

ALBERT E. CUMMINGS, JR.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ELLER AND COMPANY)	DATE ISSUED:
)	
and)	
)	
GEORGIA INSURER'S INSOLVENCY)	
POOL)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Award of Attorney Fee of Robert J. Shea, Administrative Law Judge, United States Department of Labor.

Paul H. Felser (Portman & Felser), Savannah, Georgia, for claimant.

Richard C. E. Jennings (Brennan, Harris & Rominger), Savannah, Georgia, for employer/carrier.

LuAnn Kressley (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, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Supplemental Decision and Order Award of Attorney Fee (81-LHC-2340) of Administrative Law Judge Robert J. Shea rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 30 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion or contrary to law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, on April 2, 1980, sustained a work-related back injury for which he was awarded temporary partial disability compensation. Claimant thereafter sought modification of this award pursuant to Section 22 of the Act, 33 U.S.C. §922, arguing that his disability was permanent and total. In a Decision and Order on Motion for Section 22 Modification, Administrative Law Judge Aaron Silverman modified claimant's award to reflect claimant's entitlement to benefits for permanent partial disability, 33 U.S.C. §908(c)(21), and awarded employer Section 8(f) relief. 33 U.S.C. §908(f). Claimant appealed the administrative law judge's finding of permanent partial disability to the Board, which affirmed the administrative law judge's finding that claimant is not entitled to benefits for permanent total disability. *Cummings v. Eller and Company*, BRB No. 84-2806 (Feb. 29, 1988) (unpublished). Claimant again sought modification of his award pursuant to Section 22. In a Decision and Order - Granting Claimant's Application for Modification, Administrative Law Judge Robert J. Shea modified claimant's permanent partial disability award to permanent total disability. 33 U.S.C. §908(a).

Claimant's counsel subsequently filed a fee petition requesting \$4,875, representing 39 hours of attorney time billed at \$125 per hour. In his Supplemental Decision and Order Award of Attorney Fee, Administrative Law Judge Shea found that a formal hearing of claimant's modification petition for total disability benefits would not have been required but for inaction by the Director, who is the representative for the Special Fund. Specifically, the administrative law judge stated that the Director received notice of the request for modification, but neither appeared at the formal hearing to contest modification nor stipulated that claimant is totally disabled. The administrative law judge therefore concluded that all attorney fees generated in this case on behalf of claimant were due to the inaction of the Special Fund. Accordingly, pursuant to Section 26 of the Act, 33 U.S.C. §926, the administrative law judge ordered the Special Fund to pay claimant's counsel \$4,875 for services rendered to claimant by his attorney.

On appeal, the Director, citing *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991), contends that the administrative law judge erred in assessing claimant's attorney's fees against the Special Fund pursuant to Section 26 of the Act. Claimant and employer respond, urging affirmance.

We agree with the Director that the administrative law judge erred in awarding claimant's counsel an attorney's fee, payable by the Special Fund, pursuant to Section 26 of the Act, 33 U.S.C.

§926.¹ The Board has held that attorney fees may not be considered costs within the meaning of Section 26, and thus cannot be assessed against any party pursuant to that section. *See Bordelon v. Republic Bulk Stevedores*, 27 BRBS 280 (1994); *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991). Moreover, subsequent to the issuance of the administrative law judge's supplemental decision, the United States Courts of Appeals for the Fifth and Ninth Circuits have addressed the question of the compensability of costs under Section 26, and concluded that neither the district director, the administrative law judge nor the Board has authority to award costs under Section 26; rather, 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. *See Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995), *aff'g on other grounds* 24 BRBS 84 (1990); *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132 (CRT)(9th Cir. 1993). Accordingly, for the reasons stated in *Bordelon*, *Toscano*, *Rihner*, and *Brickner*, we reverse the administrative law judge's determination that the Special Fund is liable for claimant's attorney fee under Section 26.

Finally, we remand this case for the administrative law judge to determine if employer is liable for claimant's attorney's fee or whether claimant will have to bear that burden. *See* 33 U.S.C. §928. Although the administrative law judge found that the Director's inaction necessitated a formal hearing, we note that the record indicates employer did not stipulate to the payment of a past medical bill or to arrangement for future medical treatment until shortly before the formal hearing. *See* Tr. at 5-7. This unresolved issue of medical expenses may result in employer's being liable for the attorney's fee. *See Frawley v. Savannah Shipyard Co.*, 22 BRBS 328, 331 (1989). If employer is not liable, the administrative law judge must consider whether the fee should be assessed against claimant. 33 U.S.C. §928(c).

¹Section 26 of the Act provides:

If the court having jurisdiction of proceedings in respect of any claim or compensation order determines that the proceedings in respect of such claim or order have been instituted or continued without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings.

Accordingly, the Supplemental Decision and Order Award of Attorney Fee is reversed, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge