

BRB No. 97-1113

RICHARD C. JOHNSON)	
)	
Claimant-Petitioner)	DATE ISSUED:
)	
v.)	
)	
STEVEDORING SERVICES OF AMERICA)	
)	
and)	
)	
EAGLE PACIFIC INSURANCE COMPANY)	
)	
Employer/Carrier-Respondents)	DECISION and ORDER

Appeal of the Order Dismissing Claimant’s Motion for Increased Hourly Rate Or, In the Alternative, Interest On Fee Award of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Russell A. Metz (Metz & Associates), Seattle, Washington, for employer/ carrier.

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

PER CURIAM:

Claimant appeals the Order Dismissing Claimant’s Motion for Increased Hourly Rate Or, In the Alternative, Interest On Fee Award (93-LHC-1125) of Administrative Law Judge Paul A. Mapes 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 findings of fact and conclusions of law of the administrative law judge 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).

On February 7, 1994, the administrative law judge awarded claimant compensation for occupational hearing loss pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13). On April 20, 1994, he awarded claimant's counsel an attorney's fee and costs totaling \$5,780.34. Employer thereafter timely appealed the award of benefits, but not the attorney's fee award, to the Board. On September 12, 1996, the administrative law judge's award of benefits was administratively affirmed pursuant to the Omnibus Consolidated Rescission and Appropriations Act of 1996, P.L. No. 104-134, 110 Stat. 1321-211, 1321-219 (1996). No appeal was taken of the administrative affirmance. On January 7, 1997, employer paid the attorney's fee previously awarded by the administrative law judge. On January 15, 1997, claimant's attorney filed a Motion For Increased Hourly Rate Or, In the Alternative, Interest On Fee Award, with the administrative law judge, asserting that inasmuch as the 3-year delay in the payment of the fee had substantially reduced the value of his fee award, the administrative law judge should reopen the fee award and compensate him for the delay in payment by either awarding interest on the fee or increasing his hourly rate. In an Order dated April 3, 1997, the administrative law judge dismissed the motion on the ground that as the case has not been remanded to the Office of Administrative Law Judges by the Board or any other tribunal, and the fee award had become final pursuant to 33 U.S.C. §921(c) and 20 C.F.R. §802.406, he did not have subject matter jurisdiction to consider the requested interest award.

On appeal, claimant argues that he is entitled to interest on his attorney's fee award, as compensation for the substantial delay in payment was not due to any error in the fee award, but, rather because employer appealed the case underlying the compensation order to the Board. Moreover, claimant contends that the administrative law judge erred in finding that he lacked jurisdiction to enter an interest award. Claimant contends that as payment of the fee award was legally impossible while the appeal was pending and it was not possible to reopen the fee award, which no one had appealed, once the administrative law judge's award of benefits was affirmed, this motion is the only way to compensate him for the delay in receiving his fee. Employer responds that the administrative law judge correctly determined he had no jurisdiction because the fee award had become final and was not subject to modification under 33 U.S.C. §922. Claimant replies, reiterating his arguments, and contending that his argument should be addressed, as he could not raise the issue of interest until the fee award had become final.

The administrative law judge's conclusion that the attorney's fee award was final and that he accordingly lacked subject matter jurisdiction to decide whether an award of interest is appropriate is affirmed for the reasons stated in the Board's decision in *Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 BRBS 41, 43 (1997). See

also *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT)(7th Cir. 1982)(fee award final at same time as underlying compensation award). Claimant argues that awarding interest does not require re-opening the award but rather only a legal decision as to whether his previously issued order allowed for interest, and that the administrative law judge has jurisdiction over this issue as he entered the fee award originally. We disagree. Section 22 of the Act, 33 U.S.C. §922, which provides the only means under the Act for changing otherwise final compensation orders, does not provide a basis for reopening a final attorney's fee award. See *Greenhouse*, 31 BRBS at 43. As an attorney's fee is not "compensation" within the meaning of Section 22, fee awards may not be modified pursuant to Section 22. *Fortier v. Bath Iron Works*, 15 BRBS 261 (1982). Inasmuch as the Act and the regulations do not provide a method to reopen a fee award which has become final, we reject claimant's arguments and affirm the administrative law judge's determination that he lacked subject matter jurisdiction to address the interest issue in this case.

We note, however, that an award of interest on a fee is contrary to applicable law. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the instant case arises, has held that an attorney's fee award under the Act is not a final judgment entitled to interest under 28 U.S.C. §1961. See *Anderson v. Director, OWCP*, 91 F.3d 1322, 1325 n.3, 30 BRBS 67, 69 n.3 (CRT) (9th Cir. 1996); *Hunt v. Director, OWCP*, 999 F.2d 419, 422 n.1, 27 BRBS 84, 89 n.1 (CRT)(9th Cir. 1993), *rev'g Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991); *Hobbs v. Director, OWCP*, 820 F.2d 1528, 1531 (9th Cir. 1987). See also *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995).¹ Accordingly, for the reasons previously stated, we reject claimant's argument that he is entitled to interest on his attorney's fee.

¹Claimant argues that the policy of not awarding interest conflicts with the United States Supreme Court's decision in *Missouri v. Jenkins*, 491 U.S. 274 (1989). We disagree. In *Jenkins*, the Supreme Court held that an adjustment for delay in payment is an appropriate factor in the determination of what constitutes a reasonable fee under 42 U.S.C. §1988; it did not address the applicability of interest on fee awards under 28 U.S.C. §1961.

Accordingly, the administrative law judge's Order Dismissing Claimant's Motion for Increased Hourly Rate Or, In the Alternative, Interest On Fee Award is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge