



CRYSTAL L. BILLMAN) BRB Nos. 16-0537
) and 16-0537A
 Claimant)
)
 BRYANT C. COLE)
) BRB Nos. 16-0576
 Claimant) and 16-0576A
)
 WARDELL ORTHOPAEDICS, P.C.)
)
 Medical Provider-Petitioner)
 Cross-Respondent)
)
 v.)
)
 HUNTINGTON INGALLS INDUSTRIES,) DATE ISSUED: July 31, 2017
 INCORPORATED)
)
 Self-Insured)
 Employer-Respondent)
 Cross-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeals of the Orders Denying Motion to Dismiss and Denying Petition for Attorney's Fees and Costs of Monica Markley, Administrative Law Judge, United States Department of Labor.

David M. Gettings (Troutman Sanders), 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.

Helen H. Cox (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 Appeals Judges.

PER CURIAM:

Wardell Orthopaedics (Wardell) appeals, and employer cross-appeals, the Orders Denying Motion to Dismiss and Denying Petition for Attorney's Fees and Costs (2015-LHC-01407, 2015-LHC-04103) of Administrative Law Judge Monica Markley rendered on two claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). 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).

Both claimants, Billman and Cole, suffered work-related injuries while working for Huntington Ingalls (employer) and received medical treatment from Wardell. Wardell submitted invoices to employer for reimbursement of the costs of the medical services. For claimant Billman, Wardell sought a total of \$2,074. Employer disputed the charges and paid only \$813.37. For claimant Cole, Wardell sought \$9,268. Employer disputed the charges and paid only \$4,230.42.¹ In March 2015, Wardell filed letters with the district director seeking full reimbursement in each case.

In letters dated April 14, 2015, the district director notified Wardell and employer that, under the OWCP Medical Fee Schedule, employer owed Wardell an additional \$376.62, for a total of \$1,189.99, for services rendered to claimant Billman and an additional \$1,560.82, for a total of \$5,791.24, for services rendered to claimant Cole. Wardell Briefs at exh. C. Employer disputed the district director's calculations and requested the cases be referred to the Office of Administrative Law Judges (OALJ) if the district director did not withdraw her calculations. The district director referred the cases,

¹ Employer paid Wardell at rates set forth in the United Healthcare Fee Schedule rather than the Office of Workers' Compensation Programs (OWCP) Fee Schedule, arguing that a series of private insurance contracts entitles employer to reap the benefits of a medical re-pricing contract between Wardell and United Healthcare. Employer is a party to one of the contracts and seeks to have the contracts enforced to reduce its liability to Wardell. *See Watson v. Huntington Ingalls Industries, Inc.*, __ BRBS __, BRB No. 16-0545 (June 30, 2017).

and hearings were scheduled for November 2015.² In letters dated October 27, 2015, employer sought to avoid litigation in both cases and stated it would pay Wardell the additional \$376.62 in Billman's case and the additional \$1,560.82 in Cole's case. Consequently, in Orders dated November 4, 2015, the administrative law judge cancelled the hearings and remanded the cases to the district director.

In December 2015, counsel for Wardell filed a petition for an attorney's fee for work performed before the administrative law judge in each case. He sought a total of \$11,326, plus \$98 in costs, in claimant Billman's case, and \$22,344, plus \$35 in costs, in claimant Cole's case. Employer filed objections to the fee petitions, and Wardell filed reply briefs. On January 15, 2016, one day after the reply briefs were filed, employer filed with the administrative law judge motions to dismiss Wardell's claims, contending the administrative law judge does not have jurisdiction to address the medical benefits reimbursement claims because of the series of re-pricing contracts, *see* n.1, *supra*, executed under state law. It also asserted that Wardell does not have standing to file the claims. Employer asserted that if the administrative law judge does not have jurisdiction over the reimbursement claim, there is no basis for awarding Wardell's counsel an attorney's fee under the Act.

The administrative law judge denied employer's motions to dismiss for the reasons stated in her decision in *Watson v. Huntington Ingalls Industries, Inc.*, 2015-LHC-01497 (May 11, 2016), *aff'd in part*, __ BRBS __, BRB No. 16-0545 (June 30, 2017). Specifically, she found that she has jurisdiction to hear the reimbursement claims as well as any contractual defenses employer may have. The administrative law judge denied Wardell's counsel employer-paid attorney's fees because, although she found Wardell is a "person seeking benefits" within the meaning of Section 28(a), 33 U.S.C. §928(a), she concluded Wardell did not "file a claim" in either case, and employer's refusal to pay compensation to claimants Billman and Cole was not absolute. She also denied employer-paid fees under Section 28(b), 33 U.S.C. §928(b), because Wardell is not an "employee," and Section 28(b) applies exclusively to "employees." Orders at 2-3, 5-6.

Wardell appeals the Orders, contending the administrative law judge erred in denying its attorney an employer-paid fee under Section 28(a), (b), in each case. BRB Nos. 16-0537 and 16-0576. Employer cross-appeals the Orders, contending the administrative law judge erred in denying its motions to dismiss Wardell's claims. BRB Nos. 16-0537A and 16-0576A. In the alternative, employer urges affirmance of the administrative law judge's denials of employer-paid attorney's fees. Wardell and

² At this juncture, Wardell no longer sought reimbursement of its original invoice amounts and sought only to receive the amounts calculated by the district director.

employer filed reply briefs, respectively. The Director, Office of Workers' Compensation Programs (the Director), filed a consolidated response in each case, urging the Board to affirm the denials of the motions to dismiss³ and to reverse the denials of the employer-paid attorney's fees under Section 28(a). Wardell replied to the Director's brief, agreeing with his positions. Employer replied in opposition to the Director's brief.⁴

Employer's Cross-Appeals

On cross-appeal, employer contends the administrative law judge erred in finding she has subject matter jurisdiction over the issue of Wardell's claims for unpaid medical expenses. Employer asserts that Article III of the Constitution does not permit an administrative agency to adjudicate state contract rights, it has not given consent for this issue to be addressed in an Article I court, and Section 19(a) of the Act, 33 U.S.C. §919(a), does not encompass jurisdiction over "medical re-pricing litigation" because it does not involve the rights of any injured worker. In response, Wardell asserts it was proper for the administrative law judge to deny employer's motions to dismiss and to find that she has jurisdiction to address reimbursement claims under the Act.

The Board recently addressed this issue in *Watson v. Huntington Ingalls Industries, Inc.*, __ BRBS __, BRB No. 16-0545 (June 30, 2017). In *Watson*, which involved this same employer, Wardell treated the claimant for work-related injuries and billed the employer. The employer disputed the charges and paid Wardell less than the amount requested. As here, Wardell submitted a claim to the district director, who used the OWCP Medical Fee Schedule to determine the amount owed by the employer. The employer refused to pay the additional amount calculated and requested the case be transferred to the OALJ for a hearing, stating it should reap the benefit of the prices Wardell negotiated for its services under the series of private contracts. The administrative law judge found that she has jurisdiction over the claim and that the contract defense potentially reducing the employer's liability is ancillary to the reimbursement claim such that the contractual issues are also within her authority to address.

The Board held that the administrative law judge has jurisdiction to address a provider's claim for reimbursement of the cost of its medical services at the prevailing

³ The Director asserts that the Board can affirm the denials by: 1) rejecting employer's arguments on the cross-appeals as moot because the monies have been paid; 2) finding that the motions to dismiss were untimely filed; or 3) holding that employer's arguments regarding jurisdiction are incorrect.

⁴ We consolidate these cases for decision purposes. 20 C.F.R. §802.104(a).

rates under the Act, pursuant to the OWCP Medical Fee Schedule, as that is an issue with respect to a claim under the Act. 33 U.S.C. §§907(g), 919(a); 20 C.F.R. §§702.407(b), 702.413-702.417. However, the Board held that the administrative law judge lacks jurisdiction to address the employer's defense based on the private contracts because such issues are not "in respect of a claim." *Watson*, slip op. at 7-9 (citing *Temporary Employment Services v. Trinity Marine Group, Inc.*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001); *Equitable Equipment Co. v. Director, OWCP*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999)).

For the reasons set forth in *Watson*, we reject employer's contentions. A medical provider's claim for reimbursement for services rendered is an issue with respect to a claim under the Act, and we affirm the administrative law judge's denials of employer's motions to dismiss.⁵ *Watson*, slip op. at 8-9. However, because employer paid the additional medical fees set by the district director and no reimbursement issues under the Act remain, we need not remand these cases for further consideration of this issue.

Wardell's Appeals

As Wardell's claim for reimbursement is an issue over which the administrative law judge has jurisdiction, and as Wardell was successful in obtaining the denied medical fees after the cases were referred to the OALJ, we must address Wardell's contention that the administrative law judge erred in denying it employer-paid attorney's fees under Section 28(a). The administrative law judge found that, although Wardell is a "person seeking benefits," it did not file a "claim for compensation" because Wardell's "informal letter" to the district director "amounts to a supplemental claim arising out of Claimant's claim, [and] is not the formal action contemplated. . . ." *Billman* Order at 4; *Cole* Order at 4. More specifically, the administrative law judge found there is no evidence that employer received written notices from the district director of Wardell's filing formal claims or LS-203 claims forms. *Id.* She also found that employer did not "decline to pay compensation" because it paid some compensation to claimants after receiving notices of their claims.

Wardell and the Director assert the administrative law judge properly found Wardell to be a "person seeking benefits" under Section 28(a) but improperly found it did not file a "claim" in each case. Wardell and the Director also contend the administrative law judge erred in finding that employer did not "decline to pay any compensation." Employer asserts that Wardell is not seeking "compensation" within the meaning of the Act. It also asserts that Wardell did not file a "claim" and that it did not "decline to pay any compensation" because it paid claimants' benefits within 30 days of receiving notices

⁵ Thus, we need not address employer's remaining arguments.

of their claims for compensation. We agree with Wardell and the Director, and we reverse the administrative law judge's denials of employer-paid attorney's fees.

Section 28(a) 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 against the employer or carrier. . .

33 U.S.C. §928(a) (emphasis added). Wardell's claims are derivative of claimants' claims for medical benefits. *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993); *Aetna Life Ins. Co. v. Harris*, 578 F.2d 52 (3d Cir. 1978); *Quintana v. Crescent Wharf & Warehouse Co.*, 19 BRBS 52, *modifying on recon.* 18 BRBS 254 (1986). As there is no dispute that claimants are entitled to medical benefits under the Act, that the medical treatment provided for the work injuries was reasonable and necessary, and that employer is liable for claimants' benefits, Wardell is entitled to payment for the medical treatment it provided. 33 U.S.C. §907(d)(3). Thus, Wardell is a "person seeking benefits" under Section 28(a), and the administrative law judge properly so found. *Hunt*, 999 F.2d 419, 27 BRBS 84(CRT) (medical provider); *Grierson v. Marine Terminals Corp.*, 49 BRBS 27 (2015) (insurance provider); *see also 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) (medical provider pursued case on prevailing rates for reimbursement; implicit finding that medical provider has standing to file reimbursement claim). Moreover, Wardell's attorney's efforts to obtain payment were not duplicative of any efforts by claimants' attorneys. *Grierson*, 49 BRBS at 30.

Section 7(d)(3) of the Act states: "The Secretary may, upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee." The Director contends the Act "creates a direct cause of action for a medical benefits provider" to seek reimbursement for services rendered, and the "application by a party in interest" in Section 7(d)(3) is equivalent to the "claim for compensation" in Section 28(a). Dir. Br. at 15. That is, Wardell filed "claims" in writing with the district director, and neither the statute nor the regulations requires Wardell's

claims to be on specific forms.⁶ 33 U.S.C. §§913, 919; 20 C.F.R. §702.221; *see Metro Machine Corp. v. Director, OWCP [Stephenson]*, 846 F.3d 680, 691, 50 BRBS 81(CRT) (4th Cir. 2017) (quoting *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613 n.7, 14 BRBS 631, 633 n.7 (1982) (“those making claims under the Act need not even make claims on claim forms” as “an informal substitute . . . may be acceptable if it identifies . . . the idea that compensation is expected.”)); *compare with Virginia Int’l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005) (informal letter from claimant seeking to supplement a previously-filed claim is not a new “claim”). Moreover, the district director notified employer in letters dated April 14, 2015, of her calculations showing that it owed additional sums to Wardell in both cases. Wardell Briefs at exh. C. Thus, employer received written notice of Wardell’s claims from the district director. For these reasons, we reverse the administrative law judge’s finding that Wardell did not file written claims for compensation as required by Section 28(a). *Stephenson*, 846 F.3d at 691.

In also finding that employer did not “decline to pay any compensation” within 30 days of the notices of the claims, the administrative law judge referenced claimants’ claims as commencing the Section 28(a) 30-day periods. She found that employer did not decline to pay *claimants’* benefits within those 30-day periods; therefore, employer did not “decline to pay any compensation,” and employer is not liable for Wardell’s attorney’s fees under Section 28(a). *Billman* Order at 4-5; *Cole* Order at 4-5. Wardell and the Director contend the appropriate time period for determining if any compensation was paid was the 30 days after employer received the district director’s letters notifying employer that it owed money to Wardell for medical services provided to Billman and Cole. During those 30-day periods, employer paid Wardell nothing. We agree.

The Board’s recent decision in *Taylor v. S.S.A. Cooper, L.L.C.*, __ BRBS __, BRB No. 16-0174 (June 30, 2017), is instructive. In *Taylor*, the claimant filed a claim for both disability and medical benefits, but the employer declined to pay any disability benefits within the prescribed period. Because it had paid some medical benefits within that 30-day period, the employer urged the Board to interpret “compensation” as including medical benefits and to hold that its payment of some medical benefits, alone, established that it did not “decline to pay any compensation.” The Board rejected the employer’s interpretation and held that the term “compensation” in Section 28(a) means “disability and/or medical benefits.” Thus, the exact meaning of the phrase “declines to pay any compensation” depends on what benefits were claimed and what benefits the employer paid or declined to pay such that whatever is claimed, denied, and successfully

⁶ Wardell’s letters to the district director, dated in March 2015, clearly asserted that employer paid incorrect amounts for medical fees and that Wardell wanted the district director to investigate the claims. Wardell Briefs at exh. B.

prosecuted determines the employer's liability for an attorney's fee. *Taylor*, slip op. at 7-8. Because the claimant used the services of an attorney and successfully obtained the denied disability benefits, the Board held that his attorney was entitled to an employer-paid fee. *Id.*, slip op. at 8.

For the reasons set forth in *Taylor*, we hold that employer "declined to pay any compensation" within 30 days of receiving the district director's letters by refusing to reimburse Wardell the amounts calculated by the district director, which represented the amount of "compensation" Wardell sought. Although the claims did not proceed to hearings, employer ultimately agreed to pay the additional amounts while the cases were before the administrative law judge. Therefore, Wardell successfully prosecuted the reimbursement claims and is entitled to have its legal fees paid by employer pursuant to Section 28(a).⁷ *Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). On remand, the administrative law judge must consider the fee petitions and the objections thereto and award Wardell's counsel reasonable attorney's fees for the work performed before the OALJ. *Taylor*, slip op. at 8-9; 20 C.F.R. §702.132.

Accordingly, the administrative law judge's Orders denying Wardell employer-paid attorney's fees are reversed. The cases are remanded for consideration of Wardell's fee petitions and employer's objections. The administrative law judge's denials of employer's motions to dismiss are affirmed in part as set forth herein.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

⁷ Thus, the Board need not address whether employer is liable for a fee under Section 28(b).