

ANTHONY E. CANINGTON)

Claimant-Respondent)

v.)

SERVICE EMPLOYEES)

INTERNATIONAL, INCORPORATED)

and)

INSURANCE COMPANY OF THE STATE)

OF PENNSYLVANIA)

Employer/Carrier-)

Petitioners)

DIRECTOR, OFFICE OF WORKERS')

COMPENSATION PROGRAMS, UNITED)

STATES DEPARTMENT OF LABOR)

Respondent)

DATE ISSUED: 02/26/2010

DECISION and ORDER

Appeal of the Order Approving Attorney's Fees of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Gregg Anderson (Camerlengo & Brockwell), Jacksonville, Florida, for claimant.

Frank J. Sioli and Benedicte A. Boutrouille (Brown Sims, P.C.), Miami, Florida, for employer/carrier.

Ann Marie Scarpino (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Approving Attorney's Fees (2009-LDA-00020) of Administrative Law Judge Stuart A. Levin rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained a work-related injury to his right arm on January 2, 2005, for which employer voluntarily paid him temporary total disability benefits from February 14, 2005, through February 19, 2006. Employer notified the district director, on October 23, 2006, that it suspended payments because claimant "continues to move each time he has an appointment to address [his] return to work." Employer's Exhibit (EX) C. Claimant subsequently filed a claim for benefits on March 31, 2008, and employer did not pay any benefits in response to this claim. Following an informal conference on August 7, 2008, the district director, without making any recommendation regarding the payment of compensation, suggested that the parties arrange to have claimant's condition reevaluated. EX F.

The case was transferred to the Office of Administrative Law Judges (OALJs) for a formal hearing, but prior to the hearing, the parties reached an agreement on claimant's entitlement to medical benefits and filed a joint motion to remand the case to the district director for "on-going claims administration." Claimant's counsel filed an attorney's fee petition with the OALJs, requesting a fee totaling \$3,211.25. Employer objected to the fee petition arguing that, in the absence of a written recommendation by the district director, it cannot be liable for an attorney's fee under Section 28(b), 33 U.S.C. §928(b). The administrative law judge found that claimant's counsel is entitled to an attorney's fee payable by employer pursuant to Section 28(a), 33 U.S.C. §928(a), based on his successful prosecution of the claim. Noting that employer did not contest the number of hours or the hourly rate requested by claimant's counsel, the administrative law judge thus awarded the requested attorney's fee of \$3,211.55 in its entirety.

On appeal, employer challenges the administrative law judge's award of an attorney's fee. Claimant and the Director, Office of Workers' Compensation Programs (the Director) respond, urging affirmance of the administrative law judge's Order Approving Attorney's Fees.

Employer argues that the administrative law judge erred in awarding an attorney's fee pursuant to Section 28(a) since it voluntarily paid claimant compensation in this case, *i.e.*, temporary total disability benefits from February 14, 2005, through February 19, 2006, albeit prior to the filing of claimant's claim. In support of its argument, employer cites the Board's unpublished decision in *Cooper v. Pool Co.*, BRB No. 98-1402 (1999)(unpub.), wherein the Board held that Section 28(a) was inapplicable because the employer paid claimant some compensation prior to the filing of his claim. Employer acknowledges that the Board's decision was reversed by the United States Court of Appeal for the Fifth Circuit, *see Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001), but argues that the Fifth Circuit's decision is not binding in this case, which arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit.

Section 28 of the Act provides the authority for awarding attorney's fees under the Act. Section 28(a) provides that an employer is liable for an attorney's fee if, within 30 days of its receipt of a claim from the district director's office, it declines to pay *any* compensation. 33 U.S.C. §928(a);¹ *Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Cooper*, 274 F.3d 173, 35 BRBS 109(CRT); *A.M. [Mangiantine] v. Electric Boat Corp.*, 42 BRBS 30 (2008); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007); *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004). Once the 30-day period has expired without the payment of any benefits to the claimant, fee liability shifts to the employer, and Section 28(a) applies to the entire claim, regardless of whether any benefits had been paid prior to the filing of the claim or following the expiration of the 30-day period. *Day*, 518 F.3d 411, 42 BRBS 15(CRT); *Cooper*, 274 F.3d 173, 35 BRBS 109(CRT); *Gordon*, 41 BRBS 13; *see also*

¹ Section 28(a), 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 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 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.

Mangiantine, 42 BRBS at 33-34. Thus, the fact that employer voluntarily paid claimant benefits for his work injury prior to the filing of claimant's claim is irrelevant for purposes of determining its liability for an attorney's fee under Section 28(a).² *Id.*

As it is undisputed that employer did not pay any compensation to claimant within 30-days of its receipt of the claim from the district director's office,³ employer is liable for an attorney's fee under Section 28(a) for reasonable and necessary attorney services since, as the administrative law judge concluded, there was a "successful prosecution" of the case. 33 U.S.C. §928(a); 20 C.F.R. §702.132. Moreover, as employer does not challenge the amount of the administrative law judge's fee award, we affirm the award of an attorney's fee, payable by employer, of \$3,211.25, pursuant to Section 28(a), 33 U.S.C. §928(a).

Accordingly, the administrative law judge's Order Approving Attorney's Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

² We reject employer's argument that the Board's decision in *Pool* is controlling, since the Board has subsequently adopted the rationale applied by the Fifth Circuit in its reversal of the Board's decision. *See Mangiantine*, 42 BRBS at 33; *Gordon*, 41 BRBS 13. Moreover, as a general proposition, unpublished decisions of the Board have no precedential value. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990).

³ The district director provided written notice of the claim to employer on or about April 15, 2008, and employer did not pay any compensation within 30 days after receiving this notice.