BRB Nos. 97-1063
and 97-1063A

ESTATE OF JOHNNIE HENRY	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
Cross-Respondent	)	
	)	
v.	)	
	)	
COORDINATED CARIBBEAN TRANSPORT	)	
	)	
and	)	
	)	
AMERICAN MOTORISTS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Granting Employer/Carrier's Motion for Summary Decision of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

J. Wayne Mumphrey, Chalmette, Louisiana, for claimant.

David L. Barnett (Barnett & Alpaugh), New Orleans, Louisiana, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Granting Employer/Carrier's Motion for Summary Decision (96-LHC-2594) of Administrative Law Judge Robert D. Kaplan 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).

On October 11, 1984, claimant sustained a severe crush injury to his left hand during the course of his employment with employer which lacerated several fingers and resulted in a fingertip amputation of the left ring finger. Employer voluntarily paid temporary total disability compensation to claimant for various periods from October 12, 1984, until May 19, 1986. 33 U.S.C. §908(b). Thereafter, employer voluntarily paid claimant permanent partial disability compensation under the schedule based on an eight percent permanent impairment rating. 33 U.S.C. §908(c)(3), (19). Employer terminated its voluntary payments of compensation on September 21, 1987. Claimant subsequently filed a claim for continuing permanent total disability compensation and medical benefits under the Act. 33 U.S.C. §§908(a), 907.

Having found that claimant could not return to his former employment as a longshoreman and that employer failed to establish the availability of suitable alternate employment, Administrative Law Judge James W. Kerr, Jr., in his Decision and Order - Granting Benefits, awarded claimant permanent total disability compensation commencing on September 22, 1986. On appeal, the Board affirmed the award of permanent total disability compensation. *Henry v. Coordinated Caribbean*, BRB No. 89-3479 (June 10, 1992)(unpublished). Employer subsequently filed an appeal of the Board's decision with the United States Court of Appeals for the Fifth Circuit.

While this appeal was pending before the Fifth Circuit, the parties entered into settlement negotiations. In a facsimile dated November 22, 1993, employer's counsel sent claimant's counsel an offer to settle the case for a lump sum of $180,000, plus an additional $20,000 for claimant's attorney's fee. In a reply facsimile that day, claimant's counsel sent a letter to employer's counsel which confirmed that claimant had accepted employer's offer of settlement. Employer's counsel sent another facsimile that day, confirming that a settlement agreement had been reached; employer's counsel thereafter sent a letter to claimant's counsel on November 29, 1993, which further served to confirm the agreement. Subsequently, the parties filed a joint motion with the Fifth Circuit, representing that a settlement of the matter had been reached, and requesting that the case be remanded to the district director for approval of the settlement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i)(1994). However, in a letter dated December 21, 1993, claimant's counsel informed employer's counsel that claimant had died. Claimant's death, which was unrelated to his work accident of October 11, 1984, had occurred on November 23, 1993, the day after the parties had agreed to the terms of a settlement. By letter dated December 28, 1993, employer advised the district director of claimant's death, and, to the extent it might be deemed necessary, that it was withdrawing from the settlement it had reached with claimant's representative. In an Order dated January 7, 1994, the Fifth Circuit granted the parties' joint motion to remand.[1] *Coordinated Caribbean v. Director, Office of Workers' Compensation Programs [John Henry]*, No. 92-4690 (5th Cir. Jan. 7, 1994)(unpublished).

[1]Pursuant to the Fifth Circuit's decision, the Board, in an Order dated March 4, 1994, remanded the case to the district director.

It is undisputed that at the time of claimant's death the parties had not entered into a formal written settlement agreement; consequently, a settlement agreement had not been either signed by the parties, or submitted for approval pursuant to Section 8(i), 33 U.S.C. §908(i) (1994). Nevertheless, claimant's estate sought a ruling that there was an enforceable settlement agreement pursuant to Section 8(i). In his Decision and Order, Administrative Law Judge Robert D. Kaplan (the administrative law judge) distinguished the Fifth Circuit's holding in *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT)(5th Cir. 1988) and, relying upon *Fuller v. Matson Terminals*, 24 BRBS 252 (1991), concluded that there was no valid settlement agreement inasmuch as an application for approval of the settlement pursuant to Section 8(i) had neither been submitted to the district director nor prepared by the parties. The administrative law judge thus granted employer's motion for summary decision and dismissed claimant's claim.

On appeal, claimant challenges the administrative law judge's finding that there was no enforceable settlement agreement. Employer responds, urging affirmance of the administrative law judge's finding that an enforceable settlement agreement did not exist. On cross-appeal, employer assigns error to the administrative law judge's failure to address the issue of sanctions against claimant sought by employer pursuant to Section 26 of the Act, 33 U.S.C. §926. Claimant responds, contending that there is no legal basis for an award of an attorney's fee and costs payable to employer pursuant to Section 26. For the reasons that follow, we affirm the administrative law judge's finding that a valid settlement agreement pursuant to Section 8(i) did not exist.

Section 8(i) of the Act, as amended in 1984, 33 U.S.C. §908(i)(1994),[2] provides for the settlement of claims for compensation by a procedure in which an application for settlement is submitted for the approval of the district director or administrative law judge. Claimants are not permitted to waive their right to compensation except through settlements approved under Section 8(i). *See* 33 U.S.C. §§915, 916; *see generally Henson*

[2]Section 8(i)(1), as amended in 1984, states:

> Whenever the parties to any claim for compensation under this chapter, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

33 U.S.C. §908(i)(1)(1994).

v. Arcwel Corp., 27 BRBS 212 (1993). The procedures governing settlement agreements are delineated in the implementing regulations at 20 C.F.R. §§702.241-702.243. The regulations require, *inter alia*, that the settlement application be signed by all parties, 20 C.F.R. §702.242(a), and that a complete application be submitted to the district director or administrative law judge, 20 C.F.R. §702.243(a).

Claimant's reliance on the decision in *Nordahl* is misplaced. That case involved a settlement application which was signed by all parties and submitted to the Department of Labor, but which had not yet been approved at the time of the employee's death. The court affirmed the Board's ruling that administrative authority to approve the settlement was not precluded by the employee's death. Unlike the situation in *Nordahl*, however, it is undisputed in the instant case that a formal settlement document was never prepared, that no settlement application was signed by the parties, and that no settlement application was submitted for approval in accordance with Section 8(i) and the implementing regulations prior to the employee's death, a meeting of the minds with respect to the settlement amount notwithstanding.[3] *Compare Fuller,* 24 BRBS at 256 (Board affirmed finding no settlement prior to death where application was prepared but unsigned at time of death and administrative law judge found no meeting of the minds regarding the terms of the settlement). Accordingly, we affirm the administrative law judge's finding that there was no valid settlement agreement pursuant to Section 8(i).

Employer, on cross-appeal, contends that the administrative law judge erred in failing to address the issue of whether employer's attorney's fee and costs should be assessed against claimant pursuant to Section 26 of the Act, 33 U.S.C. §926. Any error by the administrative law judge in failing to address the issue of Section 26, however, is harmless as neither the Board nor an administrative law judge has the authority to award such fees and costs. *See Boland v. Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995); *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132 (CRT)(9th Cir. 1993); *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997). Employer's request for an attorney's fee and costs pursuant to Section 26 is therefore denied.

[3]As a formal settlement agreement was never reduced to writing and executed, claimant's argument that employer could have protected itself by inserting language into the settlement agreement allowing it to withdraw if claimant died prior to administrative approval is without merit.

Accordingly, the Decision and Order Granting Employer/Carrier's Motion for Summary Decision is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge