BRB Nos. 07-0565

J.E.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FRIEDE-GOLDMAN HALTER, INCORPORATED	)	
	)	
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY c/o TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION	)	DATE ISSUED: 12/17/2007
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Decision and Order on Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

John D. McElroy (Barton, Price, McElroy & Townsend), Orange, Texas, for claimant.

Gus David Oppermann V (Wheat, Oppermann & Meeks, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer and the Texas Property and Casualty Insurance Guaranty Association (TIGA)[1] appeal the Decision and Order Awarding Benefits and the Decision and Order on Reconsideration (2006-LHC-441) of Administrative Law Judge Clement J. Kennington 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 findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was struck on the right side of his head and shoulder by a metal frame weighing approximately 350 pounds during the course of his employment as a fitter with employer on March 17, 2000. Claimant was subsequently treated for headaches, dizziness, and depression. After attempting to perform light duty work for employer from April 24, 2000, through May 17, 2000, claimant sought ongoing disability and medical benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, that employer established rebuttal of that presumption, and that, based on the record as a whole, claimant established a causal relationship between his employment with employer and his mental problems and depression. Further, the administrative law judge determined that claimant's condition is temporary in nature and that claimant is unable to return to gainful employment. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from March 18, 2000, through April 23, 2000, temporary partial disability compensation from April 24, 2000, through May 17, 2000, and temporary total disability compensation from May 18, 2000, and continuing. 33 U.S.C. §908(b), (e). The administrative law judge also awarded claimant medical expenses and interest on accrued unpaid compensation benefits, but held that employer's carrier was not responsible for interest, penalties, or attorney's fees. On reconsideration, the administrative law judge held that under Texas state law, as well as the doctrine of preemption, TIGA is liable for interest, penalties and attorney fees relating to the instant case.

[1] TIGA is a state-created insurer designed to protect claimants from financial loss caused by the insolvency of an original, covered insurer. In this case, both employer and its original insurer, Reliance National Indemnity Company, are insolvent.

On appeal, employer challenges the administrative law judge's findings regarding the causal relationship between claimant's mental condition and his employment with employer, the nature and extent of claimant's disability, claimant's entitlement to medical benefits, and TIGA's liability for interest, penalties, and attorney fees. Claimant responds, urging affirmance.

Employer initially challenges the administrative law judge's finding that claimant's present symptoms, specifically headaches and depression, are causally related to his March 17, 2000, work-injury. Where, as in the present case, claimant has established entitlement to invocation of the Section 20(a) presumption, *see Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989), the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); S*winton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence in the record and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion *See Port Cooper*, 227 F.3d 285, 34 BRBS 96(CRT); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1984); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In the instant case, the administrative law judge found that claimant invoked the Section 20(a) presumption based on his testimony and the medical records and testimony of Drs. Gripon, Agustin, Pollock, and Bettega, but that employer established rebuttal based on the opinions of Drs. Tarrand, Barrash, and Perez.. The administrative law judge then weighed all of the evidence and, giving greater weight to claimant's testimony and the opinions of Drs. Gripon, Agustin, Bettega, and Pollock, found that claimant had established by a preponderance of the evidence a causal relationship between his post-concussive syndrome, with depression and mental deficits, and his work-injury. Specifically, the administrative law judge first found claimant and his wife to be credible witnesses. Next, in giving greater weight to the testimony of Drs. Gripon, Agustin, Bettega, and Pollock, the administrative law judge found that the opinions of these physicians were consistent with claimant's credible symptoms and that Drs. Gripon and Agustin, as claimant's treating physicians, were more familiar with claimant's condition than Drs. Barrash, Tarrand, and Perez, each of whom saw claimant once for evaluation. In this regard, Dr. Gripon, a Board-certified psychiatrist, testified that claimant's work-injury either caused or contributed to his diagnosed conditions of depression and post-concussive syndrome; Dr. Agustin, a neurologist, and Dr. Bettega diagnosed claimant with, *inter alia*, post-concussive syndrome and depression, while Dr. Pollock, a

neuropsychologist, diagnosed claimant as having sustained a cognitive disorder-organic brain syndrome and found that claimant's complaints of pain were consistent with his work-injury.

We reject employer's assertion that the administrative law judge erred in weighing the evidence of record regarding the issue of causation. It is well-established that the administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom and is not bound to accept the opinion or theory of any particular medical examiner. *See Mendoza v. Marine Pers. Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Moreover, it is impermissible for the Board to substitute its views for those of the administrative law judge; thus, the administrative law judge's findings may not be disregarded merely on the basis that other inferences might appear to be more reasonable. *See Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003). In his decision, the administrative law judge fully addressed the multiple medical opinions in the record regarding the potential causal relationship between claimant's present medical condition and his employment in weighing the evidence of record, and his ultimate findings are supported by substantial evidence. We therefore affirm the administrative law judge's conclusion that claimant's symptoms are related to claimant's employment with employer. *See Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Flanagan v. McAllister Bros., Inc.*, 33 BRBS 209 (1999).

Employer additionally contends that the administrative law judge erred in failing to find that claimant reached maximum medical improvement. We disagree. Claimant is entitled to temporary disability benefits until he reaches maximum medical improvement, the date of which is determined by medical evidence. *See generally Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant has reached maximum medical improvement when he is no longer undergoing treatment with a view toward improving his condition. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

In support of its allegation of error, employer asserts that the opinions of Drs. Barrash and Tarrand clearly establish that claimant's condition has reached a state of permanency. In concluding that claimant has not yet reached maximum medical improvement, the administrative law judge relied upon the opinions of Drs. Gripon and Pollock, both of whom recommended that claimant undergo specific additional treatment in order to alleviate his present conditions of headaches and depression. The testimony of these physicians thus supports the administrative law judge's conclusion that claimant was in need of additional medical treatment with a view to improving his condition. Substantial evidence thus supports his finding that claimant had not reached maximum medical improvement. *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT). We therefore affirm the

administrative law judge's finding on this issue. *See generally Leone v. Sealand Terminals Corp.,* 19 BRBS 100 (1986).

Employer next challenges the administrative law judge's determination that claimant is incapable of returning to his usual employment duties with employer. It is well-established that, in order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See Blake v. Bethlehem Steel Corp.,* 21 BRBS 49 (1988). In finding that claimant met this burden, the administrative law judge credited the testimony of claimant and Drs. Gripon and Pollock. In this regard, claimant testified that he continues to be prescribed Vicodin for his headaches, that he experiences dizziness, and that he is unable to work due to the totality of his post-injury symptoms and conditions. See Tr. at 29-34. Dr. Gripon, after noting that claimant will require medication management and continued psychiatric care into the foreseeable future, opined that claimant was incapable of gainful employment. *See* CX 4 at 35-36. Dr. Pollock, after performing a battery of tests on claimant, similarly opined that claimant is presently incapable of returning to any type of gainful employment. *See* CX 16 at 11-20, 32-33.

The administrative law judge, as the trier-of-fact, is entitled to evaluate the credibility of all witnesses. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 741 (5th Cir. 1962). In this case, the administrative law judge rationally credited the opinions of claimant and Drs. Gripon and Pollock. As their opinions provide substantial evidence to support the administrative law judge's determination that claimant is unable to perform any employment, *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), we affirm the administrative law judge's finding that claimant established that he is totally disabled. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

Employer also challenges the administrative law judge's award of medical expenses related to claimant's headaches and depression. Specifically, employer contends that claimant needs no further medical treatment and that further prescriptions of narcotic and anti-depressant medications are neither reasonable nor necessary. We affirm the administrative law judge's award of medical benefits to claimant.

Section 7(a) of the Act, 33 U.S.C. §907(a), states:

> The employer shall furnish such medical, surgical, and other attendance or treatment ... for such period as the nature of the injury or the process of recovery may require.

In order for a medical expense to be assessed against employer, however, the expense must be both reasonable and necessary, and must be related to the injury at hand. *See Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

In the instant case, the administrative law judge found that employer had refused to provide claimant with any medical treatment since October 15, 2005. The administrative law judge credited Dr. Gripon's explanation that Vicodin has been prescribed for claimant as a consequence of claimant's ongoing pain; accordingly, the administrative law judge's rejected employer's argument that this medication has been wrongly prescribed to claimant. As previously discussed, the administrative law judge credited the opinions of Dr. Gripon and Pollock, which provide substantial evidence to support his finding that the prescribed treatment is reasonable and necessary. Consequently, we affirm the administrative law judge's award of medical benefits associated with claimant's work-related headaches and depression. *See McGrath*, 289 F.2d 403; *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997).

Employer also argues that the administrative law judge erred in holding TIGA liable for a Section 14(e), 33 U.S.C. §914(e), assessment and interest, asserting that the statutory language of the Texas Property and Casualty Insurance Guaranty Act (TPCIGA), *see* Tex. Ins. Code Ann. Art. 21.28-C (2005), provides it with an exemption from any liability under the Act for these payments. Employer maintains that the relevant TPCIGA clause, *i.e.*, Tex. Ins. Code Ann. Art. 21.28-C, §8(a), is similar to the Florida Insurance Guaranty Act (FIGA) clause interpreted by the Board in *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992), such that the Board should hold that TIGA is exempt from the Section 14(e) assessment and interest which the administrative law judge awarded claimant in this case. In pertinent part, Section 8(a) of the Texas statute provides:

> The association shall pay covered claims that exist before the designation of impairment or that arise within 30 days after the date of the designation of impairment, before the policy expiration date if the policy expiration date is within 30 days after the date of the designation of impairment, or before the insured replaces the policy or causes its cancellation if the insured does so within 30 days after the date of the designation. The obligation is satisfied by paying to the claimant the full amount of a covered claim for benefits. The association's liability is limited to the payment of covered claims. *The association has no liability for any other claim or damages, including claims for recovery of attorney's fees, prejudgment or post judgment interest, or penalties,* extra contractual

> damages, multiple damages, or exemplary damages, or any other amount sought by or on behalf of any insured or claimant or any other provider of goods or services retained by any insured or claimant in connection with the assertion or prosecution of any claims, without regard to whether the claims are covered, against the insured or an impaired insurer, the impaired insurer, the guaranty association, the receiver, the special deputy receiver, the commissioner, or the liquidator. *This subsection does not exclude the payment of workers' compensation benefits or other liabilities or penalties authorized by Title 5, Labor Code, arising from the association's processing and payment of workers' compensation benefits after the designation of impairment.*

Tex. Ins. Code Ann. Art., §8(a) (2005) (emphasis added).

Employer's contentions lack merit as the instant case is distinguished from *Canty*, 26 BRBS 147. In this regard, the language of the Florida and Texas provisions are not on par. The provision of the Florida statute, Fla. Stat. Ann. § 631.57(1)(b) (West 1992), at issue in *Canty* provides that, upon the insolvency of a covered insurer:

> (1) The association shall: (b) Be deemed the insurer to the extent of its obligation on the covered claims, and, to such extent, shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent. *In no event shall the association be liable for any penalties or interest*.

Canty, 26 BRBS at 152, citing Fla. Stat. Ann. § 631.57(1)(b) (West 1992) (emphasis added). The TPCIGA, however, as noted above, "does not exclude the payment of workers' compensation benefits or other liability or penalties," Tex. Ins. Code Ann. Art., §8(a), and requires that the TIGA "pay the full amount of any covered claim arising out of a workers' compensation policy." Tex. Ins. Code Ann. Art., §5(8) (2005). As the language of the two statutes differs, *Canty* does not dictate the result employer seeks. It cannot be disputed that benefits paid pursuant to the Longshore Act are workers' compensation benefits, *see* 33 U.S.C. §901; *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995), such that the Section 14(e) assessment is not precluded by any provision of the TPCIGA. *See* Tex. Ins. Code Ann. Art. 21.28-C. Similarly, interest may be deemed to constitute a liability under TPCIGA. Consequently, we reject employer's assertion that the TPCIGA exempts TIGA from liability from the

Section 14(e) assessment[2] and interest[3] imposed by the administrative law judge in this case, and we affirm the administrative law judge on this issue.

Lastly, employer contends that claimant's counsel is not entitled to an award of an attorney's fee payable by employer and its carrier since, it avers, it accepted the recommendation of the district director following an informal conference. Claimant, in response, urges the Board to reject employer's contention since employer has not properly appealed the administrative law judge's award of a fee. We agree.

Employer's Notice of Appeal is of the administrative law judge's Decision and Order Awarding Benefits dated January 17, 2007, and Decision and Order on Reconsideration dated February 15, 2007. Neither of these decisions, however, award claimant's counsel a fee or make any findings regarding fee liability under Section 28 of the Act, 33 U.S.C. §928. Rather, the administrative law judge's Decision and Order instructs claimant's counsel to file a fully supported fee application within 30 days, while the Decision and Order on Reconsideration rejects the argument that TIGA cannot be responsible for fees and penalties under the Texas Statute. Employer filed its timely appeal of these decisions on March 20, 2007, and it is this appeal which is currently before us.

Following the issuance of the administrative law judge's decisions, claimant's counsel filed his fee petition with the administrative law judge on February 26, 2007. Employer responded, contesting, *inter alia*, its responsibility for the payment of counsel's requested fee under Section 28(b). On June 19, 2007, the administrative law judge issued a Supplemental Decision and Order in which, after addressing employer's multiple

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[2] In the instant case, the administrative law judge found employer liable for a Section 14(e) assessment because, while it knew of claimant's work-injury on March 17, 2000, it did not file its notice of controversion until May 11, 2000. Inasmuch as employer has not challenged the merits of the administrative law judge's finding that claimant is entitled to a Section 14(e) assessment, it is affirmed.

[3] Although there is no express provision in the Act for the payment of interest on past-due compensation, United States Courts of Appeals and the Board have uniformly approved interest awards as consistent with the Congressional purpose of ensuring that claimants receive the full amount of compensation due. *See Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 907-908, 31 BRBS 150, 152-153(CRT) (5th Cir. 1997); *see also Matulic v. Director, OWCP*, 154 F.3d 1052, 1059, 32 BRBS 148, 153(CRT) (9th Cir. 1997); *Sea-Land Serv., Inc. v. Barry*, 41 F.3d 903, 910-911, 29 BRBS 1, 10(CRT) (3d Cir. 1994), *aff'g* 27 BRBS 260 (1993); *B.C. v. Stevedoring Services of America*, ___BRBS ____, BRB No. 07-0162 (Oct. 17, 2007).

objections, he awarded claimant's counsel a fee payable by employer/carrier. In this Order, the administrative law judge made findings regarding the informal conferences and recommendations by the district director and rejected employer's argument that it is not liable for an attorney's fee under Section 28(b).

Employer's March 20, 2007, appeal, as well as its brief to the Board dated May 26, 2007, pre-dates the administrative law judge's fee Order and thus does not address the administrative law judge's relevant findings. The administrative law judge did not address Section 28 liability in the decisions on appeal but properly considered these arguments after a specific fee petition and objections were filed, and he issued a Supplemental Decision resolving the attorney's fee issues. Employer was required to file a timely appeal of the administrative law judge's Supplemental Decision and Order awarding claimant's counsel an attorney's fee in order to challenge the findings therein. As the current appeal pre-dates the dispositive decision, and as employer's brief fails to challenge the specific findings rendered by the administrative law judge in this regard, we cannot address the contentions regarding Section 28(b) as they are not properly before us. 33 U.S.C. §921(b); 20 C.F.R. §802.205; *see Leon v. Todd Shipyards Corp.*, 21 BRBS 190, 191 n.1 (1988).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order 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