BRB No. 04-0179

PIPER L. PARKS	)	
	)	
Claimant-Respondent	)	DATE ISSUED: 02/03/2006
	)	
v.	)	
	)	
NAVY PERSONNEL COMMAND/MWR	)	DECISION and ORDER on
	)	MOTION for
Self-Insured	)	RECONSIDERATION
Employer-Petitioner	)	*EN BANC*

Appeal of the Decision and Order Awarding Benefits, Erratum, Supplemental Decision and Amended Order Awarding Benefits on Reconsideration, and Supplemental Decision Awarding Attorney's Fees of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Janmarie Tokar and James G. Fongemie (McTeague, Higbee, Case, Cohen, Whitney & Tokar, P.A.), Topsham, Maine, for claimant.

Lawrence P. Postal (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

DOLDER, Chief Administrative Appeals Judge:

Employer has filed a timely Motion for Reconsideration *En Banc* of the Board's Decision and Order in *Parks v. Navy Personnel Command/MWR*, BRB No. 04-0179 (Oct. 27, 2004) (unpublished). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant opposes employer's motion. We consider employer's motion *en banc*, but the relief requested is denied.

Claimant injured her right wrist on May 25, 1995, during the course of her employment. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from October 1995 to January 2000. During this period, claimant received medical treatment for her right wrist and hand, which included surgical

decompression in February 1996 and arthroscopic debridement in January 1998. Claimant returned to work on January 26, 2000, when employer provided claimant with alternate employment washing and folding towels in its gymnasium. On December 26, 2000, claimant slipped and fell outside employer's gymnasium and again injured her right wrist. On April 4, 2001, Dr. Kalvoda performed a right endoscopic carpal tunnel release. Claimant returned to work a few weeks after the surgery with improved symptoms. Employer challenged its liability under the Act for the April 2001 surgery and the resulting period of temporary total disability.

The administrative law judge found that claimant sustained a new injury on December 26, 2000, which aggravated her pre-existing right wrist condition. The administrative law judge awarded claimant temporary total disability benefits from April 4, 2001, through the date in June 2001 when claimant returned to work. The administrative law judge rejected employer's contention that it is entitled to a credit for its alleged overpayment of compensation for the May 1995 right wrist injury against its liability for benefits for the 2000 injury. *See* 33 U.S.C. §914(j).

In its decision, the Board, *inter alia*, affirmed the administrative law judge's denying employer a credit for any overpayments of compensation for the first injury against its liability for the second injury. The Board also affirmed the administrative law judge's calculation of claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c). The Board rejected employer's contentions regarding the administrative law judge's attorney's fee award. *Parks v. Navy Personnel Command/MWR*, BRB No. 04-0179 (Oct. 27, 2004).

Employer moves for reconsideration of the Board's affirmance of the administrative law judge's finding that it cannot credit an alleged overpayment of compensation for claimant's 1995 work injury against its compensation liability for her December 2000 injury. At the hearing on February 2, 2002, employer submitted a labor market survey conducted on October 5, 2001, which it asserted established the availability of suitable alternate employment as of August 11, 1997, the date it contended that claimant's May 1995 right wrist injury reached maximum medical improvement. Employer therefore argued that it is entitled to credit any overpayment of compensation for temporary total disability from August 1997 to January 2000 against its liability for compensation for claimant's December 26, 2000, right wrist injury.

The administrative law judge rejected employer's contention. He found that claimant's May 1995 injury reached maximum medical improvement on August 11, 1997, and that claimant sustained a new injury when she slipped and fell at work on December 26, 2000. The administrative law judge found that, pursuant to the Board's decision in *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993), employer is not entitled to reduce its liability for compensation payments owed for the

December 2000 work injury by taking credit for overpayment of compensation made as a result of the May 1995 work injury. In its decision, the Board held that the administrative law judge correctly denied employer a credit under Section 14(j) inasmuch as the rationale in *Vinson* applies equally to this case, notwithstanding employer's contention that *Vinson* is distinguishable because claimant's 1995 and 2000 work injuries involved the same body part. *Parks*, slip op. at 4-5.[1]

In its motion, employer asserts that the Board's decision is erroneous in that the Board has allowed a Section 14(j) credit when there are two separate injuries to the same body part, citing *Krotsis v. General Dynamics Corp.*, 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. General Dynamics Corp. [Krotsis]*, 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990). Employer also contends that the fact that the claimant's injuries in *Vinson* were to different body parts was crucial to the Board's holding in that case.

Section 14(j) of the Act provides, "If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. §914(j). In *Vinson*, the claimant sustained a compensable work injury in 1987. Claimant sustained a second, unrelated work injury in 1990. Employer subsequently credited an overpayment made as a result of the 1987 injury against its liability for the 1990 injury. In its decision, the Board gave deference to the Director's position that advance payments of compensation for one injury may not be credited under Section 14(j) against payments due for a subsequent injury. The Board reasoned that Section 14 as a whole references only a single compensable injury:

> Our review of Section 14 in *toto* indicates that Section 14(j) was not intended to allow an employer to credit an overpayment of compensation made as a result of an injury arising under the Act against a subsequent, non-related work-injury. Specifically, Section 14(b) states that the first installment of compensation shall become due on the fourteenth day after the employer has knowledge of "the injury or death." 33 U.S.C. §914(b). Similarly, Section 14(d) provides that an employer's controversion of a claim is due on or before the fourteenth day after it has knowledge of "the alleged injury or death." 33 U.S.C. §914(d). Lastly, pursuant to Section 14(g), an employer's notice of final payment of compensation shall state "the date of the injury or death." 33 U.S.C. §914(g). Thus, the plain language of Section 14 references a *single* compensable injury.

[1] The Board thus held that the administrative law judge's finding that employer could not retroactively establish suitable alternate employment was harmless error. *Parks*, slip op. at 5 n.3.

Vinson, 27 BRBS at 223. The Board also reasoned in *Vinson* that employer's voluntary payments of compensation to claimant for the 1987 work injury, which terminated upon claimant's return to work in 1989, could not rationally be deemed "advance" payments of compensation for the subsequent 1990 work injury that had yet to occur.[2] *Id.*

We reject employer's contention that *Vinson* rests on the fact that the claimant's two work injuries involved different body parts. Rather, the key to *Vinson*, and to this case, is that the claimants sustained two distinct injuries in separate work incidents. In this case, as in *Vinson*, the administrative law judge found that claimant sustained two separate work injuries. This finding is not challenged on appeal. The rationale in *Vinson* that the plain language of Section 14 as a whole references only a single compensable injury is directly on point. Moreover, as in *Vinson*, employer's voluntary compensation payments for total disability from October 1995 to January 2000 due to claimant's May 1995 wrist injury cannot rationally be construed as advance payments of compensation for the December 2000 wrist injury, which had yet to occur when employer terminated its payments upon claimant's return to work. The purpose of Section 14(j) is twofold: to prevent a double recovery to the claimant, and to encourage employers to voluntarily pay compensation. *Blanchette v. Director, OWCP*, 998 F.2d 109, 27 BRBS 58(CRT) (2d Cir. 1993); *Castronova v. General Dynamics Corp.*, 20 BRBS 139 (1987). In this case, claimant sustained two distinct periods of disability due to separate work injuries to her right wrist in May 1995 and December 2000. There is no double recovery to claimant from her receiving compensation during these two distinct periods of total disability. Construing Section 14(j) as permitting an employer to retrospectively establish the availability of suitable alternate employment for an initial work injury in order to create a credit to be applied against a second, separate injury, and thereby avoid paying compensation for the second work injury, is thus not consistent with either the language or purpose of Section14(j). Moreover, that the second injury aggravated a prior injury does not affect the analysis of this issue, as it is well established that an aggravation is a new injury under the Act. *See* discussion, *infra*.

Employer's reliance on *Krotsis* also is misplaced. In *Krotsis*, a hearing loss case, employer had obtained relief under Section 8(f), 33 U.S.C. §908(f), and the issue involved whether employer or the Special Fund was entitled to the credit for employer's prior payments for claimant's loss of hearing. The claimant filed a hearing loss claim in

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[2] Similarly, in *Liuzza v. Cooper/T. Smith Stevedoring Co., Inc.*, 35 BRBS 112 (2001), *aff'd*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002), the Board held, and the United States Court of Appeals for the Fifth Circuit affirmed, that employer cannot offset excess disability payments to decedent's estate under Section 14(j) against its liability for death payments to the claimant/widow because disability benefits cannot be viewed as an advance payment on the subsequent death claim. *Liuzza*, 35 BRBS at 114-117.

1979, for which employer made "voluntary" compensation payments pursuant to a settlement agreement that was not approved. Claimant filed a second claim in 1983, and the administrative law judge treated the case as involving one injury since the first claim had never been adjudicated, and he therefore entered one award.[3] Employer obtained Section 8(f) relief on this award and a credit for its prior payments. The Director appealed, asserting that the administrative law judge erred in crediting employer for payments on the 1979 claim against its liability on the 1983 claim and in thus ordering the Special Fund to reimburse employer. *Compare Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989)(in a case involving two successive scheduled injuries and Section 8(f), credit for initial payments is first applied to Fund liability). The fact that claimant's benefits were properly reduced by a credit was not at issue but, rather, the question concerned whether employer or the Special Fund was entitled to have its liability reduced by the amount of the prior payment.[4] The Board held that employer was entitled to a Section 14(j) credit on the single merged claim as its advance compensation payment exceeded its liability, pursuant to Section 8(f)(1), 33

[3] This "merger" of claims is unique to hearing loss injuries based on ongoing noise exposure. *See, e.g., Spear v. General Dynamics Corp.*, 25 BRBS 254 (1991); *Balzer v. General Dynamics Corp.*, 22 BRBS 447 (1989), *recon. en banc denied*, 23 BRBS 241 (1990) (Brown J., dissenting); *accord Berg v. Matson Terminal, Inc.*, 34 BRBS 140 (2000), *aff'd*, 279 F.3d 694, 35 BRBS 152(CRT) (9th Cir. 2002) (employer is liable for two separate 104-week periods of compensation under Section 8(f) as claimant sustained two distinct injuries to each knee, notwithstanding that the injuries arose from the same working conditions). In such cases, where separate claims are filed for the same injury which have not been adjudicated, the administrative law judge may merge the claims and determine the total percentage of loss of claimant's hearing, entering one award for the loss. More recently, however, the United States Court of Appeals for the Ninth Circuit has held that the merging of hearing loss claims in a multiple employer setting is improper. *Stevedoring Services of America v. Director, OWCP [Benjamin]*, 297 F.3d 797, 36 BRBS 28(CRT) (9th Cir. 2002); *see also Giacalone v. Matson Terminals, Inc.*, 37 BRBS 87 (2003).

[4] In 1983, claimant had a total impairment of 63.33 percent, resulting in compensation of $52,803.59, which was reduced by the prior payment of $16,179.47. The finding that claimant was thus entitled only to the remaining $36,624.12 was not in dispute. The administrative law judge further found that 56.9 percent of the loss occurred pre-employment and that only 6.4 percent was due to claimant's employment. As a result of the applicability of Section 8(f), employer was liable only for the 6.4 percent loss. Employer thus overpaid claimant for the employment loss, as this impairment resulted in compensation liability of $5,338.75. The Fund was ordered to reimburse employer for its overpayment of $10,840.72.

U.S.C. §908(f)(1), for claimant's work-related hearing loss. The Special Fund was liable for the claimant's pre-existing hearing loss, and thus it was required to reimburse employer for its overpayment. *Krotsis*, 22 BRBS at 130-131. Since the claims merged into one award, the Board rejected the Director's argument that the case was controlled by the "credit doctrine"[5] and that the Fund was thus entitled to the credit pursuant to *Brown,* 868 F.2d 759, 22 BRBS 47(CRT), holding instead that Section 14(j) applied. This result was affirmed by the Second Circuit. *Krotsis*, 900 F.2d at 511-512, 23 BRBS at 49-50(CRT). The application of Section 14(j) in *Krotsis* thus turns on the merger of the hearing loss claims into a single compensable hearing loss injury. *See* n. 3, *supra.* It is not premised on the existence of two injuries to the same body part, as employer suggests, but rather addresses the credit in the context of a single compensable hearing loss injury. *Compare Blanchette v. Director, OWCP*, 998 F.2d 109, 27 BRBS 58(CRT) (2d Cir. 1993) (as no argument for merger of the two claims had been pursued, the case involved two injuries and claims, and, under those circumstances, the Special Fund and not employer was entitled to the credit). There is no argument in the present case that the two claims can merge, or that claimant did not sustain two injuries. Moreover, in *Krotsis* the existence of a credit under the Act was not at issue, as it is in this case; the only dispute concerned whether the employer or the Special Fund would receive the credit.[6] As employer's contention in support of a credit is without merit, we deny employer's motion for reconsideration on this point.

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[5] In multiple injury cases, the "credit doctrine" has been developed to allow employer a credit for prior scheduled payments in cases involving successive scheduled injuries to the same body part. The credit doctrine is an extra-statutory remedy which allows a credit to employer in a scheduled permanent partial disability case where benefits have been paid for a prior percentage of loss to the same member; in such a case, employer is entitled to a dollar amount credit for the prior payment. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *see also Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989). The doctrine thus prevents double recoveries for the same permanent impairment. The credit doctrine has been limited to awards falling under the schedule, and thus cannot apply in this case in which claimant sustained two periods of temporary total disability. *See I.T.O. Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989); *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980).

[6] In *Blanchette v. Director, OWCP*, 998 F.2d 109, 27 BRBS 58(CRT) (2d Cir. 1993), the dispute similarly was limited to whether the employer or the Special Fund was entitled to a credit for benefits previously paid by employer. The existence of a credit against claimant's benefits was not at issue, as Section 14(j) would apply if the claims had merged and the credit doctrine applied if the injuries were analyzed separately.

We respectfully disagree with Judge McGranery's reasoning in dissent that *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001), and *McCabe Inspection Service v. Willard*, 240 F.2d 942 (2d Cir. 1957), support the award of a credit to employer in this case. The court in *Spitalieri* stated that the issue therein was "whether under 33 U.S.C. § 922 an employer who overpaid a claimant who was feigning temporary total disability is nevertheless liable to pay additional compensation for a permanent partial hearing loss *resulting from the same injury*." *Id.*, 226 F.3d at 172, 34 BRBS at 87(CRT) (emphasis added). The claimant sustained head, neck, back and leg injuries in a work accident, as well as a partial hearing loss and a psychiatric condition. Claimant was awarded temporary total disability benefits. Employer sought termination of the award through modification proceedings on the ground that claimant could return to his usual work, and claimant sought permanent partial disability benefits for his scheduled hearing loss arising out of the accident. The court held that the award was properly terminated and employer was entitled to credit its overpayment of temporary total disability benefits against its liability for the scheduled hearing loss benefits, as such a credit is mandated by the language of Section 22 of the Act.[7]

In *McCabe*, the employer paid to claimant his regular wages at a rate higher than claimant would receive as temporary total disability benefits. Claimant's disability was subsequently mitigated to permanent partial. The Second Circuit held employer could credit the overpayment of temporary total disability benefits against its subsequent liability for permanent partial disability for the same injury, notwithstanding that employer was unaware of a permanent disability at the time it made the payments. *McCabe*, 240 F.2d at 943.

In these two cases, unlike the present case, there was only a single work injury for which claimant was overcompensated. In *Spitalieri*, the credit was supported by the applicable statutory provision, Section 22, and *McCabe* is consistent with *Vinson* in allowing a credit when only a single injury is involved, regardless of the type of disability resulting from that injury. These cases, however, do not support the proposition that employer is entitled to credit an overpayment for one injury against an injury that occurs in a subsequent accident. An injury occurring in a separate accident that aggravates a prior condition, even involving the same body part, is considered to be a "new injury" within the meaning of the Act. *See generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Bath Iron Works Corp. v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001); *Bath Iron Works Corp. v.*

[7] Section 22 states that if benefits are decreased by virtue of a modification order, "any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation. . . ." 33 U.S.C. §922.

Director, OWCP [Jones], 193 F.3d 27, 34 BRBS 1(CRT) (1st Cir. 1999). In this case, claimant had an injury in 1995, for which benefits were paid during the period when she was out of work from October 1995 to January 2000. Following her return to work, she sustained a second injury in a fall at work on December 26, 2000. Thus, the cases involving a single injury are not on point.

We also respectfully disagree with Judge Boggs's reasoning that *Blanchette v. Director, OWCP*, 998 F.2d 109, 27 BRBS 58(CRT) (2d Cir. 1993), supports holding that employer may credit excess compensation payments for one injury against benefits due for a subsequent injury to the same body part. *Blanchette*, like *Krotsis*, construed the interplay between a hearing loss claims and Section 8(f) where prior payments were made. Unlike *Krotsis* where two hearing loss claims were merged into a single claim, in *Blanchette* successive hearing loss claims were not merged. The court held that the credit doctrine limited the liability of the Special Fund for the first hearing loss injury, and that employer was liable for the full extent of its liability for the second hearing loss injury, pursuant to the specific language of Section 8(f). Thus, employer in *Blanchette* was not permitted under Section 8(f) to credit its compensation payments for the first injury against its liability for the second injury. *Id.*, 998 F.2d at 115, 27 BRBS at 66(CRT). The court stated that employer would be entitled to a Section 14(j) credit only if the two hearing loss claims had merged into a single claim, in which case employer would not therefore also be entitled to Section 8(f) relief. *Id*., 998 F.2d at 115-116, 27 BRBS at 68(CRT). In this case, as we have discussed, there is no basis for merger of claimant's claims for his separate injuries. The court's statement in *Blanchette* that "whether by application of the credit doctrine or the rule of Section 14(j), employers are protected against double payments to an employee for an overall disability," *id.*, 998 F.2d at 116, 27 BRBS at 71(CRT), in context states the law applicable in scheduled hearing loss cases where either Section 14(j) or the credit doctrine applies, depending on whether the case involves a single or successive injuries. *See* n. 6, *supra.* In this case, since the employee suffered two distinct injuries, each with a period of disability, there is no possibility of a double recovery. Thus, *Blanchette* does not support a credit for employer on the facts presented here.

Employer also moves for reconsideration of the Board's affirmance of the administrative law judge's average weekly wage determination. Employer argues that the Board erred in holding that claimant's average weekly wage need not be based on claimant's wages from the entire year prior to her 2000 work injury. Employer further contends that the Board and the administrative law judge erred by assuming that claimant worked a steadily increasing number of hours per week prior to her injury. In his decision, the administrative law judge credited claimant's earnings as listed on employer's First Report of Injury, Form LS-202, for her December 26, 2000, injury, which stated that at the date of her injury claimant was earning $6.76 per hour, and that she had an average daily wage of $54.08, a weekly wage of $290.40, and a yearly rate of

$14,108. EX 7. Based on this form, which the administrative law judge found was uncontradicted, the administrative law judge determined that claimant's average weekly wage at the time of her injury was $290.40. In his findings of fact, the administrative law judge credited claimant's testimony that she retuned to work in January 2000 for employer part-time, and that she gradually increased the number of hours she worked over the next year until in January 2001 she attained the same earning level as she had prior to her May 1995 injury. Decision and Order at 5; *see* Tr. at 32.

In its appeal to the Board, employer contended only that claimant's average weekly wage should be calculated pursuant to Section 10(a), 33 U.S.C. §910(a), since claimant worked 49 and 5/7 weeks prior to her December 2000 injury. In its decision, the Board held the claimant's payroll records fail to show the actual number of days claimant worked during the year preceding her injury, and that Section 10(a) is therefore inapplicable. *Parks*, slip op. at 9. Under Section 10(c), which applies, *inter alia*, if Section 10(a) cannot be applied, the administrative law judge has broad discretion to derive a reasonable estimate of claimant's annual earning capacity at the time of injury. *See, e.g., Story v. Navy Exchange Center*, 33 BRBS 111 (1999). The Board thus affirmed the administrative law judge's crediting the wage information contained in employer's First Report of Injury, Form LS-202, as establishing claimant's average weekly wage for her December 2000 injury. The Board rejected employer's contention that claimant's average weekly wage should be based on claimant's wages from the entire year prior to her injury. A calculation of wages under Section 10(c) should account for increased wages or hours. Employer's calculation would not reflect the steady increase in the number of hours claimant worked after she returned to work part-time from her May 1995 work injury in January 2000. *See Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). The Board also held that the administrative law judge's use of claimant's earnings at the time of injury fully compensates her for the earnings she lost due to her injury. *See generally Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980). Inasmuch as employer's argument that claimant's average weekly wage must be based on claimant's wages from the entire year prior to her injury was previously considered and rejected by the Board in its initial Decision and Order and employer has failed to make any persuasive argument as to why this determination is in error, we affirm our prior determination.[8]

[8] Moreover, the record supports the administrative law judge's finding that claimant worked increasing hours after she returned to work in January 2000 from her May 1995 work injury. Employer's wage records show that claimant worked approximately 18 hours per week from January to May 2000, and that she averaged approximately 34 hours per week through December 2000. EX 88. Employer's wage records document that claimant received a pay increase effective July 16, 2000, from $6.50 to $6.76 per hour. EX 87.

We reject employer's contention that claimant and employer stipulated to claimant's average weekly wage and that the administrative law judge erred by ignoring this stipulation, as this issue is not properly before the Board at this juncture. Although employer raised the administrative law judge's average weekly wage finding in its initial appeal to the Board, employer did not argue that the parties stipulated to claimant's average weekly wage. Employer cannot raise this argument for the first time in a motion for reconsideration. *See Ravalli v. Pasha Maritime Services*, 36 BRBS 91, *denying recon. in*, 36 BRBS 47 (2002); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998). Thus, we reject employer's motion for reconsideration on the average weekly wage issue.

Employer next contends that claimant's attorney is not entitled to a fee under Section 28(b) of the Act, 33 U.S.C. §928(b). The Board affirmed the administrative law judge's finding that employer is liable for claimant's attorney's fee under Section 28(a) because employer did not pay claimant any benefits after she filed her claim on March 30, 2001, and the claim was successfully prosecuted. The Board stated that it need not address employer's contention under Section 28(b). *Parks*, slip op. at 11.

Employer argues that, pursuant to *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986) (*en banc*), its settlement offer on August 10, 2001, exceeded claimant's ultimate recovery; therefore, claimant's attorney is limited to a fee for attorney and paralegal time expended before the date of its offer. In his supplemental decision, the administrative law judge rejected employer's contention. The administrative law judge found that employer's offer was contingent on claimant's waiving entitlement to future compensation and medical benefits for her December 2000 wrist injury, which is not a valid tender of compensation under Section 28(b).

Pursuant to Section 28(b) of the Act, when an employer pays or tenders benefits without an award and thereafter a controversy arises over additional compensation due, the employer is liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by the employer. *See*, *e.g.*, *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). In *Armor*, the Board held that the term "tender" in Section 28(b), means "a readiness, willingness and ability on the part of employer or carrier, expressed in writing, to make . . . a payment to the claimant." *Armor*, 19 BRBS at 122. In *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003), the United States Court of Appeals for the Ninth Circuit held that a "tender" is "an unconditional offer of money or performance to satisfy a debt or obligation." *Richardson*, 336 F.3d at 1107, 37 BRBS at 83(CRT). Thus, the Board has held that an offer to pay contingent on claimant's agreeing to a stipulation is not an unconditional offer and is therefore not a

tender within the meaning of Section 28(b). *Jackson v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 39 (2004).

In this case, the administrative law judge found that employer did not make an unconditional offer on August 10, 2001, to settle the claim, pursuant to Section 8(i), 33 U.S.C. §908(i). Employer's lump sum offer of $2,000 in compensation is greater than the amount of compensation claimant was ultimately awarded by the administrative law judge for her 2000 injury. However, employer's settlement offer was conditioned on claimant's waiving her entitlement to future compensation and medical benefits that may arise due to her work injury.[9] Employer further required that claimant agree to close out all liability for a left foot injury claim, which employer's letter indicates claimant sustained on August 31, 2000. Thus, employer's offer was not limited to the outstanding issue before the administrative law judge of claimant's entitlement to temporary total disability for a defined five-week period, and for the outstanding medical bills related to claimant's work injury. Employer's future liability for compensation, such as any permanent partial disability due to claimant's wrist injury, and medical benefits related to the wrist and foot claims may well prove in excess of the amount employer offered to settle all of its future liability for these claims.[10] Thus, after rejecting employer's settlement offer, claimant remains entitled to continuing medical benefits and possibly to additional compensation for her right wrist and the left foot injury. Accordingly, Section 28(b) does not preclude employer's liability for an attorney's fee as it did not unconditionally tender benefits and as claimant has an inchoate right to future benefits in excess of employer's offer. *See Jackson*, 38 BRBS 39; *see also E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

Finally, employer requests reconsideration of the Board's affirmance of the hourly rate the administrative law judge awarded for paralegal work, $55 and $65. Employer argues that claimant failed to disclose the person's name and credentials, and the Board erred by placing on it the burden of proof to show that the administrative law judge's finding was unreasonable. Employer also argues that the Board denied it the right to discovery and a hearing on the attorney's fee issue.

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[9] Employer's offer stated: "[T]he settlement would be under section 8(i), closing out all liability and would include a (sic) 8/31/00, which is a medicals only file." Employer's Objections to Claimant's Fee Petition at EX B.

[10] For example, there is no evidence claimant's right wrist has been rated for any permanent partial disability. *See* CX 16. Thus, claimant may be entitled to future compensation in excess of the offer. Moreover, there is no evidence that claimant will not require future medical treatment for her wrist condition.

Employer's contentions are rejected. Employer's brief on appeal did not request discovery and a hearing. Employer's Petition of Attorney Fee Award at 5-13. Moreover, these requests should have been made to the administrative law judge, who is authorized to make findings of fact and not the Board. *See generally McCloud v. George Hyman Constr. Co.*, 11 BRBS 194 (1979). In this regard, a hearing is not required where the fee request is before the administrative law judge before whom the work was performed. *Parks v. Newport News Shipbuilding & Dry Dock Co*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table). Furthermore, it is well established that on appeal, the burden of proof is on the challenging party to show error in the administrative law judge's fee award. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272. (1994). Thus, the burden of proof is on employer to show error in the hourly rate the administrative law judge awarded for paralegal work.

In his supplemental decision, the administrative law judge relied upon his experience for work performed in Maine to find reasonable the requested hourly rates for attorney time and paralegal work. Supplemental Decision at 4. In its decision, the Board held that employer did not meet it burden of showing the administrative law judge abused his discretion in finding reasonable the hourly rate requested for paralegal work. *Parks*, slip op. at 13. Inasmuch as claimant's fee petition complies with the regulatory criterion for specificity, which does not require that the fee petition include the name and qualifications of the person performing the services, and the administrative law judge rationally relied upon his experience for work performed in Maine, employer has failed to show that the administrative law judge abused his discretion. *See* 20 C.F.R. §702.132; *see also McKnight v. Carolina Shipping Co.*, 32 BRBS 251, *aff'g on recon. en banc*, 32 BRBS 165 (1998). Therefore, we deny employer's motion for reconsideration of the Board's affirmance of the administrative law judge's fee award.

Accordingly, employer's motion for reconsideration is denied and the Board decision is affirmed in all respects. 20 C.F.R. §§801.301(c), 802.409.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

We concur:

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent. I would vacate the administrative law judge's decision and remand the case for the administrative law judge to reconsider claimant's average weekly wage, to award employer a credit for any overpayment made for the first injury and to award claimant an appropriate attorney's fee.

First, I dissent from the majority's determination that it need not address on reconsideration employer's contentions that claimant and employer stipulated to claimant's average weekly wage and that the administrative law judge erred by ignoring this stipulation. Although I agree that employer did not raise this specific contention in its initial Petition for Review and brief, employer did challenge the administrative law judge's average weekly wage determination, and the cases cited by the Board as prohibiting employer from raising a new issue on reconsideration are not dispositive. In this case, unlike *Ravalli v. Pasha Maritime Services*, 36 BRBS 91, *denying recon. in*, 36 BRBS 47 (2002) and *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998), employer raised the issue of claimant's average weekly wage in its appeal. Inasmuch as there is evidence supporting employer's contention, I would remand the case for the administrative law judge to determine whether the parties stipulated to claimant's average weekly wage for the December 2000 work injury, and if they did, whether he accepts or rejects that stipulation. *See* Tr. at 7-10; *see, e.g., Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989) (administrative law judge must give the parties notice if he will not accept their stipulation).

Second, I dissent from the majority's determination that employer may not credit excess compensation payments for claimant's disability following her May 1995 right wrist injury against its compensation liability for disability following claimant's December 2000 right wrist injury. According to the medical evidence which the administrative law judge credited, claimant's second, right wrist injury exacerbated her first, right wrist injury. As a result of the combination of the two injuries, claimant developed carpal tunnel syndrome which required surgery. Decision and Order at 7, 10. Following the surgery, claimant was unable to work in 2001 for approximately ten weeks. This was claimant's second period of total disability. Employer seeks to reduce its liability for compensation for this period by the amount of any overpayment made for claimant's disability following her first injury to her right wrist in 1995.

Employer's request for a credit is supported by Section 14(j) of the Longshore and Harbor Workers' Compensation Act[1] and by caselaw. Employer is entitled to a credit for any overpayment related to claimant's first injury because the disability she suffered following her second injury was caused by a combination of the two injuries. Under these circumstances, an overpayment for disability following the first injury should be deemed an advance payment for disability following the second injury. 33 U.S.C. §914(j). To deny employer a credit for overpayment made in connection with the first injury is to award claimant a double recovery, since the disability following the second injury resulted from both injuries. Although the majority insists that there is no double recovery because the compensation awarded is for two distinct periods of disability, the significant fact is that the first injury was a cause of both periods of disability. For that reason, if claimant is permitted to keep the overpayment she received for disability from her first injury in addition to the compensation for disability caused by both her first and second injuries, she will have a double recovery.

The majority's reasoning that employer's voluntary payments of compensation to claimant for the 1995 work injury, which terminated upon claimant's return to work in January 2000 could not rationally be deemed "advance" payments of compensation for the subsequent, December 2000 work injury that had yet to occur is specious because the compensation at issue is for disability, not for the injury *per se*, and claimant's second period of total disability was caused by the combination of the first and seconds injuries. In *Director, OWCP v. General Dynamics Corp. [Krotsis]*, 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990), the Second Circuit held that, pursuant to *McCabe Inspection Service v. Willard*, 240 F.2d 942 (2d Cir. 1957), a payment for temporary total disability "may be credited as compensation in advance of an award even though the employer did not foresee the later claim." *Krotsis*, 940 F.2d at 511, 23 BRBS at 49(CRT). In *McCabe*, the Second Circuit had affirmed the district court's express finding that wage payments in lieu of compensation for temporary total disability constituted advance payments of compensation for a subsequent permanent partial disability award within the meaning of Section 14(k) (now 14(j)). *McCabe*, 240 F.2d at 943. The Second Circuit went on to state that employer properly received a credit, even though at the time it made the payments for temporary total disability payments it was unaware that claimant would sustain a permanent disability from the injury. *Id*.

[1] 33 U.S.C. §914(j) provides:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

Employer's right to a credit is also supported by the Second Circuit's decision in *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001). The *Spitalieri* court reversed the Board's decision denying employer a credit for overpayment of compensation for temporary total disability against employer's liability for hearing loss caused by the same work accident. The court stated that, "refusal to apply a credit for overpayment of an unscheduled award against a schedule award arising out of the same accident has no basis in common sense or the statute." *Id*., 226 F.2d at 173, 34 BRBS at 89(CRT). The Second Circuit's rationale applies to the instant case because claimant's first injury resulted in disability following both injuries. Common sense requires that an overpayment for disability following the first injury reduce employer's liability for the disability caused by both the first and second injuries.

The majority's attempt to distinguish *Spitalieri* from the instant case is unavailing. The majority asserts that *Spitalieri* does not support the proposition that employer is entitled to credit an overpayment for one injury against an injury that occurs in a subsequent accident. The premise of the majority's argument does not apply to the case at bar. Employer seeks to credit an overpayment for disability resulting from the 1995 right wrist injury against its liability for disability following the second right wrist injury in 2000, because that disability resulted from the combination of the two wrist injuries.

Likewise misleading is the majority's citation to cases which demonstrate the principle that an injury occurring in a separate accident that aggravates a prior condition, even involving the same body part, is considered a new injury. That principle has no bearing upon employer's right to a credit for overpayment of compensation after the first injury, against liability for compensation owed after the second injury, because the latter compensation was for disability caused by the first as well as the second injuries.

Because the second injury in the instant case constituted an aggravation of the first, the majority's reliance upon *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993), is misplaced. In *Vinson*, the Board specifically held, "[O]ur review of Section 14 in *toto* indicates that Section 14(j) was not intended to allow an employer to credit an overpayment of compensation made as a result of an injury arising

under the Act against a subsequent, non-related work-injury.[2] *Vinson,* 27 BRBS at 223 (emphasis added). Thus, the denial of a Section 14(j) credit in *Vinson* was explicitly premised, in part, on the fact that the claimant's work injuries involved different body parts.[3]

As in *Spitalieri*, employer should be allowed to credit its overpayment. In this case, employer should be allowed to credit against its compensation liability for disability following the December 2000 right wrist injury any excess compensation payments made to claimant for the initial right wrist injury as a consequence of its retroactively establishing the availability of suitable alternate employment during the period after claimant's first injury, when it voluntarily paid compensation for temporary total disability. Accordingly, I would remand the case to the administrative law judge to discuss employer's evidence of suitable alternate employment, which, as the Board noted in its initial decision, the administrative law judge declined to address on an improper basis. *See Parks*, slip op. at 5 n.3.

Third, I would vacate the attorney's fee award. Although I agree with the majority that employer has failed to demonstrate the administrative law judge erred in applying Section 28(a) of the Act, because I would vacate the award of benefits and remand the case for reconsideration of the average weekly wage and credit for employer, I would also vacate the attorney's fee award. The administrative law judge should reconsider the amount of the attorney's fee in light of the benefits awarded on remand in accordance with *Hensley v. Eckerhart*, 461 U.S. 424 (1983). I agree with the majority that

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[2] The Board also held in *Vinson*:

> As Section 14 references a single work injury, it would not be logical to interpret Section 14(j) as allowing an overpayment of compensation for one injury to be credited against compensation due on a subsequent, **unrelated** injury. We therefore hold that, pursuant to Section 14(j), an employer is not entitled to reduce its liability for compensation due as a result of a subsequent work-related injury by crediting an overpayment of compensation made as a result of a prior, **unrelated** work injury."

Vinson, 27 BRBS at 223 (emphasis added).

[3] Similarly, *Liuzza v. Cooper/T. Smith Stevedoring Co., Inc.,* 35 BRBS 112 (2001), *aff'd,* 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002), has no application to this case inasmuch as the holdings therein were based on the well-settled principle that a worker's claim for disability benefits and a widow's claim for death benefits involve separate and distinct rights.

employer's specific contentions on reconsideration regarding the attorney's fee award are without merit.

In sum, I believe the administrative law judge's decision should be vacated and the case remanded for the administrative law judge to consider employer's arguments regarding claimant's average weekly wage and application for credit. After properly determining the compensation to which claimant is entitled, the administrative law judge can determine an appropriate attorney's fee award.

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REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determinations that employer did not timely raise its contention that the administrative law judge ignored the parties' stipulation to claimant's average weekly wage for her December 2000 work injury, and that employer may not credit excess compensation payments for claimant's May 1995 right wrist injury.

In its Petition for Review, employer specifically raised the stipulation of the average weekly wage as an issue, stating, "[T]he parties stipulated the year before the injury, 2000, the claimant worked 49 5/7 weeks and earned $9,865.97 (EX-88 at 4, Tr. at 6:23-10:3).... The judge wrongfully ignored the parties' factual stipulation…." Employer's Petition for Review at 47. The Petition for Review thus raised the issue for consideration by this Board. Further, for the reasons cited by Judge McGranery, I conclude that employer also raised the overall issue of claimant's average weekly wage in its appeal, and that there is evidence supporting employer's contention as to the existence of a stipulation. Therefore, I would remand the case for the administrative law judge to determine whether the parties stipulated to claimant's average weekly wage for the December 2000 work injury, and if they did, whether he accepts or rejects that stipulation.

With respect to the question of crediting of excess compensation, I am persuaded by the reasoning of *Blanchette* v. *Director, OWCP*, 998 F.2d 109, 27 BRBS 58(CRT) (2d Cir. 1993), that employer is entitled to credit any excess compensation it paid for claimant's May 1995 right wrist injury against its compensation liability for claimant's December 2000 right wrist injury.

As in *Blanchette*, claimant in this case sustained successive work injuries which were not merged, the second injury aggravated the first, and employer is liable for the resulting overall injury.[1] Also as in *Blanchette*, claimant previously received payment for disability resulting from the first injury. Recognizing that employer's previous overpayment of the amount due for the disability caused by the first injury constituted payment for a portion of the overall injury, the court in *Blanchette* found that credit should be allocated for the overpayment. *Blanchette,* 998 F.2d at 115-116, 27 BRBS at 69-71(CRT).[2] For that same reason, employer should be allowed a credit under Section 14(j) here if it is determined that it overpaid the amount due for the first injury.

[1] The claimant in *Blanchette* suffered a 31.5 percent hearing loss from the first injury, which was added to by the second injury, resulting in a 33.85 percent overall hearing loss. Similarly here, claimant suffered persisting pain and weakness in her right wrist from the first injury which was added to by the second wrist injury, resulting in a cumulative injury for which employer is liable. Claimant testified that, following the first injury, she saw a number of physicians, but that her condition did not improve. She further testified that those symptoms remained the same after the second injury, but were intensified. Tr. at 27-37. The notes of claimant's treating physicians also indicate that claimant suffered from persistent symptoms after the first injury. CXs 21, 22. In his decision, the administrative law judge found that the December 2000 right wrist injury aggravated claimant's pre-existing wrist condition. Decision and Order at 6-11. The administrative law judge credited the opinion of Dr. Kalvoda that claimant's initial wrist injury contributed to claimant's discomfort because the first injury never resolved and claimant had similar complaints after the second injury. CX 16 at 79. Dr. Vigna opined that claimant developed carpal tunnel syndrome secondary to both wrist injuries. CX 17 at 85. And Dr. Phelps also opined that the need for carpal tunnel surgery was the result of both injuries. CX 31A.

[2] The court in *Blanchette* allocated the credit for the employer's payments to the Special Fund because of the operation of Section 8(f); however, Section 8(f) is not relevant here.

Accordingly, I would vacate the award of benefits and remand the case for the administrative law judge to determine the existence and proper application of the alleged stipulation of claimant's average weekly wage, as well as the amount of credit due for employer's overpayment of compensation for claimant's May 1995 right wrist injury; to adjust the compensation award for claimant's December 2000 right wrist injury as necessary; and to reconsider the attorney's fee in light of the extent of claimant's success on remand.

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JUDITH S. BOGGS
Administrative Appeals Judge