COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 035748-09**

Cynthia L. Merlini	Employee
Consulate General of Canada	Employer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Horan)

The case was heard by Administrative Judge Preston.

APPEARANCES
Alan S. Pierce, Esq., for the employee
Pedro Benitez-Perales, Esq., for the Workers' Compensation Trust Fund
William H. Murphy, Esq., for the amicus curiae[1] at hearing
Paul M. Moretti, Esq., for the amicus curiae on appeal

KOZIOL, J. The employee, Cynthia Merlini, is a United States citizen and Massachusetts resident who sustained an industrial injury while working as an administrative assistant in the Boston office of the Consulate General of Canada. The Workers' Compensation Trust Fund (WCTF) appeals from the judge's decision on recommittal, ordering it to pay the employee § 34 temporary total incapacity benefits, followed by § 34A permanent and total incapacity benefits from January 23, 2012, and continuing. (Dec. II, 20.)[2] In his first decision, the judge ordered the WCTF to pay the employee weekly incapacity and medical benefits under the Act. However, in doing so, he failed to make findings

[1] Government of Canada.

[2] We refer to the judge's June 28, 2011 decision as Dec. I, and his September 17, 2013 decision as Dec. II. On recommittal, testimony was taken over the course of three days, December 11, 2012, January 18, 2013, and February 20, 2013. Hereinafter, we refer to the transcripts of those proceedings as Tr. I, Tr. II, and Tr. III, respectively. We also take judicial notice of the documents in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002).

addressing the statutory requirements of § 65(2)(e).[3] Merlini v. Consulate General of Canada, 26 Mass. Workers' Comp. Rep. 195, 203 (2012), (Merlini I). Pursuant to that statutory authority, the WCTF is obligated to pay an injured worker the benefits set forth in chapter 152 only where the employer is subject to the personal jurisdiction of the commonwealth *and* is uninsured in violation of this chapter. In addition, the claimant must not be entitled to benefits in any other jurisdiction. We vacated the judge's decision and recommitted the case with directives to 1) adequately address the requirements of § 65(2)(e); 2) allow the Trust Fund the opportunity to present rebuttal testimony regarding the employee's rights under Canadian law; and 3) take judicial notice of such law, in order to sufficiently develop the record for appellate review.

On recommittal, the judge addressed those issues and ordered the WCTF to pay workers' compensation benefits to the employee. (Dec. II, 20.) The WCTF argues the judge erred in awarding benefits to the employee because, pursuant to § 65(2)(e) and 452 Code of Mass. Regs. § 3.04(8),[4] it is not legally responsible to pay the employee any benefits under the Act. For the reasons that follow, we reverse the decision.

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[3] General Laws, c. 152, § 65, provides, in pertinent part:

> (2) There is hereby established a trust fund in the state treasury, known as the Workers' Compensation Trust Fund, the proceeds of which shall be used to pay or reimburse . . . (e) payment of benefits resulting from approved claims against employers subject to the personal jurisdiction of the commonwealth who are uninsured in violation of this chapter; provided, however, that (i) the claimant is not entitled to workers' compensation benefits in any other jurisdiction. . . .

[4] 452 Code of Mass. Regs. § 3.04(8) provides:

> For the purposes of M.G.L. c. 152, § 65(2)(e), no public employer shall be considered to be uninsured.

I. Personal Jurisdiction

Pursuant to § 65(2)(e), the employer must be subject to the personal jurisdiction of the Commonwealth as a condition precedent to the issuance of an award of workers' compensation benefits against the WCTF. On recommittal, Canada resisted being joined as a party to the claim, asserting there was no jurisdiction to do so. (Dec. II, 4, 6; Government of Canada Amicus br. 1-28.) Ultimately, the judge allowed the Canadian government to participate on a limited basis without waiving the jurisdictional issue. The judge explained:

> I find that I do not have jurisdiction to order a sovereign foreign government pursuant to Chapter 152 to do anything regarding Ms. Merlini's claim. My authority is bound by Chapter 152. If the Canadian government had refused to assist the parties beyond voluntarily furnishing opinion testimony/documents/witnesses, I could not order enforcement.

(Dec. II, 7.)[5] The WCTF argues that if the judge did not have jurisdiction to join the government of Canada, then he had no jurisdiction to hear the claim against the WCTF, or to order it to pay benefits under § 65(2)(e). (WCTF br. 5.) We agree. The judge's inquiry should have ended with that initial finding and the case should have been dismissed. However, the judge further found:

> That with respect to jurisdiction over the Canadian government the WCTF pursuant to the Foreign Sovereign Immunity [sic] Act (FSIA) 28 USC, Sec. 1605(a)(2) can pursue personal jurisdiction over the sovereign government of Canada based on the exclusion of such protection in the commercial [activity] exemption.
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> . . .
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> I find that given the business setting employment status of Ms. Merlini and being an LES [locally engaged staff] employee, a Massachusetts resident and U.S. citizen, that when she had her industrial accident personal jurisdiction for the WCTF affixed over the Canadian government pursuant to the FSIA.

[5] The government of Canada was permitted to present evidence regarding its applicable laws. (Dec. II, 6-7.)

(Dec. II, 13, 15.) The judge's internally inconsistent findings regarding the issue of jurisdiction, "go to the heart of the issue presented[,] are arbitrary, and cannot stand." Cruz v. Corporate Design Co., 9 Mass. Workers' Comp. Rep. 618, 621 (1995).

To the extent the judge's decision may be read as concluding that the Canadian government was indeed subject to the personal jurisdiction of the Commonwealth in this case, it must be reversed. The judge lacks authority to make such a determination because the FSIA vests that authority in the federal courts. 28 U.S.C. § 1330; 28 U.S.C. § 1441.[6] "In enacting the FSIA, Congress, upon the recommendation of the executive branch, transferred an important aspect of our foreign policy to the judiciary." Rex v. Cia.Pervana deVapores, S.A., 660 F.2d 61, 68-69 (3rd Cir. 1981). Administrative judges at the Department of Industrial Accidents are members of the executive branch of government functioning within an agency of the Commonwealth of Massachusetts; they are not members of the state or federal judiciary, and thus have no authority to enter

[6] As stated in the report of the House of Representatives on the Foreign Sovereign Immunities Act of 1976:

> Section 2 of the bill adds a new section 1330 to title 28 of the United States Code, and provides for subject matter and personal jurisdiction of U.S. district courts over foreign states and their political subdivisions, agencies, and instrumentalities. Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences. Plaintiffs, however, will have an election whether to proceed in Federal court or in a court of a State, subject to the removal provisions of section 6 of the bill.
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> (a) *Subject Matter Jurisdiction.* – Section 1330(a) gives Federal district courts original jurisdiction in personam against foreign states (defined as including political subdivisions, agencies, and instrumentalities of foreign states). The jurisdiction extends to any claim with respect to which the foreign state is not entitled to immunity under sections 1605-1607 proposed in the bill, or under any applicable international agreement of the type contemplated by the proposed section 1604.

H. Rep. No. 94-1487, 94th Cong., 2d Sess. at 12-13, reprinted at 1976 U.S. Code Cong. & Ad. News 6604, 6615.

orders under the FSIA. See generally, Ellis v. Department of Indus. Accs., 463 Mass. 541, 546-549 (2012). Moreover, to the extent the judge's conflicting findings show he acknowledged that he lacked the authority to conclusively determine whether personal jurisdiction existed, his decision establishes only the possibility that jurisdiction exists through operation of the commercial activity exception of the FSIA, and cannot stand. Because personal jurisdiction must be present before any order can issue against the WCTF, the mere possibility that jurisdiction exists is, as a matter of law, insufficient to support an award of benefits against the WCTF. Thus, reversal is the appropriate disposition.

Our discussion could end here. However, because we find merit to the WCTF's claims that the judge erred in concluding the remaining statutory criterion under § 65(2)(e) were met, we address those claims of error.

II. Canada is not uninsured in violation of Chapter 152

Canada did not carry a Massachusetts workers' compensation insurance policy. The WCTF argues that because the Consulate General of Canada is a public employer, it is entitled to the same exemption to § 25A's requirement of procuring such coverage[7] as other exempt employers listed in § 25B, such as the Commonwealth and its various counties, cities, towns, districts and public authorities.[8] Thus, the WCTF argues, if the Commonwealth of Massachusetts

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[7] General Laws. c. 152, § 25A, provides, in pertinent part:

> In order to promote the health, safety and welfare of employees, every employer shall provide for the payment to his employees of the compensation provided for by this chapter in the following manner:
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> . . .
>
> (2) Subject to the rules of the department, by obtaining from the department annually a license as a self-insurer…

[8] General Laws, c. 152, § 25B, states in pertinent part:

> Section twenty-five A shall not apply to the commonwealth, the Massachusetts Turnpike Authority, the Massachusetts Bay Transportation Authority, the Massachusetts Port Authority or the various counties, cities, towns and districts provided for in sections sixty-nine to seventy-five, inclusive.

does not need a self-insurance license because it is a public employer, Canada is not required to have one either. (WCTF br. 7-8.) Moreover, the WCTF argues that 452 Code of Mass. Regs. § 3.04(8) states "[f]or the purposes of G. L. c. 152, § 65(2)(e), no public employer shall be considered to be uninsured."

Relying on the testimony of Canadian attorney Sean Bawden, the judge found Canada is not a public employer and is thus required to carry workers' compensation coverage. (Dec. 12, 15.) We agree that this finding is contrary to law, but not precisely for the reason proffered by the WCTF.

The regulation's mandate that "no public employer shall be considered to be uninsured" finds its root in the provisions of § 69, which allows injured workers employed by public employers to receive payment of "the compensation provided by this chapter" so long as "[t]he commonwealth and any county, city, town or district having the power of taxation . . . has accepted chapter eight hundred and seven of the acts of nineteen hundred and thirteen . . . ."[9] As discussed by the Massachusetts Appeals Court, §§ 69-75:

> 'sets apart for separate consideration the employees of the Commonwealth and of its subdivisions as distinguished from employees in private industry.' The rationale for treating 'public' and 'private' sector employees differently is derived, in large part, from longstanding principles of governmental immunity from tort liability, in the absence of a statutory exception. Section 69 of the Act departs from traditional immunity doctrine by extending the principle of compensation to cities within the Commonwealth, but only to such cities as have 'accepted' the Act. By voluntarily 'accepting' the Act, a city (or town) effectively waives its common law immunity and thereby covenants to compensate its 'laborers, workmen, mechanics, and nurses' for job related injuries. . . . Since the obligation to provide insurance under § 25A is elective with regard to public employers, a city, if it has elected to provide coverage at all, is only obliged to insure against such liability 'to the extent of its acceptance' of the Act.

[9] St. 1913, c. 807, §§ 1-7, entitled "An Act to Provide for Compensating Certain Public Employees for Injuries Sustained in the Course of Their Employment" brought "laborers, workmen and mechanics" employed by the Commonwealth, and any other political units that voted to accept the Act, within the coverage of the Chapter 152. "Nurses" were added to "laborers, workmen and mechanics" by St. 1971, c. 1059. G. L. c. 152, § 69.

Coppola v. Beverly, 31 Mass. App. Ct. 209, 212 (1991)(internal citations omitted). Thus, the regulation and §§ 69-75, do not exempt those public employers from coverage but include them within the Act's coverage, at the election of the entities listed therein. Indeed, without the provisions of § 69, individuals employed by the Commonwealth and its cities and towns, would not have a remedy at the Department of Industrial Accidents. See Woodbridge v. Worcester State Hosp., 348 Mass. 38, 42 (1981)("The rules of construction governing statutory waivers of sovereign immunity are stringent. . . . Consent to suit must be expressed by the terms of a statute, or appear by necessary implication from them."); Coppola, supra (teachers not within coverage of city's workers' compensation self-insurance and city not strictly liable for electing not to include them). As a foreign government, Canada simply is not one of the public employers described in §§ 25A, 25B, 65 and 69-75, and is not subject to those statutory provisions. However, the broader concept which provided the foundation for the enactment of those statutory provisions, and which dictates the result here, is the doctrine of sovereign immunity.

There is no dispute that the Consulate General of Canada is an arm of the Canadian government entitled to claim immunity under the FSIA. See Joseph v. Office of the Consulate General of Nigeria, 830 F.2d 1018, 1021 (9th Cir. 1987)("The Consulate, as a separate legal person, also qualifies as a 'foreign state' under the FSIA"). "The FSIA is the exclusive source of subject matter jurisdiction over suits involving foreign states or their instrumentalities." Id. Once immunity has been asserted by a foreign sovereign government, our department lacks jurisdiction to determine whether an exception to that immunity applies. (See discussion, supra, "I. Personal Jurisdiction.") Thus, by virtue of Canada's claim of

sovereign immunity, asserted in the proceedings below, our department lacks subject matter jurisdiction over the employee's claim against Canada.[10]

Section 65(e)(2)'s threshold requirement that the employer must be uninsured "in violation of this chapter," addresses the issue of subject matter jurisdiction. If a specific employer is not required to provide for workers' compensation insurance under chapter 152, the employer cannot be considered to be uninsured "in violation of this chapter" when it fails to carry such a policy, and the WCTF cannot be held responsible for the payment of such benefits. See Tibbetts v. Leech Lake Reservation Business Comm., 397 N.W.2d 883, 190 (Minn. 1986)(after observing that state's Special Compensation Fund's liability is derivative from that of the employer, a sovereign Native American Tribe, the court noted "[t]he [the state workers' compensation] Act was not designed to afford employees scheduled benefits where injured in noncovered employment"). Accordingly, on this ground alone, the WCTF cannot be responsible for payment of workers' compensation benefits in this case.

[10] Although they are not foreign sovereign governments under the FSIA, by analogy, we find the following cases concerning the sovereign immunity of Native American Tribes to be instructive. See generally, Wampanoag Tribe of Gay Head (Aquinnah) v. Massachusetts Commn. Against Discrimination, 63 F.Supp.2d 119, 123-125 (D. Mass. 1999)("tribes of Native Americans enjoy a sovereign's common-law immunity from suit" and waiver must be "unequivocally expressed," so without such waiver MCAD was enjoined from "prosecuting, hearing or deciding any claim of employment discrimination brought . . . against the Tribe and from otherwise exercising jurisdiction over the Tribe"); White Mountain Apache Tribe v. Industrial Commn. of Arizona, 144 Ariz. 129, 696 P.2d 223 (1985)(even though states' workers' compensation laws applied to federal enclaves, and congress authorized Native American Tribe's purchase of insurance, absent unequivocal waiver of Tribe's sovereign immunity, state commission lacked jurisdiction over workers' compensation claim); Middletown Rancheria of Pomo Indians v. Workers' Compensation Appeals Bd., 60 Cal.App.4th 1340, 1348, 71 Cal. Rptr.2d 105, 111 (1998)(workers' compensation board lacked subject matter jurisdiction over claim against Native American Tribe filed by injured casino worker, who was not a member of the Tribe, even though injury occurred on land where federal statute permitted application and enforcement of state workers' compensation laws. "Tribe's sovereign status is an independent barrier for holding California's workers' compensation laws inapplicable because their enforcement infringes on the right of Tribe to govern its own employment affairs.").

III. Entitlement to benefits in another jurisdiction

Finally, in order to receive benefits from the WCTF, pursuant to § 65(2)(e)(i), the employee cannot be "entitled to benefits in any other jurisdiction." The WCTF asserts the employee's claim fails to satisfy this requirement because she was paid workers' compensation benefits pursuant to Canada's Government Employees Compensation Act (GECA). (WCTF br. 11.)

There is no dispute the employee received weekly incapacity and medical benefits from the Canadian government after she was injured.[11] The employee argues, however, that receipt of benefits alone does not end the inquiry, because benefits differ between locally engaged staff (LES), such as herself, and Canadian based staff (CBS). She further asserts that LES employees do not have the right to appeal from Canada's unilateral decision to discontinue benefits. (Employee br. 9.) Based on the testimony of Canadian attorney Sean Bawden,[12] and GECA § 7(2), the judge found that the employee was not "entitled to benefits in another jurisdiction," therefore satisfying the requirements of § 65(2)(e)(i). (Dec. II, 15.) The judge found that because the employee's entitlement to benefits was discretionary in nature and because, as an LES employee, she never had a valid

[11] The employee testified she was paid workers' compensation benefits, which were paid at the rate of her full salary, pursuant to GECA, from March 13, 2009, through approximately October 28, 2009. (Tr. III, 22, 25, 26.)

[12] The judge made extensive findings adopting Mr. Bawden's opinions that the employee was not "entitled" to workers' compensation benefits under Canadian law because the payment of those benefits is discretionary for LES staff; the employee had no entitlement to an evidentiary hearing after her benefits were denied; because the employee performed clerical work, she should be considered as working for a private employer; the employee had no rights to challenge the merits of the Canadian government's refusal to re-open her case; and, her appellate rights in Canada do not satisfy the requirements of due process of law under the fourteenth Amendment to the United States Constitution. (Dec. II, 12-15.)

due process right of appeal,[13] she was never "entitled" to benefits, within the meaning of § 65(2)(e)(i), in the jurisdiction of Canada. (Dec. II, 11-14, 17.)

As a threshold matter, we note that no claim was ever advanced that the employer bore no legal responsibility for the employee's work-related injuries. With that in mind, we observe that § 7 of GECA, by its own unambiguous language, addresses only *how* compensation for LES workers is paid,[14] not whether there is an entitlement to benefits. Moreover, contrary to the judge's findings, the employee *was* provided the right to appeal the decision to terminate her compensation. (Ex. 2A & 2B.) The employee testified that she had been advised of this right. (Tr. III, 66-68.) The employee also admitted that after the denial of her request for reconsideration and reinstatement of benefits, she did not file an appeal. (Tr. III, 86.) The employee cannot assert a due process violation because of her failure to file a timely appeal.

The fact that a compensation system for injured foreign employees was in place and the employee actually received benefits under that system necessarily ended the inquiry as to whether the employee was entitled to benefits. Chico v. Merrimack Employment Servs., 24 Mass. Workers' Comp. Rep. 267 (2010),[15]

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[13] We note that a federal civilian employee covered by our own government's Federal Civilian Employees' Compensation Act, (FECA), 5 U.S.C. §§ 8108 et seq., faces a similar predicament:

> The most fundamental difference [between FECA and a typical state act] stems from the concept that federal benefits are granted as an act of grace, and that therefore Congress can attach any conditions it pleases. Thus, there is no right of judicial review of FECA decisions – a condition that would be unconstitutional under a state act.

3 Larson, Larson's Workers' Compensation Law, § 78.02 (rev. ed. 2014).

[14] Payment may be made either through a fund from which compensation payments are deposited, or directly by the Government of Canada. (Ex. 1.)

[15] Chico concerned a private employer located in New Hampshire. The existence of personal jurisdiction over the employer was established and there was no dispute that the employer was uninsured in violation of Chapter 152. Chico, supra, at 269.

aff'd, Chico's Case, 80 Mass. App. Ct. 1110 (2011)(Memorandum and Order Pursuant to Rule 1:28)(WCTF only obligated to pay compensation to injured employee of uninsured employers where injured employee is not entitled to workers' compensation benefits in any other jurisdiction). Although it lacks precedential value,[16] we find the Appeals Court panel's endorsement of our interpretation of § 65(2)(e)(i), based on the "plain and unambiguous" language of the statute, to be instructive:

> As stated by the board in its decision, CNA Ins. Cos. v. Sliski, 433 Mass. 491, 498-499 (2001), is controlling on the issue of legislative intent. The court in Sliski interpreted the amendments to § 65 as an attempt to "narrow the Trust Fund's obligation to pay benefits to employees of uninsured employers." Id. at 499 n. 8 (citations omitted). The employee's contention that the statute permits him to make a claim against the trust fund because he is no longer entitled to continued benefits in New Hampshire, notwithstanding that he already collected workers' compensation benefits there, depends upon an overly restrictive view of the statute, and one that ignores the guidance of the Supreme Judicial Court.

Chico, supra.

Therefore, consistent with the reasons recited above, the decision awarding the payment of benefits pursuant to § 65(2)(e) is reversed.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

[16] As of February 25, 2008, summary decisions of the Appeals Court issued pursuant to rule 1:28, may be cited for their persuasive value but not as binding precedent. Chace v. Curran, 71 Mass. App. Ct. 258, 261 n.4 (2008).

HORAN, J., (concurring). The majority concludes:

> The fact that a compensation system for injured foreign employees was in place and the employee actually received benefits under that system necessarily ended the inquiry as to whether the employee was entitled to benefits [under our workers' compensation act].

I agree. At the first hearing, the employee stipulated she had received, under Canadian law, workers' compensation benefits for her injury. (Dec. I, 4-5; April 15, 2011 Tr. 6, 21-22.) Relying on that stipulation, and our holding in Chico v. Merrimack Employment Servs., 24 Mass. Workers' Comp. Rep. 267 (2010), the WCTF moved to dismiss her claim. (See March 16, 2011 Motion to Dismiss.) Based on our decision in Chico, the judge should have allowed the motion and denied and dismissed the claim. In Merlini I, we should have followed our own precedent in Chico, which by then had been affirmed by the Appeals Court, and reversed the first hearing decision.[17]

Because the employee received workers' compensation benefits under Canadian law, her claim against the WCTF was invalid *ab initio*. G. L. c. 152, § 65(2)(e)(i).

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Mark D. Horan
Administrative Law Judge

Filed: **April 9, 2015**

[17] Our decision in Chico, supra, was affirmed by the Appeals Court in 2011. Chico's Case, supra. Our decision in Merlini I was filed on August 7, 2012.