BRB Nos. 99-443
and 99-443A

LONNIE PORTER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
DIX SHIPPING COMPANY	)	
	)	DATE ISSUED:_____
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order, the Order on Claimant's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Phil Watkins, Corpus Christi, Texas, for claimant.

Charles F. Herd, Jr. and Michael P. Nassif (Rice Fowler), Houston, Texas, for employer/carrier.

Before: Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order, the Order on Claimant's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees (98-LHC-283) of Administrative Law Judge Larry W. Price rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation

Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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 the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On March 18, 1988, while claimant and others were working to unload pipes from the hold of a ship, claimant and two co-workers were injured when the pipes broke free from the crane and fell. Claimant was hit by falling pipes and was also thrown against the bulkhead of the ship. He hurt his neck, back, knee and leg, and employer voluntarily paid temporary total disability benefits and medical benefits.[1] Emp. Ex. 1; Tr. at 71-74, 78. The administrative law judge found that claimant's knee and leg condition reached maximum medical improvement on March 7, 1989, and that his back and neck condition reached maximum medical improvement on December 1, 1993. In April 1995, while at his son's basketball game, claimant stood to cheer and ruptured his C4-5 disc. Tr. at 90-91. Claimant has not

[1]Claimant broke his right fibula, and he underwent surgical fasciotomies and a skin graft in March 1988. Claimant also tore the medial meniscus in his right knee, and he underwent arthroscopic surgery in March 1989. MRIs revealed herniated discs in his cervical spine at C5-6 and C6-7, and claimant underwent a diskectomy and double fusion in November 1992. The C6-7 bone plug collapsed and a repeat fusion was performed in April 1993. Emp. Ex. 11. MRIs also revealed abnormalities, including a possible herniation, in claimant's lumbar spine at L4-5 and L5-S1, which have yet to be treated. Cl. Ex. 1 at 96, 98; Cl. Ex. 2; Emp. Ex. 11.

attempted to return to any work since the 1988 injury. Tr. at 149 The administrative law judge awarded claimant periods of temporary total and permanent partial disability benefits. Decision and Order at 21, 25-26. On reconsideration, the administrative law judge amended his award to account for inflation by adjusting claimant's post-injury wage-earning capacities from $180 per week to $150.42 per week and from $110 per week to $81.20 per week; otherwise, he reaffirmed his decision. Both claimant and employer appeal these decisions. BRB Nos. 99-443/A.

In a supplemental decision, the administrative law judge awarded claimant's counsel a fee of $11,969 for services rendered, plus $8,554.86 in expenses. Employer appeals the fee award, challenging the finding that it is liable for any fee, and also challenging the amount of the fee awarded. Claimant responds, urging affirmance.

Causation

First, employer contends the administrative law judge erred in finding that claimant's C4-5 injury and his lumbar injury are related to the work accident. *See* Decision and Order at 18-20. The administrative law judge stated that, although employer presented evidence rebutting the presumed causal relationship between the neck injury and the work accident, he gave greater weight to Dr. Echeverry's opinion because Dr. Barrash failed to explain to his satisfaction the possibility that the rupture of the C4-5 disc was affected by the previous work-related double fusion at C5-6 and C6-7. Moreover, the administrative law judge stated that Dr. Barrash's opinion did not fully explain how a routine movement such as jumping up alone could have caused the C4-5 herniation. Decision and Order at 18. Thus, he concluded

that the C4-5 injury is the natural result and unavoidable consequence of the work injury. *Id.* With regard to the lumbar condition, the administrative law judge held that employer's evidence that the problem may have been caused by the aging process is not specific enough to serve as rebuttal. Additionally, even after weighing the evidence of record as a whole, the administrative law judge concluded that the lumbar injury is work-related. *Id.* at 19-20.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after the claimant establishes a *prima facie* case, *i.e.*, the claimant demonstrates that he suffered an injury and that the accident occurred, or conditions existed, at work which could have caused that harm. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once the claimant establishes his *prima facie* case, a presumption is created which the employer can rebut by producing substantial evidence establishing the absence of a connection between the injury and the employment. *Gooden*, 135 F.3d at 1066, 32 BRBS at 59(CRT). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). In a case involving a subsequent injury, an employer can rebut the Section 20(a) presumption by showing that the claimant's disabling condition was caused by a subsequent event, not related to his work, provided the employer also proves that the subsequent event was not caused by the claimant's work-related injury. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *James v. Pate Stevedoring Co.*, 22

BRBS 271 (1989). The employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury; however, where the second injury is the result of an intervening cause, the employer is relieved of liability for that portion of the disability attributable to the second injury. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

In this case, there is no dispute regarding whether claimant established a *prima facie* case and invoked the Section 20(a) presumption for the neck injury: claimant sustained a traumatic injury at work which could have harmed his cervical spine. As a result, claimant underwent two fusions of his cervical discs at C5-6 and C6-7. In April 1995, claimant ruptured the cervical disc at C4-5. Dr. Barrash, employer's expert, opined that the C4-5 injury is a new injury which was caused by jumping up and is unrelated to the work injury. Emp. Ex. 11; Tr. at 183, 196-197. Dr. Echeverry, claimant's treating physician, believed that claimant's neck problems are related to his work injury and that the C4-5 injury is specifically related to the surgeries, as the vertebrae attempted to compensate for the lack of motion in the spine due to the fusions. Cl. Ex. 1 at 26-27. The administrative law judge found both doctors credible; however, he gave greater weight to Dr. Echeverry's opinion because he concluded that Dr. Barrash did not satisfactorily explain how a routine movement could cause such an injury or fully address the effect on the neck of the lack of motion due to the fusions. Decision and Order at 18. Thus, there is substantial evidence in the record as a whole which supports the administrative law judge's finding that claimant's C4-5 injury is

related to his industrial accident, and we affirm his finding.[2] *Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992); *Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

With regard to the causal relationship between claimant's lumbar injury and his work accident, the administrative law judge found that claimant established a *prima facie* case by producing evidence of a lumbar injury and an incident at work which could have caused that harm. Thus, he invoked the Section 20(a) presumption. Decision and Order at 19. The administrative law judge then noted Dr. Barrash's opinion that there is nothing in claimant's lumbar spine which would restrict his ability to work; however, there was a bulge and some

[2]We reject employer's assertion that the administrative law concluded that Dr. Barrash's opinion "rebuts" Dr. Echeverry's "position," thereby overshadowing all of claimant's evidence on causation. Decision and Order at 17. Contrary to employer's argument, its rebuttal evidence does not eliminate claimant's evidence; rather, it eliminates the presumption and the case must be decided on the record as a whole. Review of the administrative law judge's statements in context reveals his analysis of the record as a whole and his clear intention to give greater weight to Dr. Echeverry's opinion. Decision and Order at 17-18. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

degeneration. Dr. Barrash believes those conditions are due to the aging process rather than any work incident. Emp. Exs. 11, 15; Tr. at 172-173. The administrative law judge found that employer's evidence was not specific enough to rebut the presumption. We need not decide whether the administrative law judge's determination in this aspect is correct, *see generally Conoco, Inc. v. Director, OWCP*, 194 F.3d 684 (5th Cir. 1999), as he clearly stated that he weighed all the evidence and found claimant's lumbar condition to be work-related. Decision and Order at 20; Cl. Exs. 1-2; Emp. Ex. 11. Thus, any error in failing to conclude that employer rebutted the presumption is harmless, *Reed v. The Macke Co.*, 14 BRBS 568 (1981), and we affirm his conclusion that the lumbar injury is also work-related, as it is supported by substantial evidence of record which shows that evaluations revealed a lumbar strain as well as a protrusion/herniation at L4-5 and L5-S1 following the 1988 incident. Cl. Ex. 1; Emp. Ex. 11.

Suitable Alternate Employment

Claimant contends he is totally disabled and that the administrative law judge erred in accepting employer's vocational evidence and in finding that employer established the availability of suitable alternate employment.[3] Claimant argues that the positions submitted

[3]Initially, claimant argues that the administrative law judge erred in admitting the reports and testimony of Nancy Favaloro, employer's vocational rehabilitation expert, as employer failed to comply with the administrative law judge's orders for her to present them within a reasonable time before the hearing. Further, claimant challenges employer's failure to file a motion prior to submitting the evidence in response to claimant's rebuttal vocational evidence. We reject claimant's arguments and hold that the administrative law judge acted within his discretion in admitting this vocational evidence and ascertaining the rights of the parties, as the administrative law judge need not adhere to the

by Ms. Favaloro do not represent work which he is able to perform, and, in any event, that employer cannot retroactively establish the availability of suitable alternate employment. Once a claimant establishes that he cannot return to his usual work, as here, the burden shifts to his employer to demonstrate the availability of suitable alternate employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If employer establishes the availability of suitable alternate employment, the claimant is, at most, partially disabled, commencing on the date the showing is made. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991) (decision on recon.).

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formal rules of evidence, but he must admit relevant evidence and he must conduct his inquiry so as to best ascertain the rights of the parties. *Brown v. Washington Metropolitan Area Transit Authority*, 16 BRBS 80 (1982), *aff'd*, No. 84-1046 (D.C. Cir. 1984); *Williams v. Marine Terminals Corp.*, 14 BRBS 728 (1981); 20 C.F.R. §§702.338-702.339.

Claimant contends the administrative law judge erred in finding him partially disabled prior to 1998, as employer failed to present evidence of alternate employment until 1998.[4] In this case, Nancy Favaloro, employer's vocational rehabilitation expert, performed a labor market survey and filed a report on July 15, 1998. In the report, she identified jobs she believed were suitable for claimant both in 1998 and in 1994.[5] Emp. Ex. 16. In the report, she identified jobs as a dispatcher, delivery driver, telemarketer, security guard, and photo lab worker as suitable in 1998, and jobs as a vehicle service attendant, house person, assembly worker, forklift driver, and custodian as suitable for claimant in 1994.[6] Contrary to claimant's overall assertion, employer may perform a labor market survey in 1998 to

[4]We reject claimant's argument that employer failed to establish the availability of suitable alternate employment. It is within the administrative law judge's discretion to accept or reject evidence as he deems proper and to assess the credibility of the witnesses. In the instant case, he credited the testimony and reports of Ms. Favaloro over that of Mr. Kramberg, and the opinions of Drs. Barrash and Echeverry, while rejecting as too conservative the opinion of Dr. Gutzman, with regard to claimant's physical abilities. That the two doctors credited do not agree on every aspect of claimant's condition does not render the administrative law judge's decision irrational. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).

[5]Ms. Favaloro reported that the employers she contacted "currently hire for these positions and stated that these jobs were most definitely available in 1994 as well." Emp. Ex. 16 at 6. She used Dr. Echeverry's September 1994 OWCP-5 form to determine claimant's work restrictions at that time.

[6]Dr. Echeverry essentially gave claimant no restrictions related to his neck in 1994. Cl. Ex. 2. There are no restrictions of record related to claimant's knee or leg. After the 1995 incident, Dr. Echeverry prohibited claimant from lifting over 10 pounds, bending, kneeling, climbing, twisting, and from extended sitting. Cl. Ex. 1 at 14-23, 83. Ms. Favaloro noted that both Drs. Barrash and Echeverry believed it best for claimant to return to sedentary work, although Dr. Echeverry would not commit to a number of hours per day and would rather claimant determine for himself his durability. Cl. Ex. 1 at 15, 21, 65; Emp. Ex. 20.

establish the availability of suitable alternate employment at an earlier time. *Dollins*, 949 F.2d at 185, 25 BRBS at 90(CRT); *Rinaldi*, 25 BRBS at 128. However, the administrative law judge may project those positions only back to the date of their availability. From Ms. Favaloro's report, it is clear that the positions she identified were available sometime in 1994. Thus, the administrative law judge should not have projected their availability back to either March 7, 1989, or December 1, 1993, the dates he found claimant's conditions reached maximum medical improvement. *Id.* Therefore, we vacate the awards of partial disability benefits commencing on March 7, 1989, and December 1, 1993, as it is evident that employer had not demonstrated the availability of suitable alternate employment at those times. On remand, the administrative law judge must determine the date in 1994 on which employer established the availability of suitable alternate employment. Claimant is entitled to total disability benefits until that time, as it is only then that claimant's condition may change from total to partial.

Maximum Medical Improvement

Claimant also contends the administrative law judge erred in finding two different dates of maximum medical improvement. He asserts there should be only one and that should occur after all his conditions resolve. Employer argues that the date on which claimant's knee and leg reached maximum medical improvement is moot, as claimant was still disabled and receiving temporary total disability benefits until his back and neck reached maximum medical improvement.

Maximum medical improvement is the date which separates a temporary disability

from a permanent disability, not a total disability from a partial disability. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). When there are multiple conditions resulting from a work injury, they may heal at different rates. *See Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17 BRBS 183 (1985). In this case, there is evidence of record credited by the administrative law judge that claimant's knee and leg conditions resolved by March 7, 1989, and that his neck and back conditions did not reach maximum medical improvement until December 1, 1993.[7] Emp. Ex. 11. Consequently, it was not incorrect to conclude there is more than one date of maximum medical improvement. That being said, however, we hold that the administrative law judge improperly utilized those dates in awarding benefits.

As maximum medical improvement has no effect on the *extent* of disability, it cannot be used to separate claimant's periods of total disability from his periods partial disability. *Berkstresser*, 921 F.2d at 306, 24 BRBS at 69(CRT); *Stevens*, 909 F.2d at 1256, 23 BRBS at 89 (CRT). Therefore, the administrative law judge's awards of permanent *partial* disability benefits pursuant to the schedule at Section 8(c)(2), 33 U.S.C. §908(c)(2), commencing on

[7]Additionally, Dr. Echeverry concluded that claimant's C4-5 condition reached maximum medical improvement on May 20, 1998, provided claimant continues to refuse further surgery. The administrative law judge did not discuss this date or its effect on claimant's entitlement to benefits for the C4-5 disability. *See* discussion *infra*.

March 7, 1989, and permanent *partial* disability benefits pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), commencing on December 1, 1993, are improper. Claimant, as he argues, as the administrative law judge found, and as we have affirmed, was *totally* disabled as a result of his back and neck injuries until at least December 1, 1993, and an award changing anything other than the nature of his disability on either March 7, 1989, or December 1, 1993, is erroneous. Consequently, we affirm the dates on which the administrative law judge determined that claimant's conditions reached maximum medical improvement; however, we modify the award to reflect claimant's entitlement to temporary disability benefits until December 1, 1993, when all of claimant's conditions resolved and became permanent.

To clarify our conclusions with regard to the nature and extent of claimant's disability, we hold that claimant is entitled to temporary total disability benefits until December 1, 1993, when his entire condition reached maximum medical improvement. From December 1, 1993, until the date employer established the availability of suitable alternate employment, which the administrative law judge must determine on remand, claimant is entitled to permanent total disability benefits. *Berkstresser*, 921 F.2d at 306, 24 BRBS at 69(CRT); *Stevens*, 909 F.2d at 1256, 23 BRBS at 89 (CRT). Thereafter, claimant is entitled to permanent partial disability benefits.[8] Additionally, on remand, the administrative law judge

[8]As claimant incurred both scheduled and unscheduled injuries, he may be entitled to concurrent awards of permanent partial disability benefits, *I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999), subject to the maximum rate of compensation allowable under Section 6(b) of the Act, 33 U.S.C. §906(b).

must consider the nature and extent of claimant's condition following the 1995 injury, as the record contains a May 20, 1998, date of maximum medical improvement following this injury which he did not discuss, as well as a July 15, 1998, showing of suitable alternate employment.[9]

Wage-Earning Capacity

Employer contends the administrative law judge erred in determining claimant's post-injury wage-earning capacity, as there are higher paying jobs in the labor market survey than those credited by the administrative law judge. Contrary to employer's allegation, the administrative law judge specifically noted which jobs he felt claimant could perform after a discussion of his restrictions, and he based his wage-earning capacity determination on the average starting wages of those positions. Decision and Order at 21-24. This is a reasonable method of determining claimant's post-injury wage-earning capacity. *Shell Offshore, Inc. v. Director, OWCP*, 112 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1563 (1998); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir.

[9]If the administrative law judge finds that claimant sustained a period of temporary total disability following his 1995 injury, claimant's permanent partial disability is subsumed in the period of temporary total disability, but it does not disappear. *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982). Claimant's scheduled and unscheduled awards would lapse during this period and resume thereafter. *Id.*; *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 n.4 (1985).

1992); *P & M Crane,* 930 F.2d at 424, 24 BRBS at 116(CRT).

Also with regard to wage-earning capacity, claimant asserts that the administrative law judge erroneously applied the inflationary adjustments required by Section 8(h) of the Act, 33 U.S.C. §908(h), to the wages he found claimant could earn. To adjust for inflation when the actual wages paid at the time of injury in a post-injury job are unknown, it is proper to use the percentage increase in the national average weekly wage, *see* 33 U.S.C. §906(b)(1)-(3), to adjust the post-injury wages downward to the date of injury. *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). Here, Ms. Favaloro presented evidence of jobs available and their wages in 1998 and 1994. There is no evidence of the wages those jobs would have paid in 1988; therefore, the administrative law judge properly used the percentage increase in the national average weekly wage. However, he improperly adjusted the wages for post-injury suitable alternate employment to the wages those jobs would have paid in December 1993 (date of maximum medical improvement) and April 1995 (date of C4-5 injury) rather than back to the date of the original injury in 1988. Therefore, we vacate the administrative law judge's determination of claimant's post-injury wage-earning capacity, and on remand, he must recalculate the effects of inflation on the wages of the jobs he deemed suitable. *Quan*, 30 BRBS at 124.

Interest

Claimant contends the administrative law judge erred in denying him interest. Specifically, he avers that there is a gap in regular payments between March 9, 1990, and

January 9, 1991, as reflected in Employer's Exhibit 17. In his decision on reconsideration, the administrative law judge denied claimant interest on the basis that employer's change from weekly to bi-weekly payments of benefits does not warrant an award of interest. However, it is clear from the record that the gap in payments was more than a change in check-writing. Between March 9, 1990, and January 9, 1991, employer ceased making weekly or bi-weekly payments and, instead, issued two checks identified as "advances" on October 4, 1990, and December 19, 1990, for a total payment of $4,860.54. On January 9, 1991, employer issued a check to claimant in the amount of $5,555.46. Thereafter, weekly payments began again. Emp. Ex. 17.

Interest is mandatory and cannot be waived by the parties. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982). Interest is computed from the date each payment of compensation becomes overdue, *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997); *Canamore v. Todd Shipyards Corp.*, 13 BRBS 911 (1981), and it cannot be credited against an employer's overpayment of benefits. *Castronova v. General Dynamics Corp.*, 20 BRBS 139 (1987). As employer in this case failed to make certain installments of benefits when they became due, claimant is entitled to interest on those overdue payments. Consequently, we reverse the administrative law judge's denial of interest. On remand, he must determine the amount of interest to which claimant is entitled in light of the overdue payments between March 9, 1990, and January 9, 1991.

Attorney's Fee

Subsequent to the award of benefits, claimant's counsel filed a petition for an

attorney's fee for work performed before the administrative law judge. He requested a fee totaling $29,056.45, representing 91.72 hours at an hourly rate of $175, 4.75 hours at an hourly rate of $150, 40.72 hours at an hourly rate of $100, and 2.63 hours at an hourly rate of $65, plus expenses of $10,407.61. Employer objected to the request. The administrative law judge considered the petition and the objections and awarded a fee of $11,969, representing 61.72 hours at an hourly rate of $150, 4.75 hours at an hourly rate of $150, 24.72 hours at an hourly rate of $75, and 2.63 hours at an hourly rate of $55, plus $8,554.86 in expenses.

Employer contends it is not liable for any fee, as the requirements of Section 28, 33 U.S.C. §928, have not been met. Alternatively, it argues the fee is excessive, the rates are excessive, certain time is not compensable and the administrative law judge did not address all of its contentions; therefore, it argues the fee should be further reduced. We reject employer's contentions and affirm the fee award.

Under Section 28(b), 33 U.S.C. §928(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that already paid or tendered by the employer. *See Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993). Where a claimant succeeds in obtaining a continuing award of permanent partial disability pursuant to Section 8(c)(21), even though due to the employer's overpayment of temporary total disability benefits the claimant may not realize the award for several years, the employer is liable for a fee under Section 28(b). *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). In this case,

employer voluntarily paid benefits, then it challenged, but failed to establish, that claimant's back and neck conditions are work-related, and claimant obtained an award of continuing permanent partial disability benefits. Thus, the elements of Section 28(b) have been satisfied, *Merrill*, 25 BRBS at 140; *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989).[10] Therefore, we affirm the administrative law judge's determination that employer is liable for counsel's fee. We also affirm the amount of the fee, as employer has not shown that the administrative law judge committed reversible error in assessing either the rates or the compensable items. *See, e.g., Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

[10]Contrary to employer's argument, it is not necessary for every step enumerated in Section 28(b) to occur prior to holding employer liable for a fee. *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986).

Accordingly, the administrative law judge's Decision and Order and Order on Claimant's motion for reconsideration are modified in part and vacated in part, and the case is remanded for further consideration consistent with this opinion. In all other respects the administrative law judge's decisions are affirmed.

SO ORDERED.

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Administrative Appeals Judge

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Administrative Appeals Judge

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Administrative Appeals Judge