UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

DAYLE JAMES, as Personal Representative of the ESTATE OF CHARLIE THOMAS JAMES, JR., **Plaintiff,** **vs.** **UNITED STATES OF AMERICA; GENERAL DYNAMICS LAND SYSTEMS INC.; GENERAL DYNAMICS LAND SYSTEMS CUSTOMER SERVICE & SUPPORT CO.,** **Defendants.**	**3:17-CV-00046 JWS** **ORDER AND OPINION** **[Re: Dockets 86, 110]**

I. MOTION PRESENTED

At docket 86 Defendant United States of America ("United States") filed a motion pursuant to Rule 12(b)(1) to dismiss the negligence claims against it set forth in the Second Amended Complaint, arguing that the court lacks subject matter jurisdiction over such claims because the Federal Tort Claims Act ("FTCA") does not waive the government's sovereign immunity with respect to those claims. Plaintiff Dayle James, as Personal Representative of the Estate of Charlie Thomas James, Jr. ("Plaintiff"), filed a response at docket 97. Plaintiff also filed a motion to amend the complaint at docket 95. The United States filed a combined reply and opposition to the motion to amend at docket 100. The court thereafter granted the motion to amend.

Plaintiff filed the Third Amended Complaint at docket 106. Like its prior iteration, the new complaint relies on the sovereign immunity waiver in the FTCA to support its tort claims against the United States, but it rephrases the claims to state that the United States is liable for damages caused by negligence of personnel "pursuant to the FTCA, 33 U.S.C. [§] 933 of the [Longshore and Harbor Workers' Compensation Act], a federal maritime common law action for negligence and wrongful death."[1]

The United States filed a second motion to dismiss based on lack of subject matter jurisdiction at docket 110, reiterating its arguments as to why the court lacks subject matter jurisdiction under the FTCA and arguing that Plaintiff's newly structured negligence claims do not correct the complaint's jurisdictional issues. Plaintiff responded at docket 120. The United States replied at docket 125. Oral argument would not be of assistance to the court.

II. BACKGROUND

Plaintiff filed this action as the personal representative of the estate of Charlie Thomas James, Jr. ("James"). James died on March 13, 2015, after being struck by a U.S. Army Stryker military vehicle. At the time of the accident, James was acting within the course and scope of his employment as a longshoreman with Sea Star Stevedore Company ("Sea Star"). Longshoremen had offloaded Strykers from a TOTE Maritime Alaska, Inc. ("TOTE") vessel at the Port of Anchorage and were loading them onto railroad cars for transport to the military base near Fairbanks, Alaska. James had been tasked with guiding the vehicles to the spot in the railway cars where they would be strapped down. He was positioned in front of one of the Strykers in order to guide it to its designated point behind another Stryker. He gave a signal for the driver of the Stryker to stop, but, allegedly due to a brake failure, the vehicle did not stop and struck James. He died as a result of the accident. Plaintiff alleges that the United States had

[1]Doc. 106 at ¶ 40.

a duty to properly maintain the Strykers and breached that duty, proximately causing James's death.[2]

The Stryker that struck James was being transported by a government contractor, TOTE, from one military base to another pursuant to a 2014 contract between TOTE and the United States Transportation Command ("USTRANSCOM"), a component of the Department of Defense, and was in effect at the time of the accident. USTRANSCOM is responsible for transporting military personnel, equipment, and supplies for the Department of Defense. A division of USTRANSCOM, the Military Surface Deployment and Distribution Command ("SDDC") provides ocean terminal, commercial ocean liner, and distribution services to deploy and sustain U.S. military forces. SDDC is the interface between the Department of Defense and the private commercial transportation industry with respect to the movement of miliary cargo, such as the Strykers, to and from ports.

TOTE's contract was one of many contracts entered into by USTRANSCOM with private carriers to fulfill the SDDC mission of moving cargo through ports. Under these contracts, the contractors must be able to provide "door to door" transport of the cargo, meaning they not only ship the cargo but also transport the cargo overland to designated points, such as military bases. Under TOTE's contract, it agreed to accept "bookings" for USTRANSCOM. Bookings specify the cargo to be shipped, the points the contractor will transport from and to, and other requirements. The Stryker involved in the accident was shipped pursuant to one of these bookings. TOTE took possession of the Strykers from the U.S. military in or around Yermo, California, and agreed to transport the Strykers to Fort Wainwright. The booking involved TOTE transporting the Strykers from California, to a port in Washington, to sea, to a receiving port in Anchorage, and then overland via railway to Fort Wainwright. TOTE agreed to provide

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[2]Plaintiff also raises claims against the Strykers' manufacturer, General Dynamics and Land Systems Co., and its technical support company, General Dynamics Land Systems Support and Service Co., but such claims are not at issue in this motion.

all labor necessary to transfer the cargo, including the labor necessary to load and unload the Strykers from the vessels onto the railway cars and off at the point of delivery.

TOTE entered into a contract with Sea Star to perform cargo checking, staging, and vessel loading and discharging for TOTE at the Anchorage terminal. Sea Star acted as TOTE's subcontractor and was obligated to employ and direct all persons performing services under the contract. James was one of those persons.

Sea Star was obligated under the subcontract to provide all workers' compensation insurance coverage for its employees as required by law. TOTE's contract with USTRANSCOM incorporated by reference a federal acquisition regulation that required TOTE to provide workers' compensation insurance coverage for employees under the LHWCA and required TOTE to require its subcontractors to provide workers' compensation insurance coverage as well.

Sea Star, as James's employer, began paying benefits to Plaintiff under the Longshore and Harbor Workers' Compensation Act ("LHWCA") shortly after the accident. Plaintiff later submitted a claim for additional death benefits under the Alaska Worker's Compensation Act ("AWCA")[3] given that the accident occurred on land and fell within the concurrent jurisdiction of the LHWCA and AWCA. The parties agreed to a stipulated increase in death benefits under the LHWCA in exchange for the dismissal of its AWCA claim.

III. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 12(b)(1), a party may seek dismissal of an action for lack of subject matter jurisdiction. In order to survive a defendant's motion to dismiss, the plaintiff has the burden of proving jurisdiction.[4] Where, as here, the defendant raises a factual attack and the jurisdictional issues raised by the motion are

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[3]AS 23.30.001-.400.

[4]*St. Clair v. City of Chico,* 880 F.2d 199, 201 (9th Cir. 1989).

not intertwined with the substantive issues on the merits, the court is free to consider materials outside of the pleading.[5] "[T]he district court is free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary . . . . [to] evaluate the merits of jurisdictional claims."[6]

IV. DISCUSSION

FTCA and Sovereign Immunity

Plaintiff relies on the FTCA to bring suit against the United States. The FTCA provides a limited waiver of its sovereign immunity for certain torts committed by federal employees. Pursuant to the FTCA, this court only has jurisdiction over tort actions against the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[7] In other words, the United States has only waived immunity in circumstances where state law would make a similarly situated private person liable.[8] Where there is no liability for a private entity in an analogous situation, the court must dismiss the action for lack of jurisdiction.

The FTCA is generally the exclusive remedy for tort claims against the United States.[9] However, it does not apply to tort claims against the United States under maritime law.[10] A maritime claim against the United States that does not involve a vessel must be brought pursuant to the waiver of sovereign immunity in the Suits in

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[5] *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *Kingman Reef Atoll Invs., L.L.C. v. United States,* 541 F.3d 1189, 1195 (9th Cir. 2008).

[6] *Kingman Reef,* 541 F.3d at 1195 (quoting *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987)).

[7] 28 U.S.C. § 1346(b)(1),

[8] *United States v. Olson*, 546 U.S. 43, 44 (2005).

[9] 28 U.S.C. § 2679(b)(1).

[10] 28 U.S.C. § 2680(d). The terms "admiralty" and "maritime" are used interchangeably. *See Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379, 381 n.2 (7th Cir. 2001).

Admiralty Act ("SAA").[11] That act waives the sovereign immunity of the United States for admiralty claims under circumstances where "if a private person or property were involved, a civil action in admiralty could be maintained."[12] If a remedy against the United States is provided for under the SAA, that claim may not be brought under the FTCA.[13] Plaintiff did not raise a claim under the SAA but did state that her negligence claim is based on a "federal maritime common law action" under the FTCA and LHWCA.

Status under the AWCA

To determine whether the court has jurisdiction over Plaintiff's FTCA tort claim, it must analogize the United States to a private actor in a similar situation and apply Alaska state law to determine amenability to suit.[14] The United States argues that a similarly situated private actor in Alaska would be considered a "project owner" under the AWCA and thus would have a defense against a negligence suit under the AWCA's exclusive remedy provision. That provision states that workers' compensation is the sole remedy available to an injured employee.[15] The benefit of that exclusive remedy provision extends not only to the direct employer but anyone else who is liable or "potentially liable" for securing workers' compensation to an injured employee under AWCA.[16] A "project owner" is potentially liable for securing workers' compensation for

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[11]46 U.S.C. § 30901, et seq.

[12]46 U.S.C. § 30903.

[13]28 U.S.C. § 2680(d); *see also Taghadomi v. United States*, 401 F.3d 1080, 1089-90 n.11 (9th Cir. 2005) ("Because the . . . SAA supplied a remedy, [the plaintiffs] may not bring the negligence claim under the FTCA.").

[14]*LaBarge v. Mariposa Cnty.,* 798 F.2d 364, 366 (9th Cir. 1986).

[15]AS § 23.30.055.

[16]AS § 23.30.055 states as follows: "The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer

employees of the contractor if the contractor fails to do so,[17] and thus benefits from the exclusive remedy provision. A project owner is defined as a person who, "in the course of the person's business, engages the services of a contractor and who enjoys the beneficial use of the work."[18]

The court agrees that an analogous private actor in the position of the United States would be considered a "project owner" under the AWCA. It "engage[d] the services of a contractor" and did so in the course of government business—transporting military equipment from a training facility in California to a military base in Alaska—and enjoyed the beneficial use of TOTE's and Sea Star's work. In this scenario, TOTE falls within the definition of a contractor and Sea Star falls within the definition of a subcontractor.[19] As noted by the United States, "in the TOTE Contract the United States acted much like how the Alaska legislature hoped a private entity would when [it] amended the AWCA, in that the United States required TOTE and its subcontractor to secure workers' compensation insurance coverage for their employees."[20] As a project owner, the United States would be immune from tort liability under the AWCA and therefore the court lacks jurisdiction over the negligence claims brought against the United States under the FTCA.

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or fellow employee at law or in admiralty on account of the injury or death. . . . In this section, "employer" includes, in addition to the meaning given in AS 23.30.395, a person who, under AS 23.30.045(a), is liable for or potentially liable for securing payment of compensation."

[17]AS 23.30.045(a) states as follows: "An employer is liable for and shall secure the payment to employees of the compensation payable . . . . If the employer is a subcontractor and fails to secure the payment of compensation to its employees, the contractor is liable for and shall secure the payment of the compensation to employees of the subcontractor. If the employer is a contractor and fails to secure the payment of compensation to its employees or the employees of a subcontractor, the project owner is liable for and shall secure the payment of the compensation to employees of the contractor and employees of a subcontractor, as applicable."

[18]AS 23.30.045(f)(2).

[19]AS 23.30.045(f)(1); AS 23.30.045(f)(3).

[20]Doc. 110 at p. 17.

Plaintiff does not dispute the underlying facts supporting the analogy but argues that a recent Alaska Supreme Court case, *Lovely v. Baker Hughes, Inc.*,[21] has raised questions as to whether the United States is in fact a project owner. In *Lovely*, three related corporations—a parent corporation, its subsidiary, and another related company—all claimed project owner status and immunity from the tort claims brought against them. They did so based on their interconnected relationships and the indemnity provisions in the applicable contract, which they argued made them potentially liable for paying workers' compensation. The court rejected their arguments. It noted that "regardless of how the corporations defined themselves by contract, and regardless of the obligations they claim to have assumed, whether they are protected from third-party liability as project owners still depends on whether they satisfy the statutory definition [under the AWCA]."[22] By definition "a project owner is someone who engages the services of – that is, *contracts with* – a person to perform specific work and enjoys the beneficial use of that work."[23] The project owner is only the entity that entered into the contract that created legal obligations between it and the contractor. Based on *Lovely*, Plaintiff asserts that the United States acts like a parent company and only the contracting agencies themselves can be project owners under the AWCA's exclusive remedy provision.

The court agrees with the United States' analysis that "its agencies are not analogous to separate corporations with separate identities."[24] When an agency enters into a contract, the contractual rights and obligations flow to the United States.[25]

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[21]459 P.3d 1162 (Alaska 2020).

[22]*Id.* at 1171.

[23]*Id.* at 1169.

[24]Doc. 125 at p. 7.

[25]*See, e.g., Stephenson v. United States*, 58 Fed. Cl. 186, 190 (2003); *Boyd v. United States*, 482 F.Supp. 1126, 1128 (W.D. Pa. 1980).

Indeed, the contract with TOTE is in fact signed by a United States contracting officer on behalf of the "United States of America" and not the agency itself.[26] The court also agrees with and adopts the United States' reasoning that to find otherwise would place the United States in a position worse than an analogous private person.[27]

LHWCA and AWCA

Plaintiff argues that the interplay of the LHWCA in this case changes the jurisdictional analysis as to her FTCA tort claim. Specifically, she argues that the exclusive remedy provision of the AWCA that exempts a project owner from a negligence lawsuit is preempted by the LHWCA, which does not exempt a third-party contractor from suit under the LHWCA unless the contractor actually secures workers' compensation benefits for a subcontractor's employees. Plaintiff seems to argue that the FTCA waiver of immunity should apply in this circumstance because of the fact that she receives benefits under the LHWCA and the LHWCA has provisions, while not directly applicable to her FTCA claim, that limit the availability of contractor immunity.

There are three instances in which state law is preempted by federal law: (1) where Congress expressly provides for preemption; (b) where federal law completely occupies the field; and (3) where there is a specific conflict between the state and federal law.[28] It is clearly established that the LHWCA as a whole does not expressly preempt state laws or occupy the field of workers' compensation for injuries occurring on land.[29] Nor is there a conflict preemption issue between the LHWCA and state compensation schemes in general. Conflict preemption occurs "where it is impossible to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and executing of the full purposes and

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[26]Doc. 86-1 at p. 8.

[27]Doc. 125 at pp. 7-8.

[28]*Serv. Eng'g Co. v. Emery*, 100 F3d 659, 661 (9th Cir. 1996).

[29]*Sun Ship, Inc. v. Pa.*, 447 U.S. 715, 716 (1980).

objectives of Congress."[30] The LHWCA and state workers' compensation schemes operate concurrently and are not at odds.[31] Also, the Supreme Court has held that state compensation schemes are not an obstacle in meeting the purpose of the LHWCA.[32]

Plaintiff more specifically argues that because the accident occurred on land and within the concurrent jurisdiction of the LHWCA and AWCA for purposes of compensation benefits, and because the LHWCA has more limited immunity for third-party negligence claims that fall within the scope of the LHWCA, the LHWCA preempts the AWCA's exclusive remedy provision. Indeed, the LHWCA only provides immunity to contractors if the contractor actually secures workers' compensation, as opposed to the AWCA which provides immunity to a contractor who is merely "potentially liable" for securing workers' compensation.[33] However, the fact that the LHWCA differs from the AWCA in its scope of immunity does not create a conflict for purposes of preemption here. Nothing in the LHWCA prevents a state from enacting a compensation scheme with broader exclusive remedy provisions such as Alaska's. Moreover, the court is addressing Plaintiff's state tort claim under the FTCA; Plaintiff has no negligence cause of action under the LHWCA itself.[34] Thus, state immunity provisions apply. Most courts that have considered the interplay between the LHWCA and the exclusive remedy

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[30] *Emery*, 100 F.3d at 661.

[31] *Id.* Workers injured on land who meet the test for coverage under the LHWCA can collect benefits under both schemes, although amounts paid to the worker under the state workers' compensation law are credited against any liability imposed by the LHWCA. 33 U.S.C. § 903(e); *E.P. Paup Co. v. Dir., Office of Workers Comp. Programs, U.S. Dep't of Labor*, 999 F.2d 1341, 1349 (9th Cir. 1993).

[32] *Sun Ship*, 447 U.S. at 724-25.

[33] *Compare* 33 U.S.C. § 905(a), *with* AS 23.30.045(a), (f)(2); AS 23.30.055.

[34] *See McLaurin v. Noble Drilling (US) Inc.*, 529 F.3d 285, 292 (5th Cir. 2008) ("Section 933 preserves and codifies a maritime worker's common law right to pursuant a negligence claim against a third party that is not the employer or a coworker; it does not create a cause of action nor establish a third party's liability for negligence."). *See Vega-Mena v. United States*, 990 F.2d 684 (1st Cir.1993) ("The liability of a third party, other than a vessel, must arise under some federal or state law other than the LHWCA.").

provisions of state workers' compensation laws with respect to land-based injuries have similarly found no conflict.[35] Plaintiff's attempt to distinguish these cases is unavailing for the reasons identified in the United States' briefing.[36]

Plaintiff also asserts that the AWCA's immunity for project owners would not apply here because Alaska law in fact "favor[s] application of Federal LHWCA statutes and case law"[37] for injuries linked in some way to maritime law. However, the cases he relies on are inapposite, as they involve claims brought against employers for maritime injuries. In *Barber v. New England Fish Co.*, the plaintiff was injured while working on a vessel in navigable waters, collected compensation benefits under the AWCA, and also brought an admiralty law claim based on unseaworthiness.[38] The Alaska Supreme Court held that the exclusive remedy provisions of the AWCA did not apply to bar the claim.[39] Here, as discussed in more detail below, plaintiff cannot bring an admiralty claim based on the circumstances of the land-based accident. Additionally, the court in *Barber* stated that the plaintiff's claim would be barred by the AWCA if it were based on state tort law rather than admiralty law.[40] The second case cited by Plaintiff, *State, Department of Public Safety v. Brown*, also involved an admiralty claim.[41] The Alaska Supreme Court allowed the plaintiff, who had collected benefits under the AWCA, to

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[35]*See id.*; *Garvin v. Alumax of South Carolina, Inc.*, 787 F.2d 910, 916-17 (4th Cir. 1986); *Ladd v. Research Triangle Inst.*, No. 5-cv-02122, 2006 WL 2682239, at *3 (D. Colo. Sept. 17, 2006) (holding that the LHWCA does not preempt the immunity created by the Colorado Workers Compensation Act).

[36]Doc. 125 at pp. 17-18.

[37]Doc. 97 at p. 27.

[38]510 P.2d 806, 807 (1973).

[39]*Id.* at 813.

[40]*Id.* at 807.

[41]794 P.2d 108 (Alaska 1990).

also pursue a claim under admiralty law against his employer. Again, it noted that the claim would be barred if the plaintiff had sued for damages under state law.[42]

The fact that Plaintiff received benefits under the LHWCA and not the AWCA does not change the analysis. The exclusive remedy provisions of the AWCA apply regardless of whether a plaintiff sought and received benefits under the act.[43]

Federal Maritime Common Law

Plaintiff's Third Amended Complaint adds that her claim is based in part on "federal maritime common law . . . for negligence and wrongful death."[44] Plaintiff's attempt to bring a maritime common law claim based on a hybrid federal and state theory must fail. The court already ruled that Plaintiff's claim does not arise under admiralty law because the accident happened on land.[45] Admiralty jurisdiction only extends to torts committed on navigable waters and not those committed ashore.[46] Therefore, Plaintiff cannot bring a claim against the United States under admiralty law.

V. CONCLUSION

Based on the preceding discussion, the United States' motion to dismiss the claims against it for lack of subject matter jurisdiction at docket 110 is hereby GRANTED. The first motion to dismiss at docket 86 is denied as moot.

DATED this 6th day of July 2020.

/s/ JOHN W. SEDWICK
SENIOR JUDGE, UNITED STATES DISTRICT COURT

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[42] *Id.* at 110.

[43] AS 23.30.055; *Garvin*, 787 F.2d at 916-18.

[44] Doc. 106 at ¶ 40.

[45] Doc. 49 at p. 4. The fact that an accident occurred in an area adjoining navigable water only qualifies the injured worker for LHWCA benefits. It does not confer admiralty jurisdiction.

[46] *Guidry v. Durkin*, 834 F.2d 1465, 1469 (9th Cir. 1987).