

PAOLO TORNABENE)
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 Claimant-Respondent)
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 v.)
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 NORVAL, INCORPORATED) DATE ISSUED:
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 and)
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 STATE INSURANCE FUND)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Compensation Order - Award of Attorney's Fees of Richard V. Robilotti, District Director, United States Department of Labor.

Angelo C. Gucciardo (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Richard A. Cooper (Fischer Brothers), New York, New York, for employer/carrier.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Compensation Order - Award of Attorney's Fees (Case No. 2-102876) 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 may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act, as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

The facts of this claim are uncontroverted. Claimant was injured on June 5, 1990, during the course of his employment with employer. Employer commenced voluntary payments of

compensation to claimant on June 20, 1990. Claimant filed a Claim for Compensation (LS-203) under the Act on June 28, 1990. Subsequently, employer filed a Notice of Payment of Compensation Without Award (LS-206) on July 6, 1990, but temporarily continued its voluntary payments of compensation at the New York state maximum rate of \$300 per week pending receipt of claimant's payroll information. The Office of the District Director thereafter advised employer of claimant's filing in a letter dated July 6, 1990; this letter additionally informed employer that an informal conference was scheduled for July 20, 1990. Notwithstanding the fact that employer notified the claims examiner on July 17, 1990, that the matter had been accepted under the Act and there was no need for the informal conference, one was held on July 20, 1990. At the conference employer stipulated to an average weekly wage of \$992.25, and a resulting compensation rate of \$660.62. Claimant filed an attorney's fee petition immediately following the hearing on July 20, 1990. The claims examiner's recommendation resulting from the informal conference was issued July 23, 1990; also on this date, the district director issued a Compensation Order awarding claimant's counsel an attorney's fee of \$750, representing six hours of services performed between June 21 and July 20, 1990. On July 25, 1990, employer increased claimant's rate of compensation to comply with its July 20, 1990, stipulation and the claims examiner's subsequent recommendation.

On appeal, employer challenges the attorney's fee awarded to claimant's counsel by the district director. Claimant responds, urging affirmance.

Employer initially contends that it should not be held liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), since it accepted liability for the claim and commenced voluntary payments of compensation to claimant prior to receiving formal notice of the claim from the district director's office. We agree. Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee payable by employer. *See* 33 U.S.C. §928(a); 20 C.F.R. §702.134(a); *see generally* *Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992). In the instant case, it is uncontroverted that employer commenced voluntary payments of compensation before receiving written notice of claimant's claim from the district director; we hold therefore that employer cannot be held liable for claimant's counsel's attorney's fee pursuant to Section 28(a) of the Act.

Employer additionally contends that Section 28(b) is inapplicable to the instant case. Under Section 28(b) of the Act, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by employer. 33 U.S.C. §928(b); *see, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24

BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). Specifically, Section 28(b) states, in pertinent part, that:

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 utilized 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 by the employer or carrier, shall be awarded in addition to the amount of compensation....

33 U.S.C. §928(b). In the instant case, it is uncontroverted that employer commenced payment of benefits to claimant at the rate recommended by the claims examiner within fourteen days of the claims examiner's recommendation; thus, we hold that, as employer accepted the written recommendation of the claims examiner within fourteen days of its receipt of that recommendation, employer cannot be held liable for claimant's counsel's fee pursuant to Section 28(b) of the Act. Accordingly, as employer properly tendered compensation to claimant without an award, and because employer thereafter accepted the written recommendation of the claims examiner and commenced payment of compensation at a modified rate within fourteen days of its receipt of that recommendation, neither Section 28(a) nor (b) is applicable to the instant case; we therefore reverse the district director's assessment of an attorney's fee against employer.¹

Finally, as claimant's counsel's services did result in claimant's receipt of benefits, we remand the case to the district director to determine whether claimant should be held liable for his counsel's fee pursuant to 33 U.S.C. §928(c). See *Portland Stevedoring Co. v. Director, OWCP*, 552 F.2d 293, 6 BRBS 61 (9th Cir. 1977), *rev'g Loiselle v. Portland Stevedoring Co.*, 2 BRBS 214 (1975). We note that the regulations provide that the amount of benefits awarded may be taken into

¹We reject claimant's argument that the district director's award of a fee payable by employer should be affirmed since employer did not object to his submission of a fee petition on July 20, 1990. No transcript of the informal conference is before the Board, thus claimant's allegation is unsupported by record evidence. Additionally, we note that the district director's award of a fee was issued within three days of the informal conference; this issuance within three days deprived employer of a reasonable opportunity to respond to claimant's counsel's application for a fee. See *Harbour v. C & M Metal Works, Inc.*, 10 BRBS 732 (1978). Employer's actions in the instant case fulfilled the Act's intention to facilitate the informal resolution of claims.

account in awarding the fee, and that the financial circumstances of claimant shall be taken into account when the fee is assessed against claimant. *See* 20 C.F.R. §702.132(a).

Accordingly, the district director's assessment of claimant's counsel's fee against employer is reversed and the case remanded for consideration of an attorney fee payable by claimant.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge