BRB No. 05-0160

JAMES M. LOPEZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
EAGLE MARINE SERVICES	)	DATE ISSUED: 10/26/2005
	)	
Self-Insured Employer-Respondent	)	
	)	
MAERSK PACIFIC, LIMITED	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Order Concerning Attorney's Fees of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Charles D. Naylor, San Pedro, California, for claimant.

James P. Aleccia, Alexa A. Socha, and Courtney B. Adolph (Aleccia, Conner & Socha), Long Beach, California, for Stevedoring Services of America and Homeport Insurance Company.

Daniel F. Valenzuela and Michael D. Doran (Samuelsen, Gonzalez, Valenzuela & Brown), San Pedro, California, for Eagle Marine Services.

James P. Aleccia (Aleccia, Conner & Socha), Long Beach, California, for Maersk Pacific, Limited and Signal Mutual Indemnity Association.

Mark A. Reinhalter and Kathleen H. Kim (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Stevedoring Services of America (SSA) appeals the Decision and Order Awarding Benefits and the Order Concerning Attorney's Fees (2003-LHC-2741, 2003-LHC-2742, 2003-LHC-2743, 2003-LHC-2744) of Administrative Law Judge Russell D. Pulver 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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, e.g., Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984). The Board heard oral argument in this case on June 27, 2005, in Pasadena, California.

Claimant began working as a casual longshoreman in 1994, and between 1999 and November 29, 2001, he operated a top handler that he alleged caused general pain in his

shoulders, elbows, knees and back. In addition, claimant sustained a series of specific accidents with several employers over the course of his employment. On November 29, 2001, while working for Eagle Marine Services (EMS), claimant's left knee popped out of place in the course of his operating a top handler. He thereafter decided, because of intense pain and safety concerns, that he could no longer operate a top handler, and began driving UTR's, *i.e.*, trucks used to move containers, chassis, and bomb carts around the yard.

On December 3, 2001, claimant sustained right shoulder and right elbow strains as a result of a UTR accident during his work for EMS. Claimant stopped driving UTR's on January 6, 2002, because the work became too painful, and he subsequently obtained light-duty work through the casual board. Claimant filed claims under the Act seeking benefits from EMS related to his November 29, 2001, and January 6, 2002, work accidents.

Claimant next performed signal and clerking duties from the casual board from January 7, 2002, until April 8, 2003, including a stint with Maersk Pacific (Maersk) from October 10-14, 2002. On October 17, 2002, Dr. Delman opined that claimant's recent work activities, including those for Maersk, exacerbated his prior shoulder, elbow and knee symptoms, and thus he placed claimant on temporary total disability for a period of two days. As a result, claimant filed a claim under the Act against Maersk in November 2002, seeking benefits for continuous repetitive trauma to his shoulders, knees and elbows. On February 28, 2003, Dr. Gold scheduled surgery on claimant's right shoulder for April 10, 2003. Claimant continued to perform light-duty work up until the scheduled surgery, with his last employment, as a signalman for SSA, occurring on April 8, 2003. Claimant alleged that his work for SSA on that day caused an increase in his overall symptoms, and he thus filed a claim for benefits against SSA on June 18, 2003.

Dr. Gold performed surgery on claimant's right shoulder on April 10, 2003, and on his left shoulder on June 10, 2003. Claimant then underwent laparoscopic banding surgery, on September 23, 2003, to lose weight in preparation for his impending knee surgeries. Left knee surgery was performed by Dr. Gold on February 23, 2004. At the time of the formal hearing, the right knee surgery was pending while claimant recovered from the left knee surgery.

In his decision, the administrative law judge initially found that SSA is the responsible employer as it was the last employer to have subjected claimant to trauma that aggravated and accelerated his underlying bilateral shoulder, knee and elbow conditions. The administrative law judge then determined that although claimant did not provide written notice of his April 8, 2003, injury to SSA until June 27, 2003, claimant's notice was timely as it was given within 30 days of the date upon which claimant first became aware of the relationship between his injuries and his employment with SSA. 33

U.S.C. §912(a). Moreover, the administrative law judge concluded that SSA did not show that it was prejudiced by its perceived lack of timely notice. 33 U.S.C. §912(d). With regard to the merits of the claim, the administrative law judge found that claimant is entitled to ongoing temporary total disability and medical benefits from April 9, 2003. 33 U.S.C. §§907, 908(b).

Claimant's counsel thereafter requested an attorney's fee totaling $58,171.53, representing 196.35 attorney hours at an hourly rate of $275, plus costs of $4,175.28. Claimant's counsel also filed a supplemental petition for an attorney's fee requesting an additional fee of $5,175, representing 23 attorney hours at an hourly rate of $225, for work performed in conjunction with the initial fee petition. SSA objected to its liability for an attorney's fee pursuant to Section 28 of the Act, 33 U.S.C. §928. In his Order Concerning Attorney's Fees, the administrative law judge found SSA liable for an attorney's fee to claimant's counsel totaling $49,422.78, representing 201.1 hours at an hourly rate of $225, plus the requested costs of $4,175.28.

On appeal, SSA challenges the administrative law judge's finding that claimant's employment with it aggravated his orthopedic conditions and therefore that it is the responsible employer in this case. SSA also contends that the administrative law judge erred in finding that claimant filed a timely notice of injury, and that it is liable for claimant's medical benefits and an attorney's fee. Claimant, EMS, Maersk, and the Director, Office of Workers' Compensation Programs (the Director), have filed response briefs in this case. Claimant and EMS urge affirmance of the administrative law judge's decision. Maersk, on the other hand, joins SSA in arguing that the administrative law judge erred in finding that claimant's orthopedic conditions were aggravated by his employment subsequent to his last work for EMS, that claimant provided timely notice of his injury pursuant to Section 12 of the Act, and that claimant is entitled to medical benefits. The Director urges the Board to affirm the administrative law judge's award of temporary total disability benefits, and to vacate the award of medical expenses and remand for clarification of SSA's liability with regard to any awarded medical expenses.

Section 12

SSA asserts that claimant's notice of injury to SSA was untimely as it was first received on June 27, 2003, sixty days beyond the purported date of injury, April 8, 2003. SSA maintains that the record establishes that claimant was aware or should have been aware of his duty to report his alleged injury at SSA within thirty days of April 8, 2003. In this regard, SSA points to the facts that claimant, at that time represented by counsel, had already filed claims against EMS and Maersk and thus was well-versed in the Act's requirements and that claimant, who stopped working as of April 8, 2003, in order to undergo surgery for his work-related shoulder condition on April 10, 2003, testified that his signaling duties at SSA caused him increased pain.

Section 12(a) of the Act requires that claimant must, in a traumatic injury case, give employer written notice of his injury within 30 days of the injury or of the date claimant is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the injury and employment.[1] 33 U.S.C. §912(a); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). "Awareness" for purposes of Section 12 in a traumatic injury case occurs when claimant is aware, or should have been aware, of the relationship between the injury, the employment, and the disability, and not necessarily on the date of the accident, or in this case, the last alleged trauma to claimant's overall condition. *See Ceres Gulf, Inc. v. Director, OWCP [Fagan]*, 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *J.M. Martinac Shipbuilding v. Director, OWCP [Grage]*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984); *see also Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979). Thus, a proper analysis requires the consideration of three components: awareness of injury, relationship to claimant's work for employer, and the resulting impact on wage-earning capacity.

In the instant case, the fact that claimant filed prior claims establishes that he was aware of his medical condition and also of the impact it had on his wage-earning capacity. Nonetheless, such evidence does not necessarily establish that claimant was aware of the relationship between his injury and/or condition and his specific employment for SSA on April 8, 2003. The administrative law judge found that claimant was not aware of that relationship until June 18, 2003, the date on which claimant signed his claim form seeking compensation from SSA. The administrative law judge rationally relied on claimant's testimony that he filed his claim against SSA after consulting with his attorney, who advised him to file it against his last employer, SSA. Hearing Transcript (HT) at 191. Claimant further stated that he did not become fully aware of the relationship between his injury and his SSA employment until Dr. Gold articulated, on April 4, 2004, that the cumulative trauma and aggravation of claimant's prior work duties, including signal work, was a primary cause of his shoulder condition.[2] Claimant's Exhibit (CX) 38.

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[1] In the absence of substantial evidence to the contrary, it is presumed, pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), that employer has been given sufficient notice of the injury pursuant to Section 12. *See Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994).

[2] Dr. Gold, on April 17, 2003, opined that an accumulation of three injuries, all preceding claimant's last work with SSA on April 8, 2003, ultimately caused claimant's current disability. It was not until his deposition on April 4, 2004, that Dr. Gold opined

Moreover, contrary to SSA's contention, awareness of pain is not necessarily tantamount to, nor indicative of, an awareness of a causal connection between the injury and the employment. *See, e.g., Grage*, 900 F.2d 180, 23 BRBS 127(CRT) (under Section 13(a), the court held that an employee's claim was timely, noting that experiencing pain is alone insufficient as a matter of law to establish an awareness of a compensable injury); *Galen*, 605 F.2d at 585, 10 BRBS at 866 ("[w]e take it to be clear, however, that a claimant's awareness that his back hurts is not the same as his awareness that his back is injured with the meaning [of the Act]."); *Allan*, 666 F.2d 399, 14 BRBS 427 (claimant did not become aware of his compensable traumatic injury until he was properly diagnosed several years later); *see also Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991) (court acknowledges that Section 12(a) mirrors the language of Section 13(a)). Consequently, as the administrative law judge's finding that claimant did not become aware of the relationship between his injury and his work for SSA on April 8, 2003, until June 18, 2003, is supported by substantial evidence, it is affirmed. *Grage*, 900 F.2d 180, 23 BRBS 127(CRT); *Galen*, 605 F.2d 583, 10 BRBS 863. Therefore, we affirm the administrative law judge's finding that claimant's written notice of injury provided on June 23, 2003, was timely filed.[3] 33 U.S.C. §912(a).

Responsible Employer

SSA asserts that the administrative laws judge erred in finding that claimant sustained a cumulative trauma injury to his shoulders, knees and elbows attributable to his five hours of employment with SSA on April 8, 2003. SSA maintains that claimant's conditions in his bilateral shoulders, knees and elbows resulted from the natural progression of his underlying orthopedic condition and his prior employment with EMS.

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that claimant's work-related activities with SSA on April 8, 2003, contributed to his need for his shoulder surgeries and overall condition. CX 38. Dr. Gold subsequently explained that he previously did not have cause to relate claimant's work for SSA to his injury because at that time claimant had not mentioned such work. Thus, we reject SSA's contention that Dr. Gold's 2004 deposition testimony and his April 17, 2003, opinions are in conflict.

[3] Moreover, as SSA does not support either of its generalized assertions of prejudice, *i.e.*, its inability to investigate the claim or to obtain medical information prior to surgery, and as the administrative law judge rationally found that SSA did not show an inability to conduct its investigation of this claim, we likewise reject its alternative assertion that it was prejudiced by claimant's alleged late notice of injury. *See* 33 U.S.C. §912(d). *Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999); *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999).

SSA further contends that the overall opinions of Drs. Delman, London and Newton establish that claimant's present condition is the result of the natural progression of his underlying shoulder and knee complaints and not his last employment with SSA. SSA also contends that this case is distinguishable from *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 125 S.Ct. 309 (2004), and *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991).

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the instant case arises, has stated that the rule for determining which employer is liable for the totality of claimant's disability in a case involving cumulative traumatic injuries is applied as follows: if the disability results from the natural progression of an initial injury and would have occurred notwithstanding a subsequent injury, then the initial injury is the compensable injury, and, accordingly, the employer at the time of that injury is responsible for the payment of benefits. If, on the other hand, the subsequent injury aggravates, accelerates, or combines with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is fully liable. *Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT); *see also Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 Fed.Appx. 547 (9th Cir. 2001). The Ninth Circuit has emphasized that a subsequent employer may be found responsible for an employee's benefits even when the aggravating injury incurred with that employer is not the primary factor in the claimant's resultant disability. *See Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966)*; see also Lopez v. Southern Stevedores*, 23 BRBS 295, 297 (1990); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453, 456 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982). Accordingly, in the case at bar, SSA must prove that claimant's disability is due solely to the natural progression of his prior injuries in order to meet its burden of establishing that it is not the responsible employer. *See Buchanan*, 33 BRBS at 36; *see generally General Ship Serv. v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991).

The administrative law judge determined, "based on a review of the relevant case law and careful analysis of the record," Decision and Order at 9, that claimant's employment with SSA on April 8, 2003, aggravated and accelerated claimant's bilateral shoulder, knee and elbow conditions. In so finding, the administrative law judge relied on claimant's undisputed testimony that his duties as a signalman required prolonged standing throughout his entire five-hour shift, as well as repetitive use of his arms at or

above shoulder level to signal both crane and UTR drivers,[4] HT at 115, and that by the end of his work day on April 8, 2003, he had increased pain in his shoulders and knees. HT at 132. In addition, the administrative law judge found that Drs. Gold and Delman confirmed claimant's testimony, as they credibly testified that signal work contributed to the progression of claimant's shoulder and knee conditions. CX 37 at 374; CX 38 at 384. Specifically, the administrative law judge found that Dr. Gold opined that pointing overhead, and working at or above shoulder level, combined with claimant's existing symptoms, put added stress on the shoulders and can contribute to the progression of the impingement syndrome in the shoulders. CX 38 at 380. Dr. Gold also stated that continuous standing, in combination with claimant's weight, added stress to his knees and contributed to the continued progression of his condition. CX 38 at 384. The administrative law judge found that Dr. Delman similarly testified that repetitive signaling overhead to cranes and truck drivers and standing for five consecutive hours are all activities that contributed to the orthopedic problems claimant suffered in his shoulders and knees. CX 37 at 374. In contrast, the administrative law judge found that the testimony of Drs. London and Newton that claimant's signal duties on April 8, 2003, did not permanently aggravate, worsen or accelerate his pre-existing underlying condition, was unconvincing.

SSA's contention that the opinions of Drs. London and Newton are entitled to greater weight than those of Drs. Gold and Delman is without merit as such an assertion is tantamount to a request that the Board reweigh the evidence of record, a role outside of the Board's scope of review. *See generally Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *see generally Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). The administrative law judge rationally gave greater weight to the opinions of Drs. Gold and Delman over the contrary opinions of Drs. London and Newton because, as treating physicians, they were in a better position to know the patient as an individual.[5] *See Amos v. Director, OWCP*, 153 F.3d 1051 (9th

[4] The administrative law judge further acknowledged claimant's testimony that on the day in question he also helped remove cones, weighing 10-15 pounds, from containers which similarly required repetitive use of both hands at or above shoulder level. HT at 132.

[5] Additionally, we reject SSA's assertion that claimant must have been aware of the detrimental effects that his SSA employment had on his earning capacity at the time he was performing that work in order for SSA to be liable for benefits, as this argument lacks merit. The record establishes that claimant ultimately obtained the requisite awareness of the relationship between his injury, his work for employer, and its impact on his earning capacity within the time frame allotted by the Act. *See* 33 U.S.C. §912(a).

Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Consequently, in light of the credited opinions of Drs. Gold and Delman, that the signal work performed by claimant for SSA on April 8, 2003, contributed to the progression of claimant's shoulder and knee conditions, as well as claimant's corroborating testimony that he sustained increased symptoms and pain while working in that capacity and on that date for SSA, we affirm the administrative law judge's finding that SSA is the responsible employer.[6] *See Price*, 339 F.3d 1102, 37 BRBS 89(CRT).

Medical Benefits

SSA asserts that the administrative law judge erred in finding that claimant is entitled to medical expenses because he did not request authorization from SSA. SSA maintains that a request for authorization is an absolute prerequisite, and that its controversion of the claim cannot be used by the administrative law judge as evidence that it likely would have refused to authorize any request that claimant might have made. In addition, SSA contends that it did not have knowledge of claimant's injury until after he underwent his surgeries, and thus, it could not have neglected to provide or authorize the medical services rendered in connection with those injuries. SSA further asserts that

[6] We note that the underlying theme of SSA's responsible employer argument in this case is that a finding of liability is unfair given claimant's limited employment with it. Such a contention was specifically rejected by the Ninth Circuit in *Price*. In *Price*, the court stated that although a finding of liability through an application of the "last employer rule" may seem harsh, having a bright line rule helps to ensure that workers receive timely and adequate compensation for their injuries under the Act. The Ninth Circuit explicitly recognized that every employer subject to the Act shares the risk that it will bear the burden of compensation at one point or another, even if it was not predominantly responsible for the compensable injury. Moreover, the court explained that "the unfairness to the last employer is mitigated by two factors: the spreading of the risk through mandatory insurance, and the availability of the second injury fund to the last employer in some cases." *Price*, 339 F.3d at 1107, 37 BRBS at 92(CRT); *see also Foundation Constructors*, 950 F.2d at 623, 25 BRBS at 75(CRT). The facts in *Price* are virtually identical to those in the present case, and it is controlling precedent.

none of claimant's physicians submitted the requisite medical reports. Furthermore, SSA asserts that it cannot be responsible for repayment of medical services paid by claimant's private health insurance carrier. Claimant responds that, pursuant to 20 C.F.R. §702.418(a), a request for authorization prior to the date upon which claimant became aware of the relationship between his condition and his work for SSA, and provided written notice to SSA, was not necessary, and that under 20 C.F.R. §702.419 the filing of his claim on June 18, 2003, together with SSA's controversion thereof satisfied Section 7(d) of the Act, 33 U.S.C. §907(d). The Director's responds that the case should be remanded to the administrative law judge for clarification of SSA's liability for medical expenses given that the administrative law judge's discussion of the issue is ambiguous.

Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. In pertinent part, that provision states:

> **(d) Request of treatment or services prerequisite to recovery of expenses; formal report of injury and treatment; suspension of compensation for refusal of treatment or examination; justification**
>
> (1) An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless--
>
> (A) the employer shall have refused or neglected *a request* to furnish such services and the employee has complied with subsections (b) and (c) of this section and the applicable regulations; or (B) the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize same.
>
> (2) No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary. The Secretary may excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the interest of justice to do so.

[emphasis added]. The Board has held that Section 7(d) requires that a claimant request his employer's authorization for medical services performed by any physician, including the claimant's initial choice. *See Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981)(Miller, J., dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). Where the employer refuses a claimant's request for authorization, claimant is

released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he subsequently procured on his own initiative was necessary for his injury in order to be entitled to such treatment at employer's expense. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

The issues of whether claimant requested authorization, whether employer refused the request, and whether the treatment subsequently obtained was necessary are factual issues for the administrative law judge to resolve. *Anderson*, 22 BRBS 20. In the instant case, the administrative law judge found that claimant did not seek authorization for his shoulder surgeries from SSA prior to the procedures on April 10, 2003, and June 10, 2003, that SSA was not prejudiced by the lack of a prior request for authorization, and that therefore SSA is liable for all outstanding medical bills related to claimant's injuries and shall furnish reasonable, appropriate and necessary medical care and treatment as required by the Act. Decision and Order at 14.

Initially, we hold that the administrative law judge correctly determined, consistent with the last employer rule, that SSA is liable for all reasonable and necessary medical expenses related to claimant's work injuries. *Price*, 339 F.3d 1102, 37 BRBS 89(CRT). We also reject SSA's assertion that claimant was required to request separate authorization from it in this case, as claimant sought and received prior authorization for treatment by Dr. Gold in February 2003, not only from the employers who were on the risk at the time, but, more importantly, from the district director.[7] CX 11; ALJX 39. Specifically, the record establishes that, by correspondence dated February 18, 2003, the district director "recommended at the present time that the change in physician [from Dr. Delman to Dr. Gold] be authorized," CX 11, and further acknowledged, following an informal conference dated March 25, 2003, that "the employer/carriers [Maersk and EMS] have no objection to claimant's care being transferred to Dr. Gold."[8] ALJX 39.

[7] In light of the fact that claimant obtained authorization to treat with Dr. Gold in this case from the district director, we need not address the issues of whether the prior authorization of employers, Maersk and EMS, may be imputed on SSA. Similarly, we need not address claimant's position that under Sections 702.418(a), 702.419, 20 C.F.R. §§702.418(a), 702.419, a request for authorization prior to the time of claimant's awareness of the relationship between his condition and his work for SSA was not necessary. Moreover, we note that contrary to the administrative law judge's finding, the question of prejudice to employer is not relevant to a resolution of the medical benefits liability issue.

[8] The record reflects that in the interim, specifically on February 28, 2003, Dr. Gold scheduled claimant's right shoulder surgery for April 10, 2003. CX 38.

Claimant thus satisfied the requirements under the Act for requesting authorization for medical treatment, and the employer liable for his authorized treatment was properly determined by application of the responsible employer rule.

Section 7(b) of the Act charges the Secretary, and therefore the district director, with the duty to "actively supervise," or monitor claimant's care, and includes a grant of authority to "determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished," 33 U.S.C. §907(b). *See generally Jackson v. Universal Maritime Serv. Corp.*, 31 BRBS 103 (1997)(Brown, J., concurring). The district director's involvement in the instant case, coupled with the fact that, under Section 7(a), all compensable medical expenses must be reasonable and necessary to treat the work-related injury, sufficiently protects the responsible employer's interests with regard to its liability for the medical treatment rendered by Dr. Gold subsequent to April 8, 2003. 33 U.S.C. §907(a), (b); *Schoen*, 30 BRBS 112.

We agree with the Director, however, that we must remand this case for further consideration of the issue of SSA's liability for medical benefits, as the administrative law judge's discussion of this issue is vague as to identifying the outstanding expenses for treatment of claimant's work-related injuries and as to the reasonableness and necessity of any expenses.[9] Decision and Order at 14. Moreover, we clarify the administrative law judge's determination by holding that SSA's liability for medical benefits commences as of April 8, 2003, when it employed claimant. SSA cannot be held liable for any expenses related to medical treatment provided prior to that time. *See generally Port of Portland v. Director, OWCP [Ronne I]*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991) (must be a rational connection between the employment and the resulting injury for which benefits are sought); *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996); 20 C.F.R. §702.402. If at issue, treatment prior to claimant's SSA employment is the liability of the last employer at that time.

In addition, we note that the instant case must be remanded to the district director for a determination, as raised by SSA, as to whether Dr. Gold timely filed a first report of treatment in this case[10] and, if not, whether, the failure may be excused in the interest of

[9] Claimant is not entitled to reimbursement for medical bills paid by his private insurance because Section 7(d) provides that the employee may only recover amounts which he himself expended for medical treatment or services. *Nooner v. Nat'l Steel & Shipbuilding Co.*, 19 BRBS 43, 46 (1986). Moreover, we note that claimant's private health insurer has not intervened in this case.

[10] Pursuant to Section 7(d), the report must be furnished to the employer and district director "within ten days following the first treatment," 33 U.S.C. §907(d),

justice under 33 U.S.C. §907(d)(2). *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting); *Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994) (McGranery, J., dissenting); *see also Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000). After the district director makes his determination, the case should be returned to the administrative law judge for him to address the reasonableness and necessity of claimant's medical expenses. *Schoen*, 30 BRBS 112. On remand, the administrative law judge must specifically delineate the outstanding expenses in question and apply the requisite standard for reasonableness to discern whether each expense is compensable. *Id*.

Attorney's Fee

With regard to the attorney's fee, SSA initially asserts that the administrative law judge's Order Concerning Attorney's Fees should be held in abeyance pending the outcome of its appeal on the merits. It is well established that to further the goal of administrative efficiency, an administrative law judge may render an attorney's fee determination where an appeal is pending; such an award, however, does not become effective and thus is not enforceable until all appeals have been exhausted. *Thompson v. Potashnick Constr. Co.*, 812 F.2d 574 (9th Cir. 1987); *Thompson v. Potashnik Constr. Co.*, 21 BRBS 59, *on recon.*, 21 BRBS 63 (1988); *see also Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47(CRT) (7th Cir. 1982); *Williams v. Halter Marine Serv., Inc.* 19 BRBS 248 (1987); *Bruce v. Atlantic Marine, Inc.*, 12 BRBS 65 (1980), *aff'd*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981). Thus, we reject this contention.

SSA next asserts that the administrative law judge erred in finding that it is liable for claimant's attorney's fee prior to the time it controverted the claim. SSA maintains that it cannot be liable for such fees because claimant's pursuit of his claims against EMS and Maersk was not necessary to his pursuit of his claim against SSA.

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.[11] 33

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rendered by Dr. Gold. This requirement thus does not apply to the first treatment after SSA became responsible for medical expenses, *i.e.*, April 8, 2003.

[11] 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

U.S.C. §928(a); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). In the instant case, the administrative law judge found that claimant's counsel's tasks relating to Maersk and EMS were all part of claimant's combined claim against all three of his former employers. The administrative law judge determined that the end result of the combined claim was that claimant's theory that he suffered a cumulative trauma as a result of working for all three employers, including most recently SSA, was vindicated. As such, the administrative law judge found that claimant's counsel's work in relation to Maersk and EMS was necessary to arrive at this overall conclusion, *i.e.*, that claimant sustained a cumulative trauma and that SSA, as the last employer for which claimant performed work which contributed to his overall condition, is responsible for benefits under the Act, and thus, was necessary to the successful prosecution of claimant's claim. Consequently, in light of the last employer rule, the administrative law judge concluded that SSA is liable for the attorney's fees accrued in his claims against all three employers, including fees accrued prior to the time it filed its controversion in this case.

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 finding that SSA is liable for all attorney's fess, including those incurred prior to controversion, so long as he found them necessary to claimant's successful prosecution of the case.[12] *Price*, 339 F.3d 1102, 37 BRBS 89(CRT). As SSA'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), the administrative law judge's award of an attorney's fee totaling $49,422.78 payable by SSA is affirmed.

Accordingly, the administrative law judge's findings that claimant's notice of injury to SSA was timely filed, and that SSA is the responsible employer are affirmed. The administrative law judge's decision is modified to hold that SSA is potentially liable for medical benefits only from April 8, 2003. The administrative law judge's award of medical benefits is vacated, and the case is remanded to the district director for

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> 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....

[12] We reject SSA's assertion that the claims, and thus the resulting attorney's fees, against Maersk and EMS are severable from the claim against SSA pursuant to the principles enunciated in *Hensley v. Eckerhart*, 461 U.S. 421 (1983), as the administrative law judge rationally found that the claims are not severable, and more importantly, that claimant was fully successful and is entitled to a full fee commensurate with that success.

consideration of SSA's contention pursuant to Section 7(d)(2), and then to the administrative law judge for further consideration as to SSA's liability for medical benefits in this case consistent with this decision. The administrative law judge's Order Concerning 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