Nos. 11-73485

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AECOM TECHNOLOGY CORPORATION and ACE AMERICAN INSURANCE COMPANY

Petitioners

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR and RONNIE L. McDONALD,

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This proceeding arises from a claim for disability benefits filed by Ronnie McDonald under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. §§ 901-950, as extended by the Defense Base Act (DBA), 42 U.S.C. §§ 1651-1654. On August 12, 2010, Administrative Law Judge Richard Avery (the ALJ) issued a Supplemental Decision and Order

Awarding Attorney's Fees. Excerpts of Record (ER) 25-27. The ALJ had jurisdiction to adjudicate McDonald's claim under 33 U.S.C. § 919(d).

On September 14, 2010, AECOM filed a notice of appeal to the Benefits Review Board, which has authority to hear such appeals under 33 U.S.C. § 921(b)(3). Pet. br. at 2. AECOM's appeal to the Board was timely because it was filed within 30 days of August 23, 2010, the date the Supplemental Decision was filed with the district director for the Office of Workers' Compensation Programs' (OWCP's) Longshore District Office 13 in San Francisco. *Id.*; *see* 33 U.S.C. § 921(a).[1]

On September 19, 2011, the Board issued a Decision and Order affirming the ALJ's fee award. ER 1-14. AECOM timely filed its petition for review with this Court on November 17, 2011, Pet. br. at 2, within the 60-day period provided by 33 U.S.C. § 921(c). This DBA appeal was properly directed to the court of appeals rather than a district court. *Pearce*

[1] District directors are OWCP officials responsible for the initial administration of Longshore Act claims. The term "district director" has replaced "deputy commissioner," which is used in the statute. 20 C.F.R. § 702.105. This name change "in no way affects the authority of or the powers granted and responsibilities imposed by the statute on that position." *Id.*; *see also* 20 C.F.R. § 701.301(a)(7); *Kreschollek v. Southern Stevedoring Co.*, 223 F.3d 202, 206 (3d Cir. 2000). District directors were initially responsible for conducting hearings under the Act, a function that was transferred to administrative law judges in 1972. *See* 33 U.S.C. § 919(c).

v. Director, OWCP, 603 F.2d 763, 766-70 (9th Cir. 1979). Among the circuits, this Court has jurisdiction of AECOM's appeal because the district director who filed and served the award AECOM challenges is located in California. 42 U.S.C. § 1653(b); *Hice v. Director, OWCP*, 156 F.3d 214, 215-18 (D.C. Cir. 1998); *Service Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 454 (2d Cir. 2010).

STATEMENT OF THE ISSUE

Under Section 28(b) of the Longshore Act, an employer is liable for a claimant's reasonable attorney's fees when it contests the existence or extent of its liability and the claimant is awarded increased compensation. AECOM contended that it was not liable for McDonald's psychological condition and that its liability for McDonald's existing disability had decreased because that disability was no longer total. The ALJ held that AECOM was liable for the psychological condition, for ongoing total disability benefits, and for McDonald's reasonable attorney's fees. Was the ALJ's attorney's fee award permissible under Section 28(b)?

STATEMENT OF THE CASE

While working for AECOM in Afghanistan, McDonald developed a disabling pulmonary condition. ER 35, 51, 57, 59. AECOM did not dispute

that the condition was work-related, and voluntarily paid total disability and medical benefits beginning in May 2006. ER 34-35. McDonald was later diagnosed with diabetes. A dispute then developed over whether the diabetes had been caused by medication prescribed to treat McDonald's pulmonary condition, in which case it would be a secondary injury covered by the Act.

The district director unsuccessfully attempted to resolve the dispute voluntarily in two informal conferences. ER 56-60. After the second conference, the district director issued a written recommendation concluding that the diabetes had developed consequentially to McDonald's work-related pulmonary condition. ER 59. AECOM did not accept the recommendation and the case was referred to the Office of Administrative Law Judges for a formal hearing.

At the hearing, the ALJ considered several additional disputes not addressed in the district director's recommendation. AECOM argued that McDonald was no longer totally disabled by his pulmonary condition and was therefore entitled only to lower partial-disability benefits. McDonald alleged two additional secondary injuries: hypertension and a psychiatric condition. The ALJ concluded that McDonald's psychiatric condition was compensable, although his diabetes and hypertension were not. ER 33-50.

The ALJ also rejected AECOM's contention that McDonald was only partially disabled and ordered the employer to continue to pay compensation for total disability, as well as McDonald's past and future medical expenses for the covered pulmonary and psychiatric conditions. ER 47-48. No party appealed any aspect of that decision.

In a subsequent order, the ALJ concluded that AECOM was liable for McDonald's reasonable attorney's fees under Section 28(b) of the Longshore Act, 33 U.S.C. § 928(b). ER 15-27. AECOM appealed the fee order to the Board, which affirmed. ER 1-14. This appeal followed.

STATEMENT OF FACTS

A. Statutory framework.

1. Dispute resolution procedures

The Longshore Act and its implementing regulations establish a four-tier process for resolving claims. The first step is an informal conference before a district director, who can attempt to mediate any dispute. 20 C.F.R. §§ 702.311-.314. If the parties reach agreement on all issues, the district director issues, files, and serves a compensation order embodying that agreement. 20 C.F.R. § 702.315(a). If the parties do not reach an agreement, the district director prepares a memorandum setting forth the outstanding issues and a recommendation for their resolution. 20 C.F.R. §

702.316. The parties then have 14 days to decide whether to agree with the district director's recommendation. If the recommendation is not accepted by both parties, the district director forwards the case to the Office of Administrative Law Judges for a *de novo* hearing. *Id*. ALJ decisions are appealable to the Benefits Review Board and then to the courts of appeals. 33 U.S.C. §§ 919, 921.

2. Fee-shifting

The Longshore Act contains two fee-shifting provisions. The first, Section 28(a), is not at issue in this case because it applies only where an employer "declines to pay *any* compensation[.]" 33 U.S.C. § 928(a) (emphasis added). This case turns on Section 28(b), which provides, in relevant part:

> **(b) Attorney's fee; successful prosecution for additional compensation; independent medical evaluation of disability controversy; restriction of other assessments**
>
> If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy.
>
> If the employer or carrier refuse to accept such written recommendation, within fourteen days after its receipt by

> them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled.
>
> If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation.

33 U.S.C. § 928(b) (returns between sentences added for readability).

B. Proceedings on the merits.

1. Unsuccessful informal dispute resolution attempts

McDonald suffered his initial pulmonary injury on November 15, 2005, as a result of inhaling paint fumes while welding. ER 34. His condition worsened over time until, in May 2006, he was no longer able to work for AECOM. ER 35. AECOM did not dispute that the condition was work-related or, at least initially, that McDonald was totally disabled by it.[2] It therefore voluntarily paid total disability compensation and medical

[2] Disability under the Act is primarily an economic concept. *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990). A claimant is totally disabled if he or she is unable to secure any suitable alternate employment. *Id.*

benefits beginning in May 2006. ER 34-35.[3] Because 2/3 of McDonald's average weekly wage exceeded the $1,073.64 maximum weekly rate for fiscal year 2005 (during which he became disabled) benefits were paid at that maximum rate.[4]

After taking a steroid medication prescribed to treat his pulmonary condition for a number of months, McDonald was diagnosed with diabetes. ER 59. He raised the issue during an informal conference on May 6, 2008, at which the district director recommended that AECOM review McDonald's medical records to determine whether it agreed that medication prescribed for his pulmonary condition caused his diabetes. *Id.*[5]

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[3] The Act specifically contemplates that employers will pay benefits without a formal award. *See* 33 U.S.C. §914(a).

[4] Totally disabled workers are generally entitled to benefits equal to 2/3 of their pre-injury average weekly wage. 33 U.S.C. §§ 908(a)-(b), 910. Benefits are, however, subject to a maximum cap published annually by the Department equal to 200% of the national average weekly wage for the preceding year. 33 U.S.C. § 906(b)-(c). For most claimants, including McDonald, the applicable cap is the maximum rate for the fiscal year during which they become disabled and therefore entitled to benefits. *Roberts v. Sea-Land Servs. Inc.*, --- U.S. ---, No. 10-1399, slip op. at 18 (March 12, 2010) (*aff'g* 625 F.3d 1204 (9th Cir. 2010)).

[5] The May 2008 informal conference appears to have been initially called to address facial and dental fractures McDonald suffered in a fall as the result of a coughing spasm caused by his pulmonary condition. ER 56-57. It appears that AECOM paid McDonald's medical expenses for these injuries
Continued …

AECOM did not agree that McDonald's diabetes was related to his pulmonary medication. Consequently, a second informal conference was held on April 3, 2009. ER 58. After reviewing conflicting reports by McDonald's treating physician and a doctor retained by AECOM, the district director agreed with McDonald, recommending "that the diabetes has developed consequentially to the industrial asthma." ER at 59. AECOM did not accept the recommendation, and the case was referred for a formal ALJ hearing.

2. Proceedings before the ALJ

Before the ALJ hearing, both parties injected additional issues into the dispute. AECOM argued that McDonald was now only partially disabled, submitting testimony by a rehabilitation expert that McDonald was capable of performing a number of jobs paying from $7.50 to $13.00 per hour. ER 36. McDonald alleged that he had also developed hypertension and a psychiatric condition because of his pulmonary condition. ER 45. He also asserted that he should be allowed to change treating physicians. ER 48. AECOM opposed the request, arguing that McDonald had acquiesced to treatment by a doctor selected by its insurer. *Id.* As permitted under the

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which, in any event, are not before the Court. *Id.*

Longshore Act's implementing regulations, the ALJ heard and decided all the disputed issues in the case, rather than referring the case back to the district director for another informal conference.[6]

The ALJ determined that McDonald's diabetes and hypertension were not work-related but, based in part on admissions by AECOM's own expert, held that McDonald's psychiatric condition was work-related. ER. 44-45. He also rejected AECOM's argument that McDonald was only partially disabled. To reach that conclusion, the ALJ determined that none of the seven potential job openings AECOM identified in a labor market survey

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[6] 20 C.F.R. § 702.336 states, in relevant part:

> **Formal hearings; new issues.**
>
> (a) If, during the course of the formal hearing, the evidence warrants consideration of an issue or issues not previously considered, the hearing may be expanded to include the new issue. . . . If the new issue arises from evidence that has not been considered by the district director, *and such evidence is likely to resolve the case without the need for a formal hearing, the [ALJ] may* remand the case to the district director for his or her evaluation and recommendation[.]
>
> (b) At any time prior to the filing of the compensation order in the case, the [ALJ] *may in his discretion* give notice that he will consider any new issue[.]

(Emphasis added). Here, there is no indication that the parties could have resolved the disputed issues through another informal conference, and they had ample time to develop their respective positions on these issues prior to the hearing.

constituted suitable alternative employment either because they were unavailable or because McDonald was unable to perform them due to his pulmonary and psychiatric conditions. ER 47.

Accordingly, the ALJ ordered AECOM to continue to pay McDonald total disability compensation and to pay or reimburse him for all medical expenses reasonably necessary to treat his pulmonary and psychiatric conditions. ER 48. He also allowed McDonald to change treating physicians and invited his attorney to submit an application for fees. ER 48-49. No party appealed any aspect of the ALJ's order on the merits.

C. Proceedings on the attorney's fee issue.

McDonald's counsel submitted a fee application seeking a total of $74,731.65 for his work while the case was pending before the ALJ. ER 17. AECOM argued that it could not be liable for McDonald's fees under Section 28(b) because the issues McDonald prevailed on -- continuing total disability, the psychological condition, and choice of physicians -- were not disputed until after the case was referred to the ALJ. *Id.* The ALJ rejected the argument, concluding that, under this Court's law, 28(b) shifts liability for the claimant's attorney fees to the employer "when the existence or extent of disability is controverted and the claimant succeeds in establishing liability or obtaining increased compensation." ER 17 (*citing*, *Matulic v.*

Director, OWCP, 154 F.3d 1052, 1060 (9th Cir 1998); *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1354 (9th Cir. 1993); *National Steel & Shipbuilding Co. v. United States Dep't of Labor*, 606 F.2d 875, 882 (9th Cir. 1979)). The ALJ concluded that this standard was satisfied because McDonald established AECOM's liability for his psychological condition as well as securing additional medical benefits. ER 18.

The ALJ also refused AECOM's request for an "across-the-board reduction" of the fee award because McDonald lost on the hypertension and diabetes issues, in light of his success on other issues "including securing temporary total disability benefits from the date of Claimant's injury and continuing." *Id.* The ALJ did not, however, simply rubber-stamp the fee petition. To the contrary, he reduced counsel's hourly rate by $100 and denied numerous individual time entries claimed on the fee petition as clerical, duplicative, or related to issues on which McDonald was unsuccessful. ER 19-26. As the result of these and other adjustments, the ALJ awarded only $38,694.15 out of the requested $74,731.64 in fees. ER 26. The Benefits Review Board affirmed the ALJ's fee award in all respects. AECOM timely appealed.

SUMMARY OF ARGUMENT

This Court has expressly held, and repeatedly confirmed, that Section 28(b) shifts liability for a claimant's attorney's fees when an employer contests the existence or extent of liability and the claimant succeeds in establishing liability or obtaining increased compensation in formal proceedings. The ALJ's fee award easily satisfies that test. AECOM contested the extent of McDonald's acknowledged pulmonary disability and the existence of liability for his psychological injury. If AECOM had prevailed, McDonald's disability compensation would have been significantly reduced and his employer would not be obligated to pay for reasonable medical care for the psychological condition. As a result of the ALJ's award on the merits McDonald avoided this outcome and obtained increased compensation

AECOM attacks the fee award on two primary grounds. The first is that Section 28(b) does not permit fee shifting in this case because the issues McDonald prevailed on before the ALJ were not the subject of a written recommendation by the district director. But the law of this Circuit is clear that a written recommendation is not a precondition to fee-shifting under Section 28(b). AECOM's argument amounts to little more than an appeal to follow out-of-circuit caselaw. The second is that McDonald did not obtain

increased compensation as the result of the ALJ's merits award because medical benefits are not "compensation" for purposes of Section 28(b). This ignores the fact that McDonald was awarded continuing total disability benefits at the maximum rate, not the lower partial-disability award AECOM sought. This is increased "compensation" even under a narrow definition of the term. And, in any event, medical benefits are compensation for purposes of Section 28(b). AECOM has failed to identify any error in the fee award, which should be affirmed.

STANDARD OF REVIEW

This case presents a question of law – whether the ALJ's decision to shift fees under Section 28(b) was justified under the undisputed facts of this case – subject to *de novo* review. *Trachsel v. Rogers Terminal & Shipping Corp*., 597 F.3d 947, 949 (9th Cir. 2010). The Director's interpretation of the Longshore Act is, however, entitled to deference. *See, e.g., Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (since "the Secretary of Labor has delegated the bulk of her statutory authority to administer and enforce the Act, including rule-making power, to the Director," the Director's "reasonable interpretation of the Act" has some "persuasive force") (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

ARGUMENT

A. In this Circuit, attorney's fee liability shifts when an employer contests the extent of its liability and the claimant obtains a compensation award greater than the employer was willing to pay, even in the absence of a district director's written recommendation.

AECOM's primary argument on appeal is that McDonald is not entitled to a fee award because the issues he prevailed on before the ALJ – continuing total disability, coverage for his psychological condition, and choice of physician – were not the subject of a written recommendation by the district director. This argument is based on the last clause of Section 28(b)'s first sentence, which states that, if a controversy develops about the amount of additional compensation a claimant is entitled to, "the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy." 33 U.S.C. § 928(b).

It is firmly established in this Circuit that fee-shifting under Section 28(b) is not limited to situations where the employer rejects a district director's written recommendation after an informal conference. Indeed, fee-shifting does not depend on the existence of a written recommendation. As the "seminal Ninth Circuit decision regarding Section 982(b)," Pet. br. at 22, held:

> We do not believe that the statute contemplates the making of a written recommendation by the [district director] as a precondition to the imposition of liability for attorney's fees. The congressional intent was to limit liability to cases in which the parties disputed the existence or extent of liability, whether or not the employer had actually rejected an administrative recommendation.

Nat'l Steel & Shipbuilding Co. v. U.S. Dept. of Labor, OWCP ("*Holston*"), 606 F.2d 875, 882 (9th Cir. 1979). *Accord*, *Matulic v. Director, OWCP*, 154 F.3d 1052, 1061 (9th Cir. 1998) (Successful LHWCA claimants are entitled to fees "whether or not the employer actually rejected an administrative recommendation.") (citation omitted). *See generally E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1354 (9th Cir. 1993) ("The purpose of Section 928 is to authorize attorney's fees and costs against employers when the existence or extent of liability is controverted and the claimant succeeds in establishing liability or obtaining increased compensation[.]").

Contrary to AECOM's suggestion, this Court's later decisions have not retreated from *Holston's* clear holding. In *Todd Shipyards Corp. v. Director, OWCP*, 950 F.2d 607 (9th Cir. 1990) ("*Watts*"), a panel held that a claimant was not entitled to attorney's fees under Section 928(b). But it did so not because of a lack of a recommendation from the district director, but because the only issue that remained in the case after the informal conference was entitlement to attorney's fees for work performed prior to

formal litigation. The *Watts* panel plainly reiterated the holding of *Holston* that the purpose of Section 28(b) is to authorize assessment of legal fees where liability is contested and an attorney secures higher compensation in formal proceedings. 950 F.2d at 610. And it distinguished *Holston* only because:

> In this matter, there was no controversy concerning liability on the amount of compensation to be paid after the informal conference. These issues were resolved by Todd's concession and the parties' stipulation. Section 928(b) does not authorize the payment of attorneys' fees if the only unresolved issue is whether attorneys' fees awarded should be for services performed prior to the successful termination of the informal conference. That is the only issue that was unresolved after the informal conference in this matter.

Id. at 611.

Any doubt about *Holston's* continuing viability is eliminated by *Matulic v. Director, OWCP*, 154 F.3d 1052, 1061 (9th Cir. 1998), which squarely holds that, "where the extent of liability is controverted and the claimant successfully obtains increased compensation," fees can be shifted under Section 28(b) "even though [the employer] did not reject the OWCP [district director's] recommendation." The panel went on to emphasize the consistency between *Watts* and *Holston,* explaining that "[t]he holding in [*Watts*] is simply that §928(b) is inapplicable when, following the informal conference, there is no longer any dispute regarding the employee's right to

disability compensation or other benefits or reimbursement" and pointing out that Watts "reiterated our earlier explanation [in *Holston*] of the intent underlying the enactment of §928(b)." *Id.* (emphasis added).[7]

Hemmed in by these precedents, AECOM urges the panel to apply decisions by other courts of appeals that, in its view, would compel a different outcome. Pet. br. at 15-22, 27-28. Even assuming, for the sake of argument, that those decisions would in fact lead to a different result in this case, this panel is bound by Ninth Circuit law. *See, e.g.*, *Murray v. Cable Nat. Broadcasting Co.*, 86 F.3d 858, 960 (9th Cir. 1996) ("[O]nly a panel sitting *en banc* may overturn existing Ninth Circuit precedent.") (internal quotation and citation omitted).

As the ALJ and Board properly recognized, in this Circuit fees can shift under Section 28(b) in the absence of a written recommendation from the district director. The fact that there is no written recommendation specifically addressing the issues McDonald ultimately prevailed on is therefore no bar to fee shifting in this case.

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[7] AECOM's suggestion that *Dyer v. Cenex Harvest States Co-op*, 563 F.3d 1044 (9th Cir. 2009) is inconsistent with *Holston* is puzzling. *Dyer* involved fee-shifting under Section 28(a), and turned on an analysis of the word "thereafter" as used in that subsection, which has no obvious relevance to this case. *Dyer*, 563 F.3d at 1046.

B. The ALJ and Board correctly determined that McDonald obtained a compensation award greater than AECOM was willing to pay, thus shifting fee liability to his employer.

AECOM's second principal line of argument is based on the fourth sentence of Section 28(b), which allows fee shifting only where "the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier[.]" 33 U.S.C. § 928(b). According to AECOM, "compensation" in this context is limited to disability benefits and other periodic money payments. Pet. br. 33. The increased medical benefits McDonald was awarded for his psychological condition, so the theory goes, are not "compensation" for purposes of Section 28(b) and therefore cannot justify fee-shifting. Pet. br. 21, 39-40.

This argument completely overlooks the fact that McDonald was awarded more than medical benefits; he was awarded total disability benefits back to the date he was injured and continuing. ER 48. As a result, he is entitled to benefits at the maximum compensation rate of $1,073.64 per week. This is compensation even under AECOM's narrow definition. Before the ALJ, AECOM disputed the extent of McDonald's disability, arguing that he was capable of performing a number of available jobs and therefore was only partially disabled. ER 46-47. Had AECOM prevailed,

McDonald's disability benefits would have been reduced to as little as $764.27 per week, substantially lower than his current entitlement.[8]

AECOM apparently believes the total disability award is irrelevant because it voluntarily paid compensation at the $1,073.64 maximum rate while it was litigating the issue. The Fifth Circuit, however, correctly rejected a substantially identical argument in *Carey v. Ormet Primary Aluminum Corporation*, 627 F.3d 979 (5th Cir. 2010). In *Carey*, the employer disputed the claimant's average weekly wage, but voluntarily paid benefits based on the higher average (with which it disagreed) during the adjudication of the case. 627 F.3d at 983. After losing on the merits, the employer argued that the claimant was not entitled to attorney's fees under Section 28(b) because he had not been awarded more compensation than the employer paid voluntarily.

The Fifth Circuit, agreeing with the Director, disagreed. On a plain reading of Section 28(b), the question is not whether a claimant is awarded

[8] Partially disabled workers are paid two-thirds of the difference between their pre-injury average weekly wage and their residual earning capacity. 33 U.S.C. §§ 908(c) & (e). The parties stipulated that McDonald's average weekly wage was $1,666.40, and AECOM's rehabilitation expert testified that McDonald was capable of performing a number of jobs paying from $7.50 to $13.00 per hour – *i.e.*, $300-$520 per 40-hour week. ER 36. 2/3 of ($1,666.40 – $520) = $764.27.

more compensation than the employer voluntarily paid while contesting that amount in formal administrative proceedings. *Id.* An employee is entitled to an award of attorney's fees when he secures more compensation than the amount "to which [the employer] believe[s] the employee is entitled." *Id.* (*citing*, 33 U.S.C. § 928(b)).[9]

While AECOM made voluntary compensation payments at the maximum rate, it is clear that it did not believe McDonald was entitled to those benefits. Instead, it tried to lower McDonald's compensation through

[9] The relevant portion of Section 28(b) states:

> If the employer or carrier refuse to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, *to which they believe the employee is entitled.* If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation.

33 U.S.C. § 928(b) (emphasis added).

litigation but was ultimately unsuccessful.[10] As in *Carey*, AECOM is liable for McDonald's attorney's fees under Section 28(b).[11]

In light of the ALJ's total disability award, the Court need not address AECOM's argument that medical benefits are not "compensation" for purposes of Section 28(b). Cases interpreting the same word in Section 28(a), however, suggest that they are. *See, e.g., Oilfield Safety and Machine Specialties, Inc. v. Harman Unlimited*, 625 F.2d 1248, 1257 (5th Cir. 1980) (holding that medical benefits are "compensation" for purposes of Section 28(a)). The Director agrees.

As AECOM points out, the word "compensation" is used in several senses in the Longshore Act, some of which would not include medical benefits. Pet br. at 31-32. But it is equally clear that "Congress used the term 'compensation' on several occasions in a fashion encompassing medical expenses." *Oilfield* Safety, 625 F.2d at 1257. Given this ambiguity, the *Oilfield Safety* court appropriately looked to the policies underlying

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[10] Had AECOM prevailed in reducing McDonald's compensation rate, it may have been able to recover its voluntary overpayments as a credit against McDonald's future partial disability benefits. *See* 33 U.S.C. § 914(j).

[11] This substantial total disability award – which entitles McDonald to $1,073.64 per week for the duration of his disability – wholly undermines AECOM's various suggestions that the ALJ's $38,694.15 fee award is facially unreasonable. Pet. br. at 36-40.

Section 28(a) – ensuring that a disabled worker's right to benefits is not diminished by attorney's fees necessary to vindicate that right and encouraging employers to pay valid claims – in concluding that it allows fee shifting in cases where the claimant secures only medical benefits. *Id; accord, Hunt v. Director, OWCP*, 999 F.2d 419, 424 (9th Cir. 1993) (identifying same policies in Section 28(a); holding that medical providers are entitled to attorney's fees if they successfully recover unpaid medical bills from Longshore employers). Section 28(b), a neighboring fee-shifting provision in the same section of the Act that advances similar policies, should be interpreted the same way. If the Court chooses to address the issue, it should hold that medical benefits are "compensation" for purposes of Section 28(b).

CONCLUSION

For all the above reasons, the decision of the Benefits Review Board should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The Director is unaware of any related cases pending before this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14 point typeface, and contains 4,298 words, as counted by Microsoft Office Word 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2012, I electronically filed the foregoing Brief of the Federal Respondent with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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