

EDMOND W. WOODS, IV)
)
 Claimant-Petitioner)
)
 v.)
)
 BUNGE NORTH AMERICA,) DATE ISSUED: Nov. 7, 2014
 INCORPORATED)
)
 and)
)
 ACE AMERICAN INSURANCE)
 COMPANY c/o CCMSI)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

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

Robert E. Thomas (Farrington & Thomas, LLC), New Orleans, Louisiana,
for claimant.

Matthew H. Ammerman (Law Offices of Matthew H. Ammerman, P.C.),
Houston, Texas, for employer/carrier.

Ann Marie Scarpino (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, Acting Chief Administrative Appeals Judge,
McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Compensation Order Attorney's Fees (Case No. 07-192450) of District Director David A. Duhon 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 shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant filed a claim for hearing loss benefits on June 24, 2011, based on an audiometric evaluation reflecting a 13.1 percent binaural impairment. It is undisputed that within 30 days of receipt of formal notice of the claim from the district director, employer paid claimant \$1,271.36, which represented two weeks of compensation,¹ and authorized the purchase of hearing aids. Thereafter, employer filed a claim for Section 8(f) relief, 33 U.S.C. §908(f). Ultimately, claimant and employer stipulated that claimant has a 17 percent binaural impairment. 33 U.S.C. §908(c)(13). The district director issued a compensation order awarding claimant benefits; employer was held liable for a 7.3 percent impairment and the Special Fund was held liable for a 9.7 percent impairment, pursuant to Section 8(f). 20 C.F.R. §702.315.

Claimant's counsel subsequently filed with the district director a petition for an employer-paid attorney's fee of \$1,845, representing 5.8 hours of attorney time at \$275 per hour plus \$250 in expenses. The district director awarded counsel the fee sought, payable by employer pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), relying on the Board's decision in *Green v. Ceres Marine Terminals*, 43 BRBS 173 (2010), *rev'd on other grounds*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011). The district director found that employer's payment within the 30 days after its receipt of the claim was a "token" payment to avoid liability under Section 28(a) and did not constitute "compensation" within the meaning of Section 28(a). The district director determined that employer was not entitled to rely on its claim for Section 8(f) relief as a basis for not paying compensation for the degree of impairment found by one of the initial audiological examinations.² Comp. Order at 2.

¹ The parties agreed that this figure represents two weeks of compensation at the rate of two-thirds of claimant's average weekly wage of \$935.68.

² In addition to the audiogram which formed the basis of claimant's claim, employer's expert, Dr. Seidemann, administered an audiogram on July 11, 2011, which

Employer appeals, contending that, pursuant to the plain language of Section 28(a), it cannot be held liable for claimant's attorney's fee as it paid claimant compensation within the 30 days after its receipt of the claim. Claimant responds, urging affirmance of the district director's fee award. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief urging affirmance of the district director's award of an employer-paid attorney's fee under Section 28(a). Employer has filed a reply to the Director's response.

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 [district director], on the ground that there is no liability for compensation within the provisions of this Act, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, 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). Thus, Section 28(a) applies to shift fee liability to employer when it declines to pay any benefits within 30 days of receiving notice of the claim from the district director. *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887,889, 13 BRBS 294 (5th Cir. 1981) (when employer pays partial compensation, Section 28(a) is not applicable). Employer avers that, as this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has strictly construed the Act's attorney's fee provisions, the district director's reliance on *Green* is inappropriate. Moreover, employer avers that *Green* is distinguishable. We agree with employer, and, 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 *Green*, 43 BRBS 173, the employer controverted the claimant's hearing loss claim and, upon receiving written notice of the claimant's claim from the district director, voluntarily paid the claimant the amount of \$1. The employer made no additional payments to the claimant in connection with his injury and continued to contest the claim. The administrative law judge awarded claimant benefits for a 1.875 percent hearing loss. In addressing claimant's counsel's fee petition, the administrative law judge found that

revealed a 13.4 percent binaural impairment. This examination occurred within the 30 days after employer received notice of the claim from the district director's office.

the employer contested the claimant's right to compensation by filing a notice of controversion before the expiration of the 30-day period in Section 28(a) and that the \$1 payment, though timely under Section 28(a), did not represent an intent to pay "compensation." Thus, the administrative law judge found the employer liable for claimant's attorney's fee under Section 28(a).

On appeal to the Board, the employer contended it could not be held liable for claimant's attorney's fee under Section 28(a) because it paid some compensation to the claimant within 30 days of its receipt of notice of the claim. The Board affirmed the administrative law judge's finding that the employer's payment of \$1 does not preclude the applicability of Section 28(a), as the administrative law judge rationally found that the payment was merely an attempt to avoid fee liability rather than the payment of compensation for the claimant's injury. Consequently, as the employer did not pay the claimant "any compensation" within the meaning of Section 28(a) of the Act, and, in fact, controverted the claim prior to receiving notice of the claim, the Board concluded that the administrative law judge properly held the employer liable for claimant's attorney's fee pursuant to Section 28(a). *Green*, 43 BRBS at 177-178.³

In this case, the district director found that, pursuant to *Green*, employer's payment of \$1,271.36 within the 30-day period was nothing more than a "token payment . . . which does not [relieve] the Employer/Carrier of liability under Section 28(a)." Comp. Order at 2. The basis for the district director's determination is that both audiograms in existence at the time of employer's payment showed a hearing loss of at least 13 percent; a 13 percent impairment entitles claimant to benefits for 26 weeks, yet employer paid only two weeks' compensation. In addition, the district director found that employer could not rely on its potential entitlement to Section 8(f) relief as a basis for not paying greater benefits because the Special Fund would have to reimburse employer if Section 8(f) were applicable. Thus, the district director found employer liable for claimant's attorney's fee pursuant to Section 28(a).

We reverse this determination in view of the Fourth Circuit's decision in *Lincoln v. Director, OWCP*, 744 F.3d 911, 48 BRBS 17(CRT) (4th Cir. 2014), *cert. denied*, 82 USLW 3735 (U.S. Oct. 14, 2014) (No. 13-1457), which was issued subsequent to the district director's fee award. Although *Lincoln* is not controlling precedent in this case,

³ The Board's decision on the merits was overturned on appeal to the Fourth Circuit. The administrative law judge had averaged audiograms showing a zero percent loss and a 3.75 percent loss. The court held that if one of the credited audiograms shows a zero percent loss, the claimant has not sustained his burden of establishing he is impaired. *Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011).

as it arises within the jurisdiction of the Fifth Circuit, we find its rationale persuasive in view of the construction given to the statute by the Fifth Circuit.⁴

In *Lincoln*, after the district director served notice of the claimant's claim for a hearing loss on the employer, the employer paid the claimant, within 30 days, \$1,256.84, amounting to one week of compensation for a .5 percent binaural impairment. The parties later agreed that the claimant sustained a 10 percent hearing impairment and entered into a Section 8(i) settlement, 33 U.S.C. §908(i). Claimant's attorney filed a petition for an attorney's fee. The district director found that the employer was not liable for an attorney's fee pursuant to Section 28(a) because it had not "declined to pay any compensation." The Board affirmed this decision.

On appeal to the Fourth Circuit, the court also affirmed the denial of an employer-paid attorney's fee. The court first rejected the claimant's contention that an employer must pay "all" compensation claimed in order to avoid fee liability under Section 28(a). The plain language of Section 28(a) states that an employer is potentially liable for an attorney's fee only if it "declines to pay any compensation" within the 30-day period; i.e., only if employer pays no compensation. *Lincoln*, 744 F.3d at 916, 48 BRBS at 19(CRT). The court observed that this plain language construction of the statute has been adopted by the Fifth Circuit. See *Andrepoint*, 566 F.3d 415, 43 BRBS 27(CRT); see also *Pittsburgh & Conneaut Dock Co. v. Director, OWCP [Bordeaux]*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007) *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), cert. denied, 546 U.S. 960 (2005); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007).

The Fourth Circuit further addressed the claimant's contention that the case was analogous to *Green*, and found *Green* "dramatically different" and thus inapplicable. The court stated that the employer's payment was for a 0.5 percent hearing loss at the maximum compensation rate, and thus was not "untethered" to the claim as the \$1 payment in *Green* had been. The court thus held that the payment was "compensation" within the meaning of Section 28(a) such that the employer could not be held liable for claimant's attorney's fee. *Lincoln*, 744 F.3d at 916, 48 BRBS at 18-19(CRT).

In this case, within 30 days of its receipt of the claim, employer paid claimant \$1,271.36, which, the district director found, was two weeks' compensation and which the parties stipulated was based on claimant's average weekly wage. Nevertheless, the

⁴ The Fourth Circuit also has strictly construed the Act's attorney's fee provisions. See *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), cert. denied, 546 U.S. 960 (2005).

district director found it was a “token” payment intended to avoid fee liability in view of the fact that claimant had had two audiograms – one by his expert and one by employer’s – both of which showed at least a 13 percent hearing impairment. We hold that this conclusion is erroneous.

The fact that employer paid claimant “compensation,” a sum “tethered” to the claim in that the payment was for two weeks of benefits based on claimant’s average weekly wage, precludes employer’s liability for an attorney’s fee pursuant to Section 28(a). See Emp. Notice of Final Payment, Form LS-208, dated Aug. 5, 2011. Employer did not “decline to pay any compensation” within the 30-day period; whether the payment was intended as a mechanism to avoid attorney fee liability is immaterial when the payment is, in fact, “compensation.” *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).⁵ *Andrepoint*, 566 F.3d at 419, 43 BRBS at 29(CRT). “[P]olicy arguments are . . . best addressed to Congress, not the courts.” *Id.*, 566 F.3d at 420, 43 BRBS at 31(CRT).

⁵ Thus, on the facts presented here, we disagree with the Director’s assertion that the district director has the discretion to find that employer made a “sham” payment in order to avoid fee liability.

Accordingly, we reverse the district director's award of an employer-paid attorney's fee pursuant to Section 28(a). We remand the case for the administrative law judge to address whether employer is liable for claimant's attorney's fee pursuant to Section 28(b), 33 U.S.C. §928(b).⁶

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁶ If employer cannot be held liable for an attorney's fee pursuant to Section 28(b), the district director should address claimant's liability for a fee pursuant to Section 28(c) if counsel seeks a claimant-paid fee. 33 U.S.C. §928(c); *see also* 20 C.F.R. 702.132(a).