congress has expressly made it criminally punishable for an alien to obtain employment with false documents. There is no reason to think that Congress nonetheless intended to permit backpay where *but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities.*

Hoffman, supra at 149. (Emphasis added.) It was on this basis that the Hoffman court reversed the NLRB's award of backpay to the undocumented alien. One

[14] As the majority points out, the Court in Hoffman was not called upon to address whether the employment contract between the undocumented alien Castro and Hoffman Plastics was void ab initio, due to its illegality under the IRCA, because the employer did not raise that issue and did not challenge other sanctions imposed on it by the National Labor Relations Board. Supra at 152.

need only transpose one phrase in the above quotation to conclude, as I do, that the reviewing board wrongly decided Brambila, and repeats its error in this case: "but for [his industrial accident, Mr. Medellin] would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities."

The majority frames the question posed by this case as "whether federal illegality means that *the contract of employment* under G. L. c. 152, § 1(4), is also illegal, and void ab initio, as a matter of federal preemption." (Emphasis added.) The majority answers that question in the negative by constructing a syllogism of legal analysis which assumes that: a) chapter 152 is a statute regulating the business of insurance; b) under the McCarran-Ferguson Act, c. 152 is not preempted by federal law, not even the IRCA; and c) illegal aliens are "employees" as defined by § 1(4) and entitled to the protection of workers' compensation coverage. In my view, however, this syllogism crumbles because its very foundation is the assumption that the Legislature intended the phrase "any contract of hire" in § 1(4), to include a contract which is illegal, not only under federal law, but state law as well. In my opinion, this is an impermissible interpretation of legislative intent.

Massachusetts General Laws c. 152, § 1(4), defines "employee" as "every person in the service of another under any contract of hire, express or implied, oral or written. . . ." Beyond "express or implied, oral or written," the Legislature did not further qualify the phrase "any contract of hire" by inserting "legal or illegal." I think, however, that the requirement of legality is inherent in the statute. It is simply impermissible to infer that our duly-elected lawmaking body intended to sanction illegal contracts for illegal employment. However, to the extent that the majority's interpretation of § 1(4) suggests ambiguity in the phrase, "any contract of hire," it is appropriate to apply the rule of statutory construction that when words are used in the compensation act which derive meaning from some other statute or statutes, such words are to be given a uniform meaning. A statute, "[i]f

reasonably practicable . . . is to be explained in conjunction with other statutes to the end that there may be an harmonious and consistent body of law." Walsh v. Commissioners of Civil Service, 300 Mass. 244, 246 (1938).

Enacted in 1976, ten years before Congress passed the IRCA, M. G. L. c. 149, § 19C, inserted by St. 1976, c. 452, provides in pertinent part:

> It shall be unlawful for any employer knowingly to employ any alien in the commonwealth who is a student or visitor or, who has not been admitted to the United States for permanent residence, except those who are admitted under a work permit, or unless the employment of such alien is authorized by the attorney general of the United States. An employer shall not be deemed to have violated this section if he has made a bona fide inquiry whether a person hereafter employed or referred by him is a citizen or an alien, and if an alien, whether he is lawfully admitted to the United States for permanent residence, or admitted under a work permit, or is authorized by the attorney general of the United States to accept employment.

This statute makes it a crime for an employer to knowingly employ any alien who is illegally present in this country. 453 Code Mass. Regs. § 3.01 identifies the purpose and scope of the statute: it "prohibits the employment of unauthorized aliens in Massachusetts." As defined by § 3.02 of the same regulations, "[u]nauthorized alien shall mean, with respect to these provisions, an alien that, at the time of employment, is not lawfully admitted into or otherwise permitted to work in the United States by the U.S. Immigration and Naturalization Service of the U.S. Attorney General."

No plausible reading of this statute and these regulations permits the conclusion that an illegal alien can be lawfully employed in the Commonwealth under *any* circumstance, including when the employer is unaware of the alien's illegal status. Moreover, the Legislature has evidenced its intent to deny other

types of benefits and legal protection to illegal aliens.[15] Surely an unwitting employer, such as we have in this case, who asks for the documentation required by federal law but is given fraudulent identification papers by the illegal alien, cannot be held to have entered into a lawful employment contract, which is voidable only if and when the employer discovers the fraud. That, however, was exactly the result reached by the reviewing board in Brambila v. Chase Walton Elastomers, Inc., 11 Mass. Workers' Comp. Rep. 410 (1997), and by the majority in this case.

In Brambila, on facts remarkably similar to those in this case, the reviewing board held that the contract of employment, though "tainted by illegality," was not void ab initio, but rather voidable by the employer upon discovery of the worker's illegal alien status. Citing to Sure-Tan, Inc. v. N.L.R.B., 467 U.S. 883, 893 (1984), the board held that "[t]here was no illegality regarding the employer's employment of Mr. Brambila so long as this employer was unaware of his unauthorized status," because "the federal law in effect at the time of [Brambila's] industrial injury made it illegal only for employers to *knowingly* hire unauthorized aliens." Brambila, supra at 415. (Emphasis in original.) There are two inherent flaws in the board's reasoning: first, Sure-Tan was decided before the 1986 enactment of IRCA; and second, Brambila was hired in 1991, five years after

[15] For example, § 1 of G. L. c. 149, under which the department of labor and industries is charged with protecting the employment, wages, health and safety of workers in the commonwealth, defines the term "employee" as "any person employed for hire by an employer *in any lawful employment*. . . ." (Emphasis added.) Thus, it appears that our Legislature does not share the majority's view that the worthy goal of workplace safety is intended to protect illegal aliens, let alone that it justifies extending workers' compensation coverage to them. Section 4 of G. L. c. 117A, which provides for a program of emergency aid, within the department of public welfare, for elderly and disabled residents of the commonwealth, excludes from eligibility for assistance "[a] person who is neither a citizen of the United States nor lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law. . . ." Section 16D(2) of G. L. c. 118E, which regulates the division of medical assistance and medical benefits paid by that agency, prohibits undocumented aliens from receiving services or benefits, other than emergency services, unless required by federal law.

IRCA was passed.[16] Thus, instead of addressing Brambila's criminal conduct, and its effect on the contract of hire, the board focused only on whether the employer committed a crime by hiring him. In my view, under both federal and state law, even without the guidance of the Supreme Court's holding in Hoffman, the contract was not simply *tainted* by illegality – it was entirely illegal and, therefore, void ab initio.[17]

The majority seems to suggest that because we are administering a state statutory scheme, rather than a federal one, a different outcome is justified for Mr. Medellin. I disagree. "[W]e, as a State [administrative tribunal, are] charged with the duty of enforcing Federal law in our jurisdiction. . . ." Nelson v. Commissioner of Correction, 390 Mass. 379, 392 n. 17 (1983). A state may not condition a workers' compensation scheme in a manner which frustrates the purpose of a federal statute. Nash v. Florida Indus. Comm'n, 389 U.S. 235, 240 (1967).[18] The majority concludes that an award of workers' compensation

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[16] As the Hoffman court noted, Sure-Tan was decided against the backdrop of immigration laws as then written which "expressed only a 'peripheral concern' with the employment of illegal aliens . . . 'For whatever reason,' Congress had not 'made it a separate criminal offense' for employers to hire an illegal alien, or for an illegal alien 'to accept employment after entering this country illegally.' " Hoffman, supra at 144-145, quoting Sure-Tan, supra at 892-893. The 1986 IRCA made combating the employment of illegal aliens central to the policy of immigration law by making it criminally punishable not only for an employer to knowingly hire an illegal alien, 8 U.S.C. § 1324a, but also for an illegal alien to obtain employment by tendering fraudulent documents. 8 U.S.C. § 1324c.

[17] The Massachusetts Supreme Judicial Court recently held that no claim for tortious interference of contract could lie where the contract was illegal, and therefore void and unenforceable. South Boston Betterment Trust Corp. v. Boston Redev.Auth., 438 Mass. 57 (2002). The court cited Restatement (Second) of Torts § 774 comment b (1979), that "[i]llegal agreements and those in violation of public policy are commonly held to be entirely void and so not contracts at all." South Boston Betterment Trust Corp., supra at 69.

[18] See also Borgosano v. Babcock & Wilcox Power Co., 10 Mass. Workers' Comp. Rep. 120, 123 (1996)(under Supremacy Clause of United States Constitution, rate of reimbursement for medical services found compensable under G. L. c. 152, § 30, is preempted by federal law setting rates for medical services rendered by the United States

benefits in this case does not "unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA." Hoffman, supra at 151. I am convinced that it does, and I find the majority's reasoning to the contrary unpersuasive.

Even if one assumes, for the sake of argument, that the phrase, "contract of hire," in § 1(4) does not implicitly require the contract to be legal, but that it may include a contract "tainted" by illegality, my application of the factors identified in Town Planning and Eng'g Assoc., Inc. v. Amesbury Specialty Co., Inc., 369 Mass. 737, 745 (1976), yields a very different result than that reached by the majority. Even if, as the majority suggests, there is a policy of universal workers' compensation coverage at the heart of c. 152, that has no part in the Amesbury Specialty analysis. It simply is not the "policy underlying the prohibition." What is crucial to the analysis is that the "contract of hire" here could not have existed *but for* Mr. Medellin's illegal attainment of employment by use of fraudulent documents, and his retention in employment to the date of his injury was occasioned only by his continuing illegal presence in the country. Thus, the "extent of the illegal behavior" in relation to the subject matter of the contract was substantial, making that "behavior a material . . . part of the performance of the contract." Hoffman does not mince words in articulating the "strength of the public policy underlying the prohibition" against employment of illegal aliens: it is extraordinarily strong. The "effectuation of the policy" against such illegal employment would be utterly "defeated by denial of an added sanction" -- declaring the contract void and unenforceable. Moreover, declaring the illegal contract void and unenforceable would not result in a "serious forfeiture" by Mr. Medellin. As a person under the Fourteenth Amendment, he has an absolute right to retain the wages he earned for work performed, as a matter of equity under a

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Department of Veteran's Affairs). "Where there is a clear conflict between federal and state laws, state law must give way under the Supremacy Clause, Article VI of the United States Constitution." Id., citing Free v. Bland, 369 U.S. 663, 666 (1962).

quantum meruit theory. The only forfeiture is of workers' compensation benefits, the purpose of which is to replace future lost wages which he could not have legally earned in the first place.[19]

Because I conclude that Massachusetts law lines up four square with the federal law as to the illegality of the contract of hire and the employment relationship, no issue of preemption even exists. Absent a conflict, McCarran-Ferguson is inapplicable. Humana, Inc., v. Forsyth, 525 U.S. 299 (1999).[20]

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[19] Likewise, it is untenable for the majority to suggest that excluding Mr. Medellin from coverage under the employer's workers' compensation policy would result in a windfall to the insurer. Does such a windfall result if a lawfully employed person is denied benefits under c. 152 because a judge finds the injury non-compensable for any number of reasons, e.g., the injury occurred during a deviation from employment, or resulted from serious and wilful misconduct of the employee, or, if a mental or emotional injury, it arose out of a bona fide personnel action by the employer? Certainly not, and in any event, the insurance industry's process of experience modification allows for decreases in an insured's premium when claims actually paid are less than those which were anticipated, based on payroll and the classification of the insured's work.

[20] Even if there is a conflict, I consider the majority's application of McCarran-Ferguson misplaced. No reported federal appellate case applies McCarran-Ferguson in the realm of immigration law, and research has not uncovered a McCarran-Ferguson application that deals with anything remotely akin to the case at bar: an explicit crime under a federal statute that is, to indulge the majority's thesis, perfectly legal under state insurance law. The Supreme Court's decision in S. E. C. v. National Securities, Inc., 393 U.S. 453 (1969), comes closest, and sheds important light on the case at bar. In National Securities, the Securities and Exchange Commission challenged the approval, by the Arizona Director of Insurance, of a merger of domestic insurance companies. The S. E. C. alleged that in proposing the merger, the companies had violated various federal securities laws by engaging in fraudulent misrepresentations. Construing the "business of insurance" test required by McCarran-Ferguson, the Court held that McCarran-Ferguson did not bar the imposition of federal securities law onto the state's regulation of "the business of insurance" because the state "*has not commanded something which the Federal Government seeks to prohibit. It has permitted respondents to consummate the merger; it did not order them to do so* . . . In these circumstances, we simply cannot see the conflict." Id. at 465. (Emphasis added.) Likewise, in the present case, the application of IRCA to § 1(4), to render the contract of hire illegal, and therefore a nullity, does not conflict with any Massachusetts law regulating the business of insurance. By addressing who may enter into a legal employment contract and who may not, federal immigration law is defining and limiting a *condition precedent* to the business of insurance -- that is, who is an employee. Simply put, federal law renders the contract of hire illegal, and the insurance contract does not contemplate illegal

I add two final points. First, the coverage of minors under c. 152 has no bearing on the present case. The principal goal of child labor laws is the protection of the child, and c. 152 has been rightly interpreted in harmony with that aim. Garnhum's Case, 348 Mass. 87 (1964); Pierce's Case, 267 Mass. 208 (1929). By contrast, the object of immigration laws is not the protection of those entering the country illegally, and obtaining employment fraudulently. Moreover, unlike Mr. Medellin, a child employed in violation of St. 1909, c. 514, §§ 56 and 61, was not violating the law. Berdos v. Tremont & Suffolk Mills, 209 Mass. 489 (1911).

Second, I see no distinction to be drawn between the Hoffman bar to a backpay award under the NLRA and a bar to indemnity benefits under c. 152.[21] Note how the Hoffman court framed the issue presented by the NLRB litigation: "The Board asks that we . . . allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud." Hoffman, supra at 148-149. Weekly incapacity benefits are paid for the loss of *future* earning capacity attributable to a work injury. "Compensation is awarded not for the injury as such but rather for an impairment of earning capacity caused by the

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employees. See also, Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 133-134 (1982)(insurer's use of a peer review committee to determine reasonableness and necessity of chiropractic treatment for coverage under policyholder's health insurance policy not the "business of insurance" for the purpose of McCarran-Ferguson); United States Dep't of Treasury v. Fabe, 508 U.S. 491, 503 (1993)("The peer review practice at issue [in Pireno] had nothing to do with whether the insurance contract was performed; it dealt only with calculating what fell within the scope of the contract's coverage.") The application of those holdings here is apparent: the § 1(4) definition of "employee" pertains solely to the scope of the insurance contract's coverage. Only after that coverage is defined is the "transfer of risk" analysis, undertaken by the majority, appropriate.

[21] To the extent that the majority distinguishes the backpay award reversed in Hoffman from the workers' compensation benefits claimed here on a temporal basis -- past versus future --, see footnote 12, supra, it misapprehends what the two remedies have in common: both seek payment for, or in lieu of, work which was *not*, and legally never could be, performed.

injury. An injury to be compensable must be one which lessens the employee's ability to work." Zeigale's Case, 325 Mass. 128, 129-130 (1949). Where there is no legal capacity to work and no legal capacity to earn, there is no compensable loss. See Connolly's Case, 418 Mass. 848, 853 (1994)(employee who is incarcerated loses his ability to work because of the incarceration, not the injury).[22]

The concerns raised by the majority are not trivial; they pose important issues of public policy. I respectfully suggest, however, that it is not for this board to substitute its judgment for that of Congress and our Legislature as to what protections and benefits, if any, should be afforded to illegal aliens. "The 'time tested wisdom of the separation of powers' requires courts to avoid 'judicial legislation in the guise of new constructions to meet real or supposed new popular viewpoints, preserving always to the Legislature alone its proper prerogative of adjusting the statutes to changed conditions.' " Goodridge v. Department of Pub. Health, 440 Mass. 309, 380 (2003), (Cordy, J., dissenting), quoting Pielech v. Massasoit Greyhound, Inc., 423 Mass. 534, 539, 540 (1996), cert. denied, 520 U.S. 1131 (1997), quoting Commonwealth v. A Juvenile, 368 Mass. 580, 595 (1975). "Under our system of government there are those who are charged with the duty of considering such questions, and there is an orderly procedure for carrying out whatever they may determine." Bursey's Case, 325 Mass. 702, 707

[22] Even if, as the majority suggests, most earning capacity determinations under § 35D are conjectural, based on a judge's vocational assessment of an employee against the backdrop of expert medical opinion addressing disability, the illegal status of the injured worker has serious, potentially prejudicial, ramifications for the adjudication of his earning capacity. For example, his employer, once aware of his illegal status, could not make a § 35D job offer, as the majority posits. See footnote 12, supra. To do so would violate federal law. 8 U.S.C. §1324a. Moreover, it would be an exercise in futility for the workers' compensation insurer to request that the injured worker apply for unemployment compensation benefits, to avail itself of the offset against partial incapacity benefits pursuant to § 36B. Illegal aliens are barred from receiving unemployment compensation benefits in Massachusetts. G. L. c. 151A, § 25(h).

(1950). The arguments advanced by Mr. Medellin and the amici, and endorsed by the majority, are better made to our Legislature.[23] Accordingly, I dissent.

Based on Mr. Medellin's status as an illegal alien, without the ability to enter into a legal contract of hire and to work lawfully in this country, he was not an employee entitled to workers' compensation benefits under our Act. The decision of the administrative judge awarding him such benefits should be reversed.

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Patricia A. Costigan
Administrative Law Judge

[23] It is, of course, open to our Legislature to amend § 1(4) to expressly include illegal aliens in the definition of "employee." That is what happened in Virginia, when the Virginia Supreme Court held that an illegal alien was not an employee under its workers' compensation act. Granados v. Windson Dev. Corp., 257 Va. 103 (1999). I think the majority begs the question when it concludes that such legislation is not necessary in Massachusetts because illegal aliens are employees under § 1(4), not having been expressly *excluded* by the Legislature. Suffice it to say that those categories of workers which have been expressly excluded from the definition of "employee" in c. 152, all represent otherwise lawful employment. See subsections (a) through (g) of G. L. c. 152, § 1(4).