BRB No. 06-0672

GALE WHEATON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GOLDEN GATE BRIDGE, HIGHWAY & TRANSPORTATION DISTRICT	)	DATE ISSUED:May 24, 2007
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer/Carrier's Motion for Summary Judgment of William Dorsey, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and John R. Hillsman (McGuinn, Hillsman & Palefsky), San Francisco, California, for claimant.

Rex M. Clack, Paul Gary Sterling, and David E. Russo (Sterling & Clack), and Roger E. Levy and Deborah C. Winslow (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Employer/Carrier's Motion for Summary Judgment (2003-LHC-1572) of Administrative Law Judge William Dorsey rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must

affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained injuries to his lower back and left shoulder while working for employer as a vessel repairman and ferryboat mechanic on October 2, 1999. Claimant initially filed a claim under the California Labor Code, but then elected to seek benefits under the Act. Employer responded by filing a motion to dismiss for lack of subject matter jurisdiction. Specifically, employer argued that it is exempt from liability pursuant to Section 3(b) of the Act, 33 U.S.C. §903(b),[1] as it is a subdivision of the State of California. Based on the joint stipulations of the parties, the administrative law judge found that employer, the Golden Gate Bridge, Highway & Transit District,[2] is a subdivision of the State of California, and thus concluded that claimant, by virtue of his position as its employee, is excluded from coverage pursuant to Section 3(b) of the Act. The administrative law judge thus granted employer's motion for summary decision and dismissed claimant's claim.

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[1] Section 3(b) of the Act, 33 U.S.C. §903(b), states:

> (b) Governmental officers and employees.
>
> No compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.

[2] In 1923 the California State Legislature enacted legislation that allowed local governments, alone or in conjunction with other local governments, to form bridge and highway districts. CA. Str. & Hwy Code §§27000 – 27556. Pursuant to this law, six counties (Sonoma, Mendocino, Marin, Napa, Del Norte, and the City and County of San Francisco) passed a uniform ordinance stating a desire to form employer as a multi-county district for the original purpose of constructing a bridge across Golden Gate Strait and the necessary highways of travel thereto. *United States v. Golden Gate Bridge & Highway Dist. of Cal.*, 37 F.Supp. 505 (N.D. Cal. 1941), *aff'd*, 125 F.2d 872 (9th Cir.), *cert. denied*, 316 U.S. 700 (1942). Employer was also given authority to "study, construct, acquire, improve, maintain, and operate any and all modes of transportation within or partly outside the district." CA. Str. & Hwy Code §27550. In furtherance of this mandate, employer created three divisions, *i.e.*, a bridge division, a bus division and a ferry division, to operate the Golden Gate Bridge and to otherwise provide public bus and ferry service within the geographic confines of its district.

On appeal, claimant challenges the administrative law judge's findings pursuant to Section 3(b) of the Act and his consequent dismissal of the claim. Employer responds, urging affirmance.

Claimant initially argues that Section 3(b) does not apply to employer because local federal courts have held that it is not an arm or agency of the State of California but an independent corporate body such that it does not have immunity, under either the Eleventh Amendment of the United States Constitution[3] or the inherent sovereign immunity of the state, from admiralty-law tort claims.[4] Claimant argues that the purpose

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[3] The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

[4] Claimant's citations in support of his sovereign immunity arguments are misplaced. For instance, claimant cites *United States v. Golden Gate Bridge & Highway Dist.*, 37 F.Supp. 505 (N.D. Cal. 1941), in support of his position that employer "is not an agency of the State of California" but "an independent corporate body." Claimant's Brief in Support of P/R at 6. However, the district court explicitly held, based on Ninth Circuit case law, *Commissioner of Internal Revenue v. Harlan*, 80 F.2d 660 (9th Cir. 1935), that employer is a "governmental agency" and not "a separate and independent corporate body." *Golden Gate Bridge & Highway Dist.*, 37 F.Supp. at 510. In affirming the district court's decision, the Ninth Circuit noted that Golden Gate "is a public corporation and *political subdivision of California* comprising the City and County of San Francisco, the Counties of Marin, Sonoma and Del Norte and portions of the Counties of Napa and Mendocino." *Golden Gate Bridge & Highway Dist. of Cal. v. U.S.***,** 125 F.2d 872, 873, n. 1 (9th Cir. 1942) (emphasis added). In *Michaeledes v. Golden Gate Bridge, Highway & Transp. Dist.*, 202 F.Supp.2d 1109 (N.D. Cal. 2002), and *Dougherty v. Golden Gate Bridge, Highway & Transp. Dist.*, 31 F. Supp. 2d 724 (N.D. Cal. 1998), cited for the proposition that since employer is not an "arm of the state" it cannot invoke sovereign immunity and thus cannot be entitled to the exclusion of Section 3(b), the doctrine of sovereign immunity was not specifically argued and therefore essentially was not considered in either decision. *Id.* Those cases, involving an interpretation of the phrase "public entity" under the California Tort Claims Act, Ca. Gov't Code §§810, *et seq*., have no relevance to a determination as to whether employer might qualify as a "subdivision" of a state under the Act.

and history of the Act make it clear that Congress enacted Section 3(b) to preserve the sovereign immunity of the states while simultaneously protecting lesser governmental entities from maritime tort claims.

In his decision, the administrative law judge opined that he was "doubtful that sovereign immunity analysis has a role in the outcome of this matter," as treating the exemption in Section 3(b) as co-extensive with Eleventh Amendment sovereign immunity "needlessly injects a constitutional issue into an ordinary question of statutory construction." Decision and Order at 12. He further observed that the legislative history of the Act "gives no reason to believe its coverage was influenced by concerns about sovereign immunity," Decision and Order at 13, and concluded that "Eleventh Amendment concerns would have no bearing on the Congressional decision to exempt federal officers and employees" and should likewise therefore have no bearing on the Congressional decision to exempt officers and employees of the various states and their subdivisions. Decision and Order at 12-13. We agree with the administrative law judge's conclusion.

The instant case does not turn on whether employer may invoke sovereign immunity, but rather involves a specific determination as to whether employer, by virtue of its structure and operation, is a "subdivision" of a state pursuant to Section 3(b). Claimant cites no authority to support his position that the scope of the Eleventh Amendment and the scope of Section 3(b) are identical.[5] Moreover, if the doctrine of sovereign immunity and Section 3(b) were, as claimant suggests, identical, then there seemingly would have been no reason for Congress to have enacted Section 3(b). Rather, given the long-standing existence of sovereign immunity via the Eleventh Amendment, it is more likely that Congress enacted Section 3(b) in order to broaden the scope of employer immunity to include governmental entities which may not necessarily fall within the sovereign immunity doctrine. Thus, an entity may fall under Section 3(b) but not necessarily be entitled to a traditional application of the sovereign immunity doctrine. Claimant has not provided any legal precedent to support an inference that Congress is prohibited from excluding from liability under the Act any type of entity or class of persons it chooses. Indeed, Congress clearly has the authority to exclude the employees

[5] In its decision in *Tyndzik v. University of Guam*, *27 BRBS 57* (1993) (Smith, J., dissenting in pertinent part), *rev'd in pertinent part sub nom. Tyndzik v. Director, OWCP*, 53 F.3d 1050, 29 BRBS 83(CRT) (9th Cir. 1995), the Board observed that "the factors considered in determining whether a state university qualifies for sovereign immunity *somewhat* overlap the factors used in determining the statutory status of an entity created by state law." *Tyndzik*, 27 BRBS at 67-68. In reversing the Board's holding that the university was a subdivision under Section 3(b), the Ninth Circuit did not discuss sovereign immunity. *Tyndzik*, 53 F.3d at 1053, 29 BRBS at 85(CRT).

of any entity it chooses from coverage under the Act. *See* 33 U.S.C. §902(3)(A)-(H). We therefore reject claimant's assertions regarding the applicability of the doctrine of sovereign immunity and affirm the administrative law judge's finding that an employer need not have sovereign immunity for Section 3(b) to apply.

Claimant next argues that policy considerations dictate the inapplicability of Section 3(b). Specifically, claimant maintains if employer is a subdivision of the state, such that claimant may not recover compensation benefits, then employer is not afforded the protection from the maritime tort claims of non-crew members like claimant by the exclusive remedy provisions of Section 5(a), 33 U.S.C. §905(a). Claimant thus argues that if the Board affirms the administrative law judge's interpretation of Section 3(b) to include employer, then employer may be liable in tort not only to claimant, but to all its other employees injured on navigable water. Employer's potential tort liability, however, has no bearing on an employee's coverage under Section 3(b). Several courts, including the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the instant case arises, have recognized that Section 3(b) "does not address, and certainly does not preclude, the rights of federal employees to pursue remedies that are available at common law," such as the right to sue the vessel owner in tort. *Bush v. Eagle-Picher Industries, Inc.*, 927 F.2d 445, 450 n. 8 (9th Cir. 1991); *see also Eagle-Picher Industries, Inc. v. U.S.*, 937 F.2d 625 (D.C. Cir. 1991). Employer's protection from potential liability under maritime law is not determinative of whether employer falls within the Section 3(b) definition of a subdivision of the State. In any event, claimant is in no position to assert this immunity on employer's behalf.

Claimant further asserts that Section 3(b) is ambiguous with respect to the status of local public entities like employer; he asserts that the exclusion is limited to "subdivisions" of "State governments" and thus does not encompass lesser entities whose liabilities do not affect the states' treasuries. Claimant concedes that while the legislative record is totally silent with respect to the purpose of the exclusion set forth in Section 3(b) or its intended scope, the underlying purposes of the Act, *i.e.*, to extend to maritime workers the benefits of, and to maritime employers the tort immunity conferred by, a workers' compensation law, dictate coverage for claimant in this case.[6] Claimant further

[6] Claimant relies on the purpose of the Longshore Act to provide coverage to employees injured on navigable waters in light of the holding in *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917), that state compensation coverage could not extend to such maritime workers. Clamant contends that while state employees were protected from the reach of the "Jensen federal-supremacy doctrine" and thus were entitled to state compensation coverage, the same was not true for employees of municipalities and lesser government entities. Claimant's Brief in Support of P/R at 24-25. Claimant thus concludes that Section 3(b) could not have been intended to exclude such employees and deny them a compensation remedy. Of course, as claimant acknowledges, court

contends that the decisions addressing the "subdivision" language in Section 3(b) are rarely on point, often misinterpreted, and essentially provide no established test for determining whether or when a lesser public entity like [employer] may be treated as a "subdivision" of a "State government." Claimant's Brief in Support of P/R at 14-16; Claimant's Reply Brief at 2. Claimant also maintains that no court has ever held that Section 3(b) grants cities and counties a blanket exemption from Longshore coverage.

As previously noted, Section 3(b) excludes from coverage employees of "any state . . . or any subdivision thereof." 33 U.S.C. §903(b). It is true that Section 3(b) does not explicitly define or identify what is encompassed by the term "subdivision" of a "state." *Keating*, 31 BRBS 187 (1997). However, case law provides guidance in addressing this issue.

Initially, a finding that a municipality may fall within the meaning of "subdivision" under Section 3(b) is supported by the Ninth Circuit's decision in *Tyndzik*. *Tyndzik*, 53 F.3d at 1053, 29 BRBS at 85(CRT). In *Tyndzik*, the Ninth Circuit held that the University of Guam was not a subdivision of the territory of Guam. Rather, the court held, the University was a "non-membership non-profit corporation" that does not perform any of the basic functions of government, such as enacting ordinances, levying taxes, or possessing the powers of eminent domain. *Id.* In this regard, the court observed that "the University is not some kind of semi-independent governmental body akin to a municipality that could reasonably be classified as a 'governmental subdivision.'" *Id*. This statement supports the proposition subsequently espoused by the Board in *Keating*, that a municipality can reasonably be classified as a subdivision under Section 3(b) *so long as it falls within the relevant factors*, an analysis which the Board undertook in that case.

In *Keating*, 31 BRBS 187, the Board held that the City of Titusville qualified as a subdivision of the State of Florida and, therefore, was not subject to liability under the Act for claimants injured at the city-owned marina.[7] *See Keating*, 31 BRBS at 188-189,

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decisions in the years after the 1927 enactment of the Act recognized a twilight zone where state coverage was permissible notwithstanding federal concerns. *See Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962). Thus, it is not the certainty claimant assumes that he would have been denied a compensation remedy under *Jensen.* In any event, claimant here was injured in 1999, and not 1917, and there is no allegation he is denied a compensation remedy.

[7] We decline claimant's invitation to revisit our holding in *Keating*. Contrary to claimant's contention, the Board's decision therein effectively "interprets" the "any subdivision" exclusion electing to rely on judicial precedence, including the decision

citing City of Plantation v. Roberts, 342 So.2d 69, 71 (Fla. 1976) (Supreme Court of Florida states that the plaintiff had no possibility of recovery under the Longshore Act as a police officer employed by the City of Plantation); *O'Brien v. City of New York*, 822 F.Supp. 943, 950 (E.D.N.Y. 1993) (court held that the City, as a subdivision of the State of New York, is excluded from the scope of the Act); *Purnell v. Norned Shipping B.V.*, 801 F.2d 152, 154 n. 2 (3d Cir. 1986), *cert. denied*, 480 U.S. 934 (1987) (Third Circuit, in *dicta*, acknowledged that the Act "expressly exempts from its coverage employees of political subdivisions of states, such as municipalities"). In making its determination, the Board analyzed the characteristics of the City, and concluded that it performed independent, government functions with the "primary purpose" of serving the general public, and had, akin to states, the power to take property by eminent domain, enact ordinances and tax its citizens. In particular, the Board held that "the State of Florida provides municipalities with the authority to construct and maintain areas for docking and mooring vessels such as marinas or wharves," and that the marina, in that case, "as a public facility operated as part of the City's Parks and Recreation Department, has as its primary purpose the service of the general populace." *Keating*, 31 BRBS at 189.

We thus reject claimant's blanket assertion that Section 3(b) was not intended to cover municipalities. Additionally, we reject claimant's contention that there is almost no case law on point, and no "clear-cut interpretative test" for determining whether or when a lesser public entity, like employer, may be treated as a "subdivision" of a "State government," as the decisions in *Keating*, 31 BRBS 187, and *Tyndzik*, 53 F.3d 1050, 29 BRBS 83(CRT), provide a test for resolving the issue. In this regard, a contextual reading of the Board's entire discussion of the Section 3(b) issue in *Keating* reveals that in order for that provision to be applicable the employer in question must perform some "basic governmental functions on its own." *Keating*, 31 BRBS at 190. We therefore turn to a consideration of the administrative law judge's findings under Section 3(b), in terms of the "test" put forth in *Keating*, 31 BRBS 187, and *Tyndzik*, 53 F.3d 1050, 29 BRBS 83(CRT).

Claimant contends that assuming the validity of the Board's decision in *Keating*, *i.e.*, that local municipal entities may fall within the definition of a "subdivision" under Section 3(b), the administrative law judge herein did not sufficiently weigh the factors espoused by the Ninth Circuit in *Tyndzik*, 53 F.3d 1050, 29 BRBS 83(CRT). Claimant avers that as employer operates independently from the state, without state funds, and that it lacks the power to tax, it performs operations which are not core governmental functions, it employs workers in its own name rather than that of the state and it cannot

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issued by the Ninth Circuit in *Tyndzik*, 53 F.3d at 1053, 29 BRBS at 85(CRT). *Keating*, 31 BRBS 187.

obligate state funds for its liabilities, the administrative law judge erred in determining that employer is a subdivision as defined by Section 3(b) of the Act.

Applying the factors discussed in the Ninth Circuit's decision in *Tyndzik*, 53 F.2d 1050, 29 BRBS 83(CRT), and the Board's decision in *Keating*, 31 BRBS 187,[8] Decision and Order at 9-10, the administrative law judge found that while employer exhibits elements of independence with regard to its operations and finances, and that these factors, in conjunction with its lack of a taxing authority, "weigh somewhat against finding that [employer] is a political subdivision," employer "has so many of the indicia of state sovereignty that it qualifies as a political subdivision of the State of California, exempt from liability under the Act" pursuant to Section 3(b). Decision and Order at 11. The administrative law judge's findings, in reaching his conclusion that employer is a "subdivision" under Section 3(b), are in accordance with law and supported by substantial evidence.

[8] The administrative law judge also cited to an administrative law judge decision, *Scarpa v. Massachusetts Port Authority*, 32 BRBS 557 (ALJ) (1998). While the administrative law judge discussed the *Scarpa* case, he ultimately considered and relied on the appropriate factors set out by the Ninth Circuit in *Tyndzik*, 53 F.2d 1050, 29 BRBS 83(CRT), and by the Board in *Keating*, 31 BRBS 187.

In *Tyndzik*, the Ninth Circuit, in finding that the employer/university in question was not, at the time of the claimant's injury, a political subdivision, reasoned that:

> The University also cannot perform basic governmental functions on its own. The University cannot take property by eminent domain, cannot enact ordinances, and cannot tax. The University is not some kind of semi-independent governmental body akin to a municipality that could reasonably be classified as a "governmental subdivision."

Tyndzik, 53 F.3d at 1053, 29 BRBS at 85(CRT). In contrast to that case, and in accordance with the City of Titusville in *Keating*, the administrative law judge found that employer performed independent, government functions with the "primary purpose" of serving the general public.[9] Specifically, like the City of Titusville, employer herein had the right to take property by eminent domain, and to enact ordinances, including "traffic regulations for travel on its facilities – rules of conduct enforceable through criminal prosecution in the state courts."[10] Decision and Order at 10. While employer does not have the taxing power possessed by its counterpart in *Keating*, it nevertheless has sufficient financial underpinnings akin to those held by a governmental subdivision, *i.e.*, the power to issue bonds and a legislatively derived reliance on local municipalities for some of its financing.[11] CA. Str. & Hwy Code §27554. Moreover, the administrative

[9] As the administrative law judge recognized, the California legislature explained that "the prospective continuing role of the district and its responsibilities in the field of transportation are policy questions of major importance to the citizens of California, the people and communities regularly served by the Golden Gate Bridge, the district, and the Legislature." CA. Str. & Hwy Code §27530. Furthermore, in *Michaeledes*, 202 F.Supp.2d at 1112, the court recognized that employer's "enabling legislation was amended in 1975 to authorize it to engage in such seemingly *municipal endeavors* as the operation of a local ferry system." *See also* CA. Str. & Hwy Code §§27000 §§27530, 27550, 27533.

[10] The administrative law judge further recognized that while employer's "independent control cuts to some extent against the conclusion that [employer] is a state entity," Decision and Order at 11, employer's directing body has a sufficient nexus to the government, *i.e.*, the California legislature "dictates how the board will be chosen," and that "no fewer than eight of [employer's] board members are public officers," to support a finding that it is a subdivision of the government. CA. Str. & Hwy Code §27510.

[11] We reject claimant's assertion that the Board specifically stated in its decision in *Tyndzik*, 27 BRBS at 68, n.17, that the "overriding factor" in every Section 3(b) analysis "is whether the named defendant has such independent status that a judgment against the

law judge reasoned that employer's authority to fix and collect tolls for public use of the Golden Gate Bridge is further indication that employer is a political subdivision.

The administrative law judge thoroughly weighed the relevant factors under Section 3(b), and his finding that employer "performs independent governmental functions on its own," is supported by substantial evidence, is rational, and is in accordance with law. Therefore, we affirm the administrative law judge's conclusion that claimant's claim is barred pursuant to Section 3(b) of the Act. *See Tyndzik*, 53 F.3d at 1053, 29 BRBS at 85(CRT); *Keating*, 31 BRBS 187.

Accordingly, the Decision and Order Granting Employer/Carrier's Motion for Summary Judgment is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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defendant would not impact the state treasury." The quoted language is in a footnote citing the factors relevant to sovereign immunity, which the Board found "somewhat overlapped" the Section 3(b) inquiry. *See* note 5, *supra*. The Board did not identify this factor, or any other, as the overriding factor in a Section 3(b) analysis. Moreover, as the Board's decision on Section 3(b) was reversed by the Ninth Circuit, that court's decision controls.