MICHAEL J. STREPPONE	)	BRB Nos. 97-258 and
	)	97-258A
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE ARMY/NAF	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
	)	
	)	
MICHAEL J. STREPPONE	)	BRB Nos. 97-322 and
	)	97-322A
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE ARMY/NAF	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order, Order on Motion for Reconsideration, Supplemental Decision and Order Awarding Attorneys Fees, and Second Supplemental Decision and Order Awarding Attorney Fees of Ralph A. Romano, Administrative Law Judge, United States Department of Labor, and the Compensation Order Award of Attorney's Fees of Richard V. Robilotti, District Director, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Lawrence Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order, Order on Motion for Reconsideration, Supplemental Decision and Order Awarding Attorneys Fees, and Second Supplemental Decision and Order Awarding Attorney Fees (95-LHC-3030) of Administrative Law Judge Ralph A. Romano, and the Compensation Order Award of Attorney's Fees (Case No. 2-103368) of District Director Richard V. Robilotti 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*., as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). 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 may be set aside only if the challenging party shows it 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 injured his back on September 30, 1990, while working in the course and scope of his employment for employer. Employer voluntarily paid claimant temporary total disability benefits from October 3, 1990, until February 7, 1996. Employer then filed a notice of controversion on February 14, 1996, in which it admitted that claimant was temporarily totally disabled from October 3, 1990, through January 6, 1994, but alleged that thereafter claimant's disability was at most partial. Employer also requested relief under Sections 8(f), 33 U.S.C. §908(f), and/or 8(j), 33 U.S.C. §908(j).

In his Decision and Order, the administrative law judge initially found that claimant is not entitled to total disability benefits after January 6, 1994, since, although claimant is not capable of returning to his usual employment, employer established the availability of suitable alternate employment through the testimony of its vocational counselor. The administrative law judge then determined that claimant is entitled to permanent partial disability benefits commencing on January 7, 1994. The administrative law judge further found that employer is not entitled to relief under either Section 8(f) or Section 8(j), but is entitled to a credit for temporary total disability benefits paid through February 7, 1996, against compensation due. Employer filed a motion for reconsideration before the administrative law judge which was summarily denied.

Acting upon a fee petition filed by claimant's trial counsel, the administrative law judge awarded, in his Supplemental Decision and Order Awarding Attorneys Fees, an attorney's fee of $11,395.25, representing 28.75 hours at $300 per hour, 11.25 hours at $100 per hour, and $1,645.25 in costs, payable by employer. In his Second Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge addressed the attorney's fee petition filed by claimant's initial counsel for work performed from October 13, 1995 through March 20, 1996, awarding a fee of $2,190, representing 14.6 hours at an hourly rate of $150. In addition, the administrative law judge ordered that payment of this latter fee be divided equally between claimant and employer.

Claimant's initial counsel also sought an award of an attorney's fee from the district director. In his Compensation Order Award of Attorney's Fees, the district director awarded claimant's initial counsel a fee of $10,000, assessing it equally between claimant, as a lien on compensation due, and employer.

Employer appeals and claimant cross-appeals the administrative law judge's Decision and Order, Order on Motion for Reconsideration, Supplemental Decision and Order Awarding Attorneys Fees, and Second Supplemental Decision and Order Awarding Attorney Fees, and the appeals are assigned BRB Nos. 97-258 and 97-258A, respectively. In addition, employer appeals and claimant cross-appeals the district director's Compensation Order Award of Attorney's Fees, and these appeals are assigned BRB Nos. 97-322 and 97-322A, respectively. The Board, by Order dated January 27, 1997, consolidated all of the pending appeals for purposes of rendering a decision.

In its appeal, BRB No. 97-258, employer challenges the administrative law judge's determinations that claimant is not capable of performing his regular job and it contests the attorney's fee awards to claimant's counsel. Claimant in his cross-appeal, BRB No. 97-258A, challenges the administrative law judge's decisions regarding the date that suitable alternate employment became available, and employer's entitlement to a credit for temporary total disability compensation it has already paid, as well as the administrative law judge's decision to assess one-half of his award of an attorney's fee to claimant's initial counsel against claimant. In its appeal, BRB No. 97-322, employer challenges the district director's award of an attorney's fee. On cross-appeal, BRB No. 97-322A, claimant contests the district director's determination that claimant is responsible for one-half of the attorney's fee awarded to his initial counsel.

Disability Issues

Employer initially argues that the administrative law judge erred in finding claimant unable to perform his regular employment as a food and beverage director since he failed to discuss relevant evidence, notably statements made by claimant's treating physician, Dr. Fromm, and employer's vocational expert, Mr. DeMark, which employer alleges is sufficient to establish that claimant is physically capable of performing his pre-injury employment and, thus, is not entitled to any compensation whatsoever after January 6, 1994.

In his decision, the administrative law judge, without ever explicitly identifying claimant's usual employment and/or the physical requirements of that position, concluded that claimant is unable to return to his previous employment. In discussing the evidence, the administrative law judge initially rejected claimant's testimony regarding his pain and/or functional restrictions, as well as the total disability determination made by Dr. Polifrone, and instead relied upon the remaining objective evidence of record. The administrative law judge specifically credited the opinions of Drs. Fromm, Zaretsky, Preslar and Poletti, as well as the testimony of employer's vocational expert Mr. DeMark. The administrative law judge observed that Dr. Fromm concluded that claimant is capable of working, and that Drs. Zaretsky, Preslar and Poletti each determined that claimant could perform the sedentary work identified by Mr. DeMark. The administrative law judge, however, failed to consider evidence of record that claimant could return to his regular job -"full duty" - as a food and beverage director.[1] Employer's Exhibit 66. Nor did the administrative law judge consider

[1]Contrary to employer's argument, Dr. Fromm's statement does not include a specific date as to when claimant could return to full duty. His statement, by letter dated May 7,

Mr. DeMark's statement that claimant could return to his usual work within the doctor's light duty work restrictions. Employer's Exhibit 69, Deposition at 27-29. Moreover, Drs. Zaretsky, Preslar and Poletti never specifically addressed claimant's ability to perform his regular employment, and instead, relying on certain physical restrictions, concluded that claimant is capable of performing sedentary work from at least January 6, 1994. Employer's Exhibits 36, 38-40, 47-50. We therefore vacate the administrative law judge's determination that claimant is unable to perform his regular employment and remand the case for reconsideration of this issue. On remand, the administrative law judge must compare and discuss claimant's medical restrictions with the specific physical requirements of his usual employment in order to determine whether claimant is capable of performing his usual employment.[2] *Carroll v. Hanover Bridge Marina,* 17 BRBS 176 (1985). If claimant is capable of performing his usual work, the administrative law judge also should consider whether claimant nevertheless has a loss in wage-earning capacity.

In his cross-appeal, claimant contends that payments made voluntarily by an employer should be recognized as an admission of liability precluding litigation of the period for which the benefits were paid, in this case up to February 7, 1996. Claimant's contention is without merit. First, there is no provision in the Act which supports claimant's assertion that an employer concedes liability by voluntarily paying compensation. In fact, such a rule would clearly violate the well-established policy of encouraging voluntary payment of benefits by employers without the need for formal adversary proceedings. *See generally Universal Terminal & Stevedoring Co. v. Parker*, 587 F.2d 608, 611, 9 BRBS 326, 329 (3d Cir. 1978); *McCabe Inspection Service, Inc. v. Willard*, 240 F.2d 942 (2d Cir. 1957); *Tibbetts v. Bath Iron Works Corp*., 10 BRBS 245 (1979). In addition, Section 14(j), 33 U.S.C. §914(j), provides employer a credit against future compensation due for overpayments of compensation and aims at reimbursing employer for the entire amount of its advance payments where these payments are too generous, for however long this takes, out of unpaid compensation found to be due. *See Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989); *Tibbetts,* 10 BRBS at 245. It is undisputed that employer, in the present case, voluntarily paid claimant temporary total disability benefits from October 3, 1990, to February 7, 1996. The administrative law judge subsequently determined that claimant is entitled to temporary total disability benefits from October 3, 1990 until January 6, 1994, and that thereafter claimant is entitled to permanent partial disability benefits.

1996, is that "it is my feeling *at this point* that the patient could return to full duty." Employer's Exhibit 66 (emphasis added).

2We note that the burden rests with claimant to show that he cannot return to his regular or usual employment due to his work-related injury. *Manigault v. Stevens Shipping Co*., 22 BRBS 332 (1989).

Employer thus overpaid compensation as a result of its voluntary payment of temporary total disability beyond January 6, 1994, and the administrative law judge properly found employer entitled to a credit of that amount to be taken against any future unpaid compensation due. *See* 33 U.S.C. §914(j); *Director, OWCP v. General Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40 (CRT) (2d Cir. 1990); *Nichols v. Bath Iron Works Corp.,* 8 BRBS 710 (1978).

Claimant also argues that the decision of the administrative law judge to find suitable alternate employment available as of January 7, 1994, is erroneous as a matter of law, as there is no evidence as to the exact details and/or availability of those jobs in the record. Claimant concedes that employer has established suitable alternate employment with respect to the jobs available during the time of the labor market survey, *i.e.,* 1996, but objects to the administrative law judge's reliance on employer's vocational counselor's testimony regarding classified advertisements (ads) going back to 1994 that only generally describe the same type of jobs he found available during his 1996 labor market survey.

Claimant's contention lacks merit. An award of partial disability benefits commences on the date suitable alternate employment is shown to be available. *See, e.g., Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991). The record establishes that Mr. DeMark provided testimony regarding specific job openings going back to January 1994. While he found such openings in 1994 classified want ads, he did not, as claimant suggests, rely exclusively on these advertisements. Rather, Mr. DeMark testified that in 1996 he called each employer in the 1994 want ads to verify the job and claimant's suitability for each position. HT at 265-269. He specifically obtained the 1994 salary, and the number of openings between the time of the ad and the hearing. *Id.* In addition, Drs. Poletti, Zaretsky and Preslar all approved the positions identified by Mr. DeMark as being within claimant's requirement that he perform sedentary/light work. Employer's Exhibits 40, 48-50. Accordingly, as the administrative law judge's determination that employer established the availability of suitable alternate employment as of January 1994 is supported by substantial evidence, *i.e.*, the labor market survey of Mr. DeMark and the medical opinions of Drs. Poletti, Zaretsky and Preslar, it is affirmed. *See generally Stevens v. Director, OWCP,* 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). Consequently, if, on remand, the administrative law judge again determines that claimant is unable to perform his usual employment, the issue of whether employer established the availability of suitable alternate employment need not be revisited.

Attorney's Fee Issues

Employer argues that the administrative law judge erroneously awarded claimant's second counsel an attorney's fee for work performed on the issues of claimant's credibility, the development of the medical evidence regarding claimant's physical condition and/or attacks on the validity of employer's labor market survey since claimant lost on each of these issues and, thus, was unsuccessful in pursuing his claim for permanent total disability benefits. Employer also argues that claimant received no more compensation than was offered him by employer in its post-hearing tender dated April 25, 1996; employer therefore contends that under *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986),

it is not liable for any fees incurred after the hearing. Lastly, employer argues that the administrative law judge overruled its objections to specific entries without adequate explanation. The administrative law judge found that claimant successfully prosecuted the claim as claimant was awarded permanent partial disability benefits which employer had not voluntarily paid and was contesting, as well as medical benefits.

In general, a claimant's attorney's fee can be assessed against an employer pursuant to Section 28 of the Act only when the employer has controverted some aspect of the claim and the claimant thereafter is successful in obtaining an award. *See Flowers v. Marine Concrete Structures, Inc.*, 19 BRBS 162 (1986). The amount of the fee awarded should reflect claimant's success or lack thereof in achieving the claims asserted, *see George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992), and it is error for the administrative law judge not to address this issue if it is properly raised below. *See generally Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995). Moreover, Section 28(b) of the Act, which is applicable to the fee at issue, specifically allows liability for a claimant's attorney's fee to be imposed on the employer only where the claimant has obtained greater compensation than that originally paid or tendered by the employer. *See* 33 U.S.C. §928(b); *Kaczmarek v. I.T.O. Corp. of Baltimore, Inc.*, 23 BRBS 376 (1990). A "tender," in light of the purpose of Section 28 to encourage voluntary payments, means a readiness, willingness and ability on the part of employer or carrier, expressed in writing, to make such a payment to the claimant. *See Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993). An employer's valid offer in writing to settle a claim may constitute a "tender of compensation" pursuant to Section 28(b). *See Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986); *see also Kaczmarek,* 23 BRBS at 376.

As previously stated, employer is entitled to a credit for the amount it voluntarily paid in temporary total disability benefits from January 7, 1994, to February 7, 1996. 33 U.S.C. §914(j). However, employer did contest claimant's entitlement to permanent partial disability benefits and medical benefits which were ultimately awarded by the administrative law judge in this case. In addition, employer contended that Section 8(j) is applicable, which the administrative law judge rejected. Thus, claimant successfully prosecuted his claim, and counsel is entitled to an attorney's fee payable by employer under Section 28(b). *Ahmed*, 27 BRBS at 24; *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Geisler v. Continental Grain Co.*, 20 BRBS 35 (1987). Moreover, as the record contains employer's pre-hearing statement dated October 13, 1995, listing "Section 7 compliance" as a contested issue, employer's contention that it cannot be liable for an attorney's fee prior to the filing of its notice of controversion on February 14, 1996, is without merit. *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986). Employer's contention that it "always agreed to pay medical benefits under Section 7 of the Act," Employer's Brief in Support of Petition for Review dated February 26, 1997 at 60, is incorrect as evidenced by the recommended Decision and Order Denying Benefits submitted post-hearing by employer to the administrative law judge wherein employer states that "the claim for payment of medical bills must be denied." See Employer's Proposed Decision and Order Denying Benefits at 53. Accordingly, we reject employer's contentions as to its liability for claimant's attorney's fee through the time of the formal hearing.

With regard to its liability for a fee for services performed after the formal hearing, employer contends that its offer of settlement on April 25, 1996, relieves it of liability as claimant did not obtain greater compensation or medical benefits than that tendered in this letter. The administrative law judge stated that his award of medical benefits resulted in greater compensation than that offered. We note that employer's post-hearing offer of settlement letter dated April 25, 1996, is not in the record before the Board, nor is it attached to employer's brief. Employer states in its brief that the April 25, 1996, letter "does not contest medicals," Brief at 60, but this does not persuade us that the administrative law judge's determination that his award resulted in greater benefits than that tendered is in error. We, therefore, reject employer's contention, and affirm the finding that employer is liable for claimant's fee after the date of the formal hearing.

Finally, with regard to the amount of the fee award to claimant's second counsel, in view of the fact that some of employer's objections were sustained, we affirm the administrative law judge's implicit rejection of employer's objection regarding the services rendered on March 29, 1996, and April 16, 1996, as a reasonable exercise of his discretion. We note, however, that neither counsel's fee petition nor employer's objection is in the present record before the Board. The administrative law judge on remand should consider employer's "limited success" argument if it was raised in employer's objection, *Ross*, 29 BRBS at 42, and should also reconsider his fee award in view of his findings on the merits on remand. *Brooks*, 963 F.2d at 1532, 25 BRBS at 161 (CRT).

Employer next argues that the administrative law judge's Second Supplemental Decision and Order Awarding Attorney Fees payable by employer to claimant's initial counsel, William D. McGillicuddy, is improper since the administrative law judge did not consider that employer paid compensation until February 7, 1996. Claimant contests only that part of the administrative law judge's Second Supplemental Decision and Order Awarding Attorney Fees which divides the payment of the fee evenly between claimant and employer, arguing that the administrative law judge's decision is devoid of any explanation for such action. Claimant avers that pursuant to Section 28(b) employer is solely responsible for the payment of Mr. McGillicuddy's fee, as there was ultimately a successful prosecution of this claim.

We agree with claimant that employer is solely liable for a fee to claimant's first attorney. As noted above, claimant has successfully prosecuted his claim, thus entitling his counsel to an attorney's fee payable by employer. 33 U.S.C. §928(b); *Ahmed*, 27 BRBS at 24; *Merrill*, 25 BRBS at 140; *Geisler,* 20 BRBS at 35. Employer's liability for an attorney's fee pursuant to Section 28(b) commences at the time a controversy arises between the parties, *see Flowers*, 19 BRBS at 162, and in the instant case, employer contested its liability for medical benefits in its pre-hearing statement which is filed at the time the case is referred to the Office of Administrative Law Judges. We therefore modify the administrative law judge's fee award to claimant's first attorney to reflect employer's liability for the fee. The amount of the fee should reflect claimant's success, however, and this issue may be reconsidered on remand consistent with the administrative law judge's other findings. *Ahmed,* 27 BRBS at 24.

Employer contends that the district director's Compensation Order awarding an attorney's fee to Mr. McGillicuddy is improper since employer was never served with the fee petition and because no explanation was provided for the assessment of half of the fee against employer. Moreover, employer asserts that claimant's counsel is not entitled to the substantial fee awarded by the district director since claimant met with only limited success in pursuit of his case. In his cross-appeal, claimant argues that the district director's assessment of half of the attorney's fee against claimant is in error. Additionally, claimant asserts that if claimant is responsible for any part of the fee, the district director should have taken into account the financial ability of claimant to pay the fee.

In his Compensation Order, the district director, upon setting out the regulatory factors he considered in making his determination, *see* 20 C.F.R. §702.132, awarded claimant's initial counsel the entire fee requested, $10,000, as reasonable, and he assessed the total amount equally between claimant and employer. The district director did not reference any objections in his Compensation Order. The applicable regulation, 20 C.F.R. §702.132(a), specifically requires service of a fee petition "upon the other parties." In addition, due process requires that employer be given a reasonable time to respond. *See generally Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989). Accordingly, we vacate the district director's Compensation Order Award of Attorney's Fees and remand for consideration of whether employer was ever served with the fee petition. On remand, the district director may reopen the record to afford claimant's counsel the opportunity to submit a copy of the certificate of service in order to establish that employer was, in fact, served with a copy of the fee petition prior to the issuance of the district director's fee award, in which case, his Compensation Order can be reinstated. If, however, claimant cannot produce proof of service, then the district director should reconsider the original fee petition in light of any objections raised by employer. As employer voluntarily paid benefits in this case, and employer's liability for an attorney's fee pursuant to Section 28(b) therefore commences at the time a controversy arose between the parties, the district director must determine the date a controversy arose between the parties and apportion the awarded attorney's fee accordingly. *Caine*, 19 BRBS at 180. Furthermore, if the district director determines that claimant is responsible for any part of counsel's fee, he must consider claimant's ability to pay the fee.[3] 33 U.S.C. §928(c); 20 C.F.R. §702.132.

Accordingly, the administrative law judge's award of permanent partial disability benefits is vacated, and the case is remanded for further consideration consistent with this decision. The administrative law judge's award of an attorney's fee to claimant's current counsel is affirmed on the present record. The fee award to claimant's initial counsel by the administrative law judge is modified to reflect employer's liability for the entire fee. The

[3]The district director must also reconsider any award of attorney's fees in light of claimant's success should the administrative law judge determine, on remand, that claimant is capable of performing his usual employment. *See generally Brooks*, 963 F.2d at 1532, 25 BRBS at 161 (CRT); *Ahmed*, 27 BRBS at 24.

district director's fee award is vacated, and the case is remanded for reconsideration.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge