BRB Nos. 08-0604, 08-0604A
and 08-0604B

R.H.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATON ROUGE MARINE CONTRACTORS, INCORPORATED	)	DATE ISSUED: 05/11/2009
	)	
Employer-Petitioner	)	
	)	
and	)	
	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	
	)	
Carrier-Cross-Petitioner Cross-Respondent	)	
	)	
and	)	
	)	
NATIONAL BEN FRANKLIN INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA	)	
	)	
Carrier-Cross-Petitioner Cross-Respondent	)	
	)	
and	)	
	)	
FIDELITY & CASUALTY COMPANY OF NEW YORK	)	
	)	
Carrier-Cross-Petitioner Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

John F. Dillon, Folsom, Louisiana, for claimant.

Christopher J. Field (Field Womack & Kawczynski), South Amboy, New Jersey, for employer.

Henry G. Terhoeve and Stephen Dale Cronin (Guglielmo, Marks, Schutte, Terhoeve & Love), Baton Rouge, Louisiana, for Louisiana Insurance Guaranty Association.

V. William Farrington, Jr. (Farrington & Thomas, LLC), New Orleans, Louisiana, for National Ben Franklin Insurance Company of Pittsburgh, Pennsylvania and Fidelity & Casualty Company of New York.

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

PER CURIAM:

Employer appeals, and the Louisiana Insurance Guaranty Association (LIGA), the National Ben Franklin Insurance Company of Pittsburgh, Pennsylvania (Ben Franklin) and the Fidelity & Casualty Company of New York (Fidelity) cross-appeal, the Decision and Order (2006-LHC-1225) of Administrative Law Judge Lee J. Romero, 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began working at the Port of Greater Baton Rouge in Port Allen, Louisiana, around 1965. He testified that he worked directly with asbestos while working at the port, unloading the asbestos from ships and restacking it on the dock. Claimant became a crane operator in approximately 1970; he did not recall directly handling asbestos after that date, but testified that he worked after 1970 in terminals where asbestos was handled. Claimant left his employment as a longshoreman in 1977 and worked for the State of Louisiana as a crane operator until his retirement in May 2005. Prior to his retirement, claimant was diagnosed as suffering from pulmonary asbestosis with an impairment of lung function. Claimant sought benefits under the Act.

In his decision, the administrative law judge found that claimant suffered a harm as a result of asbestos exposure and that he was exposed to asbestos during covered employment. Thus, the administrative law judge found that claimant established invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), that his pulmonary condition is work-related. The administrative law judge also found that employer did not establish rebuttal of this presumption. In determining the responsible carrier, the administrative law judge found that claimant continued to be exposed to asbestos until 1977. The administrative law judge thus held that the carrier on the risk at that time is liable for claimant's compensation and medical benefits. Inasmuch as that carrier, Employer's National Insurance Corporation, is insolvent, the administrative law judge found that LIGA is responsible for claimant's compensation and medical benefits. The administrative law judge also found that claimant retired, in part, due to his pulmonary condition and is not a voluntary retiree limited to an award based only on the degree of his pulmonary impairment. *See* 33 U.S.C. §§902(10), 908(c)(23). Thus, as employer submitted no evidence of suitable alternate employment, the administrative law judge found that claimant is entitled to permanent total disability benefits pursuant to Section 8(a) of the Act, 33 U.S.C. §908(a). In addition, the administrative law judge awarded interest and found that as employer did not file a timely notice of controversion, employer is liable for a Section 14(e), 33 U.S.C. §914(e), assessment for compensation due from August 7, 1996 to August 16, 1996. Subsequently, the administrative law judge awarded claimant's counsel an attorney's fee of $23,201.66.

On appeal, employer contends that the administrative law judge erred in finding that claimant did not voluntarily retire from employment in 2005, and that claimant's last injurious exposure to asbestos occurred in 1977. However, employer contends that if claimant is entitled to benefits under the Act, the administrative law judge correctly found that LIGA is responsible in the stead of its insolvent carrier. In its appeal, LIGA also contends that the administrative law judge erred in awarding claimant permanent total disability benefits and in finding that claimant was exposed to injurious stimuli through 1977. In addition, LIGA contends that the co-defendant insurers are liable for claimant's benefits as they are primary to LIGA under state law and that LIGA is entitled to a credit for medical benefits paid by claimant's health insurance. Lastly, LIGA contends that it cannot be held liable for any penalties or attorney's fees. The other potentially responsible carriers, Fidelity and Ben Franklin, cross-appeal, urging affirmance of the administrative law judge's findings regarding LIGA's liability. LIGA responds, contending that these insurers are responsible because they waived any defense to their coverage for claimant's claim. Fidelity and Ben Franklin filed a reply brief contending that LIGA did not raise the issue of a waiver below, and thus cannot raise it for the first

on appeal. Claimant responds to all of the appeals, urging affirmance of the administrative law judge's Decision and Order.[1]

Retiree Status

Employer and LIGA contend the administrative law judge erred in finding that claimant did not voluntarily retire from employment in 2005. The determination of whether a claimant's retirement is voluntary or involuntary is based on whether a work-related condition forced the claimant to leave the workforce. If his departure is due solely to considerations other than the work injury, his retirement is voluntary and claimant is limited to a permanent partial disability award based on his degree of permanent physical impairment. 33 U.S.C. §§902(10), 908(c)(23); *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997); *MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986); 20 C.F.R. §702.601(c). If claimant's work-related condition played a role in causing his retirement, the retirement is "involuntary" and claimant is entitled to disability benefits for his loss in earning capacity. 33 U.S.C. §908(a), (b), (c), (e); *Harmon*, 31 BRBS 45.

In finding that claimant's retirement was due, at least in part, to his pulmonary condition and that he thus is an "involuntary retiree," the administrative law judge

[1] Subsequent to the issuance of the administrative law judge's Decision and Order, claimant sought a default order from the district director, alleging that neither employer nor LIGA had paid any compensation awarded by the administrative law judge. The district director issued a supplemental default order declaring the amount of the default and ordering LIGA to pay a Section 14(f) assessment. Claimant then filed an enforcement proceeding in district court. *Harvey v. Baton Rouge Marine Contractors, Inc.*, Civil Action No. 08-459-JVP-CN (M.D.La., Nov. 21, 2008); 33 U.S.C. §918(a). The court held that it had no jurisdiction to review the lawfulness of the compensation order issued by the administrative law judge and that the court's review of the supplemental default order in a Section 18(a) enforcement proceeding is limited to determining whether the supplemental order is in accordance with law. The court concluded that LIGA failed to carry its burden of demonstrating a genuine issue of fact and therefore granted summary judgment in claimant's favor. On appeal of this decision, the United States Court of Appeals for the Fifth Circuit held that LIGA is entitled to a stay of the district court's judgment pending appeal based on Louisiana law concerning LIGA. *Harvey v. Baton Rouge Marine Contractors*, No. 08-31164 (5th Cir. Jan. 26, 2009).

credited claimant's testimony that he retired, in part, due to his breathing problems.[2] Decision and Order at 33. Claimant testified that he retired in 2005 because he was not able to "climb stairs and roam around those docks and up and down the railroad tracks like [he] needed to." H.Tr. at 57, 65. The administrative law judge found this testimony corroborated by the medical reports of Drs. Gomes and Hodges, which show claimant's breathing impairment had progressed from a moderate restriction to a severe restriction prior to claimant's retirement. Emp. Ex. 20; Cl. Ex. 3. Although the administrative law judge did not address claimant's acknowledgment that he applied for "regular" retirement rather than disability retirement,[3] he correctly found that employer did not present any evidence "rebutting" the evidence that claimant was suffering from a respiratory impairment that affected his ability to perform his usual work. As it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant retired, at least in part, due to his respiratory condition. *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997). The administrative law judge, therefore, properly concluded that claimant established his *prima facie* case of total disability. *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). Moreover, as the administrative law judge found that employer did not submit any evidence of suitable alternate employment, we affirm the administrative law judge's finding that claimant is entitled to permanent total disability benefits. 33 U.S.C. §908(a); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996).

Responsible Carrier

Employer and LIGA contend that the administrative law judge erred in finding that claimant was exposed to asbestos throughout his employment ending in 1977. Thus, they contend the administrative law judge erred in finding that the liable carrier is Employer's National, which is now insolvent such that LIGA stands in its stead.[4]

Pursuant to *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), the responsible carrier in an occupational disease case is the carrier on

[2] No party contests on appeal the administrative law judge's finding that claimant's pulmonary condition is work-related.

[3] Claimant testified that he chose regular retirement because he had the requisite number of years to qualify. H.Tr. at 65. The type of retirement for which claimant applies is not dispositive of his entitlement to total disability benefits under the Act. *See Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997).

[4] Employer's National insured employer from October 1, 1972 to November 1, 1982. Emp. Ex. 6 at 2.

the risk at the time the responsible employer last exposed the employee to injurious stimuli prior to the date he became aware that he is suffering from an occupational disease arising out of his employment. In order to establish that it is not the responsible carrier, the carrier must demonstrate that exposure to injurious stimuli did not cause claimant's occupational disease or that the employee was exposed to injurious stimuli while working for a subsequent covered employer or carrier. *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004). In this case, LIGA seeks to escape liability by establishing that claimant had no exposure to injurious stimuli during Employer's National's period of insurance coverage. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992).

The administrative law judge found that the evidence establishes that numerous asbestos cargoes arrived at the port by ship in the 1960's, but by the 1970's only a small amount of asbestos was shipped through the port. The administrative law judge also noted that claimant testified that he did not recall handling bags of asbestos in the 1970's. H.Tr. at 46. However, the administrative law judge found that claimant testified that he continued to work after 1970 in the terminals where others loaded and unloaded asbestos and in the terminals where asbestos had previously been stored. H.Tr. at 48. The administrative law judge also credited the deposition testimony of Mr. Parker, a board-certified industrial hygienist and asbestos consultant, which was taken in another case and offered into evidence in this case. Cl. Ex. 9. Mr. Parker testified that asbestos is difficult to destroy and that an employee would continue to be exposed to asbestos unless the warehouse is decontaminated. The administrative law judge found that there was no evidence that asbestos had been removed from employer's facility and that employer's representative testified in a deposition taken in another case that there had not been an asbestos removal program in the 1970's. Cl. Ex. 10. Thus, the administrative law judge concluded that claimant continued to be exposed to asbestos through the date he left covered employment, 1977. Consequently, as Employer's National was the carrier on the risk from October 1, 1972 to November 1, 1982, the administrative law judge found it to be the responsible carrier.

We reject the contention of employer and LIGA that the administrative law judge erred in failing to find that claimant was last exposed to asbestos prior to 1972. While employer and LIGA posit that claimant did not establish his actual exposure to injurious stimuli through 1977, they misconstrue the burden-shifting framework that underlies the last employer/carrier rule. Specifically, once, as here, claimant establishes a compensable claim, the burden is on the employer or carrier to establish that it is not the responsible employer or carrier. *Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT); *Cuevas*, 977 F.2d 186, 26 BRBS 111(CRT); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992).

Although employer and LIGA bore this burden of proof, they presented no evidence of asbestos eradication efforts prior to claimant's departure from the Port in 1977, nor did they present any evidence that claimant was not exposed to asbestos after 1970. *See Cuevas*, 977 F.2d at 192, 26 BRBS at 115(CRT). Contrary to LIGA's contention that claimant did not testify to any exposure after 1970, claimant testified that between 1971 and 1977 he occasionally worked in the terminals which had formerly been used to process shipments of asbestos cargo. H.Tr. at 61, 69. Moreover, we reject the contention that the administrative law judge erred in relying on the opinion of Mr. Parker in finding that claimant continued to be exposed to asbestos after 1970 due to the lack of an asbestos removal program. It is well established that the administrative law judge is entitled to determine the weight to be accorded to the evidence of record and to draw his own rational inferences and conclusions therefrom. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). In this case, employer and LIGA did not offer any evidence to contradict the testimony of claimant and the opinion of Mr. Parker regarding the continued presence of asbestos in employer's facility through 1977. Thus, they did not establish that claimant was not exposed to injurious stimuli while Employer's National was on the risk. *See generally Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996). Consequently, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that LIGA, in the stead of the insolvent carrier on the risk at the time of claimant's last exposure to asbestos, is liable under the Act for claimant's compensation and medical benefits. *See K.M. v. Lockheed Shipbuilding*, 42 BRBS 105 (2008).

LIGA's Liability

LIGA contends that the administrative law judge erred in holding it liable for claimant's benefits as its implementing statute requires that all of the other insurance carriers' coverage must be exhausted, including claimant's personal medical insurance, before it can be held liable for compensation or medical benefits. Specifically, LIGA relies on the provision entitled "Nonduplication of Recovery" which states, *inter alia*, that, "Any person having a claim against an insurer under any provision in an insurance policy, …, shall be required first to exhaust his rights under such policy. . . .." La. R.S. 22:1386(A). LIGA contends that it is a fund of last resort and as there were other insurance carriers who covered employer, their coverage must first be exhausted before LIGA can be held liable.

In a case relied on by LIGA, *Southern Silica of Louisiana Inc. v. Louisiana Ins. Guaranty Ass'n*, 979 So.2d 460, 207-1680 (La. 1980), the Louisiana Supreme Court held, in a case involving multiple claims for silicosis, that the employer must exhaust the "prorated shares" of the other insurers before receiving any funds from LIGA. *Id.*, 979 So.2d at 468. However, the Longshore Act does not utilize a *pro rata* share method of

assessing liability in cases involving long latency diseases, *see Ibos*, 317 F.3d at 485, 36 BRBS at 95(CRT), but instead assigns full liability to the carrier on the risk at the time of last exposure prior to awareness. *Cardillo*, 225 F.2d at 145. Thus, as there is only one liable carrier in this case, neither the Louisiana statute nor *Southern Silica* is applicable. Moreover, the court held that other policies could not be used to "fill the gap" of coverage for the insolvent carrier, *Southern Silica*, 979 So.2d at 469, which is similar to the approach urged by LIGA in this case. As Employer's National, the carrier on the risk at the time of claimant's last exposure, is now insolvent, we affirm the administrative law judge's finding that LIGA is liable for claimant's compensation benefits under the Act.[5]

Likewise, we affirm the administrative law judge's finding that LIGA is liable for claimant's medical benefits. Relying on that portion of La. R.S. 22:1386(A) stating that claims against medical insurers also must be exhausted prior to LIGA's assumption of liability and that LIGA is entitled to a credit for payments made by other medical insurers, LIGA contends the administrative law judge erred in holding it liable for claimant's medical benefits. We reject this contention. The state provision was enacted to avoid a double recovery. In a case arising under the Act, there is no concern about a double recovery of medical benefits. Employer and its carrier are fully liable for reasonable and necessary medical expenses required for the treatment of claimant's work injury. 33 U.S.C. §907(a); *M. Cutter Co., Inc. v. Carroll*, 458 F.3d 991, 40 BRBS 53(CRT) (9th Cir. 2006). If claimant has paid the medical benefits himself, he is entitled to be reimbursed by employer. 33 U.S.C. §907(d); *Marvin v. Marinette Marine Corp.*, 19 BRBS 60 (1986). If a private health insurer has paid the medical benefits, it has a statutory right to intervene to recover from employer the "reasonable value of such medical or surgical treatment" obtained by the employee. 33 U.S.C. §907(d)(3); *Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997). Neither claimant, the health care provider, nor a private insurer can recover doubly under the Act. *Quintana v. Crescent Wharf & Warehouse Co.*, 19 BRBS 52 (1986), *modifying on recon.* 18 BRBS 254 (1986).

[5] We also reject LIGA's contention that the other insurance carriers waived their insurance coverage defenses. The insurance carriers did not act in concert to defend employer against the subject claim, but rather each defended the specific periods of time for which it covered employer's risk under the Longshore Act. Moreover, unlike, *Steptore v. Masco Constr. Co., Inc.*, 643 So.2d 1213 (La. 1994), the carriers in this case maintained separate counsel from employer in defense of the claim. H.Tr. at 5-6.

Finally, LIGA contends that it cannot be held liable for claimant's attorney's fee, 33 U.S.C. §928. The Board has consistently held that it will not consider objections to an attorney's fee which were not raised before the administrative law judge. *See Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997); *Moody v. Ingalls Shipbuilding, Inc.*, 29 BRBS 63 (1995), *denying recon. of* 27 BRBS 173 (1994) (Brown, J., dissenting); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). Thus, as this contention was not raised before the administrative law judge, we decline to address it on appeal and affirm the administrative law judge's finding that LIGA is liable for claimant's attorney's fee pursuant to Section 28.[6] *See generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997).

Accordingly, the administrative law judge's Decision and Order awarding benefits 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

[6] Moreover, we need not address LIGA's assertion that it cannot be held liable for a Section 14(e) assessment. Although the administrative law judge found that employer did not timely controvert claimant's claim, employer and claimant correctly assert that no benefits were due claimant for the period to which the assessment would apply, August 7-16, 1996. Moreover, although LIGA also avers it cannot be held liable for the assessment of a Section 14(f) penalty, 33 U.S.C. §914(f), this assessment was made by the district director, *see* n. 1, *supra,* and was not subject of any notice of appeal. Thus, we will not address this contention.