BRB No. 92-0999

CHARLES PETTUS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
I.T.O. CORPORATION OF VIRGINIA	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

Gerard E. W. Voyer (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (91-LHC-1261, 1262) of Administrative Law Judge Richard K. Malamphy 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 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 F.2d 359 (1965); 33 U.S.C. §921(b)(3).

On September 22, 1987 and February 1, 1988, claimant sustained injuries to his right knee during the course of his employment with employer. Thereafter, claimant filed claims under the Act. On June 29, 1989, claimant and employer entered into stipulations regarding both claims. With regard to the September 22, 1987 injury, the parties agreed that claimant was entitled to temporary total disability benefits from September 23, 1987 through January 31, 1988, in the amount of $7,397.93, which employer had already paid. With regard to the February 1, 1988 injury, the parties agreed that claimant was entitled to temporary total disability benefits for the periods of March 29, 1988 through July 31, 1988, and August 1,

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

1988 through September 6, 1988, in the amount of $9,148.59; employer had previously paid

$7,059.09. In addition, the parties agreed that claimant was entitled to permanent partial disability benefits for a 17.5 percent permanent partial disability to his left leg, to be paid in a lump sum in the amount of $19,923.62. Subsequently, on August 23, 1989, the district director[1] issued two compensation orders awarding claimant compensation based upon the parties' stipulations. Each order stated that the file will be closed "subject to the limitations of the Act or until further order of the Deputy Commissioner." Emp. Ex. 4-5. Employer made its final payments of compensation to claimant on August 28, 1989.

On September 6, 1989, claimant's counsel sent letters to the district director, referencing the prior two claims, stating in each: "Please be advised that I herewith make demand for any and all benefits that may be due the above claimant pursuant to the Longshore & Harbor Workers' Compensation Act." Emp. Exs. 6-7. Copies of these letters were not sent to employer and the district director did not notify employer of the receipt of the letters. On October 3, 1989, claimant allegedly sustained another work-related knee injury and was out of work until October 17, 1989.

On December 13, 1989, claimant's counsel sent a letter to the district director, again referencing the two previous claims and stating: "Please be advised that we herewith make claim for any and all benefits my client may be entitled to pursuant to The Longshore & Harbor Workers' Compensation Act." Emp. Ex. 13. Claimant did not send a copy of this December 1989 letter to employer and, again, the district director did not notify employer of the letter upon his receipt of it. On January 10, 1991, claimant's counsel sent a letter to the district director, enclosing a "not fit for duty" slip from Dr. Morales, dated November 14, 1990, for the period October 3, 1989 to October 17, 1989, and requesting a conference on the issue of claimant's entitlement to temporary total disability compensation for that period.

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant suffered an additional period of work-related temporary total disability from October 3 through October 17, 1989. The administrative law judge also accepted the parties' stipulation that claimant's average weekly wage at the time of all injuries was $592.96, yielding a compensation rate of $395.31 per week under Section 10 of the Act, 33 U.S.C. §910. However, the administrative law judge, citing Section 22 of the Act, 33 U.S.C. §922, rejected claimant's argument that since his original claims were timely under Section 13 of the Act, 33 U.S.C. §913, all subsequent requests for compensation are timely. The administrative law judge then found that the September 6, 1989 letters could not be considered requests for modification since they pre-dated claimant's October 3, 1989 injury. Next, the administrative law judge found that the December 13, 1989 letter did not constitute a request for modification, as it did not indicate whether further compensation on behalf of claimant was sought. Rather, the administrative law judge found the September and December letters to be bare assertions of a claim under the Act, submitted after the district director's order, with the intent to negate the one year statute of limitations period set forth in Section 22. Thus, the administrative law judge found that since no request for modification was made by August 28, 1990,

[1] Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute.

and a claim was not filed within one year of the additional period of disability, claimant's claim for additional compensation was not timely. Accordingly, the administrative law judge denied claimant's request for additional compensation.

On appeal, claimant urges reversal of the administrative law judge's denial of his claim for additional benefits, contending that since his first claims were timely filed, his subsequent requests for compensation are timely and cannot be barred by Section 22. In the alternative, claimant asserts that his September 6 and December 13, 1989 letters constituted timely claims for compensation. Employer responds, urging affirmance.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions. Modification of a prior order is permitted, at any time prior to one year after the last payment of compensation or the rejection of a claim, based on a mistake of fact or where the claimant's physical or economic condition has improved or deteriorated. *See Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985); *see also Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). The party requesting modification based on a change in condition has the burden of showing the change in condition. *See, e.g., Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

While we agree with the administrative law judge that claimant's September 6, 1989 letters cannot be considered requests for modification, as they pre-dated the October 3, 1989 incident which resulted in claimant's subsequent period of temporary total disability, we hold, on the facts of this case, that claimant's letter dated December 13, 1989, to the district director constituted a valid request for modification.[2] It is well settled that a request for modification need not be formal in nature. Rather, such a request simply must be a writing which indicates an intention to seek further compensation. *See Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989). In the instant case, while claimant's letter of December 13, 1989 does not specifically reference the October 3, 1989 incident which affected claimant's knee condition, it does reference claimant's prior claims for his previous knee injuries, and states: "Please be advised that we herewith make claim for any and all benefits my client may be entitled to pursuant to the Longshore & Harbor Workers' Compensation Act." Emp. Ex. 13. Even assuming, *arguendo*, that claimant's counsel filed this letter as a protective measure, as the administrative law judge suggests, this statement does indicate an intention on behalf of claimant to seek further compensation with regard to his knee injury, *see*

[2]We note that the stipulations entered into by claimant and employer are not settlements under Section 8(i) of the Act, 33 U.S.C. §908(i)(1988), and can be subject to Section 22 modification, as they do not state that they are adequate and not procured by duress, and do not discharge the liability of employer for further compensation. *See Olsen v. General Engineering and Machine Works*, 25 BRBS 169 (1991); 33 U.S.C. §908(i)(1988); Emp. Exs. 3a, b. Moreover, the district director's orders cannot be construed as Section 8(i) settlements as they also do not provide for the complete discharge of employer's liability for payment of compensation. *See Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989); Emp. Exs. 4-5.

Madrid, 22 BRBS at 148, and the administrative law judge accepted the parties' stipulation that claimant did in fact sustain an additional period of work-related temporary total disability from October 3, 1989 to October 17, 1989. Accordingly, as this December 1989 letter was sent subsequent to the occurrence of a second work incident which resulted in temporary total disability, and this letter indicates an intention to seek further compensation, we reverse the administrative law judge's determination that claimant's counsel's letter of December 13, 1989 did not constitute a request for modification pursuant to Section 22 of the Act. Inasmuch as the administrative law judge accepted the parties' stipulation with regard to claimant's average weekly wage, and their stipulation that claimant suffered an additional period of work-related temporary total disability from October 3 through October 17, 1989, we additionally reverse the administrative law judge's denial of benefits and hold, based upon these accepted stipulations of the parties, that claimant is entitled to temporary total disability benefits for the aforementioned period pursuant to Section 8(b) of the Act, 33 U.S.C. §908(b).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is reversed, and the administrative law judge's decision is modified to reflect claimant's entitlement to temporary total disability benefits for the period October 3 through October 17, 1989, at a compensation rate of $395.31 per week.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge