

DOROTHY COSTICK)
(Widow of JAMES COSTICK))
)
 Claimant-Petitioner)
)
 v.)
)
 SUN SHIP, INCORPORATED) DATE ISSUED:
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Supplemental Attorney Fee Award of John J. McTaggart, District Director,
United States Department of Labor.

Clifford W. Cuniff, Baltimore, Maryland, for the claimant.

Eleanor N. Ewing (Pepper, Hamilton, & Scheetz), Philadelphia, Pennsylvania, for the
employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and LAWRENCE,
Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Supplemental Attorney Fee Award (3-20255) of District Director¹ John J. McTaggart awarding an attorney's fee to claimant's counsel 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).

¹ Pursuant to 20 C.F.R. §702.105, the term "District Director" has been substituted for the term "Deputy Commissioner" used in the statute.

*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).

This case is before the Board for a second time. Decedent worked for employer between 1942 and 1945, and died on March 7, 1986, of malignant mesothelioma. Prior to decedent's death, he and employer reached a settlement pursuant to Section 8(i), 33 U.S.C. §908(i), which included provisions for disability compensation, medical benefits, and entitlement to an attorney's fee. The district director approved this settlement on December 17, 1985, and claimant, decedent's widow, filed a claim for death benefits on April 7, 1986. Employer controverted this claim on April 21, 1986 based on causation and "lack of information," among other factors, but eventually agreed to pay death benefits. In addition, a disagreement arose regarding the payment of certain medical expenses. The parties agreed to a settlement of the outstanding medical benefits, which was approved by the district director in a March 16, 1987, Compensation Order.

The district director, however, reduced counsel's requested fee for work performed in conjunction with settlement of the issue of medical benefits and failed to award counsel any fee for work performed in connection with claimant's claim for death benefits. Claimant appealed these determinations to the Board, which affirmed the fee reductions in regard to the settlement of the medical benefits dispute, but vacated the denial of a fee for work performed in regard to the death benefits claim. The Board held that employer was liable for an attorney's fee pursuant to Section 28(a), 33 U.S.C. §928(a), because employer had initially controverted the claim, requiring claimant to secure an attorney who ultimately prevailed in obtaining compensation for claimant. *See Costick v. Sun Ship, Inc.*, BRB No. 87-959 (Oct. 30, 1989) (unpublished). The Board also stated that claimant's counsel could resubmit an attorney's fee petition to request fees for services performed before the district director in connection with the death benefits claim.

Counsel subsequently filed another fee petition in accordance with the Board's decision, seeking the sum of \$2,517.75 based on 18.65 hours of services at the hourly rate of \$135. The district director awarded counsel \$816.75 for 6.05 hours at \$135 per hour, reducing certain itemized entries upon consideration of employer's objections; he disallowed five hours of time for February 16, 1987, March 12, 1987, and March 13, 1987 spent defending the fee petition against employer's objections, and six hours on May 27, 1986 for a "response to controversion," "reply to answer," and "motion for fees and costs" pursuant to Section 26, 33 U.S.C. §926, due to employer's lack of good faith in controverting the claim.² Claimant appeals these reductions, contending that the disallowance of fees for time spent defending the fee petition is contrary to law and that the other reductions are erroneous because they pertain to work necessary to obtaining compensation for claimant.³ Employer responds, urging affirmance of the district director's fee award.

² The district director also stated that "the firm conclusion drawn by this office that claimant's counsel (sic) involvement in this case unnecessarily protracted the litigation process and that to discourage such practice by counsel the significant reduction made with respect to his fee applications will have a salutary purpose." *See Order* at 2. The district director did not explain this statement in any further detail.

³ The district director also reduced 1.60 out of 1.70 hours for telephone calls regarding conference scheduling and related problems because, he stated, the number of hours was too high in light of the hourly rate requested. This reduction was not appealed by claimant.

We reverse the district director's reduction of five hours for time counsel spent responding to employer's objections to his fee petition. The district director erred in disallowing this time as a matter of law. *See generally Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979). Moreover, an attorney should not be deprived of a fee for time spent successfully defending his fee, "lest he be effectively financially driven from the compensation field." *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883, 884 (1982). Thus, we modify the fee award to allow the five hours requested.

With regard to the reductions made by the district director on May 27, 1986, the district director stated that a fee for these hours was rejected because they represented services with "no relationship to the statutory procedures involved under the Act" and were therefore unnecessary. Order at 1. We reverse this determination, as counsel's actions on this date were taken in response to employer's controversion of claimant's death benefits claim, and were therefore consistent with the regulation at 20 C.F.R. §702.261, which states:

Where the claimant contests an action by the employer or carrier reducing, suspending, or terminating benefits, including medical care, he should immediately notify the office of the district director . . . and set forth the facts pertinent to his complaint.

20 C.F.R. §702.261.

In the instant case, claimant filed a claim for death benefits on April 7, 1986, which employer controverted on April 21, 1986. The reasons it stated on the LS-207 Form in support of this controversion were lack of medical information, causal relationship of death to work-related injury, and Section 33(g), 33 U.S.C. §933(g). *See* Cl. Br. - Ex. D. On May 6, 1986, employer filed an "answer" to the claim for compensation. *See* Cl. Br. - Ex. E. Claimant responded to both forms by letters. The letter in response to employer's controversion notes that prior to his death, decedent had settled his disability claim for mesothelioma; thus, claimant did not understand how the death benefits claim could be controverted based on causation and "lack of information." *See* Cl. Br. - Ex. F. Counsel included an autopsy report and other medical evidence supporting a causal relationship between decedent's work and his death. In addition, counsel stated that in light of the fact that a pending third party claim decedent filed against various manufacturers and distributors of asbestos had not been resolved, Section 33(g) was inapplicable to the instant case. *Id.* Claimant then requested an informal conference, and mailed two other letters to the district director consistent with this theme; in one of these letters, counsel requested that costs be assessed against employer pursuant to Section 26 for opposing the claim without reasonable grounds. *See* Cl. Br. - Exs. G, H.

Based on the regulation at 20 C.F.R. §702.261, the district director erred in denying counsel a fee because the responses are unrelated to "statutory procedures." Counsel was supplying documentation and argument in support of the claim for death benefits in light of employer's controversion of the claim, and we hold that these services are necessary to establishing claimant's

entitlement to benefits. *See generally Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); 20 C.F.R. §702.132. The district director's reduction of six hours pertaining to these services is therefore reversed, and we therefore modify his Order to award counsel 11 hours at \$135 per hour.

Accordingly, the Supplemental Attorney Fee Award of the district director is reversed in part. The order is modified to award an additional fee for 11 hours at \$135 per hour.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge