BRB Nos. 87-766
and 87-766A

FRANCIS HICKS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NORTHWEST MARINE	)	
IRON WORKS	)	DATE ISSUED:_____
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order of Steven E. Halpern, Administrative Law Judge, United States Department of Labor.

Robert K. Udziela (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

Ruth M. Cinniger, Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (86-LHC-1749) of Administrative Law Judge Steven E. Halpern 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).

The facts of this case are not in dispute. Claimant injured his back, neck, and right arm and shoulder in a work-related incident on September 29, 1979. Employer voluntarily paid temporary

total disability benefits from September 30, 1979, through May 1, 1982. On December 29, 1982, the parties entered into a Section 8(i), 33 U.S.C. §908(i) (1982), settlement for $10,300, plus future medical expenses, which the district director approved. Jt. Ex. 6. In November 1985, claimant's treating physician noted a distinct worsening in the condition of claimant's arm and shoulder. Jt. Exs. 8-9. Based on this opinion, claimant filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, requesting medical benefits and additional temporary total disability benefits. Employer controverted the claim on February 12, 1986; however, on January 14, 1987, one week prior to the hearing, employer conceded its liability for continuing medical benefits.

The administrative law judge issued a decision based on the record evidence. He held that: the 1984 Amendments to the Act do not apply to this case; the settlement under Section 8(i) is not subject to modification pursuant to Section 22; claimant is not entitled to additional temporary total disability benefits; and employer is liable for claimant's medical benefits and for an attorney's fee of $1,078.13. Decision and Order at 1-2. Claimant appeals the administrative law judge's denial of additional benefits, and employer responds, urging affirmance. BRB No. 87-766. In its cross-appeal, employer challenges the award of an attorney's fee, and claimant responds, urging affirmance. BRB No. 87-766A.

Claimant initially contends that the 1979 settlement can be modified pursuant to Section 22 of the Act. It is well-established, however, that a settlement in accordance with pre-Amendment Section 8(i) is not subject to Section 22 modification. *Downs v. Texas Star Shipping Co., Inc.*, 18 BRBS 37 (1986), *aff'd sub nom. Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36 (CRT) (5th Cir. 1986); *Lambert v. Atlantic & Gulf Stevedores*, 17 BRBS 68 (1985); *see also* 33 U.S.C. §922 (1988). Because a Section 8(i) settlement constitutes the final disposition of the 1979 claim in this case, the administrative law judge appropriately determined that it is not subject to modification under Section 22, and we affirm his finding. *See Lambert*, 17 BRBS at 70.

Next, claimant contends he is entitled to additional temporary total disability benefits because his continued employment aggravated the condition of his arm and shoulder, which were initially injured in 1979. In support of his argument, claimant cites *Director, OWCP v. General Dynamics Corp. [Morales]*, 769 F.2d 66, 17 BRBS 130 (CRT) (2d Cir. 1985), and *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984), which explain the aggravation rule. Under the aggravation rule, if an employment injury aggravates, accelerates, or combines with a pre-existing impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (*en banc*). A work-related aggravation of a pre-existing injury is compensable in itself under the Act and is considered a new injury. *Del Vacchio*, 16 BRBS at 193; *Chiarella v. Bethlehem Steel Corp.*, 13 BRBS 91 (1981). However, if a condition is the natural progression or unavoidable result of the initial injury, then the resulting disability is not separately compensable as a new injury but is considered part and parcel of the initial injury. *See generally Foundation Constructors, Inc. v. Director, OWCP [Vanover]*, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991). As claimant and employer resolved the original claim for compensation via a

Section 8(i) settlement, employer cannot now be held liable for any condition which is considered to be the result of the natural progression of the original injury. Consequently, the issue presented by claimant is whether his 1985 arm/shoulder condition is the result of the natural progression of his 1979 injury or whether it is due to a work-related aggravation and, therefore, is a new compensable injury.

In this case, Dr. Whitney originally diagnosed tendinitis in claimant's right shoulder. Jt. Ex. 1. In November 1985, he diagnosed a probable tear in the rotator cuff in the same shoulder, which "may relate to . . . the previous injury to his shoulder plus some degenerative progression change." Jt. Ex. 8 at 17. The doctor notified employer's carrier of this condition, and in his notification letter he referred to the condition as a "progressive aggravation" which dates back to the 1979 injury because of the type of pain claimant suffers, because claimant has not fully recovered from his 1979 problems, and because claimant's condition "has been aggravated and made worse due to some of his activities in the meantime and particularly brush picking." Jt. Ex. 9. Based on Dr. Whitney's conclusions and on the parties' joint statement of facts, which refers to Dr. Whitney's medical reports, claimant asserts that his injury has been aggravated by his continued employment. The administrative law judge rejected claimant's argument, stating:

> That the arm/shoulder injury sustained by claimant on September 29, 1979 has worsened by natural progression does not resurrect the settled claim, and such aggravation as may have occurred in claimant's post settlement employment as a brush picker (Joint Ex. 8, 9), evidently for an employer other than respondent, is not respondents' liability.

Decision and Order at 2.

Contrary to the administrative law judge's statement, there is no evidence of record that claimant was working for another employer as of the date Dr. Whitney stated claimant's condition was worsening. The only evidence concerning how the alleged aggravation may have occurred is Dr. Whitney's report which states that claimant worked as a brush picker. Jt. Exs. 8-9. Therefore, the administrative law judge erred in attributing "such aggravation as may have occurred" to an anonymous employer. Additionally, he did not determine the cause of claimant's 1985 condition, and in fact described it as both a "natural progression" and an "aggravation." *See* Decision and Order at 2. Because claimant's potential entitlement to benefits rests on whether his current condition is due to a "natural progression" or an "aggravation," the administrative law judge must make this determination. Accordingly, we vacate the denial of benefits, and we remand the case for the administrative law judge to ascertain whether claimant's condition was aggravated by his continued employment. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). If claimant has sustained an aggravation, then he may be entitled to additional benefits; if not, then the Section 8(i) settlement constitutes the final disposition of the original claim for benefits, which includes the natural progression of claimant's condition, and, as there has been no second injury, employer cannot be held liable for additional disability compensation. *See generally Port of Portland*, 932 F.2d at 836, 24 BRBS at 137 (CRT); *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993).

In its cross-appeal, employer contends the administrative law judge erred in awarding claimant's counsel an attorney's fee for work performed after January 14, 1987. Specifically, employer argues it is not liable for any fee generated after that date, pursuant to Section 28(b), 33 U.S.C. §928(b), as the controversy over medical benefits was settled on January 14, 1987, when it conceded liability, and the only issue remaining for the hearing was the Section 22 issue which it succeeded in defending. Thus, employer maintains that claimant's counsel's efforts failed to produce additional benefits for claimant after January 14, 1987.

Under Section 28 of the Act, approved fees must be reasonably commensurate with the necessary work performed. 33 U.S.C. §928; 20 C.F.R. §702.132. An employer may be held liable for an attorney's fee under Section 28(a), 33 U.S.C. §928(a), when it controverts an aspect of the claim and the claimant thereafter employs an attorney in the successful prosecution of the claim. *See National Steel & Shipbuilding Co. v. U.S. Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239 (1988), *aff'd*, 920 F.2d 558, 24 BRBS 49 (CRT) (9th Cir. 1990); *Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987); 20 C.F.R. §702.134(a). Because employer controverted this claim, and claimant thereafter established his entitlement to medical benefits, Section 28(a), and not Section 28(b), controls whether claimant's counsel is entitled to a fee payable by employer. However, in view of the fact that claimant's success before the administrative law judge initially was limited to his obtaining medical benefits and, in view of our decision to remand the case for the administrative law judge to ascertain whether claimant is entitled to additional disability compensation, we vacate the fee award. On remand, the administrative law judge must reconsider counsel's fee petition and the objections thereto in light of his decision on the merits.[1]

[1]In awarding counsel's fee, the administrative law judge must consider claimant's degree of success in prosecuting the claim, *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), and he also should consider the date employer conceded liability for medical expenses, *Cahill v. International Terminal Operating Co., Inc.*, 14 BRBS 483 (1981).

Accordingly, the administrative law judge's denial of additional disability benefits and his fee award are vacated, and the case is remanded for further consideration in accordance with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge