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NOT FOR PUBLICATION
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Tracy O. Dumas,
Plaintiff,
vs.
American International Specialty Lines
Insurance Company,
Defendant.

No. CV-09-1240-PHX-FJM

ORDER

The court has before it defendant’s motion to dismiss (doc. 8), plaintiff’s response (doc. 15), and defendant’s reply (doc. 16).

Circle K Stores, Inc. operates convenience stores and retail gasoline outlets throughout Arizona, including a store at 4502 North 19th Avenue in Phoenix. As part of its gasoline operations, Circle K owns three underground petroleum storage tanks at its 19th Avenue store. Ryan Dumas was employed by Circle K as a vapor recovery technician. As part of his job, Ryan descended into an underground storage tank in order to conduct an inspection. While he was working in the storage tank, toxic fumes were released and Ryan died of asphyxiation. Tracy Dumas, the personal representative of Ryan’s estate (“plaintiff”), filed a wrongful death action against Circle K in state court. The state court dismissed the case concluding that, because plaintiff had accepted worker’s compensation benefits, he was

1 barred by the exclusive remedy provided by Arizona’s worker’s compensation law. See
2 A.R.S. § 23-1022(A). Plaintiff then filed the present action against Circle K’s insurer,
3 American International Specialty Lines Insurance Company, asserting diversity jurisdiction
4 and alleging state law claims of breach of insurance contract and bad faith.

5 Generally, an accident victim has no direct cause of action against the tortfeasor’s
6 insurance company. Maricopa County v. Barfield, 206 Ariz. 109, 112, 75 P.3d 714, 717 (Ct.
7 App. 2003); Ring v. State Farm Mut. Auto. Ins. Co., 147 Ariz. 32, 35, 708 P.2d 457, 460 (Ct.
8 App. 1985) (holding that an injured plaintiff is a stranger to the contractual and fiduciary
9 relationship between the insurer and its insured). Therefore, absent contractual or statutory
10 authority, plaintiff’s present cause of action must be dismissed. Plaintiff contends that the
11 Hazardous and Solid Waste Amendment of 1984, 42 U.S.C. §§ 6991-6991m (“HSWA”),
12 provides that statutory authority.

13 The HSWA requires owners and operators of underground storage tanks to maintain
14 evidence of financial responsibility for taking corrective action and compensating third
15 parties for bodily injury and property damage caused by accidental releases arising from the
16 operation of underground storage tanks. 42 U.S.C. § 6991b(c)(6).¹ An owner or operator
17 can satisfy its financial responsibility by several methods, including “insurance, guarantee,
18 surety bond, letter of credit, [or] qualification as a self-insurer.” Id. § 6991b(d)(1). Circle K
19 met its statutory obligation by obtaining an insurance policy issued by American
20 International, which provided liability coverage for bodily injury and property damage to
21 third persons caused by accidental releases from covered underground storage tanks (the
22 “Policy”).

23 The HSWA allows an injured party to bring a direct action against the “guarantor
24 providing such evidence of financial responsibility,” but only if the injured party cannot
25 obtain jurisdiction over the owner/operator in state or federal court. Id. § 6991b(d)(2).

27 ¹Arizona’s regulation of underground storage tanks is substantially similar to the
28 federal regulatory scheme. See A.R.S. § 49-1001, *et seq.*

1 “Guarantor” for purposes of § 6991b(d) is defined as “any person . . . who provides evidence
2 of financial responsibility for an owner or operator.” 42 U.S.C. § 6991b(d)(4). Plaintiff
3 contends that because he is foreclosed from bringing an action against Circle K, as evidenced
4 by the dismissal of his state court action, he cannot obtain jurisdiction over the owner in state
5 or federal court and therefore his “direct action” against American International is authorized
6 by the HSWA.

7 American International counters that it is not a “guarantor” and therefore is not subject
8 to a direct action. It relies on the definition of “guarantor” in the regulations relating to the
9 use of a “guarantee” as the method of evidencing financial responsibility. In that instance,
10 a “guarantor” is defined as “a firm that possesses a controlling interest in the owner or
11 operator,” or is “a firm engaged in a substantial business relationship with the owner or
12 operator.” 40 C.F.R. § 280.96(a). While American International may fit within the broader
13 use of the term “guarantor” in § 6991b(d), it would not fit within the definition of
14 “guarantor” under the regulations. We need not resolve the apparent inconsistencies in these
15 definitions, however, because we conclude that even if American International is a
16 “guarantor,” plaintiff’s direct action is prohibited because plaintiff can assert his claim
17 against Circle K in the Industrial Commission and then in state court and because his claim
18 is precluded by the language of the Policy itself.

19 Worker’s compensation claims are properly presented to the Industrial Commission,
20 and decisions by the Commission are subject to judicial review. Kaibab Indus. v. Indus.
21 Comm’n, 196 Ariz. 601, 607, 2 P.3d 691, 697 (Ct. App. 2000) (“Contingent upon judicial
22 review, the Industrial Commission of Arizona establishes the full measure of a petitioner’s
23 rights according to Arizona law.”); A.R.S. § 23-921(A) (the Industrial Commission “is
24 charged with . . . the adjudication of claims for compensation”); A.R.S. § 23-951(A) (an
25 aggrieved party may apply to the court of appeals for a writ of certiorari to review a decision
26 by the Industrial Commission). Because plaintiff can obtain jurisdiction over Circle K in the
27 Industrial Commission and then in state court, a direct action against a “guarantor” is not
28 available under the HSWA.

1 Even if a direct action was authorized, however, plaintiff’s claim is precluded by the
2 language of the Policy itself. The HSWA regulations provide that available insurance
3 coverage is properly “subject to the limits of liability, exclusions, conditions, and other terms
4 of the policy.” 40 C.F.R. § 280.97(b). The American International policy expressly excludes
5 from coverage “bodily injury to an Insured [including employees of an Insured] or its parent,
6 subsidiary or affiliate *arising out of and in the course of employment* by the Insured or its
7 parent, subsidiary or affiliate.” Motion, exhibit A at 3 (emphasis added). It is undisputed
8 that Ryan Dumas was employed by Circle K and was acting within the scope of his
9 employment at the time of his death. Therefore, the Policy’s employee exclusion precludes
10 coverage for plaintiff’s claim.

11 Moreover, 42 U.S.C. § 6991b(d)(2) provides that in any “direct action,” a “guarantor”
12 may “invoke all rights and defenses which would have been available to the owner or
13 operator if any action had been brought against the owner or operator by the claimant and
14 which would have been available to the guarantor if an action had been brought against the
15 guarantor by the owner or operator.” In other words, the guarantor has no greater liability
16 than that of the owner/operator. Here, Circle K could assert that plaintiff’s claim is barred
17 by Arizona’s worker’s compensation law. Similarly, American International relies on its
18 Policy’s corresponding exclusion for employee claims.

19 Plaintiff argues that the Policy’s employee exclusion provision is invalid because it
20 contravenes the statutory mandate that the insurer cover liability “to third parties for bodily
21 injury.” But Ryan Dumas is not a third party in relation to the Policy. He is an employee of
22 the insured.² The rulemaking history makes clear that the HSWA is not intended to supplant
23 the exclusive remedy of worker’s compensation laws. Instruments evidencing financial
24 responsibility under the HSWA may properly exclude certain “standard exclusions found in
25 insurance coverage, . . . [such as] obligations under workers’ compensation, disability
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27 ²The Policy includes within the definition of “Insured” an “employee . . . acting within
28 the scope of his or her duties.” Motion, exhibit A at 10.

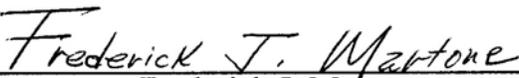
1 benefits, or unemployment compensation law.” Underground Storage Tanks—Financial
2 Responsibility Requirements, 53 Fed. Reg. 43322, 43361-62 (Oct. 26, 1988) (agency
3 commentary on final rule). The HSWA implementing regulations also recognize, for
4 example, that a guarantor’s obligation does not apply to “bodily injury to an employee of [the
5 owner or operator] arising from, and in the course of, employment by [the owner or
6 operator].” 40 C.F.R. § 280.96(c)(8)(b). The inclusion of an identical exemption in the
7 Policy does not contravene the purpose or mandate of the HSWA.

8 In sum, we hold that plaintiff’s direct action against American International is not
9 authorized by the HSWA because plaintiff can obtain jurisdiction over Circle K in the
10 Industrial Commission and then in state court. Moreover, even if a direct action was
11 available, plaintiff’s claim is precluded by the employee exclusion provision in the Policy.

12 **IT IS ORDERED GRANTING** defendant’s motion to dismiss (doc. 8).

13 It is further ordered vacating the Rule 16 conference set for December 4, 2009.

14 DATED this 24th day of November, 2009.

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 Frederick J. Martone
19 United States District Judge
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