BRB Nos. 03-0433
and 03-0578

STEVE GOODMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CSI HYDROSTATIC TESTERS	)	
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	DATE ISSUED:MAR 23, 2004
	)	
and	)	
	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	
	)	
	)	DECISION and ORDER
Employer/Carrier-Petitioners	)	

Appeals of the Decision and Order Awarding Benefits and Decision and Order Awarding Attorney's Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Billy Wright Hilleren (Hilleren & Hilleren, L.L.P.), Mandeville, Louisiana, for claimant.

Christopher M. Landry (Blue Williams, L.L.P.), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Decision and Order Awarding Attorney's Fees (02-LHC-1088) of Administrative Law Judge Clement J. Kennington 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 which 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 will not be set aside unless shown 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 began working for employer on December 2, 1996, as part of a temporary group assigned to overhaul its vessel *Discovery*, docked in Bayou LaBatre, Alabama. Claimant previously served, beginning in 1968, a 28-month tour of duty in Vietnam as a radio microwave repairman, and following an honorable discharge in 1973, he worked nearly eighty jobs, all involving medium levels of manual labor, throughout thirty states and almost sixty cities. Claimant's job with employer required that he work seven days a week, and claimant elected to eat and sleep aboard the vessel. All of his duties were performed on the vessel or centered on the vessel, and he specifically performed work mounting a crane, mounting winches, and re-steeling the ship for new anchor cables.

On December 15, 1996, claimant fell while painting a winch, and impaled his left buttock on a protruding flange, resulting in injuries to his back, legs and buttock. Claimant was initially diagnosed with a coccygeal contusion secondary to the fall, but continued pain prompted a lumbar laminectomy/discectomy at L3-4 and L5-S1 performed by Dr. Kinnard on November 17, 1997. Following the surgery, claimant continued to receive treatment for persistent back pain, and on January 7, 1999, Dr. Gimbel diagnosed epidural fibrosis. He opined that claimant had reached maximum medical improvement with regard to his back and was able to work a modified full-time job which did not involve repetitive bending or lifting greater than 25 pounds. Similar opinions were offered by Dr. McLean, on April 16, 1999, and Dr. Zipnick, on August 13, 2002: that claimant's back condition is permanent, and that he could work light duty with restrictions. Dr. Zipnick, however, also recommended a second lumbar laminectomy at L5 and potentially L4, and a decompression of the L4-5 and S1 nerve roots. In contrast, Drs. Gimbel and McLean opined that claimant was not a good candidate for surgery, and thus, they preferred a more conservative approach for treatment of his back injury. Based on those opinions, employer refused authorization for any additional back surgery.

Claimant also claimed that his inability to work and earn a living post-surgery

negatively impacted his mental state. With regard to that mental state, claimant stated that he has suffered from Post Traumatic Stress Disorder (PTSD) since 1970, but admitted that he first sought treatment for his mental condition in December 1998, and was not medically diagnosed with PTSD until November 1999. Specifically, commencing on December 1, 1998, claimant sought and received medical treatment at the Veterans Administration (VA) Hospital in Payson, Arizona, where he was eventually diagnosed by Dr. Abad as suffering from PTSD, which the doctor opined was exacerbated by claimant's physical injury. On April 20, 2000, claimant was granted total disability payments by the VA, which assigned a seventy percent impairment due to the PTSD, and stated that regardless of claimant's back problems, he "does not appear employable due to his significant mental problems." In September 2002, Dr. Laitin, a pain management physician, concluded, based on claimant's persistent back pain and PTSD, that claimant could eventually work up to four hours a day but was presently able to perform only volunteer work for two hours per week due to pain.

Claimant subsequently sought benefits under the Act, alleging that his work injury aggravated his PTSD to the point that he is permanently and totally disabled. In addition, claimant sought medical benefits for additional back surgery and continued treatment with his pain management specialist Dr. Laitin, as well as mileage expenses related to this treatment. Employer controverted the claim on the grounds that claimant is excluded from coverage under the Act because he is a "member of a crew" and alternatively that his PTSD is not related to or exacerbated by his work injury.

In his decision, the administrative law judge initially rejected employer's contention that claimant is excluded from coverage as a member of a crew pursuant to Section 2(3)(G) of the Act, 33 U.S.C. §902(3)(G), since claimant was a land-based worker, his connection to *Discovery* was only transitory, and his duties did not expose him to the perils of the sea. The administrative law judge thus concluded that claimant is covered under the Act. The administrative law judge next determined that claimant is entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to his PTSD, and that employer did not establish rebuttal. Nevertheless he determined, based on the record as a whole, that claimant established that his work accident on December 16, 1996, aggravated his PTSD. The administrative law judge also found that claimant is unable to perform his usual work for employer, and that employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from December 16, 1996, and continuing, and ordered employer to pay a Section 14(e), 33 U.S.C. §914(e), assessment on all unpaid compensation between June 21, 2000, and April 16, 2001. The administrative law judge also awarded claimant medical benefits under Section 7(a), 33 U.S.C. §7(a), including benefits for the additional back surgery recommended by Dr. Zipnick, and mileage expenses related to claimant's visits with Dr. Laitin. Employer appealed the administrative law judge's award of benefits, and the case was assigned BRB No. 03-0433.

Claimant's counsel thereafter submitted a petition for an attorney's fee of $25,879, representing 147.88 hours at the hourly rate of $175, along with $5,428.89 in expenses. After considering employer's objections, the administrative law judge awarded a total fee in the amount of $30,473.63, representing 144.13 hours of legal services at the hourly rate of 175, and $5,250.88 in expenses. Employer also appealed the administrative law judge's award of an attorney's fee, and that case was assigned BRB No. 03-0578. Employer's pending appeals were consolidated for purposes of decision by Board order dated July 21, 2003.

On appeal, employer challenges the administrative law judge's findings that claimant is entitled to coverage under the Act, that claimant's PTSD is work-related, that claimant is entitled to total disability benefits, that it is liable for the additional back surgery recommended by Dr. Zipnick, and that claimant is entitled to medical benefits for treatment related to his PTSD. Employer further challenges the administrative law judge's award of an attorney's fee in this case. Claimant responds to both appeals, urging affirmance.

Coverage

Employer contends that the administrative law judge erred in finding that claimant is not "a member of a crew" and thus is entitled to coverage under the Act. Employer asserts that claimant's descriptions of his activities and duties establish that he was, at all times, a Jones Act seaman. Specifically, employer posits that *Discovery* is a vessel, and that claimant's connection to the vessel is substantial as he spent 100 percent of his time on board in furtherance of the ship's overall mission. Employer further asserts that as the provisions of the Louisiana Insurance Guaranty Association (LIGA) specifically exclude Jones Act claims, the instant claim should be dismissed.

A ship repairman is one of the covered occupations enumerated in Section 2(3) of the Act, 33 U.S.C. §902(3). Section 2(3)(G) of the Act excludes from coverage "a master or member of a crew of any vessel." 33 U.S.C. §902(3)(G). An employee is a member of a crew if: (1) his duties contributed to the vessel's function or to the accomplishment of its mission, *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991); and (2) he had a connection to a vessel in navigation or to a fleet of vessels that is substantial in terms of both its duration and its nature. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *see also Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997). The second prong of this inquiry is necessary to separate sea-based workers entitled to coverage under the Jones Act from land-based workers with only a transitory or sporadic connection to a vessel in navigation and whose employment, therefore, does not regularly expose them to the perils of the sea. *Chandris*, 515 U.S. at 368; *see also Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996). The Supreme Court has held, however, that a claimant employed in a

position enumerated in Section 2(3) is not precluded from a Jones Act recovery "[b]ecause a ship repairman may spend all of his working hours aboard a vessel in furtherance of its mission -- even one used exclusively in ship repair work -- that worker may qualify as a Jones Act seaman." *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44(CRT) (1991). Nonetheless, such an employee must "owe [his] allegiance to a vessel and not solely to a land-based employer." *Chandris*, 515 U.S. at 359, *quoting Wilander*, 498 U.S. at 347, 26 BRBS at 83(CRT).

The United States Court of Appeals for the Ninth Circuit concluded, in *Heise v. Fishing Co. of Alaska, Inc.*, 79 F.3d 903 (9th Cir. 1996), that the claimant, who had been hired as a temporary laborer to perform maintenance and repair work aboard a vessel, was not a "seaman" under the Jones Act. Similarly, the Board, in *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000), affirmed the administrative law judge's determinations that claimant did not have a connection to a vessel, *The Bertha*, that was substantial in duration and nature, and that claimant is a land-based worker entitled to coverage under the Act. The Board specifically held that claimant is not a member of the crew merely because he was scheduled to be on *The Bertha* for the entire three months of its journey from Aruba to Europe, via Boston, and back. In addition, the Board held that the administrative law judge properly found that claimant was not usually an employee of *The Bertha*, but rather was a land-based worker placed on the vessel for only the duration of a specific repair job. In this regard, the Board acknowledged that the appropriate inquiry regarding the claimant's duties is the employee's basic job assignment at the time of injury. *See Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 33 BRBS 31(CRT) (3d Cir. 1998), *cert. denied*, 119 U.S. 1142 (1999).

In the instant case, claimant's work for employer is similar to that performed by claimants Heise and McCaskie. The mission of *Discovery* was to sail in the Atlantic Ocean waters off the shore of Nigeria for the purpose of picking up pipe. Hearing Transcript (HT) at 66. Claimant's duties did not, in any way, involve this operation. Rather, his work involved re-rigging duties on the vessel in dock. Specifically, he assisted in activities of installing shipboard cranes and winches and the complete re-steeling of the deck, all of which are related to ship construction and repair. *Id.*

In addition, the administrative law judge found claimant's connection to the vessel was neither substantial in terms of its duration nor its nature. The job assignment itself was limited to four weeks, and it did not involve any exposure to the perils of the sea. *Chandris*, 515 U.S. at 359; *Heise*, 79 F.3d 903. The *Discovery* stayed at the dock, floating in the waters of the Bayou LaBatre in Alabama during the entire period of claimant's employment, and its movement was lateral along the dock on two or three occasions for ten minutes or less each time. HT at 109. Moreover, although claimant ate and slept on the vessel, he was required to

remain on the vessel only during his twelve-hour shift, HT at 61-63, and although claimant classified himself as a "deckhand," HT at 106, and was told by the ship's captain that he would be permanently assigned to the vessel following completion of the re-rigging work, employer listed claimant's occupation merely as "laborer" and stated that his injury occurred "while repairing boat *Discovery*." CXs 2, 8. Furthermore, the record establishes that claimant never worked aboard a vessel prior to his employment with employer, that he was not a qualified seaman, that he never had any training in sea school, and did not possess able-bodied seaman's papers. Thus, as the administrative law judge found, claimant's overall employment establishes that he was a land-based worker, hired by employer to perform temporary repair work on *Discovery*, and that he did not contribute to the function or mission of the vessel. *Wilander*, 498 U.S. at 347, 26 BRBS at 80(CRT); *Heise*, 79 F.3d 903; *McCaskie*, 34 BRBS 9. Consequently, his finding is affirmed as it is rational, supported by substantial evidence and in accordance with law. We therefore affirm the administrative law judge's finding that claimant's work on *Discovery* does not confer on him the status of a member of a crew. 33 U.S.C. §902(3)(G). Consequently, we affirm the administrative law judge's determination that claimant is covered under the Act.[1]

Section 20(a)

Employer argues that the record contains no evidence to support the administrative law judge's finding that claimant's work injury aggravated his pre-existing PTSD. Employer contends that the evidence establishes that claimant had problems with his PTSD long before his back injury, as evidenced by his sporadic work history prior to his job with employer, and that with the exception of claimant's VA records, none of the physicians discuss an exacerbation of claimant's PTSD. Moreover, employer avers that claimant's VA records indicate that his PTSD is exacerbated by a variety of factors, including crowds, fireworks, stress, and the war on terrorism and the terrorist attacks, which are entirely unrelated to his work accident.

Section 20(a) provides claimant with a presumption that the injury he sustained is causally related to his employment if he establishes a *prima facie* case by showing that he suffered an injury and that employment conditions existed or a work accident occurred which could have caused the injury or aggravated a pre-existing condition. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). It is undisputed that claimant suffers from PTSD, and that claimant sustained a work-related back

[1]As claimant is covered under the Act, we need not address employer's contention that the LIGA is not liable for Jones Act claims.

injury on December 15, 1996. In addition, claimant stated that his inability to work affected him mentally, because when he is working his work occupied his mind and took his mind off his mental problems, but once he was unable to work, his mental problems came to the forefront. HT at 75-78, 126-128. Moreover, claimant's treating psychiatrist, Dr. Abad specifically stated, in an "Evaluator's Assessment of Ability to Perform Work Related Activities" dated March 8, 2001, that claimant's "psychiatric problem (PTSD) was exacerbated by physical injury." CX 18. Consequently, as claimant's testimony and the opinion of Dr. Abad support the administrative law judge's finding that claimant's inability to work and impaired physical condition resulting from his employment-related back injury sustained on December 15, 1996, could have aggravated his pre-existing PTSD, that finding is affirmed. *Price v. Stevedoring Services of America,* 36 BRBS 56 (2002). The administrative law judge's determination that claimant is entitled to invocation of the Section 20(a) presumption that his work injury on December 15, 1996, aggravated his PTSD is therefore affirmed. *Id.*

The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, has stated that in order to rebut the Section 20(a) presumption, employer must present evidence "ruling out" the employment as a possible cause of the injury. *Brown*, 893 F.2d at 297, 23 BRBS at 24(CRT). In *Brown*, the court found that the Act placed on employer the duty of rebutting the Section 20(a) presumption with evidence that the employee's employment neither caused nor aggravated his harm. *Id.; cf. Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999) (court rejects "ruling out" standard, but affirms finding Section 20(a) was not rebutted); *Bath Iron Works Corp. v. Director, OWCP [Shorette],* 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997) (employer need not "rule out" any possible causal relationship; employer must proffer substantial evidence that the condition was not caused or aggravated by the employment). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

The administrative law judge herein determined that employer did not present substantial evidence to sever the connection between claimant's workplace accident and the aggravation of his PTSD. As the administrative law judge found, employer presented evidence that claimant has had a long history of problems with PTSD, including a referral to a psychiatrist that resulted in his discharge from the Army in 1973, and in-patient treatment at Ft. Leavenworth in the mid-1980s, HT at 109-110, 113-114, that claimant has had similar symptoms from his PTSD both prior to and following his work injury, HT at 77, and that claimant's PTSD symptoms may be exacerbated by a number of other factors including

crowds, fireworks, stress, and terrorism.[2] However, employer has not put forth any evidence that claimant's work injury did not aggravate his pre-existing PTSD. Drs. Gimbel, McLean and Zipnick did not address the issue of whether claimant's work-related injuries may have exacerbated his PTSD.[3] In addition, the administrative law judge found it significant that claimant had worked steadily since leaving Vietnam, although he had held numerous jobs and had been unable to maintain any specific job for more than six months, whereas since his work accident, claimant has not been able to work at all, in large part because of his increased PTSD symptoms following his work injury. The administrative law judge's findings that employer did not establish rebuttal of the Section 20(a) presumption and, thus, that claimant has established the requisite causal connection between the work injury sustained on December 15, 1996, and his PTSD, are affirmed as they are supported by substantial evidence. *Brown*, 893 F.2d 294, 23 BRBS 22(CRT); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). Moreover, despite finding the Section 20(a) presumption was not rebutted, the administrative law judge went on to weigh the evidence in the record as a whole, crediting claimant's hearing testimony that his work injury adversely affected his PTSD, HT at 84-85, and the VA reports of Virginia Vesco and Dr. Abad documenting an exacerbation of PTSD symptoms after claimant's workplace accident, CX 18, and considering claimant's demonstrated ability to work before his workplace accident, despite his PTSD. As the administrative law judge is entitled to determine the weight accorded the evidence, these determinations are affirmed. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). Thus even if the Section 20(a) presumption were

[2] It is irrelevant that other factors may also have contributed to claimant's PTSD, as the well-settled aggravation rule provides that where a work-injury combines with other possible causes, the entire condition is compensable. *See Brown*, 893 F.2d at 297, 23 BRBS at 24(CRT).

[3] Employer asserts that these physicians could not have rendered an opinion on this issue since claimant did not tell them about his PTSD. However, claimant testified that these physicians did not know about his diagnosis and treatment for PTSD as his visits occurred prior to the time he became fully aware of his mental condition. HT at 80. This testimony is supported by the fact that Dr. Gimbel examined claimant in January 1999, and Dr. McLean examined claimant in April 1999, and the record indicates that claimant did not receive an initial diagnosis of PTSD until November 1999. CX 18. Moreover, claimant's primary purpose in visiting Drs. Gimbel and McLean related to the viability of the surgery recommended by Dr. Zipnick. Furthermore, employer apparently made no effort to subsequently obtain any causation opinions from Drs. Gimbel and McLean upon discovering claimant's claim for benefits related to his PTSD.

rebutted, the administrative law judge's finding that claimant's work injury aggravated his underlying PTSD must nonetheless be affirmed as it is supported by substantial evidence.

Suitable Alternate Employment

Employer contends that claimant's treating physician, as well as two independent medical experts, stated that claimant is able to return to work in a light duty capacity with some physical restrictions and that employer's vocational expert, Ms. O'Neil, identified a number of positions which claimant could perform, given his work skills and physical restrictions.

Where, as here, claimant establishes that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of jobs in the geographic area where claimant resides, which he is, by virtue of his age, education, work experience, and physical restrictions, capable of performing and which he could realistically secure if he diligently tried. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In addressing suitable alternate employment, the administrative law judge acknowledged that employer's vocational expert identified numerous jobs in June 1999, August 2000, and August 2002. He found, however, that while some of the jobs identified by Ms. O'Neill may have fallen within claimant's light duty restrictions as outlined by Drs. Gimbel, McLean and Zipnick, none of the jobs fell within claimant's limitations considering the present work capability of two hours of work per week, documented by Dr. Laitin.[4] CX 17. In addition, the administrative law judge rejected Ms. O'Neill's reports as she was never made aware of claimant's underlying PTSD, and thus, did not factor that condition into her job search. *See generally White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). The administrative law judge's conclusion that employer did not establish the availability of any suitable alternate employment based on claimant's overall medical condition is therefore affirmed as it is supported by substantial evidence. *Canty*, 26 BRBS 147; *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Medical Benefits

[4] Dr. Laitin observed, as of September 2002, that claimant was limited to two hours of volunteer work per week because of his pain, but he also stated that claimant "can probably eventually only work up to 4 hours/day in a job." CX 17.

Employer argues that the administrative law judge erred in finding it liable for medical benefits related to the back surgery proposed by Dr. Zipnick, and for the treatment of claimant's PTSD. Employer first maintains that Drs. Gimbel and McLean both opined that claimant was not a good surgical candidate, and that even Dr. Zipnick ultimately agreed with their opinions. Moreover, employer asserts that Dr. Zipnick specifically stated that he was uncertain as to whether the surgery would improve claimant's condition. Thus, employer maintains that it cannot be held liable for the surgery in question as the relevant medical evidence supports its position that additional surgery is neither necessary nor reasonable.[5]

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical and other attendance or treatment...medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532 (1979). In order for a medical expense to be assessed against employer, the expense must be both reasonable and necessary and must be related to the injury at hand. *See Davison v. Bender Shipbuilding & Repair Co., Inc*., 30 BRBS 45 (1996); 20 C.F.R. §702.402. Claimant can establish a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for the work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). 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).

The administrative law judge initially determined that claimant presented a *prima facie* case that additional back surgery was both reasonable and necessary based on the recommendation of claimant's treating physician, Dr. Zipnick The administrative law judge then found that employer established rebuttal of claimant's *prima facie* case based on the opinions of Drs. Gimbel and McLean. Based on the record as a whole, the administrative law judge found, relying on the decision of the United States Court of Appeals for the Ninth Circuit in *Amos v. Director, OWCP*, 153 F.3d 1051, 1054, 32 BRBS 144, 147(CRT) (9th Cir. 1998), *amended*, 164 F.3d 480 (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999), that claimant's election to undergo Dr. Zipnick's treatment in the form of additional surgery is

[5]As for claimant's PTSD, employer asserts that it cannot be liable for medical benefits related to that condition since the record establishes that claimant has suffered with it since his time in Vietnam and that his symptoms, related entirely to his war experiences, have remained unchanged. Nevertheless, employer is liable for medical benefits for treatment of the exacerbation of claimant's PTSD as a result of his work injury pursuant to the aggravation rule so long as they are reasonable and necessary. *See generally O'Kelley*, 34 BRBS 39.

both reasonable and necessary.[6] In making this determination, the administrative law judge relied on the fact that neither Dr. Gimbel nor Dr. McLean stated that the surgical procedure was unreasonable, but rather believed that a more conservative approach for treatment would be appropriate, EX 13, 20. The administrative law judge rationally concluded that claimant, like Amos, was faced with two valid alternatives for treatment of his work-related back injury, *i.e.*, the back surgery recommended by Dr. Zipnick, or the more conservative treatment recommended by Drs. Gimbel and McLean.[7] *Amos*, 153 F.3d 1054, 32 BRBS 147(CRT). Accordingly, the administrative law judge's award of medical benefits for the additional surgical procedure recommended by Dr. Zipnick is affirmed. *Id.*; *see also Wheeler*, 21 BRBS 33.

Attorney's Fee Award

Employer initially challenges the hourly rate awarded to claimant's counsel by the administrative law judge. Specifically, employer asserts that the awarded hourly rate of $175 is excessive, and that a rate of $150 per hour would be more appropriate in this case.[8] In

[6]In *Amos*, the Ninth Circuit held that a claimant's treating physician's opinion regarding medical treatment is entitled to special weight, and stated that, "[a]lthough the employer is not required to pay for unreasonable or inappropriate treatment, where the claimant is faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to chart his own destiny." *Amos*, 153 F.3d 1054, 32 BRBS 147(CRT). Thus, the court held that where the treating physician's recommendation was not shown by other medical testimony to be unreasonable, the administrative law judge was not entitled to choose between two reasonable courses of treatment; rather, the court held that claimant was entitled to make the decision as to whether to have surgery. *Id*.

[7]As the administrative law judge observed, Dr. Zipnick agreed with Dr. McLean's evaluation that claimant was not the best surgical candidate; however, the administrative law judge determined that Dr. Zipnick's statement did not alter his prior statement regarding the need for the surgical procedure. Decision and Order at 30-31.

[8]In support of its position, employer cites the Board's slip opinion in *Rock v. Halter Marine*, Inc., BRB No. 00-0281/A (Nov. 14, 2000). This case, in which the Board affirmed another administrative law judge's award of an attorney's fee based upon an hourly rate of $150, with enhancement for delay, for legal services performed in the New Orleans area is irrelevant to this case because an attorney fee award is committed to the discretion of the administrative law judge. *Bazor* v. *Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd on other grounds*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002) , *cert. denied*, 124 S.Ct. 65 (2003) (Board affirmed an hourly rate of $200 for New Orleans area).

addressing this specific contention in his supplemental decision, the administrative law judge found the hourly rate of $175 is reasonable in light of the novel and complex issues presented in the instant case, the expertise of claimant's counsel, and the prevailing rates in the geographic area wherein this case arose. As the administrative law judge specifically considered employer's objection, we hold that employer has not met its burden of showing that the administrative law judge abused his discretion in this regard. *See Doucet v. Avondale Industries, Inc.*, 34 BRBS 62 (2000); *Moore v. Universal Maritime Corp.*, 33 BRBS 54 (1999); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Employer next argues that the administrative law judge's award is premature in light of its appeal to the Board, and that therefore the award should be stayed pending the final decision in this case. The administrative law judge's award is not premature as an administrative law judge can award an attorney's fee during the pendency of an appeal; however the fee award is not enforceable until the compensation order becomes final. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *see also Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

Employer's carrier, Reliable National Indemnity Company, was liquidated, and LIGA was substituted to provide coverage on the instant claim. LIGA herein asserts that in light of Louisiana state law, it is immune from all liability for penalties and attorney's fees in this case, not just the pre-insolvency attorney's fees and costs. The Board recently addressed the issue of LIGA's liability for pre-insolvency attorney's fees under the Act. In *Marks v. Trinity Marine Group*, 37 BRBS 117 (2003), the Board held 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 that case notwithstanding its liability for claimant's compensation benefits. The Board, however, noted that employer's primary liability for an attorney's fee is not affected by the carrier's insolvency.[9] *Id.* The Board remanded the case for assessment of a fee against employer under either Section 28(a) or 28(b) of the Act, 33 U.S.C. §928(a), (b), as claimant cannot be held liable for the fee merely because LIGA is statutorily precluded from such liability. Consequently, as the administrative law judge determined, nothing in the Louisiana statute prohibits an attorney's fee from being assessed against employer in this case. The issue regarding LIGA's liability for the attorney's fee is therefore irrelevant to the issue at hand, *i.e.*, *employer's* liability for an attorney's fee in this case, and there are no contentions that employer is not liable under Section 28(a), (b). The administrative law judge's award of an attorney's fee against employer is therefore affirmed.

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

[9] In *Marks*, 37 BRBS 117, the employer was also insolvent. There are no such facts here.

and Decision and Order Awarding Attorney's Fees 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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REGINA C. McGRANERY
Administrative Appeals Judge