No. 13-1457

In the Supreme Court of the United States

STEVEN LINCOLN, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

M. PATRICIA SMITH
Solicitor of Labor
RAE ELLEN JAMES
Associate Solicitor
MARK A. REINHALTER
GARY K. STEARMAN
Counsels
MATTHEW W. BOYLE
Attorney
Department of Labor
Washington, D.C. 20210

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Section 28(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, requires an employer to pay a claimant's attorney's fees if, within 30 days of receiving notice of a claim for injury, the employer "declines to pay any compensation" on the ground that it is not liable for benefits, and the employee thereafter utilizes the services of an attorney to successfully prosecute his claim. 33 U.S.C. 928(a).

The question presented is whether the requirement to pay "any compensation" is satisfied when an employer, which lacks knowledge of the extent of claimant's alleged injury, timely pays one week of benefits at the statutory maximum compensation rate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations: Page

In the Supreme Court of the United States

No. 13-1457

STEVEN LINCOLN, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A13-A24) is reported at 744 F.3d 911. The decision of the Benefits Review Board of the Department of Labor (Pet. App. A8-A12), and the orders of the district director (Pet. App. A1-A2, A3-A4, A5-A7), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2014. The petition for a writ of certiorari was filed on June 3, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, establishes a federal workers' compensation system for employees' disability or death in the course of covered maritime employment. See 33 U.S.C. 903(a), 908, 909. An employee's compensation depends on the severity of his disability and his pre-injury pay. *Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1354 (2012) (citing 33 U.S.C. 908(a)-(b), 910).

Once an employee provides notice of a disabling injury, the LHWCA requires that an employer pay benefits voluntarily, without a formal administrative proceeding, unless the employer controverts its liability. *Roberts*, 132 S. Ct. at 1354-1355 (citing 33 U.S.C. 914(a)); see 33 U.S.C. 912, 913, 914. If the employer controverts liability, or if the employee disputes the employer's action, the District Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP) may conduct an informal conference and recommend, in writing, a disposition of the claim.[1] See 20 C.F.R. 702.311-702.314. If the informal conference fails to resolve the claim, an administrative law judge (ALJ) conducts a hearing, resulting in a formal compensation order. See 33 U.S.C. 919(c)-(e); 20 C.F.R. 702.316, 702.331-702.351. The vast majority of cases, however, resolve though voluntary payment or settlement without the entry of a formal order. *Roberts*, 132 S. Ct. at 1355.

---

[1] Regulations promulgated by the Department of Labor use the term "District Director" in lieu of the statutory term "Deputy Commissioner." 20 C.F.R. 701.301(a)(7) (emphasis omitted).

The Act provides for two situations in which a claimant may recover from the employer "a reasonable attorney's fee" following successful prosecution of his claim. 33 U.S.C. 928. First, a fee award is authorized when the employer "declines to pay any compensation" within 30 days of receiving written notice of the filing of a claim for compensation, "on the ground that there is no liability for compensation," and the claimant successfully prosecutes the claim with the assistance of an attorney. 33 U.S.C. 928(a). Second, a fee award may be authorized in certain circumstances when a dispute arises as to the appropriate amount of compensation and the case proceeds to an informal conference. If, following an informal conference, the employer refuses to accept the district director's written recommendation within 14 days, the employer must pay any additional compensation to which the employer believes the claimant is entitled. If the claimant refuses to accept the payment and, with the assistance of an attorney, is awarded compensation in excess of the amount offered by the employer, the claimant is entitled to a reasonable attorney's fee based on the difference between the amount awarded and the amount tendered. 33 U.S.C. 928(b).

2. On April 11, 2011, petitioner received results of a hearing test that showed hearing loss, but did not specify the extent of the hearing impairment. Pet. App. A14-A15, A25. On May 24, 2011, petitioner filed a claim for benefits with the district director, naming respondent Ceres Marine Terminals, Inc. (Ceres) as his employer and including a copy of the April 11

audiogram.[2] *Id.* at A14. On May 26, 2011, Ceres, apparently having received the claim directly from petitioner, filed a notice of controversion. Ceres agreed that petitioner's hearing loss was noise-induced but requested, *inter alia*, an opportunity to confirm the extent of petitioner's hearing loss. *Id.* at A14-A15, A25.

On June 14, 2011, Ceres received formal notice of the claim from the district director. On July 7, 2011, Ceres paid petitioner $1256.84—an amount equal to one week of compensation for a 0.5% binaural hearing loss.[3] On July 15, 2011, petitioner underwent an audiogram at Ceres' request which showed a 10% binaural hearing loss. Ceres, however, paid no further compensation until October 4, 2011, when the district director approved a settlement between the parties

---

[2] The record is unclear whether petitioner provided the district director and Ceres with the required initial notice of injury under 33 U.S.C. 912(a). Even if he did not, the claim is not barred because it does not appear that Ceres timely objected to the late notice. 33 U.S.C. 912(d).

[3] Binaural hearing loss may be compensated up to a maximum of 200 weeks (for total binaural hearing loss) under the LHWCA. 33 U.S.C. 908(c)(13)(B). Partial hearing loss is compensated in amounts proportionally related to the 200 week maximum. 33 U.S.C. 908(c)(19). Thus, a claimant with a 25% binaural hearing loss would receive 50 weeks of compensation (25% of 200 weeks). Here, Ceres paid one week of compensation out of the maximum 200 (1/200th), which corresponds to a 0.5% binaural hearing loss. Petitioner's actual wages, $2633.75 per week, Pet. App. A37, entitled him to receive compensation at the maximum statutory rate, which at the time was $1256.84. 33 U.S.C. 906(b)(1), 908(c); see United States Dep't of Labor, *National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, and Annual October Increases (Section 10(f))*, www.dol.gov/OWCP/DLHWC/NAWWinfo.htm (last visited Aug. 21, 2014).

pursuant to 33 U.S.C. 908(i). The settlement agreement awarded petitioner an additional $23,879.96 bringing the total paid for disability to $25,136.80, which represented the 20 weeks of compensation payable for a 10% binaural hearing loss multiplied by the maximum statutory rate, and $4000 in medical benefits. Pet. App. A15-A16.

Prior to the settlement approval, petitioner requested that Ceres pay his attorney's fees in the amount of $3460, pursuant to 33 U.S.C. 928(a). Pet. App. A16. Petitioner, relying on *Green* v. *Ceres Marine Terminals, Inc.*, 43 Ben. Rev. Bd. Serv. (MB) 173 (2010), rev'd on other grounds, 656 F.3d 235 (4th Cir. 2011), argued that the $1256.84 payment did not qualify as "compensation," but rather was a sham payment designed solely to defeat the application of Section 928(a).[4] Ceres opposed the petition for attorney's fees. The district director denied petitioner's fee petition, finding that Ceres' payment of $1256.84 did not fall within *Green*'s rationale. Pet. App. A6-A7, A16-A17.

3. The Benefits Review Board (BRB) affirmed the district director's denial of the petition for attorney's fees. Pet. App. A8-A12. The BRB held that the dis-

---

[4] In *Green*, the employer paid the claimant $1 within 30 days of receiving official notice of the claim, but thereafter contested the claim and made no further payments until an ALJ issued a compensation order awarding benefits. 43 Ben. Rev. Bd. Serv. (MB) at 177. The ALJ found that, under those circumstances, the employer's $1 payment was not compensation for claimant's injury, but a nominal amount paid in an attempt to avoid attorney's fee liability. The Benefits Review Board affirmed, *ibid.*, and the employer did not pursue the issue on appeal to the Fourth Circuit, which granted the employer's appeal on grounds not relevant here, see 656 F.3d at 237, 240-242.

trict director "acted within his discretion" in finding that the employer's timely payment of a full week of disability compensation ($1256.84) constituted "actual compensation" and not a "nominal" payment. *Id.* at A11. The BRB thus upheld the district director's denial of petitioner's attorney's fee request. *Id.* at A11-A12.

4. The court of appeals affirmed. Pet. App. A13-A24. Agreeing with the BRB, the court held that "Ceres' payment of one week's benefits at the maximum compensation rate, being directly tied as it was to [petitioner's] alleged injury, qualifies as 'compensation' within the meaning of [Section] 928(a)." *Id.* at A23. The court found that "[t]he term 'any compensation' is unambiguous and plainly encompasses an employer's partial payment of compensation." *Id.* at A19. The court reasoned that full payment within 30 days of a claim was not required: "as [petitioner's] claim demonstrates, the medical evidence establishing the extent of the claimant's injury, and thus the amount of his benefits, is often in flux and cannot be ascertained with any degree of certainty within 30 days of his claim." *Ibid.* The court therefore found that "Section 928 provides an employer [with] a safe harbor: if it admits liability for the claim by paying some compensation to the claimant * * * ,it is sheltered from fee liability under [Section] 928(a)." *Id.* at A19–A20 (citing *Andrepont* v. *Murphy Exploration & Prod. Co.*, 566 F.3d 415, 418-419 (5th Cir. 2009) (per curiam), and *Day* v. *James Marine, Inc.*, 518 F.3d 411, 419 (6th Cir. 2008)).[5]

---

[5] Even if an employer initially pays or tenders compensation, the court of appeals recognized, Pet. App. A20, that Section 928(b) provides a second mechanism for shifting attorney's fee liability if

The court of appeals also rejected petitioner's argument that fee liability was triggered by Ceres' filing of a notice of controversion, finding that "Section 928(a) nowhere * * * references notices of controversion" and "contains only one explicit trigger: the payment of 'any compensation' within 30 days." Pet. App. A24. Because Ceres met this requirement, the court held it was not liable for attorney's fees under Section 928(a). *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The court of appeals sustained the BRB's determination that Ceres' payment of one week of compensation was not a sham, but rather was an amount "directly tied * * * to [petitioner's] alleged injury." Pet. App. A23. The BRB and the court of appeals reasonably found that the amount was derived from the maximum statutory rate of compensation and reflected the medical uncertainty regarding the extent of petitioner's injury, given that the initial audiogram failed to specify the degree of his hearing loss. *Id.* at A14-A15; see *id.* at A25 (Ceres' request for an opportunity to confirm the extent of hearing loss). This factual determination does not warrant further review by this Court.

---

a controversy subsequently develops over the amount of compensation due and the case proceeds to an informal conference, 33 U.S.C. 928(b). But, the court noted that, because petitioner settled the case rather than request an informal conference, Section 928(b) did not apply. *Id.* at A22.

The court of appeals' ruling that Ceres' timely payment of partial compensation provided a "safe harbor" from attorney's-fee liability under Section 928(a), Pet. App. A19, is consistent with its earlier decisions, *Virginia Int'l Terminals, Inc.* v. *Edwards*, 398 F.3d 313, 316 (4th Cir.), cert. denied, 546 U.S. 960 (2005), and *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, 474 F.3d 109, 113 (4th Cir. 2006); and with the decisions of other courts of appeals. See *Andrepont* v. *Murphy Exploration & Prod. Co.*, 566 F.3d 415, 419 (5th Cir. 2009) (per curiam); *Pittsburgh & Conneaut Dock Co.* v. *Director, OWCP*, 473 F.3d 253, 263-264 (6th Cir. 2007); *Savannah Mach. & Shipyard Co.* v. *Director, OWCP*, 642 F.2d 887, 889 (5th Cir. 1981) (per curiam). No court of appeals has held otherwise.

2. Petitioner relies (Pet. 14-17) on this Court's decision in *Roberts* v. *Sea-Land Services, Inc.*, 132 S. Ct. 1350 (2012), to contend that Section 928(a) is intended to "bind the Employer to * * * accept or deny a claim" so as to prevent it from "com[ing] up with an imaginary number * * * solely to evade paying attorney['s] fees." That contention is without merit.

In the first place, as discussed above, the courts below rejected petitioner's contention that Ceres' initial payment was a sham, finding instead that the payment was reasonably tied to the potential compensation due, in light of the medical uncertainty. See Pet. App. A6-A7, A11-A12, A23.

At any rate, as the court of appeals noted, "[n]owhere in *Roberts* did the Supreme Court analyze the meaning of 'any compensation' in [Section] 928(a), the

central issue in this case." Pet. App. A23 n.1.[6] Nothing in *Roberts* suggests that Section 928(a) was intended to force an employer to "accept or deny a claim" before commencing voluntary payments, and before it is furnished with medical or other information establishing the cause and severity of the injury.

To the contrary, while *Roberts* mentioned the potential for "gamesmanship" by employer and claimant, see 132 S. Ct. at 1359 n.6 & 1360, this Court found that the LHWCA operates as a largely voluntary scheme with incentives that favor informal dispute resolution over formal adjudications. *Id.* at 1358. *Roberts* cited several mechanisms which encourage fair participation in that voluntary process, including verification of the rate of compensation by a Department of Labor claims examiner, *id.* at 1358-1359;[7] potential for review by an ALJ, and liability for interest on unpaid compensation, *id.* at 1363.

In this case, the court of appeals similarly emphasized the LHWCA's preference for voluntary resolution observing that a claimant must "exhaust[] the non-adversarial avenues for resolving his claim," before he can "avail himself of the fee-shifting provi-

---

[6] *Roberts* resolved a controversy over the date used to determine the statutory benefits maximum, which is recalculated each fiscal year pursuant to 33 U.S.C. 906. *Roberts* held that the maximum benefit level is determined by the date of disability, rather than by the date an employer begins voluntary compensation payments, or the date of a formal compensation award. 132 S. Ct. at 1363.

[7] See United States Dep't of Labor, *Division of Longshore and Harbor Workers' Compensation (DLHWC) Procedure Manual*, ch. 2-0201(3) (June 23, 2014), http://www.dol.gov/owcp/dlhwc/lsproman/proman.htm.

sions" under Section 928(b). Pet. App. A21. The court explained that this interpretation advances "the purposes of the LHWCA, one of which is to lessen the occasions where attorney's fees are incurred." *Ibid.* This view is entirely consistent with *Roberts*' characterization of the overarching purpose and structure of the LHWCA.

3. Petitioner last maintains (Pet. 17-19) that the court of appeals erred by rejecting his contention that Ceres "irrevocably triggered" Section 928's fee liability when it initially filed a notice of controversion pursuant to Section 914.[8]

The court of appeals correctly rejected this argument, finding that Section 928(a) neither incorporates nor references Section 914 as a trigger for fee liability. Pet. App. A24. The court thus properly relied on Section 928(a)'s plain language, which triggers liability for attorney's fees only where the employer fails to pay "any compensation" within 30 days of the notice of a claim. *Ibid.* Petitioner cites no other support for his contention, which is contrary to the plain meaning of the statute.

---

[8] Section 914 requires an employer to begin making voluntary payments or file a notice of controversion within 14 days of receipt of notice of a claim pursuant to 33 U.S.C. 912, or within 14 days of when it has "knowledge of the [employee's] injury." 33 U.S.C. 914(a), (b) and (d). By timely filing a notice of controversion an employer is excused from Section 914(e)'s 10% penalty for nonpayment of compensation. 33 U.S.C 914(e). An employer who controverts, but is later held liable for benefits, is required to pay interest on the unpaid compensation. *Roberts*, 132 S. Ct. at 1363. Section 914 does not address attorney's fee liability.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

M. PATRICIA SMITH
Solicitor of Labor
RAE ELLEN JAMES
Associate Solicitor
MARK A. REINHALTER
GARY K. STEARMAN
Counsels
MATTHEW W. BOYLE
Attorney
Department of Labor

SEPTEMBER 2014