

## Reinforced Earth - Unstable Grounds?

By: Jason Hanford, Esquire

*I believe we have to secure our borders. But we must enact comprehensive immigration reform, and we must make it a top priority.*

- Senator John McCain – May 22, 2008

*I think that, if they're illegal, then they should not be able to work in this country. That is part of the principle of comprehensive reform.*

- Senator Barack Obama – December 4, 2007

At a time when the major party Presidential candidates tend to disagree on nearly every mainstream topic, it is telling that one issue, immigration reform, has received nearly unanimous bi-partisan support. While the means to an end are the source of ongoing debate, it is widely agreed that immigration is a prominent issue on the national landscape and immigration reform will be a priority of the next administration.

A pivotal aspect of what is a multi-faceted immigration problem is the presence of undocumented illegal aliens within our country's borders. While states such as Texas, Florida and California typically come to the forefront in addressing this issue, Pennsylvania also has a substantial and thriving undocumented worker population. In this context, one might be surprised to learn that Pennsylvania has developed an approach toward dealing with undocumented workers, and in particular those who suffered workplace injuries, in a manner which seems to fly in the face of the national

movement toward immigration reform. Perhaps more alarming, the current approach in handling workplace injuries to undocumented illegal aliens may not be supported by applicable federal law.

In Reinforced Earth v. Workers' Compensation Appeal Board (Astudillo), 810 A.2d 99 (Pa. 2002), the Pennsylvania Supreme Court found that a claimant whose physical condition has improved following a workplace injury is not entitled to temporary partial disability benefits (TPD) under the Pennsylvania Workers' Compensation Act, so long as evidence is presented which documents that claimant's change in condition.

Reinforced Earth was a 2002 decision addressing a 1994 work injury suffered by Juan Carlos S. Astudillo.<sup>1</sup> Astudillo, who was by all accounts an unauthorized illegal alien, had filed a Claim Petition which was timely answered with a denial by his employer.<sup>2</sup> As litigation of the claim progressed, it became apparent that Astudillo's immigration status would play a pivotal role in the outcome of the matter. Following submission of evidence, the Workers' Compensation Judge (WCJ) hearing Astudillo's case found Astudillo's medical expert to be a credible authority and awarded benefits, doing so with the conclusion that "accepting that Claimant as an alien did not have proper [INS] documentation to work for [Reinforced Earth], such illegal alien status at the time of injury does not bar relief to the Claimant under the [Act]."<sup>3</sup>

On initial appeal by the employer, the Workers' Compensation Appeal Board (WCAB) confirmed the WCJ decision, holding that claimant's illegal alien status did not

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<sup>1</sup> Reinforced Earth, 810 A.2d at 100.

<sup>2</sup> Id.

<sup>3</sup> Reinforced Earth at 101 (*citing* the WCJ decision).

bar him from recovery pursuant to the Act.<sup>4</sup> Employer, Reinforced Earth, continued with the appellate process, bringing the matter before the Commonwealth Court and asserting the following arguments:

- (1) Illegal aliens are statutorily barred from receiving Pennsylvania Workers' Compensation Benefits pursuant to federal law;
- (2) Public policy dictates that an illegal alien should not benefit from his/her illegal actions and receive ongoing through receipt of workers' compensation benefits;<sup>5</sup> and
- (3) Claimant's benefits should be immediately suspended because he would be unavailable for suitable alternative employment as he could not legally take a job.<sup>6</sup>

The Commonwealth Court affirmed the lower court decision, but did so with the caveat that the employer would have been entitled to suspend claimant's benefits had it provided proof of job availability, even in the absence of actual job referrals.<sup>7</sup> Employer appealed once again, bringing the issue before the Pennsylvania Supreme Court.

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<sup>4</sup> Reinforced Earth at 102.

<sup>5</sup> As the Commonwealth Court explained in its decision:

Employer then asks us to employ the public policy exception we applied in Graves v. Workmen's Compensation Appeal Board (Newman), 668 A.2d 606 (Pa. Cmwlth. 1995). In that case, we held that a claimant who was an escaped prisoner was not entitled to workers' compensation benefits because to grant him benefits would have been to reward him for his prison escape, and was an absurd and unreasonable result and contrary to the General Assembly's intention to provide compensation for work-related injuries. In so holding, however, we expressly limited that holding to escaped prisoners.

Reinforced Earth v. WCAB (Astudillo), 749 A.2d 1038 (Cmwlth. Ct. 2000).

The Commonwealth Court then rejected the opportunity to extend that holding of Graves v. WCAB beyond its stated application to prison escapees.

<sup>6</sup> Reinforced Earth at 102-104.

<sup>7</sup> Reinforced Earth at 104.

By the time Reinforced Earth reached the state Supreme Court, the employer's arguments had been whittled down to two:

- (1) The Commonwealth Court erred in refusing to apply to unauthorized aliens "the public policy exception" from the Act's coverage that Graves v. Workers' Compensation Appeal Board (Newman), 668 A.2d 606 (Pa. Cmwlth. 1995) announced; and
- (2) Proof of job availability is not necessary to suspend an illegal alien's wage benefits because an illegal alien's disability is not due to his work-related injury, but is caused by his inability to work lawfully.<sup>8</sup>

Notably, the employer failed to raise its earlier argument, that illegal aliens are statutorily barred from receiving Pennsylvania Workers' Compensation Benefits pursuant to federal law.

Appealing to the state Supreme Court earned the employer a partial victory, one that would become very important in the future handling of the workers' compensation claims of illegal aliens. Namely, although the Court agreed with employer's arguments as to the suspension of benefits, it disagreed with employer's assessment of the Graves-related public policy exception. Most importantly, the Court did not take the opportunity to address, *sua sponte*, whether illegal aliens are statutorily barred from receiving Pennsylvania Workers' Compensation Benefits pursuant to state or federal law.

As to employer's first argument, on public policy, the Court majority, in a divided decision, responded as follows:

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<sup>8</sup> Reinforced Earth at 105-106.

[T]he Act is the legislature's "definitive pronouncement of the law governing remedies for work-related injuries...." Shick, 716 A.2d at 1237. In the Act, the legislature has enacted a comprehensive statutory scheme which carefully balances the respective rights of employees and employers, and provides the relief that a worker will receive when he is injured on the job. Thus, consistent with our long-held view, we will not, in the face of the Act, consider announcing public policy with respect to the receipt of workers' compensation benefits by unauthorized aliens. To do otherwise would be an exercise in judicial legislation, which we will not undertake. Accordingly, there is no basis for granting the relief that Reinforced Earth seeks on the first issue.<sup>9</sup>

As evidenced above, the Court viewed the employer's public policy argument as a pure appeal for Judicial legislation. The employer was asking the Court to read into the act a condemnation of illegal aliens just as it had read in a condemnation of escaped prisoners in Graves. Not unexpectedly, the Court declined the opportunity to do so.

Importantly, in explaining the basis for its decision, the Court also explained what it was *not* deciding, namely the impact of federal law on the handling of workplace injuries to illegal aliens in Pennsylvania:

- (1) *Reinforced Earth does not argue that the General Assembly has shown that it intends for the policies which underlie the Act to yield to the policies which underlie the federal immigration statute.* Instead, Reinforced Earth argues that this Court should see to it that such a result occurs.

and;

- (2) In its Commonwealth Court appeal, *Reinforced Earth argued that the IRCA preempts state law, thereby requiring the Pennsylvania courts to find that Claimant as an unauthorized alien cannot be considered an "employee" as defined by the Act.* Reinforced Earth also argued that since it has a protected property interest in the Act's remedy of suspension, to allow Claimant to continue receiving benefits when he is no longer disabled is a violation of its Fourteenth Amendment rights. The Commonwealth Court rejected both of these arguments. The Reinforced Earth Company v. Workers' Compensation Appeal Bd. (Astudillo), 749 A.2d 1036, 1037-38, 1040-41 & n.6 (Pa. Cmwlth. 2001). *Reinforced Earth did*

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<sup>9</sup> Reinforced Earth at 105.

*not preserve these issues in the present appeal. Therefore, we will not discuss them.*<sup>10</sup>

In addressing the employer's second prong of appeal, that suspension of benefits for an illegal alien can come about without a showing of job availability, the Court stated that "our analysis of this issue begins with the concept of disability that is embodied in the Act. Under Pennsylvania law, disability is synonymous with the loss of earning power that is attributable to the work-related injury."<sup>11</sup> Following a discussion of the Kachinski test for suspension of benefits, along with an analysis of previous exceptions to that test, the Court held as follows:

There is no dispute that Claimant as an unauthorized alien cannot apply for or accept lawful employment. We, therefore, agree with Reinforced Earth that Claimant's loss of earning power is caused by his immigration status, not his work-related injury, and that there would be no point in requiring Reinforced Earth to show for purposes of suspension that jobs were referred to or are available to Claimant. *Consequently, we conclude that Reinforced Earth does not need to satisfy Kachinski's job availability prong in order to prove its entitlement to a suspension of Claimant's benefits, and that the Commonwealth Court erred in imposing upon Reinforced Earth a requirement in this regard.*<sup>12</sup>

In the aftermath of the 2002 decision, Reinforced Earth and its progeny have become synonymous with the following two assumptions in Pennsylvania: (1) illegal aliens are entitled to workers' compensation benefits under the Act; and (2) employers can obtain a suspension of an illegal alien's benefits merely by demonstrating a change in that individual's condition, absent any proof of job availability. While it would seem that these two assumptions are a respectable reading of the Reinforced Earth decision, a closer analysis reveals that Reinforced Earth's lasting impression will be formed by the

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<sup>10</sup> Reinforced Earth at 105 & 103 (emphasis added).

<sup>11</sup> Reinforced Earth at 106 (citing Landmark Constructors, Inc. v. Workers' Compensation Appeal Bd. (Costello), 747 A.2d 850, 854 (Pa. 2000)).

<sup>12</sup> Reinforced Earth at 108.

question that it *did not* answer. Does federal law prohibit an illegal alien from collecting workers' compensation benefits in Pennsylvania?

In addressing this important question, the following factors are both inarguable and inescapable:

- (1) The Immigration Reform and Control Act (IRCA), as well as other applicable federal immigration laws, preempt state law in addressing national immigration policy;
- (2) Per the terms of the Pennsylvania Workers' Compensation Act itself, illegal aliens could never be "disabled" under the Act because an illegal alien has no measurable earning power nor legal earnings; and
- (3) The General Assembly has shown that it intends for the policies which underlie the Act to yield to the policies which underlie federal immigration law.

To begin, IRCA is a federal legislative act aimed at curbing illegal immigration by penalizing the only entities who can truly be held responsible in such a situation, the employers. As the Reinforced Earth court explained:

IRCA creates an employment verification system under which an employer must execute a form, attesting that it has examined certain requisite documents which show an alien employee's identity and employment authorization. 8 U.S.C. § 1324a(b). If an employer fails to comply with these verification requirements, it can be sanctioned with civil penalties, 8 U.S.C. § 1324a(e)(4), and can be held criminally liable for pattern or practice violations. 8 U.S.C. § 1324a(f). Moreover, the IRCA makes it unlawful for *any person* knowingly to use, attempt to use, possess, obtain, accept, receive or provide counterfeit, altered, forged, or falsely made documents in order to satisfy an employer's attestation requirements. 8 U.S.C. § 1324c(a)(2).<sup>13</sup>

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<sup>13</sup> Reinforced Earth at 102 (emphasis added).

Although the state Supreme Court did not directly address the application of IRCA in Reinforced Earth, the Commonwealth Court did, explaining that:

We disagree because the IRCA was enacted to prohibit employers from hiring individuals who were illegal aliens and places the burden on employers to obtain documentation that the prospective employee is legally in this country and can legally seek employment. See 8 U.S.C. § 1324a. *It was hoped that requiring documentation would provide an impediment to decisions by individuals to illegally immigrate to this country, there is nothing in the IRCA which indicates that an individual, hired by an employer in violation of its provisions, is not an "employee" under federal or state law.*<sup>14</sup>

It would appear that the Commonwealth Court is wrong on two accounts. Initially, that IRCA was established with an eye toward employers is irrelevant in considering the legal import of the Act. To the extent that such proclamations are anything more than illusory, it is important to note that the Pennsylvania Workers' Compensation Act was likewise crafted to curb the wrongful actions of employers. Further, and more poignantly, the United States Supreme Court has addressed the impact of IRCA in Hoffman Plastic Compounds v. NLRB, 535 U.S. 137 (2002). In Hoffman, the Supreme Court was presented with a conflict between IRCA's prohibition of illegal alien employment and the National Labor Relations Board (NLRB)'s decision to award backpay to a group of undocumented workers. In ruling against the award of backpay, the Supreme Court held as follows:

The Immigration Reform and Control Act of 1986 (IRCA) is a comprehensive scheme prohibiting the employment of illegal aliens in the United States. 8 U.S.C.S. § 1324a. *IRCA "forcefully" makes combating the employment of illegal aliens central to the policy of immigration law.* It does so by establishing an extensive "employment verification system," 8 U.S.C.S. § 1324a(a)(1), designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States, 8 U.S.C.S. § 1324a(h)(3)

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<sup>14</sup> Reinforced Earth v. WCAB (Astudillo), 749 A.2d at 1038 (Pa. Cmwlth. 2000)(emphasis added).

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Under the Immigration Reform and Control Act of 1986 (IRCA) regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies

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Awarding backpay to illegal aliens runs counter to policies underlying the Immigration Reform and Control Act of 1986, policies the National Labor Relations Board has no authority to enforce or administer.<sup>15</sup>

The impact of the Hoffman decision is unquestionable. Employment of illegal aliens is not just an employment practice to be discouraged, it is illegal for *all* involved. Simply put, an undocumented worker is an illegal worker. To the extent that other federal statutes, or a state workers' compensation system, would attempt to subvert this mandate, the Supreme Court has definitively ruled that IRCA "forcefully" makes combating the employment of illegal aliens central to the policy of immigration law.<sup>16</sup> The Homeland Security Act of 2002 and subsequent related measures contain a similar theme aimed at discouraging employment of illegal aliens by all involved.

Pursuant to Hoffman and the various federal immigration statutes which it addresses, an illegal alien can never legally be employed in the United States. To compensate such an alien with an award of workers' compensation benefits runs in direct opposition to the federal mandate of IRCA and other related Acts. Just as an alien cannot be awarded backpay as an "employee" by the NLRB, an alien should not be awarded benefits as an "employee" under the Pennsylvania Workers' Compensation Act.

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<sup>15</sup> Hoffman at 148-150 (emphasis added).

<sup>16</sup> Hoffman at 148.

Though it is clear that an illegal alien cannot be a legal employee in the United States, what is not clear, as is implied by the ruling of Reinforced Earth, is whether said aliens would have ever been entitled to workers' compensation benefits in Pennsylvania to begin with. In this regard, it is important to remember the mandate of the Reinforced Earth Court in ruling that employers can get a suspension of benefits for undocumented workers who have experienced a change in condition. As the Court explained, "[t]here is no dispute that Claimant as an unauthorized alien cannot apply for or accept lawful employment. We, therefore, agree with Reinforced Earth that *Claimant's loss of earning power is caused by his immigration status, not his work-related injury.*"<sup>17</sup>

In Pennsylvania, a worker's entitlement to benefits in the event of an injury is directly tied to whether that worker has suffered a "disability." A worker can be "injured" and not "disabled." To the extent that a worker alleges "disability", the definition of same is determined by measuring that workers' lost earning power as it can be directly attributed to the work injury.<sup>18</sup>

When, as is often the case, a claimant was an illegal alien as of the date of the alleged injury, query whether claimant has any earning power to lose. In Mora v. WCAB, the Commonwealth Court held that an illegal alien in the context of workers' compensation can *never* have earning power as that alien cannot return to legalized employment.<sup>19</sup> As the Mora court explained, "[e]ven though, in this case, Claimant found other illegal employment, *that position cannot be used as a measure of earning*

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<sup>17</sup> Reinforced Earth at 108 (emphasis added).

<sup>18</sup> See, Banic v. Workmen's Compensation Appeal Bd. (Trans-Bridge Lines, Inc.), 705 A.2d 432, 435 (Pa. 1997)(holding that the term "disability" is defined in workers' compensation law as the loss of earning power attributable to the work-related injury and *citing* Kachinski while stating that "under Pennsylvania law, disability has long been synonymous with the loss of earning power"); and Woodward v. Pittsburgh Eng'g & Constr. Co., 143 A. 21, 22-23 (Pa. 1928) (explaining that "the disability contemplated by the act is the loss, total or partial, of the earning power from the injury").

<sup>19</sup> Mora v. WCAB, 845 A.2d 950, at 954 (Pa. Commw. Ct. 2004).

*power because only employers who fail to follow the federal immigration laws can offer him a position.”<sup>20</sup>*

To take the Mora analogy a step further, not only could other employers not offer an illegal alien claimant continued work, but his own employer would be *prohibited* from doing so and would in fact be mandated by IRCA to fire the claimant immediately. Per the Supreme Court in Hoffman, if “an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is *compelled* to discharge the worker upon discovery of the worker's undocumented status.”<sup>21</sup> The contradiction between the Reinforced Earth decision and the federal mandate could not be more vivid. Where federal law requires an employer to terminate an illegal alien, Pennsylvania and the Reinforced Earth Court would have that alien enrolled in the employer’s workers’ compensation program. The question which begs to be answered: what is an employer to do?

In answering that question, it is important to address the very “public policy” debate that the Reinforced Earth Court was reluctant to engage in. Although the Reinforced Earth Court was asked to address public policy, it did so only in the context of whether illegal aliens should be punished in the workers’ compensation arena for violating the law in the same manner in which escaped prisoners were punished in Graves. The issue that the Court failed to speak to, but which truly must be addressed, is whether a conglomeration of federal legislative initiatives, workers’ rights efforts, local and national economic concerns, and nationwide groundswell support dictate that the

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<sup>20</sup> Id (emphasis added).

<sup>21</sup> Hoffman at 148 (emphasis added).

policies which underlie the Pennsylvania Workers' Compensation Act should yield to the policies which underlie federal law.

Unfortunately, what has become lost amongst the legal wrangling as to whether Pennsylvania courts *can* extend workers' compensation to illegal aliens is the more basic of question of whether they *should*. In the years since the Reinforced Earth decision, undocumented workers in the U.S. have become a centralized issue of national debate. Solutions to the growing problem range from maintaining a status quo to granting amnesty, or, in other circles, deporting all undocumented non-citizens.

While Pennsylvania courts cannot speak alone to the direction of national change, they can discern public policy in the absence of state legislative mandate.<sup>22</sup> In making such a public policy appeal, employers must be cognizant that the blame for the instant problem cannot fall solely on the shoulders of the undocumented workers. Where the alien is in violation of the law for working illegally, the employer might be found equally culpable. Additionally, should undocumented workers in Pennsylvania be denied workers compensation benefits altogether, the resulting fear would be that Pennsylvania employers will haphazardly seek out illegal aliens so that it may fire those aliens at the first hint of a work injury. This reasoning, while compelling, overlooks two inescapable realities: (1) the long term financial benefits an unscrupulous employer might realize in hiring an illegal alien is hardly offset by the payment of workers compensation benefits;<sup>23</sup> and (2) rewarding employees who obtain work illegally in fact contradicts the approach taken by every modern illegal immigration initiative.

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<sup>22</sup> Shick v. Shirey, 716 A.2d 1231 (Pa. 1998).

<sup>23</sup> It is obvious that an employer who doesn't have to pay workers' compensation to an illegal alien is recognizing a benefit, but what might not be as readily apparent are the numerous other benefits bestowed on employers who hire illegally. Namely, illegal aliens work for lower, untaxed wages, generally refrain from filing employment complaints and are much less likely to contest working conditions. Anyone

Economic benefits to the employer aside, it is apparent that the availability of workers' compensation benefits to unauthorized workers in Pennsylvania undermines the concentrated national approach that has been taken in addressing the issue. In virtually every federal immigration law, as in IRCA, the effort to weed out illegal aliens by prosecuting both sides, the employer and the employee, is readily apparent. As the Hoffman court explained, Congress has seen fit to legalize undocumented workers and it is not the place of the NLRB or any other administrative body to subvert that intent. Likewise, to the extent that Pennsylvania courts can address public policy, it would not seem prudent to do so in a manner that contradicts a national movement and subverts congressional mandate.

As the country moves toward a new administration in January 2009, the push toward immigration reform will only grow in strength. In Pennsylvania, a growing national movement toward immigration reform will only serve to further highlight the inadequacies of the Reinforced Earth decision. Until the courts at last address the pivotal issue which was not raised before the state Supreme Court in Reinforced Earth, the status of the injured undocumented worker in Pennsylvania will become increasingly tenuous.

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questioning the benefit to employers from these gains need only look at the industrial jobs which have left the country in the past twenty years. Simply stated, illegal workers are cheap workers. Even if the hire of illegal workers results in few more workers' compensation claims, determined employers are unlikely to be deterred.

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