BRB No. 91-1470

VAUGHAN E. TYNDZIK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNIVERSITY OF GUAM	)	DATE ISSUED:
	)	
Self-insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Cesar C. Cabot (Carbullido & Pipes, P.C.), Upper Tumon, Guam, for employer.

Mark A. Reinhalter (Judith E. Kramer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Maria G. Fitzpatrick, Office of the Attorney General, Agana, Guam, for the Government of Guam, *amicus curiae*.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

BROWN, Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (90-LHC-778) of Administrative Law Judge Edward C. Burch denying benefits 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for employer, the University of Guam (UOG), as a marine technician and

diver from September 1977 to May 1988.[1] In May 1988, claimant applied for leave without pay in order to attend a medical consultation in Australia. His leave status expired August 26, 1988. On September 1, 1988, claimant was diagnosed as suffering from dysbaric osteonecrosis as a result of cumulative exposure to hyperbaric environments caused by his repetitive diving at the UOG. *See* Cl. Ex. 3. In June 1989, claimant was fired by the UOG for "failing to report to work or to provide evidence of medical disability." Cl. Ex. 6. Claimant appealed his dismissal to the Civil Service Commission. Emp. Ex. 1. In addition, claimant sought permanent total disability benefits under the Act.

The administrative law judge found that the Act is not applicable to the territory of Guam. *See* Decision and Order at 8. Further, the administrative law judge found that the UOG is an exempt employer under Section 3(b) of the Act, 33 U.S.C. §903(b), both during claimant's employment and at the time the claim was filed. *Id*. at 11. Therefore, benefits were denied. On appeal, the Director contends that the administrative law judge erred in finding that Guam is not covered under Section 3(a) of the Act, 33 U.S.C. §903(a), and that the UOG is a subdivision of the Government of Guam exempted from coverage under Section 3(b) of the Act. Employer and the Government of Guam respond, urging affirmance of the administrative law judge's Decision and Order.[2]

Section 3(a)

Initially, the Director contends that the administrative law judge erred in finding that Guam is not covered under Section 3(a) of the Act. We agree. Section 3(a) of the Act provides:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States....

33 U.S.C. §903(a). Section 2(9), 33 U.S.C. §902(9), defines the term "United States" as "the several States and Territories and the District of Columbia, including the territorial waters thereof." The issue in this case concerns the scope of the term "Territories." Guam has been an "unincorporated territory" since 1951; prior to this time, it was a possession of the United States. The administrative law judge found that reference in Section 39(c) of the Act, 33 U.S.C. §939(c), to rehabilitation services in the "States or Territories, *possessions*, or the District of Columbia" suggests that Congress intended to distinguish between "Territories" and "possessions," and to exclude the latter from Section 2(9).[3] Decision and Order at 5. Following case law that holds the Act inapplicable to

[1] In 1985, claimant left the UOG for a year and a half to engage in a consulting business with his father, during which time he did not dive.

[2] The Government of Guam filed an amicus brief with the Board on November 24, 1992 as permitted by Board Order dated September 15, 1992.

[3] Section 39(c)(2) provides in pertinent part:

Puerto Rico, the administrative law judge also found that in passing the Organic Act of Guam, Congress did not intend that the Act apply concurrently with local law. Decision and Order at 7.

The term "territory" does not have a fixed and technical meaning which must be accorded it in all circumstances. It may mean a system of organized government by which certain regions have been erected into civil governments or may be meant to be synonymous only with "place" or "area." As used in acts of Congress, it may have different meanings, so that the same political entity may be included in one act but excluded in another. *Americana of Puerto Rico, Inc. v. Kaplus*, 368 F.2d 431 (3d Cir. 1966), *cert. denied*, 386 U.S. 943 (1967). Technically, a "Territory" is incorporated and destined for statehood. The United States Court of Appeals for the Ninth Circuit noted in *Kanazawa, Ltd. v. Sound, Unltd.*, 440 F.2d 1239, 1240 (9th Cir. 1971), that in legislation dealing specifically with Guam, Congress has not used a lower case "t" exclusively.[4]

The Organic Act of Guam, passed by Congress in 1951, establishes Guam as an "unincorporated *territory*" of the United States. 48 U.S.C. §1421a (emphasis added). The Organic Act vests the "legislative power and authority of Guam" in the Guam Legislature. 48 U.S.C. §1423a; *People of Territory of Guam v. Fegurgur*, 800 F.2d 1470, 1474 (9th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987). Specifically, the Organic Act provides:

> The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam.

48 U.S.C. §1423a. Due to the ambiguous usage of the word "territory" in legislation and judicial decisions, it is not readily clear from a plain reading of the Act whether Guam is a covered location under Section 3(a). We hold that coverage under the Act is not ruled out based on the use of the term "Territory" in Section 2(9) and the omission of the term "possession," as the meaning of "Territory" may vary and further analysis is required to determine the applicable usage. Further, although Section 39(c) does specifically address both Territories and possessions, it is, as the Director contends, illogical to hold that Guam is exempt from coverage under Section 3(a) but impose on the Secretary responsibility for vocational rehabilitation of permanently disabled employees in Guam under Section 39(c), merely because it is a "possession" and not a "Territory."

> The Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange with the appropriate public or private agencies in States or Territories, possessions, or the District of Columbia for such rehabilitation.

33 U.S.C. §939(c)(2).

[4] Moreover, the Supreme Court referred to Puerto Rico, an unincorporated territory, as a "Territory" rather than "territory" in *Puerto Rico v. Shell Co.*, 320 U.S. 253 (1937).

Therefore, we vacate the administrative law judge's finding that the usage of the term "States, Territories, possessions, or the District of Columbia" in Section 39(c) suggests that Congress intended to exclude "territories" from Section 2(9).[5] In light of the ambiguity of the term "Territory" as used in Section 2(9), we believe it is reasonable to defer to the Director's interpretation as to the scope of the Act's coverage.[6] *See generally Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 113 (CRT) (9th Cir. 1991). For the following reasons, we hold that Guam is covered by the Act, and we reverse the administrative law judge's finding to the contrary.

The Director contends that the administrative law judge erred in emphasizing the original purpose underlying the Act as enacted in 1927, as the 1972 amendments significantly altered that purpose. The 1972 amendments effectively established a regime of concurrent coverage for maritime workers under both state compensation statutes and the Act. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 720, 12 BRBS 890, 892 (1980). The administrative law judge found:

> Since Congress has broad power to legislate for national territories under U.S. Constit. art. IV §3, it can confer on a territory, unlike a state, the power to make local workmen's compensation laws applicable to injuries sustained by employees working in territorial waters. Thus, the remedial purpose of the Act with regard to injured workers on state navigable waters does not apply to Puerto Rico or other territories.

Decision and Order at 6. The administrative law judge relied on the decision of the United States Court of Appeals for the First Circuit in *Garcia v. Friesecke*, 597 F.2d 284, 289-90 (1st Cir. 1979), *cert. denied*, 444 U.S. 940 (1979), in which the court held that the Act does not apply to Puerto Rico as it is displaced by the local Puerto Rican compensation scheme. *See also Guerrido v. Alcoa Steamship Co.*, 234 F.2d 349, 354-355 (1st Cir. 1956). The court held in *Guerrido* that the purpose of the Act as enacted in 1927 was to provide a workers' compensation remedy to those injured on navigable waters where states could not legislate. Since Puerto Rico, as a territory, was not

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[5] The Director argues that at best whether Guam is a covered "territory" or not is ambiguous and the doubt should be resolved in favor of claimant pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a). We reject this contention as the Board has held that the Section 20(a) presumption does not apply to issues of legal interpretation involving the Act's coverage. *See Sheridon v. Petro Drive, Inc.*, 18 BRBS 57 (1986); *see generally O'Leary v. Puget Sound Bridge & Dry Dock Co.*, 349 F.2d 571 (9th Cir. 1965).

[6] The Solicitor of Labor has written three memoranda on the subject of whether Guam is covered under the Act. In 1951, the Department concluded that the Act did not apply to Guam because it was a "territory," not a "Territory," and because of a 1924 case holding that the admiralty laws of the United States are not applicable to Puerto Rico. *Lastra v. New York & Porto Rico S.S. Co.*, 2 F.2d 812 (1st Cir. 1924). In 1980, the Department's position remained unchanged. In 1983, however, the Department took the position that the Act applies to Guam, as neither legislation nor case law strictly adheres to the distinction between "territory" and "Territory." Moreover, the Department disagreed with case law holding the Act inapplicable to Puerto Rico. *See* discussion, *infra*.

prohibited from enacting a workers' compensation statute that covered its navigable waters, the court concluded that Puerto Rico was not covered under Section 3(a) of the Act. *Guerrido*, 234 F.2d at 356. In *Garcia*, the court held that the purpose of the Act as stated in *Guerrido* was not changed by the 1972 amendments and again held that the Act was not applicable to Puerto Rico. *Garcia*, 597 F.2d at 292. The Director contends that the changes in the thrust of the Act wrought by the 1972 amendments were not considered persuasive in *Garcia* because Congress did not expressly overturn prior judicial precedent holding the Act inapplicable to Puerto Rico.[7] *Id.* at 293. As the Act, since the 1972 amendments, allows for concurrent coverage with state compensation statutes and there is no judicial precedent holding the Act inapplicable to Guam, we hold that the First Circuit's opinions in *Guerrido* and *Garcia* do not require a finding that the Act does not apply to Guam.

Moreover, the Director contends that the administrative law judge erred in relying on the case law which culminated in *Garcia* as the status and Organic Act of Puerto Rico differ in several important aspects from the circumstances of Guam and its Organic Act. Although formerly a totally organized but unincorporated territory, Puerto Rico now enjoys a very different status as it has drafted and adopted its own constitution, creating a "commonwealth." 48 U.S.C. §731b. Thus, the government of the Commonwealth of Puerto Rico, unlike that of other territories, derives its powers not only from the consent of Congress, but also from the consent of the people of Puerto Rico. *See Americana of Puerto Rico, Inc.*, 368 F.2d at 435. The Puerto Rico Organic Act provides that the legislative authority of Puerto Rico extends "to all matters of a legislative character not locally inapplicable." 48 U.S.C. §739. The First Circuit interpreted this delegation as empowering Puerto Rico with exclusive jurisdiction of Puerto Rican waters. *Guerrido*, 234 F.2d at 356.

The legal status of the territory of Guam is closer in nature to the Virgin Islands than it is to that of Puerto Rico. The Virgin Islands is also an organized, but unincorporated territory. The Revised Organic Act of 1954 was intended to grant a greater degree of autonomy to the people of the Virgin Islands and has given the territory attributes of autonomy similar to those of a sovereign government or state. In language very similar to the Organic Act of Guam, the Organic Act of the Virgin Islands provides that "the legislative authority and power of the Virgin Islands shall extend to all rightful subjects of legislation not inconsistent with ... the laws of United States made applicable to the Virgin Islands." 48 U.S.C. §1574.

The United States Court of Appeals for the Third Circuit reviewed whether a tort recovery against employer allowed under Virgin Island law conflicts with the Act. *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935 (3d Cir. 1990), *reh'g denied*, 910 F.2d 1179 (3d Cir. 1990), *cert. denied*, 111 S.Ct. 783 (1991). The court noted that for purposes of its analysis, the Virgin Islands stands in no different position than would a state. *Peter*, 903 F.2d at 937 n.1. The court further noted that the legislature of the Virgin Islands may not enact legislation inconsistent with the laws of the United

[7] The court noted that Congress is presumed to be aware of administrative or judicial interpretations of a statute and to adopt that interpretation when it reenacts a statute without change. *Garcia*, 597 F.2d at 293.

States made applicable to the Virgin Islands. *Id.*; 48 U.S.C. §1574(a). Thus, the court held that the Act applies to the Virgin Islands because the Act includes within the definition of navigable waters of the United States those of United States territories.[8] *Id.* Moreover, the court held that federal maritime law does not preempt application of any state workers' compensation law and that the two may apply concurrently.[9] *Id.* at 951.

A comparison of the Organic Acts of Puerto Rico, the Virgin Islands and Guam reveals a greater similarity in the legislative delegating authority between the Virgin Islands and Guam. Both statutes allow for local legislation not inconsistent with the laws of the United States applicable to that territory. The emphasis in the legislative authority of Puerto Rico, however, is to invest the people of Puerto Rico with powers of self-government not characteristic of the sovereignty exercisable by citizens of other territories. *See generally Americana of Puerto Rico*, 368 F.2d at 434-435. Therefore, we hold that the administrative law judge erred in finding that the case law regarding the Act's applicability in Puerto Rico is persuasive in the consideration of the Act's applicability in Guam. Further, as the legal status and legislative authority of the Virgin Islands and Guam are similar, we consider the Third Circuit's decision in *Peter* persuasive in this case and hold that Guam is covered under Section 3(a) of the Act. Moreover, we hold that Section 7005 of the Guam Workers' Compensation Law which provides that Guam workers' compensation is the exclusive remedy from an employer at law or in admiralty does not preclude application of the Act. *See generally Munguia v. Chevron U.S.A., Inc.*, 23 BRBS 180, 183 (1990). The 1972 amendments to the Act extending federal jurisdiction supplements, rather than supplants, state compensation laws. *Sun Ship, Inc.*, 447 U.S. at 720-721, 12 BRBS at 892; *Munguia*, 23 BRBS at 183.

We also reject the administrative law judge's finding that the Report of the Commission on the Application of Federal Laws to Guam, H.R. Doc. No. 212, 82d Cong., 1st Sess. 1 (1951), which considered which federal laws applied or should be made applicable to Guam is persuasive in determining whether Guam is a covered location under the Act.[10] The Commission concluded that

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[8] We also note that although the United States Court of Appeals for the Fifth Circuit held that the Act does not apply in the Panama Canal Zone, *Panama Agencies Co. v. Franco*, 111 F.2d 263 (5th Cir. 1940), the Canal Zone never has been a territory.

[9] On a petition for rehearing, the court in *Peter* declined to address the specific argument that the Act does not apply to the Virgin Islands because the issue had not been raised before the district court. The court, however, noted the apparent inconsistencies in the position of the Department on this subject. 910 F.2d at 1180 n.2. In response to the court's decision in *Peter*, the Office of Workers' Compensation Programs issued a Notice (No. 71) on March 12, 1991 advising all interested parties that the Department's policy is that the Act applies to the Virgin Islands. A BRBS 4-130. This notice rescinded prior notices to the contrary.

[10] We note that the findings of the Commonwealth of the Northern Mariana Islands Commission on Federal Laws are not controlling in the territory of Guam, although the Commission's conclusion is that the Act applies to Guam and thus applies to the Northern Marianas. *See* Dir. Brief at 40-42. However, Guam, although geographically part of the Marianas, is a different legal entity (a territory)

the Act did not apply to Guam and further noted that statutes applicable to Puerto Rico and the Virgin Islands were considered presumptively appropriate for Guam.[11] Decision and Order at 7.

Section 25b of Guam's Organic Act provides in pertinent part:

> The President of the United States shall appoint a commission of seven persons, at least three of whom shall be residents of Guam, to survey the field of Federal Statutes and to make recommendations to the Congress of the United States within twelve months after the date of enactment of this Act as to which statutes of the United States not applicable to Guam on such date shall be made applicable to Guam, and as to which statutes of the United States applicable to Guam on such date shall be declared inapplicable.

48 U.S.C. §1421c(b) *repealed by* Pub. L. No. 90-497 §7, 82 Stat. 847 (1968). The Commission stated, without reasons, that the Longshoremen's and Harbor Workers' Compensation Act did not apply at that time, and should not apply.[12] Decision and Order at 7. This finding required no action by Congress and none was taken.

The Commission gave no basis for its finding that the Act did not apply to Guam in 1951. Since that time the Courts of Appeals with jurisdiction over the two territories which the Commission considered to have the same status as Guam have held that the Act applies in one, the Virgin Islands, but not in the other, Puerto Rico. In addition, the status of Puerto Rico has changed from a "territory" to a "commonwealth." As discussed earlier, we hold that the status of Guam more closely resembles that of the Virgin Islands than Puerto Rico.

Congress has repealed the section of the Organic Act of Guam that required future legislation to specifically refer to "possessions" in order to be applicable to Guam. Further, the Act was amended in 1972 to allow for concurrent jurisdiction of state and federal compensation acts for maritime employees. *See Sun Ship, Inc.*, 447 U.S. at 720, 12 BRBS at 892. Although it would be too speculative to state the basis for the findings by the commission in 1951, factors in effect at the time of the report have significantly changed today. Thus, we hold the Commission's finding that the Act does not apply to Guam is not controlling.

In sum, we reverse the administrative law judge's finding that Guam is not covered under Section 3(a) of the Act. In view of the similarities in the status of the Virgin Islands and Guam, and in light of the decision in *Peter*, we agree with the Director that a system of concurrent jurisdiction

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than the rest of the Marianas (a possession).

[11] This conclusion, however, was drawn before the establishment of the Commonwealth of Puerto Rico in 1952.

[12] The Director contends that this "finding" was beyond the scope of the Commission.

better comports with the purposes of the Act.

Section 3(b)

As we hold that the Act applies to Guam, we also must address the Director's contentions regarding whether claimant is exempt from coverage under Section 3(b) as a governmental employee. Section 3(b) provides that "[n]o compensation shall be payable in respect of the disability or death of an officer or employee...of any State or foreign government, or any subdivision thereof." 33 U.S.C. §903(b). The issue presented is whether the administrative law judge properly found that the UOG is a subdivision of the Government of Guam.

The administrative law judge found that the UOG was established in 1963 as a public territorial university. *See* Decision and Order at 8. In 1976, the Legislature of Guam enacted Public Law 13-194, known as the Higher Education Act, which created a "non-membership, non-profit corporate" university to succeed the then existing university. *See* Decision and Order at 9. The administrative law judge found that the university did not become a purely private corporation at this time, however, as it remained subject to a comprehensive legislative scheme and to funding approval by the Guam Legislature. *See* Decision and Order at 9. The Legislature reenacted Section 16101 of Chapter 16 of Title 17 of the Guam Code Annotated in December 1988 with Public Law 19-40. Emp. Ex. 2. This legislation states that the UOG, "already established according to existing laws, is hereby *confirmed* as a public territorial university and constituted a body corporate which shall continue to be known as the University of Guam." Emp. Ex. 2; 17 G.C.A. §16101 (emphasis added). The administrative law judge found that Public Law 19-40 merely clarifies that the UOG was at all time, and continues to be, a public territorial university that is a subdivision of the government. Decision and Order at 9. Thus, the administrative law judge concluded that claimant was a classified employee of the UOG and cannot maintain an action under the Act because the UOG is a governmental employer within the meaning of Section 3(b). Decision and Order at 11.

On appeal, the Director contends that the District Court of Guam has expressly held that during claimant's employment tenure the UOG was not a subdivision of the Government of Guam. In *Carter v. Torres*, Civil Action No. 83-0042 (D. Guam App. Div. 1986), the District Court of Guam considered whether the President of the UOG from 1981-1983 was a public employee for purposes of a federal civil rights action. The court concluded that while the Higher Education Act of 1976 was in effect, the UOG was a non-public employer. The administrative law judge found that interpretations of Guam Law by the District Court of Guam are not accorded special deference and that, notwithstanding *Carter*, the UOG was an exempt employer under Section 3(b) of the Act both during claimant's employment and at the time the claim was filed.

As employer correctly contends, the United States Court of Appeals for the Ninth Circuit held that interpretations of Guam Law by the District Court of Guam are not to be accorded any special deference and that questions of law are reviewed *de novo. See People of the Territory of Guam v. Yang*, 850 F.2d 507, 511 (9th Cir. 1988)(*en banc*). Thus, we affirm the administrative law

judge's finding that the decision in *Carter* is not controlling in the present case.[13]

The Director also contends that the Ninth Circuit has inferentially held that the UOG is not a subdivision of the Government of Guam. In *Bordallo v. Reyes*, 763 F.2d 1098 (9th Cir. 1985), the United States Court of Appeals for the Ninth Circuit affirmed a United States District Court's holding that the Guam Visitors Bureau is not an instrumentality of the Government of Guam even though statutorily created and defined as a public corporation. The court noted that the district court concluded that "because the Legislature had expressly designated four public corporations as instrumentalities of the government, it did not intend the same characterization to apply to other public corporations, not so designated." *Bordallo*, 763 F.2d at 1103; *see also Languana v. Guam Visitors Bureau*, 725 F.2d 519 (9th Cir. 1984). This holding is not controlling in the instant case, however, as the term "instrumentality of government" has a specific meaning under Guam's Organic Act, and the phrase is not synonymous with the term "subdivision" as used in Section 3(b) of the Act. *See generally Bordallo*, 610 F.Supp. 1128, 1134 (D.C. Guam 1984), *aff'd*, 763 F.2d 1098 (9th Cir. 1985). Specifically, the issue in *Bordallo* was whether the creation of the Visitors Bureau violated the provision of the Organic Act giving the governor general supervision and control of all departments, agencies, and other "instrumentalities" of the executive branch. As control by the governor is not necessary for an entity to fall within the term "subdivision," *see* discussion, *infra*, we reject the contention that if the UOG is not an instrumentality of the Government of Guam for purposes of the Organic Act, it cannot be a subdivision of the Government of Guam within the meaning Section 3(b) of the Act.

The Director does not dispute that the UOG has continued to be a public corporation throughout the years since its inception. Federal law, rather than state law, governs whether an entity created under state law is a "political subdivision" of the state. *See NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 602-603 (1971). In *Natural Gas Utility District of Hawkins County, Tennessee*, the following factors were determined to be relevant to a decision on whether an entity is a "political subdivision:"

1. Who directs the entity, and how are those persons appointed and removed? Are they responsible to public officials or the general electorate?

2. To whom does it report? Are annual reports submitted to the government? Is there a veto power over its decisions?

3. Does it operate on a profit or non-profit basis?

4. How is its property and revenue taxed?

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[13] In addition, we note that following the issuance of the *Carter* decision in 1986, the Legislature passed Public Law 19-40 in 1987 "confirming" that the UOG is a public territorial university. This law became effective in 1988.

5. Does it have the power of eminent domain?

6. Is money appropriated to it by the government?

7. Who pays its employees?

8. Is it an agency of the government or a private or public corporation?

Id., 402 U.S. at 605-609. *See also Shannon v. Shannon*, 965 F.2d 542 (7th Cir. 1992).

Moreover, the vast majority of state universities enjoy sovereign immunity against suits in federal court under the Eleventh Amendment to the United States Constitution. *See, e.g., Kashani v. Purdue University*, 813 F.2d 843 (7th Cir. 1987); *cert. denied*, 484 U.S. 846 (1987); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985); *cf. Kovatis v. Rutgers, The State University*, 822 F.2d 1303 (3d Cir. 1987). Sovereign immunity applies only to a state and its agencies, *see Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), and 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.[14]

In applying the facts regarding the operation of the UOG to the factors outlined in the case law, we must look to Guamanian law as it existed on September 1, 1988, the date claimant was diagnosed with dysbaric osteonecrosis and was determined to be disabled.[15] *SAIF Corp/Oregon Ship v. Johnson*, 908 F.2d 1434, 23 BRBS 113 (CRT)(9th Cir. 1990); *see also Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Insurance Co. of N.A. v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(1st Cir. 1992), *cert denied*, 113 S.Ct. 1253 (1993). After

[14] The overriding factor in determining whether a state university qualifies for sovereign immunity is whether the defendant has such an independent status that a judgment against it would not affect the state treasury. *Jackson v. Hayakawa*, 682 F.2d 1344 (9th Cir. 1982); *Ronwin v. Shapiro*, 657 F.2d 1071 (9th Cir. 1981). Other factors include: (1) whether the entity performs an essential governmental function; (2) the extent of state funding; (3) the state's oversight and control of the university's fiscal affairs; (4) the university's ability independently to raise funds; (5) whether the state taxes the university; (6) whether it has been separately incorporated; and (7) whether it has the power to sue or be sued or enter into contracts. *See Kovatis v. Rutgers, The State University*, 822 F.2d 1303 (3d Cir. 1987); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 302 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985); *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd on other grounds*, 460 U.S. 719 (1983).

[15] Claimant's condition, dysbaric osteonecrosis, is an occupational disease, as it occurred over a long period of time due to conditions of his particular employment. *See Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1990); 33 U.S.C. §902(2).

consideration of the aforementioned factors, we conclude that the administrative law judge properly found that the UOG is a "subdivision" of the Government of Guam, and that claimant is barred from obtaining compensation under the Act. As resolution of this issue rests on the interpretation of case law, and is not a matter of statutory interpretation, we need not defer to the Director's position on this issue. *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.,* 978 F.2d 750, 26 BRBS 85 (CRT) (1st Cir. 1992).

As the Director correctly asserts, the UOG was given a greater degree of autonomy in 1976 under the Higher Education Act which was in effect during the period of claimant's employment and on the date of awareness of his employment-related illness. For instance, the Board of Regents cannot be removed by the Governor or the Legislature. 17 G.C.A. §§16104, 16106. However, contrary to the Director's assertion, the Legislature retained a substantial degree of control over the UOG which it would not have been able to exercise over a private institution. Although the Board of Regents, which is appointed by the governor with the advice and consent of the Legislature, 17 G.C.A. §16104, was granted greater control over the operation of the university in 1976, a public hearing continued to be required before the charter could be amended, and meetings of the Board are subject to the Open Government Law of Guam, 17 G.C.A. §16108.[16] *See generally Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. at 607-608.

In addition, the Legislature maintained its financial control as the university was required to submit its annual budget requirements for personnel and operating costs to the legislature. The Legislature, following public hearings, appropriated the expenditure not covered by tuition, 17 G.C.A. §16121, and the Government of Guam guaranteed an adequate subsidy for the UOG's operating costs, 17 G.C.A.§16123. *See generally Lewis v. Midwestern State University,* 837 F.2d 197 (5th Cir. 1988), *cert. denied,* 488 U.S. 849 (1988). Furthermore, UOG employees are members of the Government of Guam's Retirement Fund, 17 G.C.A. §16118, are covered under the Government of Guam's Workers' Compensation Fund, and all non-academic personnel, such as claimant, are subject to the personnel rules and regulations under Title 4 of the Guam Code Annotated, which is applicable only to public employees, 17 G.C.A. §16116.[17] *See generally Brock v. Chicago Zoological Society,* 820 F.2d 909 (7th Cir. 1987); Emp. Ex. 3; Tr. at 235 *et seq.*

In addition to most of these factors, the administrative law judge credited the testimony of Marie Diaz, former UOG personnel manager, and Ron Arguon, an employee of the Guam Civil Service Commission. Ms. Diaz testified regarding the Civil Service laws applicable to the UOG's non-academic personnel, and the benefits available to such personnel as governmental employees. Mr. Arguon testified regarding the characteristics of autonomous and semi-autonomous agencies or

[16] Further, the Legislature deems it necessary that there be joint meetings between the UOG, Guam Community College and the Territorial Board of Education, 17 G.C.A. §16110, and the minutes of the meetings shall be transmitted to the Governor and the legislature.

[17] We also note that in the present case, claimant exercised his right as a classified employee and appealed his dismissal from the University to the Guam Civil Service Commission. *See* Emp. Ex. 1.

public corporations, and that these agencies are arms of the government despite some degree of autonomy. The administrative law judge concluded that the UOG is a governmental employer exempt under Section 3(b) of the Act as there has been a sufficient demonstration of control by the government over the university. The weight of the evidence supports the administrative law judge's finding that the UOG is, in fact, a "subdivision" of the Government of Guam, and case law suggesting the contrary is not persuasive.[18] Therefore, we affirm the administrative law judge's finding that claimant cannot obtain compensation under the Act, because the UOG is a governmental employer within the meaning of Section 3(b), as it is rational, supported by substantial evidence, and in accordance with law.[19]

Accordingly, the administrative law judge's finding that Guam is not covered under Section 2(9) and 3(a) the Act is reversed. The administrative law judge's finding that claimant cannot maintain an action under the Act because the University of Guam is a governmental subdivision within the meaning of Section 3(b) of the Act is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

I concur:

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[18] The following factors suggest that the University is not a "subdivision" of the government: (1) the Board of Regents cannot be removed by the Governor or Legislature, 17 G.C.A. §16104; (2) the Board members are not employees of the Government of Guam, 17 G.C.A. §16105; and (3) the Board was empowered to negotiate a loan and incur such obligations as were necessary to fund construction of a Health and Physical Education Complex, and such loan is not a general obligation of the Government of Guam, 17 G.C.A. §16122. *See generally Shannon v. Shannon*, 965 F.2d 542 (7th Cir. 1992). However, the mere presence of contrary factors does not compel a finding that a statutory entity is not a "subdivision" of the state.

[19] We reject the contention that the UOG should be collaterally estopped from litigating the issue of its status since the Guam Workers' Compensation Commission allegedly found that the UOG was a non-public employer. The commission stated merely that the UOG as a "non-public" employer should have secured private insurance, but was being permitted to use the Guam Special Fund, and it relies solely on the decision in *Carter v. Torres*, Civil Action No. 83-0042 (D. Guam App. Div. 1986). As we have affirmed the administrative law judge's conclusion that *Carter* does not control the result herein, we similarly reject the reliance on the decision of the Workers' Compensation Commission.

NANCY S. DOLDER
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's decision with respect to the reversal of the administrative law judge's finding that Guam is not covered under Section 3(a), 33 U.S.C. §903(a), of the Act. I respectfully dissent, however, from my colleagues' decision to affirm the administrative law judge's finding that claimant cannot maintain an action under the Act, because the UOG is a governmental employer with the meaning of Section 3(b), 33 U.S.C. §903(b). Where the Director's position is reasonable and does not contravene plain statutory language, it is entitled to some degree of deference. *See, e.g., Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991); *Director, OWCP v. Palmer Coking Coal Co.*, 867 F.2d 552, 6 BLR 2-11 (9th Cir. 1983).

In the instant case, the Director contends that the UOG is not exempt from coverage under Section 3(b) of the Act as the District Court of Guam has expressly held that during claimant's employment tenure, the UOG was not a subdivision of the Government of Guam. *Carter v. Torres*, Civil Action No. 83-0042 (D. Guam App. Div. 1986). In *Carter*, the District Court of Guam considered whether the President of the UOG from 1981-1983 was a public employee in a federal civil rights action. In an unpublished memorandum order, the District Court granted the defendant's motion for summary judgment as it agreed that while Public Law 13-194 was in effect, the UOG was not a public corporation and the President of the UOG was not a public employee of the Government of Guam. *Carter*, Civil Action No. 83-0042 at 3.

Although Public Law 19-40 was amended in December 1988 to "confirm" that the UOG is a public territorial university, claimant worked for the UOG from September 1977 to May 1988 and was exposed in that employment to conditions which allegedly caused his disability due to dysbaric osteonecrosis. He was diagnosed with that disease and determined to be disabled as of September 1, 1988. Title 1 G.C.A. Chapter 7, §702 provides "no part of this Code is retroactive, unless expressly so declared." No express declaration of retroactivity appears in Section 16101 of Title 17 of the Guam Code Annotated and there is no clear legislative intent by the Guam Legislature appearing in the act itself that Public Law 19-40 was to be applied retroactively.

As my colleagues note, the applicable law in occupational disease cases is that which is in effect on the date of manifestation. *SAIF Corporation/Oregon Ship v. Johnson*, 908 F.2d 1434, 23 BRBS 113 (CRT) (9th Cir. 1990). The date claimant's occupation disease manifested itself fell after the issuance of the District Court's decision in *Carter*, but before the effective date of Public Law 19-40. The court in *Carter* concluded that while the Higher Education Act of 1976 was in effect, the UOG was a non-public employer. Therefore, I would defer to the Director's position that *Carter* is controlling, and I would reverse the administrative law judge's finding that the UOG was a subdivision of the territory of Guam and remand the case to the administrative law judge for

consideration of the claim on its merits.

ROY P. SMITH
Administrative Appeals Judge