

A.P. (Widow of	)	BRB No. 09-0207
R.P.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE	)	DATE ISSUED: <u>AUG 26, 2009</u>
COMMAND	)	
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
L.L. (Widow of	)	BRB No. 09-0208
C.L.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE	)	
COMMAND	)	
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Granting Summary Decision and the Order Denying Reconsideration of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

A.P. and L.L., Subic, Zambales, Philippines, *pro se*.

Joel Z. Prohofskey (Office of Counsel, Navy Exchange Service Command), Virginia Beach, Virginia, for self-insured employer.

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

PER CURIAM:

Claimants, without the assistance of counsel, appeal the Decision and Order Granting Summary Decision and the Order Denying Reconsideration (2006-LHC-2106, 2007-LHC-0008) of Administrative Law Judge Steven B. Berlin rendered 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 Longshore Act), as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the NFIA), and as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the DBA). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are supported by substantial evidence, rational and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed. By Order dated January 14, 2009, the Board consolidated these appeals for decision. 20 C.F.R. §802.104(a).

Claimant A.P. filed a claim for death benefits, alleging that the death of her husband R.P. due to a stroke on December 30, 1991, was causally related to his employment with the Navy Exchange at the Subic Bay Naval Station in the Philippines. Similarly, claimant L.L. filed a claim for death benefits alleging that the death of her husband C.L. due to respiratory illness on May 15, 2007, was causally related to his employment with the same Navy Exchange.<sup>1</sup> Both decedents were citizens and residents of the Republic of the Philippines. The Navy Exchange Service Command (employer) controverted the claims on the basis that the decedents were not covered by the Longshore Act or by its extension under the NFIA. Following referral of the claims to the Office of Administrative Law Judges, employer filed motions for summary decision in both cases, contending that the claims are not covered by the Longshore Act or the NFIA. Noting that claimants also claimed entitlement to benefits pursuant to Philippine Presidential Decree 626, employer asserted that claimants are not covered under the provisions of that decree. Claimants filed oppositions to employer's motions for summary decision, claiming coverage under the DBA in addition to the claims they previously made. In its response to claimants' oppositions to summary decision, employer asserted that there is no coverage for decedents' injuries under any of the provisions relied upon by claimants.

In a Decision and Order Granting Summary Decision, the administrative law judge granted employer's motion and, accordingly, dismissed the claims. Subsequently, the administrative law judge denied claimants' request for reconsideration. Claimants, representing themselves, appeal the administrative law judge's decisions, and employer responds, urging affirmance.

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<sup>1</sup> A claim for disability benefits was filed by employee C.L. prior to his death.

We affirm the dismissal of the claims. The administrative law judge properly applied the standard for determining whether to grant summary decision. Summary decision is proper when there are no genuine issues of material fact and no controversy concerning inferences to be drawn from the facts, and the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999); 29 C.F.R. §18.41. The administrative law judge must look at the facts in the light most favorable to the party opposing summary decision to determine whether there is an absence of a genuine issue of fact. *See Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11<sup>th</sup> Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). In the cases before us, the assertions made by claimants in their responses to employer's motions for summary decision do not give rise to a genuine issue of material fact with respect to coverage under statutes over which the United States Department of Labor has jurisdiction. Moreover, the administrative law judge properly found that employer is entitled to judgment as a matter of law. Thus, the administrative law judge properly granted employer's motions for summary decision and dismissed the claims.

In considering the issue of coverage, the administrative law judge initially noted that claimants asserted claims arising under three separate sources: the NFIA, the DBA, and Philippine Presidential Decree 626, *see* Decision and Order at 2, and he separately addressed the applicability of each of these three sources.<sup>2</sup> We first address the administrative law judge's findings regarding the applicability of the provisions of the

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<sup>2</sup> The administrative law judge properly found that the Longshore Act itself, without reference to the extensions of its coverage by virtue of the NFIA and the DBA, does not apply to the instant claims. Decision and Order at 2 n.2. Section 3(a) of the Longshore Act, 33 U.S.C. §903(a), provides for coverage of injuries or deaths that occur "upon the navigable waters of the United States" including certain enumerated sites and adjoining areas used for loading, unloading, building or repairing vessels. Section 2(9) of the Longshore Act, 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." As correctly recognized by the administrative law judge, *see* Decision and Order at 3, the status of the Philippines as a territory or possession of the United States ended on July 4, 1946, when the United States recognized Philippine independence and withdrew American sovereignty in and over the Philippines. *See* 22 U.S.C. §1394(a). Thus, as the Republic of the Philippines is not a territory of the United States, the Longshore Act, without reference to its extensions, does not apply to injuries or deaths occurring in the Philippines. *See generally Saipan Stevedore Co. v. Director, OWCP*, 133 F.3d 717, 31 BRBS 187(CRT) (9<sup>th</sup> Cir. 1998), *aff'g Uddin v. Saipan Stevedore Co.*, 30 BRBS 117 (1996); *J.T. v. Global Int'l Offshore, Ltd.*, \_\_\_ BRBS \_\_\_, Nos. 08-0119/A (July 29, 2009).

NFIA to the instant claims. As the administrative law judge recognized, the NFIA extends the coverage of the Longshore Act to work-related injuries sustained by certain, *but not all*, employees of nonappropriated fund instrumentalities of the United States.<sup>3</sup> See Decision and Order at 2; 5 U.S.C. §§2105(c),<sup>4</sup> 8171-8173; *Utria v. U.S. Marine Exchange*, 7 BRBS 387, 388 (1978); see also *Army & Air Force Exchange Service v. Hanson*, 360 F.Supp. 258 (D. Haw. 1970).

Specifically, Section 8171(a) of the NFIA provides in pertinent part:

(a) 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.... who is –

(1) a United States citizen or a permanent resident of the United States or a territory or possession of the United States employed outside the continental United States; or

(2) employed inside the continental United States.

5 U.S.C. §8171(a). Section 8172, which applies to those nonappropriated fund employees not covered by Section 8171, provides as follows:

In case of disability or death resulting from injury, as defined by section 2(2) of the Longshore and Harbor Workers' Compensation Act (33 U.S.C.

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<sup>3</sup> “Nonappropriated fund instrumentalities,” such as Navy exchanges and other retail and recreational activities on military bases, are not funded by congressional appropriations, and their expenses, including the salaries of their employees, are paid out of the earnings generated by the activity. See 5 U.S.C. §2105(c); see generally *Vilanova v. United States*, 851 F.2d 1 (1<sup>st</sup> Cir. 1988); *Calder v. Crall*, 726 F.2d 598 (9<sup>th</sup> Cir. 1984).

<sup>4</sup> 5 U.S.C. §2105(c) provides that employees of nonappropriated fund instrumentalities are excluded from coverage under the Federal Employees Compensation Act, 5 U.S.C. §8101 *et seq.*, as well as from certain other laws administered by the Office of Personnel Management. See *Vilanova v. United States*, 851 F.2d 1, 2 n.2 (1<sup>st</sup> Cir. 1988); *Johnson v. United States*, 600 F.2d 1218, 1221 (6<sup>th</sup> Cir. 1979); *Army & Air Force Exchange Service v. Hanson*, 360 F.Supp. 258, 260 (D. Haw. 1970).

§902(2)), occurring to an employee of a nonappropriated fund instrumentality described by section 2105(c) of this title who is –

- (1) not a citizen or permanent resident of the United States or a territory or possession of the United States; and
- (2) employed outside the continental United States;

“compensation” shall be provided in accordance with regulations prescribed by the Secretary of the military department concerned and approved by the Secretary of Defense or regulations prescribed by the Secretary of Transportation, as the case may be.

5 U.S.C. §8172.<sup>5</sup> Section 8173, 5 U.S.C. §8173, provides that the liability of both the United States and the nonappropriated fund instrumentality for a covered employee’s work-related disability or death under both Sections 8171 and 8172 is exclusive and in place of all other liability for such work-related disability or death. *See Vilanova v. United States*, 851 F.2d 1, 2 (1<sup>st</sup> Cir. 1988); *Johnson v. United States*, 600 F.2d 1218, 1221 (6<sup>th</sup> Cir. 1979); *Hanson*, 360 F.Supp. at 260; *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173, 176 (1997).

In this case, it is undisputed that decedents were neither United States citizens nor permanent residents of the United States or a territory or possession of the United States and that they were employed by a nonappropriated fund instrumentality in the

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<sup>5</sup> The current Department of the Navy regulation implementing 5 U.S.C. §8172 provides as follows:

(2) Personal injury or death of foreign nationals employed outside of the continental United States. Employees who are not citizens or permanent residents, and who are employed outside the continental United States, may be protected by private insurance of the NAFI or by other arrangements. When a non-appropriated fund activity has elected not to obtain insurance coverage or to make other arrangements, compensation is separately provided by Federal statute, military regulations, and agreements with foreign countries. *See* 5 U.S.C. §8172, DoD 1401.1-M, Personnel Policy Manual for Nonappropriated Fund Instrumentalities and BUPERINST 5300.10A, NAF Personnel Manual.

32 C.F.R. §756.9(b)(2) (2007).

Philippines. Thus, the administrative law judge properly found that the claims are not covered by the provisions of Section 8171 of the NFIA,<sup>6</sup> but, rather, fall under the purview of Section 8172. *See* Decision and Order at 3; 5 U.S.C. §§8171(a), 8172. Citing the Board's holding in *Utria*, 7 BRBS 387, the administrative law judge held that he lacked jurisdiction to determine claimants' entitlement, if any, to relief pursuant to Section 8172. Decision and Order at 3-4. In its decision in *Utria*, the Board held that the jurisdiction of the United States Department of Labor is limited to claims covered by Section 8171 and that for claims under Section 8172, jurisdiction lies with the applicable military department. 7 BRBS at 390. The Board thus held in *Utria* that if the claim in that case was found on remand to be covered by Section 8172, the claimant's entitlement to compensation would be a matter for determination by the Secretary of the Navy pursuant to the provisions of Section 8172 and the applicable regulations. *Id.* Consistent with the Board's decision in *Utria*, we affirm the administrative law judge's findings that he lacked jurisdiction to determine claimants' entitlement to compensation under Section 8172 and that jurisdiction to determine such entitlement lies with the Secretary of the Navy. *See* Decision and Order at 3-4; 5 U.S.C. §8172; 32 C.F.R. §756.9(b)(2); *Utria*, 7 BRBS at 390. We therefore affirm the administrative law judge's finding that Section 8171 does not apply to the instant claims as well as his dismissal of the claims under Section 8172 of the NFIA for lack of jurisdiction. *See* Decision and Order at 3-4, 6; 5 U.S.C. §§8171, 8172; 32 C.F.R. §756.9(b)(2); USCINCPACREPPHILINST 12000.5A.<sup>7</sup> *See generally* 33 U.S.C. §§919(d), 921(b)(3).

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<sup>6</sup> The administrative law judge observed that no party suggested that decedents were permanent residents of the Subic Bay Naval Station or that the naval station was a "possession" of the United States. *See* Decision and Order at 3; *see generally Utria*, 7 BRBS 387. As claimants' assertion of coverage under the NFIA was not premised on these grounds, the issue of coverage under Section 8171 on these specific grounds need not be considered.

<sup>7</sup> The administrative law judge stated that the parties are in agreement that USCINCPACREPPHILINST 12000.5A creates the applicable compensation program for Navy Exchange employees in the Philippines. *See* Decision and Order at 3 n.5; Emp. Response Brief at 5-6. We do not address employer's contention that claimants are not covered by this program as this matter is outside the jurisdiction of the Department of Labor.

The administrative law judge next found that claimants' claims are not covered by the DBA.<sup>8</sup> In this regard, the administrative law judge cited the United States District

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<sup>8</sup> Section 1651 of the DBA provides, in pertinent part, as follows:

(a) *Places of employment.* Except as herein modified, the provisions of the Longshore and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall apply in respect to the injury or death of any employee engaged in any employment-

(1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or

(2) upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States (including the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone)...; or

\* \* \*

(6) outside the continental United States by an American employer providing welfare or similar services for the benefit of the Armed Forces pursuant to appropriate authorization by the Secretary of Defense....

\* \* \*

(c) *Liability as exclusive.* The liability of an employer... under this Act [42 USCS §1651 et seq.] shall be exclusive and in place of all other liability of such employer... to his employees (and their dependents) coming within the purview of this Act [42 USCS §1651 et seq.], under the workmen's compensation law of any State, Territory, or other jurisdiction, irrespective of the place where the contract of hire of any such employee may have been made or entered into.

42 U.S.C. §1651(a), (c).

As originally enacted in 1941, Section 1651(a)(2) specifically included the Philippine Islands as a territory or possession of the United States. This reference to the Philippines was subsequently omitted as obsolete in view of the recognition by the United States on July 4, 1946, of Philippine independence. *See* 42 U.S.C. §1651 Codification note. *See also* 22 U.S.C. §1394 note.

Court's holding in *Hanson*, 360 F.Supp. 258, that the DBA was superseded by the NFIA with respect to nonappropriated fund employees, and, thus, there is no DBA coverage for that group of employees. *See* Decision and Order at 5. We find the court's reasoning in *Hanson* to be compelling, and we therefore affirm the administrative law judge's finding that the claims in this case are not covered under the DBA.<sup>9</sup>

In *Hanson*, the issue before the court was whether the DBA extended coverage under the Longshore Act to the employee, a citizen of the Philippines, who allegedly contracted tuberculosis as a result of his employment with a nonappropriated fund instrumentality at a United States Air Force base in the Philippines.<sup>10</sup> 360 F.Supp. at 259. The employer in *Hanson* asserted that the employee was not covered by the DBA, but, rather, was covered by Section 8172 of the NFIA, 5 U.S.C. §8172, which required him to seek compensation pursuant to regulations prescribed by the Secretary of the Air Force. *Id.* After setting forth the legislative history regarding the enactment of the DBA and the NFIA and their respective amendments, the court stated that both Acts, as amended in 1958, reflected an apparent conflict in that the liability created by both statutes purported to be exclusive. *Id.* at 261. The court reasoned that Congress must have intended the later-enacted NFIA to operate as an exception to the DBA, relying in this regard on the following principle of statutory construction:

“... the subsequent enactment of a statute which treats a phase of the same general subject matter in a more minute way consequently repeals *pro tanto* the provision of the general statute with which it conflicts.” Sutherland on Statutory Construction, §2022. *See* *Abbate v. United States*, (9<sup>th</sup> Cir. 1921) 270 F.735.

*Id.* The court added that if the NFIA were not construed as an exception to the DBA consistent with this canon of statutory construction, the NFIA would be rendered “in part redundant, in part a nullity.” *Id.* Accordingly, the court set aside the United States

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<sup>9</sup> The Board has not had occasion to consider the issue of the applicability of the DBA to employees of nonappropriated fund instrumentalities, and *Hanson* is the sole judicial decision to address this issue.

<sup>10</sup> The DBA purports to cover “any employee engaged in any employment” at “any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government.” 42 U.S.C. §1651(a). The employee in *Hanson* was injured at Clark Air Force Base which, the court stated, was acquired from the Philippines in 1947. *Hanson*, 360 F.Supp. at 259 n.4.



Department of Labor’s award of compensation to the employee under the Longshore Act, as extended by the Defense Base Act.<sup>11</sup> *Id.*

In concluding that the DBA does not cover the claims in this case, the administrative law judge found, pursuant to *Hanson*, that the NFIA provides the exclusive remedy and that, with respect to the relationship between the two statutes, the NFIA was later enacted and that “it more specifically, directly, and in greater detail addresses the employees of nonappropriated fund instrumentalities than does the Defense Base Act.” Decision and Order at 5. Based on *Hanson*, we agree that as it is a later, more specific statute, the NFIA takes precedence over the DBA with respect to employees of nonappropriated fund instrumentalities. Thus, in view of the exclusive liability provision at Section 8173 of the NFIA, 5 U.S.C. §8173, we affirm the administrative law judge’s finding that the claims are not covered under the DBA.<sup>12</sup> *Hanson*, 360 F. Supp. 258.

Lastly, we affirm the administrative law judge’s determination that he lacked jurisdiction to consider claims brought under Philippine Presidential Decree 626, entitled “Employees’ Compensation and State Insurance Fund.” See Decision and Order at 5-6. Neither the administrative law judge nor the Board has jurisdiction to consider questions regarding claimants’ entitlement to relief under this Decree, and, thus, the administrative

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<sup>11</sup> The court also held, based on legislative history, that the provision at Section 1651(a)(6) of the DBA, 42 U.S.C. §1651(a)(6), pertaining to employees of an American employer providing “welfare or similar services” for the benefit of the Armed Forces does not apply to nonappropriated fund instrumentality employees. 360 F.Supp. at 260-261. Thus, in the instant case, we affirm the administrative law judge’s finding that the provision at Section 1651(a)(6) does not apply to decedents. See Decision and Order at 5.

<sup>12</sup> Because we affirm the administrative law judge’s conclusion that the claims are not covered under the DBA on the basis that the DBA is superseded by the NFIA with respect to nonappropriated fund instrumentality employees, we need not consider the administrative law judge’s further findings pursuant to Section 1651(a)(1) of the DBA, 42 U.S.C. §1651(a)(1), regarding the acquisition by the United States of the Subic Bay naval base. See Decision and Order at 4.

As discussed in notes 2 and 9, *supra*, the Philippines were no longer a United States territory or possession of the United States after July 4, 1946; thus, the administrative law judge properly found that the provisions of Section 1651(a)(2), 42 U.S.C. §1651(a)(2), are not applicable to the instant claims. See n.8, *supra*.

law judge's dismissal of these claims is affirmed.<sup>13</sup> *See generally* 33 U.S.C. §§919(d); 921(b)(3). The administrative law judge's denial of claimants' motions for reconsideration also is affirmed. The administrative law judge properly reaffirmed his previous finding that he lacked jurisdiction to award a remedy under Philippine Presidential Decree 626.

In sum, the administrative law judge properly found that claimants lack a remedy under the NFIA and DBA extensions of the Longshore Act and that he lacks jurisdiction to determine claimant's entitlement to benefits under Section 8172 of the NFIA and Philippine Presidential Decree 626. Therefore, the denial of the claims is affirmed.

Accordingly, the administrative law judge's Decision and Order Granting Summary Decision and Order Denying Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>13</sup> As the administrative law judge's finding that he lacked jurisdiction to consider claims under Philippine Presidential Decree 626 is affirmed, we do not reach the administrative law judge's finding, in the alternative, that claimants lack standing to bring claims under the Decree. *See* Decision and Order at 5-6.