BRB No. 97-311

DENNIS BAGWELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:_____
EAGLE MARINE SERVICES LIMITED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Compensation Order Approval of Attorney Fee Application, Karen P. Staats, United States Department of Labor.

Michael F. Pozzi, Seattle, Washington, for claimant.

John P. Hayes (Forsberg & Umlauf, P.S.), Seattle, Washington, for self-insured employer.

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

PER CURIAM:

Employer appeals the Compensation Order Approval of Attorney Fee Application (Case No. 14-118203) of District Director Karen P. Staats 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. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

On July 17, 1994, claimant sustained a work-related injury to his foot/ankle. He reported the injury, and employer authorized medical treatment and paid benefits. On January 13, 1995, claimant reported to employer's claims manager that he had undergone a hernia repair operation on January 9, 1995, for which he sought compensation and medical benefits. Employer immediately filed a Notice of Controversion, stating: "No medical to substantiate claim for hernia repair." Having received no response from employer regarding his claim, claimant hired an attorney. On June 8, 1995, employer

received a letter from claimant's attorney wherein counsel revoked all previous medical releases claimant may have signed. Two days later, claimant filed a formal claim for benefits. An informal conference was held on March 27, 1996, and the claims examiner recommended obtaining medical records from the clinic which first diagnosed claimant's hernia. In April 1996, claimant signed a medical release, and in May 1996 employer received the records from the clinic and the hospital, establishing a work-related hernia which necessitated surgery. On May 30, 1996, employer paid benefits to claimant.

In August 1996, claimant's counsel filed an application for an attorney's fee and expenses in the amount of $1,185 for services before the district director performed between March 20, 1995, and May 10, 1996. Thereafter, employer generally objected to the award of an attorney's fee. On October 9, 1996, the district director, without discussing any objections employer may have filed, awarded an attorney's fee in the amount of $1,185, holding employer liable for the entire amount, as it controverted the claim on January 13, 1995.

Employer challenges the fee award. It contends it is not liable for a fee under Section 28, 33 U.S.C. §928, because there was no "prosecution" of a claim, successful or otherwise, and that there was no refusal by employer to follow the district director's recommendation. According to employer, the only reason payment was delayed was because claimant failed to send employer medical reports to substantiate his claim. Additionally, employer contends that even if it is liable for a fee, it is only liable for a fee commencing 30 days after the claim was filed by claimant. In support of its appeal, employer encloses the Declaration of Sandra Pestl, its claims manager, and attached exhibits. Claimant responds, urging affirmance.[1] He argues that he provided the requested

[1]On July 29, 1997, the Board issued an Order stating that all the motions raised in this case would be addressed in the decision on the merits. Claimant moves the Board for an expedited decision and asks the Board to issue a Show Cause Order demanding employer explain why this appeal should not be resolved expeditiously. Claimant's motion is moot. 20 C.F.R. §802.219. Claimant also moves the Board to strike "evidence" submitted by employer on appeal. We grant claimant's motion to strike, and we decline to consider the Declaration of Ms. Pestl and the documents attached thereto which were not considered by the district director, as these documents may not be submitted to or considered by the Board for the first time on appeal. *Hansley v. Bethlehem Steel Corp.*, 9

medical release authorization and information, but that employer controverted the claim instead of paying benefits, compelling him to hire an attorney.

We affirm the district director's fee award. In this case, upon receiving notice from claimant concerning his hernia operation and his intent to seek compensation, employer filed a notice of controversion refusing to pay benefits for claimant's hernia operation. Claimant then obtained counsel. Under the Board's recent decisions interpreting Section 28(a) of the Act, 33 U.S.C. §928(a), once employer controverts the claim or otherwise declines to pay benefits, employer is liable for a reasonable fee for all work performed by the claimant's attorney, either before or after the claim was filed, in pursuit of the successful claim for benefits. *Liggett v. Crescent City Marine Ways & Drydock Co., Inc.*, ___ BRBS ___, BRB No. 97-0219 (Oct. 16, 1997) (*en banc*) (Smith and Dolder, J.J., dissenting in pertinent part); *Jackson v. Jewell Ridge Coal Corp.*, 21 BLR 1-27 (1997) (*en banc*) (Smith and Dolder, J.J., dissenting), *appeal pending*, No. 97-2161 (4th Cir.). Despite employer's contention that its reason for filing the notice of controversion in this case was merely to state that claimant had not provided it with the appropriate documentation showing a work-related injury, employer clearly filed the form which contained all the necessary information to establish that it was declining to pay benefits for the hernia. As claimant thereafter was successful in obtaining benefits, the district director properly held employer liable for the entire fee. *Liggett*, slip op. at 5-7; *Jackson*, 21 BLR at 1-34.

Furthermore, employer has not established that the amount of the fee award is unreasonable, and it is therefore affirmed. We note, however, that the fee award is not final and therefore payable until all appeals are exhausted. *Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT)(7th Cir. 1982).

Accordingly, the district director's fee award is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BRBS 498.2 (1978).

JAMES F. BROWN
Administrative Appeals Judge