**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0237

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| LARRY BARY | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | DATE ISSUED: 11/08/2018 |
| v. | ) | |
| | ) | |
| GLOBAL AMERICAN TERMINALS, LLC | ) | |
| | ) | |
| Self-Insured | ) | |
| Employer-Petitioner | ) | DECISION and ORDER |

Appeal of the Attorney Fee Order of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Melissa Riley (Embry and Neusner), Groton, Connecticut, for claimant.

Daniel P. Sullivan (Mouledoux, Bland, LeGrand & Brackett, LLC), New Orleans, Louisiana, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Attorney Fee Order (2012-LHC-02015) of Administrative Law Judge Peter B. Silvain, Jr., 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 it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *See, e.g., Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

This case arises out of a claim for binaural hearing loss. Claimant initially filed his claim against Jeffboat, but subsequently added Global American Terminals (employer or

GAT) as a party. In 2014, claimant and employer entered into an Agreed Settlement and Stipulation in which employer agreed to pay benefits for claimant's hearing loss. In the Settlement Agreement, which was approved by the administrative law judge on December 18, 2014, the administrative law judge ordered that "Employer [] pay Claimant's reasonable and approved attorney fees and litigation expenses incurred after the Informal Conference." Amended Decision and Order Approving Settlement at 2.

Claimant's counsel filed a fee petition for work performed before the Office of Administrative Law Judges (OALJ) requesting $37,955.60, representing 85.25 hours of work by Attorney Melissa Riley at an hourly rate of $395, 5.25 hours of paralegal work at an hourly rate of $100, and $3,756.85 in expenses. Employer filed objections to counsel's fee petition, challenging the requested attorney hourly rate and the number of hours billed, specifically 3.25 hours of deposition time which employer argued was redundant and unreasonable.

In his Attorney Fee Order, the administrative law judge concluded that the relevant community for determining counsel's hourly rate is the "community of practitioners who perform services similar to Longshore cases."[1] He reviewed the evidence submitted by counsel to find that the normal billing rate for attorneys of similar experience and reputation ranges from $350 to $650 per hour. Attorney Fee Order at 11. He concluded that counsel established the reasonableness of her requested billing rate because it is within that range. *See id.* The administrative law judge found that all the work performed was reasonable and necessary to the successful prosecution of the case and thus approved the full claimed fee of $34,198.75, plus the requested expenses of $3,756.85. *Id.* at 13-14.

Employer appeals the administrative law judge's Attorney Fee Order.[2] Claimant filed a response, urging affirmance. Employer filed a reply to claimant's response.

Employer first contends the administrative law judge erred in holding it liable for pre-controversion attorney's fees. Employer asserts that it did not receive notice of claimant's claim until May 2, 2012 and that it filed an LS-207 Form controverting claimant's claim on May 16, 2012. Employer argues that, under Section 28(a), it is not liable for an attorney's fee for work performed before it filed its notice of controversion.

[1] The administrative law judge cited *Jeffboat, LLC v. Director, OWCP*, 553 F.3d 487, 42 BRBS 65(CRT) (7th Cir. 2009) in support of this conclusion.

[2] Employer does not challenge the awarded hourly rates. Thus, we affirm the findings in this regard. *Scalio v. v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Section 28(a) of the Act, 33 U.S.C. §928(a), provides that an employer is responsible for a reasonable attorney's fee when it "declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation" and "thereafter" claimant utilizes the services of an attorney in the successful prosecution of his claim. 33 U.S.C. §928(a)[3]; 20 C.F.R. §702.134(a). The United States Courts of Appeals for the Fourth, Fifth and Sixth Circuits have held that an employer cannot be held liable for pre-controversion fees under Section 28(a) because the word "thereafter" places a temporal limitation on the fee-shifting mechanism. *Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (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.3d 1152, 19 BRBS 50(CRT) (4th Cir. 1986). The Ninth Circuit, however, has held that a claimant's attorney is entitled to both pre- and post-controversion attorney's fees, once Section 28(a)'s applicability is otherwise established. *Dyer v. Cenex Harvest States Coop.*, 563 F.3d 1044, 43 BRBS 32(CRT) (9th Cir. 2009). The Board's precedent holds that an employer is not liable for pre-controversion attorney's fees and applies when there is no controlling circuit precedent. *Childers v. Drummond Co., Inc.*, 22 BLR 1-148 (2002) (en banc) (McGranery and Hall, JJ., dissenting) (holding that employer is not liable for pre-controversion fees under Section 28(a)) effectively overruling *Liggett v. Crescent City Marine Ways & Drydock, Inc.*, 31 BRBS 135 (1997) (en banc) (Smith & Dolder, JJ., dissenting) (holding that employer is liable for pre-controversion fees); *see also Luter v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 103 (1986).

We conclude that the administrative law judge's award of a fee for all hours claimed cannot be affirmed. Employer raised the issue of its non-liability for pre-controversion

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[3] Section 28(a) 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 [deputy commissioner],* on the ground that there is no liability for compensation within the provisions of this chapter *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 in an amount approved by the [district director], Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

(emphasis added).

fees, which the administrative law judge acknowledged but did not address. *See* Attorney Fee Order at 2. This contention is comprised of two parts. The first concerns the circuit within whose jurisdiction this case arises, as employer contends it cannot be held liable for pre-controversion fees if this case arises in the Sixth Circuit, pursuant to *Day*, 518 F.3d at 419, 42 BRBS at 19(CRT). The administrative law judge noted that claimant's hearing loss injury occurred in both Jeffersonville, Indiana, which is within the jurisdiction of the Seventh Circuit, and in Louisville, Kentucky, which is within the jurisdiction of the Sixth Circuit.[4] Attorney Fee Order at 4. The administrative law judge appears to have determined that this case arises within the jurisdiction of the Seventh Circuit. *See* n.1, *supra* (applying Seventh Circuit precedent to determine the relevant community to set the hourly rate). However, as the precedent of both the Sixth Circuit and the Board is aligned on this subject, we hold that employer cannot be held liable for pre-controversion attorney's fees irrespective of whether this case arises within the jurisdiction of the Sixth or the Seventh Circuit.[5] *Day*, 518 F.3d at 419, 42 BRBS at 19(CRT); *Childers*, 22 BLR 1-148.

Employer's second contention in this respect concerns the date on which its liability commences. Claimant's initial claim was filed against Jeffboat. However, in 2001, Jeffboat had sold some of its assets to employer and claimant continued to work at the same site for employer after that date. After the case was referred to the OALJ, claimant moved to join employer to the claim and Jeffboat moved to be dismissed.[6] Employer contends its liability under Section 28(a) cannot commence until it controverted the claim, irrespective of any actions taken by Jeffboat. Claimant responds that because this case involved a dispute concerning the responsible employer, it is reasonable to hold the responsible employer liable for a fee for all work necessary to the success of the claimant's claim, including that performed before the responsible employer controverted the claim, citing

[4] Section 21(c) of the Act states that appellate jurisdiction of a case is in the circuit "in which the injury occurred," or in this case, where the last exposure to injurious noise occurred. 33 U.S.C. §921(c); *see, e.g., Dantes v. Western Found. Corp.*, 614 F.2d 299, 11 BRBS 753 (1st Cir. 1980) (holding that Section 21(c) confers exclusive jurisdiction for review of a Board decision in the court of appeals for the circuit in which the injury occurred).

[5] For the sake of clarity, however, on remand the administrative law judge should determine where claimant's last exposure to injurious noise occurred.

[6] Jeffboat's motion to be dismissed was not formally acted upon, but the settlement between claimant and GAT indicates that GAT is the responsible employer. *See* Amended Decision and Order Approving Settlement at 1 n1.

*Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem.*, 377 F. App'x 640 (9th Cir. 2010).

In *Lopez*, the claimant filed serial claims against three employers for his cumulative trauma injuries. The administrative law judge held the last employer liable for the claimant's benefits. With respect to liability for the attorney's fee, the administrative law judge found that claimant's counsel's work on the first two claims was necessary to the successful prosecution of the third claim. Consequently, in light of the last employer rule, the administrative law judge concluded that the last employer was liable for the attorney's fees accrued in the claims against all three employers, including those accrued prior to the time the last employer filed its notice of controversion. The Board affirmed the application of the responsible employer rule on these facts. *Lopez*, 39 BRBS at 93-94.[7] Claimant contends this reasoning applies in this case such that employer can be held liable for necessary work before it was joined to the claim and controverted it. As the determination of the date employer's fee liability commences, and whether employer is liable for any accrued fees, requires additional findings, we remand the case for the administrative law judge to address the parties' contentions on this issue.

Employer next contends the administrative law judge erred in not addressing its contention that claimant's counsel billed excessive hours for depositions and counsel's concession to reduce her fee for these services by 3.25 hours. We agree. The administrative law judge noted that claimant's counsel "consented to the reduction of hours for preparation for the depositions," but he did not reduce the hours billed by the agreed-upon 3.25 hours. Attorney Fee Order at 2. The administrative law judge awarded all hours claimed, stating only that he found that the "complexity of developing evidence for the hearing in addition to the necessary work performed by Counsel was essential to the successful litigation of the claim." *Id.* at 13. We remand the case for the administrative law judge to address employer's contention and claimant's counsel's concession and to explain his determination for the award or disallowance of a fee for the services in question. *See* 5 U.S.C. §557(c)(3)(A); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

[7] In a subsequent case, the Board relied on both *Lopez* and *Dyer*, 563 F.3d at 1051, 43 BRBS at 35(CRT) to affirm a similar award. *S.T. [Towne] v. California United Terminals*, 43 BRBS 82 (2009), *aff'd mem.*, 414 F. App'x 941 (9th Cir. 2011). *Lopez*, however, was decided before *Dyer*, and thus, does not rest on its holding.

Accordingly, the award of an attorney's fee for 90.50 hours of services is vacated, and the case remanded for further proceedings consistent with this opinion. In all other respects, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge