



BRB No. 16-0142

HECTOR DURAZO)	
)	
Claimant)	
)	
v.)	
)	
LONG BEACH CONTAINER TERMINAL,)	
INCORPORATED)	
)	
and)	DATE ISSUED: <u>Aug. 25, 2016</u>
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Petitioners)	
)	
ILWU-PMA WELFARE PLAN)	
)	
Intervenor-Respondent)	DECISION and ORDER

Appeal of the Order Awarding Attorneys' Fees to the Welfare Plan of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

James P. Aleccia and Marcy K. Mitani (Aleccia & Mitani), Long Beach California, for employer/carrier.

Shawn C. Groff and Estelle Pae Huerta (Leonard Carder, LLP), Oakland, California, for intervenor.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Awarding Attorneys' Fees to the Welfare Plan (2010-LHC-01587, 2010-LHC-01588) of Administrative Law Judge Steven B. Berlin 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). The administrative law judge's attorney's fee award may be set aside only if shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant suffered a work-related left foot and ankle injury on August 5, 2009, while working for employer. Claimant also suffered a work-related hearing loss, which was diagnosed by an audiogram dated November 17, 2009. Claimant filed claims under the Act for both injuries, and employer controverted the compensability of the claims. In the interim, the ILWU-PMA Welfare Plan (the Plan) covered the cost of medical services rendered to claimant from November 2, 2009 through October 14, 2010. The Plan intervened in the administrative proceedings, seeking reimbursement of the cost of medical benefits it paid on claimant's behalf. The administrative law judge awarded claimant benefits under the Act for both injuries and held that employer must reimburse the Plan the cost of the medical benefits it paid for claimant's care.

Subsequently, the Plan submitted an application to the administrative law judge for an employer-paid attorney's fee for the legal services necessary for its successful prosecution of its claim for reimbursement of claimant's medical benefits under Section 7, 33 U.S.C. §907.¹ Employer objected to the fee application, averring that the Plan does not have standing to recover an attorney's fee from employer for time spent pursuing reimbursement of medical expenses, and challenging some of the time expended as clerical work or as overhead. After allowing the Plan and employer to submit briefs regarding employer's liability for the Plan's attorney's fee in light of the Board's decision in *Grierson v. Marine Terminals Corp.*, 49 BRBS 27 (2015), the administrative law judge found employer liable for the Plan's attorney's fee, found merit in some of employer's objections, and awarded the Plan a fee of \$10,384.78.² In so doing, the administrative law judge rejected employer's contention that the Supreme Court's decision in *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. ___, 135 S.Ct. 2158 (2015), precludes employer's liability for an attorney's fee for the Plan's work on the merits of its claim for reimbursement of medical benefits. Employer appeals, and the Plan responds, urging affirmance of the fee award.

¹ The Plan sought a fee of \$10,555.64, representing 28.25 hours of attorney services at an hourly rate of \$250 (\$8,737.50), 4.75 hours of paralegal services at an hourly rate of \$150 (\$712.50), and \$1,105.64 in costs.

² The administrative law judge disallowed as clerical \$165 for 1.1 hours of paralegal services and as overhead \$5.86 for postage. Order at 4.

On appeal, employer asserts the administrative law judge erred in not applying *Baker Botts* because courts cannot shift liability for an attorney’s fee to an opposing party absent explicit statutory authority to do so, and the Act’s fee-shifting provision authorizes only the fees of a claimant’s attorney to be shifted to an employer. Thus, employer argues that the Board wrongly decided *Grierson*, in upholding an attorney’s fee awarded to the Plan under Section 28(a), 33 U.S.C. §928(a), for its work pursuing medical benefits on behalf of the claimant, based on *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993).³ In so arguing, employer asserts that the holding of the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, in *Hunt* is no longer binding precedent in light of that court’s subsequent decision in *Price v. Stevedoring Services of America*, 697 F.3d 820, 46 BRBS 51(CRT) (9th Cir. 2012).⁴ We affirm the administrative law judge’s fee award.

For the reasons set forth in *Clisso v. Elro Coal Co.*, 50 BRBS 13 (2016), and *Grierson*, 49 BRBS 27, we reject employer’s assertion that the Plan is not entitled to an attorney’s fee payable by employer pursuant to Section 28(a) of the Act. As the Board explained in *Grierson*, the Ninth Circuit’s decision in *Hunt* provides a statutory framework for shifting fee liability to employer on the circumstances present in this

³ In *Hunt*, a doctor and a physical therapist retained their own counsel and intervened in a claim under the Act, seeking payment for medical services provided to the claimant after the employer ceased paying benefits. The court held that the medical providers were “part[ies] in interest” seeking the reasonable value of medical treatment, see 33 U.S.C. §907(d)(3), and, therefore, were “persons seeking benefits” under the Act for purposes of an attorney’s fee under Section 28(a), 33 U.S.C. §928(a). *Hunt*, 999 F.2d at 423-424, 27 BRBS at 91(CRT).

⁴ In *Price*, the Ninth Circuit held that the litigating position of the Director, Office of Workers’ Compensation Programs (the Director), is not entitled to *Chevron* deference but only to *Skidmore* deference. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that where Congress has delegated legislative authority to an administrative agency to interpret an ambiguous statute through rules carrying the force of law, and when action is taken as an exercise of that authority, courts must defer to the agency’s reasonable interpretation); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that agency interpretations which lack the force of law are entitled to respect, but only to the extent that those interpretations have power to persuade); see also n. 5, *infra*.

case.⁵ Moreover, because Section 28(a) is a fee-shifting statute, the administrative law judge properly found *Baker Botts* inapplicable to this case. *Clisso*, 50 BRBS 13. As employer does not otherwise challenge the administrative law judge's order awarding an attorney's fee to the Plan payable by employer, we affirm it.

Accordingly, the administrative law judge's Order Awarding Attorneys' Fees to the Welfare Plan is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

⁵ In *Grierson*, the Board held that the Plan may be a "party in interest" seeking medical benefits on behalf of a claimant pursuant to Section 7(d)(3) and that Section 28(a), therefore, provides the requisite statutory basis for a fee award to an entity such as the Plan because it entitles "the person seeking benefits" to a "reasonable attorney's fee against the employer or carrier" upon the successful prosecution of his claim. *Hunt*, 999 F.2d 419, 27 BRBS 84(CRT); *Grierson*, 49 BRBS 27. Contrary to employer's assertion, *Hunt* remains good law. The Ninth Circuit's decision in *Price*, limiting the use of *Chevron* deference, does not overrule or address the issues in *Hunt*. Moreover, the court's decision in *Hunt* was not based on *Chevron* deference given to the Director's litigating position. Instead, the court addressed issues of statutory construction and determined that the Director's interpretation was "entirely compatible with the statutory scheme" and "best advance[d] the purposes of the Act." *Hunt*, 999 F.2d at 424, 27 BRBS at 91(CRT).