BRB No. 93-1947

HELAL UDDIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SAIPAN STEVEDORE COMPANY, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DATE ISSUED:_____
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

Jay H. Sorensen, Saipan, Northern Mariana Islands, for claimant.

Donald R. Hazlewood, Saipan, Northern Mariana Islands, and Ronald H. Klein (Emard & Perrochet), San Francisco, California, for self-insured employer.

Mark A. Reinhalter (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (91-LHC-1510) of Administrative Law Judge G. Marvin Bober 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, who resides and works on the island of Saipan, in the Commonwealth of the Northern Mariana Islands (CNMI), began working for employer on April 13, 1987, as a stevedore, performing all ship- and stevedore-related work. Tr. at 24-25. On June 13, 1987, claimant stood on top of a container to unhook it after it was loaded on the ship. The crane and cable developed a problem and started shaking. Claimant injured his back when he jumped from the container onto the deck of the ship before the crane fell onto the container. *Id.* at 27-31. He returned to work in July, but he soon quit because he was unable to perform heavy work without pain. By November 1987, claimant had begun working as a security guard with various agencies. Decision and Order at 2-3. Employer paid temporary total disability and medical benefits from June 13 through July 8, 1987, and claimant filed a claim for continuing benefits.

On November 24, 1992, the administrative law judge issued an order denying employer's motion to dismiss the claim for lack of jurisdiction. Employer argued that the Act does not apply to the CNMI because the Covenant establishing the CNMI, *see infra*, does not mention the Act as applying and because the Act, by definition, does not cover the CNMI. The administrative law judge determined that the Act applies to territories of the United States (U.S.) and their waters and it applies to Guam; therefore, he concluded it applies to the CNMI. In his decision issued on June 4, 1993, prior to addressing the factual issues raised in the case, he reaffirmed his conclusion that the Act applies to the CNMI. Decision and Order at 4. Thereafter, the administrative law judge awarded claimant permanent partial disability and medical benefits, interest, a Section 14(e) penalty, and an attorney's fee. *Id.* at 6-9. On appeal, employer raises only the jurisdiction issue. Both claimant and the Director, Office of Workers' Compensation Programs (the Director), respond. Before addressing employer's appeal, we shall outline the history of the CNMI and its political status in the U.S.

The Northern Mariana Islands are a group of small islands located in the South Pacific, in Micronesia, north of Guam. Saipan, Tinian, and Rota are the largest and most populated islands of the group. *See Hillblom v. United States*, 896 F.2d 426 (9th Cir. 1990); S. Rep. No. 596, 94th Cong., 2d Sess.4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 448 (1976). From the beginning of World War I until the U.S. invasion in 1944, Japan ruled the Marianas. From 1944 until 1947, the islands were a U.S. possession. In 1947, the United Nations designated the area as a Trust Territory to be administered by the U.S. *Micronesian Telecommunications Corp. v. NLRB*, 820 F.2d 1097, 1098 (9th Cir. 1987) (*MTC*).

In 1969, the U.S. began negotiations with representatives of the Micronesian islands of the Trust Territory to determine their future political status. In 1972, representatives of the Northern Mariana Islands entered into separate negotiations with the U.S. because they desired a closer tie to the U.S. than did the remaining island communities.[1] *United States v. De Leon Guerrero*, 4 F.3d

[1]The remaining communities eventually formed the Federated States of Micronesia, the Marshall Islands, and Palau, all of which entered into Compacts of Free Association with the U.S. *Temengil v. Trust Territory of the Pacific Islands*, 881 F.2d 647, 650 (9th Cir. 1989).

749, 751 (9th Cir. 1993); *Temengil v. Trust Territory of the Pacific Islands*, 881 F.2d 647, 650 (9th Cir. 1989). In 1976, the U.S. and the Northern Mariana Islands entered into a "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" (Covenant). The Covenant was approved by the legislature and citizens of the Northern Mariana Islands and was enacted into law by the U.S. Congress. Joint Resolution of March 24, 1976, Pub.L. No. 94-241, 90 Stat. 263, *reprinted in* 48 U.S.C. §1681 note; *see De Leon Guerrero*, 4 F.3d at 751. Some of the provisions of the Covenant became effective in 1976, others in 1978 by Presidential Proclamation, and as of November 3, 1986, the Covenant took full effect.[2] Covenant §1003(b), 48 U.S.C. §1801 (Supp. 1995); *MTC*, 820 F.2d at 1099; Proclamation No. 4534, 42 Fed. Reg. 56,593. Despite the staggered effective dates, the U.S. generally treated the Northern Mariana Islands as a commonwealth since 1978. *Temengil*, 881 F.2d at 650.

Employer contends that the Act, by definition, does not cover the CNMI because the Act's silence on the matter indicates the CNMI is not included in the definition of "United States." Employer argues that the status of the CNMI is like that of Puerto Rico and, as the Act is not applicable to Puerto Rico, it should not apply to the CNMI. The Director, however, maintains that the CNMI falls within the coverage of the Act and the definition of "United States" in Section 2(9), 33 U.S.C. §902(9), as the term "Territory" has a broad meaning, and that the Act's silence on the matter merely indicates the CNMI is not excluded. Section 3(a) of the Act, 33 U.S.C. §903(a), provides that it covers injuries or deaths which occur "upon the navigable waters of the United States. . . ." Section 2(9) defines the term "United States" as follows: "The term `United States' when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof." 33 U.S.C. §902(9). Employer contends the CNMI is not a "Territory" and thus does not fall within the Act's realm of coverage.

The term "territory" (or "Territory") does not have a fixed and technical meaning and is not defined in the Act. As the Board stated in *Tyndzik v. University of Guam*, 27 BRBS 57, 61 (1993) (Smith, J., dissenting on other grounds), *rev'd in part on other grounds sub nom. Tyndzik v. Director, OWCP*, 53 F.3d 1050, 29 BRBS 83 (CRT) (9th Cir. 1995), the meaning "may vary and further analysis is required to determine the applicable usage." Although the terms "possession," "territory,"[3] and "commonwealth,"[4] have been used to label the islands, the "political and sovereign

[2]As of November 3, 1986, the Trusteeship Agreement was terminated with respect to the Northern Marianas. *MTC*, 820 F.2d at 1099.

[3]A "territory" is defined as the land and waters under the jurisdiction of a state, nation, or sovereign. Webster's II New Riverside University Dictionary (1984). A "Territory" is considered to be a part of the U.S. that is not admitted as a state, but is administered by a governor and a legislature. *Id.* Technically, incorporated territories ("Territories") are destined for statehood. *Tyndzik*, 27 BRBS at 60; Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. Haw. L. Rev. 445, 449 (1992).

[4]A "commonwealth" is defined as a nation or state that is self-governing and autonomous and has a voluntary relationship with a larger political unit. Webster's II New Riverside University

status of the Trust Territory . . . puzzled legislators, courts, and commentators from the beginning." *Temengil*, 881 F.2d at 650. Currently, the CNMI and Puerto Rico are commonwealths while Guam and the Virgin Islands are territories. *See Tyndzik*, 27 BRBS at 62 (Board finds status of Guam closer to that of the Virgin Islands than to that of Puerto Rico);[5] Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. Haw. L. Rev. 445, 450-451 (1992).

Senate Report 94-596 describes the CNMI as follows:

> Although described as a commonwealth, the relationship is territorial in nature with final sovereignty vested in the United States and plenary legislative authority vested in the United States Congress. The essential difference between the Covenant and the usual territorial relationship, such as that of Guam, is the provision in the Covenant that the Marianas constitution and government structure will be a product of a Marianas constitutional convention, as was the case with Puerto Rico, rather than through an organic act of the United States Congress.

1976 U.S.C.C.A.N. at 449. Thus, there is some support for employer's analogy between the CNMI and Puerto Rico, wherein the Act is inapplicable. *Garcia v. Friesecke*, 597 F.2d 284 (1st Cir.), *cert. denied*, 444 U.S. 940 (1979) (Court concluded that workers' compensation law is a local matter to be addressed by the Puerto Rican legislature); *Guerrido v. Alcoa Steamship Co.*, 234 F.2d 349 (1st Cir. 1956). The CNMI has agreed it is an "unincorporated territory" which resembles Puerto Rico; however, it claims it is different from other unincorporated territories such as Puerto Rico because it has a right to self-government which is guaranteed by the mutual consent provisions of the Covenant and no other territory has this guarantee. *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 691 n.28 (9th Cir.), *cert. denied*, 467 U.S. 1244 (1984); *see also* Covenant §§101-105, 48 U.S.C. §1801 (Supp. 1995); *Garcia*, 597 F.2d at 293 n.11. Nonetheless, despite the similarity between the status of Puerto Rico and the status of the CNMI, we conclude the administrative law judge properly relied on the terms of the Covenant which created the CNMI to determine that the Act applies therein.

Article I of the Covenant defines the relationship between the U.S. and the CNMI. Section 102 states that relations will be governed by the "Covenant which, together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands."[6] Covenant §102, 48 U.S.C. §1801 (Supp.

Dictionary (1984).

[5]The Act applies to the Virgin Islands. *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, *reh'g denied*, 910 F.2d 1179 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991).

[6]In accordance with the Covenant, the CNMI has the right to local self-government, while the responsibilities relating to foreign matters and defense rest with the U.S. Government. Covenant §104, 48 U.S.C. §1801 (Supp. 1995); *Hillblom*, 896 F.2d at 428.

1995). Article V of the Covenant concerns the applicability of U.S. laws. Section 501 discusses the portions of the U.S. Constitution which apply to the CNMI and Section 502 discusses which laws apply. Specifically, Section 502 provides:

> (a) The following laws of the United States in existence on the effective date of the Section and subsequent amendments to such laws will apply to the Northern Mariana Islands, except as otherwise provided in this Covenant:
>
> (1) those laws which provide federal services and financial assistance programs and the federal banking laws as they apply to Guam; Section 228 of Title II and Title XVI of the Social Security Act as it applies to the several States; the Public Health Service Act as it applies to the Virgin Islands; and the Micronesian Claims Act as it applies to the Trust Territory of the Pacific Islands;
>
> (2) *those laws not described in paragraph (1) which are applicable to Guam and which are of general application to the several States as they are applicable to the several States*;

Covenant §502(a)(1), (2), 48 U.S.C. §1801 (Supp. 1995) (emphasis added). Section 502 of the Covenant became effective on January 9, 1978. Proclamation No. 4534. The authority of the U.S. towards the CNMI arises solely under this Covenant. *Hillblom*, 896 F.2d at 429.

Pursuant to Section 504, a commission was appointed to survey U.S. laws and make recommendations regarding which laws should apply to the CNMI. Covenant §504, 48 U.S.C. §1801 (Supp. 1995). In its report, the Commission determined that the Act would cover injuries on the navigable waters of Guam, and therefore, the Act would apply to the CNMI.[7] Later, the research staff studied the Act in more depth and appears to have drawn the conclusion that the Act pertains to the CNMI.[8]

The administrative law judge relied on Section 502 of the Covenant and the Commission's findings to conclude that, as the Act is applicable to Guam, it, therefore, is applicable to the CNMI. Order at 2. Employer contends this reliance is improper. It argues that the Act does not apply to the CNMI because the Act and Covenant are silent on the matter and it is impossible to know the intent of the Covenant or of Congress. Consequently, it argues, there is no evidence to show that the Act

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[7]Northern Mariana Islands Commission on Federal Laws, *Welcoming America's Newest Commonwealth: The Second Interim Report of the Northern Mariana Islands Commission on Federal Laws to the Congress of the United States* (1985) at 52.

[8]3 *Legal Analysis of Selected Titles of the United States Code: Research by the Staff of the Northern Mariana Islands Commission on Federal Laws* (1985) at 1019.

should be included in the laws covering the CNMI.[9] Employer maintains that the lack of case law, memoranda, *etc.*, applying the Act to the CNMI reflects the intent to exclude the CNMI from coverage. We reject employer's argument. Silence on the matter should not be interpreted as an intent to exclude or an intent to include, but should be considered on a case-by-case basis. *See generally United States v. Standard Oil Co. of Cal.*, 404 U.S. 558 (1972).

Other statutes which are not identified in the Covenant have been held to apply to the CNMI. For example, relying on Section 502 of the Covenant and the Commission's recommendation, the United States Court of Appeals for the Ninth Circuit, which has jurisdiction over this case, held that the National Labor Relations Act (NLRA) applies to the CNMI. *MTC*, 820 F.2d at 1100-1101. Moreover, the court rejected the argument that Congress did not contemplate including the CNMI under the NLRA's coverage. It quoted the following from the Supreme Court's decision in *Standard Oil*, 404 U.S. at 559 (Sherman

[9]We reject employer's assertion that the Commission report is not persuasive because the introduction to the research staff report concludes with a disclaimer of the materials. The research committee's introduction also states:

> Caveats aside, the research compiled in these volumes is sufficiently valuable to justify its photocopying and distribution to institutions especially concerned with the applicability of federal laws to the Northern Mariana Islands.

Moreover, the comments therein do not encompass the recommendations reported in the Second Interim Report, which were "widely circulated for critical comment. . . ."

Act is applicable to American Samoa):

> if the acquisition of that insular dependency had been foreseen, Congress would have so varied it (sic) comprehensive language as to exclude it from the operation of the act

to conclude that lack of foresight alone is not enough to exclude coverage; therefore, the term "Territory," which has been read broadly, includes the CNMI. *MTC*, 820 F.2d at 1100. The Ninth Circuit has held that the civil rights statutes, 42 U.S.C. §§1981, 1983, and the Jones Act, 46 U.S.C. §688, also cover the CNMI. *Misch v. Zee Enterprises, Inc.*, 879 F.2d 628 (9th Cir. 1989) (Jones Act); *Fleming v. Dep't of Public Safety*, 837 F.2d 401 (9th Cir.) (§§1981, 1983), *cert. denied*, 488 U.S. 889 (1988); *see also Temengil*, 881 F.2d at 651.

Employer also contends the Act does not apply to Guam and, consequently, cannot apply to the CNMI under Section 502 of the Covenant. It argues that the Board's decision regarding application of the Act to Guam in *Tyndzik* need not be followed because it is "merely *dicta*." Alternatively, employer argues that if it is not *dicta*, it was decided incorrectly. Contrary to employer's assertion, the Board's holding is not *dicta*. *Dicta* refers to an observation made by a court which is not necessary to the disposition of the case before it. *Cole Energy Development Co. v. Ingersoll-Rand Co.*, 8 F.3d 607 (7th Cir. 1993); *Burroughs v. Holiday Inn*, 621 F.Supp. 351 (D.C.N.Y. 1985); 1B *Moore's Federal Practice*, 0.402[2] at 38 (2d Edition, 1984). In *Tyndzik*, two issues were raised before the Board. Both issues were discussed and decided and it was necessary to resolve the issue of whether the Act applies to Guam before it could address the issue of whether the University of Guam was exempt under Section 3(b) of the Act, 33 U.S.C. §903(b). Consequently, the Board's holding that the Act applies to Guam is controlling. Further, on appeal in *Tyndzik*, the Ninth Circuit addressed only whether the University of Guam was a "subdivision" of the Territory of Guam at the time Tyndzik was injured. *See Tyndzik*, 53 F.3d at 1050, 29 BRBS at 83-84 (CRT). Thus, the court did not disturb the Board's holding that the Act applies to Guam.

Employer also contends the Act should not apply to the CNMI because the CNMI, like Puerto Rico, has provided its own coverage to injured workers. Claimant responds, arguing that the CNMI statute did not exist at the time of his injury, and therefore, the Act must apply in the absence. Employer replies, maintaining there were other legal remedies available to claimant at that time. This issue is not dispositive, as state workers' compensation laws and the Act may have concurrent jurisdiction over maritime employees. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980). Regardless of whether there was a local workers' compensation act in effect at the time of claimant's injury, the

Act can only apply if it fulfills the provisions of Section 502 of the Covenant, as we conclude it does.[10]

Given the broad definition of the term "territory," the Covenant provision requiring that laws applicable to Guam and the several States also apply to the CNMI, the Commission's recommendation that the Act applies to the CNMI, and the Board's decision that the Act applies to Guam, it is reasonable for the administrative law judge to have concluded that the Act also applies to the CNMI. Therefore, we reject employer's arguments and affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

[10]We also reject employer's remaining "practical" challenges to the application of the Act in the CNMI, as administration of the Act is the responsibility of the Director, who, in this case, promotes application therein. Moreover, we disagree with employer's allegation that administration of the Act over such a great distance would be difficult. By operation of its extensions, the Act covers great distances. *See* 43 U.S.C. §1301 *et seq.* (Outer Continental Shelf Lands Act); 42 U.S.C. §1651 *et seq.* (Defense Base Act); 5 U.S.C. §8171 *et seq.* (Nonappropriated Fund Instrumentalities Act).