BRB No. 08-0713

S.T.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CALIFORNIA UNITED TERMINALS	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	DATE ISSUED: 06/19/2009
	)	
and	)	
	)	
AVIZENT ACCLAIM	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
	)	
APM TERMINALS/MAERSK PACIFIC, LIMITED	)	
	)	
and	)	
	)	
SIGNAL/COMMERCIAL INSURANCE SERVICES	)	
	)	
	)	
CENTENNIAL STEVEDORING SERVICES	)	
	)	
and	)	
	)	

HOMEPORT INSURANCE COMPANY	)	
	)	
Employers/Carriers-	)	
Respondents	)	DECISION and ORDER

Appeal of the Order Granting Attorney's Fees of William Dorsey, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Charles D. Naylor, San Pedro, California, for claimant.

Roy D. Axelrod (Law Office of Roy D. Axelrod), Solona Beach, California, for employer/carrier-petitioners.

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

PER CURIAM:

California United Terminals (CUT) appeals the Order Granting Attorney's Fees (2004-LHC-0767 and 2004-LHC-0768) of Administrative Law Judge William Dorsey rendered on claims 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant, while working as a marine clerk for Marine Terminals Corporation (MTC) on July 10, 2002, sustained injuries to her right hand, wrist and arm. Dr. Ahn diagnosed a work-related right wrist injury due to repetitive hand use and opined that claimant could return to work without restrictions as of August 14, 2002. Claimant returned to work as a marine clerk obtaining jobs out of a hiring hall for various maritime employers. She also filed a claim for benefits under the Act. MTC controverted the claim but subsequently paid temporary total disability benefits from July 11, 2002, through August 15, 2002.

On January 31, 2003, Dr. Ahn diagnosed right carpal tunnel syndrome and tendonitis, which he opined had been aggravated by her continued work activities, and recommended, on June 19, 2003, that claimant have surgery on her right hand. Claimant continued to work without restrictions but also filed a second claim, dated July 18, 2003,

against her then current employer, Maersk Pacific (Maersk). Claimant, MTC, and Maersk thereafter attended an informal conference on October 7, 2003, from which the district director concluded that he could not name a responsible employer until claimant ceases work and has the surgery. The district director referred the case to the Office of Administrative Law Judges on January 7, 2004.

On May 7, 2004, claimant joined Centennial Stevedoring Services (CSS), based on an alleged June 18, 2003, date of injury, and CSS subsequently sought to join CUT, for whom claimant had begun to work as of June 2, 2004. On September 23, 2004, the administrative law judge issued an Order joining claimant's "current employer" CUT and its insurer as a result of Dr. London's July 20, 2004, assessment that claimant continues to aggravate and worsen her right wrist condition as a result of her ongoing employment. CUT stipulated, on November 24, 2004, that it is the responsible employer for claimant's right wrist and hand injuries, and paid disability and medical benefits relating to claimant's right wrist surgery, which occurred on June 30, 2005.[1]

Meanwhile, claimant's counsel submitted a fee petition, dated November 30, 2004, requesting an attorney's fee totaling $14,737.50, representing 65.5 hours of work performed between January 7, 2004, and November 18, 2004, at an hourly rate of $225, plus costs of $38.87. CSS and MTC filed objections, arguing that CUT is the responsible employer, and thus, solely liable for all attorney's fees awarded in this case. CUT also challenged the fee petition, arguing that 33 U.S.C. §928 limits its liability for an attorney's fee in this case to those services provided between October 24, 2004, and November 5, 2004. CUT maintained that its liability for an attorney's fee began thirty days from the date upon which it was joined by the administrative law judge in this case, *i.e.*, thirty days from the date of the administrative law judge's Order dated September 23, 2004.

At the August 16, 2005, hearing conducted by the administrative law judge on the issue of attorney's fee liability, CUT acknowledged its liability only for claimant's counsel's attorney's fees for the period from October 24, 2004, through November 5, 2004, which it calculated at approximately $1,400. At the end of the hearing, the administrative law judge stated that he was "approving at least that much" in attorney's fees, and he directed CUT to "[g]o ahead and pay that and get it out of the way." HT dated August 16, 2005, at 92. The administrative law judge added that the parties could "continue fighting over whatever's . . . left" to be paid in attorney's fees. *Id.*

[1] Specifically, CUT paid claimant $8,246.24 in temporary total disability benefits for the period between June 30, 2005, and August 24, 2005.

On February 9, 2006, claimant and CUT submitted their Joint Stipulations and Application for Settlement Pursuant to 33 U.S.C. §908(i)(1) with supporting documentation to the administrative law judge for approval.[2] On February 16, 2006, the administrative law judge issued an order approving the settlement agreement, including the attorney's fee of $1,500 "in settlement of that liability from September 24, 2004 through the date of this approval."[3] Order dated February 16, 2006. The administrative law judge, however, noted that the issue of whether CUT is liable for attorney's fes for work performed prior to September 24, 2004, remained in dispute, and added that that issue would "be the subject of a separate order." *Id.*

The administrative law judge issued his Order Granting Attorney's Fees on June 6, 2008, wherein he found, based on the Board's decision in *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *appeal pending*, No. 08-72267 (9th Cir.), that CUT is, as the responsible employer in this case, liable for claimant's attorney's fees incurred between January 7, 2004, and September 23, 2004, pursuant to Section 28(a), 33 U.S.C. §928(a). The administrative law judge therefore ordered CUT to pay claimant's counsel an attorney's fee totaling $15,507.62, representing 56.25 hours at the current hourly rate of $275, plus $38.87 in costs.

On appeal, CUT challenges the administrative law judge's finding that it is liable for attorney's fees prior to thirty days after the time it was joined to the claim. Claimant responds, urging affirmance of the administrative law judge's award of an attorney's fee.

CUT argues that it cannot be liable for attorney's fees pursuant to Section 28(a) for services rendered prior to the time it was joined in this case. Additionally, CUT contends that the administrative law judge's application of the last employer rule to resolve the attorney's fee liability in this case is inappropriate.

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[2] Under the settlement agreement, CUT agreed to pay claimant, in addition to amounts previously paid, $16,080.17 in compensation, less a $7,762.13 credit for money which claimant received as a result of a 1990 Section 8(i) settlement for a June 26, 1989, injury to her right wrist, plus an attorney's fee of $1,500, to discharge liability for future compensation and "claimed attorney fees by claimant's counsel after September 23, 2004."

[3] The attorney's fee specifically covered the amount previously "ordered" by the administrative law judge at the August 16, 2005, hearing.

Section 28(a), in pertinent part, states:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the [district director], on the ground that there is no liability for compensation within the provisions of this Act, and the person seeking benefits shall *thereafter* have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier....

33 U.S.C. §928(a) (emphasis added). We affirm the administrative law judge's decision that CUT is liable for the fees award in this case under Section 28(a), as the Board's decision in *Lopez,* 39 BRBS at 93-94, is controlling with regard to the fee liability of the responsible employer. This decision, moreover, is consistent with the recent interpretation of Section 28(a) of the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, in *Dyer v. Cenex Harvest States Co-op.*, 563 F.3d 1044 (9th Cir. 2009).

In support of its contentions on appeal, CUT argues that under Section 28(a), it can only be held liable for services performed 30 days after it was notified of a claim, as Section 28(a) authorizes employer fee liability only where such notice is provided and claimant "thereafter" obtains counsel. In *Dyer,* the court addressed the specific argument that employer is not liable under Section 28(a) for attorney services performed prior to its controversion of a claim and rejected it, holding that once liability under Section 28(a) is established, employer is liable for a reasonable attorney's fee including both pre- and post-controversion services.[4] In addressing the meaning of the word "thereafter" in Section 28(a), the court stated, "the most natural reading of 'thereafter,' as used in Section 28(a), is that it requires only that the claimant show that he or she employed an attorney after the employer declined to pay a claim." *Dyer*, 563 F.3d at 1049. Once this

[4] The Ninth Circuit rejected the decisions "of our sister circuits" which interpret "thereafter" as authorizing only post-controversion attorney's fees under Section 28(a). *Dyer*, 563 F.3d at 1051. *See e.g.*, *Day v. James Marine, Inc.*, 518 F.3d 411 (6th Cir. 2008); *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002); *Kemp v. Newport News Shipbuilding & Dry Dock Co.*, 805 F.2d 1152, 19 BRBS 50(CRT) (4th Cir.1986). CUT relies on this case law in support of its appeal. As this case arises within the jurisdiction of the Ninth Circuit, its interpretation of the term "thereafter" as articulated in *Dyer* is controlling.

retention of counsel occurs, employer becomes liable for all reasonable attorney services regardless of when they were performed.

The Ninth Circuit found that an interpretation of "thereafter" as limiting the amount of attorney's fees to post-controversion services is a "somewhat strained reading" of that term as it is used in Section 28(a). *Dyer*, 563 F.3d at 1049. In this regard, the Ninth Circuit stated that Section 28(a) limits attorney's fees to a "reasonable" fee, and that while the Act does not provide a definition for what a "reasonable" attorney's fee should be, there is "no other attorney's fees-shifting statutory scheme in which that term has been interpreted to impart a temporal limitation." *Id.* The court also found support for its conclusion in the language employed by Congress in subsections (b) and (d).

Employer may be held liable for an attorney's fee under Section 28(a) if it declines to pay any compensation, and claimant is thereafter successful in obtaining benefits. 33 U.S.C. §928(a); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). In *Dyer*, 563 F.3d 1044, the Ninth Circuit stated that Section 28(a) "imposes four conditions that must be satisfied in order to receive attorney's fees: (1) the claimant must file a claim with the Deputy Commissioner of OWCP; (2) the employer must receive notice of the claim from the Deputy Commissioner; (3) the employer must decline to pay compensation or not respond within 30 days; and (4) the claimant must 'thereafter' utilize the services of an attorney to prosecute his claim." *Dyer*, 563 F.3d at 1048.

In the instant case, the administrative law judge, after observing that the Act does not contemplate multi-employer claims, found CUT liable for the fees as it was the employer liable for benefits under the last employer rule. Examining CUT's liability with regard to the requirements of Section 28(a), he found that all of the pre-conditions had been satisfied. Specifically, it is undisputed that claimant filed a claim for benefits, and that CUT received notice of the claim at the time it was joined. The administrative law judge then found that CUT's failure to accept liability for the surgery and disability benefits within 30 days of its joinder triggered liability for an attorney's fee under Section 28(a), as claimant successfully prosecuted her claim. As all of the prerequisites for attorney's fee liability arising under Section 28(a) were met, we affirm the administrative law judge's conclusion that CUT is liable under Section 28(a). *Dyer*, 563 F.3d at 1048. Moreover, as the responsible employer, the conclusion that CUT is liable for all reasonable fees is supported by the Ninth Circuit's determination in *Dyer*, 563 F.3d at 1049, that Section 28(a) lacks a temporal limitation. The decision in *Dyer* is also consistent with the Board's holding in *Lopez*, 39 BRBS 85, and the last employer rule, *see Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co.* [*Price*], 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), as it supports holding a responsible employer liable for services performed prior to its controversion of a claim where the prerequisites

for such liability are met and the fees in question are reasonable, regardless of the date it was notified of its potential liability.

In *Lopez*, 39 BRBS 85, the Board held that the employer liable for benefits under the last employer rule is also liable for an attorney's fee under Section 28(a) in a multiple employer case regardless of the date it was joined. The claimant in *Lopez* filed claims against his employers Eagle Marine Services (EMS), Maersk Pacific (Maersk), and Stevedoring Services of America (SSA) seeking benefits based on alleged work-related cumulative traumatic injuries to his knees, shoulders and elbows. The administrative law judge found claimant entitled to ongoing temporary total disability benefits and determined that SSA, as the last employer, is liable for the payment of those benefits. The administrative law judge also found SSA liable for all of claimant's attorney's fees, including legal work performed prior to the date that SSA received notice of the claim against it. SSA appealed, challenging its liability for those pre-controversion fees. The Board affirmed the administrative law judge's application of the last employer rule to find that SSA is liable for claimant's attorney's fees. In particular, the Board affirmed the administrative law judge's finding that the services performed by counsel on the claims against EMS and Maersk were "necessary to the successful prosecution of claimant's claim" against SSA, the last employer. Specifically, the administrative law judge found that claimant's counsel's work in relation to Maersk and EMS was necessary to "vindicate" claimant's cumulative trauma theory and enabled him to successfully prosecute his claim. Consequently, the Board affirmed the conclusion that in light of the last employer rule SSA was liable for the attorney's fees accrued in his claims against all three employers including fees for services performed before it was joined to the claim.[5]

In this case, the administrative law judge found that claimant's counsel's tasks relating to MTC, Maersk, CSS and CUT, performed after the case was transferred to the Office of Administrative Law Judges on January 7, 2004, were all part of claimant's combined claim against all four of her former employers. The administrative law judge found that the informal conference in this case, which occurred prior to CUT's joinder, yielded only an ambiguous conclusion that the last employer would be determined when the claimant stopped working and had the surgery originally recommended by Dr. Ahn. The administrative law judge found that the resolution of the last employer issue in this case came through the joinder first of CSS and ultimately of CUT. As such, he determined that just as the claim in *Lopez* against multiple employers was united in a common core of facts, the joinder and participation of all four employers in this case was necessary to identify CUT as the last responsible employer. The administrative law judge

[5] Contrary to CUT's assertion, the Board, in *Lopez*, explicitly considered and applied Section 28(a) in affirming the administrative law judge's award of an attorney's fee. *Lopez*, 39 BRBS at 93.

thus concluded that since claimant's counsel's work in relation to MTC, Maersk, CSS and CUT was reasonable, CUT is, as the last employer for which claimant performed work which contributed to her overall condition, liable for the attorney's fees accrued in her claims against all four employers, including those fees accrued prior to the time it was joined in this case. Moreover, substantial evidence supports the administrative law judge's finding that all of the prerequisites for CUT's liability under Section 28(a), as articulated by the Ninth Circuit in *Dyer*, have been met and that the work performed in association with the requested fee was reasonable.

Consistent with the Board's prior decision in *Lopez*, as well as with the Ninth Circuit's decision in *Dyer*, 563 F.3d 1044, we affirm the administrative law judge's application of the last employer rule in this case to his determination regarding liability for an attorney's fee, and thus, affirm his conclusion that CUT is liable for all attorney's fees, including those incurred prior to its controversion of the claim, as he found the services reasonable and necessary to claimant's successful prosecution of the case. *Dyer*, 563 F.3d 1044; *Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Lopez*, 39 BRBS 85. As CUT's assertions are otherwise insufficient to meet its burden of proving that the administrative law judge abused his discretion in awarding an attorney's fee in this case, *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997), his award of an attorney's fee totaling $15,507.62 payable by CUT is affirmed.

Accordingly, the administrative law judge's Order Granting Attorney's Fees is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge