BRB Nos. 97-1035
and 97-1762

THOMAS E. CALLAHAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MAR COM, INCORPORATED	)	DATE ISSUED: _____
	)	
and	)	
	)	
AIG CLAIM SERVICES, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
NORTHWEST MARINE IRON WORKS	)	
	)	
and	)	
	)	
LEGION INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
NORTHWEST MARINE IRON WORKS	)	
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
WEST STATES, INCORPORATED	)	
	)	
and	)	
	)	
SAIF CORPORATION	)	

Employer/Carrier-Respondents	)	
WEST STATES, INCORPORATED	)	
and	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order and the Supplemental Decision and Order Awarding Attorney Fee of Alexander Karst, Administrative Law Judge, United States Department of Labor, and the Compensation Order: Approval of Attorney Fee Application and the Supplemental Compensation Order: Approval of Attorney Fee Application of Karen P. Staats, District Director, United States Department of Labor.

Douglas A. Swanson (Swanson, Thomas & Coon), Portland, Oregon, for claimant.

Delbert J. Brenneman and Jennifer A. Weston (Hoffman, Hart & Wagner), Portland, Oregon, for Mar Com, Incorporated and AIG Claim Services, Incorporated.

Russell A. Metz (Metz & Associates), Seattle, Washington, for Northwest Marine, Incorporated and Legion Insurance Company.

Carrol J. Smith, Salem Oregon, for Northwest Marine Iron Works, West States, Incorporated and SAIF Corporation.

Gene L. Platt (Cummins, Goodman, Fish & Platt, P.C.), McMinnville, Oregon, for West State, Incorporated and Eagle Pacific Insurance Company.

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

PER CURIAM:

Mar Com, Incorporated and AIG Claim Services, Incorporated (Mar Com) appeals the Decision and Order and Supplemental Decision and Order Awarding Attorney Fee (96-LHC-1359) 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). BRB No. 97-1035. In addition, Mar Com appeals the Compensation Order: Approval of Attorney Fee Application and Supplemental Compensation Order: Approval of Attorney Fee Application (14-119813 and 14-118825) issued by District Director Karen P. Staats. BRB No. 97-1762. 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 only be set aside if shown by the challenging party 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 worked as a shipyard laborer from 1974 until February 15, 1995, for numerous employers. Claimant's main employer in the early eighties was Northwest Marine Iron Works (Northwest), and he achieved seniority with this company in 1985 or 1986. Claimant testified that his work as a laborer at Northwest was strenuous and that he did more lifting and carrying for Northwest than for any other company. While at Northwest, claimant's work included cleaning oil tankers with high pressure hoses and dragging 90 pound pumps into the hold of the ship. Mar Com EX- 23 at 33. On July 15, 1986, while working for Northwest, claimant smacked his head on a pipe and was eventually diagnosed as suffering from cervical dorsal sprain, myalgia, and acute cervical/dorsal dysfunction. Mar Com EX-1. On December 12, 1987, while still employed with Northwest, claimant complained of right shoulder and right forearm pain which occurred when he was carrying buckets of cement. Dr. Patton, claimant's treating physician, characterized this injury as a "right shoulder injury on the job." Mar Com EX- 5.

Claimant began working for West State, Incorporated (WSI) while still employed at Northwest,[1] but as of January 1990 he began working solely for WSI.

[1]Northwest was insured by SAIF Corporation from 1974 until approximately April 13, 1989. From May 16, 1989, until after claimant left Northwest, Legion Insurance Company provided coverage for Northwest. *See* Decision and Order at 3 n.1.

Claimant continued to work there until he was laid off on July 24, 1994.[2] At WSI, claimant testified that he first did housecleaning, then held a relatively strenuous job as a lead man, where he often helped his men. Claimant also did fire watch while at WSI. Although claimant continued to have some problems with numbness and with his arms going to sleep, he continued to work regularly and did not seek any medical treatment after January 1990.

After leaving WSI, claimant remained unemployed until February 1995, when he began working at Mar Com. Claimant's work at Mar Com, which lasted approximately 15 days, involved mostly performing fire watch, which included maneuvering hoses weighing 50 or more pounds and using fire bottles to put out fires. In addition, he occasionally performed more strenuous work such as using a chipping gun and carrying bags of rust weighing 50-70 pounds which he maintained caused him to experience increased hand and arm numbness and shoulder pain. Tr. at 48- 51. On February 15, 1995, after rolling high pressure rubber fire hoses that were very thick and heavy, claimant testified that he realized that he was incapable of performing the work expected of him, *id.* at 54, and he has not returned to the waterfront since that time. Claimant filed Notices of Injury with all employers on July 5, 1995, CXs-17-19, and on July 11, 1995, he filed a claim for total disability benefits for the work-related aggravation of his cervical spine condition as well as pain, weakness, and paresthesia of both arms and hands. In the alternative, claimant asserted that he was temporarily totally disabled due to an occupational disease resulting from the cumulative trauma of 20 years of heavy labor.

In his Decision and Order, the administrative law judge determined that, inasmuch as the medical evidence of record demonstrated that claimant's most recent employment at Mar Com aggravated his prior 1986 and 1987 injuries to some degree, Mar Com is liable as the responsible employer. Without specifically determining whether the notice provided to Mar Com on July 5, 1995, was timely filed pursuant to Section 12(a), 33 U.S.C. §912(a), the administrative law judge found that claimant's claim was not barred by this provision because Mar Com failed to establish that it was prejudiced in its ability to investigate the claim. *See* 33 U.S.C. §912(d)(2). Finally, the administrative law judge determined that as claimant could not return to his usual employment, and no evidence was presented regarding the availability of suitable alternate employment, claimant was entitled to continuing

[2]WSI was first insured by SAIF Corporation, then Eagle Pacific, and finally Majestic Insurance. At the hearing, Majestic Insurance was dismissed by agreement of all parties, as claimant had ceased to work for WSI by the time that Majestic commenced insurance coverage. Tr. at 24.

temporary total disability commencing as of February 16, 1995, based on an average weekly wage of $282.98. In addition, future medical benefits were awarded.

Subsequent to the administrative law judge's decision, claimant's attorney filed a fee petition for work performed before the administrative law judge, requesting $14,078.75 representing 52.25 hours of attorney's services at $175 per hour and 82.25 paralegal hours at $60 per hour, plus $1,094.04 in costs. Employer submitted objections to the fee petition, and claimant filed a response. Claimant also submitted a supplemental petition requesting additional fees of $650. In a Supplemental Decision and Order, the administrative law judge awarded claimant the full $14,728.75 requested, but reduced the amount of allowable costs to $863.94. On July 11, 1997, claimant also submitted an application for fees before the District Director, requesting 10 hours of attorney's fees at an hourly rate of $175, $28.50 for paralegal time at a rate of $60 per hour, and costs in the amount of $106.26, for a total of $3,566.26. Employer filed objections. On July 29, 1997, the District Director issued a Compensation Order approving a fee of $3,451.26, representing 10 hours of attorney's fees at an hourly rate of $165, 28.25 hours of paralegal services at the rate of $60 per hour, and costs in the amount of $106.26. Subsequently, claimant requested an additional fee of $88.75, representing .25 hours at an hourly rate of $125 and .75 hours at an hourly rate of $60 for time spent defending employer's objections to his attorney's fee application. In a Supplemental Compensation Order dated August 14, 1997, the district director approved an additional fee of $86.25 representing .25 hours at the rate of $165 per hour and .75 hours at the rate of $60 per hour.

Mar Com appeals, arguing that the administrative law judge erred in failing to find that the notice provided by claimant was untimely under Section 12, and in determining that claimant's disabling condition is causally related to the short period of work he performed while employed there.[3] Moreover, Mar Com asserts that the finding that it is liable as the responsible employer is irrational and not supported by substantial evidence.[4] Claimant responds, urging affirmance of the administrative

[3]Although Mar Com also lists claimant's entitlement to temporary total disability as an issue for appeal, there is no discussion of this issue, or the relevant law and evidence in the body of its brief. Inasmuch as the mere assignment of error is insufficient to invoke Board review, we decline to address this issue. 20 C.F.R. §802.210; *Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997); *Shoemaker v. Schiavone and Sons, Inc.*, 20 BRBS 214 (1988); *Carnegie v. C & P Telephone Co.*, 19 BRBS 57, 59 (1986).

[4]Mar Com's request for a 60 day extension to maintain an appellate

law judge's Decision and Order on the merits. SAIF Corporation, representing both Northwest and WSI for different periods, and Legion Insurance, the carrier on the risk for Northwest from May 16, 1989 through January 26, 1990, also respond, urging affirmance of the administrative law judge's decision. Eagle Pacific, the carrier on the risk for WSI between July 1, 1991 and April 30, 1994, responds, urging the Board to hold that claimant's injuries were not work-related but rather due to aging, and accordingly deny him compensation from any employer.[5] In the alternative, Eagle Pacific urges affirmance of the administrative law judge's determination that WSI is not the responsible employer. Mar Com also appeals both the administrative law judge's and district director's fee awards, arguing that inasmuch as there are issues on the merits pending on appeal the Board should issue a stay of the fee awards.

Employer initially argues that the administrative law judge erred in finding that the claim was not barred pursuant to Section 12 of the Act. Specifically, employer argues that because claimant alleged that he could no longer work for Mar Com as of February 15, 1995, but did not provide it with notice until July 5, 1995, the notice provided was untimely under Section 12(a). Employer further asserts that claimant's failure to file timely notice within 30 days is not excused pursuant to Section 12(d) because it had no actual knowledge of claimant's injury and it was prejudiced in that it was unable to effectively investigate or determine the nature and extent of the alleged illness or provide medical services. Employer contends that because the claimant worked for a such a short period of time, by the time notice was provided it was impossible for employer to determine the exact physical requirements and job duties claimant performed while working at Mar Com several months before. Claimant responds that there is evidence that employer had knowledge of claimant's condition at the time of his employment, and that the administrative law judge properly found that employer was not prejudiced, in any event.

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proceeding pursuant to Pub. L. No. 104-134 is moot.

[5]The Board will not address Eagle Pacific's argument in this regard because it challenges the administrative law judge's determination and thus should have been raised in a timely filed cross-appeal. *Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988).

Under Section 12(a), 33 U.S.C. §912(a), an employee in a traumatic injury case is required to notify the employer of his work-related injury within 30 days after the date of injury or the time when the employee was aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between his injury and employment.[6] *See Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49 (CRT)(D.C. Cir. 1987); *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979). The failure to provide timely notice pursuant to Section 12(a) will bar a claim unless such failure is excused under Section 12(d), 33 U.S.C. §912(d)(1994), which provides alternative bases for excuse, including cases where employer had knowledge of the injury or was not prejudiced by the failure to give timely notice. *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), *modifying on recon.* 18 BRBS 1 (1985). In the absence of evidence to the contrary, it is presumed pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), that employer has been given sufficient notice under Section 12. *See Lucas v. Louisiana Insurance Guaranty Association*, 28 BRBS 1 (1994).

The administrative law judge's finding that this claim is not barred under Section 12 is affirmed because it is rational, supported by substantial evidence, and in accordance with applicable law. *O'Keeffe*, 380 U.S. at 359. Although the administrative law judge did not make a determination as to when claimant had the requisite awareness necessary to trigger his duty to provide notice to employer under Section 12(a), he nonetheless rationally found that the claim was not barred as Section 12(d)(2) was applicable, reasoning that employer failed to introduce any evidence sufficient to establish that it was unable to effectively investigate the injury due to claimant's failure to timely provide formal notice. Inasmuch as a conclusory allegation of an inability to investigate the claim is insufficient to establish prejudice, and the administrative law judge's finding that employer made no attempt to introduce any evidence to support its allegation of prejudice is supported by the record, his conclusion that Section 12 does not bar claimant's entitlement to

[6]A claimant in the case of an occupational disease "which does not immediately result in a disability" must provide employer with notice of his injury within one year of the date of awareness of the relationship between his employment, disease and disability. *See* 33 U.S.C. §912(a). Employer presents alternate theories regarding when notice should have been provided based on whether claimant's injury is viewed as a traumatic injury or an occupational disease. The administrative law judge properly found that as the claim was one involving cumulative traumatic injury rather than an occupational disease, it was subject to the 30-day filing requirement of Section 12(a). *See generallly Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

benefits is affirmed. *See I.T.O. Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989); *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997).

Mar Com also argues on appeal that the claim filed on July 11, 1995, is untimely under Section 13, 33 U.S.C. §913, because claimant was aware that he had a work-related condition which had the potential to result in a loss in his wage-earning capacity as of January 19, 1990, when Dr. Patton examined him and informed him that his condition placed him at high risk for injury and recommended that he retire or change jobs. Section 13(a) applies in cases involving traumatic injuries and requires that a claimant file his claim for benefits within one year of the time he becomes aware, or with the exercise of reasonable diligence should be aware, of the relationship between his injury and his employment. 33 U.S.C. §913(a). *See Welch v. Pennzoil Co.,* 23 BRBS 395 (1990); *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991). In addition, the United States Courts of Appeals which have addressed the issue of "awareness" have uniformly held that the time for filing a claim under Section 13(a) does not begin to run until the injured employee becomes aware of the full character, extent, and impact of the harm done to him as a result of the employment-related injury. *See Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP,* 43 F.3d 1206 (8th Cir. 1994); *Newport News Shipbuilding & Dry Dock Co. v. Parker,* 935 F.2d 20, 24 BRBS 98 (CRT) (4th Cir. 1991); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130 (CRT) (9th Cir. 1991); *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990); *Brown v. Jacksonville Shipyards Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990). Thus, claimant is not "aware," for Section 13 purposes, until he knows or has reason to know that he has sustained a permanent injury which is likely to impair his wage-earning capacity. *See Abel v. Director, OWCP,* 932 F.2d 819, 24 BRBS 130 (CRT) (9th Cir. 1991); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100 (CRT) (5th Cir. 1984); *see also Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979). The Section 20(b), 33 U.S.C. §920(b), presumption applies to Section 13, placing the burden of proof on employer to produce substantial evidence that the claim was not timely filed. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

We reject Mar Com's assertion that the July 11, 1995, claim is untimely under Section 13(a). Although the administrative law judge in the present case did not specifically address Section 13, on the facts presented, it is not necessary to remand the case for consideration of this issue. Inasmuch as claimant continued to work regularly without incident for an additional five years beyond the date of awareness urged by employer and the administrative law judge rationally determined that he sustained a subsequent aggravating injury while working for Mar Com in February 1995 which precluded him from working as of February 16, 1995, claimant did not

have the requisite awareness necessary to trigger his duty to file a claim prior to that date. Inasmuch as the July 11, 1995, claim was filed well within one year of the aggravating injury and the February 16, 1995, date of disability found by the administrative law judge, the claim was timely filed under Section 13(a) as a matter of law.[7] *See generally J.M. Martinac Shipbuilding v. Director, OWCP [Grage]*, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990)

Mar Com next argues that the administrative law judge erred in finding that claimant's current disability is causally related to the work he performed at Mar Com which lasted only 15 days and involved only two and one-half days of heavy labor. Mar Com initially asserts that the administrative law judge erred in affording claimant the benefit of the Section 20(a) presumption inasmuch as there is no evidence that he suffered any harm or that the working conditions under which he worked during his tenure with Mar Com could have caused such a harm. In the alternative, Mar Com contends that even if the presumption was invoked, it has produced substantial countervailing evidence sufficient to rebut the presumption that claimant's injury was causally related to his work with Mar Com.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is causally related to his employment. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either an accident occurred or working conditions existed on his job which could have caused or

[7]Mar Com also suggests that although claimant's current condition had been described as bilateral shoulder adhesive capulitis, chronic cervical strain, and bilateral physiological thoracic outlet syndrome no claim has been perfected against it for these conditions. Contrary to Mar Com's assertions, however, inasmuch as the claim filed on July 11, 1995 reflects that compensation was being sought for work related aggravation of a cervical spine condition as well as pain, weakness, and paresthesia of both arms and hands, CX-22, the claim is sufficient to encompass the aforementioned conditions.

aggravated the harm. *See Stevens v. Tacoma Boatbuilding Co.,* 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.,* 20 BRBS 90 (1987). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition is not caused or aggravated by his employment. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Sam v. Loffland Bros.,* 19 BRBS 288 (1987). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (19760; *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

In the case at hand, the administrative law judge did not analyze the causation issue in terms of the Section 20(a) presumption and his only discussion of the cause of claimant's disability is that contained in his analysis of the responsible employer issue. As it is undisputed that claimant sufferers from neck, shoulder, upper back, arm, and hand symptoms and that he engaged in some heavy lifting and chipping work while working at Mar Com which could have caused or aggravated these conditions, claimant is, contrary to employer's assertions, entitled to the Section 20(a) presumption on the facts as a matter of law. *See Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989). Moreover, although the administrative law judge did not analyze the evidence in terms of rebuttal of the Section 20(a) presumption, any error he may have made in this regard is harmless. In analyzing the responsible employer issue, he fully considered and weighed the evidence of record relevant to the causation issue, including that which employer cites in support of its rebuttal argument, and rationally concluded based on his crediting of claimant's testimony and that of his treating physician, Dr. Patton, that claimant sustained an aggravation of his 1986 and 1987 injuries while performing heavy lifting at Mar Com which was the cause of his current disability. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144-145 (1991).

Employer's specific contentions amount to a request that the Board reweigh the evidence. Employer initially argues that the Section 20(a) presumption was rebutted because claimant testified that he had chronic problems with his neck, arms, and shoulders since 1986 and 1987 which were constant even when he was not working, and admitted that, although he had increased symptomatology while working at Mar Com, his symptoms were exactly the same as they had been in the past, and in any event resolved the same evening as each shift. Accordingly, employer avers that claimant had no symptoms relative to working at Mar Com after February 15, 1995, and thus his need for treatment in February and March 1995 was related to his pre-existing chronic problems. Contrary to employer's assertions,

however, in attributing claimant's disability to his work with Mar Com rather than his prior work and earlier injuries, the administrative law judge fully considered those portions of claimant's testimony which suggested that the aggravating effect of his work at Mar Com was temporary and that his symptoms did not differ substantially from those he had experienced previously. Nonetheless, after observing that claimant appeared to downplay rather than embellish his symptoms, he credited claimant's testimony that he had "real problems" after returning to Mar Com which were more significant than those he had previously. Tr. at 70. Claimant's testimony in this regard was consistent with Dr. Patton's February 27, 1995, notation that claimant's symptoms had been markedly aggravated recently by repeated lifting at work and with his deposition testimony, which the administrative law judge credited. The administrative law judge noted that Dr. Patton deposed that given that claimant did not seek any treatment since 1990, it was unlikely that he would have chosen to do so after five years if his symptoms had not worsened at Mar Com and that the fact that claimant returned several weeks after he ceased working belied the notion that the aggravating effects were only temporary. SAIF EX-25 at 80-81, 85-86; Decision and Order at 5-7.

Employer asserts that Dr. Patton's testimony cannot properly support a finding of compensability because it is premised on the erroneous assumption that claimant performed repetitive heavy lifting while at Mar Com. This argument must be rejected, as Dr. Patton testified that "one good heavy lift" was all that was needed to aggravate claimant's condition, SAIF EX-25, p. 82, and the administrative law judge credited this testimony. Inasmuch as is undisputed that while at Mar Com claimant was required to move heavy bags of rust on at least one occasion and to move heavy hoses while on fire watch, any misconception that Dr. Patton may have been under regarding the disputed issue of whether claimant was required to engage in repetitive heavy lifting while employed with Mar Com is not determinative.

Mar Com also asserts that the independent medical examiners who evaluated claimant reported that he had no work-related conditions at the present time and stated that his work subsequent to 1987 did not contribute in any way to his current condition, an opinion echoed by Dr. Kirschner.[8] After considering this medical evidence, however, the administrative law judge, acting within his discretionary authority, determined that the independent medical examiner's September 3, 1996, panel report was entitled to less weight than other relevant medical evidence

[8]Dr. Kirsnner is a board-certified neurologist who testified regarding the absence of any relationship between claimant's employment with Mar Com and his disability.

because the employment history taken by the doctors therein was incomplete. With regard to Dr. Kirschner, the administrative law judge noted that he testified that the short duration of claimant's work at Mar Com could not account for any of his changes and symptoms. However, the administrative law judge also found that later in his testimony, Dr. Kirshner acknowledged at least a minimal contribution when he stated that if he were to take the 70 hours that claimant worked at Mar Com and divide it over his entire career of labor and all the hours worked, that would be the percentage of contribution. Tr. at 132; Decision and Order at 7. Inasmuch as the administrative law judge acted within his discretion in discrediting the independent medical examiner's report, and his determination that Dr. Kirschner's testimony was insufficient to rule out claimant's employment with Mar Com as a contributing factor in his disability is rational, we reject Mar Com's arguments in this regard. Inasmuch as claimant's testimony and the credited medical opinion of Dr. Patton provide substantial evidence to support the administrative law judge's finding that claimant sustained an aggravation of his pre-existing injuries while working at Mar Com which is the cause of his disability, and employer has failed to establish any reversible error, we affirm that determination.[9] *See generally Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

[9]Mar Com also asserts that Dr.Gritzka's opinion cannot support a finding of a compensable injury with Mar Com because he had no idea of what work claimant actually did there and appears to have believed that all of the work claimant performed with each of his employers was equally injurious. Inasmuch as the administrative law judge did not rely on Dr. Gritzka's opinion in attributing claimant's disability to his work at Mar Com, we need not address this contention.

It follows, therefore, that Mar Com's assertion that the administrative law judge erred in finding that it is the responsible employer must also be rejected. In a case involving successive traumatic injuries, if disability results from the natural progression of a 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).[10] The administrative law judge properly found that the question of determining the responsible employer boiled down to whether claimant's condition arose naturally out of his 1986 and 1987 injuries, with liability falling on Northwest, or whether there was an aggravation at some later time, with responsibility falling on Northwest, West State or Mar Com. After weighing the relevant evidence, he concluded that while it was a close question, the medical evidence supported a finding that claimant's employment at Mar Com did aggravate his condition to some degree. As we have affirmed this finding, it follows that Mar Com is the responsible employer. We therefore affirm the administrative law judge's finding that Mar Com is liable as the responsible employer. *Kelaita v. Director, OWCP,* 799 F.2d 1308 (9th Cir. 1986).

Finally, we address Mar Com's arguments relating to the attorney's fee awards entered by the administrative law judge and by the district director. Mar Com does not challenge the amount of either of these fee awards. Rather, it requests that the Board stay enforcement of both fee awards, on the rationale that there are various issues on the merits which remain to be resolved through the appellate process, arguing that until such time that these issues are resolved claimant's attorney's entitlement to an employer-paid fee cannot be properly addressed. Claimant responds that the requested stay is not necessary.

Employer's request is denied. A stay of the attorney's fee awards pending appeal is unnecessary, as an attorney's fee award is not a compensation order and thus does not become effective until all appeals are exhausted. *See Thompson v. Potashnick Constr. Co.*, 812 F.2d 574 (9th Cir. 1987); *Jenkins v. Federal Marine*

[10]Although employer makes arguments regarding the responsible employer under both the traumatic injury and the occupational disease theories, the administrative law judge properly found that as claimant's injuries were due to cumulative trauma, the relevant inquiry is whether claimant's disability resulted from the natural progression of his prior injuries or was due to subsequent aggravation. *See Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986).

Terminals, 14 BRBS 380 (1981); *see also Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT)(7th Cir. 1982); *Spinner v. Safeway Stores, Inc.*, 18 BRBS 155 (1986), *aff'd mem. sub nom. Safeway Stores, Inc. v. Director, OWCP*, 811 F.2d 676 (D.C. Cir. 1987).

Accordingly, the Decision and Order and Supplemental Decision and Order Awarding Attorney Fee of the administrative law judge are affirmed. BRB No. 97-1035. The Compensation Order: Approval of Attorney Fee Petition and Supplemental Compensation Order: Approval of Attorney Fee Application of the district director are also affirmed. BRB No. 97-1762.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge