BRB No. 03-0209

EDWARD NEAL MARKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRINITY MARINE GROUP	)	
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	DATE ISSUED: Oct. 14, 2003
	)	
and	)	
	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney=s Fees of Michael O. Brewer, District Director, United States Department of Labor.

J. Paul Demarest (Favret, Demarest, Russo & Lutkewitte), New Orleans, Louisiana, for claimant.

Collins C. Rossi, Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Compensation Order Award of Attorney=s Fees (07-144521) of District Director Michael O. Brewer 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 injured his back on May 2, 1997, while working for employer. Employer began voluntary payments of benefits under the Act. Subsequently, on May 11, 1998, employer terminated compensation benefits. Claimant=s counsel successfully sought reinstatement of benefits, and consequently filed a petition for an attorney=s fee for work performed before the district director. Claimant=s counsel sought a fee in the amount of $3,543.75, representing 20.25 hours of legal services at the hourly rate of $175, and $450 in expenses. Employer filed for bankruptcy protection on April 12, 2000, and its carrier was placed in liquidation by the Insurance Commissioner of Pennsylvania on October 4, 2001. Pursuant to the Louisiana Code, Louisiana Insurance Guaranty Association (LIGA) was substituted for carrier in this claim. La.R.S. '22:1375 *et seq.* Employer and LIGA responded to claimant=s counsel=s fee petition, objecting to LIGA=s liability for work performed before the district director, as well as to liability under Section 28(a) of the Act, 33 U.S.C. '928(a), to the hourly rate, and to numerous specific entries in the fee petition.

In his Compensation Order Award of Attorney=s Fee, the district director agreed with LIGA that it is not responsible for attorney fees incurred prior to the insolvency of the carrier, and thus disallowed all time and expenses requested by claimant=s counsel. The district director concluded that counsel=s attorney fee should be paid by claimant as a lien against his compensation, 33 U.S.C. '928(c), and found that claimant=s counsel is entitled to a fee in the amount of $200.

On appeal, claimant contends that the district director erred in finding that LIGA is not responsible for claimant=s attorney fee as LIGA became contractually obligated to claimant as of the date of the indemnification agreement between employer and carrier and that the Longshore Act preempts any state law precluding an attorney=s fee payable by LIGA. LIGA responds, urging affirmance of the district director=s compensation order.

Claimant contends that the statute which establishes LIGA provides that LIGA is to step into the shoes of the insurance companies it guarantees. Therefore, as Reliance (the carrier) agreed to indemnify Trinity Marine Group (employer) for all claims arising under the Act, claimant contends that LIGA is bound by the same terms and is liable for claimant=s attorney=s fees. We reject this contention as it rests solely on the legislative language establishing LIGA and assigning its role in a claim, but ignores the limits set by the same legislation.

LIGA is a state-created insurer designed to protect claimants from financial loss caused by the insolvency of an original insurer. The Louisiana legislature enacted provisions Ato provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders

because of the insolvency of the insurer.@ La.R.S. '22:1376 (2002). However, 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 attorneys' fees and expenses, statutory penalties and attorneys' fees, court costs, interest and bond premiums, or any other expenses incurred prior to the determination of the carrier=s insolvency. La.R.S. '22:1379(3)(d). Because employer=s carrier, Reliance National Indemnity Company, is insolvent, LIGA is deemed the insurer as to liability for claimant=s compensation benefits.

The Board has not previously addressed the issue of LIGA=s liability for pre-insolvency attorney=s fees under the Act. However, in determining LIGA=s liability under Louisiana law, the Third Circuit Court of Appeal of Louisiana considered a case where an employee brought a workers= compensation action against an employer and LIGA. The court held that

> Louisiana law is clear that LIGA is not an Ainsurer@ for purposes of applicable statutes imposing penalties, attorney fees and therefore cannot be assessed penalties and attorney fees under our jurisprudence. It is true that the penalties and attorney fees were imposed prior to [the carrier=s] insolvency and cast in the judgment rendered in the trial court and now on appeal. Although LIGA is obliged to the extent of covered pre-insolvency claims, [La.R.S. '22:1382], pre-insolvency obligations for statutory penalties and attorney fees are not covered claims.

Frank v. Kent Guidry Farms, 816 So.2d 969, 972 (La.Ct.App. 2002), *writ denied,* 847 So. 2d 1273 (La. 2003); La.R.S. '22:1379(3)(d); *Castille v. McDaniel*, 620 So.2d 461 (La.Ct.App. 1993). Therefore, the court held that LIGA cannot be held liable for the statutory penalties and attorney fees. *Frank*, 816 So.2d at 972. Consequently, the court affirmed the award of penalties and attorney=s fees against the employer. *Id.; see also Townsend v. Clakley*, 628 So.2d 1249, 1254 (1993)(court held that statutory penalties and attorney fees are specifically excluded from a covered claim). Consequently, we hold, that the state law regarding the scope of LIGA=s responsibilities precludes LIGA=s liability for the payment of claimant=s pre-insolvency attorney=s fees in this case notwithstanding its liability for claimant=s compensation benefits.

Claimant next contends that attorney=s fees are provided for by the Longshore Act and thus cannot be preempted by Louisiana state law. The Board has addressed a case in which the Florida Insurance Guaranty Association (FIGA) contended that the administrative law judge erred in holding it liable for the payment of interest and penalties under the Act, which was against its implementing legislation. *Canty v. S.E.L. Maduro,* 26 BRBS 147 (1992); Fla. Stat. Ann. '631.57(1)(b). The Board held that although the law of federal pre-

emption does apply to the Act in general, *see Bouchard v. General Dynamics Corp.*, 963 F.2d 541, 25 BRBS 152(CRT)(2d Cir. 1992), the administrative law judge erred in interpreting the Florida non-liability clause as requiring a denial of claimant=s right to interest and penalties. Rather, the Board held that the Florida statutory provision merely limits the liability of the state-created insurer and does not deny claimant any of his rights under the Act. *Canty*, 26 BRBS at 155. The Board concluded that the mere provision of a guaranty association as a Aback-up@ insurance carrier does not absolve an employer of its fundamental liability to claimant under Section 4 of the Act, 33 U.S.C. '904.[1] *Canty*, 26 BRBS at 156-157, *citing B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 22 BRBS 24(CRT) (1st Cir. 1989). Thus, the Board held FIGA was not liable for pre-judgment interest or a Section 14(e) penalty but modified the decision to hold the employer directly liable for those amounts.

Similarly, in the present case, the district director was required to determine whether claimant=s counsel is entitled to an attorney=s fee payable directly by employer under Section 28(a) or (b) of the Act,[2] 33 U.S.C. '928(a), (b), as employer=s primary liability is

[1] Section 4 of the Act states that Aevery employer shall be liable for and shall secure the payment to his employees of compensation payable under@ the Act. 33 U.S.C. '904.

[2] Section 28 of the Act, 33 U.S.C. '928, provides for the award of an attorney=s fee to claimant=s attorney. An attorney=s fee can only be levied against an employer if the conditions of Section 28(a) or Section 28(b) are met. 33 U.S.C. '928(a), (b). If the employer is found not to be liable for an attorney fee under Section 28(a) or 28(b), the attorney=s fee may be assessed against claimant as a lien on claimant=s compensation pursuant to Section 28(c). 33 U.S.C. '928(c).

not affected by carrier=s insolvency.[3] The district director erred in focusing only on whether LIGA could be held liable for the fee, rather than on counsel=s entitlement to that fee under the provisions of the Act. As the issue under the Longshore Act concerns counsel=s entitlement to a fee and employer=s liability, questions which are not addressed by the Louisiana laws regarding LIGA, the Longshore Act and the Louisiana statute are not inconsistent with each other. Therefore, we need not apply a pre-emption analysis in this case. *Canty*, 26 BRBS at 156-157.

As the district director did not address claimant=s entitlement to an attorney=s fee payable by employer under Section 28(a) or (b), we vacate the district director=s denial of counsel=s requested fee and remand for further consideration of the fee petition in its entirety, including all objections to the amount of the fee request. In addition, we vacate the district director=s finding that claimant=s counsel is entitled to an attorney fee of $200, payable by claimant as a lien against his compensation. The district director did not find that employer was not liable for an attorney fee under Section 28(a) or (b), but rather found that LIGA is not liable for the fee due to the terms of its enacting legislation. This finding is not a proper basis for imposing the fee on claimant as a lien against compensation. The district director must address counsel=s entitlement to a fee for reasonable and necessary work, 20 C.F.R. ' 702.132, and whether employer is liable for that fee under Section 28(a) or (b).

Accordingly, we affirm the district director=s finding that LIGA cannot be held liable for claimant=s attorney=s fee. The finding that claimant is liable for a fee of $200 is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

[3] Employer=s liability must be determined under the Act, and this determination is not affected by its filing for bankruptcy protection. *See generally In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108 (6th Cir. 1981). Counsel=s ability to enforce any award is a different matter, *id.*, but not one appropriate for our resolution. *See* 33 U.S.C. ''921(d), 918(b).

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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