

BILLY C. RIHNER )  
(Son of PAUL RIHNER, deceased) )  
 )  
 Claimant )  
 )  
 v. )  
 )  
 BOLAND MARINE AND )  
 MANUFACTURING COMPANY ) DATE ISSUED:  
 )  
 and )  
 )  
 CONTINENTAL INSURANCE )  
 COMPANY )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, )  
 UNITED STATES DEPARTMENT )  
 OF LABOR )  
 )  
 Respondent ) DECISION and ORDER

Appeal of the Order on Remand of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

James R. Logan, IV (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for employer/carrier.

Marianne Demetral Smith (Thomas S. Williamson, Jr., Solicitor of Labor, Carol DeDeo, Associate Solicitor, Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and DOLDER, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.\*

\*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

PER CURIAM:

Employer appeals the Order on Remand (87-LHC-0538) of Administrative Law Judge Quentin P. McColgin awarding an attorney's fee 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). An award of an attorney's fee is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This is the second time that this case has been appealed to the Board. Claimant is the dependent adult child of the deceased employee. Claimant's father suffered a fatal heart attack on February 3, 1981, during the course of his employment; employer paid claimant's mother benefits until her death in February 1985, at which time employer began making benefit payments to claimant. Employer subsequently sought, and was denied, relief under Section 8(f) of the Act, 33 U.S.C. §908(f); thereafter, employer discontinued benefit payments to claimant. At the hearing before Administrative Law Judge Parlen L. McKenna, employer and claimant stipulated to a number of issues, leaving only the issues of the existence of a compensable injury and the applicability of Section 8(f) to be resolved. In a Decision and Order dated June 16, 1988, Judge McKenna awarded claimant death benefits, determined that employer was entitled to Section 8(f) relief, and found claimant's counsel to be entitled to an attorney's fee award to be assessed against employer. In a subsequent Order, the administrative law judge assessed claimant's attorney's fee against the Special Fund pursuant to Section 26 of the Act, 33 U.S.C. §926, because he found the pre-hearing position of the Director, Office of Workers' Compensation Programs (the Director), to be unreasonable since claimant was clearly entitled to benefits, employer was entitled to Section 8(f) relief and no contradictory evidence was submitted. Subsequently, in a Supplemental Decision and Order Awarding Attorney's Fees, Judge McKenna awarded claimant's counsel a fee in the amount of \$3,885, representing 38.85 hours of services at \$100 per hour, plus expenses of \$175.56.

The Director thereafter appealed the administrative law judge's assessment of counsel's fee against the Special Fund to the Board. *See Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990). The Board determined that Judge McKenna erred in assessing counsel's fee against the Special Fund pursuant to Section 26, 33 U.S.C. §926, as this section provides for the assessment of the costs of a proceeding only against a party who has instituted or continued the proceedings without reasonable grounds, which did not apply to the instant case; additionally, the Board noted that the Special Fund cannot be held liable for an attorney's fee under Section 28 of the Act, 33 U.S.C. §928. However, as claimant succeeded in obtaining greater compensation than that paid by employer prior to employer's termination of benefit payments, the Board modified the administrative law judge's Decision and Order to hold employer liable for counsel's attorney's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b); the Board therefore remanded the case to the administrative law judge to allow employer the opportunity to object to claimant's counsel's fee petition prior to the issuance of a fee award pursuant to Section 28(b). 24 BRBS at 86-88.

In an Order on Remand dated June 12, 1992, Administrative Law Judge Quentin P. McColgin, noting that there had been an express waiver of objections to the amount sought by

claimant's counsel for fees and expenses and finding that those amounts claimed were reasonable, awarded claimant's counsel \$4,060.56 for fees and expenses incurred while representing claimant before the Office of Administrative Law Judges.

On appeal, employer challenges the administrative law judge's decision to assess claimant's counsel's fee against it, contending that any attorney's fee awarded should be assessed against the Special Fund pursuant to Section 26. Subsequent to its appeal, employer, conceding that the sole issue raised has already been decided by the Board in its prior decision and that that decision represents the "law of the case," filed correspondence requesting that the Board, pursuant to 20 C.F.R. §802.404(b), issue a summary decision disposing of its appeal. The Director responds, agreeing that summary affirmance by the Board is appropriate in this case.

The issue of liability for claimant's counsel's fee was resolved by the Board in the prior appeal of this case. This issue was fully addressed and resolved in the Board's prior published opinion in which we stated that employer, and not the Special Fund, was liable for any attorney's fee awarded to claimant's counsel. Our decision on this issue of fee liability constitutes the law of the case, and we therefore decline to consider this issue again. *See Doe v. Jarka Corporation of New England*, 21 BRBS 142 (1988); *Dean v. Marine Terminals Corp.*, 15 BRBS 394 (1983).

Accordingly, the administrative law judge's Order on Remand is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

LEONARD N. LAWRENCE  
Administrative Law Judge