

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 16 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

**CALIFORNIA UNITED TERMINALS;
SIGNAL MUTUAL INDEMNITY
ASSOCIATION, LTD.; AVIZENT
ACCLAIM,**

Petitioners,

v.

**SANDRA TOWNE; DIRECTOR,
OFFICE OF WORKERS
COMPENSATION PROGRAMS;
MARINE TERMINALS
CORPORATION; MAJESTIC
INSURANCE COMPANY; APM
TERMINALS/MAERSK PACIFIC
LIMITED; CENTENNIAL
STEVEDORING SERVICES;
HOMEPORT INSURANCE
COMPANY,**

Respondents.

No. 09-72407

BRB No. 08-0713

MEMORANDUM*

On Petition for Review of an Order of the
Benefits Review Board

Argued and Submitted February 8, 2011

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Pasadena, California

Before: **KOZINSKI**, Chief Judge, **HAWKINS** and **FISHER**, Circuit Judges.

Before the Benefits Review Board, California United Terminals (CUT) conceded that the ALJ's order of joinder was the equivalent of the filing and notification of a claim before the District Director for purposes of 33 U.S.C. § 928(a). For example, CUT acknowledged that the statute's references "to the [District Director] also refer to the ALJ in a case where the employer or carrier has been joined as a party defendant by the ALJ." Because CUT conceded that the ALJ complied with § 928(a), it has waived the opportunity to now argue the contrary position. See Schwabenland v. Sanger Boats, 683 F.2d 309, 310 n.1 (9th Cir. 1982); see also Fed. Sav. & Loan Ins. Corp. v. Butler, 904 F.2d 505, 509 (9th Cir. 1990). We find no "exceptional circumstances" that warrant consideration of CUT's argument for the first time on appeal. See Duncanson-Harrelson Co. v. Dir., Office of Workers' Comp. Programs, 644 F.2d 827, 832 (9th Cir. 1981).

CUT's remaining claims fail because we've held that § 928(a) authorizes the award of pre-controversion attorney's fees. See Dyer v. Cenex Harvest States Coop., 563 F.3d 1044, 1050–52 (9th Cir. 2009).

PETITION DENIED.