BRB No. 03-0831

ARTURO PEREZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EAGLE MARINE SERVICES, LIMITED	)	DATE ISSUED: MAR 4, 2004
	)	
Self-Insured	)	
Employer-Respondent	)	ORDER

Employer appeals the "Order Regarding Claimant's Motion for Modification; Employer's Motion to Strike Claimant's Evidence; and Employer's Motion to Terminate Claimant's Period of Temporary Total Disability" (2001-LHC-0203) of Administrative Law Judge Anne Beytin Torkington. Employer also has filed a motion to the stay payments awarded in the administrative law judge's initial Decision and Order, as affirmed by the Board in its March 19, 2003, Decision and Order. Claimant opposes the motion for a stay of payments.

Claimant was injured while working as a truck driver for employer on August 15, 1998. As a result of this incident, claimant sustained an injury to his lower back as well as an alleged psychological injury. The administrative law judge found that although claimant's back condition did not preclude his return to work as of April 2, 1999, claimant's psychological condition is work-related and prevents his return to work. The administrative law judge awarded claimant ongoing temporary total disability benefits.

Employer appealed the administrative law judge's decision, contending she erred in finding claimant's psychological condition to be work-related and disabling, in awarding medical benefits for claimant's back condition, and in assessing a Section 14(e) penalty, 33 U.S.C. §914(e). The Board affirmed the administrative law judge's findings regarding claimant's psychological condition. *Perez v. Eagle Marine Services, Ltd.*, BRB No. 02-0452 (March 19, 2003). The Board affirmed the award of medical benefits for claimant's back injury through October 1, 2001, but remanded the case for the administrative law judge to determine the necessity of treatment for claimant's back injury thereafter. The Board modified the awarded Section 14(e) penalty to reflect its termination as of the date of the informal conference.

On remand, the administrative law judge ordered the parties to file statements concerning their positions on the issue of the necessity of medical treatment for claimant's back. With his statement, claimant filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging a mistake in fact concerning claimant's back condition. Employer countered with a motion for an order terminating disability compensation on the ground that claimant has returned to work. Employer also raised the issue of its liability for claimant's self-procured medical treatment.

The administrative law judge held a conference call, at which time the parties agreed that additional discovery was warranted and that a new hearing would be required to address the issues raised. Order at 3. The administrative law judge then issued the Order which is the subject of the current appeal, in which she "granted" claimant's motion for modification and denied employer's motion for an order terminating claimant's benefits as that issue could only be decided after an evidentiary hearing. In the meantime, employer twice suspended claimant's compensation and claimant twice obtained from the district director an order declaring employer to be in default of the payments due under the terms of the administrative law judge's original decision. In April 2003 and December 2003, the United States District Court for the Western District of Washington entered default judgments in claimant's favor. *See* 33 U.S.C. §918.

In its motion for a stay of payments, employer alleges that claimant has returned to work and earns wages in excess of his pre-injury average weekly wage. Employer maintains that irreparable harm will ensue to it if it has to pay claimant's benefits as well as the Section 14(f) penalty, 33 U.S.C. §914(f), and interest due pursuant to the default judgments.

We deny employer's motion for a stay of payments.[1] In order to obtain a stay of payments pursuant to Section 21(b)(3), employer/carrier must establish that it will suffer "irreparable injury" if it has to satisfy the award of benefits. 33 U.S.C. §921(b)(3); 20 C.F.R. §802.105(a). It is insufficient to allege that the payment of benefits will cause serious financial hardship to the employer or carrier, or that benefits cannot be recouped if they were erroneously paid. *Rivere v. Offshore Painting Contractors*, 872 F.2d 1187, 22 BRBS 52(CRT) (5th Cir. 1989). Rather, "[i]rreparable injury is demonstrated only when the compensation award may be too heavy for the employer [or insurer] to pay without practically taking all his property or rendering him incapable of carrying on his business, or . . . by reason of age, sickness, or other circumstances [of the payer], a condition is created which would amount to irreparable injury." *Id.*, 872 F.2d at 1191, citing *Continental Casualty Co. v. Lawson*, 2 F.Supp. 459, 461 (S.D. Fla.1932), *rev'd on other grounds*, 64 F.2d 802 (5th Cir. 1933); *see also Maxon Marine, Inc. v. Director*,

[1] We reject claimant's contention that employer's motion for a stay of payments was untimely filed. Neither Section 21(b)(3) of the Act, 33 U.S.C. §921(b)(3), nor its implementing regulation, 20 C.F.R. §802.105(a), contains any time constraints on an employer's request to stay payments due under the terms of an award.

OWCP [Ahl], 63 F.3d 605, 29 BRBS 109 (7th Cir. 1995); *Meehan Seaway Service, Inc. v. Director, OWCP*, 4 F.3d 633, 27 BRBS 108(CRT) (8th Cir. 1993); *Edwards v. Director, OWCP*, 932 F.2d 1325, 24 BRBS 146(CRT) (9th Cir. 1991). Employer has not satisfied its burden of establishing "irreparable harm." Employer argues only that it is inequitable to force it to pay total disability benefits while claimant allegedly is working full time and at full wages. To the extent that employer is contending that it will not be able to recoup sums paid to claimant if it is later determined he was not disabled, this argument fails to establish "irreparable injury." *Rivere*, 872 F.2d at 1191, 22 BRBS at 55-56(CRT); *see also Williams v. Jones*, 11 F.3d 247, 27 BRBS 142(CRT) (1st Cir. 1993). Thus, we deny the motion for a stay of payments.

Moreover, employer's appeal on the merits must be dismissed. As stated by the administrative law judge and twice by the district court, employer's avenue of recourse is to obtain modification of the administrative law judge's prior award. The *only* way to change otherwise final decisions is through Section 22. Thus, contrary to employer's contention, doctrines of finality such as the "law of the case" are supplanted by Section 22. *See Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *Hudson v. Southwestern Barge Fleet Service, Inc.*, 16 BRBS 367 (1984). Modification is permitted based on a mistake in a determination of fact in the prior decision or on a change in the claimant's physical or economic condition, and a motion for modification may be filed at any time prior to one year after the last payment of benefits or the final rejection of the claim.[2] *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS

[2] Section 22 provides,

> Upon his own initiative, or upon the application of any party in interest . . . , on the ground of a change in conditions or because of a mistake in a determination of fact . . . , the [administrative law judge] may, 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, review a compensation case . . . in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation. . . .

1(CRT) (1995); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999); *Moore v. Virginia Int'l Terminals, Inc.*, 35 BRBS 28 (2001). Modification proceedings are to be conducted as are initial claims for compensation, *see* 33 U.S.C. §§919, 922; 20 C.F.R. §702.373, and thus employer is not, as a matter of law, entitled to have the prior award terminated based on its pleadings to the administrative law judge or on documents affixed thereto. Contrary to employer's contention, the administrative law judge did not "grant" claimant's motion for modification in the sense that she altered the prior award. Rather, the administrative law judge correctly stated that the parties may introduce their evidence in support of their respective motions at the formal hearing, and that she will determine "[u]pon proof at trial," whether modification of the prior decision is warranted. Order at 2. As the administrative law judge has yet to make any findings of fact or conclusions of law, and as the documents attached to employer's brief to the Board have not been introduced into evidence before the administrative law judge, the Board is without authority to further address employer's substantive contentions. *See generally* 33 U.S.C. §921(b)(3); *Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003); 20 C.F.R. §802.301(a), (b). Therefore, employer's appeal is dismissed, and the case is remanded for the administrative law judge to hold a hearing on the parties' modification requests,[3] 20 C.F.R. §802.301(c), and, if necessary, to address the issue on which the Board previously remanded the case. 20 C.F.R. §802.405(a).

---

33 U.S.C. §922. As claimant was awarded ongoing temporary total disability benefits, we reject employer's contention that claimant's motion for modification was not timely filed.

[3] By Order dated January 16, 2004, the administrative law judge issued an "Order Taking Trial Off-Calendar and Holding Case in Abeyance Pending BRB Appeal." We observe that, by pursuing its groundless appeal, employer has delayed action on its motion for modification, in which employer seeks to terminate benefits.

Accordingly, employer's motion for a stay of payments is denied. Employer's appeal is dismissed, and the case is remanded to the administrative law judge for remand and modification proceedings.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge