COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 007254-08**

Daniel J. Thompson	Claimant[1]
Raytheon Corporation	Employer
Raytheon Corporation	Self-insurer

REVIEWING BOARD DECISION
(Judges Koziol, Costigan and Horan)

The case was heard by Administrative Judge Taub.

APPEARANCES
Joseph M. Burke, Esq., for the claimant
Thomas P. O'Reilly, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

KOZIOL, J. The claimant appeals from a decision denying and dismissing his claim for worker's compensation benefits on the ground the Department of Industrial Accidents lacks jurisdiction to adjudicate his claim. We affirm.

The judge heard the jurisdictional issue, bifurcated from the merits of the claim.[2] The parties submitted the matter on an agreed statement of facts, stipulating that the claimant and the self-insured employer entered into a contract of employment in Massachusetts. The contract was for the performance of work in the Kingdom of Saudi Arabia, where the claimant was to provide training and services regarding the utilization and maintenance of Patriot missile batteries.

---

[1] For the reasons discussed infra, although the employer employed Mr. Thompson at all relevant times, he is not a "covered" employee under our Act; accordingly, we refer to him as the "claimant."

[2] Although not expressly enumerated in the decision, (Dec. 2), the board file reveals that the claimant sought a closed period of § 34 total incapacity benefits, ongoing § 35 partial incapacity benefits, medical benefits under §§ 13 and 30, and double compensation under § 28. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of contents of board file).

(Dec. 1.) On March 25, 2005, the claimant sustained injuries "to multiple body parts" while performing his job in Saudi Arabia. (Dec. 1-2.) Without application by the claimant, Liberty Insurance Company, which insured the employer under the Defense Base Act (DBA), 42 U.S.C. § 1651 *et seq.*, of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.,* immediately paid him benefits under the DBA. (Dec. 1-2; Ex. 2.)

The DBA provides that "[t]he liability of an employer . . . shall be exclusive and in place of all other liability of such employer . . . coming within the purview of this Act under the workmen's compensation law of any State, Territory, or other jurisdiction, irrespective of the place where the contract of hire of any such employee may have been made or entered into." 42 U.S.C. § 1651(c). Such an express exclusivity clause requires the application of the Supremacy Clause of the United States Constitution.[3] This long settled law of preemption defeats the employee's claim. English v. General Elec. Co., 496 U.S. 72, 79 (1990) ("[W]hen Congress has made its intent known through explicit statutory language, the courts' task is an easy one").[4]

The claimant argues that express preemption cannot apply to his § 28 claim[5] because the DBA and LHWCA contain no provisions for doubling benefit

---

[3] The Supremacy Clause states, in pertinent part: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." United States Constitution art. VI, cl. 2.

[4] "Another modification of the act . . . is the inclusion of a provision making the employer's liability under the act exclusive and in place of liability for workmen's compensation under the law of any State. . . . This has been included for the following reason: We have found that some employees injured at defense bases and who have returned to the United States have endeavored to secure benefits under State law, notwithstanding that their injury occurred within the purview of the Federal act." 88 Congressional Record 8886 (1942).

[5] General Laws c. 152, § 28, provides, in pertinent part:

payments upon a finding of an employer's serious and willful misconduct. We disagree. A claim that the employer has engaged in such misconduct does not create an exception to the exclusivity of the DBA and LHWCA.

> The coverage of the LHWCA extends "to accidental injury or death," . . . and the overwhelming weight of authority is that "the common-law liability of the employer cannot be stretched to include accidental injuries caused by the gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of genuine intentional injury." 2A Larson, Workmen's Compensation Law § 68.13 at 13-5, and cases cited n. 11 (1976). Nothing short of a specific intent to injure the employee falls outside the scope of the Act.
>
> . . .
>
> Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, willfully failing to furnish a safe place to work, or even willfully and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental character.

Austin v. Johns-Manville Sales Corp., 508 F. Supp. 313, 316-317 (D. Me. 1981).[6] Moreover, as a practical matter, no "amounts of compensation" have been or could be "hereinafter provided" to the claimant under c. 152, because Congress

---

> If the employee is injured by reason of the serious and wilful misconduct of an employer or of any person regularly intrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled.

[6] A § 28 claim is a claim under the Commonwealth's workers' compensation law, and is therefore expressly barred by the DBA. Although "[a] very narrow exception to the DBA's exclusive liability provision applies where the employer acted with the specific intent to injure the employee," the claimant makes no such express allegation here, (Employee br. 13-23), and to the extent that his claim may be viewed as doing so, his remedy appears to lie elsewhere. Fisher v. Halliburton, 390 F. Supp.2d 610, 613-614 & n.2 (S.D. Texas 2005)(denying defendant's motion to dismiss claims that employer intended plaintiff truck drivers to be attacked by anti-American insurgents). Cf. O'Connell v. Chasdi, 400 Mass. 686 (1987)(exclusivity provisions of c. 152 no bar to employee's action against employer for assault and battery and intentional infliction of emotional distress).

mandated that the DBA provide the exclusive remedy for the claimant's injury. Consequently, there is no compensation to be doubled under § 28.

The claimant also asserts that his contract of hire requires the application of the laws of the Commonwealth and that the parties expressly contracted for the application of Massachusetts law in regard to his workers' compensation claim. Even were we to assume his contract of hire so provides, the claimant is not an "employee" within the coverage of our Act. 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, *excepting* . . . (f) persons employed by an employer engaged in interstate or foreign commerce but only so far as the laws of the United States provide for compensation or liability for their injury or death. . . .

(Emphasis added.) Because the DBA is a "law[] of the United States" that not only provides for compensation for the claimant's injuries but also expressly excludes any recovery under our State's workers' compensation law, the claimant cannot be deemed to be an "employee" as contemplated by G. L. c. 152. See Zangao v. M.B. Seafood, Inc., 16 Mass. Workers' Comp. Rep. 64, 70 (2002). There was no error in the judge's denial and dismissal of the claim based upon 42 U.S.C. § 1651 *et seq.* The decision is affirmed.

So ordered.

_____
Catherine Watson Koziol
Administrative Law Judge

_____
Patricia A. Costigan
Administrative Law Judge

_____
Mark D. Horan
Administrative Law Judge

Filed: ***September 22, 2011***