ROBERT HIZINSKI	)	BRB Nos. 92-2285
	)	and 92-2285A
Claimant-Respondent	)	
	)	
v.	)	
	)	
MEEHAN SEAWAY SERVICES	)	DATE ISSUED:
	)	
and	)	
	)	
RANDLES & HOLBROOK	)	
	)	
Employer/Carrier-Petitioners Cross-Respondents	)	
	)	
and	)	
	)	
AMERICAN GRAIN TRIMMERS, INCORPORATED	)	
	)	
	)	
Employer-Respondent Cross-Petitioner	)	
	)	
ROBERT HIZINSKI	)	BRB Nos. 93-780
	)	and 93-780A
Claimant-Petitioner Cross-Respondent	)	
	)	
v.	)	
	)	
MEEHAN SEAWAY SERVICES	)	
	)	
and	)	
	)	
RANDLES & HOLBROOK	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order-Awarding Benefits of Charles W. Campbell, Administrative Law Judge, and the Compensation Order Award of Attorney's Fee of Thomas S. Hunter, District Director, United States Department of Labor.

James Courtney, III, Duluth, Minnesota, for claimant.

Gregory P. Sujack (Garofalo, Hanson, Schreiber & Vandlik, Chartered), Chicago, Illinois, for Meehan Seaway Services.

John A. Mundell, Jr. (Foster, Meadows & Ballad, P.C.), Detroit, Michigan, for American Grain Trimmers, Incorporated.

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

PER CURIAM:

Employer/carrier Meehan Seaway Services and Randles and Holbrook (Meehan) appeal and American Grain Trimmers, Incorporated (American Grain), cross-appeals, the Decision and Order-Awarding Benefits (90-LHC-3254) of Administrative Law Judge Charles W. Campbell 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 Nos. 92-2285/A. Additionally, claimant appeals and Meehan cross-appeals the Compensation Order Award of Attorney's Fee (No. 10-12916) of District Director Thomas C. Hunter. BRB Nos. 93-780/A. 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., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained a knee injury on December 7, 1979, while working for American Grain. Claimant received some compensation benefits from American Grain for a left knee injury and returned to work after 3 1/2 weeks. Claimant thereafter began experiencing problems with his right knee, which he initially attributed to the 1979 injury. Claimant continued to work as a longshoreman until October 14, 1989, when he alleged that he injured his right knee while working for Meehan when he stepped into a crevice or gap between bags in the hold while carrying 110-pound bags of grain. Claimant has not worked since that date.

An MRI performed in November 1989 revealed a torn medial meniscus, and on February 2, 1990, Dr. Moen performed an arthroscopy and medial meniscectomy on claimant's right knee. On February 21, 1990, claimant wrote a letter to the United States Department of Labor, asserting a claim against American Grain, whose carrier, Midland Insurance Company, had been placed in liquidation, based on an alleged 1979 right knee injury. Claimant filed an amended claim on May 9,

1990, adding a claim against Meehan, alleging that on October 14, 1989, he injured his right knee, "while doing heavy hold work carrying wheat bags weighing approximately 110 lbs and carrying them 5-20 ft. at a time...." In a pre-hearing statement dated September 4, 1990, claimant stated he reinjured his knee on October 14, 1989, while doing heavy hold work for Meehan.

In his Decision and Order, the administrative law judge found that in 1979 claimant injured his left knee and that therefore American Grain was not liable for the present claim for injury to his right knee. He further found that claimant was entitled to the Section 20(a), 33 U.S.C. §920(a), presumption with regard to the causal nexus between his right knee problems and his employment with Meehan and that rebuttal has not been established with regard to this condition. The administrative law judge also determined that the claim was timely filed under Section 12, 33 U.S.C. §912, and that claimant's failure to file timely formal notice under Section 12(a), was excused pursuant to Section 12(d)(2), 33 U.S.C. §912(a), (d)(2)(1988). The administrative law judge concluded that claimant was permanently totally disabled, as Meehan did not establish the existence of suitable alternate employment, and awarded benefits based on an average weekly wage of $186.

On appeal, Meehan challenges the administrative law judge's finding that claimant sustained a compensable work-related injury while in its employ on October 14, 1989. Meehan argues that the administrative law judge erroneously applied the Section 20(a) presumption based on a theory not specifically alleged by claimant, and, in addition, erred in finding that it was not prejudiced by claimant's failure to provide timely notice, in calculating claimant's average weekly wage, and in concluding that claimant was permanently totally disabled. Claimant responds, urging affirmance. Meehan has also filed a reply brief, an addendum to the reply brief, and a Motion to Cite Supplemental Authority, and claimant responds to Meehan's motion. American Grain has filed a protective cross-appeal, BRB No. 92-2285A, in which it argues that inasmuch as the administrative law judge's finding that claimant's 1979 injury was to his left knee is not challenged by Meehan on appeal and the present claim is for an injury of the right knee, the administrative law judge's decision holding Meehan liable as responsible employer should be affirmed.

SECTION 20(a)

Meehan initially argues that inasmuch as the United States Supreme Court held in *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), that the Section 20(a) presumption only attaches to claims which are actually made and claimant did not allege, nor would the evidence support, a cumulative trauma, repetitive trauma, repetitive aggravation, or other aggravation theory, the administrative law judge erred in *sua sponte* seizing upon an aggravation theory of recovery. Claimant responds that the theory of cumulative trauma was, in fact, raised by virtue of claimant's stipulation reserving a right to claim a "*Gillette*" injury,[1] and that, in any event, he also claimed that his injury occurred when carrying bags on October 14, 1989, which was the theory relied upon by the administrative law judge.

[1]A "Gillette" injury appears to be a cumulative trauma injury under state law.

After considering employer's arguments, we affirm the causation findings made by the administrative law judge. To establish a *prima facie* case under Section 20(a), claimant must show that he has sustained a harm or pain, which here is undisputed, and that conditions existed or an accident occurred which could have caused the pain. *See, e.g., Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1989). Once claimant establishes these two elements of his *prima facie* case, the Section 20(a) presumption applies to link the harm or pain with claimant's employment. *See, e.g., Stevens v. Takoma Boatbuilding Co.*, 23 BRBS 191 (1990). In analyzing the cause of claimant's injury, the administrative law judge initially found that despite conflicting evidence, claimant injured his left knee in 1979, not his right knee, and therefore no basis exists for holding American Grain liable for the present right knee claim. He further determined that claimant is entitled to invocation of the Section 20(a) presumption, as there is no dispute that claimant has an injury, *i.e.*, a torn medial meniscus, and that claimant established the presence of working conditions on October 14, 1989, *i.e.*, carrying 110-pound bags of grain, which could have caused or aggravated his injury. The administrative law judge reasoned that claimant's credible testimony that he suffered increased and severe pain that day while working and his failure to return to work afterward, in conjunction with Dr. Person's opinion that claimant aggravated his condition on October 14, 1989, after being informed that claimant experienced increased symptoms while lifting 110-pound bags, established that claimant's work at Meehan on the date in question could have aggravated his knee condition. The administrative law judge also specifically found that the statements contained in a June 11, 1990, letter from claimant's counsel to the district director, which employer asserts shows that no specific accident occurred in 1989, are not entirely inconsistent with the evidence that claimant's knee condition was aggravated in 1989, because counsel stated that claimant, "after having time to think it over, stated that the 'work he did' at Meehan (not the accident he had) temporarily aggravated his knee condition." Decision and Order at 27.

We affirm the administrative law judge's finding that claimant established the "working conditions" element of his *prima facie* case under Section 20(a). In the present case, although the administrative law judge found that the specific accident which claimant alleged on October 14, 1989, *i.e.*, stepping into a hole, did not occur, he nonetheless found that claimant established that his work at Meehan on October 14, 1989, carrying 110-pound bags could have aggravated his pre-existing right knee problems. Inasmuch as claimant's amended claim and pre-hearing statement indicate that claimant alleged an injury on October 14, 1989, when he was carrying 110-pound bags, consistent with administrative law judge's findings with regard to the second prong of claimant's *prima facie* case, and it is evident from claimant's hearing and deposition testimony alleging re-injury, Ex. A-17 at 70, Tr. at 95, that a claim for aggravation was being made, we hold that the administrative law judge's decision comports with *U.S. Industries* and reject employer's arguments to the contrary.

We also reject employer's argument that the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994), invalidates the application of the Section 20(a) presumption. In *Greenwich Collieries*, the Court recognized that claimants benefit from the statutory presumption provided by Section 20(a). *Id.*, 114 S.Ct. at 2259, 28 BRBS at 47 (CRT). The court's opinion has no effect upon invocation or rebuttal of Section

20(a). It holds that once Section 20(a) is rebutted, claimant bears the burden of proof, striking down the rule that where the evidence is equally balanced, doubt should be resolved in favor of claimant. *See Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18, 21 n.3 (1995).

Meehan also avers that an award of benefits for the alleged accident on October 14, 1989, rewards a fraudulent claim, asserting that while claimant suffered from a knee condition, there was no showing that this condition was related to claimant's employment. Meehan posits that claimant fabricated the story of the 1989 accident against Meehan because he found out that American Grain's carrier was in liquidation. The administrative law judge, however, fully considered the conflicting evidence regarding the circumstances surrounding the alleged October 14, 1989, injury, and acted within his authority in crediting claimant's testimony and Dr. Person's medical opinion that claimant sustained a work-related injury as alleged when he lifted 100-pound bags.

We reject employer's argument that Dr. Person erroneously relied on information that claimant's injury in 1979 was to his right knee and, thus, his opinion cannot properly support the findings made by the administrative law judge. Regardless of whether Dr. Person believed claimant's 1979 injury was to the left or right knee, he specifically opined that claimant sustained an injury to his right knee at work on October 14, 1989, while carrying 110-pound bags, which aggravated his pre-existing right knee symptoms and resulted in greater disability. Inasmuch as the administrative law judge's finding that claimant sustained a work-related injury on October 14, 1989, while working for Meehan is rational, supported by substantial evidence, and comports with applicable law, and employer has failed to raise any reversible error, we affirm the causation findings made by the administrative law judge.

We also reject Meehan's argument that the administrative law judge erred in determining that it is liable as the responsible employer. Although Meehan argues that the administrative law judge erroneously applied the last employer rule, which only applies to occupational, and not traumatic injuries, we disagree. *See Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991), *aff'g Vanover v. Foundation Constructors*, 22 BRBS 453 (1989). In the case of multiple traumatic injuries, where, as here, a subsequent injury, aggravates, accelerates, or combines with a prior injury resulting in claimant's disability, the subsequent injury is the compensable injury and the subsequent employer is responsible. *Id. See generally Lopez v. Southern Stevedores*, 23 BRBS 453 (1989); *Abbott v. Dillingham Marine & Manuf. Co*., 14 BRBS 453 (1981), *aff'd mem*., No. 81-7801 (9th Cir. 1982). Accordingly, we affirm the administrative law judge's determination that Meehan is liable as the responsible employer, based on his finding that claimant sustained an aggravating injury while in its employ on October 14, 1989. In light of our affirmance of the administrative law judge's causation and responsible employer findings, American Grain's protective cross-appeal, BRB No. 92-2285A, is rendered moot.

SECTION 12 NOTICE

Meehan next argues that the administrative law judge erred in finding that it was not prejudiced by claimant's failure to provide timely notice and that therefore claimant's untimely notice

was excused pursuant to Section 12(d)(2). In the case of traumatic injury, claimant's failure to provide timely notice within 30 days of his awareness of his injury as is required by Section 12(a), bars the claim unless excused under Section 12(d). Under Section 12(d), failure to provide timely written notice will not bar the claim if claimant shows either that employer had knowledge of the injury during the filing period, (Section 12 (d)(1)), or that employer was not prejudiced by the failure to give timely notice (Section 12(d)(2)). *See Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 34 (1989); *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986). 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 Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). To establish prejudice, employer must establish that due to claimant's failure to provide timely written notice, it has been unable to effectively investigate some aspect of the claim. *See, e.g., Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990).

Meehan contends that it has been prejudiced because if it had timely notice that claimant was raising a cumulative trauma theory it would have employed a different defensive trial strategy. These allegations of prejudice refer to trial tactics rather than to Meehan's inability to investigate some aspect of the claim. We therefore affirm the administrative law judge's finding that Meehan did not prove it was prejudiced by claimant's failure to provide timely notice on the facts presented in this case. *See generally Williams v. Nicole Enterprises*, 21 BRBS 164 (1988), *aff'd mem. sub nom. Jones v. Director, OWCP*, 915 F.2d 1557 (1st Cir. 1990).

AVERAGE WEEKLY WAGE

Meehan next argues that the administrative law judge erred in using Section 10(c) of the Act, 33 U.S.C. §910(c), to calculate claimant's average weekly wage as $186. Meehan contends that because the only evidence relevant to claimant's average weekly wage was claimant's 1989 tax return, which reflects earnings of $5,287.05, the administrative law judge should have calculated claimant's average weekly wage as $101.67 by dividing this figure by 52 weeks.

After review of the administrative law judge's decision in light of the evidence of record, we affirm his average weekly wage determination. In the instant case, the administrative law judge rationally applied Section 10(c) to determine claimant's average weekly wage because the record reflects that claimant's work was seasonal and discontinuous and that he worked only 43 days in 1989 prior to his injury. *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996).[2] The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). The administrative

[2]The administrative law judge also reasonably determined that claimant's average weekly wage could not be determined under either Section 10(a) or Section 10(b), 33 U.S.C. §910(a), (b), because the record did not reflect whether claimant was a 5 day or a 6 day worker, and contained no evidence regarding the wages of a similarly situated worker. *See generally Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991).

law judge is afforded broad discretion in arriving at a fair and reasonable approximation of claimant's earning capacity at the time of injury pursuant to Section 10(c). *See Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979).

In calculating claimant's average weekly wage under Section 10(c), the administrative law judge credited claimant's deposition testimony that he worked 116 days in 1984, 57 days in 1985, 129 days in 1985, 39 days in 1987, and 88 days in 1988. A-17, Ex. 2. The administrative law judge then noted that claimant's tax return for 1989 reflects that he earned $5,287.05, which when divided by 43 days worked, would yield a $122.95 daily wage. Proceeding on the assumption that claimant's daily wages were about the same for the days he worked in the prior five years, the administrative law judge multiplied the $122.95 daily wage figure by the number of days claimant worked during each of the preceding 5 years, and determined that claimant had average annual earnings for 1984 through 1989 of $9,675. He then divided this figure by 52 under Section 10(d)(1), to obtain an average weekly wage of $186. An administrative law judge may calculate average annual earnings under Section 10(c) based on claimant's earning pattern over a period of years prior to the injury, where, as here, all of the years within that period are taken into account. *See Gatlin*, 935 F.2d at 819, 25 BRBS at 26(CRT); *Anderson v. Todd Shipyards*, 13 BRBS 593, 596 (1981). Inasmuch as the administrative law judge's calculation of claimant's average weekly wage is reasonable, supported by substantial evidence, and consistent with the goal of arriving at a sum which reasonably represents claimant's annual earnings at the time of his injury, we affirm his average weekly wage determination. *See Guthrie*, 30 BRBS at 52; *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Geisler v. Continental Grain Co.*, 20 BRBS 35 (1987); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985).

SUITABLE ALTERNATE EMPLOYMENT

Meehan also contends that the administrative law judge erred in finding claimant permanently totally disabled, arguing that the testimony of its vocational specialist, Paul Genereux, is sufficient to meet its burden of establishing the availability of suitable alternate employment, and that the administrative law judge performed "mental gymnastics" to discredit this opinion. Meehan maintains that the opinion of Mr. Genereux should be credited over that of claimant's vocational expert, Mr. Casper, because Mr. Casper's opinion that claimant was unemployable is wholly unbelievable and is based on claimant's assessments of his limitations rather than on medical opinions.

As it is undisputed that claimant could not perform his usual work, he established a *prima facie* case of total disability. Accordingly, the burden shifted to employer to demonstrate the availability of realistic specific job opportunities which claimant could perform, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Royce v. Elrich Construction Co.*, 17 BRBS 157 (1985).

We affirm the administrative law judge's finding that employer failed to meet its burden of establishing the availability of suitable alternate employment through the testimony of its vocational expert, Mr. Genereux. The administrative law judge's decision to accord greater weight to the vocational testimony of claimant's vocational expert, Jack Casper, who after interviewing claimant, performing a transferable skills analysis, and administering a wide range achievement test, opined that there was no work in the local economy that claimant could perform, was a credibility determination within his authority. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990). Although Mr. Genereux identified available job opportunities as a security guard, parking lot attendant, and retail video store clerk which he believed that claimant could perform, the administrative law judge rationally found his testimony insufficient to meet employer's burden of establishing the availability of suitable alternate employment. The administrative law judge reasoned that Mr. Genereux admitted that he was unaware as of the time he performed his labor market survey that claimant walked with a cane, Mx. 15 at 70, and conceded that his opinion regarding claimant's ability to obtain a position could have been affected if he had known of a July 23, 1991, letter in which Dr. Moen stated that claimant had a degenerative knee condition which could affect the amount of walking he could do. Mx. 15 at 88. Moreover, because the security jobs identified by Mr. Genereux required alternating sitting and walking on a frequent basis depending on the size of the plant and the schedule of monitoring, and Drs. Moen, Person, and Engasser indicated that claimant should refrain from extensive walking, the administrative law judge rationally concluded that it was not clear that the jobs identified were, in fact, suitable. Similarly, the administrative law judge rationally found that employer failed to establish that the video store clerk position Mr. Genereux identified was suitable, because Mr. Genereux indicated that light stocking may be required and failed to provide any indication as to the amount of standing required, while claimant had both lifting and standing restrictions.

Finally, the administrative law judge rationally determined that employer did not meet its burden of establishing the availability of suitable alternate employment based on the two parking lot attendant positions Mr. Genereux identified at the Medical Arts Building and at St. Mary's. The record contains conflicting testimony as to the amount of walking required for the position identified at the Medical Arts Building. While Mr. Genereux indicated that this position required primarily sitting with some minimal standing and walking, claimant's vocational expert, Mr. Casper, testified that the position required considerable walking because attendants at that lot had to retrieve cars. The administrative law judge credited Mr. Casper's opinion and found that since Mr. Genereux may have been mistaken as to how much walking was required in the parking lot attendant position at the Medical Arts Building, he may also have been mistaken as to the physical requirements of the lot attendant position at St. Mary's; he accordingly rationally rejected these positions as unsuitable. Inasmuch as the administrative law judge's finding that Mr. Genereux's opinion was insufficient to meet employer's burden of establishing the availability of suitable alternate employment is rational, supported by substantial evidence, and comports with applicable law, and employer has failed to raise any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, we affirm this finding. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

ATTORNEY'S FEES

Turning to claimant's appeal of the district director's Compensation Order Award of Attorney's Fee, BRB No. 93-780, we note that claimant's counsel submitted a fee petition for work performed before the district director in which he requested an attorney's fee of $2,217.50, for 2.1 hours at $125 per hour for Attorney Courtney and 23 hours at $85 per hour for Attorney Margolis, plus $112 in expenses.

In a Compensation Order issued on November 2, 1992, the district director disallowed 21.8 hours, and awarded $247.50 representing 3.3 hours[3] at an hourly rate of $75 plus $112 in expenses.

In reducing the requested fee the district director stated:

> Only 3.3 hours, as itemized in counsel for the employer's Objection and Response, is traceable to any conceivable time spent on the claim against Meehan Seaway Service. The balance of the time was spent pursuing a claim against American Grain Trimmers, wherein no recovery was made. That 21.8 hours had no direct or indirect effect upon the ultimate award against Meehan...and cannot be considered to have been necessary. In fact, at the District Office level counsel for the claimant explicitly stated that no claim against Meehan...was being asserted.

Initially, we find no merit to claimant's suggestion that because the administrative law judge held Meehan liable for the services rendered in connection with both the claim against American Grain and the claim against Meehan, the district director was required to award the requested fee; the

[3]The district director did not identify the itemized entries included in the 3.3 hours awarded.

determination of the amount of an attorney's fee is within the discretion of the body awarding the fee. *See* 33 U.S.C. §928(c); 20 C.F.R. §702.132. Nonetheless, we are unable to affirm the district director's fee award, because his reduction of the fee was based on application of an improper legal standard. The proper test for determining if an attorney's work is compensable is whether, at the time the attorney performs the work in question, he could reasonably regard the work as necessary to establish entitlement. *See, e.g., Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). The district director in the instant case, however, utilized hindsight to determine that the time counsel expended building a case against American Grain was not necessary because ultimately claimant's recovery was from Meehan. As was previously recognized by the Board in *Marcum v. Director, OWCP*, 12 BRBS 355, 362 (1980), "it is easy...to apply retroactive wisdom but it is entirely another matter for an attorney to predict accurately the ultimate usefulness of each action he takes to prepare his case." Moreover, "in the process of investigating and building evidence to support a claim, the attorney develops evidence... which may or may not be used." *Marcum*, 12 BRBS at 361.

The record reflects that at the time that claimant filed his amended claim in May 1990, he was uncertain as to which employer was liable, as is evidenced by the fact that he named both American Grain and Meehan as responsible employers, and by counsel's subsequent June 1990 letter to Claims Examiner Stamper. M-6. Moreover, inasmuch as the amended claim was filed on May 9, 1990, prior to referral of the case to the Office of Administrative Law Judges on August 30, 1990, the district director erred in concluding that no claim against Meehan had been asserted at the district director level. Moreover, much of the work claimed by counsel and disallowed by the district director would have been necessary to establish entitlement regardless of which employer claimant was proceeding against.

In light of these facts, we vacate the district director's fee award and remand the case to allow him to enter a reasonable attorney's fee for the necessary work performed by counsel in establishing entitlement consistent with the standard enunciated in *Marcum*, 12 BRBS at 362, and *Maddon*, 23 BRBS at 55.[4]

Accordingly, the administrative law judge's Decision and Order is affirmed. BRB Nos. 92-2285/A. The district director's Compensation Order-Award of Attorney's Fee is vacated, and the case is remanded for reconsideration in accordance with this opinion. BRB No. 93-780. The cross-appeal of the district director's Compensation Order-Award of Attorney's Fee is dismissed as abandoned. BRB No. 93-780A.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[4]Meehan filed a cross-appeal of the district director's Compensation Order awarding an attorney's fee. BRB No. 93-780A. In an Order issued December 17, 1993, the Board directed Meehan to file a Petition for Review and brief in support of its cross-appeal. As Meehan has not complied with this order, its cross-appeal is deemed abandoned.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge