EDGAR PAZ	)	BRB No. 91-1387
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INTERNATIONAL TRANSPORTATION SERVICES	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED:
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE GROUP	)	
	)	
Employer/Carrier-Respondents	)	
	)	
EDGAR PAZ	)	BRB No. 91-2112
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INTERNATIONAL TRANSPORTATION SERVICES	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	

STEVEDORING SERVICES OF AMERICA	)	
and	)	
EAGLE PACIFIC INSURANCE GROUP	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Order for Fees of Henry B. Lasky, Administrative Law Judge, United States Department of Labor, and the Recommendation of the Claims Examiner of Linda Myer, District Director, United States Department of Labor.

Richard Mark Baker, Long Beach, California, for claimant.

James P. Aleccia (Mullen & Filippi), Long Beach, California, for International Transportation Services and National Union Fire Insurance Company.

Gretchen Guzman, Seal Beach, California, for Stevedoring Services of America and Eagle Pacific Insurance Company.

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

PER CURIAM:

International Transportation Services (ITS) appeals the Decision and Order Awarding Benefits and the Order for Fees (90-LHC-989, 990, 89-LHC-2449) of Administrative Law Judge Henry B. Lasky, and claimant appeals the Recommendation of the Claims Examiner (OWCP No. 18-32668) of District Director Linda Myer, 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). An attorney's fee award will not be disturbed on appeal unless it is shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant suffered a work-related injury on November 7, 1986 while working for ITS as a marine clerk when he fell approximately 18 inches, landing on the right side of his head and back.

Claimant complained of dizziness and pain in his neck radiating down to his right shoulder and right leg and was diagnosed as suffering from post-traumatic head injury syndrome, strain of his cervical and lumbar spine, right ankle strain and increased hypertension. ITS voluntarily paid claimant temporary total disability compensation from November 8, 1986 through April 10, 1987. 33 U.S.C. §908(b). In April 1987, after being released to return to work by Dr. Styner with the restrictions of no heavy lifting, repetitive bending or stooping, claimant commenced employment as a marine clerk with Stevedoring Services of America (SSA) and worked without incident through July 2, 1987. Claimant testified that, while at home on July 5, 1987, he experienced intense lower back pain, such that he was unable to return to work on July 7, 1987. Instead, claimant was hospitalized for four days, and thereafter remained out of work until November 23, 1987, when he again returned to work as a marine clerk with SSA. Claimant, who was diagnosed as suffering from cervical and lumbar radiculopathy and degenerative disc disease, testified that following his return to work he continued to experience back pain and, on July 28, 1988, stopped working due to that pain.

Claimant subsequently filed a claim for benefits under the Act against ITS seeking permanent total disability compensation. 33 U.S.C. §908(a). Additionally, claimant filed a protective claim against SSA. In his Decision and Order, the administrative law judge credited claimant's testimony and the opinion of Dr. Miller, who stated that claimant's back condition was due to the natural progression of his degenerative arthritis which was aggravated by his 1986 injury at ITS, and was not due to cumulative trauma while working for SSA, in determining that ITS was the employer responsible for the payment of claimant's benefits. Next, the administrative law judge found that claimant is incapable of resuming his usual employment duties, and that ITS had not established the availability of suitable alternate employment. Thus, the administrative law judge awarded claimant temporary total disability compensation from November 8, 1986, through April 10, 1987, and from July 8, 1987, through November 23, 1987, and permanent total disability compensation thereafter, as well as medical benefits and interest. Lastly, the administrative law judge found that ITS was entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Thereafter, claimant's counsel filed a fee petition for work performed before the administrative law judge in which he requested a fee of $19,987.50, representing 133.25 hours of legal services performed at an hourly rate of $150. Employer filed objections to the fee request. In a supplemental decision, the administrative law judge considered employer's objections, reduced the number of hours sought by counsel to 131.25, and awarded claimant's counsel an attorney's fee of $19,687.50.

On appeal, ITS challenges the administrative law judge's determination that it is the employer responsible of the payment of claimant's benefits. In a supplemental appeal, ITS contends that the attorney's fee awarded to claimant's counsel by the administrative law judge is excessive. Claimant and SSA respond, urging affirmance of the administrative law judge's award of benefits.[1]

[1]In a letter dated March 20, 1993, claimant's counsel notified the Board of claimant's intention to withdraw his appeal of the Recommendation of the Claims Examiner, BRB No. 91-2112. We hereby grant claimant's withdrawal request and dismiss his appeal in BRB No. 91-2112. 20 C.F.R.

ITS, on appeal, contends that the administrative law judge erred in determining that it is the employer responsible for the payment of claimant's benefits. In support of this contention, ITS, after acknowledging that claimant suffered a work-related injury to his back on November 7, 1986, while working for it, asserts that the administrative law judge erred in failing to find that claimant's present back condition was caused by either a new injury or an aggravation of his prior back injury while working for SSA in 1987 and 1988. Thus, ITS avers that SSA is the responsible employer. We disagree.

In allocating liability between two successive employers in cases involving traumatic injury, the employer at the time of the original injury remains liable for the full disability resulting from the natural progression of that injury. *See Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991); *Kooley v. Marine Industries Northwest*, 22 BRBS 735 (1981). If, however, claimant sustains a subsequent injury which aggravates, accelerates or combines with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is liable for the entire disability. *See Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). The aggravation rule applies even if the claimant does not incur the greater part of his injury with the subsequent employer. *See generally Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991).

In the instant case, the administrative law judge, in finding that claimant's present back condition is due to the natural progression of his degenerative arthritis and his 1979 and 1986 work-injuries, credited the opinion of Dr. Miller over that of Dr. Craemer, and furthermore, credited claimant's testimony regarding the history he gave to Dr. Craemer. Dr. Craemer, who allegedly acted as an Agreed Medical Examiner,[2] examined claimant in April, June, September and October 1987, and February 1990. In his June 5, 1987 report, Dr. Craemer reported that claimant did not feel that his 1986 injury aggravated his 1979 back injury.[3] ITS Ex. 18 at 292. Thereafter, in a report dated September 11, 1987, Dr. Craemer stated that claimant had been performing strenuous work for one month prior to July 2, 1987, and started having back pain. *Id*. at 304; Tr. at 109. Claimant, however, denied making these statements to Dr. Craemer. Tr. at 44-45, 83. Dr. Craemer ultimately

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§802.401(a).

[2]On January 29, 1990, ITS's counsel sent an *ex parte* letter to Dr. Craemer prior to claimant's scheduled examination with the physician on February 6, 1990. Counsel gave an overview of claimant's medical history, and requested that Dr. Craemer give his opinion regarding the causation and extent of claimant's disability. Counsel also stated: "I would like to mention that our client is potentially looking at a permanent total disability claim; therefore, as you can see your medical findings pertaining to whether or not Mr. Paz sustained a new injury on July 3, 1987 and July 28, 1988 are most important." SSA Ex. Y at 131.

[3]In June 1979, claimant sustained an injury to his back when a 300 pound sack fell and struck him in the back.

diagnosed a "[h]yperextension ligamentous low back sprain with right radiculopathy," *see* ITS Ex. 18 at 308, and attributed claimant's current lower back condition to his bending activities while employed at SSA. Tr. at 111, 118-120.

Dr. Miller examined claimant on December 12, 1989; in his subsequent report, Dr. Miller noted that claimant specifically denied that he was doing strenuous work prior to his July 1987 hospitalization, and that claimant was merely a marine clerk.[4] Dr. Miller rejected Dr. Craemer's opinion that a new, specific injury occurred on July 2, 1987. Diagnosing cervical and lumbar osteoarthritis, Dr. Miller opined that nothing specifically had occurred to claimant on July 2, 1987 and July 28, 1988, but that claimant's present lower back condition was caused when the 1986 injury had deteriorated.[5] SSA Ex. W at 110-111.

The administrative law judge rejected Dr. Craemer's opinion as biased, contrary to claimant's credible testimony regarding his work duties and symptoms, and inconsistent with the other medical evidence of record.[6] While the administrative law judge noted that there were some inconsistencies in Dr. Miller's report, he found his report to be consistent with claimant's testimony and his opinion the most credible. Moreover, the administrative law judge credited claimant's testimony that he did not perform strenuous activities while working for SSA, that he never told Dr. Craemer he performed such duties, and that he did not suffer any injury while working for SSA. *See* Decision and Order at 6, 11-12. Thus, the administrative law judge found that claimant did not suffer an aggravation of his back condition while working for SSA.

In adjudicating a claim, an administrative law judge is not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Rather, the administrative law judge is entitled to evaluate the credibility of all witnesses and draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Thus, as the administrative law judge's decision to credit the opinion

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[4]As a marine clerk, claimant's job was to facilitate the delivery of cargo by checking the paperwork and assigning the cargo to the proper truck line. This required him to drive around the terminal in an electric car. ITS Ex. 23 at 14-15. Claimant testified that while working for SSA, this work was a lot "easier" for him. *Id*. at 13.

[5]In November 1987 and August 1988, Dr. Jaffin also reported that claimant suffered no new injuries since his 1986 injury at ITS. SSA Exs. O, P. Dr. Conley reported no new injuries in November 1988. SSA Ex. U.

[6]The administrative law judge noted that Dr. Craemer did not examine claimant's lower back in April and June 1987, *see* Tr. at 107-108, 142-143, even though claimant complained of lower back pain to Dr. Craemer. ITS Ex. 18 at 285, 292. While Dr. Craemer insisted that claimant told him his lower back pain was the same as it always was, *see* Tr. at 142-143, other physicians reported that claimant's lower back pain had steadily worsened since the 1986 injury. *See* SSA Exs. C at 9 (Dr. London), E at 15 (Dr. Styner), J at 45 (Dr. Chua).

of Dr. Miller over the contrary opinion of Dr. Craemer is rational, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), we affirm his finding that claimant's back condition is due to the natural progression of the 1986 work-injury which he sustained while working for ITS, and that claimant sustained no aggravation of his back condition during his subsequent employment with SSA. Accordingly, we affirm the administrative law judge's finding that ITS is the employer responsible for the payment of the compensation benefits awarded to claimant, as that finding is supported by substantial evidence and is in accordance with law.

Lastly, ITS challenges the attorney's fee awarded to claimant's counsel by the administrative law judge. Specifically, ITS contends that the administrative law judge erred in approving the 28 hours requested by claimant's counsel for the research and writing of claimant's joinder of SSA's motion for summary judgment, and 17.5 hours for preparing claimant's opposition to ITS's motion for summary judgment. ITS asserts that these services were unnecessary and duplicative of the services performed by SSA's counsel, and that, therefore, the fee award approved by the administrative law judge should be reduced by 45.5 hours.[7] The administrative law judge, after noting that ITS had set forth specific objections to the number of hours requested by claimant's counsel for certain services, thereafter reduced the number of hours requested by counsel by 2 hours. ITS's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard; thus, we decline to further reduce or disallow the hours approved by the administrative law judge. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). We therefore affirm the attorney's fee awarded to claimant's counsel by the administrative law judge.

[7]ITS does not challenge the hourly rate requested by counsel and approved by the administrative law judge.

Accordingly, the Decision and Order Awarding Benefits and the Order for Fees of the administrative law judge are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge