BRB Nos. 05-0665
and 05-0666

RONALD AMBO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FRIEDE GOLDMAN HALTER	)	DATE ISSUED: 05/08/2006
	)	
and	)	
	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeals of the Supplemental Decision and Order Awarding Attorney's Fees and Decision on Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor, and the Compensation Order Award of Attorney's Fees and Compensation Order Award of Attorney's Fees on Reconsideration of David A. Duhon, District Director, United States Department of Labor.

Sue Esther Dulin (Dulin & Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Robert S. Reich, Jerald L. Album and Lauren J. Lopresto (Reich, Meeks & Treadaway, L.L.C.), Metairie, Louisiana, for Louisiana Insurance Guaranty Association.

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

PER CURIAM:

Louisiana Insurance Guaranty Association (LIGA) appeals the Supplemental Decision and Order Awarding Attorney's Fees and Decision on Motion for Reconsideration (2003-LHC-1668) of Administrative Law Judge C. Richard Avery and the Compensation Order Award of Attorney's Fees and Compensation Award of Attorney's Fees on Reconsideration (Case No. 07-156932) of District Director David A. Duhon 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).[1] 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 work-related injuries to his neck in an accident occurring on May 18, 2000. Employer instituted payment of temporary total disability benefits on June 15, 2000. Subsequently, employer refused claimant's request for authorization to undergo a discogram as recommended by claimant's treating physician, Dr. Bartholomew. After an informal conference in March 2003, the district director recommended that the parties agree on an impartial specialist to evaluate claimant's neck condition. Dr. Bazzone, who the parties selected, stated that a discogram was necessary. Employer refused to authorize this procedure. The case was referred to the administrative law judge. Claimant claimed ongoing permanent total disability benefits, an increased average weekly wage, and entitlement to the disputed medical care. LIGA, who had taken over the claim from employer's insolvent carrier at some time in 2001, alleged that claimant was capable of returning to work as of May 22, 2000 or June 2001, that claimant did not require cervical surgery, that it validly refused to authorize the discogram, and that it correctly calculated claimant's average weekly wage.

In his Decision and Order, the administrative law judge found that claimant's average weekly wage is $735.37, which is less than the rate of $742.64 used by employer in making voluntary payments. The administrative law judge awarded claimant temporary total disability benefits from May 18, 2000, until September 15, 2003, the date of maximum medical improvement, permanent total disability benefits from September 15, 2003 until January 7, 2004, the date employer established suitable alternate employment, and continuing permanent partial disability benefits from January 7, 2004, based on the two-thirds of the difference between the average weekly wage of $735.37 and claimant's residual wage-earning capacity of $243.60. The administrative law judge

[1] By Order dated May 17, 2005, the Board consolidated LIGA's appeal of the administrative law judge's fee award, BRB No. 05-0665, with its appeal of the district director's fee award, BRB No. 05-0666.

held employer liable for the discogram, but found that "at this time" claimant does not require the requested cervical surgery.[2]

Thereafter, for work performed before the administrative law judge, claimant's counsel submitted a petition for an attorney's fee and costs of $17,945.96. LIGA filed objections. As to work performed before the district director, claimant's counsel submitted a petition requesting a fee of $2,150. LIGA filed objections.

In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge addressed LIGA's objections and awarded claimant's counsel an attorney's fee of $9,520.96, representing 42.125 hours of attorney services at an hourly rate of $200, plus expenses in the amount of $1,095.96. The administrative law judge reduced the requested fee in view of the principles espoused in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), as claimant was not fully successful in pursuing his claim. The administrative law judge specifically found that LIGA is liable for claimant's attorney's fee because it is a post-insolvency obligation of the insolvent carrier. LIGA filed a motion for reconsideration of the fee award, which the administrative law judge denied.

The district director addressed LIGA's objections to the fee request and awarded claimant's counsel an attorney's fee of $716.67 for 3.58 hours at an hourly rate of $200, taking into account claimant's limited success before the administrative law judge. The district director held that LIGA is liable for the post-insolvency attorney's fee awarded. The district director denied LIGA's motion for reconsideration.

On appeal, LIGA challenges the attorney's fee awards of the administrative law judge and the district director. Claimant responds, urging affirmance of the fee awards.

LIGA first argues that it cannot be held liable for any attorney's fee pursuant to Section 28(a) or (b) of the Act, 33 U.S.C. §928(a), (b), as it was paying claimant temporary total disability benefits. We decline to address this issue, as LIGA did not raise the issue of its liability under these sections in its objections before the administrative law judge or the district director, *see* LIGA's objections (July 9, 2004) and Motion for Reconsideration (April 12, 2005), and the Board will not address these issues raised for the first time on appeal. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

[2] Claimant's appeal of the administrative law judge's decision was dismissed by Board Order dated July 1, 2004. BRB No. 04-0733.

LIGA next contends that claimant was not successful on any "significant" issue presented to the administrative law judge and that therefore his attorney is not entitled to a fee. The administrative law judge rejected this contention, and found that claimant established his entitlement to an ongoing award of permanent partial disability benefits which employer contested, even though he was not successful in obtaining an increased average weekly wage or the requested cervical surgery. LIGA specifically contended that claimant was not disabled at all after May 22, 2000 or June 2001 or alternatively, that claimant was at most partially disabled. Decision and Order at 2-3; Jt. Ex. 1; Tr. at 17, 24, 33; LIGA post-trial brief at 13-15. Thus, LIGA's contention on appeal that claimant's entitlement to permanent partial disability benefits was not at issue before the administrative law judge is without merit. The administrative law judge awarded claimant total disability benefits until January 7, 2004, and ongoing permanent partial disability benefits from that date. In addition, the administrative law judge held employer liable for the contested discogram. As claimant obtained an award of benefits which LIGA actively contested, the administrative law judge properly held that claimant obtained some degree of success before him and that claimant is entitled to an attorney's fee award. *See Quave v. Progress Marine*, 918 F.2d 33, 24 BRBS 55(CRT) (5th Cir. 1990), *modifying on reh'g* 912 F.2d 798, 24 BRBS 43(CRT), *cert. denied*, 500 U.S. 916 (1991); *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004). Moreover, as claimant was successful before the administrative law judge, he is entitled to a reasonable fee for necessary work leading to that success, including that performed before the district director. *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). As the administrative law judge properly found that claimant was successful in pursuing some of his claim, we reject LIGA's challenge to the fee awards on this basis.

LIGA next contends that the administrative law judge and the district director failed to reduce the requested fees in accordance with *Hensley v. Eckerhart*, 461 U.S. 424 (1983). We reject this contention. The administrative law judge stated that, pursuant to *Hensley*, the issue is whether claimant prevailed on his claim, and if so, did he achieve a level of success that makes the requested fee reasonable. Supp. Decision and Order at 2. Thus, the administrative law judge stated that:

> Although Claimant was not successful on the issues of average weekly wage and surgery, he did gain permanent partial disability compensation. Consequently, following the admonition of *Hensley*, I reduce Claimant's counsel's request by 50 percent.

Id. The district director reduced the requested fee by two-thirds to reflect claimant's limited success. Comp. Order at 3. The administrative law judge and the district director are is in the best position of observing the factors affecting the amount of an attorney's fee award for work performed before their offices and the Board is not free to substitute its judgment concerning the amount of an appropriate fee in light of claimant's degree of

success. *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000); *Ezell v. Direct, Labor, Inc.*, 33 BRBS 19 (1999); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000). As LIGA has not established that the awards of attorney's fees and expenses by the administrative law judge and the district director are contrary to law or an abuse of discretion in view of claimant's success in obtaining an ongoing award of permanent partial disability benefits, we reject LIGA's contentions of error in this regard. *Avondale Industries, Inc. v. Davis*, 348 F.3d 487, 37 BRBS 113(CRT) (5th Cir. 2003); 20 C.F.R. §702.132.

We next address LIGA's argument that it is not liable for the fees awarded under the Act. LIGA contends that awards of attorney's fees are not "covered claims" under its enacting statute, La. Rev. Stat. 22:1375, *et seq.* The administrative law judge and the district director rejected this contention, as the fees were for work performed after the insolvency of the carrier and as such not explicitly excluded by statute from LIGA's coverage as are pre-insolvency attorney's fees. La. Rev. Stat. 22:1379(3)(d); *see Marks v. Trinity Marine Group*, 37 BRBS 117 (2003). Nonetheless, LIGA contends that case law arising under the Louisiana Workers' Compensation Law establishes that LIGA is not liable for any attorney's fees pursuant to its enacting statute.

LIGA is a state-created association designed to protect claimants and policy holders from financial loss caused by the insolvency of an original insurer. La. Rev. Stat. 22:1376. The enacting legislation provides that a "covered claim" shall not include any claim based on or arising from a pre-insolvency obligation of an insolvent insurer, including, but not limited to, contractual attorney's fees and expenses, and statutory penalties and attorney's fees. La. Rev. Stat. 22:1379(3)(d). Thus, the Louisiana statute explicitly excludes LIGA's liability for the payment of pre-insolvency attorney's fees, and in accordance with this provision, the Board has held that LIGA is not liable for an attorney's fee under the Act for services rendered prior to the carrier's insolvency. *Marks*, 37 BRBS at 118.

The Louisiana statute is silent as to LIGA's liability for post-insolvency attorney's fees. However, the Supreme Court of Louisiana has held that LIGA is not liable for any attorney's fee awards under the Louisiana Workers' Compensation Statute, because such awards are not "covered claims" under La. Rev. Stat. 22:1382(a)(1). *Bowens v. General Motors Corp.*, 608 So.2d 999 (La. 1992). The court first reasoned that attorney's fee awards under the workers' compensation law are punitive in nature, applying when an employer or carrier fails to timely pay benefits without probable cause or for arbitrary or capricious reasons. La. Rev. Stat. 23:1201. The court held that an obligation arising out of a penalty statute is separate and distinct from a contractual obligation of the insolvent

entity and cannot be the liability of LIGA as it is not a "covered claim." *Bowens*, 608 So.2d at 1004. Moreover, the court held that LIGA cannot be held liable for an attorney's fee for its own actions in litigating a claim, as it is neither an "employer" or an "insurer" to which the attorney's fee provisions apply, *see* La. Rev. Stat. 23:1201, but rather is a statutorily created "association." *See* La. Rev. Stat. 22:1380. As penalty provisions such as those providing for attorney's fees under the workers' compensation statute are to be strictly construed against the imposition of the penalty, the court held that LIGA is not liable for attorney's fees. *Bowens*, 608 So.2d at 1004-1005; *see also Allman v. Washington Parish Police Jury*, 907 So.2d 86 (La. Ct. App. 2005); *Leson Chevrolet, Inc. v. Triche*, 742 So.2d 1047 (La. Ct. App. 1999); *LIGA v. Cloud*, 627 So.2d (La. Ct. App. 1993).

We are not persuaded that this law prohibits the imposition on LIGA of post-insolvency attorney's fee awards under the Act as LIGA suggests. As noted above, there is no express prohibition in the statute creating LIGA prohibiting its liability for post-insolvency attorney's fees. Moreover, the rationale utilized by the Louisiana Supreme Court for absolving LIGA of fee liability is not applicable to cases arising under the Act. The attorney's fee provisions of Section 28 of the Act are not punitive in nature. Rather, they are "rather straightforward fee-shifting devices, designed to ensure that a claimant's disability benefits not be eroded by legal fees." *Bethenergy Mines, Inc. v. Director, OWCP*, 854 F.2d 632, 637 (3d Cir. 1988); *see also Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004); *Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980). Thus, imposition on LIGA of fee liability under the Act does not involve broadening the scope of a penalty provision, but merely insures that claimant's recovery in a contested claim such as this one is not diminished by his having to pay his legal fees. *Id.*

In addition, that LIGA is a statutorily created "association" and not an insurer does not prevent its liability for an attorney's fee under the Act. Section 32(a) of the Act states that every employer shall secure the payment of compensation by obtaining insurance from "any stock company or mutual company or association," or by self-insuring. 33 U.S.C. §932(a). In addition, the entity from which an employer obtains insurance, generally called the carrier, stands in the stead of the employer and "any requirement . . . under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer." 33 U.S.C. §935. While LIGA is not authorized to enter into a contractual insurance agreement with an employer, we hold that the provisions of the Longshore Act governing the securing of compensation with an "association" are sufficiently broad so as to encompass this entity as a "carrier" for purposes of shifting fee liability to LIGA in appropriate cases.

Finally, we reject LIGA's assertion that employer should be held liable for the claimant's attorney's fee. An employer is primarily liable for benefits under the Act. 33 U.S.C. §904(a); *see generally B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 22 BRBS 24(CRT) (1st Cir. 1989), *aff'g* 20 BRBS 151 (1987). Where, however, employer secures the payment of compensation through an insurance policy, the carrier is substituted for the employer as the liable entity. *See* 33 U.S.C. §935. In this case, employer obtained insurance from Reliance, which subsequently became insolvent. LIGA was substituted for Reliance and appeared at the proceedings before the district director and litigated the claim before the administrative law judge. As employer's payments remain secured through LIGA, and as LIGA is not statutorily precluded from liability for post-insolvency fees, *cf. Marks*, 37 BRBS 117, we hold that employer is not liable for the fees awarded in this case. Consequently, we reject LIGA's contention that it was improperly held liable for the attorney's fees awarded by the administrative law judge and the district director. We affirm those attorney's fee awards in their entirety, as LIGA has not established that the awards are arbitrary or capricious, constitute an abuse of discretion, or are not in accordance with law. *See generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees and Decision on Motion for Reconsideration and the District Director's Compensation Order Award of Attorney's Fees and Compensation Order Award of Attorney's Fees on Reconsideration are 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