BRB No. 02-0736

STEPHEN S. MERTIG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
D & M FIBERGLASS SERVICE	)	DATE ISSUED: May 29, 2003
INCORPORATED	)	
	)	
and	)	
	)	
COMMERCIAL UNION INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Motion for Reconsideration of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

Charles F. Midkiff (Midkiff, Muncie & Ross, P.C.), Richmond, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Order Denying Motion for Reconsideration (2002-LHC-0312) of Administrative Law Judge Daniel A. Sarno, Jr., 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 which are rational, supported by substantial evidence and in accordance with law. 33 U.S.C. '921(b)(3); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a work-related injury in 1996 for which he filed claims under both the Act and the Virginia workers= compensation statute. Each claim was settled for a lump sum of $17,500 plus an attorney=s fee of $4,000. The settlement under Section 8(i) of the Act, 33 U.S.C. '908(i), was approved by the district director on August 23, 2001. Employer issued two checks to claimant, the first dated September 6, 2001, and the second dated September 26, 2001. The second check was accompanied by an additional check for $3,450, which is a sum representing 20 percent of $17,500. Alleging that it was not clear which check represented compensation for which claim and that neither check was issued timely, claimant sought a penalty pursuant to Section 14(f) of the Act, 33 U.S.C. '914(f), on the amount due under the longshore settlement. After the case was referred to the administrative law judge and discovery was completed, claimant withdrew this claim. Employer, however, sought to have its attorney=s fees and costs paid by claimant on the ground that claimant=s seeking a Section 14(f) penalty was frivolous on the facts of this case.

The administrative law judge found that it is clear that claimant=s experienced attorney should have perceived that the first two checks were timely under the state act and untimely under the Longshore Act, and that the third check for 20 percent of the lump sum represented employer=s voluntary payment of the Section 14(f) penalty due on the untimely paid longshore compensation. Thus, the administrative law judge found that claimant=s claim for the Section 14(f) penalty was frivolously pursued. The administrative law judge found that, pursuant to *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995), attorney=s fees cannot be assessed as costs pursuant to Section 26 of the Act, 33 U.S.C. '926. Thus, he denied employer=s request that claimant be held liable for its attorney=s fee. The administrative law judge, however, held claimant liable for employer=s costs of $86.81 pursuant to Section 26. Claimant filed a motion for reconsideration, which the administrative law judge denied.

Claimant appeals the administrative law judge=s finding that he is liable for

employer=s costs pursuant to Section 26. Employer responds, urging affirmance.[1]

We reverse the administrative law judge=s finding that claimant is liable for employer=s costs pursuant to Section 26 of the Act. Section 26 states:

> 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.

[1]Employer=s brief is entitled AEmployer and Carrier=s Brief in Opposition to Claimant=s Petition for Review and Cross Appeal.@ The Board does not have a record of an appeal or cross-appeal filed by employer. 33 U.S.C. '921; 20 C.F.R. '802.205(a), (b). Nevertheless, employer=s contention that the administrative law judge erred in finding that claimant is not liable for employer=s attorney=s fees is without merit for the reasons stated in *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995), and *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991).

33 U.S.C. '926 (emphasis added). The United States Courts of Appeals for the Ninth and Fifth Circuits have held that since the plain language of Section 26, as supported by its legislative history, references only a *court=s* ability to assess costs, the district directors, administrative law judges, and Board do not have this authority. *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993) (further holding that costs cannot be assessed pursuant to the Federal Rules of Civil Procedure); *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995) (same). The Board has subsequently applied these cases where Section 26 has been raised or applied in an administrative proceedings. *See Valdez v. Crosby & Overton*, 34 BRBS 69, *aff=d on recon.*, 34 BRBS 185 (2000); *Terrell v. Washington Metropolitan Area Transit Authority*, 34 BRBS 1 (2000); *Henry v. Coordinated Caribbean Transport*, 32 BRBS 29 (1998), *aff=d*, 204 F.3d 609, 34 BRBS 15(CRT) (5th Cir. 2000); *Porter v. Kwajalein Services, Inc.,* 31 BRBS 112 (1997), *aff=d on recon.*, 32 BRBS 56 (1998), *aff=d sub. nom. Porter v. Director, OWCP*, 176 F.3d 484 (9th Cir. 1999) (table), *cert. denied,* 528 U.S. 1052 (1999). Thus, as the administrative law judge does not have the authority to assess costs against any party pursuant to Section 26, we reverse the administrative law judge=s award of employer=s costs against claimant.[2]

[2]Thus, we need not address claimant=s alternative contention that the administrative law judge erred in finding that claimant instituted the claim for the Section 14(f) penalty Awithout reasonable ground.@

Accordingly, the administrative law judge=s Decision and Order and Order Denying Motion for Reconsideration are reversed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge