BRB No. 12-0297

LEONARD A. WEIMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS	)	DATE ISSUED: 02/26/2013
	)	
Self-Insured Employer-Respondent	)	
	)	
LIBERTY NORTHWEST INSURANCE COMPANY	)	
	)	
Carrier-Petitioner	)	DECISION and ORDER

Appeal of the Attorney Fee Order of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Robert H. Madden, Seattle, Washington, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for Todd Pacific Shipyards.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for Liberty Northwest Insurance Company.

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

PER CURIAM:

Liberty Northwest Insurance Company (Liberty) appeals the Attorney Fee Order (2010-LHC-0471, 1608) 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). 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. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained injuries to his lumbar spine and left shoulder while working for employer as a marine electrician on October 27, 1999. Claimant returned to light-duty work for employer but subsequently alleged that this work aggravated his lumbar spine condition and that he sustained an upper back injury as a result of a second work-related accident on May 16, 2005.[1] Claimant filed a claim seeking disability benefits, as well as an order requiring employer and Liberty to authorize and pay for a surgical procedure recommended by his treating physician, Dr. Nelson. The parties stipulated that claimant has been permanently totally disabled since May 16, 2005.[2] A controversy, however, arose as to whether employer or Liberty was liable for claimant's disability and medical benefits.

In his Decision and Order dated June 7, 2011, the administrative law judge found that claimant's work-related duties, specifically from November 18, 2003, through his last day of work on May 16, 2005, aggravated his pre-existing medical condition to the point of permanent total disability. He therefore found that Liberty, as the carrier on the risk at the time of claimant's aggravating injury, is responsible for disability benefits and medical expenses. The administrative law judge thus awarded claimant temporary total and permanent partial disability benefits payable by employer until November 18, 2003, and thereafter permanent partial and total disability benefits payable by Liberty. The administrative law judge also ordered Liberty to pay medical expenses relating to claimant's requested surgery and to reimburse employer for disability payments it made after November 18, 2003. The administrative law judge's calculation of claimant's average weekly wage at the time of his October 27, 1999 work injury, his finding that claimant sustained an aggravation of that injury after November 18, 2003, for which Liberty is liable, as well as his conclusion that claimant is entitled to disability and medical benefits, were affirmed by the Board. *See Weimer v. Todd Shipyards Corp.*, BRB Nos. 11-0694/A (June 28, 2012) (unpub.). The Board, however, vacated the administrative law judge's calculations of the disability awards and remanded the case for further consideration of those issues. *Weimer*, slip op. at 8-9.

[1]At the time of the October 27, 1999 accident, employer was insured by Fremont Industrial Indemnity Group (Fremont). Fremont became insolvent and employer was self-insured until September 30, 2002, when Liberty became its carrier. This relationship remained in place until September 28, 2007.

[2]The Director, Office of Workers' Compensation Programs, conceded employer's entitlement to Section 8(f) relief relating to permanent disability arising from the October 27, 1999 work injury, 33 U.S.C. §908(f).

Meanwhile, claimant's counsel submitted to the administrative law judge an attorney's fee petition detailing the parties' stipulation that claimant's counsel is entitled to an attorney's fee totaling $51,012.79, representing, after compromise, $49,000 for counsel's time and $2,012.79 in costs. In his supplemental decision, the administrative law judge approved the parties' agreement insofar as the amount of the attorney's fee was concerned. Noting that the parties could not reach an agreement on apportionment of the attorney's fees and costs between employer and Liberty,[3] the administrative law judge concluded, based on his application of the last employer/carrier rule, that Liberty is liable for the entire award of attorney's fees. Accordingly, he found claimant's counsel entitled to, and Liberty liable for, an attorney's fee totaling $51,012.79.

On appeal, Liberty challenges the administrative law judge's finding that it is liable for the entirety of the attorney's fee award. Claimant and employer each respond, urging affirmance of the administrative law judge's Attorney Fee Order. Liberty has filed a reply to claimant's response brief.

Liberty contends that because claimant abandoned his claim relating to an upper back injury sustained on May 16, 2005, such that liability for an attorney's fees is based only on the 1999 injury, it cannot be liable for any attorney's fees in this case until May 20, 2010, when it first received notice of claimant's intention to join it as a defending party to that initial claim, based on the 1999 injury. Liberty challenges the administrative law judge's application of the last employer rule, as well as his reliance on decisions of the United States Court of Appeals for the Ninth Circuit in *Dyer v. Cenex Harvest States Coop.*, 563 F.3d 1044, 43 BRBS 32(CRT) (9th Cir. 2008), and the Board in *S.T. [Towne] v. California United Terminals*, 43 BRBS 82 (2009), *aff'd mem.*, 414 F.App'x 941 (9th Cir. 2011), and *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem.*, 377 F.App'x 640 (9th Cir. 2010), to determine liability for claimant's counsel's attorney's fees in this case. We reject Liberty's contentions.

Pursuant to the "responsible carrier" rule, the carrier that insured the employer for which the claimant worked at the time of the last aggravating injury that resulted in disability is liable for the claimant's entire disability irrespective of the degree of the last injury's contribution. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS

[3]Employer argued that Liberty, as its carrier at the time of the aggravating injury, is liable for the entirety of the attorney's fees, while Liberty maintained that it is liable only for those fees incurred subsequent to May 20, 2010, the date that claimant joined it as a defending party.

71(CRT) (9th Cir. 1991). In *Lopez*, 39 BRBS 85, the Board applied the logic of the last employer rule to resolve an issue of attorney's fee liability in a multiple employer case. The claimant filed claims against his employers, Eagle Marine Services (EMS), Maersk, and Stevedoring Services of America (SSA), seeking benefits for cumulative traumatic injuries. The administrative law judge found the claimant entitled to ongoing temporary total disability benefits for which SSA, the last employer, was liable. The administrative law judge also found SSA liable for the claimant's attorney's fee, which included legal work performed prior to the date SSA received notice of the claim against it. SSA appealed, challenging its liability for those fees. The Board affirmed the administrative law judge's application of the last employer rule to find that SSA is liable for the claimant's attorney's fees. The Board agreed with the administrative law judge that the services the attorney provided in the claims against EMS and Maersk were "necessary to the successful prosecution of claimant's claim" against SSA, the last employer. Consequently, the Board held that, in light of the last employer rule, SSA was liable for the attorney's fees accrued in the claims against all three employers including those fees incurred before SSA was joined to the claim.

In *Dyer*, 563 F.3d 1044, 43 BRBS 32(CRT), the Ninth Circuit, in whose jurisdiction this case arises, addressed the contention that an employer cannot be liable under Section 28(a), 33 U.S.C. §928(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, the employer is liable for a reasonable attorney's fee including both pre- and post-controversion services. The court 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 [district director]; (2) the employer must receive notice of the claim from the [district director]; (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, 43 BRBS at 34(CRT). Once this retention of counsel occurs, employer, and its carrier at the time of the injury, become liable for all reasonable attorney services regardless of when they were performed. *Id.* *Dyer*, however, was not a multiple employer/carrier case.

Thereafter, in *Towne*, 43 BRBS 82, the Board applied both *Lopez* and *Dyer* in affirming an administrative law judge's application of the last employer rule to determine liability for an attorney's fee. In *Towne*, the claimant worked for four employers. The last employer was joined to the action after claimant had filed claims against the first two employers and the third employer had been joined. The last employer stipulated to its liability for the claimant's disability, but disputed its liability for an attorney's fee for any period prior to 30 days after it was joined to the claim. The administrative law judge found the last employer liable for the entire attorney's fee because resolution of the responsible employer issue involved a common core of facts, such that the joinder and

participation of all four employers in the case was necessary for the identification of the responsible employer. The administrative law judge also found that the requirements of Section 28(a), as articulated in *Dyer*, were met as to the responsible employer in that case and the Board thus affirmed the conclusion that the responsible employer was liable for all attorney's fees, including those incurred prior to its notice and controversion of the claim, as the administrative law judge found the services reasonable and necessary to the claimant's successful prosecution of the claim.[4] *Towne*, 43 BRBS 82.

In this case, the administrative law judge found that all of the *Dyer* pre-conditions were satisfied against Liberty. Liberty conceded that the first two conditions of *Dyer* were satisfied, i.e., claimant filed claims with the district director, and Liberty received notice of those claims. The administrative law judge rejected Liberty's contention that the third and fourth conditions of *Dyer* were satisfied only with regard to the 1999-related aggravation claim, to which it was not a party, concluding that he need not differentiate the 1999 claim from the 2005 claim since he found that the 1999 injury was aggravated during the time that Liberty insured employer.[5] In particular, with regard to the aggravation claim, Liberty, upon being joined to the case, challenged its liability for disability and medical benefits, and claimant, thereafter, utilized the services of an attorney to successfully prosecute his claim. The administrative law judge thus concluded that since Liberty is responsible for claimant's total disability and medical expenses pursuant to the aggravation rule, it also is liable for attorney's fees under *Lopez* and *Towne* because the last employer rule applies to the attorney's fee issue. As in

[4]Specifically, the responsible employer did not pay any benefits to the claimant within 30 days of its joinder to the claim, which was subsequently prosecuted successfully. *Towne,* 43 BRBS 84.

[5]While, as Liberty notes, the administrative law judge did not award any additional benefits for claimant's May 16, 2005 upper back injury, Liberty's liability for disability and medical benefits, as well as for the attorney's fees, is not related to that injury. Rather, as the administrative law judge concluded, Liberty's liability is based on the work-related aggravation of claimant's 1999 work-related lower back injury, which occurred during the period when Liberty was employer's carrier. It is that aggravation which is the cause of claimant's total disability commencing May 16, 2005, and the need for the surgical procedure.

Lopez and *Towne*,[6] the administrative law judge rationally concluded that claimant's counsel's work prior to the joinder of Liberty was necessary to arrive at the conclusion that claimant's work subsequent to his October 27, 1999 work injury, including the period from September 30, 2002, when Liberty became employer's carrier, aggravated his existing medical condition to the point of total disability. For the reasons articulated in *Dyer*, 563 F.3d 1044, 43 BRBS 32(CRT); *Towne*, 43 BRBS 82, and *Lopez*, 39 BRBS 85, we reject Liberty's arguments that it cannot be liable for claimant's attorney's fees for work performed prior to the date that it controverted the claim. *Dyer*, 563 F.3d 1044. We thus affirm the administrative law judge's application of the last carrier rule to his determination regarding liability for an attorney's fee and affirm his finding that Liberty is liable for attorney's fees, including those incurred prior to its controversion of the claim. In this case, Liberty stipulated that claimant's counsel's fees, including those for pre-controversion services, were "reasonably incurred" in the successful prosecution of the claim.[7] *See* Liberty's Fee Objection at 2; Brief in Support of P/R at 2. The administrative law judge properly relied on this stipulation as the underlying basis for the fee award.

Liberty also argues that it was denied its right to due process, as it is required to pay attorney's fees for legal services incurred prior to the time it began insuring employer's obligations under the Act. Due process requires that the parties be given notice and the opportunity to be heard at a reasonable time and in a reasonable manner. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). The responsible employer rule does not "offend either the due process or the equal protection clauses of the Constitution." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1337, 8 BRBS 744, 749 (9th Cir. 1978). In this case, while Liberty may not have been notified in 2002 that claimant's counsel was performing legal services for claimant, it was notified in 2010 that he had performed such services and that it might be liable for them under Section 28 of the Act, if it did not pay claimant within the statutory

[6]Contrary to Liberty's contention, the administrative law judge did not read *Towne* and *Lopez* too broadly. As the Board stated in those decisions, an attorney's pre-controversion services may be considered part of a combined claim against multiple employers/carriers even if, as Liberty herein alleges, they took place before the responsible employer or carrier was joined to or notified of the claim. *Towne*, 43 BRBS at 85; *Lopez*, 39 BRBS at 93.

[7]Specifically, Liberty stated "Liberty Northwest and Todd Pacific Shipyards agree that $49,000.00 has been reasonably incurred as attorney fees, [and] that costs of $2,012.79 have been reasonably incurred;" a position Liberty reiterated on appeal. Brief in Support of P/R at 2.

time frame. Upon receiving this notice, Liberty opted to contest its liability, and it received a full and fair opportunity to make its case before the administrative law judge. Moreover, due process considerations require that employer have notice of the attorney's fee request and a reasonable time to respond to it. *See Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976); *Codd v. Stevedoring Services of America*, 32 BRBS 143 (1998). In this case, Liberty received claimant's counsel's fee petition for its review, *see* Liberty's Fee Objection at 2; Brief in Support of P/R at 2; *see also* 33 U.S.C. §935, and it filed a response to that fee application. On these facts, Liberty has not established that it was denied its right to due process with regard to the administrative law judge's attorney's fee award.

As Liberty has failed to establish that the administrative law judge's fee award is based on an incorrect application of law or an abuse of discretion, we affirm the administrative law judge's award of an attorney's fee, payable by Liberty, in the amount of $51,012.79.

Accordingly, the administrative law judge's Attorney Fee Order 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