U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

AMY H. BEDNAR	)	BRB No. 18-0619
	)	Case No. 2016-LHC-00192
	)	
JOSEPH H. BURCH	)	BRB No. 18-0620
	)	Case No. 2016-LHC-00276
	)	
BEVERLY A. CLARK	)	BRB No. 18-0621
	)	Case No. 2016-LHC-00195
	)	
JERMAINE H. HILL	)	BRB No. 18-0622
	)	Case No. 2016-LHC-00196
	)	
BETTY JONES	)	BRB No. 18-0623
	)	Case No. 2016-LHC-00197
	)	
CRYSTAL L. BILLMAN	)	BRB No. 18-0624
	)	Case No. 2015-LHC-01407
	)	
BRYANT C. COLE	)	BRB No. 18-0625
	)	Case No. 2015-LHC-01403
	)	
HENRY BIGGS, JR.	)	BRB No. 18-0626
	)	Case No. 2015-LHC-00916
	)	
CARMELITA Y. SEABORN	)	BRB No. 18-0627
	)	Case No. 2015-LHC-01598
	)	
LAMAINE T. WATSON	)	BRB No. 18-0628
	)	Case Nos. 2015-LHC-01497
Claimants	)	and 2015-LHC-01492
	)	
ARTHUR W. WARDELL d/b/a	)	
WARDELL ORTHOPAEDICS, P.C.	)	
	)	DATE ISSUED: 05/15/2019
Medical Provider-Respondent	)	

v.	)	
	)	
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeals of the Supplemental Order Awarding Attorney Fees of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

David M. Gettings (Troutman Sanders, L.L.P.), Virginia Beach, Virginia, for medical provider.

Christopher R. Hedrick and Bradley D. Reeser (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Order Awarding Attorney Fees in the above-named cases of Administrative Law Judge Paul C. Johnson, Jr., rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); *see also Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

Claimants in the consolidated cases sustained compensable injuries, and employer paid them benefits under the Act either voluntarily or via settlement. Disputes arose when Dr. Wardell, a physician who treated each claimant, billed employer for his services, and employer disagreed with the charges. The claims in *Billman*, *Cole*, *Biggs*, *Seaborn* and

[1] The administrative law judge's decision states that these 10 cases are representative of many involving the same issues between employer and Dr. Wardell. As the administrative law judge did, the Board consolidated them for briefing and decision. Order (Oct. 23, 2018); 20 C.F.R. §802.104(a).

Watson arose due to employer's dispute over the rate for Dr. Wardell's services. Rather than paying the invoiced amount, employer paid a lesser amount based on a series of private re-pricing contracts.[2] Dr. Wardell sought redress from the district director, who recommended payment based on rates set forth in the Office of Workers' Compensation Programs (OWCP) Medical Fee Schedule. *See* 20 C.F.R. §702.413. Employer rejected the recommendation to pay at those rates and had the cases transferred to the Office of Administrative Law Judges (OALJ). Before any hearings were held, employer paid Dr. Wardell's fee based on the OWCP rates. Thereafter, Dr. Wardell's attorney filed a petition for an attorney's fee payable by employer. *See Billman v. Huntington Ingalls Industries, Inc.*, 51 BRBS 23 (2017); *Watson v. Huntington Ingalls Industries, Inc.*, 51 BRBS 17 (2017).[3]

The remaining five cases, *Bednar*, *Burch*, *Clark*, *Hill* and *Jones*, arose due to employer's refusal to pay Dr. Wardell for ultrasound-guided injection treatments. The district director recommended employer pay for this treatment. Employer refused. The cases were transferred to the OALJ, but before any hearings were held, employer paid for

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[2] *See Watson v. Huntington Ingalls Industries, Inc.*, 51 BRBS 17 (2017), for a description of the series of contracts.

[3] *Billman*, *Cole* and *Watson* were before the Board previously. In *Watson*, the Board granted review of interlocutory orders and held that the administrative law judge has the authority to address a medical provider's claim for reimbursement under Section 7(d)(3), 33 U.S.C. §907(d)(3); *see also* 20 C.F.R. §702.413 *et seq.*, but does not have the authority to address a defense based on the private re-pricing contracts. *Watson*, 51 BRBS at 20-21. As the administrative law judge lacked jurisdiction over the contractual issues, the Board did not reach the constitutional issues raised by employer. The Board remanded the case for further proceedings related to employer's liability for medical services under the Act. *Id.*, 51 BRBS at 21.

In *Billman* (consolidated with *Cole*), pursuant to *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993), the Board held that Dr. Wardell is a "person seeking benefits" under Section 28(a), 33 U.S.C. §928(a), who filed "claims" under Section 7(d)(3) with the district director. 33 U.S.C. §907(d)(3); 20 C.F.R. §702.413 *et seq.* Thereafter, the district director notified employer of the claims, but employer did not pay the medical fees within 30 days after notice of those claims. Thus, the Board held that Dr. Wardell's attorney is entitled to an employer-paid fee because he successfully prosecuted the reimbursement claims. 33 U.S.C. §928(a). The Board remanded the cases to the administrative law judge to award an attorney's fee. *Billman v. Huntington Ingalls Industries, Inc.*, 51 BRBS 23, 25-27 (2017).

the treatment.[4] Dr. Wardell's attorney subsequently filed attorney's fee petitions.

Dr. Wardell's attorney requested a total fee of $160,518.11, representing work performed before the OALJ in these 10 cases. 33 U.S.C. §928(a). Pursuant to the Board's decision in *Billman*, 51 BRBS 23, the administrative law judge rejected employer's assertion that it is not liable for Dr. Wardell's attorney's fee. He also addressed employer's objections regarding the claimed hourly rates and itemized entries, and he awarded a total employer-paid fee of $128,316. Supp. Order. at 7 n.6, 13-14. Employer appeals the fee award, and Dr. Wardell's counsel responds, urging affirmance.

Employer contends it is not liable for Dr. Wardell's attorney's fee under Section 28(a) of the Act, 33 U.S.C. §928(a).[5] It asserts that the Board's decisions in *Billman*, and by reference *Watson*, are erroneous,[6] and again raises constitutional and jurisdictional issues, as well as statutory interpretation issues involving Sections 19(a) and 28(a), (b) of the Act, 33 U.S.C. §§919(a), 928(a), (b). Because it recognizes the Board has addressed all these issues, employer considers this a "pass-through" appeal to preserve its right to appeal to the United States Court of Appeals for the Fourth Circuit. Alternatively, in an attempt to have the Board revisit the issues, or to avoid application of the law of the case doctrine, employer cites the Board's decision in *Walton v. SSA Containers, Inc.*, 52 BRBS 1 (2018) (en banc) (Gilligan, J., dissenting), as intervening law. *See Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986). We reject employer's contentions.

In *Billman*, the Board rejected employer's jurisdictional contentions for the reasons stated in *Watson*. It held that a medical provider's claim for reimbursement for services rendered is "in respect of" a claim under Section 19(a) of the Act, but an employer's

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[4] According to employer, after the Board's decisions in *Watson* and *Billman*, but prior to action by the administrative law judge on remand, employer and Dr. Wardell settled all state and federal litigation with regard to the ultrasound and re-pricing cases. Only the attorney's fee issues remained unresolved.

[5] Employer does not challenge the amount of the attorney's fee awarded.

[6] Employer indicates its appeal also encompasses Administrative Law Judge Monica Markley's Order denying employer's motion to dismiss the claim in *Billman*, dated May 18, 2016. The Board addressed Judge Markley's Order concerning subject matter jurisdiction over a medical provider's claim for reimbursement and the medical provider's right to pursue an employer-paid attorney's fee upon successful prosecution of said claim in *Billman*, 51 BRBS 23. *See also Watson*, 51 BRBS 17; n.3, *supra*.

defense based on private contracts is not. *Billman*, 51 BRBS at 25; *Watson*, 51 BRBS at 19-20; *see also* 33 U.S.C. §§907(g), 919(a); 20 C.F.R. §§702.407(b), 702.413-702.417; *see generally Newport News Shipbuilding & Dry Dock Co. v. Loxley*, 934 F.2d 511, 24 BRBS 175(CRT) (4th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992).[7] As in *Watson*, the Board declined to address employer's constitutional arguments because they became moot when the Board held the administrative law judge could not address the contractual issues.[8] *Billman*, 51 BRBS at 25. The Board also rejected employer's assertions that Dr. Wardell did not properly file a claim for reimbursement and that his attorney is not entitled to a fee for his services because the term "compensation" in Section 28(a) does not include medical benefits.[9] *Id.* at 26. Employer asks the Board to reassess these holdings due to a change in law since their issuance.

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[7] Contrary to employer's assertion, the Fourth Circuit's decision in *Sea "B" Mining Co. v. Director, OWCP*, 45 F.3d 851 (4th Cir. 1995), is distinguishable. The issue in that case concerned the claim by the Director, Office of Workers' Compensation Programs, that interest should be assessed against coal mine operators on amounts they were to reimburse the Black Lung Disability Trust Fund for medical benefits advanced to the claimants. The court held that such issue was not "in respect of" a claim under the Act, 33 U.S.C. §919(a), because the interest sought was not a claim brought by, or for the benefit of, the claimants, nor was it based on any provision of the statute. Here, Dr. Wardell's entitlement to seek payment of medical benefits is based on the statute, 33 U.S.C. §907(d)(3). *See also Grierson v. Marine Terminals Corp.*, 49 BRBS 27 (2015).

[8] In both *Billman* and *Watson*, employer asserted that Article III of the Constitution does not permit an administrative agency to adjudicate state contract rights, it did not give permission for an Article I court to address the re-pricing contract issue, and Section 19(a) of the Act does not encompass jurisdiction over that issue.

[9] Dr. Wardell's letters to the district director asserted employer paid incorrect amounts and asked the district director to investigate. They are sufficient to constitute "claims" under the Act, as there is no requirement to use specific forms. *Billman*, 51 BRBS at 26 n.6. Further, the Board's decision in *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017), addressed the meaning of the term "compensation" in Section 28(a), with specific focus on the phrase "declines to pay any compensation." Agreeing with the position of the Director the Board held that the phrase means "disability benefits" and/or "medical benefits" "depend[ing] on what benefits were claimed and what benefits the employer paid or declined to pay such that whatever is claimed, denied, and successfully prosecuted determines the employer's liability for an attorney's fee." *Taylor*, 51 BRBS at 14. The Board relied on *Taylor* to hold Dr. Wardell's counsel entitled to an employer-paid attorney's fee. *Billman*, 51 BRBS at 26.

Contrary to employer's assertion, *Walton*, 52 BRBS 1, is legally and factually distinguishable from *Billman*, *Watson*, and the remaining cases before us.[10] In *Walton*, in an en banc decision on reconsideration, the Board held there was no justiciable claim under the Act for the administrative law judge to address because the issue of lien liability was not "in respect of" a claim under the Act on the facts presented. *See* 33 U.S.C. §919(a). The only claim under the Act was the claimant's claim for benefits which had been settled; although the medical insurer had a derivative right to seek reimbursement for sums paid for the claimant's medical treatment, it did not file such a claim under the Act. *See* 33 U.S.C. §907(d)(3); 20 C.F.R. §702.414. Therefore, the Board held the administrative law judge lacked jurisdiction to resolve which employer was liable for the medical treatment at issue. *Walton*, 52 BRBS at 4-5. Here, unlike in *Walton*, the medical provider with the derivative right to file a claim for reimbursement of medical expenses under the Act filed such claim pursuant to Section 7(d)(3), making the issues herein "in respect of" a claim under the Act. 33 U.S.C. §919(a). Thus, the current cases each involve a justiciable claim under the Act, and *Walton* is not controlling. *See Watson*, 51 BRBS at 20.

As *Walton* is not applicable, we decline to revisit the issues in *Billman* and *Watson*. We apply the law of the case doctrine to the appeals in *Billman*, *Cole* and *Watson*. *See, e.g., Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010); *Kirkpatrick*, 39 BRBS 69; *Boone v. Newport News Shipbuilding & Dry Dock Co*., 37 BRBS 1 (2003); 20 C.F.R. §802.404(b). And, for the reasons set forth in *Billman*, *Watson* and *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017), we hold that the administrative law judge has the authority to address Dr. Wardell's claims in the remaining cases and, upon his success, to award Dr.

[10] In *Walton*, the claimant sustained injuries while working for two different covered employers in 2011. The parties settled the claims, but did not resolve which employer was responsible for the claimant's past medical treatment. Prior to that settlement, the two employers had entered into an indemnity agreement whereby one would hold the other harmless in return for $10,000. Several years after the settlement under the Act and after the claimant had returned to gainful employment, she filed a state claim for compensation for one of the 2011 injuries as well as for injuries that occurred in 2014. The parties settled the state claim, and the claimant's private health insurance company filed a lien in state court for reimbursement of medical expenses it had paid related to the 2011 injury. Rather than address the issue in state court, one employer requested an informal conference with the district director to address the reimbursement/responsible employer issue that had been reserved in the settlement under the Act. Upon referral, the administrative law judge found he lacked jurisdiction to address the dispute because there was no claim for medical reimbursement under Section 7(d)(3). *Walton*, 52 BRBS at 4-5.

Wardell's counsel an employer-paid attorney's fee pursuant to Section 28(a) of the Act.[11] 33 U.S.C. §928(a); *Billman*, 51 BRBS 23; *Watson*, 51 BRBS 17; *Taylor*, 51 BRBS 11; 20 C.F.R. §802.404(b); n.9, *supra*. Because we affirm employer's liability for Dr. Wardell's attorney's fee, and employer has not challenged the amount of the fee awarded, we affirm the administrative law judge's decision awarding Dr. Wardell's counsel $128,316, payable directly to counsel by employer.

Accordingly, the administrative law judge's Supplemental Order Awarding Attorney Fees is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[11] As employer did not pay Dr. Wardell any medical fees within 30 days of notification from the district director of the claims for medical fees, employer's liability for an attorney's fee is pursuant to Section 28(a), 33 U.S.C. §928(a). Consequently, we need not address employer's arguments with respect to Section 28(b), 33 U.S.C. §928(b).