No. 02-60470

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AVONDALE INDUSTRIES, INC.,
Petitioner

v.

RAY ALARIO, JOSEPH HOWARD,
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents

On Petition for Review of Orders
of the Benefits Review Board

BRIEF FOR RESPONDENT DIRECTOR, OWCP

EUGENE SCALIA
Solicitor of Labor

JOHN F. DEPENBROCK
Associate Solicitor for Employee Benefits

BURKE WONG
Counsel for Longshore

JOSHUA T. GILLELAN II
Senior Attorney
S-4325 Frances Perkins Building
Washington, DC 20210
(202) 693-5331

Attorneys for Respondent Director, OWCP

STATEMENT WITH RESPECT TO ORAL ARGUMENT

The Director, OWCP, suggests that oral argument of this case would be appropriate. The issue presented by Avondale's petition for review is a question of law with broad precedential significance. Because of the course of the Board's treatment of the issue in these cases, it would be appropriate for the Court to dispose of the case by published opinion. Thus, although the issue may be resolved without extended discussion on the basis of the direct terms of the relevant statutory provision, to the extent the Court wishes to satisfy itself that the result is consistent with the relevant legislative policies and the overall plan of the statute, those subjects are particularly suited to examination in oral argument.

JOSHUA T. GILLELAN II
Senior Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-60470

AVONDALE INDUSTRIES, INC.,
Petitioner

v.

RAY ALARIO, JOSEPH HOWARD,
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents[1]

On Petition for Review of Orders
of the Benefits Review Board

BRIEF FOR RESPONDENT DIRECTOR, OWCP

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This case is before the Court for review of a decision of the Benefits Review Board, affirming orders of a "district director" of the Department of Labor's Office of Workers' Compensation Programs. The district director held that petitioner

[1] Eugene Craig was also named as a respondent in Avondale's petition for review. Because the Board's decisions on reconsideration *en banc* remanded the fee dispute in Craig's case to the district director for further proceedings, the Director moved to dismiss the petition for review, as to his case, for lack of the "final order of the Board" requisite to the Court's review jurisdiction. The Court granted that motion on September 18, 2002.

Avondale is liable for fees for some of the services of the attorneys who represented respondents Alario and Howard on their compensation claims under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 ("LHWCA"). Although panels of the Board initially reversed the fee awards against Avondale, on reconsideration *en banc* the Board unanimously vacated that disposition and affirmed the district director's awards; and on Avondale's motion for reconsideration of that decision, the Board unanimously adhered to it.[2]

The jurisdiction of the local "district director" – the statutory "deputy commissioner," *see* LHWCA § 19(a), 33 U.S.C. § 919(a); 20 C.F.R. §§ 701.301(a)(7) – was invoked by Alario's and Howard's claims for benefits under the LHWCA. *See* LHWCA § 19(a). The parties resolved their disputes concerning their rights and liabilities for benefits under the Act while the case was pending before the office of the district director, but a dispute then arose concerning who was liable for fees for Alario's and Howard's counsel; the district

[2] Avondale's Record Excerpts – one of the two documents it filed with the cover heading "Brief for Avondale Industries, Inc./Record Excerpts" – does not contain the district director's fee-award orders, nor does it contain the Board panel decision in *Alario*. It does include, without overall pagination, the Board panel's decision in *Howard* (Apr. 24, 2001) (third document), the initial decision of the Board *en banc* in both cases (and a third, *Craig*, that is not before the Court, *see* note 1 *supra*) (Oct. 5, 2001) (second document), and the Board's *en banc* decision on Avondale's motion for reconsideration of the decision *en banc* (May 23, 2002) (first document). (The final two documents included in the Excerpts pertain only to the *Craig* case.) The Record Excerpts nevertheless do not appear to require supplementation to include the missing orders; they add nothing to the fully framed issue of law presented.

director had authority to resolve the fee dispute by entry of a "compensation order." LHWCA § 28, 33 U.S.C. § 928; 20 C.F.R. §§ 702.132(a), 702.134(a); *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090 (9th Cir.), *cert. denied*, 531 U.S. 956 (2000). The Benefits Review Board had jurisdiction of Avondale's appeals from the district director's orders under LHWCA § 21(b)(3), 33 U.S.C. § 921(b)(3). It thereafter had jurisdiction of the Director's and Alario's timely motions for reconsideration of the Board panels' decisions, and later of Avondale's timely motion for reconsideration of the full Board's altered disposition of the cases, under LHWCA § 21(b)(5), 33 U.S.C. § 921 (b)(5), and 20 C.F.R. § 802.407.

Section 21(c) of the Act, 33 U.S.C. § 921(c), provides for judicial review of a "final order of the Board" by the court of appeals for "the circuit in which the injury occurred," on petition for review filed within sixty days of the Board order by a "person adversely affected or aggrieved." Alario's and Howard's claims were based on conditions of employment at Avondale's shipyards in the New Orleans area, within this Circuit. The Board's *en banc* decision of October 5, 2001, affirmed the district director's fee-award orders, and its *en banc* decision of May 23, 2002, on Avondale's timely motion for reconsideration of the October 2001 decision's disposition of the cases, adhered to that disposition, putting an end to the administrative proceedings with respect to attorney fees for services on Alario's and Howard's claims. Accordingly, it was a "final order" within the meaning of

LHWCA § 21(c). *See*, *e.g.*, *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir.) (*en banc*), *cert. denied*, 469 U.S. 818 (1984). Avondale filed its petition for review in this Court on June 11, 2002, within 60 days after the Board's order disposing of Avondale's motion for reconsideration, and accordingly was timely. *See Arch Mineral Corp. v. Director, OWCP*, 798 F.2d 215 (7th Cir. 1986) (timely motion to Board for reconsideration tolls time for review under LHWCA § 21(c)); *Peabody Coal Co. v. Abner*, 118 F.3d 1106 (6th Cir. 1997) (but motion for reconsideration of decision on reconsideration tolls time for review only if that decision altered Board's disposition). The Court thus has jurisdiction under § 21(c).

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether Avondale's thirty-day grace period under LHWCA § 28(a), within which to pay what the claimant was entitled to and thereby to avoid liability for any fee awarded to the claimant's attorney, was triggered in each case when the district director served notice of the filing of the claim on it, irrespective of whether the claim was accompanied by prima facie evidence showing that the claimant was entitled to some particular amount of compensation.

COUNTER-STATEMENT OF THE CASE

A. Proceedings Below

Respondents Alario and Howard filed claims for compensation for permanent hearing loss, resulting from their shipyard employment with Avondale, under the LHWCA. After the claims were resolved without hearings while pending before the district director's office, their attorneys filed petitions for approval of fees under LHWCA § 28. In each case, Avondale contended that it was not liable for any of the fees because it had paid the compensation due within thirty days of receiving an audiogram accompanied by a medical report documenting and quantifying the extent of the claimant's hearing loss. In Alario's case, the district director initially agreed, awarding the attorney a fee payable only by his client. On a timely motion for reconsideration, however, the district director held Avondale liable for the attorney's work after the service of notice of the claim on Avondale by the district director's office, six weeks before Avondale instituted payments of compensation. In Howard's case, the district director likewise held Avondale liable for the attorney's work after service of the claim on it by the district director's office, twelve and a half months before Avondale made payment. *See*, *e.g.*, R.E., Benefits Review Board's Decision and Order on Motions for Reconsideration *en Banc* at 4-5 (Oct. 5, 2001).

On appeals by Avondale, separate panels of the Board reversed, holding that Avondale was absolved of attorney-fee liability under § 28 because it had paid promptly after receiving copies of audiograms with accompanying medical reports quantifying the claimants' hearing impairments. *E.g.*, R.E. third document (*Howard*). On motions for reconsideration filed by Alario and (in both cases) the Director, the full Board consolidated the cases for decision and unanimously overruled the panel decisions. R.E. second document. It held that the service of notice of the filing of the claims themselves on Avondale by the district director's office started the thirty-day period for payment without incurring fee liability under § 28(a), irrespective of whether the claim was accompanied by any supporting evidence. *Id*. at 9-10. Since Avondale had not paid within that period, the Board held, it was liable for the attorneys' services after such service took place (by which time it had already filed a "notice of controversion" of the claimants' asserted rights, pursuant to LHWCA § 14(d), 33 U.S.C. § 914(d)). *Id*. It therefore reinstated the district director's fee awards. *Id*. at 11. On Avondale's motion for reconsideration of that decision, the Board again rejected Avondale's contention that the thirty-day period for payment under § 28(a) did not begin to run until the claimant provided the employer with competent evidence in support of the claim. R.E. first document.

B. Statement of Facts

The relevant facts are only those concerning the course of proceedings on the claims before the district director's office. Howard filed a claim with the district director, and served it on Avondale, in late November 1996, alleging occupational noise-related hearing loss, without specifying the extent of such loss. *E.g.*, Board's Decision *en Banc* of Oct. 5, 2001, R.E. second document, at 5. On December 12, 1996, Avondale filed with the district director, on the prescribed form, a notice pursuant to LHWCA § 14(d), 33 U.S.C. § 914(d), that it "controverted" Howard's asserted right to compensation. The district director gave notice of the filing of the claim to Avondale, pursuant to LHWCA § 19(b), 33 U.S.C. § 919(b), on December 31, 1996. *Id*. Avondale apparently took no action whatsoever for over a year. Finally, on January 8, 1998, it received from Howard's counsel a copy of a June 1995 audiogram and report, and on January 14, 1998, it paid compensation for the degree of hearing loss shown in that report (13.8 percent).[3] *Id*.

Alario filed a hearing-loss claim, and served it on Avondale, on July 12, 1999. *E.g.*, Board's Decision *en Banc* of Oct. 5, 2001, R.E. second document, at 4. The claim was accompanied by a letter to Avondale giving notice of the injury and

[3] Avondale continued for some time thereafter to deny liability for the particular type of hearing aids recommended by Howard's audiologist. The fees awarded against Avondale and against Howard for the attorney's successful efforts to secure the disputed medical benefits are no longer in issue (*see* Board panel Decision of Apr. 24, 2001, R.E. third document, at 2-3, 4).

demanding authorization for medical care by a physician of Alario's choice, under LHWCA § 7, 33 U.S.C. § 907, and by an audiogram performed three weeks earlier by an unidentified examiner, without any accompanying medical report. *Id*. Avondale filed a notice of controversion on July 30, 1999, stating as its ground that because the audiogram was neither identified as having been performed by a qualified professional nor accompanied by an interpretive report, "there is no valid claim to which to respond." The district director gave Avondale notice of the filing of the claim pursuant to LHWCA § 19(b) on August 4, 1999. *Id*. On August 16, 1999, Alario had his hearing retested by an audiologist, and submitted the audiogram, with an accompanying medical report quantifying his binaural impairment at 62.8 percent, to Avondale on September 13, 1999. *Id*. Avondale then instituted biweeekly payments of compensation on September 14, and had him examined by a physician of its own designation on September 27; it then averaged the results of that evaluation (54.1 percent impairment) and the August 16 results, and made full payment for a 58.45 percent loss on October 12, 1999. *Id*.

SUMMARY OF ARGUMENT

Section 28(a) of the LHWCA is clear on its face: the thirty days within which the employer must pay in order to avoid add-on attorney-fee liability under that subsection dates from when it "receiv[es] written notice of a claim for

compensation having been filed from the deputy commissioner." Neither a "claim" filed under LHWCA § 13(a) nor the notice of the filing of a claim that the district director is required by § 19(b) to give the employer requires that the claimant have submitted any evidence in support of the claim.

Contrary to Avondale's contention, when it failed to pay anything within thirty days after the district director gave it notice of the filing of Alario's and Howard's claims, it did thereby "decline to pay any compensation" *within that period*, even though its only stated ground for doing so was that the claimants had not submitted competent evidence in support of the claims. Likewise, Avondale's argument that it could not, or had no duty to, respond to the claims because the claimants had not submitted "*prima facie* evidence" in support of their claims at that time is unsupported by anything in the statute, and is contrary to the general plan of the Act. Under § 14(a)-(d) of the Act, the employer is responsible to respond to *any* notice, or knowledge, of an injury or asserted injury by promptly conducting an investigation and instituting payments to the extent its investigation reveals them to be due, without the claimant having to do anything more than cooperate with the investigation. The plan of § 28(a) is consistent with that imposition on the employer of responsibility to recognize and discharge its liabilities under the Act without action – much less the submission of competent evidence – by the claimant. The employer is entitled nevertheless to deny

responsibility and put the claimant to his proof – but under § 28(a), the price of that choice is liability for a fee for the claimant's attorney's development and submission of the evidence.

ARGUMENT

THE THIRTY DAYS WITHIN WHICH THE EMPLOYER CAN PAY WHAT IS THEN DUE ON A CLAIM AND THEREBY AVOID LIABILITY FOR THE CLAIMANT'S ATTORNEY FEES, UNDER § 28(a) OF THE LONGSHORE ACT, BEGINS WHEN THE DISTRICT DIRECTOR PROVIDES IT WITH NOTICE OF THE FILING OF THE CLAIM, RATHER THAN WHEN THE CLAIMANT SUBMITS EVIDENCE CONSTITUTING A PRIMA FACIE CASE OF ENTITLEMENT TO THE COMPENSATION CLAIMED.

A. Standard of Review

The issues presented are exclusively questions of LHWCA law, not of record-based fact. With respect to such issues, the Court's review of rulings below is plenary. *E.g.*, *Pool Co. v. Cooper*, 274 F.3d 173, 177 (5th Cir. 2001). The Court has long recognized that the views of the Director, as the administrator of the LHWCA, on questions of LHWCA law are entitled to deference (*e.g., Boudreaux v. American Workover, Inc.,* 680 F.2d 1034, 1046 & n.23 (5th Cir. 1982) (*en banc*), *cert. denied,* 459 U.S. 1170 (1983)); but it has recently clarified that, under the Supreme Court's approach in *United States v. Mead Corp.*, 533 U.S. 218 (2001), the deference due the Director's interpretations advanced in litigation is "not

Chevron deference, but *Skidmore* deference," i.e., "'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Pool*, 274 F.3d at 177& n.3, *quoting Mead*, 533 U.S. at 228.

B. The Unambiguous Terms of LHWCA § 28(a)

Section 28(a) of the LHWCA, 33 U.S.C. § 928(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 Act, 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 in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

(Emphasis added.) The statute thus unambiguously provides that what triggers the thirty-day period within which the employer can accept liability for compensation, and thereby avoid any liability for the claimant's attorney's fee, is the district director's official notice to the employer of the filing of the claim, required by LHWCA § 19(b). Thus, as this Court has recently held, "receipt of notice by the

employer [i]s a prerequisite to the recovery of attorney's fees [under § 28(a)]. Thus, any fees incurred before receipt of such notice could not be charged against the employer," even where the employer had filed a notice of controversion earlier than that. *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 359 (5th Cir. 2002). Once both conditions have been satisfied – the district director has given the employer notice under § 19(b), and the employer either has controverted the claimant's entitlement or has allowed thirty days to pass after service without paying *or* controverting –, however, the claimant's attorney's services thereafter in the successful pursuit of the claim are the responsibility of the employer under § 28(a). *Id*. at 359-60.

In each of the present cases, as in *Weaver*, the employer had filed a notice of controversion, in response to its receipt of notice of injury from the claimant, before the district director effected service on it of notice of the filing of the claim. Thus here, as there, as soon as the district director did effect such service, the employer both had been given notice and had declined to pay, and the claimant's attorney's services thereafter, if successful (as they were), were the employer's responsibility under § 28(a).

C. Avondale's Contentions

1. "Decline[d] to Pay on or Before the Thirtieth Day After Notice"

Only a small part of Avondale's brief to the Court is devoted to the issue actually presented here – the correctness of the Board's holding that even a bare claim, unaccompanied by *any* evidence *demonstrating* the claimant's entitlement to compensation or quantifying the amount of the asserted entitlement, triggers the employer's obligation to pay what is due within 30 days if it would avoid add-on fee liability (*e.g.*, Decision *en Banc* of Oct. 5, 2001, R.E. second document, at 10). If the Board's holding that notice of a bare claim is sufficient to begin the thirty-day grace period for payment under § 28(a) without incurring add-on fee liability is correct, Avondale's arguments about what a claimant must present, or what is competent evidence to make out a "prima facie case" of or to "establish" entitlement to compensation under the Act for hearing loss, Pet. Br. 13-15, 16-17, are entirely beside the point. Likewise, Avondale's description of § 28(b), establishing different conditions for add-on fee liability in cases where the employer does pay something in response to a claim but a controversy develops over its *further* liability, Pet. Br. 18, is irrelevant. The district director and the Board based their fee-liability rulings on § 28(a); Avondale had paid nothing before the attorneys' services at issue; and no party has contended that Avondale bore fee liability in these cases under § 28(b).

Avondale's sole arguments concerning LHWCA § 28(a) are contained in a single paragraph of its Summary of Argument (Pet. Br. at 12) and a single paragraph of its Argument (*id*. at 17-18). Avondale there contends, not that something more than notice of a claim is required to trigger the thirty-day period of § 28(a), but that

> [u]nder Section 28(a), the claimant is entitled to attorney's fees if the employer 'declines to pay any compensation...' 33 U.S.C. 928(a). Avondale never declined to pay compensation. . . . Avondale voluntarily paid each claim promptly *after receiving the information needed to determine the extent of the Claimants['] losses*."

Pet. Br. at 18 (ellipsis in quotation of § 28(a) by Avondale; emphasis added); *see also id*. at 12 ("Avondale never denied these claims."). This contention both ignores the critical, albeit elided, terms of § 28(a), and is based on an untenable characterization of Avondale's response to the claims.

First, Avondale fails to address, or even to include quotation of, the entirety of the relevant phrase of § 28(a). The statute does not condition add-on fee liability on the employer "declin[ing] to pay any compensation," without stated time limits, as Avondale purports to quote it. Rather, it conditions such liability on the employer "declin[ing] to pay any compensation *on or before the thirtieth day after receiving written notice of [the] claim . . . having been filed* from the deputy commissioner[.]" If § 28(a) were written merely in the terms quoted by Avondale,

perhaps it would be arguable that the employer could avoid fee liability by responding, when presented with notice of a claim, "Maybe we owe you something and maybe we don't; let's see your proof," and then sitting back and paying nothing until further action by the claimant – as Avondale in effect did. The phrase "declines to pay," standing alone, might facially be read not to encompass such a response. But the provision's terms require only that the employer "decline *to pay compensation on or before the thirtieth day*" after notice of the filing of the claim. When it *failed* to pay anything within the specified thirty-day period, Avondale perforce "*declined* to pay" within that period, even if it did not thereby "decline to pay" at *any* time.

And second, in any event, Avondale did not simply sit mute in response to the claims; it filed in each case, in response to the claimant's service on it of a notice of the injury and claim for compensation, the "notice . . . stating that the right to compensation is controverted" provided for in LHWCA § 14(d).[4] To be

---

[4] Section 14 of the Act, 33 U.S.C. § 914, provides in relevant part:

> (b) The first installment of compensation shall become due on the fourteenth day after the employer has been notified pursuant to section 12, or the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in [biweekly] installments . . ..
>
> * * * * *
>
> (d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed

sure, the only stated *ground* of its controversions – that no competent proof of any stated extent of hearing impairment had been provided – was not a legally sufficient *ground* for controversion of the claimants' rights to compensation, but a mere assertion of a basis (though an invalid one, *see* pp. 19-21 *infra*) for *delay*. Nevertheless, having filed the form used to deny liability, having paid nothing in response to the claim, and having escaped assessment of an additional ten percent of the amount of compensation otherwise payable, pursuant to LHWCA § 14(e), on the basis of its filing of that notice, Avondale cannot validly claim that it did not "decline to pay," much less that it did not decline to pay *within* the stated time.

Avondale's contention that the phrase "declines to pay any compensation" in § 28(a) was not satisfied under the circumstances of these cases is thus insubstantial. Avondale did "declin[e] to pay any compensation on or before the

---

> by the Secretary, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.
>
> (e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

thirtieth day after receiving written notice of [Alario's and Howard's] claim[s] for compensation having been filed from the deputy commissioner."

2. "Claim" or "Valid Claim"

The bulk of Avondale's brief to the Court is devoted to the proposition that, because neither Alario nor Howard included with the claim he filed (or otherwise provided to Avondale until more than thirty days after the district director's service of notice of the filing of the claim on it) statutory "presumptive evidence" of the extent of his hearing loss (an audiogram by a licensed professional, with an accompanying report, *see* LHWCA § 8(c)(13)(C), 33 U.S.C. § 908(c)(13)(C)), Avondale "could not pay," or had no "obligation" to pay (or take any other action), in response to mere "unsubstantiated" claims. *See generally* Pet. Br. at 11-12, 13-17. It repeatedly characterizes the claims as not "valid," or requiring a response, Pet. Br. at 14, 15, or as not "meet[ing] the criteria of a 'claim' within the provisions of the Act," *id*. at 6, or as "no 'claim' when there was nothing to establish the extent of Claimants' hearing loss," *id*. at 9. Avondale does not attempt to relate its concept of a "valid claim" to the phrase of § 28(a), "notice of a claim for compensation having been filed from the deputy commissioner," or to any other relevant provision of the Act. It could, however, be understood to argue that the bare claim of which the district director gave notice in *Howard*, and the claim accompanied only by an audiogram not qualifying as "presumptive

evidence" of the extent of the hearing impairment in *Alario*, were not "claims" within the meaning of § 28(a). Some such premise appears to have underlain the initial decisions of the district director in *Alario*, and the Board panels' initial decisions, that Avondale was not liable for fees. As the district director and the Board recognized on reconsideration, that view is inconsistent with the statute.

The claims by Alario and Howard of which the district director gave notice to Avondale were on the (non-mandatory) form administratively prescribed for a "claim" under LHWCA § 13, 33 U.S.C. § 913.[5] Avondale does not even suggest any principles of statutory construction that would permit a reading of "claim" for purposes of § 28(a) that does not even encompass claims filed under § 13 on the form prescribed as a "claim," of which notice is given under § 19(b) as a "claim." Nothing in the Act requires that in order to constitute a "claim," for *any* purpose, a filing must have competent evidence attached showing a compensable disability; on the contrary, it is well established that any writing evidencing an intent to seek compensation under the Act constitutes a "claim," even in the absence of any attached evidence at all. *See*, *e.g.*, *Fireman's Fund Insurance Co. v. Bergeron*, 493 F.2d 545, 547 (5th Cir. 1974), and authorities cited therein.

---

[5] The claim form provided by the OWCP, its Form LS-203, is reproduced at "A" Ben. Rev. Bd. Serv. 3-10. It does not even ask the extent of the disability for which compensation is sought (though it does ask the question whether the injury "[h]as . . . resulted in permanent disability, amputation or serious disfigurement," LS-203 # 32, which both of these claimants answered in the affirmative).

Nor does the Act (or its implementing regulations) require even that the "claim" must specify the extent of the disability the claimant asserts is compensable. Even with no requirement of any such evidence or assertion – or, indeed, the filing of any claim at all –, the employer is required either to pay or to controvert the claimant's right to any compensation within 14 days of *learning of the asserted injury* (LHWCA § 14(d)), on pain of ten-percent augmentation of its liability if it does not pay within a further 14 days (§ 14(e)). In short, the Act contemplates that it is the *employer's* responsibility to respond to *any* notice of an asserted injury by promptly investigating to determine what, if anything, is due, and satisfying any liability its investigation shows is due and controverting to the extent its investigation shows compensation is *not* due.

Section 28(a) does not qualify "a claim" whose service on the employer by the district director requires the employer to pay what is in fact due within thirty days or else bear exposure to the claimant's attorney fees, any more than § 13(a), § 19(c), or any other provision limits the other consequences of a "claim" to only those claims accompanied by competent supporting evidence or asserting entitlement to a particular degree of disability. Alario's and Howard's claims were entirely effective, valid claims for purposes of § 28(a), just as much as for every other purpose under the Act.

Avondale centrally insists that until it received the qualifying, interpreted audiograms, there were no claims to which it could respond by paying benefits. As the Board recognized on reconsideration, this assertion is wholly insupportable. Rather, under such circumstances the employer could have conducted an investigation, primarily by scheduling the claimant for a hearing evaluation by a physician of its choice, to determine the extent, if any, of his entitlement, and then paid, controverted, or both, on the basis of the results of that investigation. It is the basic plan of the Act that the employer is to make such an evaluation for itself, very promptly, and pay what it finds to be due, without the need for the claimant even to file a claim, much less to go forward on his own to produce evidence. If Avondale had followed that plan when it was notified of the claimants' asserted hearing impairments, or even (belatedly) when given notice of the filing of the claims, and promptly paid what it found due, it would have absolved itself of any possible fee liability under § 28(a).[6] The notion that the employer cannot pay benefits until and unless it knows what the injured worker believes him- or herself entitled to, and is provided with "presumptive" evidence substantiating the extent

[6] Following the prompt-evaluation-and-payment-by-the-employer plan would have left Avondale subject to possible liability for a fee under § 28(b), if its payment was less than the claimant subsequently showed, through the efforts of counsel, to have been due. Even in such a case, however, § 28(b) would have given it a further chance to accept further liability, without litigation, and thereby to avoid bearing any fee liability. *See generally Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 409, *modified on rehearing*, 237 F.3d 409 (5th Cir. 2000).

of the disability, is contrary to the very structure of the Act, which places the initial responsibility for understanding and discharging the Act's obligations squarely on the employer, not on the injured worker. The consequence of the contrary approach, of leaving the claimant to make his case for himself, is liability under § 28(a) for fees for the claimant's attorney's services in doing so.

Section 28(a) dates the employer's time to pay without incurring add-on fee liability from when the district director gives the employer notice of a claim having been filed, not from when the claimant provides the employer with evidence constituting a prima facie case of entitlement.[7] Avondale fundamentally misperceives its obligations under the Act when presented with a claim (or indeed any notice of an asserted injury) in suggesting that it neglects no obligation under the Act if it responds merely, "Prove it!" Although it is free to take that course – requiring the claimant to make his case before it responds –, if the claimant

[7] Avondale asserts, citing only decisions of the Board, that the claimant must produce a "prima facie case" (albeit a minimal one) in order to invoke the "presumption" of LHWCA § 20(a), 33 U.S.C. § 920(a), that his claim is compensable "in the absence of substantial evidence to the contrary." Pet. Br. at 13. In the Director's view Avondale, like a mountain of *obiter dicta* to like effect in the Board's jurisprudence, is simply incorrect. Rather, the presumption attaches in terms, *in an adjudication*, to the allegations of and in support of the claim, without the need for the claimant to produce any evidence until the employer produces "substantial evidence to the contrary," at which point the presumption drops out of the case entirely (with respect to any element of the claim to which such evidence pertains). But in any event, that question relates only to whether an award of benefits should be issued, which is not at issue in the present cases. The responsibility *vel non* to produce evidence *at the time of a contested adjudication* has nothing to do with the requisites of a filing sufficient to constitute a "claim."

succeeds, through counsel, in doing so, the employer must bear the expense of the legal representation it has thereby required.

CONCLUSION

For the foregoing reasons, the decision below is in accordance with law, and the Court should affirm.

Respectfully submitted,

EUGENE SCALIA
Solicitor of Labor

JOHN F. DEPENBROCK
Associate Solicitor

BURKE WONG
Counsel for Longshore

JOSHUA T. GILLELAN II
Senior Attorney
U.S. Department of Labor
Frances Perkins Building, Suite S-4325
200 Constitution Avenue, N.W.
Washington, DC 20210
(202) 693-5331

Attorneys for the Director, OWCP

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2002, two copies of the foregoing Brief and one diskette containing the Brief in MSWord format were served by mail, postage prepaid, on each of the following:

Christopher M. Landry, Esq.
Blue Williams
3421 North Causeway Boulevard, 9th Floor
Metairie, LA 70002

John D. Gibbons, Esq.
Gardner, Middlebrooks
P.O. Box 3103
Mobile, AL 36652

Frank A. Bruno, Esq.
Bruno & Bruno
807 Howard Avenue
New Orleans, LA 70113

JOSHUA T. GILLELAN II
Attorney

CERTIFICATE OF COMPLIANCE WITH
5TH CIR. RULE 32.2.7(b)(1)

I hereby certify that the foregoing brief complies with the type-volume limitations of 5th Cir. Rule 32.2.7(b)(1). More particularly, (1) exclusive of exempted portions the brief contains (according to the word-processing program) 5,487 words of text, headings, and footnotes; and (2) it is produced by MS Word, in the fourteen-point Times New Roman proportional font, except for footnotes in twelve-point type of the same face. I understand that any misrepresentation or circumvention in this certificate may result in the brief being stricken and sanctions imposed against me.

JOSHUA T. GILLELAN II
Attorney