U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0027

ROBERT BERGARA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SUDERMAN CONTRACTING STEVEDORES	)	DATE ISSUED: Sept. 30, 2015
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Compensation Order Granting Attorney's Fees of David Widener, District Director, United States Department of Labor.

V. William Farrington, Jr. (Farrington & Thomas, L.L.C.), New Orleans, Louisiana, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for employer/carrier.

MacKenzie Fillow (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and

BUZZARD, Administrative Appeals Judges.
HALL, Chief Administrative Appeals Judge:

Employer appeals the Compensation Order Granting Attorney's Fees (Case No. 08-300336) of District Director David Widener 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 fee award of the district director must be affirmed unless it is shown to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *See Sans v. Todd Shipyard Corp.*, 19 BRBS 24 (1986); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant filed a claim for a work-related hearing loss, and the district director notified employer of the claim on February 21, 2014. On March 20, 2014, employer paid claimant for a one percent binaural impairment, which amounted to two weeks of disability benefits, based on claimant's average weekly wage of $315.11 and his corresponding compensation rate of $210.07, for a total payment of $420.14. Employer filed both a Payment Without Award form and a Notice of Final Payment form on that date. On April 3, 2014, the district director scheduled an informal conference for May 2. On April 7, 2014, claimant's counsel filed a petition for an attorney's fee; the cover letter stated that claimant is owed $8,360.79 for the remaining weeks of disability for a 20.9 percent binaural impairment.[1] On May 2, the informal conference was held. The memorandum of the conference indicates that claimant established a prima facie case for a work-related hearing loss, and there was no rebuttal of the prima facie case. 33 U.S.C. §920(a). It also indicates that the audiogram demonstrated a 20.9 percent binaural impairment, which entitles claimant to 41.8 weeks of compensation, totaling $8,780.93, but that $420.14 has been paid. The district director recommended employer pay the remaining amount of compensation and authorize the recommended hearing aids. On May 8, 2014, employer sent the district director a letter stating it was accepting the recommendation. It also noted that it had no objection to counsel's fee being taken out of claimant's benefits. Employer paid claimant the remaining benefits on May 15.

Claimant's counsel re-submitted his fee petition to the district director, stating his request that the fee be paid by employer. Employer responded, asserting that it had paid claimant some compensation within 30 days of receiving notice of the claim, and it did not reject the district director's recommendation following the informal conference. Therefore, employer asserted it is not liable for an attorney's fee under either Section 28(a) or 28(b), 33 U.S.C. §928(a), (b).

The district director issued an order awarding counsel a fee on October 10, 2014.

[1] Counsel requested a fee of $2,000. He also requested that the fee be taken out of claimant's future compensation benefits.

The district director set forth the law, 33 U.S.C. §928(a), (b); 20 C.F.R. §§702.132-702.135, and found that employer is liable for claimant's attorney's fee under Section 28(a) because the two weeks of compensation, while paid within the 30-day period following employer's receipt of the notice of the claim, was no more than a token attempt to avoid paying an attorney's fee. He found that the LS-208 Notice of Final Payment form had the correct 20.9 percent impairment rating on it, and there was no basis for employer's payment of benefits for a one percent impairment. However, the district director also found that employer is not liable for any fee generated before the district director's notice of the claim to employer, dated February 21, 2014, and he denied a fee for services before that date. Therefore, the district director held employer liable for a fee of $341.25, plus $300 in expenses.

Employer appeals the fee award, first contending it cannot be held liable for any fee under Section 28(a), as it paid some compensation within 30 days of the notice of the claim. Employer relies on the decision in *Lincoln v. Director, OWCP*, 744 F.3d 911, 48 BRBS 17(CRT) (4th Cir. 2014), *cert. denied*, 135 S.Ct. 356 (2014), to support its argument. Claimant responds to the appeal, urging affirmance and averring that employer's initial payment was merely a token to avoid fee liability and was not "compensation." The Director, Office of Workers' Compensation Programs (the Director), also responds to employer's appeal. The Director asserts that the question of whether a payment is "compensation" or merely a sham payment is a question of fact to be determined by the district director and that the district director acted within his discretion in finding the payment here was not compensation because he found no evidence to support liability for only a one percent impairment. Employer replies, asserting that the Director's position is untenable because it precludes the possibility that claimant's impairment could have been one percent if additional audiograms had been administered. Further, employer argues that the Director's position, effectively, requires that full payment be made in order to gain "safe harbor" from fee liability.

Section 28(a) of the Act provides:

> If the employer or carrier *declines to pay any compensation* on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee. . . .

33 U.S.C. §928(a) (emphasis added). A prerequisite for an employer's liability under Section 28(a) is that it refused to pay "any compensation" within 30 days of its receipt of

the notice of the claim from the district director. *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). In a case in which an employer paid benefits for a .5 percent binaural impairment within the 30-day period, equating to one week of compensation, the United States Court of Appeals for the Fourth Circuit affirmed the finding that the employer was not liable for the claimant's attorney's fee under Section 28(a). *Lincoln*, 744 F.3d 911, 48 BRBS 17(CRT). Although this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, *Lincoln* is persuasive because the Fifth Circuit has construed the statute in a manner similar to the Fourth Circuit. *Compare Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied*, 546 U.S. 960 (2005), *with Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). Thus, for the reasons that follow, we reverse the district director's award of an attorney's fee payable by employer pursuant to Section 28(a) in this case.

In *Lincoln*, the claimant filed a claim for a work-related hearing loss. The employer responded with a notice of controversion asking for more information, and the claimant forwarded his audiogram to the employer.[2] After the district director notified the employer of the claimant's claim, the employer paid, within 30 days, benefits of just over $1,250, equating to payment for a .5 percent binaural hearing loss and one week of compensation at the maximum compensation rate. The employer also requested the claimant undergo another hearing test, and that second test revealed a 10 percent binaural loss. After negotiations, the district director entered a settlement compensation order, as the parties agreed the claimant sustained a 10 percent binaural impairment, and the employer paid the claimant benefits.

The claimant's attorney sought an employer-paid fee for his services and contended he was entitled to such under Section 28(a) because the employer did not pay all the compensation that was due within the 30-day period. The Fourth Circuit rejected the view that "any compensation" under Section 28(a) means "all compensation," stating that the text encompasses partial payment as the most natural reading of the phrase and the surrounding text supports that interpretation. Therefore, the court concluded that an employer's refusal to pay compensation within the 30-day period must be absolute for it to face possible fee liability under Section 28(a). *Lincoln*, 744 F.3d at 914-915, 48 BRBS at 18-19(CRT). The Fourth Circuit reasoned that, because the extent of a claimant's

[2] There appears to have been no specific percentage of impairment claimed. A claim for hearing loss benefits, like any other claim, need not specify the degree of impairment claimed. *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003).

injury can fluctuate, there may be no certainty within the 30-day period as to the full amount of compensation due him. Consequently, if an employer:

> admits liability for the claim by paying some compensation to the claimant for a work-related injury and only contests the total amount of the benefits, it is sheltered from fee liability under §928(a).

Id., 744 F.3d at 915, 48 BRBS at 19(CRT) (citing *Andrepont*, 566 F.3d at 418-419, 43 BRBS at 29(CRT)). In determining whether "any" compensation has been paid, the court held that an amount that is tied to the alleged injury qualifies as compensation. The *Lincoln* court held that because the payment to the claimant was based on his average weekly wage, it was "directly tied" to his injury and was "compensation." Accordingly, it affirmed the denial of an employer-paid fee under Section 28(a). *Lincoln*, 744 F.3d at 916, 48 BRBS at 20(CRT).

Claimant relies on *Green v. Ceres Marine Terminals, Inc.*, 43 BRBS 173 (2010), *rev'd on other grounds*, 656 F.3d 235, 45 BRBS 45(CRT) (4th Cir. 2011), in arguing that the $420 payment here was not compensation. However, the *Lincoln* court explained how *Green* was distinguishable from the case before it. In *Green*, the employer paid the claimant $1 after receiving the notice of the hearing loss claim from the district director. The administrative law judge found, and the Board affirmed, that amount was merely an attempt to avoid fee liability as opposed to an actual payment of "any compensation." *Green*, 43 BRBS at 177. The *Lincoln* court stated that *Green* "differs dramatically" as the payment therein was "untethered to the underlying claim" and was not "compensation." *Lincoln*, 744 F.3d at 916, 48 BRBS at 19-20(CRT). In comparison to *Green*, the Fourth Circuit discussed *Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT) (continued payment of permanent partial disability benefits; disputed extent of disability), and *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007) (paid temporary total disability benefits; disputed permanent benefits), wherein the courts held that "partial" payments were "compensation" within the meaning of Section 28(a), which precluded the employers from being held liable for an attorney's fee under Section 28(a). *Lincoln*, 744 F.3d at 916, 48 BRBS at 19-20(CRT).

Although he agrees with the basic holding in *Lincoln* that payment of any/some compensation is sufficient to preclude an employer's liability for a fee under Section 28(a), Dir. Br. at 3 n.2, the Director argues that, nevertheless, the district director retains the discretion to determine from the facts of the case whether an employer's payment to a claimant constitutes the payment of "any compensation" or is merely a sham payment to avoid fee liability, and this finding is to be based on more than just whether the payment has a connection to the compensation that might later be awarded. The Director asserts that the lack of evidence demonstrating that claimant had only a one percent impairment

supports the district director's finding that employer's payment was not "compensation." The Director's argument relies on the fact that the only audiogram of record revealed a 20.9 percent impairment. To the extent the Director is suggesting that no other rate of impairment was supportable, and that employer should have paid benefits for the full 20.9 percent in order to avoid liability for a fee under Section 28(a), or that the district director could infer in this case that any payment for less than the full amount precludes the payment from being "compensation," we reject the implication.[3] As stated above, the Director agreed that payment of "any compensation" is sufficient to preclude application of Section 28(a), and this "any means all" argument has been repeatedly rejected by the Fifth Circuit. *Andrepont*, 566 F.3d at 418, 43 BRBS at 29(CRT); *Cooper*, 274 F.3d 173, 35 BRBS 109(CRT); *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 889, 13 BRBS 294, 296 (5th Cir. 1981); *see also Lincoln*, 744 F.3d at 914-915, 48 BRBS at 19(CRT); *Pittsburgh & Conneaut Dock*, 473 F.3d at 264, 40 BRBS at 80(CRT).

[3] At the time employer made the payment, it had not yet been determined whether claimant would undergo additional audiometric examinations. On its Notice of Final Payment Form, dated March 20, 2104, employer indicated its payment of benefits for a one percent impairment and wrote that it was terminating payments because "Employee/Representative have not cooperated in allowing employer to investigate fac[ts]." At the informal conference on May 2, 2014, employer requested that it be able to "take the claimant's statement before issuing payment for the balance of the PPD." Memo. of Inf. Conf. (May 2, 2014) This request was reiterated in a letter to the district director on May 8, 2014, in which employer also sought from claimant information concerning any prior claims or employment with other maritime employers. In opposing counsel's fee petition, employer's claims examiner wrote a letter to the district director on July 8, 2014, stating that employer paid only two weeks' compensation because "we had not been provided the opportunity to fully investigate [claimant's] claim in order to determine the extent of the employer/carrier's liability. After the informal conference was held on May 2, 2014 we had the opportunity to secure [claimant's statement] to complete our investigation and the PPD payments were resumed promptly. . . ." Employer's action in this case in paying benefits for a one percent impairment at the appropriate average weekly wage is not inconsistent with *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003). In this case, the Fifth Circuit rejected the employer's contention that it could not be expected to make a payment of "any compensation" within 30 days if it did not have "presumptive evidence" of the degree of the claimant's hearing loss. The court held that the employer was free to have the claimant examined within the 30-day period in order to ascertain a basis for compensation payments that would avoid the fee-shifting provision. Here, employer made a payment of compensation while it attempted to investigate the claim.

There is nothing legally distinguishable between this case and *Lincoln*. In both cases, the employers paid, within the 30-day period, a portion of the compensation to which the claimants were ultimately entitled. *See Lincoln*, 744 F.3d at 916, 48 BRBS at 19(CRT). The payments were tied to the disabilities alleged as well as to the claimants' average weekly wages and compensation rates. Once the *Lincoln* court determined the payment therein was "tethered" to the claimant's disability, it concluded the payment was "compensation." No other facts or inferences were needed. *Id.*, 744 F.3d at 916, 48 BRBS at 19-20(CRT). In comparison, where the payment was not tied to the claimant's disability, as in *Green*, it could be presumed by the fact-finder that the payment was made for the sole purpose of avoiding fee liability and was not compensation. Thus, on the facts presented here, we disagree with the Director's assertion that the district director had the discretion to find that employer made a "sham" payment in order to avoid fee liability.

Employer's payment to claimant in this case was based on claimant's disability and paid at his compensation rate; therefore, it was "tethered" to the claim and constitutes "compensation." This payment of "any compensation" within the 30-day period precludes employer's liability for an attorney's fee pursuant to Section 28(a). *Lincoln*, 744 F.3d at 916, 48 BRBS at 18-19(CRT). That an employer may avoid attorney fee liability with a relatively small payment of compensation cannot contravene the plain words of Section 28(a). *Andrepont*, 566 F.3d at 419, 43 BRBS at 29(CRT) ("[P]olicy arguments are . . . best addressed to Congress, not the courts."). Accordingly, we reverse the district director's award of an employer-paid attorney's fee under Section 28(a). *Lincoln*, 744 F.3d at 916, 48 BRBS at 18-19(CRT); *Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT); *Pittsburgh & Conneaut Dock*, 473 F.3d 253, 40 BRBS 73(CRT); *Savannah Machine*, 642 F.2d 887, 13 BRBS 294.

Although the district director did not address employer's liability under Section 28(b), employer correctly asserts it also is not liable under that section because it did not reject the district director's written recommendation. The Fifth Circuit has strictly interpreted Section 28(b), 33 U.S.C. §928(b), and held that the following are prerequisites to an employer's liability under Section 28(b): (1) an informal conference; (2) a written recommendation from the district director; (3) the employer's refusal to accept the written recommendation; and (4) the employee's achieving a greater award than what the employer was willing to pay after the written recommendation. *Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT); *see also Pittsburgh & Conneaut Dock*, 473 F.3d 253, 40 BRBS 73(CRT); *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT); *Devor v. Dep't of the Army,* 41 BRBS 77 (2007); *Davis v. Eller & Co.*, 41 BRBS 58 (2007). If any element is missing, an employer cannot be held liable for a fee under Section 28(b). *Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT) (no rejection of the written recommendation); *Pittsburgh & Conneaut Dock*, 473 F.3d 253, 40 BRBS 73(CRT) (no written recommendation

addressing same issue as before the administrative law judge); *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (no informal conference or written recommendation).

In this case, it is undisputed that the district director held an informal conference and issued a memorandum recommending that employer pay claimant benefits for a 20.9 percent binaural impairment and approve the request for hearing aids. It is also undisputed that employer wrote a letter, six days after the informal conference, to the district director stating that it accepted the written recommendation and it paid claimant benefits accordingly. Thus, employer did not reject the district director's recommendation. In light of the absence of a necessary element, employer cannot be held liable for a fee under Section 28(b) as a matter of law. *Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT).

Accordingly, the district director's Compensation Order Granting Attorney's Fees is reversed.[4]

SO ORDERED.

[4] Claimant's counsel should file a new fee petition with the district director if he wishes to hold claimant liable for an attorney's fee pursuant to Section 28(c). 33 U.S.C. §928(c); 20 C.F.R. §702.132.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____

I concur:

JUDITH S. BOGGS
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge:

I respectfully dissent from the majority's holding that the district director erred in finding employer liable for the payment of claimant's attorney's fee pursuant to Section 28(a) of the Longshore and Harbor Workers' Compensation Act (the Act). 33 U.S.C. §928(a). I agree with the Director, Office of Workers' Compensation Programs (the Director), that the district director permissibly determined that employer's payment to claimant was not "compensation," and therefore was insufficient for employer to avoid liability for an attorney's fee in this case.

Section 28(a) of the Act requires an employer to pay a claimant's attorney's fee if the employer "declines to pay any compensation" within 30 days of receiving notice of the claim from the district director, and the claimant thereafter "utilize[s] the services of an attorney at law in the successful prosecution of his claim." 33 U.S.C. §928(a). "Compensation" is defined in the Act as "the money allowance payable to an employee," such that Section 28(a) can properly be read as imposing liability for an attorney's fee on an employer that "declines to pay any [money allowance payable to an employee]" within 30 days of receiving notice of the claim. 33 U.S.C. §§902(12), 928(a).

This section has been interpreted by the Fifth Circuit, under whose jurisdiction this case arises, as prohibiting fee-shifting "if the employer admits to liability for the injury and *tenders any compensation*" within the 30-day period set forth in Section 28(a). *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 418-19, 43 BRBS 27, 29(CRT) (5th Cir. 2009) (emphasis added); *Savannah Mach. & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 889, 13 BRBS 294, 296 (5th Cir. 1981) ("Since [employer] tendered partial compensation, we agree that Section 28(a) is inapplicable to the situation at hand."); *see also Lincoln v. Director, OWCP*, 744 F.3d 911, 915, 48 BRBS 17, 19(CRT) (4th Cir.), *cert. denied,* 135 S.Ct. 356 (2014) ("[I]f [employer] *admits liability for the claim by paying some compensation* to the claimant for a work-related injury and only contests the total amount of the benefits, it is sheltered from fee liability under §928(a)."") (emphasis added).

However, even when an employer pays *some amount* of money to a claimant within 30 days of receiving notice of the claim, the Board has held that certain payments do not constitute "compensation within the meaning of Section 28(a) of the Act." *Green v. Ceres Marine Terminals, Inc.*, 43 BRBS 173, 177 (2010), *rev'd on other grounds*, 656 F.3d 235, 45 BRBS 45(CRT) (4th Cir. 2011). In *Green*, the Board "affirm[ed] the administrative law judge's finding that an employer's payment of $1 does not preclude the applicability of Section 28(a), as the administrative law judge rationally found that employer's payment of $1 was merely an attempt to avoid fee liability rather than the payment of compensation for claimant's injury." *Id*.

In the present case, claimant underwent audiometric testing on October 18, 2013, revealing a 20.9 percent binaural impairment. Compensation Order at 3 (October 10, 2014); Letter from Heights Audiology & Hearing Aids (December 6, 2013); Audiology Report from Heights Audiology & Hearing Aids (October 18, 2013). Thereafter, on January 3, 2014, claimant filed a claim for benefits based on his assessed 20.9 percent hearing loss. Compensation Order at 2. On February 21, 2014, the district director served employer with notice of the claim, and three days later, claimant's counsel provided copies of claimant's audiogram, showing a 20.9 percent binaural hearing loss, to the Department of Labor (the Department) claims examiner, and also provided copies of those documents to employer. Letter from Claimant's Counsel (February 24, 2014).

According to employer's LS-208 form, titled Notice of Final Payment or Suspension of Compensation, employer paid claimant $420.14, which represented a two-week payment of benefits based on employer's unsubstantiated assessment that claimant suffered a 1 percent hearing impairment. Form LS-208 (March 20, 2014); Compensation Order at 3. That same form also acknowledged employer's awareness that claimant actually suffered a 20.9 percent binaural hearing impairment, but that employer was ceasing to make any additional payments to claimant, because claimant had not "cooperated in allowing employer to investigate fac[sic]." *Id*.

In this case, there is a significant difference in benefit levels between claimant's medically-supported impairment of 20.9 percent, and employer's arbitrary assessment that claimant suffered a 1 percent impairment. A 20.9 percent binaural impairment would have entitled claimant to 41.8 weeks of compensation, whereas employer's unsubstantiated assertion that claimant suffered a 1 percent binaural impairment would have entitled claimant to only 2 weeks of compensation. 33 U.S.C. §908(c)(13)(B), (19); Compensation Order at 3. Notably, the impairment level of 1 percent appears to have been chosen by employer at-random, despite its knowledge that claimant's medical evidence reflected that he suffered a more severe 20.9 percent hearing impairment. *Id*.; Letter from Employer's Counsel to the Claims Examiner (July 31, 2014) ("Employer's initial payment of two weeks compensation [at the one percent permanent partial disability rate] . . . fully satisfies the requirements of [S]ection 28(a) of the Act.").

Based on these facts, the district director relied on the Board's holding in *Green* to find that "There is no basis for a 2 week payment given that the filing audiogram showed a 20.9 [percent] binaural hearing loss which would entitle claimant to 41.8 weeks of compensation. Therefore, it appears that the $420.14 payment was nothing more than a 'token' payment in an attempt to avoid paying attorney fees." Compensation Order at 3 (citing *Green*, 43 BRBS 173). The district director then concluded that "I don't find this 'token payment' to be a true good faith payment of compensation sufficient to preclude the employer's liability for payment of fees." *Id*.

On appeal, employer argues that its payment to claimant, based on a 1 percent impairment, constitutes "compensation" under Section 28(a), despite the fact that it has no connection whatsoever to the medical evidence showing that claimant suffered a 20.9 percent disability. The majority, finding no distinction between this case and *Lincoln*, agrees with employer that the district director is precluded from holding employer liable for an attorney's fee because employer's payment to claimant, regardless of the amount or its connection to claimant's disability, is sufficient to constitute "compensation." Majority Opinion at 7. In reaching its conclusion, the majority interprets the Fourth Circuit's holding in *Lincoln* as relieving an employer of liability for attorneys' fees if "the payment to the claimant was based on his average weekly wage, [and thus] was 'directly tied' to his injury and was 'compensation.'" Majority Opinion at 5 (quoting *Lincoln*, 744 F.3d at 916, 48 BRBS at 20(CRT)).

To the contrary, the determinative factor for the Fourth Circuit in *Lincoln* was not that the payment was based on claimant's *average weekly wage*, but rather that the employer "based its calculation of the . . . payment on [claimant's] *alleged disability*." *Lincoln*, 744 F.3d at 916, 48 BRBS at 20(CRT) (emphasis added). This difference is significant in that the majority's interpretation of *Lincoln* suggests that the Fourth Circuit would have been satisfied with any payment to a claimant, as long as it was based on a percentage of the claimant's wages, without any regard to the claimant's actual injury or disability. However, a more accurate interpretation of the Fourth Circuit's holding is that to be considered "compensation" under Section 28(a), an employer's payment must be based on the claimant's "alleged disability." *Id*. Providing payments to a claimant based on his alleged disability "tethers" those payments "to the underlying claim" in a way that a payment based loosely as a percentage of a claimant's wages, unconnected to the claimant's "alleged disability," would not. *Id*.

This distinction is also significant in that, under the facts of the present case, employer was presented with medical evidence showing that claimant had been diagnosed with a 20.9 percent hearing impairment. Form LS-208 (March 20, 2014); Compensation Order at 3; Letter from Heights Audiology & Hearing Aids (December 6, 2013); Audiology Report from Heights Audiology & Hearing Aids (October 18, 2013).

Rather than basing its payment of "compensation" on the medical evidence relating to claimant's alleged disability, employer chose to ignore that evidence and arbitrarily selected a much lower impairment rating of 1 percent. Thus, in the present case, employer based its payment to claimant, not on any medical evidence of record, but instead on its own belief that Section 28(a) permits it to pay claimant the least amount of money possible to avoid liability for attorneys' fees, regardless of whether that payment is tied in any way to the extent of claimant's disability. Letter from Employer's Counsel to the Claims Examiner (July 31, 2014) ("Employer's initial payment of two weeks compensation [at the one percent permanent partial disability rate]…fully satisfies the requirements of [S]ection 28(a) of the Act.").

Fifth Circuit case law also supports my interpretation of the Fourth Circuit's holding in *Lincoln* – that to qualify as "compensation" under Section 28(a), an employer's payment to a claimant during the 30-day window cannot be arbitrary, but instead must be based on claimant's "alleged disability," according to the medical evidence of record. *Lincoln*, 744 F.3d at 916, 48 BRBS at 20(CRT). As the majority opinion indicates, in *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003), the Fifth Circuit rejected an employer's contention that it could not have been expected to make a payment of "any compensation" to a claimant within 30 days under Section 28(a) because the claimant had not yet provided it with evidence of the degree of his hearing loss. Majority Opinion at 6 n.3. The Fifth Circuit went on to state that "the employer is free to schedule the claimant for a hearing evaluation by a physician of the employer's choosing to determine the amount, if any, of hearing loss…This would allow [employer] to ascertain the *proper amount of payment* and begin paying in time to avoid the fee-shifting provision." *Id.*, 355 F.3d at 852-853, 37 BRBS at 119(CRT) (emphasis added). If anything, this guidance from the Fifth Circuit suggests not only that the "compensation" required under Section 28(a) must be based on actual medical evidence pertaining to the claimant's disability, but also that an employer itself bears responsibility for seeking information on which to base its payment to a claimant.

Moreover, neither the Fourth Circuit case in *Lincoln*, nor the Fifth Circuit cases cited by the majority, establish a bright-line rule that one or two weeks' worth of benefit payments always constitutes "compensation" under Section 28(a), or otherwise diminish the role of the district director in determining whether a payment is "compensation" for a claimant's injury or "merely an attempt to avoid fee liability." *Green*, 43 BRBS at 177; *see Lincoln*, 744 F.3d 911, 48 BRBS 17(CRT); *Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Savannah Machine & Shipyard Co.*, 642 F.2d 887, 13 BRBS 294; *see also Alario*, 355 F.3d 848, 37 BRBS 116(CRT).

In *Lincoln*, the Fourth Circuit explicitly declined to overturn the Board's decision in *Green*, preserving the Board's holding that certain payments made to claimants are not "compensation," and thus do not shield employers from liability for attorneys' fees under Section 28(a). *Lincoln*, 744 F.3d at 916, 48 BRBS at 20(CRT). As the Director points out, under *Lincoln*, "the district director retains the discretion to determine whether the payment of monies to a claimant constitutes the payment of 'any compensation' or is merely a sham intended to avoid attorney fee liability. This finding must necessarily be based on a review of the entire factual circumstances of a case…." Dir. Resp. Br. at 3 n.2. Thus, I would hold that the question of whether an employer has paid a claimant "compensation" under Section 28(a) is a determination within the discretion of the district director based on the facts of the particular case. *See generally Healy Tibbits Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000) (matters within the sole discretion of the district director, such as a fee award, are reviewed for abuse of discretion and compliance with law).

In this case, I would affirm the district director's determination that employer's payment to claimant, based on a 1 percent disability, was not "compensation" under Section 28(a), as it was arbitrarily chosen by employer and wholly disconnected from the medical evidence establishing that claimant suffered a more severe disability of 20.9 percent. Thus, employer's payment was not based on claimant's "alleged disability" and was therefore "untethered to the underlying claim." *Lincoln*, 744 F.3d at 916, 48 BRBS at 20(CRT). Consequently, I would affirm the district director's award of an attorney's fee to claimant, payable by employer, pursuant to Section 28(a) of the Act.

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GREG J. BUZZARD
Administrative Appeals Judge