

PATRICIA ANN CRYER)
(Widow of RALPH CRYER))

Claimant-Respondent)

v.)

GULFPORT SHIPBUILDING,)
INCORPORATED)

Employer)

and)

TEXAS PROPERTY AND CASUALTY)
INSURANCE GUARANTY ASSOCIATION)

DATE ISSUED: 02/26/2010

for)

RELIANCE NATIONAL INDEMNITY)
COMPANY)

Carrier-Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

DECISION and ORDER

Appeal of the Order Awarding Attorney's Fees and the Order Denying
TPCIGA's Petition for Reconsideration of Clement J. Kennington,
Administrative Law Judge, United States Department of Labor.

Dwight E. Jefferson, Houston, Texas, for claimant.

Peter Thompson (Thompson & Reilley, P.C.), Houston, Texas, for Texas
Property and Casualty Insurance Guaranty Association.

Jonathan P. Rolfe (Deborah Greenfield, Acting Solicitor of Labor; Rae Ellen Frank James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Texas Property and Casualty Insurance Guaranty Association (hereinafter TPCIGA)¹ appeals the Order Awarding Attorney's Fees and the Order Denying TPCIGA's Petition for Reconsideration (2008-LHC-00232) 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 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 suffered a work-related injury and sought benefits under the Act. Employer contested claimant's entitlement to benefits and the case was referred to the Office of Administrative Law Judges for resolution. Prior to the date of the hearing, the parties agreed to settle the claim and the case was remanded to the district director for resolution. *See* Order Canceling Hearing and Order of Remand (Feb. 27, 2009). In October 2001, TPCIGA had declared employer's carrier Reliance National Indemnity Company "impaired," and subsequently, Reliance became insolvent.

On April 17, 2009, claimant's counsel filed a petition for an attorney's fee with the administrative law judge. He requested a total of \$8,140.14, representing 18 hours of attorney work at an hourly rate of \$300, 21.80 hours of paralegal work at the hourly rate of \$75, and 12.30 hours of legal clerk work at the hourly rate of \$75, plus \$122.64 in expenses. The legal services were provided between February 20, 2008, and February 24, 2009. TPCIGA filed objections to counsel's fee petition.

¹TPCIGA, created under the Texas Property and Casualty Insurance Guaranty Act, was designed to protect claimants and policyholders from financial loss caused by the insolvency of an insurer. *See* Tex. Ins. Code Ann. Art. 21.28-C §§2(1)-(2), 5(8) (2001). The Act has since been amended and recodified in the Texas Insurance Guaranty Act (TIGA), Tex. Ins. Code Ann. Chapter 462.

The administrative law judge rejected TPCIGA's argument that it cannot be held liable for an attorney's fee pursuant to Chapter 462 of the Texas Insurance Code, *see* Tex. Ins. Code Ann. §462.302 (2007), and the Board's decision in *Canty v. SEL Maduro*, 26 BRBS 147 (1992). He found that Section 462.302 allows TPICGA to be held liable for an attorney's fee because it is a fee related to the payment of workers' compensation.² The administrative law judge also found that the Longshore Act preempts the state law because the two laws conflict. Order Awarding Attorney's Fees at 3. Thus, the administrative law judge held TPCIGA liable for claimant's attorney's fee. The administrative law judge addressed all of TPCIGA's objections to the requested hours and hourly rates, and he awarded an attorney's fee of \$5,033.75, representing 17.35 hours of attorney work at the hourly rate of \$200, 14.2 hours of paralegal work at the hourly rate of \$75, and 6.65 of legal clerk work at the hourly rate of \$75. *Id.* at 6. The administrative law judge denied TPCIGA's motion for reconsideration. TPCIGA appeals, and claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance. TPCIGA filed a reply brief.

Recently, the Board addressed whether TPCIGA can be held liable for a claimant's attorney's fee in a case which involved the same insolvent carrier, Reliance. *Zamora v. Friede Goldman Halter, Inc.*, 43 BRBS 160 (2009). Initially, the Board held that as there is no conflict between the Longshore Act and the Texas insurance code, the administrative law judge erred in finding that the Longshore Act preempts the Texas law. Thus, as both statutes apply, it is the application of the state statute that mandates whether and to what extent TPCIGA must satisfy Reliance's obligations under the Longshore Act. *Id.* at 162. The Board also held that the law in effect at the time Reliance became impaired in October 2001 is the appropriate law to use in assessing TPCIGA's liability for fees under the Longshore Act. After reviewing the Texas law, the Board held that, under the 2001 Texas Insurance Code, TPCIGA may be held liable for an attorney's fee for services performed after Reliance was declared impaired in October 2001 but cannot be held liable for fees incurred prior thereto. *Id.* at 163-164.

In this case, TPCIGA contends that it cannot be held liable for claimant's attorney's fee because "penalties, interest, and attorney's fees" are specifically excluded under the Texas law as recodified in 2005. We reject this contention, as the 2001 law applies in this case. *Zamora*, 43 BRBS at 163. The legal services provided by claimant's counsel and his staff occurred after the date of Reliance's impairment in October 2001. Thus, for the reasons stated in *Zamora*, although the administrative law judge erred in

² Section 462.302(e) states: "This section 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 paying workers' compensation benefits after the designation of impairment."

finding that the Texas statute is preempted by the Longshore Act, we affirm his finding that TPCIGA is liable for the entire attorney's fee awarded in this case. As TPCIGA does not challenge the amount of the fee awarded by the administrative law judge, the attorney's fee award of \$5,033.75 is affirmed.

Counsel for claimant has submitted a petition for an attorney's fee seeking \$12,958.75 for services performed before the Board in connection with the defense of employer's appeal to the Board. Neither TPCIGA nor employer has filed objections to this fee request. TPCIGA filed its appeal of the administrative law judge's award of an attorney's fee in July 2009. Therefore, we disallow the entries dated prior to filing of the appeal with the Board. *See Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996); *Canty*, 26 BRBS at 157. Moreover, we disallow the entries performed by the paralegal on July 9, 2009 (.20) and on August 7, 2009 (.20), as the work does not relate to the appeal before the Board. With regard to the other entries, the fee requested for services performed between July 7, 2009 and October 23, 2009, is reasonable and commensurate with the necessary work performed in defending the fee award against TPCIGA's appeal. The requested hourly rates are reasonable and customary for the Houston Area. 20 C.F.R. §802.203(d)(4). Thus, we grant counsel a fee in the amount of \$5,595, representing 29.30 hours of legal services by attorney Cynthia Tan at the hourly rate of \$150 (\$4,395), 3.8 hours of legal services by attorney Dwight E. Jefferson at the hourly rate of \$300 (\$1,140), and .80 hours of paralegal services at the hourly rate of \$75 (\$60). *See Lewis v. Todd Shipyards Corp.*, 30 BRBS 154, 159 (1996); *Smith*, 30 BRBS at 89, 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's award of an attorney's fee payable by TPCIGA is affirmed. Claimant's counsel is awarded an attorney's fee of \$5,595, for work performed before the Board, payable directly to counsel by TPCIGA.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge