BRB Nos. 96-0691
and 96-0691A

JERRY L. MACE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
JONES OREGON STEVEDORING COMPANY	)	DATE ISSUED: _____
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order, Decision and Order Upon Reconsideration, and Order Awarding Attorney Fee of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

William M. Tomlinson (Lindsay, Hart, Neil & Weigler), Portland, Oregon, for Jones Oregon Stevedoring Company.

Dennis R. VavRosky (VavRosky, MacColl, Olson & Miller, P.C.), Portland, Oregon, for Stevedore Services of America and Eagle Pacific Insurance Company.

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

PER CURIAM:

Stevedoring Services of America (SSA) appeals the Decision and Order and Decision and Order Upon Reconsideration and claimant cross-appeals the Order Awarding Attorney's Fee (93-LHC-3461) of Administrative Law Judge Alexander Karst 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 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 may be set aside only if 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).

This appeal is of a Decision and Order on modification under Section 22 of the Act, 33 U.S.C. §922. On December 26, 1986, claimant sustained a work-related back injury while working for Jones Oregon Stevedoring Company (Jones Oregon). In a Decision and Order by Administrative Law Judge Lindeman dated March 30, 1990, claimant was awarded temporary disability benefits through October 16, 1989, and continuing permanent partial disability benefits thereafter pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), for this injury. *Mace v. Jones Oregon Stevedoring Co.*, No. 89-LHC-1872 (Mar. 30, 1991). The administrative law judge awarded claimant continuing benefits of $211.13 per week, based on his findings that claimant's average weekly wage at the time of the 1986 injury was $956.77 and that his post-injury wage-earning capacity was $640.07, as stipulated by the parties.

In October 1989, claimant returned to work performing the lightest work available on the waterfront through the hiring hall. He retired in November 1990 because of unrelenting back pain. On November 23, 1992, claimant sought to modify the prior permanent partial disability award against Jones Oregon to an award of permanent total disability compensation pursuant to Section 22 of the Act. On March 14, 1994, claimant moved to amend his claim to add SSA, his last documented employer prior to retirement, based on a cumulative trauma theory.

In his March 24, 1995, Decision and Order on modification, based on testimony provided by Dr. Cohen, Administrative Law Judge Karst found that claimant's work on the waterfront between October 1989 and his retirement, although light, did increase his pain and at least in the legal sense, aggravated his back condition and accelerated his retirement, which was due at least in part to his inability to continue to endure his back pain. He accordingly determined that inasmuch as SSA was claimant's last employer prior to his retirement, SSA was liable as the responsible employer for this injury. Claimant was awarded permanent total disability benefits commencing August 27, 1990, based on an average weekly wage of $640.72, which was claimant's residual wage-earning capacity following his 1986 back injury as determined in the earlier decision. The award of permanent total disability was to run concurrently with the prior award of permanent partial disability compensation against Jones Oregon. In his Decision and Order Upon Reconsideration, the administrative law judge reaffirmed his finding that SSA was liable as the responsible employer and rejected SSA's argument that he had erred in employing claimant's residual wage-earning capacity following his

1986 injury as the average weekly wage for the concurrent award of permanent total disability compensation.

Claimant's counsel sought attorney's fees and costs for work performed before the administrative law judge in connection with claimant's modification claim. The administrative law judge disallowed $21.61 in costs and 2 hours at $175 per hour for the preparation of the fee petition but otherwise found the fee requested to be reasonable and awarded claimant's counsel a fee of $12,117.85.

On appeal, SSA contends that the administrative law judge erred in holding it, rather than Jones Oregon, liable as the responsible employer inasmuch as Dr. Cohen testified that if claimant had retired in 1989 rather than returning to work, his back would not be different today and related claimant's deteriorating condition to the natural progression of his November 26, 1986, injury. SSA also contends that if it is found to be the responsible employer, the applicable average weekly wage for the award of permanent total disability compensation should be reduced to $394.76, based on claimant's actual earnings in the year prior to his retirement, which SSA maintains is more reliable evidence of claimant's wage-earning capacity at the time of his second injury than the stipulation regarding claimant's residual wage-earning capacity between Jones Oregon and claimant in the initial proceeding. Finally, SSA contends that the administrative law judge's choice of August 27, 1990, for the commencement date for the award of permanent total disability, bears no relevance to claimant's disability and asserts that the commencement date should be modified to November 2, 1990, to coincide with claimant's date of retirement.[1] Jones Oregon responds, urging affirmance of the administrative law judge's finding that SSA is liable as the responsible employer under a cumulative trauma theory. Claimant also responds, expressing agreement with SSA's position that Jones Oregon should be held liable as the responsible employer on a natural progression theory but otherwise urging affirmance of the administrative law judge's award of permanent total disability compensation. Claimant also cross-appeals the administrative law judge's award of attorney's fees, contending that pursuant to *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67 (CRT) (9th Cir. 1996), he is entitled to a fee for the two hours denied by the administrative law judge for preparing the fee petition. SSA replies, reiterating the arguments raised in its Petition for Review and, in addition, urging the Board to reject claimant's argument on cross-appeal and affirm the fee award made by the administrative law judge.

Initially, we reject SSA's contention that the administrative law judge erred in holding it liable as the responsible employer for the award of permanent total disability compensation. In a case involving successive traumatic injuries, if disability results from the natural progression of a

[1]By motion dated January 16, 1997, SSA requested that the Board maintain its appeal on the docket for an additional 60 days pursuant to Public Law No. 104-134. While SSA's motion is moot in light of the Board's timely disposition of this case within one year of its filing date, the appropriations bill enacted for Fiscal Year 1997, Pub. L. No. 104-208, unlike its predecessor, does not contain a provision for extending the time for review for an additional 60 days. *See Barker v. Bath Iron Works Corp.*, 30 BRBS 198 (1996).

prior injury, and would have occurred without the subsequent injury, the employer at the time of the initial injury is liable. If, however, the subsequent employment aggravates, accelerates or combines with a prior injury, resulting in disability, then claimant has sustained a new injury and the employer at that time is liable. *See, e.g., Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991). In holding SSA liable, the administrative law judge credited Dr. Cohen's testimony that claimant's work between October 1989 and his retirement contributed to his back pain and that once the pain increased, it did not decrease thereafter. Transcript at 105-107. He thus concluded that claimant's work after October 1989 aggravated his prior condition and constituted a new injury.

While portions of Dr. Cohen's testimony could support a conclusion that claimant's permanent total disability is due to the natural progression of his 1986 work injury with Jones Oregon, the administrative law judge noted this testimony but chose to credit those portions of Dr. Cohen's opinion which support a finding that claimant sustained an aggravation of his 1986 injury while working for SSA immediately prior to his retirement. Inasmuch as the administrative law judge may accept or reject all or any part of any testimony according to his judgment, *see Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990), and the credited portions of Dr. Cohen's testimony provide substantial evidence to support the administrative law judge's finding that claimant sustained an aggravation of his pre-existing 1986 injury while working for SSA, we affirm his finding that SSA, rather than Jones Oregon, is liable as the responsible employer for claimant's permanent total disability. *Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75 (CRT); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989).

We agree with SSA, however, that on the facts presented the administrative law judge erred in summarily employing the stipulated residual wage-earning capacity of $640.07 following claimant's 1986 injury as his average weekly wage for the award of permanent total disability compensation. Initially, it is well-established that where claimant sustains an aggravation, he has sustained a new injury and his average weekly wage is determined at that time. *See, e.g., Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980). In *Hastings*, the United States Court of Appeals for the District of Columbia Circuit held that a claimant may receive concurrent permanent partial and permanent total disability awards under Sections 8(a) and 8(c)(21), 33 U.S.C. §908(a), (c)(21), where claimant sustained two injuries. In *Hastings*, claimant received a permanent partial disability award based on earnings prior to a 1971 stroke, after which he returned to work part-time at reduced wages. When claimant thereafter suffered a second injury, resulting in permanent total disability, the court agreed with the Board that this award should be based on his reduced earnings prior to the second injury. In *Hastings*, the combination of claimant's two awards fully compensated his loss in wage-earning capacity from the amount he was able to earn prior to the first injury.

The decision in *Hastings*, however, does not require use of the figure agreed to by claimant and Jones Oregon in establishing claimant's remaining wage-earning capacity was $640.72 following the December 1986 injury as his average weekly wage for the award for permanent total

disability in 1990 absent a finding that this figure equates to claimant's average weekly wage in the year preceding his last injury. Under *Hastings* claimant's compensation is based on his average weekly wage under Section 10 of the Act, 33 U.S.C. §910, at the time of each injury. In general, following an initial injury resulting in permanent partial disability, claimant's earnings thereafter should reflect claimant's reduced wage-earning capacity. *See Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Crum v. General Adjustment Bureau*, 16 BRBS 101 (1983), *aff'd in pert. part and rev'd and rem. on other grounds*, 738 F.2d 474, 16 BRBS 115 (CRT) (D.C. Cir. 1984). Thus, if the finding regarding wage-earning capacity in an initial award of permanent partial disability accurately reflects claimant's earning potential, the same figure will be claimant's average weekly wage if a second injury occurs.[2] An administrative law judge may not, however, simply assume that claimant's average weekly wage equals a prior wage-earning capacity finding, as he must make his own finding regarding average weekly wage at the time of the subsequent injury based on the evidence in the record. If claimant's earnings either do not rise to the level anticipated in an initial award, as SSA alleges occurred in this case, or if actual earnings increase, the administrative law judge must address the facts relating to claimant's employment prior to the second injury and make a reasonable determination of claimant's earning capacity at that time in fixing his average weekly wage for the second injury. *Hastings* recognizes that modification of the prior award may be necessary in fashioning a concurrent award for a second injury. *Hastings*, 628 F.2d at 96 n. 30, 14 BRBS at 354 n.30.

In this regard, cases have addressed a variety of fact patterns involving concurrent awards. In *Morgan v. Marine Corps Exchange*, 14 BRBS 784 (1982), *aff'd mem. sub nom. Marine Corps Exchange v. Director, OWCP*, 718 F.2d 1111 (9th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984), the Board affirmed the administrative law judge's use of claimant's increased actual earnings prior to the second injury to calculate his average weekly wage at that time. Recognizing the possibility of double recovery due to the concurrent awards, the Board noted that under these circumstances the remedy, consistent with *Hastings*, would be downward adjustment of the first award. Concluding, however, that claimant's increased earnings in that case did not reflect an increase in his earning capacity, the Board affirmed the concurrent awards without adjustment. Under similar circumstances, in *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101 (CRT) (9th Cir. 1995), the United States Court of Appeals for the Ninth Circuit held that a worker is entitled to calculation of his average weekly wage at the time of an aggravating injury based on his increased earnings rather than the residual wage-earning capacity following his first injury. In that case, however, the court noted that the combination of two awards would exceed claimant's statutory entitlement under Section 8(a) and remanded the case for an adjustment in the amount of one of the awards.[3]

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[2]A wage-earning capacity finding by an administrative law judge seeks to determine claimant's *capacity* to earn post-injury. Similarly, average weekly wage under Section 10(a)-(c), 33 U.S.C. §910(a)-(c), seeks a reasonable approximation of claimant's annual earning *capacity*. In a concurrent award situation, the two should coincide.

[3]*Brady-Hamilton* is controlling in this case which arises within the appellate jurisdiction of the United States Court of Appeals for the Ninth Circuit. In *Brady-Hamilton*, unlike the present case,

It is clear from cases involving concurrent awards that *Hastings* does not set forth a mechanical rule but rather outlines a flexible scheme for compensating loss of wage-earning capacity in cases of multiple injuries based on the facts in a specific case. *See also Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989); *Kooley v. Marine Industry Northwest*, 22 BRBS 142 (1989). The administrative law judge in the present case, however, applied *Hastings* mechanically in summarily using claimant's stipulated residual wage-earning capacity following the first injury as his average weekly wage for the award of permanent total disability compensation despite evidence suggesting that claimant's actual earnings did not coincide with the post-injury wage-earning capacity projected in the first decision. Because the prior assessment of claimant's residual post-injury wage-earning capacity after the initial injury presents a potential mistake involving a mixed question of law and fact which impinges on the average weekly wage for the award of permanent total disability benefits, the administrative law judge erred in not addressing the evidence regarding claimant's earnings prior to the second injury and considering modification of the first award. *See Finch*, 22 BRBS at 201. Accordingly, we vacate the administrative law judge's finding regarding claimant's average weekly wage for the award of permanent total disability and remand this case for reconsideration of claimant's concurrent awards for permanent partial disability and permanent total disability.

Finally, we reject SSA's assertion that the administrative law judge erred in commencing the permanent total disability award on August 27, 1990 rather than on November 2, 1990, when claimant retired. The administrative law judge's choice of August 27, 1990, as the commencement date for the award of permanent total disability benefits is contemporaneous both with the last day claimant actually was able to work on the waterfront and with Dr. Cohen's assessment regarding the onset of claimant's permanent total disability, Claimant's Exhibit 14; Transcript at 59. Because the

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claimant's earnings prior to the second injury increased such that the combined effect of claimant's permanent partial disability and permanent total disability awards exceeded the statutory maximum of Section 8(a), 33 U.S.C. §908(a), based on his earnings at the time of the permanent total disability. In contrast, in the present case, claimant's actual earnings allegedly decreased, which is consistent with a loss of wage-earning capacity after the first injury but indicates that claimant's earning capacity after the first injury was lower than that anticipated by the parties prior to his actual return to work. Prior to the first injury, claimant's average weekly wage was $956.77, and the concurrent awards fashioned by the administrative law judge fully compensate claimant for his loss in wage-earning capacity as the two awards total 66 2/3 of this amount, consistent with Section 8(a). If the $344.76 average weekly wage urged by SSA were employed, however, without any adjustment in the initial award of permanent partial disability benefits, claimant would be undercompensated; he would receive $229.61 per week in permanent total disability benefits plus $211.13 in permanent partial disability compensation for a total of $440.74 per week which is less than 50 percent of claimant's $956.77 average weekly wage prior to the initial 1986 work injury. In calculating the concurrent awards on remand, the administrative law judge should be cognizant of the fact that the goal is to fully compensate claimant for his overall loss in wage-earning capacity. *Hastings*, 628 F.2d at 96 n.30, 14 BRBS at 354 n.30.

administrative law judge's finding that claimant's permanent total disability commenced as of August 27, 1990 is rational, supported by substantial evidence, and in accordance with applicable law, this determination is affirmed. *See generally Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279, 286 (1990) (Lawrence, J., dissenting on other grounds).

Turning to claimant's argument on cross-appeal, we agree with claimant that in light of *Anderson*, 91 F.3d at 1322, 30 BRBS at 67 (CRT), which was issued two weeks after the administrative law judge's fee award and is controlling in this case which arises within the appellate jurisdiction of the United States Court of Appeals for the Ninth Circuit, the administrative law judge's disallowance of the two hours claimant's counsel requested for preparing the fee petition cannot be affirmed. Accordingly, consistent with *Anderson*, on remand, the administrative law judge must award a reasonable attorney's fee for time spent in preparing the fee petition.

Accordingly, the administrative law judge's calculation of claimant's permanent total disability award is vacated, and the case is remanded for recalculation of his permanent partial disability and permanent total disability awards consistent with this opinion. The Decision and Order and Decision and Order Upon Reconsideration are affirmed in all other respects. The administrative law judge's Order Awarding Attorney Fee is vacated insofar as it denies time relating to preparation of the fee petition and remanded for reconsideration of this time, but is in all other respects affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge