BRB No. 92-1077

ANNIE D. HAWTHORNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Decision on Motion for Reconsideration of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

Michael G. Huey, D.A. Bass-Frazier (Huey & Leon), Mobile, Alabama, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Laura Stomski (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order and Decision on Motion for Reconsideration (91-LHC-320, 321) of Administrative Law Judge Kenneth A. Jennings awarding benefits 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 findings of fact and conclusions of law of the administrative law judge if they 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 Board heard oral argument in this case on January 11, 1994, in Mobile Alabama.

Claimant, who began working for employer as a welder in 1972, initially injured her left knee while working for employer on October 22, 1984. After undergoing arthroscopic surgery on August 13, 1985, claimant returned to work on October 31, 1985, and continued to work until February 24, 1986, when she re-injured her knee. Thereafter, claimant remained off work until May 26, 1986. On November 4, 1986, claimant again re-injured her left knee when she hit a manhole cover as she was exiting the hull of a ship. A second arthroscopic procedure was performed on February 16, 1987, and claimant did not return to work as a welder until May 23, 1988. Employer voluntarily paid claimant temporary total disability compensation during this period. 33 U.S.C. §908(b). On October 19, 1988, claimant injured her left ankle while climbing a ladder at work. Employer again voluntarily paid claimant temporary total disability compensation. On January 11, 1989, claimant tried unsuccessfully to return to work for employer. With the exception of working for one week as a telemarketer for B & H Industries, a job from which she was ultimately terminated, claimant has not worked since that time. The November 4, 1986, and August 19, 1988 injuries are the subjects of the current appeal.

On May 15, 1987, claimant filed a claim under the Act for the November 4, 1986, knee injury. On November 1, 1989, claimant amended this claim to include a back injury which she alleged was caused by limping due to the November 4, 1986, knee injury. On March 24, 1989, claimant filed a claim for the October 1988 ankle injury. Employer controverted the claim for the November 4, 1986, knee injury on March 23, 1987, and controverted the claim for the October 19, 1988, ankle injury on February 12, 1990. In its February 12, 1990, notice of controversion, employer also asserted entitlement to Section 8(f), 33 U.S.C. §908(f), relief with regard to the claim for the 1988 ankle injury. While the claims were pending before the administrative law judge, employer for the first time asserted its entitlement to Section 8(f) relief with regard to the November 4, 1986, knee injury claim.

The administrative law judge denied claimant compensation for the alleged back injury, finding that she failed to establish that this condition was causally related to the November 4, 1986 knee injury. The administrative law judge, however, awarded claimant temporary total disability compensation for the November 4, 1986, injury based upon an average weekly wage of $495.20 for the following periods: November 6, 1986 until May 23, 1988; June 6, 1988 through June 7, 1988; July 18 to July 19, 1988; and September 24, 1988 through October 2, 1988. The administrative law judge also determined that although claimant's October 1988 ankle injury did not result in any

permanent impairment, claimant was entitled to temporary total disability compensation for this injury from October 21, 1988, until November 16, 1990, and was entitled to permanent total disability compensation for the November 4, 1986 knee injury thereafter based upon an average weekly wage of $568.27. The administrative law judge also held employer liable for penalties under Section 14(e), 33 U.S.C.§914(e), for medical benefits under Section 7, 33 U.S.C. §907, and in addition determined that employer was entitled to a credit of $4,003.00 in connection with claimant's prior settlement of her October 22, 1984, and February 24, 1986 injuries of the left knee. Finally, the administrative law judge found that as employer had been negligent in filing a timely Section 8(f) petition and was properly notified by the district director[1] of the denial of Section 8(f) relief and the invocation of the Section 8(f)(3), 33 U.S.C. §908(f)(3), absolute defense, he was precluded from granting employer's Section 8(f) request.

On appeal, employer challenges the administrative law judge's award of permanent total disability, arguing that claimant is limited to an award under the schedule because she failed to make a *prima facie* showing that she is unable to return to her usual employment because of the November 4, 1988 knee injury alone. Employer also challenges the administrative law judge's finding that it failed to establish the availability of suitable alternate employment and contends that at any rate, the administrative law judge erred in awarding permanent total disability compensation for the November 4, 1986, knee injury based on the claimant's average weekly wage for her October 19, 1988, ankle injury. Employer further asserts that the administrative law judge erred in holding it liable for Section 14(e) penalties inasmuch as its LS-206, Payment of Compensation Without Award, forms filed on November 26, 1986, and November 2, 1988, are the functional equivalent of timely filed notices of controversion. Finally, employer challenges the administrative law judge's denial of Section 8(f) relief. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), also responds, contending that the case must be remanded because both the administrative law judge's disability analysis and his finding that claimant is entitled to permanent total disability compensation for the November 4, 1986, knee injury based on the average weekly wage used to compensate her for her 1988 ankle injury fail to comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §554 *et seq.* (APA). The Director further responds that the administrative law judge's imposition of Section 14(e) penalties and his denial of Section 8(f) relief should be affirmed.

Initially, we reject employer's argument that the administrative law judge erred in concluding that claimant successfully established a *prima facie* case of total disability in connection with the November 4, 1986, knee injury. In order to establish a *prima facie* case of total disability, claimant must show that she is unable to return to her usual employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 156, 161 (5th Cir. 1981). In concluding that claimant met this burden in the present case, the administrative law judge credited the medical opinions of Drs. Holland and Dyas, who found that claimant was no longer able to perform her usual welding work, over the contrary opinion of Dr. Dempsey. Employer argues on appeal that neither of

[1]Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

these medical opinions is sufficient to establish claimant's *prima facie* case inasmuch as both Dr. Holland and Dr. Dyas incorporated the physical restrictions stemming from claimant's non work-related back condition in reaching their conclusions. This argument is rejected. While Dr. Holland, claimant's treating physician, did opine that claimant's inability to do her usual work was due to the combination of her obesity, chronic lower back pain, and chronic left knee and ankle pain, Dr. Dyas specifically testified that the limitations he imposed were based solely on claimant's left knee injury; Dr. Dyas imposed no restrictions based on her back or ankle. CX 8 at 15, 16. After considering the aforementioned medical evidence, the administrative law judge ultimately found that Dr. Dyas' opinion was entitled to greater weight than Dr. Holland's opinion, noting that employer relied on Dr. Dyas' testimony in attempting to establish the availability of suitable alternate employment and in support of its claim for Section 8(f) relief. Inasmuch as the medical opinion of Dr. Dyas provides substantial evidence to support the administrative law judge's finding that claimant succeeded in establishing her *prima facie* case, we affirm this determination. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 90, 24 BRBS 46, 47 (CRT)(5th Cir. 1990).

The next issue to be addressed on appeal is whether employer succeeded in establishing the availability of suitable alternate employment. Once the claimant establishes an inability to return to his or her pre-injury employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment that the claimant is capable of performing. *Turner*, 661 F.2d at 1038, 14 BRBS at 161. In the present case, employer attempted to meet its suitable alternate employment burden through the testimony of Joseph Day, a vocational consultant. After evaluating claimant, Mr. Day opined that she was capable of performing unskilled to semi-skilled work of a sedentary or light nature such as work as a board technician, security guard, surveillance system monitor, telephone solicitor, desk clerk, cashier, or a checker. Mr. Day further opined that there were probably at least a hundred such jobs available to claimant in these categories within the last six months and that he himself was able to locate 20 available openings. In addition, Mr. Day identified a number of specific available job opportunities within these categories, including telemarketing positions with Beneficial Systems, B & H industries, and Marketing Difference, and desk clerk positions with Family Inn, Holiday Inn, Red Carpet Inn, Scottish Inn and Best Western.[2]

We agree with employer that the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment is not in accordance with law. In concluding that employer did not meet its suitable alternate employment burden, the administrative law judge found that Mr. Day's testimony indicating that there were at least 100 suitable jobs available to claimant merited little weight because he was only able to identify eight specific job openings, two of which were previously filled and thus not available to claimant. As employer asserts, it was error for the administrative law judge to reject Mr. Day's testimony regarding general job availability on this basis. The United States Court of Appeals for the Fifth Circuit, within whose

[2]Dr. Holland testified that claimant could attempt to perform light or sedentary work, and approved 11 or 12 specific job descriptions as within claimant's capabilities including: security guard, desk clerk, telephone solicitor, cashier, video arcade attendant, surveillance system monitor, board technician, and delivery driver positions.

appellate jurisdiction this case arises, held in *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991), that the employer is not required to demonstrate that specific jobs exist for the injured employee in the local economy in order to establish the availability of suitable alternate employment. Rather, employer need only show that there are a number of jobs available to claimant in the local community for which he is qualified and which he has a reasonable opportunity to secure. *Id.*, 930 F.2d at 430 n.10, 24 BRBS at 121 n.10 (CRT). Moreover, as employer and the Director assert, the fact that two of the specific jobs Mr. Day identified were filled also does not preclude a finding of suitable alternate employment based on those jobs if, in fact, such employment was available to claimant during "critical periods," *i.e.*, once she reached maximum medical improvement. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039,1045 n.11, 26 BRBS 30, 35 n.11 (CRT)(5th Cir. 1992); *see also P & M Crane*, 930 F.2d at 430-431 n.11, 24 BRBS at 121 n.11 (CRT). Inasmuch as the administrative law judge erred in discrediting Mr. Day's testimony regarding general job availability, and in addition, failed to make any findings regarding the suitability of the specific jobs identified and whether they were available to claimant after she reached maximum medical improvement, we vacate his finding that suitable alternate employment was not established and remand for reconsideration of this issue consistent with the applicable law of the United States Court of Appeals for the Fifth Circuit.[3]

[3]Employer correctly asserts that inasmuch as there were more than 8 specific jobs identified, the administrative law judge's determination that claimant applied for every position identified by employer is erroneous. The exhibits attached to Mr. Day's deposition indicate that in addition to the eight job specific jobs discussed by the administrative law judge, other job opportunities were identified at Economy Inn, at a Shell Service Station, at Stouffers Plaza, and at Olan Mills. *See Day* Deposition at Ex. 3, 4. On remand, the administrative law judge should consider all of the relevant evidence in determining whether employer established the availability of suitable alternate employment, and whether claimant then met her burden of establishing that she was diligent in seeking the alternate employment demonstrated. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

While we agree with employer that the administrative law judge improperly discredited the testimony of its vocational expert, Mr. Day, we reject employer's argument that the administrative law judge erred in concluding that the telemarketing position which claimant held for one week at B & H Industries did not constitute suitable alternate employment. The administrative law judge found that this job was not suitable based on claimant's testimony that she was not provided the freedom to move about as much as she found necessary given her physical impairment. Employer asserts that it was improper for the administrative law judge to disqualify this job on this basis, arguing that claimant's inability to sit for long periods of time was due to her unrelated back condition, rather than her work-related knee injury. We disagree. Based on claimant's physical restrictions, the administrative law judge rationally concluded that the telemarketing job at B & H Industries was not suitable for claimant. He did not err in crediting claimant's testimony in this regard. Moreover, in making his finding, the administrative law judge also relied on the fact that Dr. Holland conditioned his approval of the identified telemarketing and desk clerk positions on claimant's attempting these positions to determine if she could tolerate them physically. The administrative law judge noted that after numerous complaints, including that her leg continually swelled, claimant was terminated. Because the administrative law judge's finding that the B & H Industries job was not suitable is rational and supported by substantial evidence, it is affirmed. *See Kennel*, 949 F.2d at 90-91, 24 BRBS at 47 (CRT).[4]

Employer next contends that the administrative law judge erred in awarding permanent total disability for the 1986 knee injury based on an average weekly wage of $568.27, the applicable average weekly wage at the time of claimant's 1988 ankle injury. Employer urges the Board to correct this "obvious" clerical error and to modify the administrative law judge's Decision and Order to reflect that claimant is entitled to permanent total disability based on an average weekly wage of $495.20, the average weekly wage which the administrative law judge employed in awarding her temporary total disability benefits for the 1986 knee injury. The Director responds that the case should be remanded because the administrative law judge awarded claimant permanent total disability compensation without identifying which of claimant's two injuries was being compensated and ordered that compensation be paid based on the average weekly wage at the time of the 1988 ankle injury without explanation in violation of the APA.[5] Claimant responds that as her permanent

[4]Employer also asserts that it was error for the administrative law judge to imply that claimant's spelling abilities may hinder her ability to work as a telemarketer or desk clerk. Although the administrative law judge questioned the reliability of Mr. Day's employment survey based on his failure to assess claimant's spelling ability, which he characterized as a "potentially" critical skill, the administrative law judge made no specific findings as to whether claimant's inability to spell would actually preclude her from performing the alternate work identified. Accordingly, the administrative law judge should specifically consider this factor in evaluating the suitability of the alternate work identified on remand.

[5]The Act incorporates relevant provisions of the Administrative Procedure Act, *see* 33 U.S.C. §919(d), which requires that decisions include a statement of "findings and conclusions, and the reasons or basis therefor on all material issues of fact, law or discretion presented in the record." 5 U.S.C. §557(c)(3)(A); *see Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade*, 412 U.S. 800, 806-808 (1973).

total disability is due to the cumulative effect of her left leg injuries, the fact that the administrative law judge cited the November 1986 injury as the cause of this disability is a harmless clerical error which can be corrected by the Board or by the administrative law judge on remand.

Initially, we reject the Director's argument that the administrative law judge failed to identify which of claimant's two injuries was the subject of his award of permanent total disability compensation. The administrative law judge clearly awarded permanent total disability for claimant's 1986 left knee injury at the average weekly wage he found for the 1988 injury. Decision and Order at 28. We agree with the Director, however, that the case must be remanded because the administrative law judge failed to explain why he employed the 1988 average weekly wage figure in awarding permanent total compensation for the 1986 knee injury. The Board has held that there can be only one average weekly wage for a given injury and that all payments of compensation must be based on that figure. *See Merrill v. Todd Shipyards Corp.*, 25 BRBS 140, 150 (1991). Section 10 states that the average weekly wage is determined "at the time of injury." 33 U.S.C. §910. Accordingly, post-injury events are generally irrelevant. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT)(D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1986); *but see Johnson v. Director, OWCP*, 911 F.2d 247, 250, 24 BRBS 3, 8 (CRT)(9th Cir. 1990), *cert. denied*, 111 S.Ct. 1582 (1991). (where condition deteriorates over a period of years, average weekly wage may be based on earnings in year prior to disability). In awarding claimant permanent total disability compensation for her 1986 knee injury in the instant case, the administrative law judge employed the $568.27 average weekly wage he found applicable for the 1988 ankle injury. As the administrative law judge's finding in this regard appears contrary to applicable law and he failed to provide any explanation as to why he employed the 1988 average weekly wage figure rather than the $495.20 figure he had employed in awarding claimant temporary total disability compensation for the same 1986 injury in violation of the APA, we vacate this finding. On remand, the administrative law judge must reconsider this issue and provide an explanation of his average weekly wage finding consistent with the requirements of the APA. *See generally Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 382-383 (1990).

Employer next challenges the administrative law judge's imposition of Section 14(e) penalties. The administrative law judge held employer liable for an assessment under Section 14(e) based on the difference between the amount employer voluntarily paid and the amount claimant was ultimately awarded for each injury from the date of each injury until the date that employer filed its Form LS-207, Notice of Controversion. Accordingly, the administrative law judge found that the Section 14(e) assessment applied to compensation due and unpaid from the date of claimant's knee injury on November 4, 1986 until March 23, 1987, and from the date of her ankle injury on October 19, 1988, until February 12, 1990. *See National Steel and Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1295 (9th Cir. 1979).

On appeal, employer contends that the administrative law judge erred in holding it liable for Section 14(e) penalties, arguing that the Form LS-206, Payment of Compensation Without Award, it filed on November 26, 1986, for the November 4, 1986, knee injury, and on November 2, 1988, for the October 19, 1988, ankle injury are the functional equivalent of timely filed notices of

controversion. Claimant and the Director, respond, urging that the administrative law judge's assessment of Section 14(e) penalties be affirmed.

We reject employer's argument that its LS-206 forms filed on November 26, 1986, and November 2, 1988 are the functional equivalent of timely filed notices of controversion sufficient to relieve employer of liability under Section 14(e). Section 14(d) of the Act, 33 U.S.C. §914(d), provides that a notice of controversion must be filed on or before the 14th day after employer has knowledge of the injury, and Section 14(b), 33 U.S.C. §914(b), provides that the first installment of compensation is due on the fourteenth day after the employer has been notified pursuant to Section 12, 33 U.S.C. §912, or after the employer has knowledge of the injury. *See Ingalls Shipbuilding, Inc. v. Director, OWCP,* 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), *aff'g in pert. part and rev'g in part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) and *Gulley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 262 (1989). Section 14(d) requires that specific information be provided in the notice of controversion.[6] Although Section 14(d) refers to a "form prescribed by the Secretary" and this form is the LS-207, the Board has held that the title of the document is not determinative of whether it constitutes a notice of controversion. *White v. Rock Creek Ginger Ale Co.*, 17 BRBS 75 (1985). Thus, the Board has held that a document which contains the information required by Section 14(d) may be the equivalent of a notice of controversion.

In *White*, the Board held that a notice of suspension of compensation benefits filed with the district director within 14 days of the cessation of voluntary payments which provides the information required by Section 14(d) is the functional equivalent of a notice of controversion for purposes of avoiding a Section 14(e) penalty. In *Fairley*, however, the Board determined that a document filed by employer entitled "Answer," was not the functional equivalent of a Section 14(d) controversion. In its "Answer," employer stated that it did not controvert the claim based on present information, that it "accepted" the compensability of the claim unless it received evidence contrary to that provided with the claim, and finally employer "demanded" that the case be dismissed because it had voluntarily accepted the claim and no controversy existed. In holding that this document was not the functional equivalent of a Section 14(d) controversion, the Board noted that, since it was not clear from the document whether employer was even controverting the claim at all, the document was not the equivalent of a notice of controversion as the requirements of Section 14(d) were not met. *Fairley*, 22 BRBS at 192. In affirming the Board's holding on this issue, the United States Court of Appeals for the Fifth Circuit noted that Section 14(d) requires employer to controvert the claim on specified grounds, and that the document failed to do so. *Ingalls Shipbuilding*, 898 F.2d at 1095-1096, 23 BRBS at 67 (CRT). It is noteworthy that, like *Fairley*, the case at bar arises in the Fifth Circuit.

The Board also has rejected employer's argument that an LS-202, First Report of Injury of Occupational Illness, form containing the notations "no injury admitted" to various questions regarding the alleged injury, which employer filed in numerous hearing loss cases, was the

[6]The notice must state that the right to compensation is controverted, the name of the employer, the date of the alleged injury, and the grounds for the controversion. *See* 33 U.S.C. §914(d).

functional equivalent of a controversion. *See Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 346, 348-350 (1992)(Brown, J., dissenting), *aff'g on recon. en banc in pert. part* 25 BRBS 245, 248-250 (1991)(Brown, J., dissenting). In so concluding, the Board noted that the statement "no injury admitted" in response to the questions posed did not provide any particular information as to the grounds for a controversion of compensation, particularly in the context of an occupational hearing loss claim.

In the LS-206 forms at issue in the present case, employer listed only the periods and rates at which voluntary payments of compensation were made for each injury. These forms do not state that the right to compensation is being controverted or provide grounds for controversion. To the contrary, they in fact suggest that the compensability of the respective claims is being accepted. We therefore reject employer's argument that these documents are the equivalent of a Section 14(d) controversion for the reasons stated in *Fairley*. Accordingly, we affirm the administrative law judge's determination that employer is liable for Section 14(e) penalties with regard to both injuries.

Finally, employer challenges the administrative law judge's denial of Section 8(f) relief. The administrative law judge found that he was precluded from granting employer's request for Section 8(f) relief because employer was negligent in filing a timely Section 8(f) petition and had been properly notified of the denial and invocation of the absolute defense by the district director. On appeal, employer contends that the administrative law judge erred in denying its request for Section 8(f) relief based on correspondence from the district director which was not a part of the formal record and asserts that the absolute defense of Section 8(f)(3) must be affirmatively raised and pleaded by the Director. Employer further contends that the administrative law judge erred in denying its claim for Section 8(f) relief based on the artificial deadline for filing its Section 8(f) petition imposed by the district director inasmuch as it had no reason to anticipate the liability of the Special Fund prior to receiving the opinions of Drs. Dyas and Holland in 1991.[7] The Director responds, urging that the administrative law judge's finding that employer's claim for Section 8(f) relief is barred pursuant to Section 8(f)(3) be affirmed.

Employer's argument that the administrative law judge erred in relying on the correspondence from the district director because it was not admitted into evidence is clearly without

[7]Employer asserts that the testimony of Dr. Dyas indicates that claimant did not reach maximum medical improvement until April 10, 1991 and that Dr. Holland did not render an opinion that claimant reached maximum medical improvement until his deposition on May 16, 1991, when he opined that claimant had not reached maximum medical improvement from all of her conditions until December 13, 1990.

Contrary to employer's assertions, the permanency of claimant' 1986 knee injury was clearly at issue while the case was before the district director. In claimant's pre-hearing statement dated October 5, 1990, claimant stated that on March 9, 1990, Dr. Holland assessed claimant as having a 15 percent impairment to the body as a whole for injury to the left knee, lower back, and left ankle. The case was referred for formal hearing on October 29, 1990.

merit. The regulations specifically provide that when a case raising Section 8(f)(3) is transmitted to the Office of Administrative Law Judges, the district director shall attach a copy of the application and the district director's denial of it. 20 C.F.R. §702.321(c). As the correspondence relating to the Section 8(f) claim before the district director was thus automatically forwarded to the administrative law judge, his consideration of it was not improper. While we reject employer's argument that the administrative law judge erred in considering this correspondence, we nonetheless conclude that the administrative law judge's denial of Section 8(f) relief based on this correspondence must be reversed.

Employer first asserted entitlement to Section 8(f) relief for the 1988 injury in its February 1990 notice of controversion. In a letter dated October 29, 1990, the district director requested that employer file a Section 8(f) petition within 45 days. In a letter dated July 9, 1991, the district director informed employer that based on its failure to timely forward its petition for Section 8(f) relief relating to the 1988 ankle injury claim, the Section 8(f)(3) defense was being raised. The district director also informed employer that the October 19, 1988, ankle injury claim was being referred for a formal hearing and was to be consolidated with claimant's November 4, 1986, knee injury claim which had previously been forwarded to the Office of Administrative Law Judges on October 29, 1990. While the claims were pending before the administrative law judge, employer reiterated its prior request for Section 8(f) relief in connection with the 1988 ankle injury claim and for the first time raised the applicability of Section 8(f) with respect to the claim for claimant's 1986 knee injury. The Director did not appear before the administrative law judge or raise the Section 8(f)(3) bar before the administrative law judge. The administrative law judge found the bar was raised based on the district director's actions.

In the administrative law judge's decision, claimant was only awarded permanent disability benefits in connection with the 1986 knee injury. Thus, employer's entitlement to Section 8(f) relief need only be considered in relation to the claim for that injury. The claim for Section 8(f) relief on the 1988 injury is moot. Because the July 9, 1991, letter from the district director only raised the Section 8(f)(3) defense in relation to the claim for the October 1988 ankle injury, it does not provide substantial evidence to support the administrative law judge's determination that employer's right to Section 8(f) relief in connection with the November 4, 1986, knee injury claim is barred pursuant to the Section 8(f)(3).

Section 8(f)(3) states that any request for Section 8(f) relief shall be presented to the district director prior to the consideration of the claim by the district director and that failure to do so be an absolute defense to the liability of the Special Fund. The regulations provide that this must be affirmatively raised and pleaded by the Director. 20 C.F.R. §702.321 (b)(3). Although as discussed, employer did not raise the applicability of Section 8(f) to the 1986 claim while the case was before the district director in violation of 20 C.F.R. §702.321(a), the Director did not raise the absolute defense with regard to the November 4, 1986 knee injury claim. As the Director cannot raise the applicability of Section 8(f)(3) for the first time on appeal, we reverse the administrative law judge's determination that employer's entitlement to Section 8(f) relief is precluded by application of Section 8(f)(3) and remand for the administrative law judge to consider the merits of employer's Section 8(f)

request. *See Marko v. Morris Boney Co.*, 23 BRBS 353, 359 (1990).

Accordingly, the administrative law judge's findings with regard to the availability of suitable alternate employment, the applicable average weekly for the award of permanent total disability compensation, and the denial of Section 8(f) relief contained in his Decision and Order and Decision on Motion for Reconsideration are vacated, and the case is remanded for reconsideration of these issues in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge