BRB Nos. 98-0973
and 98-0973A

RONALD BUCHANAN Claimant-Petitioner v. INTERNATIONAL TRANSPORTATION SERVICES and RELIANCE NATIONAL INSURANCE COMPANY Employer/Carrier-Cross-Petitioners METROPOLITAN STEVEDORE COMPANY Self-Insured Employer-Respondent Cross-Respondent KAISER PERMANENTE MEDICAL GROUP Medical Provider-Respondent	)	DATE ISSUED: March 26, 1999 DECISION and ORDER

Appeals of the Decision and Order On Remand, Decision on Motion for Reconsideration, and Supplemental Decisions and Orders Awarding Attorney Fees issued April 16, 1998 and September 15, 1998 of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

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

Eric A. Dupree and Christopher M. Galichon (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 Pedro, California, for Kaiser Permanente Medical Group.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals and International Transportation Services (ITS) cross-appeals the Decision and Order On Remand and Decision on Motion for Reconsideration (95-LHC-2346, 95-LHC-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). In addition, ITS appeals the administrative law judge's Supplemental Decisions and Orders Awarding Attorney Fees issued April 16, 1998, and September 15, 1998. 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 will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Roach v. New York Protective Covering Co.,* 16 BRBS 114 (1984).

This case has been before the Board previously. Claimant, who began work as a longshoreman in 1969, 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.[1] After 30 minutes, claimant began to feel low back pain

[1] 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 two to three feet deep. Tr. at 59-64.

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 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 at 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.

Claimant filed two claims under the Act for disability due to the injuries suffered on December 31, 1993, and January 2, 1994, against Metropolitan and ITS respectively. CX-1; ITSX-6, 8; METX-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.[2] 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).[3] The administrative law judge denied the claims against the first employer, Metropolitan, as he found that ITS is the responsible employer, and he directed that ITS reimburse Kaiser for past medical expenses in the amount of $23,121.50. In holding ITS liable

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

[3]The gross amount of the settlement was $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 provided that claimant will repay ITS if Metropolitan is found to be the responsible employer.

to Kaiser, the administrative law judge found that ITS failed to rebut the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to the issue of whether the incident on January 2, 1994, constituted a new injury. Further, citing *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993), the administrative law judge 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.

ITS appealed the administrative law judge's ruling that it is the employer liable for the payment of the medical benefits furnished to claimant by Kaiser, specifically asserting that in so concluding he erred in affording Kaiser the benefit of the Section 20(a) presumption. In addition, ITS challenged the administrative law judge's reliance on the Ninth Circuit's decision in *Hunt,* 999 F.2d at 419, 27 BRBS at 84 (CRT), in awarding Kaiser's counsel an attorney's fee. Claimant cross-appealed, agreeing with ITS's position that it should not have been held liable as the responsible employer, but stating that he was taking no position with regard to whether Section 20(a) would inure to the benefit of a medical provider. Metropolitan and Kaiser responded, urging affirmance.

On appeal, the Board agreed with ITS that the Section 20(a) presumption is inapplicable to the identification of the responsible employer. Accordingly, it vacated the administrative law judge's determination that ITS is liable to Kaiser for claimant's medical expenses, and remanded the case for him to determine which employer is responsible without application of the Section 20(a) presumption based on his weighing of the evidence as a whole. In addition, the Board held that the Ninth's Circuit's decision in *Hunt* was controlling, and as ITS did not otherwise contest the fee awards, affirmed the administrative law judge's and district director's determinations that counsel for Kaiser is entitled to a fee. In light, however, of its decision to vacate the administrative law judge's responsible employer determination, the Board also vacated the determination that ITS is liable for Kaiser's fee, and instructed the administrative law judge to enter the fee awards against whichever employer was found to be liable on remand. *Buchanan v. Int'l Transportation Services,* 31 BRBS 81 (1997).

In a Decision and Order on Remand, after weighing the record evidence, the administrative law judge again determined that ITS is liable as the responsible employer, finding that the evidence as a whole establishes that claimant sustained an aggravation of his Metropolitan injury while working for ITS on January 2, 1994. ITS's motion for reconsideration was denied. In addition, in a Supplemental

Decision and Order Awarding Attorney Fees issued April 16, 1998, Kaiser's counsel was awarded a fee of $1,687,50 representing 13.5 hours at $125 per hour for work performed before the administrative law judge, and in a Supplemental Decision and Order Awarding Attorney Fees issued September 15, 1998, an additional a fee of $437.50, representing 2.75 hours at $175 per hour which counsel had erroneously included in his prior fee petition to the Board.[4]

Claimant appeals and ITS cross-appeals the administrative law judge's determination in his Decision and Order On Remand that ITS is liable as the responsible employer. Claimant and ITS argue that the credible medical evidence of record conclusively shows that claimant sustained a disc herniation while working for Metropolitan on December 31, 1993, which is the cause of his current back problems, and that in concluding otherwise the administrative law judge erred in relying on the opinion of Dr. Capen, and improperly discredited the opinion of Dr. London. In addition, ITS asserts that the administrative law judge erred in failing to comply with the Board's instructions on remand to evaluate the record evidence to determine whether Metropolitan established that claimant sustained a new injury or aggravation with ITS by a preponderance of the evidence. ITS avers that inasmuch as he held in his prior Decision and Order that Metropolitan's evidence was insufficient to rebut the Section 20(a) presumption, the administrative law judge acted irrationally in relying on this same evidence to conclude that Metropolitan met its burden of showing that claimant sustained a new or aggravating injury at ITS. In addition, ITS appeals the administrative law judge's fee awards, asserting that it is not liable for Kaiser's counsel's attorney's fees because the Ninth Circuit's decision in *Hunt,* 999 F.2d at 419, 27 BRBS at 84 (CRT), was incorrectly decided. Kaiser and Metropolitan respond, urging affirmance of the administrative law judge's determination that ITS is liable as the responsible employer.

In determining the responsible employer in the case of multiple traumatic injuries, if the disability results from the natural progression of an initial injury and would have occurred notwithstanding a subsequent injury, then the initial injury is the compensable injury and accordingly the employer at the time of that injury is responsible for the payment of benefits. If, on the other hand, the subsequent injury 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 fully liable. *Foundation Constructors, Inc. v. Director, OWCP,* 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991); *Kelaita v. Director, OWCP*,

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[4]By Order dated July 29, 1998, the Board awarded claimant's counsel a fee of $3,368.75, disallowing time for services rendered before the administrative law judge.

799 F.2d 1308 (9th Cir. 1986); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991).

Initially, we reject ITS's argument that the administrative law judge did not follow the Board's instructions on remand. The Board instructed the administrative law judge that in identifying the responsible employer he was to determine whether Metropolitan met its burden of proving, by a preponderance of the evidence, that there was a new injury or aggravation with ITS, or whether ITS, on the other hand, successfully established that claimant's condition is the natural result of his injury with Metropolitan. *Buchanan*, 31 BRBS at 84-85. Although the administrative law judge characterized the dual burdens of proof described by the Board as confusing, and creating the potential for irrational outcomes such as neither employer successfully proving its case, he nonetheless correctly inferred that what the Board was actually seeking, and what was required under applicable law, was for him to weigh the evidence to determine whether claimant's condition following his work on January 2, 1994, was aggravated by that work, or was merely the natural progression of his injury with Metropolitan.[5] *See* Decision and Order on Remand at 14-15; Decision and Order on Reconsideration at 5-6. After considering the relevant evidence, the administrative law judge determined that the more persuasive evidence supports a finding that claimant sustained an aggravation of his December 31, 1993, injury on January 2, 1994.

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[5]The administrative law judge stated that by using the phrase "burden of proving," the Board did not clearly address which employer bears the ultimate burden of persuasion, and that it appears that the burden of proof is irrelevant once the fact of two injuries is established. Decision and Order on Remand at 14-15.

In order to clarify any misunderstanding arising from the Board's prior decision in this case, we now explain the implications of the holding therein. As we held, the Section 20(a) presumption plays no role in the determination of the responsible employer. *Buchanan*, 31 BRBS at 84. Section 20(a) is an aid to a claimant seeking to establish that his claim comes within the provisions of the Act. *See, e.g., Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (*en banc*). Once, as here, the existence of work-related injuries with more than one covered employer is established, the inquiry is whether the claimant's disability is due to the natural progression of the first injury or is due instead to the aggravating or accelerating effects of the second injury. "The key under this formulation is determining which injury ultimately resulted in the claimant's disability." *Kelaita*, 799 F.2d at 1311. In turn, resolution of this issue determines which employer is liable for the totality of claimant's disability. *See, e.g., Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75 (CRT); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *see also Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). As the administrative law judge stated, resolution of this issue involves the weighing of the evidence of record; in this sense, each employer's burden is more properly considered to be that of persuasion, rather than of production, as each employer bears the burden of persuading the factfinder, by a preponderance of the evidence, that the claimant's disability is due to the injury with the other employer.[6] *See, e.g., Kelaita*, 799 F.2d at 1312; *Mulligan v. Haughton Elevator*, 12 BRBS 99 (1980); *Crawford v. Equitable Shipyards, Inc.*, 11 BRBS 646 (1979), *aff'd mem. sub nom. Employers National Ins. Co. v. Equitable Shipyards*, 640 F.2d 383 (5th Cir. 1981). Contrary to ITS's contention, Metropolitan need not establish that the injury claimant sustained in its employ played no role in claimant's ultimate disability in order to be absolved of liability. It need only establish that the injury claimant sustained in ITS's employ aggravated, accelerated or combined with claimant's prior

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[6]The preponderance of the evidence standard does no more than require that the proponent present a more persuasive case. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994)*; Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). We note that if, however, claimant alleged only one work-related injury, and the employer sought to establish the existence of a later traumatic event that is the cause of the claimant's disability, the employer would bear both the burden of production and of persuasion in order to escape liability. *See, e.g., Shell Offshore, Inc. v. Director, OWCP*, 112 F.3d 312, 31 BRBS 129 (CRT) (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1563 (1998). As the issue in the latter instance involves causation, a necessary element of a claim for a work-related injury, Section 20(a) would apply to claimant's benefit.

injury to result in claimant's disability.[7] *See Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75 (CRT). In the unlikely event that neither employer was able to persuade the administrative law judge that its evidence is entitled to greater weight,[8] we believe, contrary to ITS's contention, that the purposes of the Act would best be served by assigning liability to the later employer, consistent with case law defining responsible employer in an occupational disease context.[9] *See, e.g., General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991). Therefore, the initial burden of persuasion is on the later employer to establish that claimant's disability is due solely to the natural progression of the initial injury.

In the instant case, the administrative law judge weighed the relevant evidence, and we now address the contentions of claimant and ITS that the administrative law judge's

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[7]The situation presented in the instant case, that of two potentially liable covered employers, should be contrasted with that where one covered employer seeks to be absolved of partial or total liability based on the occurrence of a subsequent event which it alleges is an intervening cause of the claimant's disability. In the latter case, unlike the former, in order to be relieved of liability the employer must establish that the work injury played no role in the claimant's disability due to the occurrence of the subsequent event. *See, e.g., Shell Offshore, Inc. v. Director, OWCP*, 112 F.3d 312, 31 BRBS 129 (CRT) (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1563 (1998); *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Plappert v. Marine Corps Exchange,* 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997); *Leach v. Thompson's Dairy*, 13 BRBS 231 (1981).

[8]If, for example, the administrative law judge rationally found that neither employer put forth any creditable evidence.

[9]ITS's contention is based on its belief that because it voluntarily paid claimant benefits and later entered into a Section 8(i) settlement with claimant, Metropolitan is, *de facto*, the only employer "claimed against." *See General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991). This argument is not persuasive for two reasons. First, the administrative law judge found, conclusively, that claimant sustained a work-related injury with each employer, and claimant filed a claim against both employers. Moreover, inasmuch as the Section 8(i) settlement did not dispose of Kaiser's derivative claim for reimbursement, ITS also was "claimed against" following the settlement of claimant's claim.

finding that ITS is the responsible employer is not supported by the evidence of record. The administrative law judge credited Dr. Capen's opinion that a disc fragment, loosened by claimant's work at Metropolitan on December 31, 1993, broke off into the spinal canal as a result of claimant's activities at ITS on January 2, 1994. Dr. Capen opined that claimant sustained an aggravating injury while working for ITS on January 2, 1994, which he found to be consistent with claimant's left-sided radiculopathy after the December 31, 1993, work injury, his decreased pain with rest after the Metropolitan injury, and his excruciating pain after working for ITS on January 2, 1994. In addition, the administrative law judge found that Dr. Capen's opinion was partially corroborated by the testimony of Dr. Miller, and by the fact that claimant conceded that his work activities at ITS were more strenuous than those at Metropolitan, while claimant was unable to remember any specific incident occurring at Metropolitan, he admitted having slipped on grease a couple of times and feeling a "twingle [sic]" in his back several times while bending over at ITS. Decision and Order on Remand at 16.

The administrative law judge also considered Dr. London's opinion relating claimant's back problems entirely to the Metropolitan injury but found it less persuasive than the aforementioned opinions. Decision and Order on Remand at 9-10. In so concluding, he noted that in attributing claimant's problems to the December 31, 1993, work injury, Dr. London failed to provide any explanation as to why claimant's symptoms improved with rest after the December 31 incident but did not do so after the January 2 injury. The administrative law judge further noted that Dr. London relied heavily on the history claimant provided him regarding his pain. After observing that claimant asserted that his symptoms following the ITS injury never surpassed those he experienced as a result of the December 31 injury, the administrative law judge found that claimant's actions belied this testimony in that he was barely able to walk on the morning of January 3, 1994, and did not seek medical attention until after the ITS injury. Finally, the administrative law judge noted that Dr. London admitted that other than the history provided to him by claimant, there was nothing in claimant's records from Kaiser inconsistent with an injury on January 2, 1994, and inferred that this rendered the basis for his opinion suspect.

We affirm the administrative law judge's finding that ITS is the responsible employer as it is rational and based on substantial evidence in the record. We reject the contention that Dr. Capen's failure to address whether the final separation of the disc material was the natural and unavoidable consequence of claimant's December 31, 1993, injury renders this opinion too speculative to properly support the administrative law judge's determination. Dr. Capen explicitly attributed the final separation of the disc material in claimant's back, and claimant's excruciating pain thereafter, to his work activities on January 2, 1994. *See* METX-27 at 79. Moreover,

the administrative law judge acted within his discretion in viewing Dr. Miller's testimony that once a disc fragment became firmly lodged the symptoms of pain would be continuous as corroborative of Dr. Capen's opinion, given that the objective evidence of record reflects that claimant did not suffer from pain which did not respond to conservative measures until after he worked for ITS on January 2, 1994. *See* Tr. at 86, 119-120, 251-252, 290; *see generally Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).

Claimant and ITS also allege error in the administrative law judge's treatment of Dr. London's testimony, contending he wrongfully inferred that Dr. London's opinion was premised on an erroneous history of events. They maintain that a complete reading of his opinion reveals that Dr. London clearly understood and considered the fact that claimant experienced excruciating pain between January 3 and January 13, 1994. Moreover, ITS asserts that any suggestion that Dr. London failed to account for claimant's increased symptoms after working for ITS was eliminated by his testimony that within a reasonable medical probability, the fragment which became lodged while claimant was working at Metropolitan would produce increased inflammation with any form of activity. *See* Tr. at 378.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28 (CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30 (CRT) (9th Cir. 1988). In this case, the administrative law judge provided valid reasons for finding Dr. London's testimony less persuasive than the opinion of Dr. Capen. Decision and Order On Remand at 17-18. Inasmuch as the credited opinion of Dr. Capen, in conjunction with the partially corroborating opinion of Dr. Miller, provides substantial evidence to support the administrative law judge's determination that ITS is liable as claimant sustained an aggravating injury on January 4, 1994, and claimant and ITS have failed to establish reversible error in the administrative law judge's weighing of the conflicting testimony, his determination that ITS is liable as the responsible employer is affirmed.[10] *Kelaita,* 799 F.2d at 1308; *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).

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[10]In light of our affirmance of the administrative law judge's responsible employer determination, we need not address ITS's contention that it is entitled to indemnification from Metropolitan.

We now turn our attention to ITS's appeals of the fee awards. In both fee appeals, ITS argues that it is not liable for Kaiser's counsel's attorney's fees because the Ninth Circuit's decision in *Hunt* , 999 F.2d at 419, 27 BRBS at 84 (CRT), is incorrect. Inasmuch, however, as the Board considered and rejected this argument in the prior appeal in this case, we need not address it again here. Our prior determination that *Hunt* is controlling is the law of the case. *See Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991).

With regard to the September 15, 1998, fee award, ITS maintains that if Kaiser is entitled to a fee, the administrative law judge erred in basing his fee award on a $175 hourly rate. ITS avers that because the administrative law judge previously entered an award of attorney's fees on August 26, 1996, in which he determined that the $175 hourly rate requested was excessive given the lack of complexity and the quality of representation, and that an hourly rate of $125 was reasonable, the administrative law judge's prior determination that Kaiser is limited to an attorney's fee based on a $125 hourly rate is binding.

We reject ITS's argument. The administrative law judge noted that the Board awarded Kaiser's attorney a fee based on an hourly rate of $175, and in view of the passage of time since the initial award, he was free to set a new rate. We affirm the administrative law judge's hourly rate determination as ITS has failed to establish that the hourly rate awarded is unreasonable or an abuse of discretion. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 173-174, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

Accordingly, the administrative law judge's Decision and Order On Remand, Decision on Motion for Reconsideration, and Supplemental Decisions and Orders Awarding Attorney Fees issued April 16, 1998 and September 15, 1998, are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge