

GERRIT HAGENZEIKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTON LILLY & COMPANY,	)	
INCORPORATED	)	
	)	
and	)	DATE ISSUED:
	)	
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.

Michael Magro (Reisman, Abramson & Magro, P.C.), New York, for the claimant.

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

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.\*

PER CURIAM:

Claimant appeals the Compensation Order-Award of Attorney's Fees (2-78305) of District Director<sup>1</sup> 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). 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. *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).

Claimant sought compensation under the Act for injuries to his head, face, back and

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<sup>1</sup>The title "district director" has been substituted for the title "deputy commissioner" used in the statute. 20 C.F.R. §702.105.

left arm sustained in a work-related automobile accident on August 31, 1980. Although employer initially controverted the claim, at the hearing the parties stipulated that claimant was temporarily totally disabled from August 31, 1980 through the June 6, 1985 hearing date, that claimant's accident occurred in the scope and course of his employment, and that claimant satisfied the status requirements of Section 2(3) of the Act, 33 U.S.C. §902(3). Accordingly, the only issue before the administrative law judge was whether claimant was injured on a covered situs.

In his Decision and Order, the administrative law judge denied the claim based on his determination that claimant was not injured on a covered situs. On appeal, the Board reversed the administrative law judge's finding that claimant's injury did not occur on a covered situs and remanded for the administrative law judge to enter an award of temporary total disability compensation consistent with the stipulations of the parties. *Hagenzeiker v. Norton Lilly & Company*, 22 BRBS 313 (1989).

On April 6, 1990, the administrative law judge issued a Decision and Order on Remand in which he awarded claimant temporary total disability compensation and awarded claimant's counsel an attorney's fee of \$6,945. Claimant's counsel subsequently filed a fee petition for work performed before the Board and was awarded a fee of \$1,625 by Order dated September 9, 1991.

On September 16, 1991, the district director wrote to the parties and requested that they either settle the case pursuant to 33 U.S.C. §908(i), or submit evidence on the question of permanency. Following receipt of this communication, the parties conferred and agreed upon June 1, 1988 as the date of permanency. Stipulations to this effect were prepared and submitted to the district director on October 18, 1991, along with a supporting medical report. In addition, counsel requested a fee of \$6,068.75, representing 23 hours of attorney services at an hourly rate of \$250, plus 4.25 hours of secretarial services at \$75 per hour for work performed before the district director. By letter dated November 1, 1991, the district director advised the parties that based upon their stipulation that claimant was permanently totally disabled as of June 1, 1988, employer was liable for intervening cost of living adjustments commencing October 1, 1988, pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f). By Order dated November 1, 1991, the district director awarded claimant's counsel a fee of \$2,875 representing 23 hours of attorney services at \$125 per hour, plus the \$318.25 requested for secretarial services. Employer appeals the district director's fee award. Claimant responds, urging affirmance.

On appeal, employer contends that the district director erred in assessing fee liability against employer for those services rendered subsequent to the administrative law judge's April 6, 1990, Decision and Order on Remand. Employer asserts that as there was no refusal to pay compensation while the case was before the district director during this time period as is required to impose fee liability under Section 28(a), 33 U.S.C. §928(a), and as no controversy existed regarding additional compensation owed within the meaning of Section 28(b), 33 U.S.C. §928(b), the fee for these services should have been assessed against claimant as a lien upon his compensation award under Section 28(c) of the Act, 33 U.S.C. §928(c). Employer also contends, in any event, that the district director's fee award should be vacated because it was not served with a copy of counsel's fee petition

until March 2, 1992, in connection with its preparation for the current appeal, and accordingly was not afforded a timely opportunity to object or respond. Claimant responds that the fee application was initially submitted to the carrier at the same time it was submitted to the district director and asserts that fee liability was properly assessed against employer because 22 hours and 10 minutes of the 23 hours of time requested for attorney services involved work performed between July 28, 1981 and November 21, 1988, a time when employer was not paying claimant any compensation benefits.

Due process requires that a fee request be served on employer and that employer be given an opportunity to respond. *See Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976). As the record before us does not contain any evidence which indicates that employer was timely served with counsel's fee petition and given time to respond, as is required under 20 C.F.R. §702.132, we vacate the district director's fee award.<sup>2</sup> On remand, the district director should reconsider the attorney's fee issue after affording employer a reasonable opportunity to respond. *See Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86, 95 (1989).

Accordingly, the Compensation Order-Award of Attorney's Fees of the district director is vacated, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

ROBERT J. SHEA  
Administrative Law Judge

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<sup>2</sup>Employer's argument that it was not liable for fees for services rendered subsequent to the administrative law judge's April 6, 1990 Decision and Order On Remand should be addressed by the district director in the first instance.