RONALD BUCHANAN Claimant- Cross-Petitioner v. INTERNATIONAL TRANSPORTATION SERVICES and RELIANCE NATIONAL INSURANCE COMPANY Employer/Carrier- Petitioners METROPOLITAN STEVEDORE COMPANY Self-Insured Employer- Respondent Cross-Respondent KAISER PERMANENTE MEDICAL GROUP Medical Provider- Respondent	)	BRB Nos. 96-1424, 96-1424A and 96-1424S DATE ISSUED:_____
RONALD BUCHANAN Claimant v. INTERNATIONAL TRANSPORTATION SERVICES and	)	BRB No. 97-392

RELIANCE NATIONAL INSURANCE COMPANY Employer/Carrier-Petitioners METROPOLITAN STEVEDORE COMPANY Self-Insured Employer-Respondent KAISER PERMANENTE MEDICAL GROUP Medical Provider-Respondent	)	
RONALD BUCHANAN Claimant v.	)	BRB No. 97-613
INTERNATIONAL TRANSPORTATION SERVICES and RELIANCE NATIONAL INSURANCE COMPANY Employer/Carrier-Respondents METROPOLITAN STEVEDORE COMPANY Self-Insured Employer-Respondent KAISER PERMANENTE MEDICAL GROUP Medical Provider-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Approving Settlement, Awarding Benefits and Attorneys Fees Against International Transportation Services, Awarding Medical Benefits to Kaiser Permanente, and Denying Claims for Benefits Against Metropolitan Stevedore, the Supplemental Decision and Order Awarding Attorney Fees, and the Decision on Motion for Reconsideration of Daniel L. Stewart, Administrative Law Judge, and the Compensation Order Award of Attorney Fees of District Director Joyce L. Terry, United States Department of Labor.

David Utley (Devirian, Utley & Detrick), Wilmington, California, for claimant.

Jack H. Swift (Dupree and Associates), San Diego, California, for International Transportation Services and Reliance National Insurance Company.

Robert E. Babcock (Babcock & Company), Lake Oswego, Oregon, for Metropolitan Stevedore Company.

Robert W. Nizich (Law Offices of Robert W. Nizich), San Diego, California, for Kaiser Permanente Medical Group.

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

PER CURIAM:

International Transportation Services (ITS) appeals the Decision and Order, the Supplemental Decision and Order Awarding Attorney Fees, and the Decision on Motion for Reconsideration (95-LHC-2346, 2347) of Administrative Law Judge Daniel L. Stewart rendered on claims 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 Nos. 94-1424/S. Claimant cross-appeals the administrative law judge's Decision and Order. BRB No. 96-1424A. Kaiser Permanente Medical Group (Kaiser) appeals the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees, and the Decision on Motion for Reconsideration. BRB No. 97-613. ITS also appeals the Compensation Order Award of Attorney Fees (Case Nos. 18-56416, 18-57503) of District Director Joyce L. Terry.[1] BRB No. 97-392. 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 district director's fee award will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in

[1]By Order dated February 5, 1997, all appeals were consolidated. By letter dated April 2, 1997, Kaiser requested that its appeal in BRB No. 97-613 be withdrawn. We hereby dismiss Kaiser's appeal with prejudice. 20 C.F.R. §802.401(a).

accordance with law. *See, e.g., Roach v. New York Protective Covering Co.,* 16 BRBS 114 (1984).

Claimant began work as a longshoreman in 1969. Claimant suffered the first of two injuries which form the basis of these claims on December 31, 1993, when he held a position in a longshore gang and was employed by Metropolitan Stevedore Company (Metropolitan). On that date he was transferring container locking cones from one side of a 9 by 20 feet "cone basket" to the other.[2] After thirty minutes, claimant began to feel a low back pain which radiated into his buttocks and left leg, and he then performed this work while working on his hands and knees to avoid bending over. Tr. at 59-64. Claimant refused his supervisor's offer to make out a doctor's slip, and instead drove home after work in moderate to severe pain. He recalled that he spent most of that evening and the next day lying on his left side in order to alleviate the pain. Tr. at 69-71.

Two days later, on January 2, 1994, claimant returned to work, and was assigned to do a "swing lashing job" for ITS, which required him to unlash containers on board ships by loosening turnbuckles and removing bars that held containers in place on the vessels. Claimant recalled that he slipped on grease a number of times, that it was difficult to handle the equipment, and that he began to feel pain in his lower back and left leg within an hour of starting this work. Tr. at 72, 77-79. These symptoms gradually intensified as claimant drove home after work, and reached a point when claimant sought medical attention at Kaiser Hospital that evening. Tr. at 84-85. After returning home, claimant suffered from increased pain which precluded him from walking, and he returned to the hospital emergency room the following morning. Claimant underwent a lumbar laminectomy on January 13, 1994, *see* ITSX-22:176, which resulted in the removal of the L5-S1 disc and which relieved the leg pain and lessened the pain in his lower back. *See* Tr. at 95.

[2]Claimant testified that the locking cones weighed between 15 to 20 pounds, and that his job required him to bend over and lift them out of a "basket" which was approximately 2 to 3 feet deep. Tr. at 59-64.

Claimant filed two claims under the Act for disability due to the injuries suffered on December 31, 1993, and January 2, 1994, against Metropolitan Stevedores and ITS respectively. CX-1; ITSXs-6, 8; METXs-11, 10. Kaiser intervened to recover the cost of the medical services it provided claimant during his surgery. Just prior to the formal hearing, claimant and ITS settled the second claim, and claimant thereupon sought benefits, in the form of a *de minimis* award, against Metropolitan.[3] The administrative law judge stated at the hearing that he would approve the settlement between claimant and ITS.[4] After a formal hearing, the administrative law judge issued a Decision and Order approving the settlement with ITS pursuant to Section 8(i), 33 U.S.C. §908(i), denying any claims against the first employer, Metropolitan, and directing that ITS reimburse Kaiser for past medical expenses in the amount of $23,121.50. In finding ITS liable to Kaiser, the administrative law judge found that ITS failed to rebut the Section 20(a) presumption with regard to the issue of whether the incident on January 2, 1994, constituted a new injury. Further, the administrative law judge, citing *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993), also ruled that ITS is liable for Kaiser's attorney's fee, and subsequently awarded Kaiser's counsel a fee of $9,362.50. The administrative law judge denied motions for reconsideration of the fee award filed by Kaiser and ITS. The district director, on November 12, 1996, issued a Compensation Order awarding an attorney's fee to Kaiser's counsel of $1,468.75, payable by ITS. These appeals followed.

ITS appeals and claimant cross-appeals the administrative law judge's Decision and Order. ITS contests the administrative law judge's ruling that it is responsible for the payment of the medical benefits that were furnished claimant by Kaiser, and specifically contends that the administrative law judge erred in according Kaiser the benefit of the Section 20(a), 33 U.S.C. §920(a), presumption that the injury of January 2 aggravated claimant's condition. ITS challenges the administrative law judge's reliance on the Ninth Circuit's decision in *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993), and contends that the reasoning in that case, which involved the recovery of an attorney's fee by a medical provider under Section 28(a), 33 U.S.C. §928(a), should not be

[3]Claimant had returned to work with no loss in actual wages.

[4]The gross amount of the settlement is $15,000, with $9,000 payable for compensation, $2,000 for an attorney's fee and $4,000 set aside for future medical benefits. The settlement specifically did not resolve any claim of Kaiser for past medical care. *See* Decision and Order at 5. It also provides that claimant will repay ITS if Metropolitan is found to be the responsible employer.

extended to Section 20(a). ITS also asserts that, if the Section 20(a) presumption is applicable, it has rebutted the Section 20(a) presumption and that the preponderance of the evidence does not establish a second injury which would form the basis of its liability for medical benefits in this case. Thus, ITS concludes that Metropolitan should be held liable for the medical services provided by Kaiser. In his Petition for Review, claimant states that he "fully adopts" the arguments submitted on behalf of ITS, but takes no position as to whether the Section 20(a) presumption would inure to the benefit of a medical provider. Metropolitan and Kaiser respond in support of the administrative law judge's findings.

The administrative law judge initiated his discussion of the responsible employer by stating that Metropolitan will be liable unless claimant sustained a new injury with ITS on January 2. The administrative law judge then stated that although claimant no longer has a claim against ITS (due to the settlement), Kaiser's claim for medical benefits is derivative of claimant's right to seek such benefits. As such, Kaiser is entitled to the Section 20(a) presumption that the incident at ITS on January 2 aggravated claimant's condition, if it establishes a *prima facie* case. As support for this proposition, the administrative law judge cited *Hunt,* 999 F.2d at 419, 27 BRBS at 84 (CRT), and *Lazarus v. Chevron USA*, 958 F.2d 1257, 25 BRBS 145 (CRT) (5th Cir. 1992). In *Lazarus,* the United States Court of Appeals for the Fifth Circuit held that medical benefits are "compensation" for purposes of enforcement proceedings under 33 U.S.C. §918. The administrative law judge noted that Section 20 of the Act applies to claims for compensation, which, pursuant to *Lazarus*, includes claims for medical benefits. In *Hunt,* the United States Court of Appeals for the Ninth Circuit adopted the view of the Director, Office of Workers' Compensation Programs, that Section 7(d)(3) of the Act, 33 U.S.C. §907(d)(3), "grants medical providers standing to pursue an employee's medical benefits" when the benefits are owed to the provider for medical services rendered. 999 F.2d at 424, 25 BRBS at 91 (CRT).[5] Thus, as Kaiser is a person seeking compensation in the form of medical benefits, the administrative law judge reasoned that Kaiser is entitled to the Section 20(a) presumption that claimant's injury at ITS aggravated his condition. The administrative law judge found the presumption invoked based on claimant's complaints of pain to his back and left leg after working on January 2, and on his description of the work activities on that date as "very heavy work." Decision and Order at 18. He further found Dr. London's opinion insufficient to rebut the presumption that claimant's work with ITS on January 2 aggravated claimant's condition, and thus concluded that ITS is liable to Kaiser.[6]

ITS contends that it is inappropriate to use the Section 20(a) presumption to resolve the issue of the responsible employer in a two-injury case (*i.e.*, one which is not an

[5]The purpose of this holding was to permit the medical providers to obtain an attorney's fee payable by employer as Section 28(a), 33 U.S.C. §928(a), states that the "person seeking benefits" is entitled to a fee payable by employer.

[6]Based on this conclusion, the administrative law judge also found that Metropolitan is not liable to claimant for disability compensation.

occupational disease case). ITS contends that the benefit of the presumption will always accrue to the first employer, because the presumption will apply to presume that there was an aggravating second injury. ITS contends that since Metropolitan is advancing the possibility of a second injury as an affirmative defense to its liability to Kaiser, it bears the burden of persuasion that the claimant's employment at ITS did aggravate claimant's condition pursuant to *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994) (proponent bears burden of persuasion). ITS also contends that the administrative law judge's extension of the *Hunt* holding to these facts is unwarranted because the Section 20(a) presumption is one of compensability, and the compensability of claimant's injury is not at issue; rather, the issue is who is the liable employer.

We agree with ITS that the administrative law judge erred in applying the Section 20(a) presumption to determine that it was liable for the payment for the medical services. Section 20(a) aids a claimant in establishing the compensability of his claim,[7] *see generally U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), and does not apply to the issue of responsible employer. *See Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62, 65 (1992); *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149, 151 n. 2 (1986). *Cf. Avondale Industries, Inc. v. Director, OWCP,* 977 F.2d 186, 26 BRBS 111 (CRT) (5th Cir. 1992); *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991) (in occupational disease case, the employer claimed against bears the burden of proving it is not the last employer to expose claimant to injurious stimuli). The compensability of claimant's claim (*i.e.*, whether he has a work-related injury) was at issue in this case with regard to the December 31, 1993, injury with Metropolitan inasmuch as Metropolitan argued that claimant's condition after the injury was due to the natural progression of a prior condition. The administrative law judge resolved this issue in favor of claimant, invoking the Section 20(a) presumption with regard to the injury at Metropolitan, and finding the presumption unrebutted. This finding is not appealed. Had Kaiser derivatively been seeking to establish that claimant sustained a work-related injury with Metropolitan, the Section 20(a) presumption would have applied to its claim.

In view of the administrative law judge's finding that Metropolitan failed to rebut the Section 20(a) presumption, the fact that claimant sustained a work-related injury with that employer is established. *See generally Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). Moreover, ITS did not contest that claimant sustained a work-related injury in its employment. Thus, the compensability of claimant's claim is established, and Kaiser's derivative claim for reimbursement for medical treatment comes within the provisions of the Act. See generally Ozene v. Crescent Wharf & Warehouse Co., 19 BRBS 9 (1986). The remaining issue is which employment injury caused claimant's

[7]Section 20(a) states that "In the absence of substantial evidence to the contrary" it is presumed "that the claim comes within the provisions of the Act." 33 U.S.C. §920(a).

disabling condition. As this issue is relevant only to determining the responsible employer, the Section 20(a) presumption has no further role in this case. The employer at the time of an initial traumatic injury remains liable for the full disability resulting from the natural progression of that injury. If a claimant sustains an aggravation of the original injury, however, the employer at the time of the aggravation is liable for the entire disability resulting therefrom. *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 142 (1989); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982). This result follows from the aggravation rule, *see Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966), under which a claimant is compensated for the totality of his disability. *Kelaita v. Director, OWCP*, 799 F.2d 1038, 1311 (9th Cir. 1986); *see also Foundation Constructors,* 950 F.2d at 624, 25 BRBS at 75 (CRT).

An employer thus may be relieved of liability for disability and/or medical benefits in a two-injury case by establishing that a subsequent work-related injury aggravated the employee's condition. *Abbott*, 14 BRBS at 453. In this case, therefore, Metropolitan bears the burden of proving, without benefit of further presumption, *see Lins*, 26 BRBS at 65, by a preponderance of the evidence that there was a new injury or aggravation with ITS in order to be relieved of its liability as responsible employer. *See Greenwich Collieries*, 512 U.S. at 276, 28 BRBS at 46 (CRT). ITS, on the other hand, must prove that claimant's condition is the result of the injury with Metropolitan in order to escape liability. A determination as to which employer is liable requires that the administrative law judge weigh the evidence. As the administrative law judge did not weigh the evidence as a whole to determine the employer responsible for the payment of disability and medical benefits in this case, we vacate the administrative law judge's holding that ITS is liable to Kaiser and remand the case for a determination of the responsible employer based on the record as a whole. The determination of the employer liable to claimant must be determined consistently with the finding of the employer liable to Kaiser.[8]

ITS also appeals the attorney's fee awards to Kaiser's counsel rendered by the administrative law judge and the district director. ITS' sole contention on appeal is that it is not liable for an attorney's fee to Kaiser's counsel because the Ninth Circuit's decision in *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993), is incorrect. In *Hunt*, the claimant's physicians intervened in claimant's claim for benefits, seeking payment for medical services rendered after the date the employer ceased paying benefits. The Ninth Circuit held that Section 7(d)(3) grants medical providers standing to "'seek benefits' on behalf of an employee where the benefits are owed to the provider for medical services rendered." 999 F.2d at 424, 27 BRBS at 91(CRT). As such, the providers are "person[s]

[8]The provision of the settlement agreement between claimant and ITS which provides that claimant will repay ITS if Metropolitan is found to be the responsible employer would moot Metropolitan's claim for a credit in the amount of the settlement if it is found to be the liable employer. *See* Tr. at 7-10.

seeking benefits" within the meaning of Section 28(a), entitling the providers' counsel to an attorney's fee payable by employer.

Inasmuch as the Board is bound by the controlling law in the Ninth Circuit, in whose jurisdiction this claim arises, ITS' contention that *Hunt* was incorrectly decided is rejected. *See, e.g., Robidoux v. Xerox Corp.*, 18 BRBS 209, 210-911 (1986); *see also Spese v. Peabody Coal Co.*, 19 BLR 1-45, 1-50 n. 5 (1995). Because ITS does not otherwise contest the fee awards of either the administrative law judge or district director, we affirm the conclusions that counsel for Kaiser is entitled to an attorney's fee. In view of our decision to vacate the administrative law judge's award of medical benefits against ITS, however, we also vacate the attorney's fee awards to the extent that they hold ITS liable for Kaiser's fees. On remand, the fee awards should be entered against whichever employer is found to be liable. If ITS is again found liable, the fee awards are affirmed in their entirety.

Accordingly, we vacate the administrative law judge's determination that ITS is the responsible employer, and we remand this case to the administrative law judge for further findings consistent with this decision. BRB Nos. 96-1424/A. We affirm the findings that Kaiser's counsel is entitled to an attorney's fee payable by an employer, but we vacate the findings of the administrative law judge and district director that ITS is liable for Kaiser's attorney's fees. BRB Nos. 96-1424S, 97-392. This issue is to be resolved in accordance with the claim on the merits. In all other respects the administrative law judge's Decision and Order is affirmed. Kaiser's appeal in BRB No. 97-613 is dismissed with prejudice.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge