JOSEPH F. KEATING	)	BRB No. 97-0821
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CITY OF TITUSVILLE	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	
	)	
BONITA KING	)	BRB No. 97-0853
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CITY OF TITUSVILLE	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order - Denying Benefits of David W. Di Nardi, and the Decision and Order of Edith Barnett, Administrative Law Judges, United States Department of Labor.

John M. Schwartz (Blumenthal, Schwartz & Garfinkel, P.A.), Titusville, Florida, for the claimants.

George W. Boring, III and James M. Hess (Langston, Hess, Bolton, Znosko & Helm), Maitland, Florida, for the self-insured employer.

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

PER CURIAM:

Claimants, Joseph F. Keating and Bonita King, appeal respectively the Decision and Order - Denying Benefits (96-LHC-1343) of Administrative Law Judge David W. Di Nardi, and the Decision and Order (95-LHC-2264) of Administrative Law Judge Edith Barnett denying benefits on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act).[1] We must

[1]By Order dated July 22, 1997, the Board consolidated these cases pursuant to 20

affirm the findings of fact and conclusions of law of the administrative law judges 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). The Board held oral argument in these cases in Jacksonville, Florida, on November 13, 1997.

Claimant Keating, employed as the marina manager/dockmaster at the Titusville Marina, sustained an employment-related injury to his lower back on July 7, 1993, when he attempted to lift a pump out of a sinking vessel. By agreement of the parties, the sole issue before Judge Di Nardi was whether Mr. Keating is a covered maritime employee under the Act. In resolving this issue, Judge Di Nardi determined that Mr. Keating is excluded from coverage under both Section 2(3)(C), 33 U.S.C. §902(3)(C), and Section 3(b), 33 U.S.C. §903(b), of the Act. Specifically, Judge Di Nardi found that at the time of his injury, Mr. Keating was employed as a marina worker not engaged in the construction, replacement or expansion of the marina, and thus, by operation of Section 2(3)(C) is not an "employee" under the Act. In addition, Judge Di Nardi found that employer, the City of Titusville, is a political subdivision of the State of Florida, and thus concluded that Mr. Keating, by virtue of his position as a city employee, is excluded from coverage pursuant to Section 3(b) of the Act. Accordingly, Judge Di Nardi denied Mr. Keating's claim for benefits.

Claimant King, working as a senior account clerk at the Titusville Marina, injured her right shoulder, elbow and knee as a result of a fall which occurred while she was directing a sailboat to move away from the "C" dock on December 6, 1994. Judge Barnett similarly determined that Ms. King's claim lacked jurisdiction under the Act pursuant to Sections 2(3)(C) and 3(b), as she is a marina worker employed by a state subdivision. Accordingly, her claim was denied.

On appeal, claimants contest the denial of their claims. Employer responds, urging affirmance.

SECTION 3(b)

Claimants contend that the administrative law judges incorrectly interpreted Section 3(b) of the Act in finding that claimants are, as employees of the City of Titusville, excluded from coverage under the Act. Specifically, claimants argue that the provisions of Section 3(b) are meant to apply only to those situations where the state is involved in a traditional state activity performed for the purposes of the general population, such as law enforcement, and not, as in the instant case, a non-state activity performed for purposes not related to the normal welfare of the people of the governmental agency. In addition, claimants assert that the "any subdivision" language of Section 3(b) in referring to a State was not meant to encompass city governments but rather more immediate governmental subdivisions directly related to the state level, like the Department of Labor or the

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C.F.R. §802.104.

Department of Insurance.

Section 3(b) states that "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*." 33 U.S.C. §903(b) (emphasis added). Section 3(b), however, does not explicitly define or identify what is encompassed by the term "subdivision" of a "State."

In *City of Plantation v. Roberts*, 342 So.2d 69, 71 (Fla.1976), the Supreme Court of Florida held that the plaintiff had no possibility of recovery under the Longshore Act because, as a police officer employed by the City of Plantation, he is an employee of a political subdivision of the State of Florida.[2] Similarly, in *O'Brien v. City of New York*, 822 F.Supp. 943, 950 (E.D.N.Y. 1993), the United States District Court for the Eastern District of New York held that the City, as a subdivision of the State of New York, is excluded from the scope of the Act. Additionally, the United States Court of Appeals for the Third Circuit, in *dicta*, acknowledged that the Act "expressly exempts from its coverage employees of political subdivisions of states, such as municipalities." *Purnell v. Norned Shipping B.V.*, 801 F.2d 152, 154 n. 2 (3d Cir. 1986), *cert. denied,* 480 U.S. 934 (1987). Thus, contrary to claimants' contentions, city governments and municipalities fall within the "any subdivision" language of Section 3(b). Moreover, in *Tyndzik v. Director, OWCP*, 53 F.3d 1050, 29 BRBS 83 (CRT) (9th Cir. 1995), *rev'g in part Tyndzik v. University of Guam*, 27 BRBS 547 (1993)(Smith, J., dissenting in part), the United States Court of Appeals for the Ninth Circuit held that the claimant could pursue his claim for benefits under the Act against the employer/university because at the time of the claimant's injury it was not a political subdivision. The court 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 the instant cases, the administrative law judges determined that the City of Titusville performs independent governmental functions on its own. Notably, the administrative law judges found that in contrast to the employer/university in *Tyndzik*, the City of Titusville is able to take property, enact ordinances and tax its citizens. Additionally, the administrative law judges acknowledged that the City of Titusville has been duly recognized as a municipal corporation under the laws of the State of Florida, as evidenced by its City Charter. RX 2-Keating; EX 1-King. In light of this, the administrative law judges

[2]Plaintiff was injured on a police launch on a canal within the city.

properly concluded that the City of Titusville is a governmental subdivision of the State of Florida.

The administrative law judges then determined that the City of Titusville owns and operates the Titusville Marina, and thus, that claimants, as City employees, are employees of a subdivision of the State of Florida. *See generally Tyndzik*, 53 F.3d at 1053, 29 BRBS at 85 (CRT); *Purnell*, 801 F.2d at 154. Claimants argue that the operation of the marina is not a municipal activity because the marina was built as an “enterprise zone,” and that it is supposed to be self-supporting and "for profit."[3] Nevertheless, that it is part of the city’s financial accounts, and that it is set up, along with some other entities, as an “enterprise fund” so that it accounts for operations similar to those of a private business, is not dispositive of its status as a municipal entity. RX 7 at 4-Keating. Moreover, that there is a private marina supplying many of the same services nearby does not negate the municipal nature of the marina in question. The State of Florida provides municipalities with the authority to construct and maintain areas for docking and mooring vessels such as marinas or wharves. FLA. STAT. Ch. 161.051 (1996). The marina, 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. RX 8 at 12-Keating. Any rate increases in the docking fees would have to be approved by city officials. *Id*. The city owns the land surrounding the marina, and it has the lease from the state on the submerged lands. RX 3-Keating; EX 2-King. The evidence of record therefore supports the administrative law judges’ determinations that employer, the City of Titusville, is a subdivision of the State of Florida as defined by Section 3(b) of the Act, and thus, we reject claimants’ contentions to the contrary. As the administrative law judges’ findings that claimants are excluded from coverage under the Act by operation of Section 3(b) are in accordance with law and supported by the evidence of record, they are affirmed.

SECTION 2(3)(C)

[3]If the marina is short of funds, it may borrow from the city. At the time of the hearing, the marina was running a deficit. RX 7 at 6-Keating.

Claimants also argue that as their injuries occurred over navigable waters in the course of maritime employment they are covered under the Act. Claimants specifically contend that the United States Supreme Court, in *Southern Pacific Co. v. Jensen*, 244 U.S. 225 (1917), held that state compensation laws cannot apply beyond the water's edge,[4] and thus, where individuals are injured over the water in maritime employment, they shall be covered under the Act pursuant to the Supreme Court's decision in *Director, OWCP v. Perini North River Associates* [*Perini*], 459 U.S. 297, 15 BRBS 62 (CRT)(1983). Lastly, claimants aver that they are covered under the Act as the Titusville Marina is not actually a marina as contemplated under Section 2(3)(C), but rather a small port wherein they performed traditional longshoring operations entitling them to coverage under the Act.

Section 2(3) defines the term "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker," 33 U.S.C. §902(3), with some delineated exceptions if such excepted employees are covered under a state workers' compensation law. *See* 33 U.S.C. §902(3)(A)-(F) (1994); n. 4, *supra*. Relevant to the instant cases is the exception enumerated by Congress at Section 2(3)(C), wherein the term "employee" does not include "individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance)." 33 U.S.C. §902(3)(C) (1994). The legislative history with regard to the addition of Section 2(3)(C) in the 1984 Amendments to the Act provides insight into the issue at hand. Congress provided several examples of individuals who would and would not be covered by operation of this provision. Of pertinence to the instant cases, Congress recognized that:

> The employees of a recreational marina who are engaged in taking reservations, servicing boats, preparing and serving food, and other such activities would be excluded from the definition of "employee" and thus, from the Act's coverage. But, a marina may employ workers to drive piles and construct additional piers and docking spaces over the water. This latter category of worker would not come within the exemption, and accordingly, would remain within Longshore Act coverage.

H.R. Rep. No. 570, 98th Cong., 2d Sess., pt. 1, at 5 (1984), reprinted in 1984 U.S.C.C.A.N. 2734, 2738.

[4]Nevertheless, the record establishes that both claimants received benefits under Florida's workers' compensation law.

The issues presented by Section 2(3)(C), as to whether the Titusville Marina is a "recreational" marina and whether claimants are "engaged in construction, replacement, or expansion of such marina," are thus largely questions of fact to be resolved by the administrative law judges. In the instant cases, the administrative law judges initially determined that the Titusville Marina is a recreational marina, and not, as suggested by claimants, a small port,[5] by looking at the services rendered by that entity and claimants' duties in relation thereto. Di Nardi Decision and Order at 18 ; Barnett Decision and Order at 6. First, both administrative law judges found that the marina primarily services recreational boats, *i.e.,* sailboats or houseboats. Keating Tr. at 35-36; King Tr. at 23. The administrative law judges specifically found that the marina exists to secure boats, sell gasoline and snacks, and provide electricity and telephone services. *See, e.g.,* King Tr. at 23-24. In addition, each administrative law judge examined the specific responsibilities of the respective claimants' jobs. Judge Di Nardi found that claimant Keating's duties involved inspecting vessels for seaworthiness and arranging for repairs of any electrical or mechanical problems, items Judge Di Nardi classified as "servicing boats." Di Nardi Decision and Order at 18; Keating Tr. at 25, 31. Similarly, Judge Barnett determined that claimant King's duties entailed both office and dock work including fueling and tying boats, and inspecting the docks, services typically provided by a marina. Barnett Decision and Order at 2, 6; King Tr. at 13. Moreover, both of the administrative law judges determined and it is uncontested that claimants were not engaged in the construction, replacement, or expansion of the marina. Di Nardi Decision and Order at 18; Barnett Decision and Order at 2, 6. Consequently, the administrative law judges concluded that claimants, as employees of a marina, are excluded from coverage under the Act pursuant to Section 2(3)(C). *Id.* The administrative law judges' factual determinations regarding the recreational nature of the Titusville Marina and claimants' duties are rational and supported by substantial evidence. Therefore, we affirm their conclusions that claimants are excluded from coverage pursuant to Section 2(3)(c).

Lastly, we note that the fact that claimants may have been injured on actual navigable waters (Keating in the water on a boat, King on a floating dock) does not compel a finding of coverage under *Perini*. In *Perini*, the Supreme Court held that:

> when a worker is injured on actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in §2(3), and is covered under the LHWCA, *providing, of course, that he . . . is not excluded by any other provision*

[5] Judge Barnett went even further by finding, through a definition in WEBSTER'S NEW COLLEGIATE DICTIONARY, that the Titusville Marina is more closely aligned with the definition of a marina than a port. Specifically, she noted that no cargo is loaded or unloaded there, nor are duties and customs fees collected.

of the Act.

Perini, 459 U.S. at 324, 15 BRBS at 80 (CRT)(emphasis added). Inasmuch as claimants are specifically excluded by Section 2(3)(C), they are not entitled to coverage by virtue of an injury on actual navigable waters.

Accordingly, Judge Di Nardi's Decision and Order - Denying Benefits and Judge Barnett's Decision and Order denying benefits are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge