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Issue Date: 06 June 2008

CASE NOs. 2004-LHC-0767 & 0768

OWCP NOs. 18-78591 & 81253

In the Matter of:

S. T.,
Claimant,

v.

MARINE TERMINALS CORP. and
MAJESTIC INSURANCE CO.,
Employer and Insurer,

and

APM TERMINALS/MAERSK PACIFIC, LTD. and
SIGNAL/COMMERCIAL INSURANCE SERVICES,
Employer and Insurer,

and

CENTENNIAL STEVEDORING SERVICES and
HOMEPORT INSURANCE CO.,
Employer and Insurer,

v.

CALIFORNIA UNTIED TERMINALS and
SIGNAL MUTUAL INDEMNITY ASSN.,
Employer and Insurer.

ORDER GRANTING ATTORNEY'S FEES

I. Introduction

Four employers were joined in this claim for disability payments and medical care filed under the Longshore and Harbor Workers' Compensation Act (the Act), as

amended, 33 U.S.C. §§ 901 *et seq.* California United Terminal, and its insurance carrier, Signal Mutual Indemnity Association (collectively referred to as CUT), conceded responsibility for those benefits as the last responsible employer. The question before me is whether CUT therefore is liable under Section 28 of the Act for:

(a) all of the Claimant's attorney's fees, including those incurred before CUT was joined as a party, or

(b) only the fees incurred more than thirty days after CUT was joined, with the earlier fees being a lien on the compensation the Claimant obtained by litigating here.

I find CUT liable for all the Claimant's fees.

II. Background Facts and Procedural Posture

While working as a marine clerk for Marine Terminals Corporation (MTC), the Claimant alleged that she injured her right hand, wrist and arm on July 10, 2002 while working a gearshift. Stipulations of All Parties, 2004-LHC-0767, 0768, at 2 (Aug. 15, 2005). MTC controverted the claim on July 17, 2002. *Id.* After Duke Ahn, M.D., an orthopedic surgeon, and Michael Rosco, M.D., an independent medical examiner, both diagnosed a right wrist injury, MTC paid the Claimant retroactive benefits when she returned to work. *Id.* Thereafter, the Claimant continued to work out of the hiring hall for various maritime employers as a marine clerk. *Id.* at 3.

Dr. Ahn saw the Claimant again on January 31, 2003, and found that her "right wrist problems were aggravated and caused by her industrial exposure." *Id.* at 3. He recommended EMG studies, the results of which might show a need for wrist surgery. *Id.* Around June 19, 2003, Dr. Ahn recommended that the Claimant have surgery on her right hand. *Id.* at 4.

The Claimant filed a second claim against her then-current employer, Maersk Pacific (Maersk), around July 18, 2003. *Id.* She continued working without restrictions. *Id.* at 4. Maersk controverted the claim, saying the Claimant had presented inadequate documentation. *Id.*

The Claimant, MTC, and Maersk attended an informal conference at the Office of Workers' Compensation Programs (OWCP) on October 7, 2003. The OWCP claims examiner concluded that "a responsible employer cannot be named until such time as [the Claimant] ceases work and has the surgery." *Id.* at 3, 4.

By letter dated January 7, 2004, the district director referred the case to the Office of Administrative Law Judges.

At Maersk's request, Ross Nathan, M.D., an orthopedic surgeon, evaluated the Claimant on January 15, 2004. He diagnosed carpal tunnel syndrome that he believed had not been aggravated by work. Stipulations of All Parties, at 4. He related the Claimant's wrist arthritis to her preexisting, "well documented" injury and also contended that the Claimant's de Quervain's tendonitis was an industrial injury from July 2002. *Id.* at 4-5.

The Claimant joined Centennial Stevedoring Services (CSS) as a party, based on work done for that employer, on May 7, 2004. CSS controverted the claim. *Id.* at 5.[1]

The Claimant began to work for CUT on June 2, 2004. *Id.* at 6. On September 23, 2004, the motion CSS filed to join CUT as an employer potentially liable for the claim was granted. *Id.* at 7. CUT took more than thirty days to respond to the claim that it was the liable employer. *See* Reply Brief on Behalf of California United Terminals and Signal Mutual & Frank Gates Acclaim (December Reply Brief), 2004-LHC-0767, 0768, at 1, 3, 6 (Dec. 10, 2005).

On December 10, 2005, CUT conceded liability as the employer legally responsible for the injuries to the Claimant's wrist and hand. Stipulations of All Parties, at 6; December Reply Brief, at 1.

The Claimant's wrist surgery was done on June 30, 2005. As the last responsible employer, CUT paid for that procedure and paid temporary total disability benefits during her recovery. December Reply Brief, at 1.

On August 18, 2005, I issued an Interim Order Granting Attorney's Fees of $1,406.25 that CUT paid. Interim Order Granting Attorney's Fees, 2004-LHC-0767, 0768, at 1 (OALJ) (Aug. 18, 2005).

The parties entered into a settlement agreement on February 9, 2006.[2] The question of attorney's fees remained unresolved. December Reply Brief, at 3. A hearing regarding the issue of liability for attorney's fees covering the whole formal proceeding was held on August 16, 2005. Hearing Transcript, at 1.

In a later settlement agreement, CUT paid an additional $1,500 to cover attorney's fees incurred after September 23, 2004. 33 U.S.C. Section 8(i) Settlement Agreement, 2004-LHC-0767, 0768, at 4-5 (OALJ) (Feb. 9, 2006).

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[1] The Claimant based her motion for joinder on an injury she sustained working at CSS. Stipulations of All Parties, 2004-LHC-0767, 0768, at 5 (Aug. 15, 2005). The claim's date of injury was June 18, 2003. *Id.* As of November 7, 2004, CSS owed nothing for the Claimant's medical treatment. *Id.* at 6.

[2] 33 U.S.C. § 8(i) Settlement Agreement, 2004-LHC-0767, 0768, at 4 (OALJ) (Feb. 9, 2006). February 9, 2006 is the Office of Administrative Law Judges date of receipt.

III. Analysis

The issue is whether CUT is liable for the attorney's fees the Claimant incurred to successfully prosecute this claim against several of her employers, including fees for the time her lawyer devoted to the matter before CUT was joined as a party.

Before the hearing, the Claimant argued that the law allows an administrative law judge to apportion liability for attorney's fees among the employers or, in the alternative, to place the entire fee liability on a single employer. The Claimant could cite few decisions squarely addressing the allocation of attorney's fee in multiple-employer cases, for until recently none existed. The Claimant primarily argued that fairness and due process required that she not be required to bear the fees.

CUT argues that Section 28(a) of the Act precludes the assessment of attorney's fees against it for any time before September 23, 2004 given the text of the Act, and interpretations of the attorney's fee provision made in single-employer cases.

Since the hearing of August 15, 2005, both the Claimant and CUT have submitted two recent Benefits Review Board decisions that they believe support their respective positions. The Claimant cites to the published decision in *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (BRB) (Oct. 26, 2005), *appeal dismissed*, *SSA Marine, et. al. v. O.W.C.P.*, No. 05-777 (9th Cir. Dec. 12, 2005); CUT relies upon the unpublished decision in *Phillips v. Kinder Morgan Bulk Terminals*, BRB Case No.: 06-0408 (BRB) (Dec. 20, 2006).

I find the application of the last responsible employer rule in *Lopez* persuasive and conclude that CUT is liable for all of the Claimant's attorney's fees. CUT is liable from the date the district director transferred the case to the Office of Administrative Law Judges, and shall pay attorney's fees for the period between January 7, 2004 and September 23, 2004.

A. Liability for Attorney's Fees in Relation to Section 28 and Formal Proceedings After Joinder

Section 28(a) of the Act authorizes an award of attorney's fees where an employer does not offer to pay a claim within thirty days of written notification by the deputy commissioner, and the claimant thereafter hires an attorney who prosecutes the claim successfully. 33 U.S.C.A. § 928(a) (West 2007); *Richardson v. Continental Grain*, 336 F.3d 1103, 1105 (9th Cir. 2003); *Lopez*, 39 BRBS at 93. The Ninth Circuit has "liberally construed" Section 28(a), emphasizing that attorney's fees "shall" be awarded. *Richardson*, 336 F.3d at 1105; *see also Voris v. Eikel*, 346

U.S. 328, 333 (1953) ("[The Act] must be liberally construed in conformance with its purpose."). The failure to pay a claim within thirty days of notice shifts liability for attorney's fees from the Claimant to the Employer. *Richardson*, 336 F.3d at 1105-6.

Administrative law judges adjudicate disputes in proceedings "conducted in accordance with the provisions of [the Administrative Procedure Act (APA)]." 33 U.S.C. § 919(d) (2007). Under the APA, "[w]hen private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in law or fact." 5 U.S.C.A. § 554(b) (West 2007). Administrative law judges may join employers as parties to ongoing adjudications even when "no claim had been filed against it by claimant" and find the employer joined in that way liable to pay the Claimant's disability compensation and to furnish medical benefits. *Vodanovich v. Fishing Vessel Owners Marine Ways*, 27 BRBS 286, 288-89 (BRB 1994). Joinders of this sort comport with the policy underlying the Federal Rules of Civil Procedure that govern the joinder of third parties. "A person . . . must be joined as a party if, in that person's absence, the court cannot accord complete relief among existing parties . . . ." Fed. R. Civ. P. 19(1)(a); *see also* 29 C.F.R. § 18.10 (West 2007) ("Other persons . . . shall have the right to participate as parties if the administrative law judge determines that the final decision could directly and adversely affect them . . . .").

An administrative law judge also has authority to adjudicate a successful claimant's applications for attorney's fees. 33 U.S.C.A. § 928(c) (providing that any adjudicator may approve an attorney's fee for the work done before him). This authority is broad. *Lopez*, 39 BRBS at 86; *Martin v. Kaiser Co.*, 24 BRBS 112, 126 (BRB 1990); 20 C.F.R. § 702.339 (West 2007) ("[An] administrative law judge shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure.").

Section 28(a) of the Act does not contemplate parties being joined in the course of formal adjudicatory proceedings. The statute's paradigm assumes one claim and one employer, who either accepts liability for the claim, and so avoids liability for attorney's fees, or controverts the claim and thereby risks fee liability if the claimant retains a lawyer who prosecutes the claim successfully.

CUT, citing *Percoats v. Marine Terminals Corp.*, 15 BRBS 151 (BRB 1982), argues that after the 1972 amendments to the Act transferred adjudicatory powers to the Office of Administrative Law Judges, "the language in Section 28, which refers to the transmittal of a claim by the OWCP deputy commissioner, can also refer to the transmittal of a claim by the ALJ." Post Trial Brief on Behalf of CUT of September 28, 2005, at 5-6. This statement must be qualified to account for the distinctions between proceedings at the district director and administrative law judge levels, and the difference between a claim under Section 28(a) and a joinder

notice an administrative law judge issues to add a later employer (and its insurance carrier) as a party.

The Board distinguished the offices of the deputy commissioner and administrative law judges in *Percoats*. "[T]reating them as separate functions," the Board emphasized the difference "between the authority to conduct investigations and the authority to hold hearings." *Percoats*, 15 BRBS at 154. The deputy commissioner "retains all powers necessary to conduct pre-hearing investigations or inquiries . . . without resort to formal hearing processes," but "Section 19(d) divested the deputy commissioner only of the hearing power." *Id.* The procedure Congress fashioned avoids formal adjudications when possible. Formal proceedings begin if the parties cannot settle their disputes through the informal mechanisms Section 19 describes. The district director transmits the claim to the employer, investigates it, convenes an informal conference, and makes a recommendation to dispose of the claim. 33 U.S.C. § 919(a) through (c) (2007). *See also Director, O.W.C.P. v. Newport New Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 133 (1995) (the director "lack[s] control over the adjudicative process"); *Barthelemy v. J. Ray McDermott*, 537 F.2d 168, 173 (5th Cir. 1976) ("[A]dministrative and adjudicatory functions under the Act should be separated to better effectuate its purposes and policies.").

CUT confuses an analogy with an identity when it equates the transmittal of a claim by a district director to the Office of Administrative Law Judges for formal hearing with a joinder notice a presiding administrative law judge issues to add an employer who had not participated in informal proceeding at OWCP. Transmitting a claim to the OALJ ordinarily is the district director's final act in the pre-hearing process, which involves sending an employer a standardized form often addressed to an adjuster. The joinder of a party in the course of a formal adjudication falls to the administrative law judge, who customizes it to the proceedings, gives notice of time and place of the hearing, and likely addresses it to the new party's lawyer. *See* 5 U.S.C.A. § 554(b). CUT's analogy of transmittal of a claim to a joinder notice fails.

The text of Section 28 of the Act further highlights the distinction between proceedings at the deputy commissioner/district director and administrative law judge levels. While "the deputy commissioner, Board, or court" may assess attorney's fees under the provisions of Section 28(a), only "the Board or court may approve an attorney's fee for the work done before it by the attorney for the claimant" in an adjudicative proceeding. 33 U.S.C. § 928(c) (2007). This language distinguishes the constraints on the assessment of attorney's fees between the deputy commissioner or district director and the administrative law judge. An administrative law judge has discretion to award attorney's fees in proceedings before her or him that a deputy commissioner does not.

CUT relies on *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (BRB 1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993), for its holding regarding the relationship between notice requirements and attorney's fees under Section 28(a). The Board held that only written notice of the claim from the district director (the statue refers to the deputy commissioner) triggers employer's liability for an attorney's fee under Section 28(a). *Watkins*, 26 BRBS at 184. CUT reads the opinion narrowly, as a holding that attorney's fees cannot be assessed in a Claimant's favor when the last responsible employer is joined at the administrative law judge level. This reading conflicts with the administrative law judge's statutory authority to join parties and to assess attorney's fees. *See* 33 U.S.C. § 928(c); *Vodanovich*, 27 BRBS at 288-89. Following its *Watkins* theory to its logical conclusion, CUT should contest all liability for attorney's fees, yet it has paid almost $3,000 already, after it was joined at the administrative law judge level without ever having received notice of the claim from the district director. *Watkins* describes the time liability for fees attaches in the ordinary single-employer situation, where the district director notifies the employer in writing of the claim. As no district director was involved in joining CUT, *Watkins* simply has nothing to say on the fee liability issue that this case presents.

The structure of the *Watkins* decision itself supports this distinction between the authority district directors and administrative law judges enjoy with respect to awarding attorney's fees. The Board evaluated two fee awards in *Watkins*, one by an administrative law judge, the other by a district director. The Board applied an abuse of discretion standard to the fee the administrative law judge set, but held the claimant to the literal language of Section 28(a), and allowed only fees incurred more than 30 days after the district director gave the employer notice that the claim had been filed. *Watkins*, 26 BRBS at 181, 183-85. Had the Board wished to extend its narrow reading of the statute beyond the wording to encompass administrative law judges, it would likely have said so when it had both sources of authority for granting attorney's fee before it.[3]

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[3] The Fifth Circuit adopted the holding of *Watkins* in an unpublished decision, *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357 (5th Cir. 2002). That case also did not discuss the notice requirements relating to proceedings before an administrative law judge. Here the assessment of attorney's fees is not before the district director or deputy commissioner, but before an administrative law judge, whose assessment of attorney's fees will not be overruled unless it is "arbitrary, capricious, an abuse of discretion or not in accordance with the law." *Watkins*, 26 BRBS at 180. The Fifth Circuit's rule provides only persuasive authority in the Ninth Circuit. While the Fifth Circuit approach may be compatible with the current state of the law in the Ninth Circuit, my decision also is in harmony with Ninth Circuit precedent. Extending the last employer rule to cover liability for attorney's fees for the whole claim is consistent with the policy reasons that assign total liability for disability benefits and medical care to the last responsible employer, and follows the intent of the Act that a compensation award not be diminished when claimant must hire an attorney to obtain the benefits due to her.

Section 28(a) simply does not address joinder situations, but assumes one worker with one claim against one employer. It makes sense to expect an employer joined in a formal adjudication to accept the claim or become liable for attorney's fees within the 30 days. *See*, Section 28(a) of the Act, 33 U.S.C. § 928(a). An employer joined as a party in the course of a multi-employer claim must either accept liability within 30 days of a joinder notice from the administrative law judge, or shoulder liability for attorney's fees if it is found to be the last responsible employer.

Neither would Section 28(b) of the Act preclude a fee award, if it were somehow thought to apply. After CUT was joined at the OALJ level, no informal conference could be held at the OWCP on the claim against CUT. The lack of a conference could have some significance, as several of the U.S. Courts of Appeal have held that without an informal conference and a recommendation by the district director, no fees are payable under § 28(b) of the Act. *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253 (6th Cir. 2007); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313 (4th Cir. 2003); *Pool Co. v. Cooper*, 274 F.3d 173 (5th Cir. 2001). The Ninth Circuit, the jurisdiction in which this matter arises, rejects that interpretation of the Act. *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 882 (9th Cir. 1979), something the Benefits Review Board recognized in *Davis v. Eller & Co.*, 41 BRBS 58 (BRB 2007). The lack of an informal conference is no impediment to awarding fees against CUT.

i. Liability for Attorney's Fees Triggered by Lack of Prompt Response to Joinder Notice

CUT admits that it did not accept responsibility for the claim within thirty days of its joinder.[4]

ii. Successful Prosecution of Claim

Successful prosecution requires that the "actual relief [obtained] 'materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Richardson*, 336 F.3d at 1106 (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992)); *see Wells v. International Great Lakes Shipping Company*, 14 BRBS 868, 872 (BRB 1982) (finding successful prosecution where the "[c]laimant had received no compensation until after his attorney represented him at the deputy commissioner level"); *Revoir v. General Dynamics Corp.*, 12 BRBS 524, 526 (BRB 1980) ("[L]egal services rendered on behalf of the claimant in anticipation of litigation which result in a favorable settlement or agreement are compensable under the Act."); *Ross v. General*

[4] CSS, a private party to the action, moved for CUT's joinder. Stipulations of All Parties, at 6.

Dynamics Corp., 11 BRBS 449 (BRB 1979) (compensation found for representation after informal conference and until settlement shortly before the trial of the claim).

CUT concedes the Claimant successfully prosecuted her claim. It made an "unconditional offer" to cover expenses for the surgery and subsequent compensation. Such an "unconditional offer" constitutes relief that "materially alters the legal relationship between the parties." CUT effectively concedes that the Claimant has successfully prosecuted the matter in agreeing to pay compensation and some attorney's fees. Finally, at the informal conference stage of the proceeding, the liability for the wrist surgery was not established. The transfer to the Office of Administrative Law Judges led to the joinders of CSS and CUT as parties. CUT then accepted liability. The Claimant had representation at the district director level and throughout the formal proceedings before me that ultimately led to the resolution of the claim—CUT paid for the wrist surgery and paid disability benefits.

iii. Vesting of Liability for Attorney's Fees

CUT's failure to accept liability for the surgery and disability benefits within 30 days of its joinder triggered liability for attorney's fees because the Claimant successfully prosecuted her claim. It already has paid about $3,000 in fees. While the time requirements set in Section 28(a) triggered the time CUT's fee liability attaches, in multi-employer cases the last employer rule is the underlying source of the liability, not any statutory text.[5] I turn to the last responsible employer rule to guide the assessment of liability.

B. Application of Last Responsible Employer Rule to Attorney's Fees

The Act does not give explicit guidance on an employer's responsibility for attorney's fees in multi-employer litigation. It is an example of what Judge Richard Posner of the Seventh Circuit has referred to as "the open area" where preexisting rules found in canonical legal texts such as statutes, regulations and binding decisions do yield no ready answer.[6] Multi-employer claims fall under the judge-

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[5] CUT also cites *Childers v. Drummond Co.*, BRB No. 01-0585 (BLA) (June 20, 2002), a Black Lung case involving a single employer that relies heavily on *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357 (5th Cir. 2002), and *Watkins*. After interpreting Section 28(a), *Childers* emphasized that in single employer cases, the parties are not in adverse positions before a controversion is filed. *Childers*, BRB No. 01-0585, at 12. In multiemployer cases like this one, the Claimant and the Employers are already in adverse positions before a later employer such as CUT is joined. So while CUT is correct that *Childers* might apply to Longshore cases as a persuasive authority, and possibly "effectively overrule[s]" *Liggett v. Crescent City Marine Ways & Drydock, Inc.*, 31 BRBS 135 (BRB) (Oct. 16, 1997), it sheds no light on the fees to be awarded in a multiparty situation where the adjudication is focused on determining the last responsible employer. *Phillips v. Kinder Morgan Bulk Terminals*, BRB No. 06-0408 (Dec. 20, 2006) (unpublished).

[6] Richard A. Posner, *How Judges Think* at 9, 41 (Harvard Univ. Press 2008).

made last responsible employer rule that has it genesis in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955). CUT conceded that the statute does not contemplate these facts—it assumed responsibility for compensation under the last employer rule, a rule the courts created for a circumstance where the statute does not speak "with clarity,"[7] one fashioned in the "open area" under Posner's taxonomy. CUT correctly asserts that "in a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning . . . is finished." December Reply Brief, at 4 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). The Benefits Review Board has affirmed an "administrative law judge's application of the last employer rule . . . regarding liability for an attorney's fee" in a multi-employer case. *Lopez*, 39 BRBS at 93. Under the Board's *Lopez* decision, CUT's liability for attorney's fees does not cease on September 23, 2004 because the claimant's successful prosecution of her injury claim is the vindication of a last employer liability.

When an injury develops over the course of working for several employers, the last employer rule assigns total liability for compensation to a single employer. *Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co.*, 339 F.3d 1102, 1104 (9th Cir. 2003). Under the rule, "a single employer may be held liable for the totality of an injured worker's disability, even though the disability may be attributable to a series of injuries that the worker suffered while working for more than one employer." *Id.* In cases of cumulative trauma or injury, where a subsequent injury "aggravated, accelerated, or combined" with claimant's prior injury, as CUT conceded happened here, as the last employer it is saddled with liability for all medical care and compensation. *Foundation Constructors, Inc. v. Director, O.W.C.P.*, 950 F.2d 621, 624 (9th Cir. 1991) (quoting *Kelaita v. Director, O.W.C.P.*, 799 F.2d 1308, 1311 (9th Cir. 1986)).

The claimant in *Lopez* began working as a longshoreman in 1994. Between 1999 and 2001, his work on top handlers caused injuries to his knees, shoulders, elbows, and back. *Lopez*, 39 BRBS at 86. In November 2001 while he worked for Eagle Marine Services (Eagle), his knee popped out of place and in December 2001 he injured his right shoulder and elbow. He filed claims against Eagle for these injuries in November 2001 and January 2002. *Id.*. Afterward he obtained light duty work from January 2002 through April 2003, "including a stint with Maersk Pacific (Maersk)." *Id.* at 87. His doctor believed that his work from 2002 to 2003 (including that at Maersk) aggravated his condition, so he filed a cumulative trauma claim against Maersk for injuries to his shoulders, knees and elbows. *Id.* He worked for Stevedoring Services of America (SSA) until two days before the

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[7] CUT's citation to *Virginia International Terminals, Inc. v. Edwards*, 398 F.3d 313 (4th Cir. 2005) is inapplicable on these grounds as well. Unlike *Edwards*, the instant case is not only subject to the last employer rule because there are multiple employers, but it diverges from Section 28(a)'s assumption that the district director should transmit the claim to the employer.

shoulder surgery that his doctor performed on April 10, 2003. *Id.* Alleging that his work for SSA had "caused an increase in his overall symptoms," he filed a claim against SSA in June 2003. *Id.* The administrative law judge found SSA the last employer responsible for the injuries to his knees, shoulders, and elbows, which entitled him to ongoing temporary total disability benefits from SSA. *Id.* The judge also assessed attorney's fees against SSA for legal work his lawyer did before SSA received notice of the claim against it. *Id.* at 93. SSA sought review of that aspect of the fee award at the Benefits Review Board.

Aware that the Claimant had proceeded on a cumulative trauma theory "as a result of working for all three employers," the Board affirmed "the administrative law judge's application of the last employer rule . . . regarding liability for an attorney's fee," including the assessment of pre-controversion fees. *Id.* at 93-94. The Board agreed with the administrative law judge that the claims made against two previous employers (Eagle and Maersk) that were not the responsible employers, were "necessary to the successful prosecution of claimant's claim" against SSA, the last responsible employer. *Id.* at 93. The claimant's counsel's work in relation to Maersk and Eagle was necessary to "vindicate" the Claimant's theory and to successfully prosecute the claim. *Id.* "[I]n light of the last employer rule," "SSA [was] liable for the attorney's fees accrued in his claims against all three employers." *Id.* The administrative law judge had relied correctly on the Board's discussion of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), finding that "[w]here claims involve a common core of facts, or are based on related legal theories [the judge evaluating fee liability] should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation." *O'Kelley v. Dept. of the Navy*, 34 BRBS 39, 43 (BRB 2000).

Although CUT was joined after formal proceedings were under way, there was uncertainty about which employer was liable, as there had been in *Lopez*. Both SSA in *Lopez* and CUT here face liability for attorney's fees under Section 28. In *Lopez*, SSA controverted the claim in a timely manner. *Lopez v. Eagle Marine Services*, 2003-LHC-02741, 02742, 02743, 02744, at 8 (ALJ) (Sept. 29, 2004). Here, CUT did not controvert liability within thirty days of the joinder notice. The informal conference in this case (which involved fewer than all parties that appeared at OALJ) yielded only an ambiguous conclusion—that the last employer would be determined when the claimant stopped working and he had the surgery he needed. While in *Lopez,* the three employers litigated to determine which was liable, the resolution of the issue of the last employer here came through the joinder first of CSS and ultimately of CUT. *Id.* at 2, 7-8. Just as the participation in the *Lopez* adjudicatory proceedings united all claims in "a common core of facts," the joinder and participation of all four employers were necessary here to identify CUT as the last responsible employer.

The ultimate outcome in this case was the same as in *Lopez*: the claimant's counsel's work in relation to the employers *not* found to be last responsible employers was necessary to determine the last employer and vindicate the Claimant's cumulative trauma theory for liability. *See*,*Lopez*, 39 BRBS at 93. CUT conceded it was the last employer, indicating that it recognized that the Claimant "suffered a cumulative trauma as a result of working for all employers." *Id.* In light of the "medical evidence and the claimant's testimony," CUT settled the case rather than incur the "additional attorney fees" of "continued litigation." Hearing Transcript, at 67.

CUT was joined as a party after the district director transferred the matter to the Office of Administrative Law Judges. CUT's liability extends to that transfer, when formal proceedings began. *See* 33 U.S.C. § 928(c); *Revoir*, 12 BRBS at 527 ("[A] claimant's attorney should apply to the administrative law judge for a fee for all services performed after the informal conference proceedings were terminated . . . ."); *Fitzgerald v. RCA International Service Corp.*, 15 BRBS 345, 347 (BRB 1983) (citing *Miller v. Prolerized New England Co.*, 14 BRBS 811, 823 (BRB1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982) ("[T]he letter of referral of the case from the Office of the Deputy Commissioner to the Office of Administrative Law Judges provided the clearest indication of the date that informal proceedings terminated."). This holding harmonizes the intent of Congress that awards to injured workers "shall not be diminished" by diminishing their recoveries with fees with the limits on the administrative law judge's jurisdiction to assess attorney's fees for formal proceedings.

CUT argues that it did not have sufficient notice of the claim to be held liable for attorney's fees before September 23, 2004 and that holding it liable runs contrary to the Act's goal of resolving issues quickly. But a claimant may file claims against employers in any order. *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62, 65 (BRB 1992). Employers added later remain liable for all medical care and compensation under the last employer rule. They also are liable for attorney's fees incurred in the successful prosecution of the proceeding before the administrative law judge. Finally, the last responsible employer rule itself is designed to reduce litigation. *Metropolitan Stevedore*, 339 F.3d at 1107 (quoting *Foundation Constructors*, 950 F.2d at 623) ("'[The last employer rule] serves to avoid the difficulties and delays connected with trying to apportion liability among several employers.'").

CUT also argues that as a matter of law, no controversy existed between CUT and the claimant before its joinder. Nonetheless, CUT conceded that it was the responsible employer, which amounts to a tacit acceptance that this rule governs. Although CUT insists that a strict reading of Section 28(a) should control this matter, it seems incongruous to argue for adherence so strictly to a statutory

text that never contemplated multi-employer adjudications or the judicial development of the last responsible employer rule.

Finally, CUT asserts that assessing attorney's fees according to the last employer rule creates an exception to the "American Rule" that Congress has not enacted.[8] Applying the last employer rule to attorney's fees as well as to medical care and disability benefits comports with Congressional intent. Courts have recognized that "Congress intended that the employer during the last employment . . . should be liable for the full amount of the award." *Cardillo*, 225 F.2d at 145. Congress also intended that attorney's fees should not diminish or erode the award. 33 U.S.C. § 928(d). Applying the last employer rule to include attorney's fees is more consistent with the overall scheme Congress enacted to protect workers.

Policy considerations also support this resolution of the fee claim. After a claimant's attorney litigated a claim through to the last responsible employer, which must then pay for several employer's worth of injury, it would be illogical to pay him only for the work done pertaining to the final employer. Such a result conflicts with the policy animating the last responsible employer rule, and circumscribes the statutory authority administrative law judges exercise to "approve an attorney's fee for work done before [them]." 33 U.S.C. § 928(c). Assigning full responsibility of attorney's fees in this case also discourages future claimants from joining all possible employers on a last employer claim at once, cutting down litigation costs.

C. Extending the Last Employer Rule to Attorney's Fees Does Not Conflict with the Holdings of Other Circuit Court and Board Decisions

CUT claims that awarding attorney's fees before an employer had controverted a claim violates Circuit court and Board precedent. I disagree. The majority of the cases cited to argue against applying the last responsible employer rule to attorney's fees involve the single employer cases that Section 28(a) contemplates. The last responsible employer rule grew out of multi-employer cases the Act never envisaged. It would be foolish to expect to apply Section 28(a) literally in that circumstance.

The Fourth Circuit decision in *Kemp v. Newport New Shipbuilding Co.*, 805 F.2d 1152 (4th Cir. 1990), recognized that the language of Section 28(a) was "ambiguous" and indicated that there are other "reasonable construction[s]" of the statute. *Kemp*, 805 F.2d at 1153. The language even suggests that, had the *Lopez* case appeared before it, the Fourth Circuit would have decided differently. *Id.* ("[T]he Board's construction . . . must be accepted, even if it is not . . . the

[8] Under the American Rule, "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Aleyska Pipeline Service, Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975).

construction this court would have reached if originally deciding the question."). The court upheld the denial of pre-controversion attorney's fees because the Board's construction of the statute was "sufficiently reasonable." *Id.* A reasonable construction of the statute led the reviewing court of appeals to accept the Board's decision. The extension of the last employer rule in this instant case is also a "sufficiently reasonable" reading of the Act with that rule.

Precedent supplements the Act with a rule that assigns all liability in multi-party actions to the last responsible employer. If Congress intends that the last employer pay full compensation, and that no attorney's fees "shall diminish" an award, it is reasonable to assign liability to the last employer for attorney's fees in this case. *See* 33 U.S.C. § 928(d); *Cardillo*, 225 F.2d at 145. Just as the last employer rule ensures that employers become liable for benefits a proportionate percentage of the time, the liability to pay the attorney's fees associated with multiparty claims is also proportionate.

As in *Kemp*, *Baker v. Todd Shipyards*, 12 BRBS 309 (1980), involved a single employer, not the last employer rule. The Board found that the claimant bears pre-controversion fees and costs. *Baker*, 12 BRBS at 312. *Baker* looked to no judge-made rule for guidance; the last responsible employer rule fills the statutory interstices here.

Like *Baker*, *Jones v. Chesapeake & Potomac Telephone Company*, 11 BRBS 7 (BRB 1979), *aff'd mem.*, No. 79-1458 (D.C. Cir. Feb. 26, 1980), *amended*, (D.C. Cir. Mar. 31, 1980), held that Section 28(a) limited a claimant's ability to recover attorney's fees from the employer. *Jones*, 11 BRBS at 13-14; *see also Lonergan v. Ira S. Bushey & Sons, Inc.*, 11 BRBS 345 (1979) (citing *Jones* as the sole justification for barring recovery of attorney's fees according to Section 28(a)). In *Jones*, a single-employer case, the Board held that "the language of Section 28(a) does not authorize a claimant to utilize an attorney until after employer receives notice of the claim from the deputy commissioner [*i.e.,* the district director]," but noted that the holding might run contrary to the policy of the Act, and reconciled its narrow reading of the statutory language based on Congress' intent. *Jones*, 11 BRBS at 14-16. The Board emphasized Congress' intention that attorneys be brought in only after the employer had controverted a claim and "formal proceedings" were initiated. *Id.* at 15. This reasoning is not inconsistent with the result here. Formal proceedings already were under way when CUT was joined. The *Jones* panel of the Board, faced with these facts, likely would have held CUT liable, given the multi-employer nature of this case and the fact that "formal proceedings" and "litigation" had begun. The difference in facts likely would have led to a different statutory interpretation.

Finally, CUT also cites to *Martin v. Kaiser*, 24 BRBS 112 (BRB 1990) to support its narrow statutory interpretation. That case, in addition to involving a

tangle of employers that included a roofing company, relied for its interpretation of Section 28(a) on *Kemp* and *Luter v. Newport News Shipbuilding and Dry Dock Co.*, 19 BRBS 103 (BRB 1986). Based on these two cases, the Board drew the conclusion that the "[e]mployer is liable only for those fees incurred after 30 days from the date employer or carrier received notice of the claim or from the date employer or carrier declines to pay benefits, whichever occurs sooner." *Martin*, 24 BRBS at 126. However, the language of *Kemp* does not require this statutory interpretation. As mentioned above, *Kemp* upheld this interpretation because it was "sufficiently reasonable." This does not preclude other reasonable constructions of the statute. In its citation to *Luter,* the Board in *Martin* did not consider how it might have ruled in a multi-employer case.

IV. The Attorney's Fee

Fixing this fee requires consideration of the factors listed in the Secretary's fee regulation, *viz.*, (a) the necessary work done; (b) the quality of the representation; (c) the complexity of the legal issues involved; and (d) the amount of the benefits awarded. 42 Fed. Reg. 42548, 42551 (Aug. 23, 1977), *codified as* 20 C.F.R. § 702.132(a) (2006); *Brown v. Marine Terminals Corp.,* 30 BRBS 29, 33 (1996) (*en banc*). The Secretary's regulations capture the essence of the lodestar method of fee calculation. *B & G Mining, Inc v. Director, OWCP*, 552 F.3d 657 (6th Cir. 2008) (interpreting a similar regulation published at 20 C.F.R. § 725.366(b) that applies the attorney's fee provision of Section 28 of the Longshore Act to claims for fees under the Black Lung Benefits Act, 30 U.S.C. § 932(a)).

The lodestar determination that implements federal fee shifting statutes is a two-step process. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). First the attorney's normal rate is multiplied by the hours reasonably devoted to the matter. *Hensley*, 461 U.S. at 433. The "party seeking an award should submit evidence supporting the hours worked and rates claimed" to set the presumptive fee. *Id.* But this multiplication of hourly rate by hours expended "does not end the inquiry." *Id.* at 434. The presumptive fee may be adjusted "in rare or exceptional cases." *Cunningham v. County of Los Angeles*, 879 F.2d 473, 488 (9th Cir. 1988). None of those exceptional circumstances are present here.

Citing *Ingalls Shipbuilding, Inc. v. Director, O.W.C.P. (Biggs)*, 46 F.2d 66 (5th Cir. 1995), CUT objects to the Claimant's lawyer billing by quarters of an hour. Objections to Petition for Attorney Fees and Costs from Claimant's Attorney for Work Before OALJ, at 2 (Dec. 13, 2004). This Fifth Circuit rule is not binding in adjudications in the Ninth Circuit. It is somewhat difficult to understand why quarter hour billings are *per se* improper, when the fee regulation of the Benefits Review Board specifically approves them. 20 C.F.R. § 802.203(d)(3). Reviewing a bill might show that the lawyer manipulated it by repeated quarter hour entries for small or brief tasks as a way to pad it. That is not the case here. Mr. Naylor's

billing according to these time increments is reasonable, and no deduction need be made. *Snowden v. Ingalls Shipbuilding, Inc.,* 25 BRBS 245, 252 (BRB 1991).

CUT also requests that I order Mr. Naylor to provide CUT with "any and all documents identified by Mr. Naylor in his fee petition" so that it can verify that documents produced are worth the time listed. *Id.* CUT has had adequate time to obtain these documents. Had CUT urgently needed them, it would have been more proactive in obtaining them. I have reviewed Mr. Naylor's billings. The time he asks for preparing the listed documents is reasonable and I see no valid objections to the time he devoted to the file.

CUT shall pay the Claimant's attorney's fees for the period beginning after the district director's referral of the case to the Office of Administrative Law Judges on January 7, 2004 until September 23, 2004. Mr. Naylor's November 30, 2004 request for attorney's fees account for 65.5 hours between the dates of January 7, 2004 and November 18, 2004.[9] Considering only the period for which CUT is liable amounts to 56.25 hours. At the current rate of $275 per hour judges in this office award for good quality legal work, Mr. Naylor is entitled to $15,468.75. *Cf.*, *Blanchard v. Bergeron,* 489 U.S. 87, 91 n. 5, (1989); *B& G Mining*, 552 F.3d at 663-664 (approving the use of rates in other cases as a basis for an award in a black lung matter). Costs for $38.87 are also included. The total fee, including costs, shall be $15,507.62.

Summary

CUT is liable for attorney's fees incurred between January 7, 2004 and September 23, 2004. When CUT was joined in the action, it became part of a larger proceeding based on a common core of facts. Failing to respond within the thirty days the statute offers triggered CUT's attorney's fee liability under Section 28(a). The Claimant successfully prosecuted the claim since she succeeded in obtaining coverage of her wrist surgery and subsequent compensation. Under the last employer rule, which in cases of cumulative traumatic injury imposes liability for compensation on the last employer, CUT is responsible for paying the compensation, which it has already agreed to, and attorney's fees for work done related to the proceeding between the district director's transfer of the case to the Office of Administrative Law Judges on January 7, 2004 and September 23, 2004. The granting of attorney's fees is not inconsistent with the holdings made in previous cases that involved a single employer.

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[9] Fees for work done after September 23, 2004 are settled according to the Section 8(i) Settlement Agreement. 33 U.S.C. § 8(i) Settlement Agreement, 2004-LHC-0767, 0768, at 3-4 (OALJ) (Feb. 9, 2006). Accordingly, the fee calculation included only the hours listed from January 7, 2004 through September 22, 2004. There were no entries on September 23, 2004.

ORDER

CUT shall pay Claimant's attorney, Mr. Naylor, $15,507.62. As an order approving the settlement of the underlying claim was already issued, this order is the final disposition in the case.

A

William Dorsey
ADMINISTRATIVE LAW JUDGE