BRB No. 97-1676

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| LEONARD PTAK | ) | |
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| Claimant-Petitioner | ) | DATE ISSUED:_____ |
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| v. | ) | |
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| OWENS-CORNING FIBERGLAS | ) | |
| | ) | |
| and | ) | |
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| AETNA CASUALTY AND SURETY COMPANY | ) | |
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| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Compensation Order of Karen P. Staat, District Director, United States Department of Labor.

Jeffrey S. Mutnick (Pozzi, Wilson, Atchison, L.L.P.), Portland, Oregon, for claimant.

William M. Tomlinson (Lindsay, Hart, Neil & Weigler, L.L.P.), Portland, Oregon, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Compensation Order (OWCP No. 14-115354) of District Director Karen P. Staat 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 the law. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986); *Roach v. New York Protective Covering Co.*, 16 BRBS

114 (1984).

A Decision and Order was issued by Judge Lindeman on November 29, 1995, wherein he accepted claimant and employer's joint stipulation of facts. Pursuant to the stipulation, employer agreed to pay claimant permanent partial disability benefits for his scleroderma which is causally related to his work. Additionally, employer agreed to pay medical expenses in accordance with Section 7, 33 U.S.C. §907, as well as an attorney's fee. Decision and Order at 1-2.

On June 25, 1997, claimant's counsel filed a fee petition with the district director, requesting $3,290.62 for a total of 19.875 hours of services for work performed before the district director between March 8, 1996, and May 13, 1997, after the administrative law judge issued his decision. According to claimant's counsel, a large percentage of the charges arose because it was necessary to file an application for default after the issuance of the decision because employer refused to pay the medical expenses. Employer objected to the fee, arguing that a majority of the work for which counsel sought a fee was related to a controversy created by counsel himself. Specifically, employer argued that between the date of the administrative law judge's Decision and Order, November 29, 1995, and the date it paid medical expenses, April 17, 1997, it repeatedly requested documentation to substantiate the claimed expenses. It argued it was willing to pay benefits, but it needed an itemization of expenses and reports, and it required information concerning which costs had been paid and which had not, and counsel did not supply this information to employer until March 20, 1997. Emp. Obj. to Fee.[1] Therefore, employer argued that the fee request was excessive and unreasonable and that it should not be held liable for any fee.

The district director agreed with employer's objections and found that claimant's counsel generated the controversy over the payment of medical expenses by not furnishing employer with documentation to prove that the expenses

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[1]Claimant's counsel submitted to employer a hand-written list of expenses (without supporting documentation). On March 8, 1996, counsel informed employer that the documentation was in his office available for employer to see, and he gave employer two weeks to pay or he would initiate litigation. In April 1996, counsel gave employer a boxful of medical bills (no accompanying reports), and in May, he asked the district director to order employer to pay. In June 1996, the district director asked counsel to provide employer with an itemization of unpaid bills together with related medical reports. Also, in June 1996, employer again asked for additional documentation regarding medical expenses and mileage charges. In September 1996, counsel threatened to seek enforcement in district court, and later he sought a default order from the district director. In March 1997, counsel finally provided employer with the requested information. Emp. Brief and attachments.

were related to the injury and were reasonable. Therefore, she significantly reduced the fee, disallowing all entries related to the "controversy" and allowing only those costs related to winding up the case and to substantiating the medical expenses. Further, the district director concluded that none of those reasonable costs could be assessed against employer because it did not contest the claim after the entry of the administrative law judge's order. After scrutinizing the petition, the district director determined that the issues involved in the allowable services were not complex and do not warrant an hourly rate of $225. Therefore, she awarded hourly rates of $150 for attorney time and $50 for paralegal time. She concluded that only 1.15 hours of attorney time and 1.05 hours of paralegal time were necessary to "wind up" the case and to document the claimed medical expenses. Thus, she awarded a fee of $225, payable by claimant. Comp. Order at 1-4.

Claimant's counsel appeals the award, arguing that employer failed to pay medical expenses in accordance with Judge Lindeman's order and that it therefore was necessary to initiate a default action. In that light, counsel argues that it was erroneous for the district director to require counsel to incur the expense of itemizing claimant's medical expenses. Counsel thus challenges the reduction of his fee request and the imposition of fee liability on claimant. Employer urges affirmance, arguing that, as counsel created the "post-settlement" controversy, the district director properly reduced the fee and assessed it against claimant. In reply, counsel states there are no facts to support the district director's conclusion that counsel generated an unnecessary controversy, as employer is obligated to pay the expenses, and there is no legal authority to support her decision to assess the fee against claimant. Further, counsel challenges the reduction of the hourly rate.[2]

Section 7 of the Act, 33 U.S.C. §907, requires an employer to pay reasonable and necessary medical expenses related to a claimant's work injury. It is the claimant's burden, however, to show that the expenses are necessary and are related to the injury. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Counsel here argues that employer should be held liable for the entire requested fee because he had a legitimate cause of action due to employer's refusal to pay

[2]We decline to address the argument concerning the awarded hourly rates. Counsel did not raise it in his initial brief before the Board, and employer did not address it in its response brief. 20 C.F.R. §802.213(b). Therefore, the argument is not properly raised before the Board.

medical expenses and its insistence that he bear the burden of itemizing the expenses. As it is claimant's burden to establish the necessity of medical expenses, we affirm the district director's determination that it is not employer's responsibility to search counsel's collection of medical bills, but that it is claimant's/counsel's responsibility to prove that the requested expenses are related to claimant's injury and are necessary to treat it. *See Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). Therefore, the district director correctly determined that claimant and his attorney bear the responsibility for providing employer with documentation substantiating the claim for medical benefits.

Since it is claimant's burden to prove the compensability of medical expenses, we hold that it was reasonable for the district director to find that counsel initiated and prolonged a "controversy" by failing to submit the documentation to employer to substantiate the claim. Consequently, she rationally disallowed the hours counsel claimed for the work created by his actions, as it resulted from counsel's failure to timely provide the necessary documentation. Counsel is entitled to a reasonable fee for necessary work. 20 C.F.R. §702.132. Therefore, we affirm the reduction of the fee award, as it is reasonable and thoroughly explained, and we affirm the disallowance of all charges related to the default action, as that action was unnecessary. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *Roach*, 16 BRBS at 114.

We agree, however, with counsel's assertion that employer, and not claimant, should be held liable for the awarded fee. Employer may be held liable for reasonable "wind-up" services after it has agreed to pay benefits. *See generally Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). Contrary to the district director's finding, there need not be an agreement between the parties on employer's liability for wind-up services before it can be held liable. Further, the district director determined that it was reasonable for counsel to charge for time needed to document the medical expenses. Although the district director correctly placed responsibility for the delay of payment on counsel's unwarranted actions, this fact does not warrant relieving employer of its liability for a reasonable attorney's fee for the necessary work, as employer did contest claimant's entitlement to benefits, which were later awarded. Therefore, as claimant successfully prosecuted this case, *see, e.g., Frawley v. Savannah Shipyard Co.*, 22 BRBS 328 (1989); *Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987), we hold that the district director improperly held claimant liable for the fee. Consequently, we modify the district director's fee award to reflect employer's liability for the reasonable fee of $225 assessed by the district director.

Accordingly, the district director's fee award is modified to reflect counsel's entitlement to an attorney's fee of $225, payable by employer directly to claimant's counsel. In all other respects, the district director's order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge