BRB Nos. 08-0341

S.B.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
B & B INTERIORS, INCORPORATED	)	
	)	
and	)	
	)	
LOUISANA INSURANCE GUARANTY ASSOCIATION	)	DATE ISSUED: 01/28/2009
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order, Order Denying Motion for Reconsideration, Supplemental Decision and Order Awarding Attorney's Fee, and Order Granting Motion for Reconsideration of Supplemental Decision and Order Awarding Attorney's Fee of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

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

Robert S. Reich, Jerald L. Album, Shannon S. Sale and Michael T. Wawrzycki (Reich, Album & Plunkett, L.L.C.), Metairie, Louisiana, for employer/carrier.

Jeffrey S. Goldberg (Carol DeDeo, Deputy Solicitor; Rae Ellen Frank James, Acting 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:

Louisiana Insurance Guaranty Association (LIGA)[1] appeals the Decision and Order, Order Denying Motion for Reconsideration, Supplemental Decision and Order Awarding Attorney's Fee, and Order Granting Motion for Reconsideration of Supplemental Decision and Order Awarding Attorney's Fee (2006-LHC-1757) 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 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). The amount of an attorney's fee award is discretionary and must be affirmed unless the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was injured on August 21, 1999, while working for employer at Leevac Shipyards in Louisiana. Following claimant's filing of a claim seeking ongoing disability and medical benefits under the Act, employer and its carrier, Casualty Reciprocal Exchange, stipulated that claimant was entitled to temporary total disability benefits from August 28, 1999, and continuing, based on an average weekly wage of $1,300, as well as future medical treatment.

In August 2004, Casualty Reciprocal Exchange was liquidated, and the administration of claimant's claim was assumed by LIGA, which continued to pay claimant benefits pursuant to the prior stipulations. In January 2005, claimant sought a formal hearing in order to resolve a dispute that had arisen regarding his medical treatment. On June 15, 2005, Administrative Law Judge Kennington issued a Decision and Order Approving Parties Stipulation and Remanding Case to District Director. LIGA thereafter retained its present counsel and, between October 14, 2005 and January 20, 2006, it suspended payments of compensation to claimant.

[1] LIGA is a state-created association 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, Casualty Reciprocal Exchange, are insolvent.

In his Decision and Order, Administrative Law Judge Romero (the administrative law judge) found that employer was covered by an insurance policy providing coverage under the Act at the time of claimant's injury and that claimant did not knowingly and willfully misrepresent his earnings in the year preceding his work injury when he stipulated to an average weekly wage of $1,300. The administrative law judge determined, however, that the $68,786.44 figure on which it was based does not accurately reflect claimant's annual wages for purposes of calculating claimant's average weekly wage and that the $44,342.52 claimant received in the year preceding his work injury more accurately reflected his annual wages. The administrative law judge consequently modified Judge Kennington's June 2005 decision to reflect claimant's entitlement to temporary total disability compensation commencing August 22, 1999, based on an average weekly wage of $852.74. 33 U.S.C. §908(b). The administrative law judge also found claimant entitled to reimbursement for all reasonable and necessary medical expenses related to his compensable work injury, and he held LIGA liable for a Section 14(e) assessment, 33 U.S.C. §914(e), interest, and attorney's fees. The administrative law judge granted LIGA a credit for all compensation paid to claimant.

The administrative law judge denied LIGA's motion for reconsideration which asserted, *inter alia*, that it should be allowed to credit its overpayment of temporary total disability benefits to claimant against not only its liability for claimant's future compensation but also its liability for claimant's medical expenses, attorney's fee, Section 14(e) assessment, and interest. In a Supplemental Decision and Order, the administrative law judge awarded claimant's attorney a fee of $29,767.50, representing 132.3 hours of legal services rendered at an hourly rate of $225, plus costs of $1,563.85, for services rendered by counsel subsequent to July 26, 2006, to be paid by LIGA. On reconsideration, the administrative law judge awarded claimant's counsel an additional $10,722.47, representing 44.35 hours of legal services rendered at an hourly rate of $225, plus $743.72 in costs, for services rendered between January 24, 2005 and July 26, 2006.

On appeal, LIGA challenges the administrative law judge's findings regarding the credit for the overpayment of compensation paid to claimant, and LIGA's liability for a Section 14(e) assessment and claimant's attorney's fees. Claimant responds, urging affirmance of the administrative law judge's decisions in their entirety. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief in support of the administrative law judge's determination that LIGA may be held liable for claimant's counsel's attorney's fee.

Section 14(j)

LIGA contends that, pursuant to Section 14(j) of the Act, 33 U.S.C. §914(j), it is entitled to credit its overpayments of compensation to claimant against any medical

expenses for which it is liable to claimant.[2] Specifically, LIGA argues that medical expenses must be considered compensation for purposes of applying Section 14(j) of the Act. In his decision on reconsideration, the administrative law judge rejected LIGA's argument, stating that any overpayment of compensation made to claimant is to be credited only against claimant's future compensation. Order Denying Motion for Reconsideration at 3. For the reasons that follow, we affirm the administrative law judge's decision.

Section 14(j) of the Act provides:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. §914(j). The Act, therefore, allows employer a credit of its advance payments of compensation only if unpaid installments of compensation remain owing. *See Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125(CRT) (5th Cir. 1992). The issue raised by LIGA was addressed by the Board in *Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. 1991), wherein the Board held that under Section 14(j) an employer cannot credit advance payments of compensation against medical expenses awarded under Section 7 of the Act, 33 U.S.C. §907. In *Aurelio*, the Board initially stated that only disability compensation is paid in periodic installments and that medical benefits thus cannot be considered "installments of compensation." The Board also relied on the decision of the United States Supreme Court in *Marshall v. Pletz*, 317 U.S. 383 (1943), holding that payments of medical benefits under the Act are not payments of "compensation" which would toll the Act's Section 13 time limitation for filing a claim. In *Marshall*, the Court noted that since an insurer rather than a claimant usually pays the costs of medical care, such costs are not payable to an employee. As medical benefits are generally paid directly to health care providers, they do not meet the definition of "compensation" in Section 2(12) of the Act, 33 U.S.C. §902(12), which provides it is the "money allowance payable to an employee." *Aurelio*, 22 BRBS at 423.

LIGA asserts on appeal that the term "compensation" is not a term of art under the Act, and, indeed, the Board has acknowledged, as the Court did in *Marshall*, that the term

[2] Employer contends that, as a result of the modification made to claimant's average weekly wage by the administrative law judge, claimant has been overpaid approximately $129,000. On reconsideration, the administrative law judge declined to set forth a specific amount of employer's overpayment, stating that this figure must be administratively calculated by the district director.

may have different meanings under different sections of the Act. *See Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988). However, the specific language of Section 14(j) provides for reimbursement of advance payments from "any unpaid installment or installments" of compensation due claimant, and medical benefits under Section 7 involve the reimbursement of medical costs rather than installment payments to claimant. Consistent with the plain language of Section 14(j), the administrative law judge correctly determined that LIGA is not entitled to a credit for any overpayments of disability compensation against its liability for medical expenses. *Aurelio*, 22 BRBS at 423.

Section 14(e)

LIGA next contends that the administrative law judge erred in holding it liable for a Section 14(e) assessment on the amount of benefits due claimant between October 29, 2005, and January 20, 2006. LIGA asserts that an assessment pursuant to Section 14(e) of the Act should not be enforced on the facts of this case as it only suspended claimant's benefits during this period of time in order to reconcile the amount of benefits due claimant with its alleged overpayment of benefits made to claimant during 2004. We reject this contention.

Section 14(e) of the Act, 33 U.S.C. §914(e), provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional ten percent of such installment, unless it files a timely notice of controversion pursuant to Section 14(d), 33 U.S.C. §914(d), or the failure to pay is excused by the district director based on employer's showing that the non-payment was due to circumstances beyond its control. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990); *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993). Section 14(b), 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the fourteenth day after the employer has been notified of an injury pursuant to Section 12 of the Act, 33 U.S.C. §912, or the employer has knowledge of the injury.

The undisputed facts of this case support the administrative law judge's determination that LIGA is liable for a Section 14(e) assessment on all compensation due and unpaid from October 29, 2005, through January 20, 2006. The administrative law judge found that while LIGA commenced the payment of temporary total disability benefits to claimant on September 18, 2004, it terminated those payments on October 14, 2005.[3] As of this date, a dispute existed between the parties as to the amount of

[3] No party challenges the administrative law judge finding that Judge Kennington's June 2005 Decision and Order awarding benefits to claimant was not

compensation due claimant. Once this dispute existed, LIGA had 28 days to pay the benefits due or 14 days to file a notice of controversion with the district director. *See Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). On appeal, LIGA does not contend that it timely filed a notice of controversion; rather, LIGA asserts that while it was not "controverting" claimant's right to compensation, it suspended claimant's benefits during the period in question to recoup an accidental overpayment. LIGA's br. at 13. This argument does not provide a basis for excusing the failure to file a notice of controversion. The administrative law judge's finding that LIGA is liable for a Section 14(e) assessment on all benefits due and unpaid is affirmed.[4]

Liability of Attorney's Fee

LIGA argues that it cannot be held liable for the attorney's fees awarded by the administrative law judge under Section 28 of the Act. 33 U.S.C. §928. LIGA initially avers that it and the Special Fund established by 33 U.S.C. §944 should be treated similarly and that, since the Special Fund cannot be held liable for claimant's attorney's fee, neither should LIGA. Additionally, LIGA contends that its enabling legislation does not provide for an award of post-insolvency attorney's fees against it, that Louisiana state law establishes that it is not liable for post-insolvency attorney's fees pursuant to its enacting statute, and that attorney's fees are akin to penalties, which cannot be awarded against LIGA. We reject these specific contentions of error.

We initially reject LIGA's argument that decisions holding that the Special Fund is not liable for fees are applicable to its potential liability for post-insolvency attorney fees. The Special Fund provides disability benefits where a pre-existing condition contributes to a claimant's disability and other payments specified in Section 44 of the

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binding on LIGA since LIGA was not listed in the style of the case and it is unclear whether employer's counsel at that time was acting on behalf of LIGA, and that consequently Section 14(e) rather than Section 14(f), 33 U.S.C. §914(f), of the Act is applicable in this case. *See* Decision and Order at 49.

[4] If, in fact, LIGA paid claimant all benefits due in advance of its suspension, as it avers, then it need not fear a Section 14(e) assessment, as the benefits "due and unpaid" during the time in question would be $0. However, claimant points out in his response brief that, according to LIGA's attachment B to its brief, it paid claimant some $13,000 when it commenced payments in January 2006 after the suspension. This document, which is apparently not in evidence, appears to contradict LIGA's assertion. As the case is being remanded on other grounds, *see infra*, any issues regarding the amount "due and unpaid" can be resolved by the administrative law judge on remand.

Act and is administered by the Department of Labor. Because Section 28(a), (b) provides only for fee liability for an "employer or carrier" and Section 44 does not authorize payment of attorney's fees, the Special Fund cannot be held liable for attorney's fees. *See, e.g., Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981); *Director, OWCP v. Robertson*, 625 F.2d 873, 12 BRBS 550 (9th Cir. 1980). On the other hand, LIGA is a state-created association designed to protect claimant's and policy holders from financial loss caused by the insolvency of an original insurer. *See* La. Rev. Stat. 22:1376. As a guaranty association, it steps into the shoes of the insolvent insurance carrier and assumes its liabilities. The holdings applicable to the Special Fund thus do not apply to LIGA.

We also reject LIGA's assertion that it cannot be held liable for post-insolvency attorney's fees. The Board has addressed this precise argument, and rejected it, albeit in an unpublished decision. *See Ambo v. Friede Goldman Halter*, BRB Nos. 05-0665, 0666 (May 8, 2006)(unpub.), *appeal dismissed*, No. 07-60103 (5th Cir. Jan. 16, 2008). In *Ambo*, the Board initially found, after acknowledging that LIGA cannot be held liable for fees incurred prior to a covered carrier's insolvency, *see Marks v. Trinity Marine Group*, 37 BRBS 117 (2003), that the Louisiana statute creating LIGA is silent as to LIGA's liability for post-insolvency attorney's fees.[5] The Board then discussed the state cases relied on by LIGA, specifically including *Bowens v. General Motors Corp.*, 608 So.2d 999 (La. 1992), and concluded:

> 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 [in *Bowens*] 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.*

[5] Pre-insolvency fees are not at issue in this case.

Ambo, slip op. at 5 – 6. We therefore reject LIGA's contention that it may not be held liable for post-insolvency attorney's fees.

Alternatively, LIGA contends that the administrative law judge erred in holding it liable for claimant's attorney's fee pursuant to Section 28(b) of the Act since LIGA accepted and complied with all recommendations issued following the informal conference in this case. We agree.

Section 28(b) of the Act states, in relevant part:

> If the employer or carrier pays or tenders payment of compensation without an award…and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse (sic) to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by employer or carrier, a reasonable attorney's fee…shall be awarded in addition to the amount of compensation. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b). This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has strictly construed the language of Section 28(b). In *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified in part on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000), the court enumerated three criteria for fee liability under Section 28(b): (1) an informal conference on the disputed issue; (2) a written recommendation on that issue; and (3) the employer's refusal of the recommendation. *Staftex Staffing*, 237 F.2d at 409, 34 BRBS at 47(CRT); *see Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *FMC Corp. v. Perez*, 128 F.3d 908, 909-911, 31 BRBS 162, 163(CRT) (5th Cir. 1997) (stating Section 28(b) gives an employer an opportunity to avoid the payment of attorney's fees by "accepting the . . . Commissioner's recommendations"). *Accord Newport News Shipbuilding & Dry Dock Co. v.* Director, *OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS

1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005); *Davis v. Eller & Co.*, 41 BRBS 58 (2007). Moreover, the Board has held that there is no fee liability under Section 28(b) where employer accepts the district director's recommendation that no further compensation is due the claimant, notwithstanding the subsequent award of greater compensation. *Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 1 (Hall, J., dissenting), *aff'd on recon.*, 41 BRBS 73 (2007) (Hall, J., concurring); *see also Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006).

In considering claimant's counsel's request for an employer-paid fee pursuant to Section 28(b), the administrative law judge found that, following a telephonic conference call held on January 4, 2006, LIGA agreed to reinstate claimant's temporary total disability benefits retroactive to October 14, 2005 and to authorize conservative medical treatment for claimant; LIGA did not agree, however, to pay for claimant's proposed surgery in Texas. *See* Supplemental Decision and Order at 8; CX 3 at 20 – 21, 23. Subsequently, a second telephonic conference was scheduled for June 29, 2006, with the issues being listed as "medical/permanency;" *see* CX 3 at 32; on June 12, 2006, however, claimant's counsel sent a letter to the claims examiner stating that he had requested a conference to discuss only "Section 7 medical issues." *Id.* at 33. An LS-280, Memorandum of Informal Conference dated July 10, 2006, states that an informal conference was held on July 3, 2006, that both parties were represented by counsel, and that claimant sought authorization for surgery which he contends is necessary and related to his work-injury. The Memorandum further states under "Summary of the Informal Conference and Recommendation" that "it does not appear surgical intervention is necessary for the work related injury." *Id.* at 34 – 35.

This record supports LIGA's contention that any issue regarding the amount of additional compensation due claimant was not the subject of an informal conference. Moreover, the issue which was the subject of the informal conferences and subsequent recommendation was resolved when LIGA accepted recommendation that the surgery sought by claimant was not necessary. *See R.S. v. Virginia Int'l Terminals*, 42 BRBS 11 (2008); *Andrepont*, 41 BRBS 1. Under these circumstances, the requirements for liability under Section 28(b) have not been met. *Andrepont*, 41 BRBS 1. Thus, LIGA cannot be held liable for claimant's attorney's fee pursuant to Section 28(b) for work performed before the administrative law judge as the statutory conditions have not been met. The administrative law judge's award of an attorney's fee payable by LIGA is reversed.

However, since claimant was successful in obtaining authorization for surgery and in defending his ongoing award of temporary total disability benefits, counsel may be entitled to a fee assessed against claimant pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). *See generally Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996). Under such circumstances, any fee approved must take into account the amount of

benefits awarded and the financial circumstances of claimant. 20 C.F.R. §702.132. The case is therefore remanded for the administrative law judge to consider an attorney's fee payable by claimant.

Motion to Remand

Claimant has notified the Board that he has filed a request for modification under Section 22 of the Act, 33 U.S.C. §922, with the administrative law judge and requests that the Board remand this case to the Office of Administrative Law Judges for modification proceedings. Claimant's request is granted, and on remand, the administrative law judge should also address claimant's request for modification.

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are affirmed. The administrative law judge's determination that LIGA is liable for claimant's counsel's attorney's fee is reversed. The case is remanded to the administrative law judge for consideration of an attorney's fee payable by claimant, as well as claimant's motion for modification.

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