



BRB No. 16-0174

ARTHUR B. TAYLOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SSA COOPER, L.L.C.	)	DATE ISSUED: <u>June 30, 2017</u>
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order - Denying Attorney Fees of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

E. Paul Gibson (E. Paul Gibson, P.C.), Charleston, South Carolina, for claimant.

Vincent C. Northcutt and Kate K. Hemingway (Lueder, Larkin & Hunter, L.L.C.), Mount Pleasant, South Carolina, for employer/carrier.

Matthew W. Boyle (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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: BUZZARD, GILLIGAN and ROLFE, Administrative Appeal Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order - Denying Attorney Fees (2014-LHC-00481) of Administrative Law Judge Alan L. Bergstrom 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 amount of an attorney's fee award is discretionary and will not be set aside unless it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

On October 2, 2013, claimant injured his left leg while working for employer as a longshoreman. Claimant stopped work immediately and filed a claim for compensation on October 23, 2013.<sup>1</sup> Employer received formal notice of the claim from the district director on November 22, 2013, and voluntarily paid medical benefits for claimant's work injury through December 2, 2013, when claimant was cleared to return to work. Claimant returned to work on December 6, 2013. Employer controverted the claim on December 19, 2013. The administrative law judge awarded claimant temporary total disability benefits from October 2 through October 10, 2013, when employer established the availability of suitable alternate employment with no loss of wage-earning capacity.<sup>2</sup> Decision and Order at 18.

Subsequently, claimant's counsel filed a petition for an attorney's fee totaling \$11,136.28 for legal services provided and costs incurred while the case was pending before the administrative law judge.<sup>3</sup> Employer objected to the fee petition, arguing that it is not liable for a fee under Section 28 of the Act, 33 U.S.C. §928. Employer additionally objected to the hourly rates requested and the reasonableness of the fee

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<sup>1</sup> Claimant also generally asserted his entitlement to medical benefits, but did not make a claim for any particular treatment or care. His claim specifically noted that medical treatment was being provided by employer but that compensation benefits were not being paid. CX 3.

<sup>2</sup> Due to his own misconduct, claimant was prevented from performing the suitable alternate employment. Decision and Order at 17.

<sup>3</sup> Counsel sought a fee for 19.6 hours of attorney Gibson's time at an hourly rate of \$375, 11.4 hours of attorney Leard's time at an hourly rate of \$284, 2.15 hours of paralegal time at an hourly rate of \$97, and \$340 in expenses.

requested in light of claimant's limited success. Claimant's counsel responded to employer's objections, asserting his entitlement to a fee under Section 28(a), 33 U.S.C. §928(a). Finding it undisputed that Section 28(b), 33 U.S.C. §928(b), is inapplicable because no informal conference was held, and that employer "paid 'compensation' within the time set forth in §928(a)" because it voluntarily paid medical benefits during the 30-day period after receiving notice of the claim, the administrative law judge found that employer is not liable for an attorney's fee under the Act and denied claimant's fee petition. Supp. Decision and Order at 5.

On appeal, claimant challenges the administrative law judge's denial of an employer-paid attorney's fee. Employer responds, urging affirmance. Pursuant to the Board's Order dated February 14, 2017, the Director, Office of Workers' Compensation Programs (the Director), filed a brief on the matter. Employer filed a reply to the Director's brief.

Claimant contends the administrative law judge should have held employer liable for his attorney's fee under Section 28(a) because employer declined to pay any disability compensation. Employer asserts it paid claimant's medical benefits within the prescribed period and, thus, did not "decline to pay any compensation." The Director asserts that employer declined to pay disability benefits and is liable for claimant's attorney's fee, albeit for reasons that differ from claimant's. The issue before the Board, therefore, is whether employer's payment of medical benefits within the 30-day period set forth in Section 28(a) constitutes payment of "compensation" such that employer cannot be held liable for an attorney's fee, despite claimant's success in obtaining disability benefits after using the services of an attorney. For the reasons set forth below, we reverse the administrative law judge's Supplemental Decision and Order and hold that employer is liable for an attorney's fee in this case.

Section 28(a) of the Act states:

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 against the employer or carrier. . . .

33 U.S.C. §928(a) (emphasis added). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that an employer is not liable for an attorney's fee under Section 28(a) if it "admits liability for the claim by paying

some compensation to the claimant” within 30 days after it receives notice of the claim from the district director. *Lincoln v. Director, OWCP*, 744 F.3d 911, 48 BRBS 17(CRT) (4th Cir.), *cert. denied*, 135 S.Ct. 356 (2014); *Virginia Int’l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005). In *Lincoln*, the employer paid one week of disability benefits based on the claimant’s average weekly wage, and the Fourth Circuit rejected the claimant’s argument that the term “any compensation” in Section 28(a) requires an employer to pay all disability payments claimed in order to avoid fee liability. *Lincoln*, 744 F.3d at 916, 48 BRBS 19-20(CRT). The court reasoned that when an employer pays “some” of the disability payments sought or “tenders any compensation” tied to the alleged injury, fee liability will not shift to the employer.<sup>4</sup> *Id.* The *Lincoln* court did not address medical benefits or whether they constitute “compensation” under Section 28(a).

It is well established, however, that the definition of “compensation” in Section 28(a) includes medical benefits in a contested case for purposes of establishing a “successful prosecution of the claim.”<sup>5</sup> *Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *Simeone v. Universal Terminal & Stevedoring Corp.*, 5 BRBS 249 (1976). Therefore, assuming other requirements are satisfied, a successful prosecution resulting in an award of medical benefits entitles the claimant to an employer-paid attorney’s fee pursuant to Section 28(a). *See Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170, *aff’d*, 892 F.2d 173, 23

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<sup>4</sup> Because there was no informal conference, the employer also was not liable for the attorney’s fee under Section 28(b). *Lincoln*, 744 F.3d at 916, 48 BRBS 19(CRT).

<sup>5</sup> Section 28 does not define “compensation.” However, the word is defined in various ways throughout the Act. For example, although Section 2(12) of the Act, 33 U.S.C. §902(12), defines “compensation” as “the money allowance payable to an employee or to his dependents as provided for in this chapter[.]” Section 4(a) of the Act, 33 U.S.C. §904(a), provides that “[e]very employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title.” *See also Marshall v. Pletz*, 317 U.S. 383 (1943) (medical benefits are not “compensation” under 33 U.S.C. §913); *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992) (medical benefits may be “compensation” under Section 18(a)); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir.), *cert. denied*, 565 U.S. 1058 (2011) (medical benefits are not “compensation” under 33 U.S.C. §922); *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 15(CRT), 24 BRBS 49(CRT) (9th Cir. 1990) (“compensation” in Section 33(g)(1) does not include medical benefits because Section 33(g)(2) refers to “compensation and medical benefits”).

BRBS 13(CRT) (2d Cir. 1989); *Speedy v. General Dynamics Corp.*, 15 BRBS 448 (1983); *Timmons v. Jacksonville Shipyards, Inc.*, 2 BRBS 125 (1975).

After addressing case precedent on the various definitions of the term “compensation,” the administrative law judge determined that *Oilfield Safety* and *Simeone* are the most instructive because they address the term as used in Section 28. Supp. Decision and Order at 3-5. The administrative law judge found that the term “compensation” in the phrase “declines to pay any compensation” in Section 28(a) includes medical benefits. Consequently, he concluded, employer’s voluntary payment of claimant’s medical benefits within the 30-day period after its receipt of notice of the claim constitutes the payment of “compensation” within the meaning of Section 28(a), relieving employer of liability for claimant’s attorney’s fee because it did not “decline to pay any compensation.”<sup>6</sup> *Id.*

Claimant contends the phrase “declines to pay any compensation” in Section 28(a) does not include medical benefits pursuant to 33 U.S.C. §902(12). *See* n.5, *supra*. Claimant asserts that “compensation” either does not include medical benefits at all or does not include medical expenses paid directly to the provider, as here. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir.), *cert. denied*, 565 U.S. 1058 (2011); *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992).<sup>7</sup> Employer responds that “compensation” as used in

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<sup>6</sup> Employer received claimant’s October 23 claim on November 22, 2013. It paid for medical services claimant received on December 2, 2013, and it filed a notice of controversion on December 19, 2013, disputing liability for disability benefits. Emp. Br. at 4; EX 9. Although the administrative law judge did not address it, we reject claimant’s assertion that the December 19 notice of controversion demonstrates that employer “declined to pay” within the 30-day period of Section 28(a). The 30-day period begins to run from the date the employer receives notice of the claim from the district director and not from the date on the claim form. 33 U.S.C. §928(a); *Lincoln*, 744 F.3d 911, 48 BRBS 17(CRT); *Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Boe v. Dep’t of the Navy/MWR*, 34 BRBS 108 (2000).

<sup>7</sup> *Lazarus* involved the question of whether medical benefits were “compensation” so as to permit enforcement of an award of medical benefits under Section 18(a), 33 U.S.C. §918(a). The court held that medical benefits paid to the claimant to reimburse him for his medical expenses are “compensation” for purposes of Section 18(a), but monies paid directly to the providers are not “compensation” under that section. *Lazarus*, 958 F.2d at 1301, 25 BRBS at 148(CRT).

Section 28(a) includes medical benefits and that it did not “decline to pay any compensation” because it voluntarily paid medical benefits within the 30-day period.<sup>8</sup>

The Director contends the term “compensation” should be interpreted as including disability and/or medical benefits. That is, the claimant is entitled to an employer-paid attorney’s fee where, as here, the claim filed is for both disability and medical benefits, the employer declined to pay one or the other type, and the claimant used the services of an attorney to obtain the denied benefit. The Director asserts that, because “compensation” is not a term of art and does not have a uniform meaning in all sections of the Act, its meaning in Section 28(a) is not constrained by its meanings in other sections. Dir. Br. at 5-7; *see* 33 U.S.C. §§902(12), 906, 907, 909 918(a), 933; *see Oilfield Safety*, 625 F.2d at 1257, 14 BRBS at 362. Rather, he avers, each time the word “compensation” is used in the Act, its interpretation rests on the purposes of the individual section of the statute. Specifically:

If the language [of the Act] is ambiguous, in that it lends itself to more than one reasonable interpretation, our obligation is to find that interpretation which can most fairly be said to be embedded in the statute, in the sense of being most harmonious with its scheme and the general purposes that Congress manifested.

*Wheeler*, 637 F.3d at 284, 45 BRBS at 11(CRT) (quoting *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004)).

The Director argues that the purposes of Section 28(a) are two-fold: 1) to provide employers with the incentive to pay disability and medical benefits and avoid fee liability; and 2) to allow claimants to receive the full amount of their benefits without

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<sup>8</sup> Employer disputes claimant’s reliance on *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001), on the grounds that the court did not address whether payments to medical providers are payments of “compensation” for purposes of Section 28. Employer is correct that the United States Court of Appeals for the Fifth Circuit did not address the payment of medical benefits or its significance to a fee award, and nothing in the facts indicates that medical benefits actually were paid during the 30-day period after receipt of notice of the claim. *Id.* Employer also asserts that, in *Petroleum Helicopters, Inc. v. Nancy T. Garrett, L.P.T.*, 23 F.3d 107, 109 n.3, 28 BRBS 40, 41 n.3(CRT) (5th Cir. 1994), the Fifth Circuit specifically left that question open when it declined to address the plaintiffs’ argument that *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993), stands for the proposition that “compensation” should be interpreted broadly and would include payments to providers. *Petroleum Helicopters*, 23 F.3d at 109 n.3, 28 BRBS at 41 n.3(CRT).

having to reach into their benefits to pay for legal services. *See Oilfield Safety*, 625 F.2d at 1257, 14 BRBS at 362. The Director acknowledges that *Oilfield Safety* is not directly on point but asserts that its logic leads to a uniform rule: a claimant's successful prosecution of the claim following the employer's failure to pay either medical benefits or disability benefits results in shifting fee liability to the employer.<sup>9</sup> Thus, the Director contends his interpretation gives consistent meaning to the term throughout the section and fulfills the section's purposes. Dir. Br. at 10-11; *see Wheeler*, 637 F.3d at 288, 45 BRBS at 14(CRT).

In order to satisfy the purposes of Section 28(a), and to maintain a consistent meaning of the term within that section, we agree with the Director that the term "compensation" in Section 28(a) should be read as "disability and/or medical benefits." Its precise meaning in the phrase "declines to pay any compensation" depends on what benefits are claimed and what benefits the employer paid or declined to pay in each case. Whether a claimant files a claim for both disability and medical benefits or for only one or the other type of benefit, fee liability under Section 28(a) depends on whether there is success in obtaining the claimed but denied benefit.<sup>10</sup>

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<sup>9</sup> In *Oilfield Safety*, the claimant filed a claim for both disability and medical benefits. Because the employer paid disability benefits within the 30-day period, but not medical benefits, at the hearing the claimant raised only his entitlement to medical benefits. The administrative law judge awarded medical benefits and an employer-paid attorney's fee. On appeal, the Fifth Circuit "dispel[led] the notion that Congress used the term 'compensation' as a term of art in the LHWCA" because a number of sections used the term "compensation" and encompassed medical benefits. *Oilfield Safety*, 625 F.2d at 1257, 14 BRBS at 362; *see* 33 U.S.C. §§907, 908, 909. The court stated that the policies underlying Section 28(a) indicate Congress's intent to shift fee liability when a claimant uses the services of an attorney to successfully prosecute his claim, and this has historically included the success in obtaining an award of medical benefits. As the claimant enlisted the services of an attorney, who obtained the contested medical benefits for the claimant, the Fifth Circuit affirmed the award of an employer-paid attorney's fee under Section 28(a). *Oilfield Safety*, 625 F.2d at 1251, 1256-1258, 14 BRBS at 357, 361-362.

<sup>10</sup> One of the goals of the Act is to "provide prompt and certain payment to injured workers without protracted litigation. It would be illogical to force an employee to forego all compensation, however meager, in order to collect attorney's fees incurred to recover compensation wrongfully denied." *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 889 n.6, 13 BRBS 294, 296 n.6 (5th Cir. 1981); *see also C & P Telephone Co. v. District of Columbia Dep't of Employment Serv.*, 638 A.2d 690 (D.C. 1994).

Under the Director's interpretation, which we adopt, a claim may be made up of parts, *i.e.*, disability benefits, death benefits, medical benefits. If any type of benefit is denied and legal services are necessary to obtain the denied benefit, the claimant is entitled to an employer-paid fee because the employer's denial caused the need for attorney involvement.<sup>11</sup> *Lincoln*, 744 F.3d at 916, 48 BRBS 19(CRT); *Oilfield Safety*, 625 F.2d at 1251, 1256-1258, 14 BRBS at 357, 361-362; *Simeone*, 5 BRBS at 252-253. Specifically, if both medical and disability benefits are claimed, and the employer pays one but not the other type of benefit, the employer is liable for an attorney's fee if the claimant is later successful in obtaining the denied benefit. To hold otherwise is to reduce the claimant's successfully-obtained benefits, which the employer had denied, by the amount of his attorney's fee.

In this case, claimant filed a claim for both medical and disability benefits, and employer paid medical benefits but declined to pay any disability benefits within 30 days of its receipt of notice of the claim. Claimant's counsel successfully prosecuted the claim, obtaining for claimant the disability benefits which had been wholly denied by employer; therefore, claimant is entitled to have his attorney's fee paid by employer pursuant to Section 28(a). *Lincoln*, 744 F.3d at 916, 48 BRBS 19-20(CRT); *Oilfield Safety*, 625 F.2d at 1251, 1256-1258, 14 BRBS at 357, 361-362. We reverse the administrative law judge's conclusion to the contrary, and we remand the case for consideration of counsel's fee petition and employer's remaining objections.

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<sup>11</sup> In contrast, under employer's interpretation, disability benefits and medical benefits would make up the entirety of the claim and payment of any amount of that whole claim would constitute the payment of "some" benefits.



Accordingly, the administrative law judge's Supplemental Decision and Order - Denying Attorney Fees is reversed. The case is remanded for consideration of counsel's fee petition and employer's objections to determine the amount of employer's liability for claimant's attorney's fee under Section 28(a).

SO ORDERED.

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GREG J. BUZZARD  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge