

TOPIC 26 COSTS

26.1 GENERALLY

Section 26 of the LHWCA 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.

33 U.S.C. § 926.

In Metropolitan Stevedore Co. v. Brickner, 11 F.3d 887, 27 BRBS 132 (CRT) (9th Cir. 1993), the **Ninth Circuit** held that neither the deputy commissioner [district director] administrative law judge nor the Board has the authority to impose costs under Section 26 since the plain language of the section refers to "the court having jurisdiction."

The **Ninth Circuit** did agree with the Board that Section 26, which allows a sanction for unreasonable claims against either party, impliedly precludes a sanction for bad faith claims, and therefore Federal Rule of Civil Procedure 11 should not be incorporated into the administrative proceedings under the LHWCA. This interpretation was deduced from a reading of Federal Rule of Civil Procedure 81(a)(6), together with 29 C.F.R. §§ 18.1(a) and 18.29(b).

A Section 26 issue should be raised before the judge to perfect the issue for appeal before the Board. Pinell v. Patterson Serv., 22 BRBS 61, 66 (1989).

When applying Section 26, the judge must determine whether, from a pre-hearing perspective, the claimant had some reasonable basis for initiating or pursuing his claim. The test is an objective one, requiring consideration of whether the evidence could justify the relief requested. See Bolden v. U.S. Stevedores Corp., 18 BRBS 172 (1986) (the issue once raised must be decided by the judge).

26.2 COSTS OF HEARING CHARGED TO CLAIMANT

In Ceres Gulf v. Cooper, 756 F. Supp. 303, 24 BRBS 56 (CRT) (S.D. Tex. 1990), rev'd, 957 F.2d 1199 (5th Cir. 1992), costs were awarded by the district court as the Board's order (finding no work-related injury) had become final and as there was no legitimate basis for the defendant (claimant) to refuse to refund the payments to the employer. Section 26 costs were awarded because the litigation by the plaintiff (employer) to recover the benefits paid should not have been necessary and, once brought, its continuation was without reason. Accord Travelers Ins. Co. v. Thompson, 20 BRBS 77 (CRT) (W.D. Wash. 1987).

In Zepeda v. National Steel & Shipbuilding Co., 24 BRBS 163, 168 (1991), the Board, in a Section 22 modification proceeding, awarded costs to the employer because the opinion of the claimant's physician provided no support for the claimant's position that there had been a change in his physical condition and because the claimant presented no basis for establishing that the amount of his lost wage-earning capacity should be related back to the time of injury.

26.3 COSTS DENIED

In Olsen v. General Engineering & Machine Works, 25 BRBS 169, 173 (1991), the Board denied the employer's Section 26 motion as there was no evidence indicating that the claimant continued this claim without a good faith, reasonable basis and as "this appeal was not completely groundless in light of the novel issue raised in this case."

In Boland Marine & Mfg. Co. v. Rihner, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995), the **Fifth Circuit** reversed an award of attorney fees against the Special Fund as attorney fees may not be considered costs within the meaning of Section 26. See also Toscano v. Sun Ship, Inc., 24 BRBS 207, 211-15 (1991); Steed v. Container Stevedoring Co., 25 BRBS 210 (1991); Medrano v. Bethlehem Steel Corp. (Medrano I), 18 BRBS 229 (1986) (Board held that fees could potentially be assessed against the Trust Fund); and Medrano v. Bethlehem Steel Corp. (Medrano II), 23 BRBS 223 (1990) (Board subsequently stated, at 23 BRBS 226, that "based on the facts of this case, the administrative law judge erred in assessing attorney's fees against the Special Fund pursuant to Section 26 ... Section 28 of the Act, the only other provision of the Act under which fees for attorneys can be granted, allows for the award of fees only to a claimant's representative.").

Moreover, in Toscano, 24 BRBS 207, even assuming, *arguendo*, that attorney's fees were assessable as costs or that there were other costs for which reimbursement was sought, the award of such costs against the Fund would still be reversed because the Director did not continue the proceedings without reasonable grounds and in opposition to established Board law. See also Medrano I, 18 BRBS 229.

Similarly, in Medrano II, 23 BRBS 223, the Board reversed assessment of an attorney's fee against the Special Fund as the record reflected (1) that the employer had declined to stipulate to the claimant's entitlement to benefits, a prerequisite to its own entitlement to Section 8(f) relief, and had requested the formal hearing at the Office of Administrative Law Judges, and (2) that there was no showing that the Director otherwise instituted or continued the proceedings in the case without reasonable ground.

In Freiwillig v. Triple A South, 23 BRBS 371, 373-74 (1990), the Board reversed an assessment of costs against the claimant "as claimant did not institute or continue the claim without reasonable grounds" although the Board noted that the claimant's post-injury self-employment, properly reported, would establish that the claimant earned higher wages post-injury than pre-injury.

Costs cannot be assessed against a claimant's attorney as he was not a "party," within Section 26, as he was not a necessary party to the hearing and as he sought no relief in the case and as no relief was sought against him. Fletcher v. Slatery Assocs., 22 BRBS 70, 72 (1989).

In Stone v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 1, 3 (1987), the employer's Section 26 motion was denied because the Board's "review of the record indicates that the Director's contentions are reasonable" as Section 26 allows recovery of a party's costs where it

is determined that its opponent or the Director has instituted or continued, without reasonable ground, proceedings in respect to a compensation claim or order.