

BRB Nos. 92-347
and 92-347A

GEORGE J. CHASE and JENNIFER)
CHASE (Children of DANIEL E.)
CHASE))
Claimants-)
Cross-Petitioners)
v.)
BATH IRON WORKS CORPORATION)
and)
COMMERCIAL UNION INSURANCE)
COMPANY)
Employer/Carrier-)
Respondents)
Cross-Respondents)
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
Petitioner) DECISION and ORDER

Appeals of the Decision and Order On Modification - Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (McTeague, Higbee, Libner, MacAdam, Case & Watson), Topsham, Maine, for claimants.

Michelle Jodoin LaFond (Norman, Hanson & DeTroy), Portland, Maine, for employer/carrier.

Mark Reinalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

The Director appeals, and claimants cross-appeal, the Decision and Order on Modification - Awarding Benefits (88-LHC-1966) of Administrative Law Judge David W. Di Nardi 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Daniel Chase (decedent), the deceased father of claimants, died on January 30, 1988, due to work-related asbestosis. At the time of the first hearing, held on December 14, 1988, George Chase was 16 years old, and Jennifer Chase was 19 years old and enrolled full-time in a job training school. Decedent had two other children who were twenty-one years of age or older and were not parties to the proceeding. In the original decision, the administrative law judge found that decedent's death was work-related. The administrative law judge found that Jennifer was a full-time student pursuant to Section 2(18), 33 U.S.C. §902(18), and that George was a minor under Section 2(14), 33 U.S.C. §902(14).¹ The administrative law judge awarded death benefits to claimants pursuant to Section 9, 33 U.S.C. §909, from January 30, 1988 and continuing "as long as they are eligible therefor." Decision and Order at 22. The administrative law judge also awarded decedent's estate medical and funeral expenses, and awarded employer Section 8(f), 33 U.S.C. §908(f), relief. Decedent had not filed an *inter vivos* claim for disability benefits.

Prior to the hearing, on August 31, 1988, decedent's estate had received third-party settlements totaling approximately \$28,000 from three asbestos manufacturers and had numerous lawsuits pending against other manufacturers. The administrative law judge found that employer was entitled to a credit under Section 33(f), 33 U.S.C. §933(f), for the net amounts of compensation previously paid to decedent as a result of his third-party recoveries. The administrative law judge stated that the net credit should be administratively determined by the district director² upon the filing of the appropriate documentation. Decision and Order at 22.

¹Without explanation, the administrative law judge also found that Jennifer was unable to support herself.

²The term "district director" has replaced the term "deputy commissioner" used in the statute. See 20 C.F.R. §702.105.

*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).

After the administrative law judge's decision was issued, employer made all appropriate payments through January 26, 1990, at which time the Special Fund was to continue payments pursuant to employer's entitlement to Section 8(f) relief, and, in fact, the Fund commenced payments to George. The Special Fund, however, by letter dated March 13, 1990, terminated George's payments as of February 26, 1990, when George turned 18 years old. The Special Fund made no payments to Jennifer, who was no longer in school. Prior to the Special Fund's termination of benefits, claimants' counsel sought continuation of payments with submission of Applications For Continuation Of Death Benefits (DOL Form LS-266), for Jennifer on February 2, 1990, and for George on February 22, 1990. Medical records documenting Jennifer's inability to continue her education due to health problems were attached to her application. The Special Fund declined to pay further death benefits, and an informal conference and formal hearing followed. Subsequently, after the hearing, by letter dated June 28, 1991, claimants filed a petition for modification of the administrative law judge's original decision. In the petition, in addition to seeking continuation of their death benefits, claimants sought modification of the administrative law judge's finding regarding employer's entitlement to a credit against the proceeds of the third-party settlements to reflect that it applies only against the amounts owed decedent, and a penalty against the Special Fund for its termination of benefits.

In the Decision and Order on Modification, the administrative law judge found that George and Jennifer were entitled to continued death benefits, a finding which the Director does not dispute on appeal.³ The administrative law judge ordered that the Special Fund pay George and Jennifer death benefits from February 27, 1988 and continuing as long as they are eligible. The administrative law judge refused to modify the finding in his first decision that employer is entitled to receive a credit under Section 33(f) for the net amounts of the third-party settlements against the compensation previously paid to decedent.⁴ The administrative law judge refused to address the credit issue, finding that because claimants failed to appeal the original decision, his decision was *res judicata*, and he could not address it in a modification proceeding pursuant to Section 22, 33 U.S.C. §922. He also noted that because claimants were seeking modification based on the holding of the United States Court of Appeals for the Ninth Circuit in *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991), *aff'g and rev'g Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), the request was based on a change in law which is not a ground for modification.

³George's entitlement was based on his being a full-time student. 33 U.S.C. §902(18). He graduated from the Deck House, a private school, which was certified by the State of Maine, on September 19, 1990. Cl.'s Ex. 10. George's graduation was delayed due to a bout of pneumonia he had in April 1990. He was accepted as a full-time student at the University of Southern Maine to commence his studies in September 1991. Jennifer's entitlement was based on her being incapable of taking care of herself due to a mental disability. 33 U.S.C. §902(14); Cl.'s Ex. 12, p. 2.

⁴Despite the administrative law judge's wording in his first decision that employer is entitled to a credit for sums it owed decedent, the parties apparently interpreted the administrative law judge's original decision as granting employer a credit against amounts owed to both decedent and claimants.

In the alternative, if modification was appropriate, the administrative law judge found that because the third-party settlement proceeds were divided equally among decedent's four children in accordance with decedent's will and trust, and an order approving one of the settlements by the U.S. Magistrate for the District of Maine, and since Jennifer and George were the only "litigants" among decedent's children, employer would be entitled to a credit of one-half of the net third-party proceeds against its liability for death benefits.⁵ The administrative law judge stated that to deny employer credit for one-half of the net proceeds would grant claimants a windfall and an unauthorized double recovery.

The administrative law judge also assessed claimants' attorney's fee in the amount of \$3,645 against the Special Fund, finding that the Director's unilateral termination of death benefits to claimants was outrageous, that it would be harsh and incongruous to assess the fee against claimants, and that employer had no pecuniary interest in the proceeding at the time. The administrative law judge found that employer attended the April 19, 1991 hearing merely as an observer and as a courtesy to the administrative law judge.

The administrative law judge further found that although the Special Fund cannot be held liable for an attorney's fee under Section 28 of the Act, 33 U.S.C. §928, the Director's conduct came within exceptions to the "American Rule" that a party is to pay its own attorney's fee. The administrative law judge found that the Special Fund, in terminating benefits, wilfully violated a court order. The administrative law judge also stated that the Director's action was groundless in that claimants submitted adequate, timely documentation of their ongoing eligibility, and vexatious in that the Director's action aggravated Jennifer's health, delayed the start of the hearing, and delayed George's enrollment into college due to lack of funds. The administrative law judge also found that a fee award against the Special Fund was appropriate pursuant to Section 26 of the Act, 33 U.S.C. §926.

On appeal, the Director contends that the administrative law judge erred in assessing claimants' attorney's fee against the Special Fund, and the Director and claimants challenge the administrative law judge's refusal to modify his apparent finding in his original decision that employer is entitled to credit the net third-party proceeds against its liability to decedent's estate and for death benefits to the children. The Director and claimants contend that the administrative law judge's "finding" regarding employer's entitlement to a credit against its liability for death benefits is encompassed within modification based on a "mistake in fact." Employer responds, urging affirmation of the administrative law judge's Decision and Order on Modification.

We first address whether the administrative law judge properly refused to modify his original decision regarding employer's entitlement to a credit under Section 33(f) pursuant to Section 22 of

⁵The U.S. Magistrate for the District of Maine approved a third-party settlement against Eastern Refractories in the amount of \$26,108.65 to be distributed in one-quarter shares to decedent's children in accordance with decedent's will and *inter vivos* trust.

the Act. Section 22 permits modification based on a mistake in fact in the initial decision or a change in condition within one year of the date of the last payment of compensation whether or not a compensation order has been issued. *See, e.g., Williams v. Jones*, 11 F.3d 247, 257, 27 BRBS 142, 159-160 (CRT)(1st Cir. 1993); *Ryan v. Lane and Co.*, 28 BRBS 1327 (1994); *Finch v. Newport News Shipbuilding and Dry Dock Co.*, 22 BRBS 196, 201 (1989). This section was intended to displace traditional notions of finality and *res judicata*. *See Williams*, 11 F.3d at 257, 27 BRBS at 159-160 (CRT). In determining whether to reopen a case under Section 22, a major criterion is whether reopening the case will render justice under the Act. *Id.*, 11 F.3d at 257, 27 BRBS at 160 (CRT); *Finch*, 22 BRBS at 201. Modification may be based on newly submitted evidence, cumulative evidence or merely upon further reflection on the evidence previously submitted. *Williams*, 11 F.3d at 257, 27 BRBS at 160 (CRT); *Finch*, 22 BRBS at 200.

Under Section 33(f), where claimant's net recovery against a third party equals or exceeds employer's workers' compensation liability, employer is entitled to offset past and future benefits against the net amount of the third-party recovery. *Force*, 23 BRBS at 3. In *Force*, 23 BRBS at 6, the Board explained that if the settlement recovery in the third-party action is apportioned between the parties, employer is only entitled to offset its liability to the claimant (decedent's surviving wife) for death benefits against those portions of the third-party recovery received in exchange for the surrender of the claimant's rights and to offset its liability to the decedent for accrued disability benefits against those portions of the third-party recovery received in exchange for the surrender of his rights. *Force*, 23 BRBS at 6. *See also Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992); *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990); *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1991)(Dolder, J., concurring); *Brisco v. American Cyanamid Corp.*, 22 BRBS 389 (1989). Subsequent to the issuance of the administrative law judge's first decision, the Ninth Circuit affirmed, in part, the Board's decision in *Force*, agreeing with the Board that apportionment of damages among parties to a third-party settlement is mandatory inasmuch as the offset provision applies only to the third-party recovery obtained by "the person entitled to compensation." *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991). In reversing the Board's decision, in part, however, the court concluded that it is employer, rather than claimant, who bears the burden of proving what is claimant's portion of the group settlement. *Id.*, 938 F.2d at 985, 25 BRBS at 18 (CRT). Without such evidence, employer is not entitled to any offset at all. *Id.*; *see also I.T.O. Corp. of Baltimore v. Sellman*, 967 F.2d 971, 26 BRBS 7 (CRT)(4th Cir. 1992), *modifying on recon.*, 954 F.2d 239, 25 BRBS 101 (CRT)(4th Cir. 1992).

In this case, although the Director initially suggests that the law changed since the administrative law judge issued his decision, in her reply brief, the Director asserts that modification of the administrative law judge's findings on Section 33(f) does not rest on a change in law, as at the time of the administrative law judge's first decision, issued in August 1989, the Board's decision in *Force* had been issued and the Board recognized the theory that third-party credits could be apportioned by party. *See, e.g., Jones v. St. John Stevedoring Co., Inc.*, 18 BRBS 68, 73 (1986), *rev'd on other grounds sub nom. St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397 (5th Cir. 1987), *cert. denied*, 484 U.S. 976 (1987); Dir.'s Reply Br. at 10. The Director, however, asserts that claimants' motion for modification involves a question of fact, as the administrative law judge, in his initial decision, did not specify whether employer could apply its third-party credit against the death benefits awarded to George and Jennifer, or only against the funeral and medical expenses awarded to decedent's estate. The Director states that the administrative law judge's decision reflects a mistake in determination of fact regarding the identity of the person(s) who brought and settled the third-party claims. Dir.'s Reply Br. at 10.

In their appeal, claimants also contend the administrative law judge should consider the Section 33(f) credit issue because it is based on a mistake in fact. Claimants contend that the administrative law judge was unaware of the district court's order apportioning one of the third-party settlements in quarter shares to decedent's children and he did not realize that the third-party recoveries were not settlements of claims brought by claimants. Citing both the Board's and the Ninth Circuit's decisions in *Force*, claimants assert that third-party recoveries can only be used as an offset against benefits to the individual whose claim was being settled. Therefore, they contend the administrative law judge erred in authorizing a credit to employer against its liability for death benefits.

As the claimants' motion for modification properly fell within the scope of a "mistake in fact," the administrative law judge erred in finding he was unable to address the credit issue on modification. *See generally Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). Claimant's motion for modification involved a question of fact, as the administrative law judge's decisions are unclear as to whether employer is entitled to a credit solely against its liability for payments owed to decedent's estate or for death benefits as well. Because Section 22 specifically eschews traditional notions of *res judicata*, the administrative law judge's denial of claimants' motion for modification on that ground is erroneous. *Id.* Contrary to employer's assertions, once a valid basis exists for granting Section 22 modification, there is no requirement that the issues addressed in the modification proceeding have been raised or briefed in the first hearing or that the evidence which the administrative law judge reviews be newly submitted evidence or not previously available. *See generally O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). We therefore hold that it is proper for the administrative law judge to address claimants' request for Section 22 modification, and his finding to the contrary is reversed.

Regarding Section 33(f), in the original decision, the administrative law judge stated that employer was entitled only to an offset against the third-party proceeds for benefits owed decedent. In the decision on modification, however, in declining to modify his original decision, the administrative law judge in effect affirmed his finding on the issue but also thereby indicated that he agreed with employer's interpretation of his first decision that employer is entitled to a credit against its liability for death benefits. The administrative law judge's decision on modification must be vacated and the case remanded for the administrative law judge to make findings consistent with law. If the third-party claims were brought by decedent and were settled by him or his estate in exchange for the surrender of his rights, employer is only entitled to offset the net third-party recovery against its liability to decedent's estate. *Force*, 938 F.2d at 985, 25 BRBS at 19 (CRT). If claimants merely received the money because of their father's will and trust, employer is not entitled to a credit. *Martin*, 24 BRBS at 125. If, however, claimants settled third-party claims in their own right, then employer would be entitled to offset the net amount of the third-party recovery received by George and Jennifer against its liability for death benefits. *Yates v. Ingalls Shipbuilding, Inc.*, 28 BRBS 137 (1994) (Brown, J., concurring) (Smith, J., dissenting on other grounds). Employer has the burden of proving the claimants' portion of the group settlement in order to be entitled to an offset, and on remand the administrative law judge should provide employer the opportunity to present evidence to meet its burden of establishing apportionment among the parties. *Jones*, 25 BRBS at 361-362.

The Director next contends that the administrative law judge erroneously assessed claimants' attorney's fee against the Special Fund contending that it is contrary to law, and that the exceptions to the "American Rule" do not apply. The Director contends that she did not violate a court order by suspending payments and did not act in bad faith. The Director contends that she had a reasonable basis for declining to continue to pay benefits, as the grounds on which the administrative law judge found claimants entitled to death benefits in the first decision, George's being a minor and Jennifer's being a full-time student, had changed; in his second decision, the administrative law judge found claimants eligible because George was a full-time student and Jennifer was unable to support herself due to her health. The Director also contends that claimants' documentation of their ongoing eligibility was inadequate in that George did not submit proof that his high school was accredited; the Director did not state in what way Jennifer's documentation of her medical condition was inadequate.⁶

The Director's arguments have merit. The Act does not authorize an attorney's fee to be assessed against the Special Fund under either Section 44, 33 U.S.C. §944, or Section 28, 33 U.S.C. §928, and Section 26 is unavailable as a vehicle for assessing an attorney's fee. Section 44(i) of the

⁶The medical evidence submitted with Jennifer's application for continued benefits contained a report dated January 12, 1990 by Ruth Davis, an "R.N., M.S.N., and C.S.," which states that Jennifer is not capable of self-sufficiency at this time, and Dr. Cheng's December 12, 1989 diagnosis that Jennifer was depressed with psychotic features, and suffered pervasive developmental disorder.

Act, which provides the circumstances under which payments can be made from the Special Fund, makes no reference to the payment of an attorney's fee by that fund. *See Bordelon v. Republic Bulk Stevedores*, 27 BRBS 280 (1994). The United States Courts of Appeals for the Fifth, Ninth and Eleventh Circuits have held that the Special Fund cannot be held liable for an attorney's fee under Section 28 since there is no specific and explicit provision for the assessment of attorney's fees against the Special Fund under the Act. *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), *overruled on other grounds by Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*); *Director, OWCP v. Alabama Dry Dock & Shipbuilding Co.*, 672 F.2d 415, 14 BRBS 669 (11th Cir. 1982); *Director, OWCP v. Robertson*, 625 F.2d 873, 12 BRBS 550 (9th Cir. 1980); *see Bordelon*, 27 BRBS at 285.

Moreover, the United States Court of Appeals for the Ninth Circuit has held that the language of Section 26, that a "court" may assess costs under appropriate circumstances, and the legislative history of the Act, establish that only a court may assess costs under Section 26. Since neither the Board, the administrative law judge, nor the district director is a "court," they may not assess costs pursuant to Section 26. *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 633, 27 BRBS 132 (CRT)(9th Cir. 1994). Further, the Board has held that an attorney's fee may not be assessed against any party pursuant to Section 26. *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991).

Under the "American Rule", absent express statutory language or an enforceable contract, litigants pay their own attorney's fees and such fees are not recoverable as costs. *Alyeska Pipe Line Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Non-statutory exceptions to the "American Rule" may apply when the party's action results in a substantial benefit to others, the losing party acted in bad faith, or the defendant in a contempt action wilfully violated a court order. The "bad faith" exception provides for the awarding of an attorney's fee when the losing party has acted vexatiously or oppressively; the rationale underlying this exception is therefore punitive. *See Robertson*, 625 F.2d at 879, 12 BRBS at 554.

The Director correctly contends that the administrative law judge erroneously determined based on the evidence of record that termination of the benefits delayed George's entry into college and worsened Jennifer's health. The evidence establishes George delayed entry into college because he finished high school late due to pneumonia, and the evidence establishes that Jennifer had a history of serious health problems.⁷ Thus, the Director's reasons for declining to resume benefits were not so egregious as to form a basis for applying an exception to the American Rule. Furthermore, the Director did not violate the administrative law judge's original order, as it stated that benefits were to continue as long as claimants were eligible. The original determination of eligibility was based on Jennifer's being a full-time student and George's being under 18. When Jennifer ceased being a full-time student, her eligibility was based on her inability to support herself due to a mental disorder. When George turned 18, his eligibility needed to be based on his being a

⁷Jennifer's aunt testified that while Jennifer became physically sick on the day of the second hearing and Jennifer usually reacts that way under stress, the aunt was not sure that the stress of the hearing caused the illness. Tr. at 25.

full-time student, and his application failed to indicate that his school was accredited. *See* Cl. Ex. 9. Thus, based on the facts in this case, it cannot be said that the Director's suspension of benefits falls within an exception to the American Rule. Accordingly, the administrative law judge's award of claimants' attorney's fee against the Special Fund is reversed.

Under Section 28(a), (b) of the Act, employer can be held liable for claimants' attorney's fee if it contests some aspect of the claim, and claimants succeed in obtaining an award which employer opposed. *See generally Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). As the Director contends, the hearing transcript indicates that employer actively participated in the modification proceedings below, contrary to the administrative law judge's statement that employer was present merely as an observer. Employer argued at the hearing that Section 33(f) should not be addressed, which was to its advantage, as modification of the administrative law judge's Section 33(f) issue might result in employer's owing claimants additional sums. Further, employer submitted a pre-hearing statement addressing Section 33(f) and an exhibit, and cross-examined two witnesses. As the Director contends, employer has a direct adverse financial interest in payments made by the Special Fund, and suggests employer may have obtained a greater credit pursuant to Section 33(f) prior to the expiration of its liability than that to which it was entitled. Based on these considerations, the case is remanded for the administrative law judge to determine whether employer is liable for claimants' attorney's fee. On remand, the administrative law judge should determine whether claimants obtained additional compensation based on his findings regarding the Section 33(f) issue. If employer obtained a greater credit than that to which it was entitled, claimants will have obtained additional benefits and will be entitled to an attorney's fee payable by employer. *See Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84, 88 (1990). If the administrative law judge finds that employer is not liable for the attorney's fee, then claimants may have to bear the cost of the attorney's fee under Section 28(c), 33 U.S.C. §928(c).

Accordingly, the administrative law judge's Decision and Order on Modification - Awarding Benefits is vacated insofar as it refused to address the Section 33(f) issue on modification, and the case is remanded for further findings consistent with this opinion. The assessment of claimants' attorney's fee against the Special Fund is reversed, and the case is remanded for consideration of employer's liability for the fee. In all other respects, the administrative law judge's Decision and Order on Modification is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge