COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 37522-99**

Durvino Zangao	Employee
M.B. Seafood, Inc.	Employer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Maze-Rothstein and Levine)

APPEARANCES
Peter Zatir, Esq., for the employee
Thomas M. Wielgus, Esq., for the Trust Fund
Richard T. Moses, Esq., for the employer at hearing

MCCARTHY, J. The appeal of an administrative judge's decision by the Workers' Compensation Trust Fund ("Trust Fund") presents a novel question on the interplay between certain provisions of c. 152 and the federal Longshore and Harbor Workers' Compensation Act ("LHWCA" or "Longshore Act"). The judge awarded the claimant, who was injured while assisting the docking of a fishing boat during his employment, benefits under c. 152. The Trust Fund argues that the decision is contrary to law because the judge erred in three respects: 1) by finding that the employer was not engaged in interstate commerce; 2) by finding that the claimant was an employee under § 1(4), and not subject to the § 1(4)(f) exemption based on the provision of compensation or liability under the LHWCA;[1] and 3) by failing to apply clause (i) of § 65(2)(e), barring payment of compensation by the Trust Fund when the claimant is entitled to

[1] G.L. c. 152, § 1(4), defines "Employee" in relevant part as:

> [E]very 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 . . . .

compensation in any other jurisdiction. We agree with the Trust Fund's first and second assertions of error and reverse the decision as a result.[2]

Mr. Zangao has worked for fifteen years as a "chuteman" for several fish processing companies in New Bedford. The job involves sorting and separating fish by species as they are being off-loaded from fishing vessels. On or about September 6, 1999, Mr. Zangao was working for the employer and traveled to a wharf in New Bedford with co-workers to obtain fish from the *Luso American One*, a commercial fishing vessel with a load of fish to sell. When they arrived at the wharf, they learned that the boat could not dock properly because its engine had stalled. Mr. Zangao and his co-workers attempted to pull the boat up to the dock by hand. They were unsuccessful. Then they tied a line to the "ICC bar" of the employer's truck and tried to tow the boat to the dock. Instead, the ICC bar was torn from the truck and flew into Mr. Zangao's leg, breaking his femur and deranging his knee. (Dec. 4-5.)

Because the employer was uninsured for risks under both c. 152 and the Longshore Act, Mr. Zangao claimed workers' compensation benefits against the Trust Fund.[3] (Dec. 2, 7.) The Trust Fund denied the claim on the bases enumerated above, as well as incapacity, and appealed a conference order in Mr. Zangao's favor to a full evidentiary hearing. (Dec. 2-3.) In his hearing decision, the judge first addressed whether the employer was involved in interstate commerce for the purposes of the subsection (f) exemption to the § 1(4) definition of "employee" under the Act. See n. 1, supra. The judge reasoned that, while the employer purchased fish from vessels originating from other states, such purchases were made exclusively in New Bedford and sales were made to the local market. The judge concluded that the employer was strictly a local fish dealer and not engaged in interstate or foreign commerce. The judge

[2] Given our disposition, we need not reach the question of whether § 65(2)(e)(i) applies in the circumstances of this case.

[3] Under G.L. c. 152, § 65(2)(e), the Workers' Compensation Trust Fund is responsible for "payment of benefits from approved claims against employers subject to the personal jurisdiction of the commonwealth who are uninsured in violation of this chapter . . . ."

therefore determined that Mr. Zangao was an employee within the meaning of the Act. (Dec. 4-5.)

The judge continued:

> . . . I am convinced that Mr. Zangao worked as a "chuteman" under the direction and control of MB Seafood, and that he was in all respects an "employee" of this local fish dealer. Where he clearly was injured in the course and scope of his employment, he would be entitled to receive benefits under G.L. c. 152. However, it is undisputed that MB Seafood did not have workers' compensation coverage, so the employee has filed the instant claim against the Trust Fund. The Trust Fund has raised, among other issues, the interesting defense that because the employee would be entitled to receive benefits under the federal Long Shore and Harbor Workers' Act [sic] (33 USC § 901) the Trust Fund cannot be called upon to pay benefits in accordance with G.L. c. 152, § 65(2)(e)(i). The latter provides that a claim may not lie against the Trust Fund if the claimant is entitled to workers' compensation benefits "in any other jurisdiction." Turning to the facts of this case, it is apparent that neither the employee nor the other MB Seafood workers were going to unload fish from the *Luso American One*. Instead, they were at the site merely to take delivery of the fish in their truck, sort the load by species, and transport it back to the MB Seafood facility. However, by assisting and towing the vessel closer to the dock, they were performing work which was ancillary to their expected job functions, and arguably could fall under the jurisdiction of the Long Shore and Harbor Workers' Compensation Act [sic] (see 33 USC 903(a)). The arguments by the Trust Fund and the employer are that the actions of the employee and the MB Seafood workers do in fact bring in the federal compensation scheme, and therefore because the employee would be eligible to receive benefits, the claim against the Trust Fund must fail. I am not to persuaded. Instead, it is undisputed the MB Seafood not only failed to provide Massachusetts workers' compensation coverage, but also did not maintain a Long Shore and Harbor Workers' [sic] policy. Therefore, the claimant could not be entitled to "benefits" in the federal jurisdiction. The Trust Fund acknowledges the admitted lack of a federal compensation policy, but nevertheless argues that the employee would still have rights to maintain an action under 33 U.S.C. § 905. While this right does exist, it is in my estimation not the equivalent of receiving "workers' compensation benefits in any other jurisdiction" within the meaning of G.L. c. 152, § 65(2)(e)(i). Therefore, I conclude that where the employee is not entitled to workers' compensation benefits in any other jurisdiction, he has an actionable claim against the Trust Fund.

(Dec. 6-7.) The judge therefore awarded benefits payable by the Trust Fund to the employee under c. 152 for his work-related injury. (Dec. 10.)

The Trust Fund argues on appeal that the initial and critical error is in the judge's finding that the employer was engaged in only *intra*state – not *inter*state or foreign – commerce and therefore not subject to further inquiry under the § 1(4)(f) exemption to the definition of "employee" under c. 152. See n. 1, supra. The record is undisputed that the employer purchased fish from boats originating in states other than the Commonwealth. (Dec. 4; Tr. 94-95.) We think that this fact is sufficient to establish that the employer was engaged in interstate commerce.

First, courts have regarded the business of ocean fishing as interstate or foreign commerce. In Commonwealth v. McHugh, 326 Mass. 249 (1950), the court reached this conclusion by reasoning as follows:

> We assume without discussion that the operations of the defendants as fishermen occur to a considerable degree in the stream of interstate or foreign commerce both because of the sale and transportation of a substantial portion of the product to other States after it has landed, and because the product comes from the high seas . . . .

Id. at 264, citing The Abby Dodge, 223 U. S. 166 (1912). Thus, the inquiry properly focuses on whether the employer's activity of purchasing fish from fishing vessels establishes that the employer was engaged in interstate commerce.

"Importation into one state from another is the indispensable element, the test, on interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation . . . is a transaction of interstate commerce." Furst v. Brewster, 282 U.S. 493, 497-498 (1931). "Interstate commerce in a legal sense embraces not only the transportation of freight from one state to another but every link in that transportation, whether or not some of the links are entirely within one state." Morrison v. Commercial Towboat Co., 227 Mass. 237 (1917). Although the employer's tug in Morrison operated strictly within the confines of Boston Harbor, the court reasoned that it was engaged in interstate commerce:

> "[The employer] was employed in aid of vessels engaged in foreign or coastwise trade and commerce of the United States, either in the delivery of their cargoes, or in towing the vessels . . . . The character of the navigation and business in which it

> was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged."

Id. at 240, quoting Foster v. Davenport, 63 U.S. 244, 22 How. 244 (1859). Similarly, we think the conclusion is undeniable that this employer's business of purchasing fish from out-of-state vessels is appropriately characterized as a "negotiation, contract, trade and dealing between citizens of different states" within the scope of interstate commerce. Furst, supra. We therefore reverse the judge's conclusion to the contrary and proceed to the remainder of the § 1(4)(f) inquiry.

The Trust Fund argues that the provisions of § 1(4)(f) bar an award of compensation under c. 152, because "the laws of the United States provide for compensation or liability for [the employee's] injury . . . ." We agree. The LHWCA provides:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results form an injury occurring upon navigable waters of the United States including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.

33 U.S.C. § 903(a). Certainly, the circumstances of Mr. Zangao's injury on the wharf – assisting in docking the fishing vessel – easily fall within the "twilight zone" of concurrent federal and state jurisdiction. See Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715 (1980). In performing this longshore activity, the employee comes within the definition of "employee" under the LHWCA: "The term 'employee' means any person engaged in martime employment, including any longshoreman *or other person engaged in longshoring operations* . . . ." 33 U.S.C. § 902(3)(emphasis added). Courts have explicitly construed this section to cover more than strictly maritime employment. "[E]mployee status may be based *either* upon the maritime nature of the claimant's activity at the time of his injury *or* upon the maritime nature of his employment as a whole." Hullinghorst Industries, Inc. v. Carroll, 650 F.2d 750, 754 (5th Cir. 1981)(Emphasis in original). Therefore, "[s]ince the [employee at the time of his injury]

was engaged in maritime activities in an area adjoining the water," Universal Fabricators, Inc. v. Smith, 878 F.2d 843, 845 (5th Cir. 1989), we conclude that his status as an employee under the LHWCA is established.[4]

Furthermore, the Legislature's use of the disjunctive, "compensation *or* liability," in § 1(4)(f) does not allow for a waiver of the exemption on the basis that this employer was not insured for payment of compensation under the LHWCA. Under such circumstances, 33 U.S.C.§ 905 establishes that liability – either strict or in tort – still lies against the employer directly:

> The liability of the employer prescribed in section 904 of this title [for payment of Longshore Act compensation and to secure payment thereof] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, *except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death . . . .*

(Emphasis added). With "compensation or liability" so clearly provided for under the LHWCA, the application of the § 1(4)(f) exemption to "employee" necessarily follows.[5] Accordingly, because the claimant was not an employee within the meaning of c. 152, we reverse the award of c. 152 compensation benefits against the Trust Fund.

Finally, we address the claimant's concern that, were § 1(4)(f) to apply to his case, he would be left without a remedy due to the employer's lack of insurance coverage under the LHWCA. Specifically, Mr. Zangao contends that the only "compensation benefits" he can pursue are those available under c. 152 from the Trust Fund in its

[4] In the event that a federal administrative law judge disagrees and denies the employee's LHWCA claim, c. 152 jurisdiction would necessarily be resurrected.

[5] There is no prohibition to the Commonwealth's surrender of its jurisdiction via § 1(4)(f). See E.P. Paup Co. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor, 999 F.2d 1341, 1350 (9th Cir. 1993)("There is nothing in the LHWCA to indicate that a state cannot exclude from its jurisdiction injuries that are covered by federal law").

§ 65(2)(e) role of insurer of last resort for uninsured employers. (Employee's Brief, 4.) In fact, Mr. Zangao's contention is incorrect.

An action against the employer pursuant to 33 U.S.C. § 905 is available to the claimant. If he obtains a judgment against the employer for compensation under the LHWCA,[6] the provisions of 33 U.S.C. § 918(b) may be invoked if necessary. That section reads in pertinent part:

> In cases where judgement cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the Secretary of Labor may, in his discretion and to the extent he shall determine advisable after consideration of current commitments payable from the special fund established in section 944 of this title, make payment from such fund upon any award made under this chapter, and in addition, provide any necessary medical, surgical, and other treatment required by section 907 of this title in any case of disability where there has been a default in furnishing medical treatment by reason of the insolvency of the employer. Such an employer shall be liable for payment into such fund of the amounts paid therefrom by the Secretary of Labor under this subsection.

The special fund established in § 944 is not unlike the Trust Fund in c. 152, except that the employee must sue the employer directly and have the employer default on the judgment prior to involvement by the § 944 special fund. Finally, there is authority for the proposition that the one-year statute of limitations for filing a claim under § 913 of the Longshore Act is tolled by both the filing of a claim under a state workers' compensation act, Ingalls Shipbuilding Division, Litton Systems v. Hollinhead, 571 F.2d 272, 274 (1978)(per curiam), and payments made under the state system. Universal Fabricators, supra at 846. But see Bath Iron Works v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor, 125 F.3d 18, 23-24 (1st Cir. 1997)(in dicta, court criticized Ingalls holding and counseled "future claimants to protect their federal claims by filing within one year" of injury).

[6] As noted above, the claimant may also sue in tort for negligence.

Accordingly, we reverse the decision and set aside the order directing the Trust Fund to pay c. 152 benefits.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **February 14, 2002**

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Susan Maze-Rothstein
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge