BRB Nos. 95-1703,
95-1703A and 95-1703S

JOHN CLARK	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:_____
Cross-Respondent	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Summary Decision and Order on Remand, Order for Fees and Costs and Supplemental Order for Fees of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Diane L. Middleton, San Pedro, California, for claimant.

Roy D. Axelrod and Christine N. Esckilsen (Littler, Mendelson, Fastiff, Tichy & Mathiason), San Diego, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Summary Decision and Order on Remand, and employer appeals the Order for Fees and Costs and Supplemental Order on Fees (88-LHC-1473) of Administrative Law Judge Henry B. Lasky 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).[1] 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).

[1]In cases such as this one involving multiple appeals, the Board considers the date of the last appeal to be controlling for purposes of the one-year period referenced in Public Laws 104-134 and 104-208. Employer's appeals in this case were filed on January 11 and February 23, 1996.

This case is before the Board for the second time. The administrative law judge initially awarded benefits in this case. On employer's appeal, the Board vacated the award and remanded this case to the administrative law judge for a determination of whether this claim is barred under Section 33(g), 33 U.S.C. §933(g), in light of the Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992). On remand, the administrative law judge denied benefits, but nonetheless awarded an attorney's fee to claimant's counsel. We now affirm the administrative law judge's finding that the claim for benefits is barred, and reverse the orders granting attorney's fees.

Claimant worked for employer from 1963 to 1986. During the course of this employment, claimant was exposed to asbestos, fumes, dust, noise, and solvents. Claimant testified that he stopped working on May 16, 1986, because he suffered from stress, breathlessness, and ear and chest pains. Tr. at 30, 32-34, 41, 45-47, 49-50. On July 18, 1986, claimant filed a claim for compensation under the Act, asserting industrial exposure to toxic and noxious substances, extreme noise, tension, pressure, and harassment. Emp. Ex. 1. He officially retired on September 4, 1987, and in August 1988, employer initiated payment of permanent partial disability benefits calculated from October 7, 1987. Emp. Exs. 7, 9-10, 20.

Claimant sued various third-parties in connection with his industrial disability, and settled with 14 asbestos manufacturers and suppliers for a total of $42,850, of which he received $26,741.92. Cl. Ex. 10. During this time, claimant was diagnosed with asbestosis, small airways disease, glaucoma, cognitive impairment, hypertension, and possibly Parkinson's disease. Tr. at 56, 60, 90-93; Cl. Ex. 11 at 10-11; Emp. Exs. 11, 17.

After a formal hearing on this claim, the administrative law judge determined that the date of injury was May 16, 1986, and he found that claimant suffers from work-related pulmonary problems which prompted his retirement. The administrative law judge thus concluded that claimant is permanently totally disabled from working and is entitled to medical benefits.[2] The administrative law judge also concluded that because claimant was not a "person entitled to compensation" at the time he settled his third-party claims, in that employer was not then paying benefits, *see Dorsey v. Cooper Stevedoring, Inc.*, 18 BRBS 25 (1986), Section 33(g) would not bar this claim. The administrative law judge instead granted employer a Section 33(f), 33 U.S.C. §933(f), credit, based on evidence of over $26,000 in net settlement proceeds.

Employer appealed the administrative law judge's award of benefits, claiming, *inter alia*, that this claim is barred under Section 33(g) because claimant failed to obtain its prior written approval of his third-party settlements or provide timely notice thereof. 33 U.S.C. §933(g)(1988). The Board, *inter alia*, vacated the administrative law judge's Decision and Order awarding benefits in

[2]The administrative law judge also awarded employer Section 8(f), 33 U.S.C. §908(f), relief and held it liable for a Section 14(e), 33 U.S.C. §914(e), penalty. Decision and Order Awarding Benefits at 13-15.

light of the Supreme Court's intervening decision in *Cowart*, wherein it held that an employee becomes a "person entitled to compensation" at the moment his right to recovery vests and not when an employer admits liability.

The ruling in *Cowart* is entitled to retroactive effect. *Kaye v. California Stevedore & Ballast*, 28 BRBS 240, 245-50 (1994); *see also Monette v. Chevron USA Inc.*, 29 BRBS 112, 115 (1995) (Brown, J., concurring), *aff'g on recon. en banc* 25 BRBS 267 (1992). Nevertheless, the Board has held that the administrative law judge in the first instance must render the predicate factual determinations necessary to determine whether Section 33(g) would apply to bar a claim. *See Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996) (Brown and McGranery, JJ., concurring in part and dissenting in part). Accordingly, the Board remanded this case to the administrative law judge for these findings. *Clark v. National Steel & Shipbuilding Co.*, BRB No. 89-6002 (Jan. 27, 1995)(unpub.).

On remand, the administrative law judge granted employer's motion for summary decision and summarily denied and dismissed the claim, finding it "clear from the record and it is undisputed that the claimant herein entered into numerous third party settlements without the prior written approval of Employer for amounts less than Employer's total liability under the Act." Summary Decision and Order on Remand at 2. The administrative law judge, however, also awarded an attorney's fee to claimant's counsel, directing employer initially to pay counsel $13,620 fees and $6,947.80 in costs. Order for Fees and Costs. The administrative law judge also awarded claimant an additional fee of $2,975 in connection with claimant's Motion to Reinstate Fees and Costs. Supplemental Order for Fees.

Claimant has appealed the Summary Decision and Order on Remand denying benefits, while employer appeals the attorney's fee awards.

We first address claimant's appeal of the Summary Decision and Order on Remand. The administrative law judge ruled that claimant was a "person entitled to compensation."[3] He also found it "undisputed" that claimant "entered into numerous third-party settlements without the prior written approval of Employer for amounts less than Employer's total liability under the Act." Summary Decision and Order on Remand at 2.

Claimant does not contest any of the administrative law judge's factual determinations on appeal. Instead, he repeats his assertion, made before the administrative law judge, that Section 33(g) should not come into play in this instance "on the grounds of equity" because he entered into the third-party settlements "consistent with existing law at the time." Summary Decision and Order on Remand at 1; Cl. Br. at 4-5. Claimant's argument is without merit. In our prior decision, we

[3]The administrative law judge in his initial Decision and Order found that the date of injury was May 16, 1986. Decision and Order at 9. This date was prior to the point at which some of the settlements were consummated. *See* Cl. Ex. 10.

ruled that *Cowart* applies to this claim. *Clark*, slip op. at 4-5. That holding constitutes the law of the case. *Armfield v. Shell Offshore, Inc.*, 30 BRBS 122, 123 (1996). Moreover, claimant's appeal to equity and fairness does not require a different result. Indeed, our ruling in *Kaye* makes clear that *Cowart* would be consistently applied and its application would not vary according to the particular equities of the parties, as controlling precedent clearly requires that the law of Section 33(g) "not shift and spring" on such a basis. *See Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991). The Court in *Cowart* recognized the "harsh effects" of Section 33(g). *Cowart*, 505 U.S. at 483, 26 BRBS at 53 (CRT). Nevertheless, the Court applied its ruling to the litigants before it. It is thus clear that this rule must also be applied "with respect to all others not barred by procedural requirements or *res judicata*." *Beam*, 501 U.S. at 545. We therefore affirm the Summary Decision and Order on Remand.

Employer appeals the administrative law judge's Order for Fees and Costs and Supplemental Order on Fees. Although the administrative law judge found on remand that the claim was barred pursuant to Section 33(g), he nevertheless granted counsel's Motion to Reinstate Attorneys Fees, because claimant had received approximately $150,925.65 in benefits due to the work of his counsel prior to the determination that his claim was barred.

The administrative law judge determined that a fee award is warranted not only where claimant establishes liability, but where claimant "obtains increased compensation," and thus "the policies behind the Act and justice demand an award of attorney fees here." Order for Fees and Costs at 8-9. The administrative law judge's analysis is flawed in two respects. First, the administrative law judge concludes that claimant achieved a measure of success on his claim, despite the reversal on remand, because counsel's efforts resulted in "obtaining increased compensation," by virtue of payments made by employer while the case was pending on appeal.[4] Order for Fees and Costs at 8. Second, the administrative law judge relies on policy considerations of the Act and justice to sanction the award of fees in this case. For the reasons that follow, we reverse the administrative law judge's fee awards.

Under the American Rule, "successful litigants generally may not recover attorneys fees unless a statute imposes fee liability [on the unsuccessful party] or some other exceptional circumstance warrants a departure from the Rule." *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 419, 13 BRBS 741, 744 (5th Cir. 1981). Such a statutory exception is accorded prevailing parties by the Act, which mandates that if counsel assists a claimant in the successful prosecution of claim, that attorney shall receive a reasonable attorney's fee. *See* 33 U.S.C. §928(a), (b); *see Davis v. U.S. Department of Labor*, 646 F.2d 609, 613 (D.C. Cir. 1980); *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 773 (5th Cir. 1981); *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90, 93-94 (1993)(*en banc*)

[4]Under Section 21(b)(3) of the Act, 33 U.S.C. §921(b)(3), payments required by an award must be made pending appeal unless stayed by the Board. In this case, claimant received substantial payments while his case was on appeal to the Board. In contrast to benefit payments, attorney's fee awards are not payable until all appeals are exhausted. *See Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT) (7th Cir. 1982).

(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in pert. part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *see also United States Department of Labor v. Triplett*, 494 U.S. 715, 717 (1990)(Section 28 incorporated into provisions of Federal Coal Mine Health & Safety Act); *Director, OWCP v. Baca*, 927 F.2d 1122, 1124 (10th Cir. 1991)(same).

The predicate for such an award of fees under Section 28 is a claimant's ultimate success on the merits of his claim pursuant to a final compensation award, *Thompson v. Potashnick Construction Co.*, 812 F.2d 574, 577 (9th Cir. 1987), and the employer's liability for fees is triggered when it contests its liability in whole or in part, or tenders partial payment of compensation but refuses to pay the total amount claimed, and the claimant is *ultimately* successful in obtaining benefits. *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 1007, 29 BRBS 43, 51 (CRT) (5th Cir. 1995); *see E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1354, 27 BRBS 41, 57 (CRT)(9th Cir. 1993); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 1536, 25 BRBS 161, 165-66 (CRT) (D.C. Cir. 1992).

Section 28 provides a bright line between ultimate success or failure on the merits of a claim as a basis for a fee award. The claimant must be a "prevailing party" to state a cognizable claim for a fee award.[5] Interlocutory success does not constitute a successful prosecution of the claim. As was stated by the Seventh Circuit, "[a] victory on appeal that does not establish entitlement to a claim but merely keeps the claim alive does not make the victor a prevailing party entitled to attorney's fees," *Eifler v. Peabody Coal Co.*, 13 F.3d 236, 237-38, 18 BLR 2-86, (7th Cir. 1993), because a fee-shifting statute requires at a minimum a final determination of the "substantial rights of the parties" as a prerequisite to a fee award. *See Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980).

[5]Although the phrase "prevailing party" does not appear in the statute, this concept is embodied in the analysis of what constitutes a "successful prosecution" of a longshore claim. *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 1536, 25 BRBS 161, 165-66 (CRT) (D.C. Cir. 1992); *cf. Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 7 (1983)(common standards applicable to all federal fee-shifting statutes).

It is well-established that a reversal of a favorable judgment, or compensation order for that matter, on appeal or after appeal, entails a ruling that the successful plaintiff or claimant is not a "prevailing party." *See, e.g., Palmer v. City of Chicago*, 806 F.2d 1316, 1320 (7th Cir. 1986); *accord Clark v. Township of Falls*, 890 F.2d 625, 626 (3d Cir. 1989); *Turner v. McMahon*, 830 F.2d 1003, 1009 (9th Cir. 1987); *Doe v. Busbee*, 684 F.2d 1375, 1380-83 (11th Cir. 1982). Claimant in this case is thus not a prevailing party because the administrative law judge on remand found against him and determined that the claim was barred. In view of our affirmance of the administrative law judge's Summary Decision and Order on Remand denying benefits, the awards of attorney's fees are without basis in law. Because claimant is not a prevailing party, we reverse the attorney's fee awards in this case.[6]

Accordingly, we affirm the administrative law judge's Summary Decision and Order on Remand denying benefits and dismissing the claim as barred under Section 33(g). We reverse the administrative law judge's Order for Fees and Costs and his Supplemental Order for Fees. In view of our disposition of this appeal, employer's Motion for Summary Decision and Expedited Review is moot.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[6]We reject the administrative law judge's reliance on policy considerations of equity and justice as a rationale for granting fees to an unsuccessful claimant. The statute provides the only basis for a fee award, and Section 28 does not recognize this rationale for awarding fees.