BRB No. 92-1674

ANDREW LEMME	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CIRCLELINE SIGHTSEEING YACHTS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
STATE INSURANCE FUND	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

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

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

PER CURIAM:

Employer appeals the Compensation Order-Award of Attorney's Fee (2-103213) 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On February 2, 1990, claimant sustained an injury while working for employer. Employer voluntarily paid him temporary total disability benefits until he returned to work on April 9, 1990. On December 31, 1990, claimant filed a claim under the Act seeking temporary total disability compensation. Based upon further medical evidence submitted, employer reinstated its voluntary payment of temporary total disability benefits from March 21, 1991 through July 10, 1991, at which time it suspended compensation through December 21, 1991, due to what it characterized as "a lack of medical evidence." Voluntary payment of temporary total disability compensation was again reinstated subsequent to December 21, 1991, on a continuing basis. Following an informal

conference on March 19, 1992, on March 27, 1992, the claims examiner issued a recommendation that employer pay claimant the temporary total disability compensation for the period from July 11, 1991 to December 20, 1991, which employer had previously refused to pay. Employer accepted this recommendation and tendered payment to claimant within 14 days of the recommendation.

On March 24, 1992, claimant filed a fee petition for work performed before the district director, requesting $3,000, representing 15 hours of services at an hourly rate of $200. On March 27, 1992, the claims examiner recommended that a fee of $2,300 be assessed against employer. Upon receiving the March 27, 1992, recommendation and the fee petition, employer requested reconsideration of the recommendation. Reconsideration was denied by letter dated May 7, 1992. In a Compensation Order-Award of Attorney's Fee dated May 7, 1992, the district director awarded claimant's counsel a fee of $2,300 payable by employer. Employer appeals the district director's fee award, contending that the district director erred in holding it liable for the fee. Claimant has not responded to employer's appeal.

The district director's finding that employer is liable for claimant's attorney's fee is affirmed. Pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), when an employer 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 originally paid or tendered by the employer. *See Tait v. Ingalls Shipbuilding, Inc.,* 24 BRBS 59 (1990); *Caine v. Washington Metropolitan Area Transit Authority,* 19 BRBS 180 (1987). Although employer contends that it is not liable for an attorney's fee in the present case because it heeded the claims examiner's recommendation after the informal conference and paid the recommended compensation, we disagree. While Section 28(b) states that employer should pay or tender payment within 14 days after its receipt of the district director's recommendation, the issuance of the district director's recommendation is not required to establish employer's liability as employer may be liable even in the absence of such a recommendation. *National Steel & Shipbuilding Co. v. U.S. Dept. of Labor,* 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979). In light of the Ninth Circuit's decision in *National Steel & Shipbuilding Co.,* the Board has held that references in Section 28(b) to informal conferences and other procedures must be regarded as suggested guidelines as opposed to prerequisites and that employer may be held liable for a fee from the time a controversy arises, *i.e.,* the time that employer ceases making voluntary payments, if claimant is successful in obtaining greater compensation than that originally agreed to by employer. *Caine,* 19 BRBS at 181- 182. In the present case, inasmuch as claimant, by employer's own admission, was successful in obtaining additional compensation, *i.e.,* the temporary total disability compensation due from July 11, 1991 to December 20, 1991 which employer had previously refused to pay, we affirm the district director's finding that

employer is liable for claimant's attorney's fee pursuant to Section 28(b). *See Fairley v. Ingalls Shipbuilding, Inc.*, 28 BRBS 61, 64 (1991)(decision on remand).

Accordingly, the Compensation Order-Award of Attorney's Fees of the district director is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge