

SECTION 26

Section 26 of the Act provides that if the court having jurisdiction over the proceedings determines that the proceedings in respect of a claim have been instituted or continued without reasonable ground, the cost of the proceedings shall be assessed against the party who has so instituted or continued the proceedings.

The Board in early cases considered the possibility that attorney's fees and costs could be assessed against a party under Section 26. *Medrano v. Bethlehem Steel Corp.*, 18 BRBS 229 (1986); *Bolden v. U.S. Stevedores Corp.*, 18 BRBS 172 (1986). It is now established that only courts, and not administrative agencies, have authority to impose costs under Section 26. *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995); *Metro. Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993). Moreover, attorney's fees are not recoverable under this section as they are not considered "costs." *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988). See, e.g., *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970); see also *Pigeaud v. McLaren*, 699 F.2d 401 (7th Cir. 1983); *Monk v. Roadway Express, Inc.*, 599 F.2d 1378 (5th Cir. 1979).

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The Board held that Section 26 requires the presiding tribunal to determine whether, from a pre-hearing perspective, the party alleged to have instituted proceedings without reasonable grounds had a reasonable likelihood of prevailing. The case was remanded for the administrative law judge to consider whether imposition of Section 26 costs on claimant was appropriate as the issue was raised below. *Bolden v. U.S. Stevedores Corp.*, 18 BRBS 172 (1986).

The Board remanded the case to the administrative law judge to determine whether attorney fees can be assessed against the Special Fund as costs under Section 26 where the Director's non-participation caused unnecessary litigation. The Board stated that this result should be limited to cases where no issues were ever contested between claimant and employer, all payments were voluntarily made, and all of the administrative law judge's findings are supported by the uncontradicted evidence of record. *Medrano v. Bethlehem Steel Corp.*, 18 BRBS 229 (1986).

On appeal after remand, the Board reversed the administrative law judge's imposition of attorney's fees and costs against the Director because it was employer's failure to stipulate to claimant's entitlement to benefits, a prerequisite for Section 8(f) relief, which necessitated a hearing. Moreover, the Director's failure to participate at the informal conference or formal hearing is not tantamount to his instituting or continuing proceedings without reasonable ground because his participation generally is not mandated. *Medrano v. Bethlehem Steel Corp.*, 23 BRBS 223 (1990).

The Board rejected employer's contention that the Director was liable for its attorney's fees and costs under Section 26, as Director's arguments on appeal were reasonable. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987).

Attorney's fees are generally not recoverable as costs in the absence of a statutory provision or enforceable contract. Section 26 refers to costs and makes no reference to attorney's fees. Thus, the Board held that employer is not entitled to payment of its attorney's fees by claimant under Section 26. *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988).

Claimant's counsel is not a "party" for purposes of Section 26, as he is not "necessary" for a formal hearing, nor is he an entity who sought relief or against whom relief was sought. Therefore, Section 26 cannot be utilized by the administrative law judge to assess an employer's attorney's fees and costs against claimant's counsel. *Fletcher v. Slattery Associates*, 22 BRBS 70 (1989).

Employer's argument that it was entitled to Section 26 costs for proceedings before the Board was rejected inasmuch as the Board reversed the administrative law judge's finding that claimant's entitlement to compensation and medical benefits under the Act was barred under Section 33(g). *Pinell v. Patterson Serv.*, 22 BRBS 61 (1989), *aff'd on other grounds mem.*, 20 F.3d 465 (5th Cir. 1994).

When applying Section 26, an administrative law judge must determine whether, from a pre-hearing perspective, the party against whom costs would be assessed had some reasonable basis for initiating or pursuing the claim. The test is an objective one, requiring consideration of whether the evidence could justify the relief requested. In this case, the Board reversed the administrative law judge's imposition of costs against claimant, holding that claimant had a reasonable ground for pursuing a claim for disability benefits despite increased earnings because he could have had a loss in wage-earning capacity. Moreover, failure to comply with the reporting requirements of Section 8(j) cannot be the basis for imposition of Section 26 costs because Section 8(j) contains its own penalty and the criminal provisions of Section 31(a) may apply. *Freiwillig v. Triple A S.*, 23 BRBS 371 (1990).

The Board held that, as a matter of law, sanctions under Section 26 of the Act were unavailable where the legal theory advanced by the claimant (that an enforceable Section 8(i) settlement should be viewed as existing where the employee died during settlement negotiations) was not so unreasonable that costs under Section 26 could be warranted. Thus, any error on the part of the administrative law judge in failing to address Section 26 was harmless. *Fuller v. Matson Terminals*, 24 BRBS 252 (1991).

The Board rejected employer's motion that its costs be assessed against claimant pursuant to Section 26, as there was no evidence that claimant continued the claim without a good

faith, reasonable basis. Moreover, the case was not groundless in that it raised a novel issue. *Olsen v. Gen. Eng'g & Mach. Works*, 25 BRBS 169 (1991).

The Board held that attorney's fees cannot be assessed against any party as costs under Section 26 because the Act specifically provides in Section 28 under what circumstances attorney's fees can be assessed and because Section 26 makes no express provision for an award of an attorney's fee. To the extent that the Board's two *Medrano* decisions are inconsistent with this holding, they were overruled. The Board further held that, contrary to the administrative law judge's finding, the Director's conduct in opposing Section 8(f) relief in the early stages of the proceedings was not vexatious and oppressive because he had a legal and factual basis for his opposition. The case was remanded for a determination as to whether employer is liable for claimant's attorney's fees. *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991). See also *Bordelon v. Republic Bulk Stevedores*, 27 BRBS 280 (1994); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991).

The Board affirmed the imposition of employer's costs, not including attorney's fees, against claimant pursuant to Section 26 because the administrative law judge rationally concluded that, from an objective pre-hearing perspective, a doctor's report provided no basis for Section 22 modification for a change in condition, and claimant also had no basis for modification based on a mistake in fact in his post-injury wage-earning capacity. *Zepeda v. Nat'l Steel & Shipbuilding Co.*, 24 BRBS 163 (1991).

The Ninth Circuit held that neither the deputy commissioner, administrative law judge nor the Board has the authority to impose costs under Section 26; costs under Section 26 can only be assessed upon review by the court of appeals or upon enforcement of an order by the district court. Section 26 implicitly precludes a sanction for bad faith claims under Rule 11 of the Federal Rules of Civil Procedure. The court thus affirmed the Board's decision reversing an administrative law judge's award of costs, although on other grounds than those relied on by the Board. *Metro. Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993).

The Board reversed the administrative law judge's imposition of attorney's fees as costs against the Director pursuant to Section 26, as it was employer's actions that necessitated a hearing, regardless of the merits of the Director's position in denying Section 8(f) relief. The Director is held to the same standard as other parties in relation to Section 26, that is, whether, from a pre-hearing perspective there was some reasonable ground for initiating or pursuing the claim. *Rihner v. Boland Marine & Mfg. Co.*, 24 BRBS 84 (1990), *aff'd on other grounds*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995).

The Fifth Circuit followed *Brickner* and held that only courts, and not administrative agencies, have authority to impose costs under Section 26. The court also agreed that application of FRCP 11 is precluded. *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995), *aff'g on other grounds* 24 BRBS 84 (1990).

The Board held that any error committed by the administrative law judge in failing to address Section 26 was harmless, as neither the Board nor an administrative law judge has the authority to award fees and costs under Section 26. *Henry v. Coordinated Caribbean Transp.*, 32 BRBS 29 (1998), *aff'd*, 204 F.3d 609, 34 BRBS 15(CRT) (5th Cir. 2000).

The Board held that the administrative law judge acted outside his authority in finding the Director liable for an attorney's fee pursuant to Section 26. It is well-established that the Special Fund cannot be held liable for an attorney's fee under Section 28, and neither the Board nor an administrative law judge has the authority to award fees and costs pursuant to Section 26. *Terrell v. Washington Metro. Area Transit Auth.*, 34 BRBS 1 (2000).

The Board affirmed the administrative law judge's denial of employer's request for fees and costs for the proceedings against Brad Valdez as costs under Section 26 can be assessed only by a court of appeals or upon enforcement of an order by the district court. *Valdez v. Crosby & Overton*, 34 BRBS 69, *aff'd on recon.*, 34 BRBS 185 (2000).

The Board denied employer's motion for attorney's fees and costs against claimant pursuant to Section 26 since the Board does not have the authority to assess such fees and costs. *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997), *aff'd on recon. on other grounds*, 32 BRBS 56 (1998), *aff'd mem.*, 117 F.3d 484 (9th Cir. 1999), *cert. denied*, 528 U.S. 1052 (1999).