BRB No. 02-0757

JOHN HARDGROVE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COAST GUARD EXCHANGE SYSTEM	)	DATE ISSUED: MAR 28, 2003
	)	
and	)	
	)	
GATES MCDONALD & COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Denying Motion for Summary Decision of Alexander Karst, Administrative Law Judge, United States Department of Labor.

James A. Danse (Danse & Scherr, LLP), San Rafael, California, for claimant.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi, LLP), San Francisco, California, for employer/carrier.

Whitney R. Given and Peter B. Silvain, Jr. (Howard Radzely, Acting Solicitor of Labor; John F. Depenbrock, Associate Solicitor; Joshua T. Gillelan II, Senior Appellate Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Denying Motion for Summary Decision (02-LHC-0780) of Administrative Law Judge Alexander Karst 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.*, as extended by the Nonappropriated Fund Instrumentalities Act (NFIA), 5 U.S.C. §8171 *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). The Board heard oral argument in this case on January 29, 2003, in Seattle, Washington.

Claimant, while on active duty in the United States Coast Guard (USCG) as a telecommunications instructor, sustained a low back injury during the course of his part-time, off-duty, employment as a sales clerk at the Coast Guard Exchange Mini Mart (Mini Mart) in Petaluma, California, on January 4, 1995. Following surgery, claimant, on May 15, 1995, resumed his usual work with the USCG in a limited capacity until April 1996, when the USCG Medical Board declared him unfit for duty because of his back disability. Claimant was thereafter discharged on August 6, 1996, on disability retirement at 60 percent of his base pay. Claimant then worked part-time at temporary clerical positions in 1997 and 1998, before finding permanent, full-time work with Restoration Hardware in Corte Madera, California.

Following the accident, claimant was unable to return to his part-time job with employer due to post-injury lifting restrictions. Employer paid periods of temporary total and temporary partial disability benefits at various rates between January 5, 1995, and January 26, 1996, based solely on the wages he lost at the Mini Mart, since he remained on full salary with the USCG. Claimant subsequently filed a claim under the Act seeking permanent partial disability benefits based on his January 4, 1995, work injury. Employer filed a motion for summary decision requesting dismissal of the claim for lack of jurisdiction on the ground that claimant, as an active duty serviceman in the USCG at the time of his injury, could not be considered a "civilian employee" covered under the Act. On July 18, 2002, the administrative law judge issued an Order Denying Motion for Summary Decision, holding that claimant was an employee covered under the NFIA for his 1995 injury. Employer appeals this decision.

On appeal, employer challenges the administrative law judge's denial of its motion for summary decision. Claimant responds, urging affirmance. In his response brief, the Director, Office of Workers' Compensation Programs (the Director), seeks dismissal of this appeal as it is taken from a non-final order. Employer and claimant each respond, urging rejection of the Director's motion. Alternatively, the Director argues in support of employer's position and thus maintains that claimant's status as an active duty serviceman at

the time of his injury precludes his coverage under the Act.

While the Board is not bound by the formal or technical rules of procedure governing litigation in federal courts, *see* 33 U.S.C. §923(a), the Board ordinarily will not grant interlocutory review unless, in its discretion, the Board finds it necessary to properly direct the course of the adjudicatory process. *See Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989). In the instant case, the significance of the issue at hand warrants consideration of employer's appeal. 33 U.S.C. §921(b)(2); *Fitzgerald v. Stevedoring Services of America*, 34 BRBS 202 (2001); *Huff v. Mike Fink Restaurant*, 33 BRBS 179 (1999); *Williams v. Whiting Turner Contracting Co.*, 19 BRBS 33 (1986). Consequently, we reject the Director's motion to dismiss this appeal, and turn to consideration of the merits of the administrative law judge's Order Denying Motion for Summary Decision.

Employer argues that the administrative law judge erred in denying its motion for summary decision as claimant's status at the time of his injury, *i.e*, on active duty with the USCG, precludes coverage under the NFIA. Employer asserts that the NFIA only covers certain specified civilian employees, *e.g*., non-active duty military personnel employed by nonappropriated fund instrumentalities, and not civilian employees of the federal government who are covered by the Federal Employee's Compensation Act (FECA) for injury-related benefits, or active military personnel. Employer maintains that two United States District Court decisions, *Amarillo Air Force Base Exchange v. Leavey*, 232 F.Supp. 963 (N.D. Tex. 1964), and *Employers Mutual Liability Insurance Company of Wisconsin v. Arrien*, 244 F. Supp. 110 (N.D. N.Y. 1965), support its position that active duty military personnel employed by nonappropriated fund instrumentalities during off-duty hours are not entitled to benefits under the Act.

Employer further contends that as part of the revision of Title 5 of the United States Code, *see* Public Law 98-554 (Sept. 6, 1966), the word "civilian" was omitted from the Act because it was understood that the word "employee" as defined under 5 U.S.C. §2105(c) refers only to civilian employees of the federal government, as distinguished from members of the Armed Forces of the United States. Specifically, employer avers that the removal of the word "civilian" from the NFIA in 1966 was not intended to extend the Act's coverage to active duty military personnel, or to overrule the *Leavey* and/or *Arrien* decisions. The Director concurs with employer's position and likewise seeks reversal of the administrative law judge's Order. Specifically, the Director maintains that it has been the long-standing position of the Department of Labor (DOL) that military personnel are not "employees" within the meaning of the NFIA.[1]

[1]In support of his position, the Director submits a Program Memorandum of the Bureau of Employees' Compensation dated October 18, 1965, regarding NFIA coverage of

In response, claimant maintains that nowhere in the statute are active military personnel in their off-duty hours excluded from the definition of "employee" under the Act. Claimant avers that the dropping of the word "civilian" from 5 U.S.C. §8171(a) is indicative of Congressional intent to include military personnel who work for nonappropriated fund instrumentalities in their off-duty hours. Additionally, claimant asserts that the *Leavey* and *Arrien* decisions are not applicable to the case at hand as they predate the 1966 congressional redrafting of the definition of "employee" under 5 U.S.C. §2105(c), and they are factually distinguishable in that claimant herein was forced, due solely to his work injury, to take a medical discharge from the military at a substantially reduced rate of pay.

Prior to the 1966 amendments, the applicable NFIA coverage provision, 5 U.S.C. §150k-1(a), stated:

> The Longshoremen's and Harbor Workers' Compensation Act shall apply with respect to disability or death resulting from injury, as defined in Section 902(a) of Title 33, occurring to a *civilian employee* of any nonappropriated fund instrumentality described in Section 150k of this title.

5 U.S.C. §150k-1(a) (emphasis added). As amended, Section 8171(a), 5 U.S.C. §8171(a), states:

> The Longshore and Harbor Workers' Compensation Act (33 U.S.C. §901 *et seq.*) applies with respect to disability or death resulting from injury, as defined by section 2(2) of such Act (33 U.S.C. §902(2)), occurring to an employee of a nonappropriated fund instrumentality described by Section 2105(c) of this title . . . .

In the instant case, the administrative law judge, after consideration of the parties' positions, determined that employer cited "no authority or good reason for

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military personnel, wherein it is stated that, in deference to the *Arrien* decision, 244 F. Supp. at 113, "the Bureau is no longer of the opinion that military personnel may be 'employees' within the meaning of the NF Act when such personnel are injured while employed in civilian work which is not also an assigned military duty." *See* Director's Brief, Exhibit B (emphasis in original).

the proposition that the amendment of the statute by dropping off the word 'civilian' should be ignored." Order Denying Motion for Summary Decision at 2. He further added, "Congress is presumed not to drop words when amending statutes through inadvertence." *Id.* The administrative law judge thus inferred that the decisions in *Leavey* and *Arrien,* holding that the claimants were not civilian employees under the NFIA because they were active members of the armed forces, were inapposite due to the 1966 alteration of the NFIA coverage provision. Consequently, the administrative law judge denied employer's motion for summary decision.

Claimant is correct in stating that the Act does not explicitly exclude active military personnel in their off-duty hours from coverage under Section 8171(a). Nonetheless, consideration of all of the relevant legal authority supports employer's position that active military personnel are not covered by the NFIA. The administrative law judge's denial of employer's request for summary decision is premised upon the fact that Congress omitted the word "civilian" in revising the coverage provision. A review of the NFIA and related statutory provisions, however, supports employer's position that the deletion of the word "civilian" was not intended to include military personnel within the coverage of NFIA. Rather, the annotation to Section 8171 states that the word "civilian" was dropped from Section 8171(a) as it was determined to be unnecessary, since "the definition of 'employee' in Section 2105 includes only civilians." *See* Annotation to 5 U.S.C.A. §8171 (West 1986); *see also* 5 U.S.C. §2105(a).[2] As the definition of "employee" in Section 2105(a) defines that term in Section 8171(a) and as it describes civilian employees of the United States, it follows that the NFIA applies only to "civilian employees." This conclusion

[2] Section 2105(a), 5 U.S.C. §2105(a), defines "employee" for purposes of Title 5 as an individual

(1) appointed in the civil service by one of the following acting in an official capacity—

(A) the President.
(B) a Member or Members of Congress, or the Congress;
(C) a member of a uniformed service;
(D) an individual who is an employee under this section;
(E) the head of a Government controlled corporation; or
(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

is further supported by the fact that the stated purpose of the 1966 amendments was to "enact title 5, codifying the general and permanent laws relating to the organization of the Government of the United States and to its *civilian officers and employees*." Pub. L. No. 89-554, 80 Stat. 378 (1966) (emphasis added). In this context, it is clear that the word "civilian" in the pre-1966 NFIA provision was redundant since Section 8171(a) as part of Title 5 necessarily concerned coverage of civilian employees.

In addition, a statutory provision referring to the NFIA which is located in Title 10 explicitly includes the word "civilian" in its definition.[3] This provision, which

[3] That Congress clearly intended to create a dichotomy between "civilian employees" of the Federal Government and military personnel is indicated by virtue of the fact that each are covered under separate titles in the United States Code, *i.e.*, "civilian officers and employees" of the Federal Government are covered pursuant to Title 5, Pub. L. No. 89-554, 80 Stat. 378 (1966), whereas matters pertaining to military personnel are covered by Title 10 of the United States Code. The NFIA falls under Title 5, and not Title 10, of the United

protects NFIA employees against reprisals for certain employment-related actions, 10 U.S.C. §1587(a),[4] consistently defines a nonappropriated fund instrumentality "employee" as a "civilian employee." That section includes the

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States Code.

[4] 10 U.S.C. §1587 (emphasis added), states:

(a) In this section:

(1) The term "nonappropriated fund instrumentality employee" *means a civilian employee* who is paid from nonappropriated funds of Army and Air Force Exchange Service, Navy Exchange Service Command, Marine Corps exchanges, or any other instrumentality of the United States under the jurisdiction of the armed forces which is conducted for the comfort, pleasure, contentment, or physical or mental improvement of members of the armed forces. Such term includes a civilian employee of a support organization within the Department of Defense or a military department, such as the Defense Finance and Accounting Service, who is paid from nonappropriated funds on account of the nature of the employee's duties.

(2) The term "civilian employee" has the meaning given the term "employee" by section 2105(a) of title 5.

explicit proviso that "the term 'civilian employee' has the meaning given the term 'employee' by section 2105(a) of title 5," 10 U.S.C. §1587(a)(2).

Thus, while the specific language in the NFIA coverage provision, 5 U.S.C. §8171(a), was altered by the 1966 amendments, the underlying definitions of its terms in actuality remained unchanged. These statutory provisions taken as a whole are clearly indicative of the intent to include only civilian personnel and, in turn, exclude active duty military personnel, from coverage under the NFIA. The statutory provisions thus do not support claimant's assertion that the omission of the word "civilian" was intended to extend the NFIA's coverage to active duty personnel injured while working in a capacity similar to that of claimant in this case.

In addition, the implementing regulations of the various branches of the military, as well as the long-standing position of DOL, explicitly speak to this issue and cannot be ignored. Regardless of a specific exclusion for military personnel in the NFIA itself, all of the military services, including the USCG, have regulations explicitly excluding "active duty military members, including those employed during their off-duty hours" from any recovery for workers' compensation benefits provided for by the NFIA. *See* United States Coast Guard Nonappropriated Fund *Workers' Compensation Procedures Guide* Chapter 1, Section 2(b) (June 2001) ("active duty military members, including those employed during their off-duty hours, are not eligible for NAF workers' compensation"); Air Force Manual 34-311 *Workers Compensation Procedures* A 2 (3 Apr 95) (notes that Workers' Compensation program under NFIA "applies to a civilian employee" but excludes "off duty military personnel"); Army Regulation 215-1, Section XV, subsection 14-81 (25 Oct 98) (Workers' Compensation benefits under the NAFI do not apply to "active duty military employed by NAFIs"); Bureau of Naval Personnel Instruction 5890.1 Chapter 5, Section 503(a) (25 Jun 1996) ("active duty military members including those employed during their off-duty hours are not eligible for NAF workers' compensation" because they "receive medical, dental and disability benefit coverages, due to their status, regardless of whether an injury or illness occurs while they are on or off-duty"); Marine Corps NAF Personnel Policy Manual Section 6006 *WORKERS' COMPENSATION BENEFITS* (31 Oct 00) ("off-duty enlisted personnel employed by NAFIs are not civilian employees for purposes of" the NFIA). All of these policies/regulations serve to implement Department of Defense 1401.1- M *Personnel Policy Manual for Nonappropriated Fund Instrumentalities* Chapter 6.3.4.1 (Dec. 1988), which provides that "off-duty enlisted personnel employed by NAFIs are not civilian employees for purposes of this [NFIA] Act." Furthermore, as previously observed, DOL has long maintained that active duty military personnel are not covered under the NFIA. *See* n. 1 *infra*.

Finally, the *Leavey* and *Arrien* cases are not inapposite to the case at hand, as the administrative law judge implied and claimant argued. Rather, both decisions

particularly provide important insight into the issue at hand. The *Arrien* case, though rendered prior to the enactment of the 1966 revisions of the NFIA, presents facts similar to the instant case, and the court's discussion addresses many of the points raised by claimant.

In *Arrien*, the claimant was an active member of the United States Air Force, who sustained a severe eye injury in the course of a part-time job during off-duty hours at the Base Tavern. The claimant's injury ultimately resulted in his retirement from the United States Air Force. He subsequently received disability retirement benefits under the provisions of the relevant military regulations and statutes. In addition, claimant filed a claim for compensation under the NFIA. The court, having determined that *Leavey* was not directly on point,[5] looked to the specific language of the statute to discern any congressional intent. In this regard, the court observed that the NFIA "nowhere defines the term 'civilian employee' as used therein,"[6] *Arrien*, 244 F. Supp. at 113, but that it would be difficult to conclude "that Congress, in limiting the class of employees covered by the statute by the use of the words 'civilian employee,' intended that the limitation had no meaning whatever in the application thereof." *Arrien*, 244 F. Supp. at 114. The court further observed that as claimant was on active duty at the time of his injury, he was afforded "a complete plan or scheme" of benefits through the military, including "medical care, hospitalization, full pay during the period of disability and a percentage allowance for the permanent partial disability found to exist," and that these benefits were provided "independent of the statutes [NFIA] involved here." *Id.* Thus, the court reasoned that "the literal application of the provisions of [Section] 150k-1 . . . results in "no

[5] In *Leavey*, 232 F. Supp. 963, the district court observed that the crucial issue for excluding coverage was the fact that no premium was calculated on the money earned and received by the claimant, or by any members of the military doing part-time work at the Base Exchange, with regard to the workers' compensation insurance policy procured by the employer. As such, the court surmised that there was no intention to cover the claimant under that policy and thus under the NFIA. This aspect of *Leavey* distinguishes it from the decision reached in *Arrien*, as well as from the facts in the instant case, as in both of these latter instances the parties conceded that the compensation insurance contract covered the claimants. Nevertheless, the underlying holding of *Leavey*, that active duty military personnel are not covered by the NFIA, supports our disposition of this case.

[6] The court also considered that the common understanding of the word "civilian" connotes "a person not on active duty in one of the armed services." *Arrien*, 244 F. Supp. at 113.

inequity as between civilian employees and members of the military performing the same type of service." *Arrien*, 244 F. Supp. at 114. Given these facts, the court held that the district director's application of the phrase "civilian employee" to include active duty military personnel under the NFIA is not in accordance with the law, as it failed to give any meaning to the word "civilian" as found therein. Accordingly, the court held that the claimant, on active duty at the time of his injury, was not entitled to coverage under the NFIA.

As in *Arrien*, claimant, in the instant case, was an active duty serviceman whose injury, sustained while working off-duty for a nonappropriated fund instrumentality, ultimately led to disability retirement. In this regard, claimant's contention that he is entitled to additional benefits under the NFIA because his work injury forced him to take disability retirement from the military at a reduced rate lacks merit. As the court in *Arrien* observed, there is no inequity presented by excluding active duty military personnel from coverage under the NFIA as such individuals, by virtue of their military service, have a complete plan or scheme separate and apart from the Act. As was the case in *Arrien*, claimant herein received medical treatment for his injury, was paid at his full USCG wages during his recovery period, and was subsequently awarded disability retirement at 60 percent of his USCG base pay under the provisions of military regulations or statutes.[7]

Thus, following consideration of all of the relevant statutory provisions, military regulations and case law pertaining to coverage under the NFIA, we hold that active duty military personnel are excluded from coverage under the NFIA. Consequently, the administrative law judge's denial of employer's motion for summary decision in the instant claim is not in accordance with law and is reversed. As claimant is not covered by the Act, his claim for benefits must be denied.

[7]In addition, employer here voluntarily paid disability benefits for approximately one year based on claimant's loss of wages at his Mini Mart job. Claimant asserts that these benefits, in addition to his military retirement, are necessary to make him whole as he was working two jobs prior to his injury but receives disability retirement based only on the earnings in one job. However, Congress has spoken in enacting the coverage provisions of the NFIA and the applicable definitions, and we are not empowered to rewrite the statute.

Accordingly, the administrative law judge's Order Denying Motion for Summary Decision is reversed, and the claim for benefits is denied.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge