

BRB Nos. 91-1597
and 91-1597A

WELDON BORDELON)	
)	
Claimant)	
)	
v.)	
)	
REPUBLIC BULK STEVEDORES)	DATE ISSUED:
)	
and)	
)	
LOUISIANA INSURANCE)	
GUARANTY ASSOCIATION)	
)	
Employer/Carrier-)	
Respondents)	
Cross-Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	
Cross-Respondent)	DECISION and ORDER

Appeal of the Supplemental Decision and Order - Awarding Costs of C. Richard Avery,
Administrative Law Judge, United States Department of Labor.

B. Ralph Bailey (Bailey, Rossi & Kincade), Metairie, Louisiana, for employer/carrier.

Karen B. Krakov (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate
Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director,
Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, BROWN and
McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director) appeals, and employer cross-appeals the Supplemental Decision and Order - Awarding Costs (90-LHC-877) of Administrative Law Judge C. Richard Avery 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant suffered an injury to his back on August 3, 1983 during the course of his employment with employer when he fell while climbing out of the hold of a ship. On May 2, 1984, claimant underwent a partial laminectomy and discectomy at the L4-5 interspace. Employer voluntarily paid claimant temporary total disability benefits from August 4, 1983 to March 31, 1987, and, thereafter, commenced paying permanent partial disability benefits in the amount of \$284.80 per week. 33 U.S.C. §908(b), (c)(21).

On September 16, 1988, employer submitted an application to the district director for relief under Section 8(f) of the Act, 33 U.S.C. §908(f), based on claimant's prior lumbar disc surgery in 1968.¹ The district director denied Section 8(f) relief on October 24, 1988, noting that employer's application did not indicate the extent of claimant's disability due to his 1968 back surgery. Emp. Ex. 16. This deficiency was not cured, although employer renewed its request, and Section 8(f) relief was again denied on May 3, 1989. Emp. Ex. 19. Thereafter, on January 11, 1990, the case was referred to the Office of Administrative Law Judges.

On May 23, 1990, the administrative law judge issued an order compelling employer to answer the Director's interrogatories, and the Director to submit a pre-hearing statement. Employer's response to the Director's discovery request on May 30, 1990 included a January 8, 1990 letter from Dr. Corales regarding the extent of claimant's pre-existing permanent disability.² Employer also requested answers to interrogatories and production of documents from the Director; the Director did not respond to this request. On June 29, 1990, the administrative law judge issued an order to compel the Director to respond to employer's discovery requests.

On July 10, 1990, the Director forwarded a letter to the administrative law judge

¹Claimant, in 1968, underwent a lumbar laminectomy for a herniated disc on the left side. Thereafter, claimant returned to work a few months after the surgery. Subsequent to this surgery, and prior to his 1983 back injury, claimant experienced two lumbar strains for which he missed a few weeks of work. Emp. Ex. 11, October 10, 1983 Dr. Applebaum report.

²Dr. Corales stated that even though claimant may have been intermittently asymptomatic following the 1968 surgery, he was at greater risk for acquiring a subsequent back injury than someone who had never had back problems.

withdrawing his opposition to Special Fund relief, "assuming you find that [employer] has carried its burden of proof of entitlement." ALJ Ex. 1. The letter further stated that the Director would no longer be involved in any further discovery and would not be attending the formal hearing.

In his Decision and Order, the administrative law judge awarded employer Section 8(f) relief. Thereafter, in a Supplemental Decision and Order, the administrative law judge found that the Director's July 10, 1990, letter did not stipulate to Section 8(f) relief or narrow the issues, thus allowing the proceedings to continue without reasonable grounds and causing employer to incur unnecessary costs in an effort to prove facts stipulated by claimant. Relying on *Medrano v. Bethlehem Steel Corp.*, 23 BRBS 223 (1990), the administrative law judge ordered the Director, pursuant to Section 26 of the Act, 33 U.S.C. §926, to pay employer's counsel's fees and expenses, specifically \$4,031.25 in attorney's fees and \$112.50 in expenses, incurred between June 18, 1990 and September 7, 1990.

On appeal, the Director, citing to *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991), contends that the administrative law judge erred in assessing employer's attorney's fees against the Special Fund pursuant to Section 26 since attorney's fees may not be considered costs under Section 26, and thus, cannot be assessed against any party under that section. In a protective cross-appeal, employer, after urging the Board to affirm the administrative law judge's award of fees and expenses under Section 26, contends that, notwithstanding the Board's interpretation of Section 26, it is entitled to recover attorney's fees and costs pursuant to 29 C.F.R. §18.29(a)(8), (9), as well as under Rules 37 and 11 of the Federal Rules of Civil Procedure, and the Equal Access to Justice Act, 5 U.S.C. §504(a)(1), since the Director caused the proceedings to continue without reasonable grounds.

Initially, we agree with the Director that the administrative law judge erred in awarding employer's counsel an attorney's fee, payable by the Special Fund, pursuant to Section 26 of the Act, 33 U.S.C. §926.³ After the administrative law judge issued his supplemental decision, the Board addressed the question of the compensability of attorney's fees under Section 26 in *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991). In *Toscano*, the Board reversed its prior decision in *Medrano*, 23 BRBS at 223, and held that attorney's fees may not be considered costs within the meaning of Section 26, and thus cannot be assessed against any party pursuant to that section. *Toscano*, 24 BRBS at 212-214. Accordingly, for the reasons stated in *Toscano*, we reverse the administrative law

³Section 26 of the Act provides as follows:

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.

judge's award of an attorney's fee to employer's counsel under Section 26.⁴

In its protective cross-appeal, employer contends that, notwithstanding the Board's interpretation of Section 26, it is entitled to an award of attorney's fees payable by the Special Fund under Section 18.29(a)(8) and (9) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. §18.29(a)(8), (9), Rules 37 and 11 of the Federal Rules of Civil Procedure, and the Equal Access to Justice Act. Specifically, employer argues that, due to the Director's refusal to comply with the administrative law judge's order to compel discovery or the administrative law judge's order that the parties enter into stipulations and exchange exhibits, the Director continued the proceedings in this case without reasonable grounds.

Sections 18.29(a)(8) and (9) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges provide that:

- (a) *General powers.* In any proceeding under this part, the administrative law judge shall have all powers necessary to the conduct of fair and impartial hearings, including, but not limited to, the following: . . .
- (8) where applicable, take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts, . . .; and
- (9) do all other things necessary to enable him or her to discharge the duties of the office.

29 C.F.R. §18.29(a)(8), (9). Since administrative law judges are thus empowered to apply Federal Rules of Civil Procedure, employer contends that Rules 37 and 11 are applicable to the instant claim. Specifically, employer contends that Rule 37(b)(2)(E), (c) and (d), which states, in pertinent part, that where a party fails to comply with a court order compelling discovery, fails to admit to the genuineness of a document, or fails to serve answers or objections to interrogatories, "the court shall require the party failing to act ... to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust," *see* FED. R. CIV. P. 37(b)(2)(E), (c), (d), and Rule 11, which provides that a court may award reasonable expenses, including attorney's fees, where a party's pleading is not well grounded in fact or warranted by existing law, *see* FED. R. CIV. P. 11, supports the administrative law judge's award of a fee payable by the Special Fund. Lastly, employer cites to the Equal Access to Justice Act, which provides, in pertinent part, that:

An agency that conducts an adversary adjudication shall award, to a

⁴We note that the Director does not contend that the administrative law judge erred in awarding employer costs, payable by the Special Fund, under Section 26; accordingly, the award of costs is affirmed.

prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. §504(a)(1).

Under the "American Rule" regarding fee awards for legal representation, absent express statutory language or an enforceable contract, litigants pay their own attorneys' fees and such fees are not recoverable as costs. *Alyeska Pipe Line Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). As the Supreme Court noted in *Alyeska*, Section 28 of the Act is an example of one instance where Congress has made a "specific and explicit" provision for the allowance of attorneys' fees payable by another party to the case. *Id.*, at 260 n.33.

Section 28 of the Act, however, while providing for awards of attorneys' fees, does not contain a provision for a fee award payable by the Special Fund. *See* 33 U.S.C. §928. Rather, subsections (a) and (b) of Section 28 create exceptions to the aforementioned "American Rule," providing specific circumstances where an employer may be held liable for claimant's attorney's fees, while subsection (c) of Section 28 sets forth the requirements whereby a claimant may be liable for his attorney's fee. *See Toscano*, 24 BRBS at 207; *Ryan v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 208 (1987); 33 U.S.C. §928(a), (b), (c). Moreover, Section 44(i) of the Act, 33 U.S.C. §944(i), which provides the circumstances under which payments can be made from the Special Fund, makes no reference to the payment of an attorney's fee by that fund.⁵ Thus, while the Act provides specific circumstances whereby an employer may be held liable for claimant's attorney's fees, the Act sets forth no provision whereby the Special Fund can be liable for an attorney's fee. Indeed, the United States Court of Appeals for the Fifth Circuit, wherein appellate jurisdiction of this case lies, has adopted the reasoning of the United States Court of Appeals for the Ninth Circuit in *Director, OWCP v. Robertson*, 625 F.2d 873, 12 BRBS 550 (9th Cir. 1980), and has held that the Special Fund cannot be held liable for attorney's fees under Section 28 since there is no specific and explicit provision for the assessment of attorneys' fees against the Special Fund under the Act. *Holliday v. Todd Pacific Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), *overruled on other grounds by Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*).

⁵Section 44(i) states that the proceeds of the Special Fund shall be available for payments of adjustments under Section 10, 33 U.S.C. §910, for payments under Section 8(f), 33 U.S.C. §908(f), for payments for rehabilitation under Sections 8(g) and 39(c), 33 U.S.C. §§908(g), 939(c), for payments for insolvent employers under Section 18(b), 33 U.S.C. §918(b), and for the expense of physical examinations under Section 7(e), 33 U.S.C. §907(e). 33 U.S.C. §944(i)(1)-(4).

It is well established that the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18, apply only to the extent they are not inconsistent with the Act or its implementing regulations, 20 C.F.R. Part 702. *See French v. California Stevedore & Ballast*, 27 BRBS 1, 7 n.6 (1993); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340, 342-343 n.2; 29 C.F.R. §18.1(a). Thus, since the Act contains specific provisions for awarding attorneys' fees which do not include a provision for holding the Special Fund liable for such fees, we conclude that to hold the Special Fund liable for employer's attorney's fee in the instant case pursuant to the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, and by reference the Federal Rules of Civil Procedure, as well as the Equal Access to Justice Act, would be inconsistent with the Act. In summation, although the Act specifically addresses the issue of attorneys' fee awards, no mechanism exists under the Act for the assessment of such a fee against the Special Fund; we therefore reject employer's arguments and hold that employer is not entitled to an attorney's fee award payable by the Special Fund.

Accordingly, the Supplemental Decision and Order - Awarding Costs of the administrative law judge is reversed with regard to the determination that the Special Fund is liable for employer's counsel's fee. In all other respects, the Supplemental Decision and Order - Awarding Costs is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge