

L.N.)
)
 Claimant-Petitioner)
)
 v.)
)
 NEWPORT NEWS SHIPBUILDING AND) DATE ISSUED: 12/23/2008
 DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order on Modification of Daniel A. Sarno, Jr.,
Administrative Law Judge, United States Department of Labor.

Charlene A. Moring (Montagna Klein Camden, LLP), Norfolk, Virginia,
for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport
News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Modification (2007-LHC-00709) of
Administrative Law Judge Daniel A. Sarno, Jr., 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).

Claimant sustained a work-related right knee injury on April 23, 1990. The parties
agreed to the issuance of a stipulated compensation order stating that employer would
pay claimant \$41,639.63 in temporary total, temporary partial, and permanent partial
disability benefits for this injury. The district director's July 28, 2000, compensation

order states that employer had paid compensation of \$29,732.02, and that, therefore, employer owed claimant \$11,907.43. EX 1.

Claimant also sustained a work-related back injury in a separate accident. In a stipulated compensation order issued on May 1, 2001, the district director noted that employer had paid claimant compensation of \$118,396.08 for this injury. The order stated that employer agreed to pay claimant ongoing benefits of \$227.69 per week for temporary partial disability. EX 2.

Employer apparently paid claimant the remaining benefits for her knee injury in a lump sum in August 2000. In March 2005, however, claimant received from employer a check for \$3,590.84. CX 3. The check references employer's claim number for the knee injury. In April and August 2005, claimant missed five days of work due to her knee injury. In October 2005, claimant filed a motion for modification pursuant to Section 22, 33 U.S.C. §922, seeking temporary total disability benefits for these five days. Employer responded that its March 2005 payment was mistaken and/or was for the back injury claim such that the motion for modification was untimely as it was not made within one year of the last payment of compensation on the knee injury claim. Employer agreed, however, that if the modification petition was timely filed, claimant is entitled to the benefits claimed.

The administrative law judge stated he need not decide for which injury the payment was made, as the one-year period for filing a motion for modification on the knee injury claim had already expired by the time the March 2005 payment was made. Thus, he found claimant's motion for modification untimely and denied the claim for additional benefits. Claimant appeals, and employer responds, urging affirmance of the administrative law judge's decision.

On appeal, claimant contends the administrative law judge misapplied the Section 22 statute of limitations, as a party has one year to file a petition for modification from the time the last payment of compensation is made, regardless of when that payment is made. Claimant also contends the March 2005 payment was for the knee injury claim such that her motion for modification was timely. Claimant further contends that since this payment was not timely in relation to the district director's compensation order, she is entitled to a Section 14(f) assessment, 33 U.S.C. §914(f), and interest on the late payment. Employer responds that the payment in March 2005 was a mistaken response to a discrepancy in its computer system regarding the two claims and that claimant was not entitled to the payment on either claim. Employer thus contends that the mistaken payment cannot serve to toll the Section 22 statute of limitations.

Section 22 of the Act states, in relevant part, that a modification petition may be filed:

at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, . . .

33 U.S.C. §922. The administrative law judge found that employer paid claimant benefits for her knee injury in the full amount due under the compensation order, \$11,907.43, on August 3, 2000. The administrative law judge therefore concluded that claimant had one year from this date to request modification of the district director's compensation order. Because she did not do so, the administrative law judge found that the statute of limitations had already expired by the time claimant received the March 2005 payment and that the filing period was not tolled.¹ Thus, the administrative law judge stated he need not rule on the nature of the payment employer made in March 2005.

We must vacate the administrative law judge's finding that claimant's motion for modification was untimely filed. The administrative law judge's conclusion that the filing period expired prior to the March 2005 payment is not supported by the plain language of the statute or by case precedent. In *House v. Southern Stevedoring Co.*, 14 BRBS 979 (1982), *aff'd*, 703 F.2d 87, 15 BRBS 114(CRT) (4th Cir. 1983), the Board stated that the phrase "last payment of compensation" "plainly and unambiguously means the 'last actual payment of compensation.'" *House*, 14 BRBS at 982. The issue in *House* was whether the modification filing period expired one year after a lump sum payment was made or after the time that periodic payments would have ended had they been made. In affirming the Board's decision that the period runs from the date of the lump sum payment, the Fourth Circuit also stated that "the plain meaning of section 922 requires that claims be filed within one year of the date of the last actual payment of compensation." *House*, 703 F.2d at 89, 15 BRBS at 119(CRT).² In this case, therefore, the time for filing a motion for modification on a particular claim runs from the last

¹ The administrative law judge cited case law arising under Section 13 which states that employer's failure to file a Section 30(a) report does not toll the statute of limitations if the claim filing time has expired prior to employer's gaining knowledge of the injury. *See, e.g., Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987).

² This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit.

actual payment of compensation on that claim. There is no basis for concluding that the result should differ based on the length of a gap in payments.

The dispositive issue in this case, thus, is for which claim was the March 2005 payment made? Claimant's motion for modification is timely as to the March 2005 payment only if the payment was for claimant's knee injury claim. The administrative law judge discussed the evidence relevant to this issue, but did not make any findings of fact. Therefore, we must remand the case for him to do so.

We reject employer's argument that the March 2005 payment was not "compensation" as it was inadvertently or voluntarily made. Voluntary payments are nonetheless "compensation." See 33 U.S.C. §914(j). In this respect, we affirm the administrative law judge's finding that claimant was not "entitled" to additional compensation on the knee injury claim pursuant to the district director's compensation order, as the finding is supported by substantial evidence. Decision and Order at 8. Employer put into evidence its Form LS-208, Notice of Final Payment, dated August 7, 2000, with an attachment dated August 8, 2000, that shows full payment of all amounts due claimant for her knee injury under the compensation order.³ EX 13. However, even if the payment was not made pursuant to the Order and was a voluntary payment of compensation on the knee injury claim, claimant's right to seek modification is not curtailed. In *Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975), the Supreme Court held that the one-year period for filing for modification runs from the date of the last voluntary payment even if the order sought to be modified is entered after the claimant's receipt of the last voluntary payment or one year from the final denial of the claim. Employer's argument that the payment is not "compensation," because it was inadvertently, or voluntarily, made is thus not well-founded.

With regard to the issue of for which injury the payment was made, the administrative law judge discussed the following evidence but did not reach any conclusions from it. After claimant received the compensation check, annotated with the knee injury claim number, in March 2005, claimant's counsel inquired of employer what the check was for and stated her understanding that it was an overpayment. EX 5.

³ Thus, as employer timely paid claimant all compensation due under the compensation order, claimant's contention that she is entitled to a Section 14(f) assessment and interest is rejected. In any event, a claim for a Section 14(f) assessment would have to be made initially before the district director. *Miller v. Central Dispatch, Inc.*, 16 BRBS 64 (1984).

Employer replied, on July 18, 2005, that its computer files for the two claims seemingly showed an underpayment on the knee claim, so a claims adjuster sent claimant a check. EX 6. However, the supervisor explained that the computer program actually showed an overpayment on the back injury claim, which is where the “missing” knee claim money was. When employer checked all its payments to claimant, without the March 2005 payment, it had, in actuality, paid claimant the correct amount in the first instance for both injuries. Employer therefore asked that claimant return the check, which she apparently did not do. *Id.* On August 25, 2005, employer informed claimant’s counsel of its intent to take a credit for the overpayment against its liability on the back injury claim. EX 7. Employer filed with the Office of Workers’ Compensation Programs (OWCP) a Notice of Suspension of Benefits on the back injury claim. By letter dated September 21, 2005, employer corrected the amount of its credit pursuant to correspondence received from the OWCP. EX 8.

Employer’s supervisor of workers’ compensation, Amy Guerie, testified at the hearing. She related the contents of the letters discussed above, stated that the basis for the confusion was an internal computer problem, and testified that employer overpaid claimant by virtue of the March 2005 check. Employer recouped the overpayment by suspending benefits on the back injury claim. Tr. at 43. Ms. Guerie testified that claimant was never actually underpaid for either injury. *Id.* at 46.

On remand, the administrative law judge must determine for which injury employer paid compensation in March 2005. If the compensation payment was for the knee injury, claimant’s motion for modification filed in October 2005 is timely as it was filed within one year of the last payment of compensation. If the payment was for the back injury, the motion for modification is untimely as the last payment of compensation for the knee injury was in August 2000.⁴

⁴ Employer is not entitled to offset an overpayment on one injury against its liability for an unrelated injury. If the payment of compensation in March 2005 was for claimant’s knee injury, the credit for the overpayment would run against employer’s liability for the additional temporary total disability benefits claimed in claimant’s modification petition. *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993); 33 U.S.C. §914(j).

Accordingly, the administrative law judge Decision and Order on Modification is vacated, and the case is remanded for further findings consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge