

MIGUEL MONTANO)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CADDELL DRY DOCK & REPAIR)	
COMPANY, INCORPORATED)	DATE ISSUED:
)	
and)	
)	
THE 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.

Samuel A. Denburg (Baker, Garber, Duffy & Pedersen), Hoboken, New Jersey, for claimant.

Richard A. Cooper (Fischer Brothers), New York, New York, for 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 Fees (OWCP No. 2-103206) 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).

Claimant sought benefits under the Act for a work-related hearing loss. Claimant underwent an audiometric examination, which revealed a 47.8 percent binaural hearing impairment. Based on this evaluation, claimant filed a claim for noise-induced hearing loss with the Department of Labor on August 6, 1990. Employer filed a notice of controversion on September 25, 1990. Claimant also underwent audiometric testing on November 1, 1990, that was interpreted by Dr. Katz as showing a zero percent binaural hearing loss. As no agreement could be reached between the parties as to the

degree of hearing loss, the parties agreed to have claimant evaluated by an impartial specialist to be appointed by the Department of Labor. Claimant underwent audiometric testing on June 3, 1991, that was interpreted by the impartial specialist, Dr. Stingle, as showing a 31.25 percent binaural hearing loss.

Thereafter, on July 1, 1991, a claims examiner recommended that employer pay claimant compensation benefits amounting to \$23,016.88 for a 31.25 percent hearing loss, which employer accepted. Claimant's counsel had previously filed a fee petition for work performed before the district director, requesting \$5,000 representing 20 hours of legal services at the hourly rate of \$250. Employer did not submit objections to the fee petition. On the same day that the claims examiner's letter was sent, the district director issued a Compensation Order awarding counsel a fee. The district director stated he considered the value of the attorney's services to claimant, the complexity of the case, the amount of time involved, the results achieved, and other factors including the professional expertise of claimant's attorney and concluded that the fee request as submitted was reasonable. Therefore, the district director ordered employer to pay claimant's counsel \$5,000 for legal services rendered on behalf of the claimant.

On appeal, employer contends that the district director erred in assessing claimant's counsel's fee against employer. In addition, employer contends that the district director erred in not permitting employer an opportunity to respond to the fee application. Claimant responds, urging affirmance of the district director's fee award.

Under Section 28(a), 33 U.S.C. §928(a), 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 award payable by the employer. *See Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239 (1988), *aff'd*, 920 F.2d 558, 24 BRBS 49 (CRT)(9th Cir. 1990). We reject employer's contention that it voluntarily accepted the compensability of the claim and thus did not decline to pay within the meaning of Section 28(a). Although claimant attached medical evidence to his claim for compensation indicating that he suffered a 47.8 percent binaural hearing loss, in its notice of controversion, employer stated that the degree of permanency could not be determined at that time. Following the notice of controversion, claimant was evaluated by the carrier's doctor, Dr. Katz, on November 1, 1990. The results of this audiometric evaluation showed a zero percent binaural hearing loss. Thus, employer did not accept the claim and, moreover, employer did not make any payments of compensation until July 8, 1991, after the claims examiner's recommendation. Therefore, we reject employer's contention that it accepted the compensability of the claim for purposes of its liability for an attorney's fee award. *See generally Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173 (1993)(Brown, J., dissenting), *recon. denied*, 29 BRBS 63 (1995).

Employer also contends, in the alternative, that the district director erred in not permitting it an opportunity to respond to the fee application. The fee application in the present case was sent to the district director by claimant's counsel on June 14, 1991. Employer states it did not receive the application until June 24, 1991. The district director's Order approving the attorney's fee was dated July 1, 1991. Therefore, employer had a total of seven days from the date it received claimant's counsel's fee request to the issuance of the order approving the attorney's fee.

Although neither Section 28 of the Act nor 20 C.F.R. §702.132 contains a provision requiring that the other parties be given notice of a request for an attorney's fee, such a requirement must be implied. *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976), *rev'g Hilton v. Todd Shipyards Corp.*, 1 BRBS 159 (1974). Due process requires that a fee request be served on employer and that employer be given a reasonable time to respond. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990)(Lawrence, J., dissenting on other grounds). In *Harbour v. C & M Metal Works, Inc.*, 10 BRBS 732 (1978), the Board addressed a case in which employer was given five days to respond to a fee application, and employer responded in seven days. However, the administrative law judge had issued the decision and order granting an attorney's fee on the sixth day. The Board held that the five days allowed by the administrative law judge to respond to the fee application was not a reasonable amount of time to in which to respond. *Harbour*, 10 BRBS at 734. Similarly, in *Devine*, 23 BRBS at 279, the district director issued an award of an attorney's fee five days after the fee petition was mailed and the Board held that employer had insufficient time to respond to the fee petition.

We agree with employer that the seven days between employer's receipt of the fee request and the issuance of the district director's Order awarding an attorney's fee in this case was not a reasonable amount in which employer could respond to the fee application. Thus, we remand the case to the district director with instructions to allow employer the opportunity to respond with any objections to the fee application within a reasonable time. *Devine*, 23 BRBS at 288.

Accordingly, the Compensation Order-Award of Attorney's Fees of the district director finding employer liable for the payment of claimant's attorney's fee is affirmed. However, the fee award is vacated and the case is remanded to the district director in order to allow employer the opportunity to respond to the fee request.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge