

ANTONIO MAZZARIELLO)
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 Claimant-Petitioner)
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 v.)
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 P&O PORTS) DATE ISSUED: 12/29/2005
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 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Compensation Order of Richard V. Robilotti, District Director, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Compensation Order (OWCP No. 02-134686) of District Director Richard V. Robilotti 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.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was injured on January 5, 2004, during the course of his employment.¹ Claimant filled out a claim form on January 12, 2004 and subsequently sent it to the

¹ It appears that claimant was hit in the left eye with a piece of rope. He was diagnosed with a corneal abrasion and was also treated for resultant migraine headaches.

district director. Employer filed a Notice of Controversion on January 27, 2004, contesting liability as no medical reports were available to show that claimant lost time from work due to the injury. The Office of Workers' Compensation Programs issued an acknowledgement of the claim on January 27, 2004, which was received by employer on January 30, 2004. On February 12, 2004, claimant requested an informal conference and submitted medical reports to substantiate his claim for benefits through January 18, 2004. On February 20, 2004, employer voluntarily paid claimant temporary total disability benefits for the period from January 6 to January 18, 2004. On May 5, 2004, claimant submitted an additional medical report stating that claimant had not been released to work until February 15, 2004. Employer states it received this report on May 12, 2004. By letter dated May 28, 2004, employer accepted liability for benefits for this period, and on June 2, 2004, paid temporary total disability benefits from January 19 to February 15, 2004.

Subsequently, claimant's counsel submitted a petition for an attorney's fee payable by employer in the amount of \$1,800, representing 6 hours of legal services at the hourly rate of \$300, for work performed before the district director. The district director denied the fee petition on the basis that employer paid compensation benefits upon receipt of medical reports from claimant's physician, and thus is not liable for claimant's attorney's fee.

On appeal, claimant contends that the district director erred in finding that employer is not liable for an attorney's fee. Specifically, claimant contends that employer did not pay benefits within 30 days of the claim's being presented. Employer responds, urging affirmance of the district director's order.

Section 28 of the Act, 33 U.S.C. §928, provides for the award of an attorney's fee to claimant's attorney. An attorney's fee can be levied against an employer only if the conditions of Section 28(a) or Section 28(b) are met. 33 U.S.C. §928(a), (b). Section 28(a) of the Act provides that the employer is liable for a reasonable attorney's fee in addition to the compensation award when it "declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim" from the district director and thereafter claimant utilizes the services of an attorney who engages in a successful prosecution of his claim. *See generally Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004). Employer is liable pursuant to Section 28(a) for those fees incurred after 30 days from the date employer received notice of the claim from the district director or from the date employer declines to pay benefits, whichever occurs sooner. *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT)(9th Cir. 2003); *see also Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003). If employer pays benefits without an award and claimant seeks additional compensation, employer can avoid liability for claimant's attorney's fee by, *inter alia*, tendering or paying the recommended benefits within 14 days. 33 U.S.C. §928(b).

In the present case, the district director issued a formal acknowledgement of the claim on January 27, 2004, which was received by employer on January 30. In addition, employer filed a Notice of Controversion of the claim on January 27, 2004, contesting liability on the basis that it had not received supporting medical documentation. Therefore, the earliest date from which employer's liability for an attorney's fee would have accrued is January 30, 2004. *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT). However, employer voluntarily paid temporary total disability benefits on February 20, 2004, within 30 days of its receipt of the claim. Therefore, employer cannot be held liable for claimant's attorney's fee pursuant to Section 28(a). Moreover, when claimant sought additional benefits on May 5, 2004, by virtue of a medical report stating that the period of claimant's disability had extended to February 15, employer voluntarily tendered and paid an additional period of temporary total disability benefits within 14 days of its receipt of the request for additional benefits. Therefore, as employer paid claimant additional compensation benefits within the time frame contemplated by Section 28(b), we affirm the district director's finding that employer is not liable for claimant's attorney's fee. *See generally Virginia International Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2003), *cert. denied*, 126 U.S. 478 (2005).

Accordingly, the district director's Compensation Order finding that employer is not liable for claimant's attorney's fee is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge