BRB No. 02-0121

ESTELLE V. THOMAS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Oct. 9, 2002
	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Estelle V. Thomas, Chesapeake, Virginia, *pro se.*

Benjamin M. Mason (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (00-LHC-3282) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, rational, and 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 left knee injury on December 4, 1981, during the course of her employment as a machinist with employer. Following a left knee arthroscopy and additional medical treatment, claimant returned to work for employer in light-duty employment, and remained employed by employer in this capacity as of the date of

the hearing. On May 1, 1982, claimant sustained a work-related injury to her right knee. Moreover, claimant continued to experience problems with her left knee, and underwent a second left knee arthroscopy on February 2, 1983, as well as additional medical treatment. *See* EXs 3, 4.

The parties entered into a settlement agreement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), with respect to claimant's 1982 right knee injury, and the agreement was approved by Deputy Commissioner B.E. Voultsides in an Order issued on September 11, 1985. Thereafter, pursuant to the parties' stipulations, Deputy Commissioner Voultsides awarded compensation for claimant's 1981 left knee injury in a separate Order issued on September 26, 1985. The September 26, 1985, Order awarded claimant temporary total disability compensation for various periods of time between March 1982 and May 1983, 33 U.S.C. §908(b), permanent partial disability compensation for a 15 percent loss of use of claimant's left leg, 33 U.S.C. §908(c)(2), (19), and medical benefits. 33 U.S.C. §907. Lastly, the Order states that as employer had paid claimant the accrued temporary total and permanent partial disability compensation of $11,508.83, claimant's file "will be CLOSED, subject to the limitations of the Act or until further order of the Deputy Commissioner." EX 9.

Subsequently, on April 28, 1986, while claimant was coming down steps in her home, her left knee gave way, causing her to fall and strike both knees and to land with the weight on her left knee. *See* Tr. at 29. Claimant's fall, which resulted in a left knee prepatellar contusion with a patella dislocation, ultimately required claimant to undergo a left prepatellar bursectomy on June 11, 1986. *See* EXs 3, 4. On June 11, 1986, John H. Klein, the attorney who represented claimant at that time, wrote the following letter to employer's workers' compensation office, with a copy to Deputy Commissioner Voultsides:

> My client informs me that her left leg gave out on her and she fell while at home going down a step. She is being treated by Dr. Fithian for this episode and apparently has been out of work since April 28. I understand she was seen at the shipyard clinic on April 29. As you know, she has a compensable shipyard injury to her left knee from December 4, 1981 (OWCP No. 5-39629). Since her left knee gave out on her, then she should be receiving compensation for this natural progression of her shipyard injury. Please send me the medical records regarding her knee treatment since April 28, 1986, both outside records and clinic progress notes. Also let me know if you are paying worker's compensation for this. If not, send me a copy of your notice of controversion. I will then request an informal conference.

CX 4.[1]

Employer subsequently filed a Notice of Controversion of Right to Compensation dated September 8, 1986, which stated that claimant's "right foot problem is not related to the injury of December 4, 1981."[2] CX 2. Notwithstanding its Notice of Controversion, employer voluntarily paid claimant temporary total disability compensation for the periods April 29, 1986 to September 14, 1986, September 8, 1994, and December 8, 1994 to January 2, 1995; employer's last payment of compensation was made to claimant on August 22, 1995. EX 10. Apparently nothing further transpired in this case until Dr. Stiles assigned disability ratings to claimant's knees on December 29, 1998. EX 1(b). Thereafter, disability ratings were assigned to claimant's left knee by Dr. Lannick on behalf of the Department of Labor and by Drs. Baddar and Tornberg on behalf of employer. EXs 2, 3, 4, 5. Following an informal conference, claimant filed a pre-hearing statement dated August 16, 2000, stating that she sought compensation for disability to both knees resulting from her 1986 fall. The case was then referred to the Office of Administrative Law Judges for a formal hearing. At the formal hearing, employer's counsel stated that claimant's fall at home on April 28, 1986 was the result of the natural progression of her 1981 left knee injury, and that employer voluntarily paid claimant temporary total disability compensation, from April 29, 1986 to September 14, 1986. *See* Tr. at 50-51.

In his Decision and Order, the administrative law judge set forth the contested issues, which involved whether the claim for permanent partial disability compensation is time-barred, whether any prior settlements preclude the compensation sought by claimant and, if claimant is found to be entitled to compensation, the appropriate disability rating to claimant's knees.[3] In considering the issue of the timeliness of the claim, the administrative law judge determined that the letter from claimant's former counsel dated June 11, 1986, constituted a valid claim for compensation with respect to claimant's left knee,[4] and that as this claim was filed prior to the expiration of one year from the date of employer's last payment of compensation,[5] the claim was timely filed. Decision and Order at 4-5. Next, the administrative law judge determined that the September 26, 1985, Order awarding benefits for claimant's 1981 left knee injury does not constitute a Section 8(i), 33 U.S.C. §908(i), settlement, and, thus, does not preclude claimant's subsequent claim for additional compensation for this injury. Decision and Order at 5.[6] Lastly, the administrative law judge accepted Dr. Lannick's opinion that claimant has sustained a 25 percent permanent partial disability of the left lower extremity and, accordingly, he awarded claimant permanent partial disability compensation based on that rating. Decision and Order at 6-7.

On appeal, employer contends that the claim filed by claimant as a result of her fall at home in 1986 is barred by the Act's one-year statute of limitations. Specifically, employer avers that the letter from claimant's former attorney dated

June 11, 1986, does not constitute a valid claim for compensation. Assuming, *arguendo,* that claimant's claim was timely filed, employer asserts that the administrative law judge erred in awarding claimant ongoing compensation since claimant's scheduled permanent partial disability is limited to the time period specified in the schedule. 33 U.S.C. §908(c)(2).[7] Claimant, who is not represented by counsel in the appeal before the Board, has not filed a response to employer's appeal.

It is well-established that if claimant sustains a work-related injury which is followed by the occurrence of a subsequent event outside of work, the employer is liable for the entire resulting disability if the second injury is the natural or unavoidable result of the first injury. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144 (1991); *James v. Pate Stevedoring Co.,* 22 BRBS 271, 273 (1989); *Madrid v. Coast Marine Constr. Co.,* 22 BRBS 148, 153 (1989). *See generally Admiralty Coatings Corp. v. Emery,* 228 F.3d 513, 34 BRBS 91(CRT)(4th Cir. 2000). In the instant case, employer acknowledges that claimant's disabling left knee condition following her fall at home on April 28, 1986 was the natural result of her 1981 work-related left knee injury. Employer challenges the administrative law judge's award of benefits by asserting that the administrative law judge erred in finding that claimant's request for additional compensation following the 1986 incident constituted a valid and timely claim.

The administrative law judge evaluated the timeliness of claimant's request for additional compensation under the provisions of Section 13 of the Act, 33 U.S.C. §913, finding claimant's 1986 letter sufficed as a timely claim as it was filed within one year of the last payment of compensation. As a prior compensation award had been filed in this case, Section 22 of the Act, 33 U.S.C. §922, would apply to permit modification of this 1985 award if a claim for additional benefits were filed within one year of the last payment of compensation. We need not decide whether the administrative law judge properly referred to Section 13 rather than Section 22, as the standards for determining the timeliness and sufficiency of claimant's request for additional compensation are the same in this case. Under either section, claimant must have filed a written document evincing an actual intent to seek compensation for a present loss within the one-year period in order to have a valid claim under the Act. *See I.T.O. Corp. of Corp. of Virginia v. Pettus,* 73 F.3d 523, 528 n.3, 30 BRBS 6, 10 n.3(CRT) (4th Cir. 1996), *cert. denied,* 519 U.S. 807 (1996) (court notes that for same reasons a letter was not a valid modification request, it would also fail as a timely claim under Section 13). *See also Greathouse v. Newport News Shipbuilding & Dry Dock Co.,* 146 F.3d 224, 226, 32 BRBS 102, 103(CRT) (4th Cir. 1998); *Gilliam v. Newport News Shipbuilding & Dry Dock Co.,* 35 BRBS 69 (2001); *Meekins v. Newport News Shipbuilding & Dry Dock Co.,* 34 BRBS 5, *aff'd mem.,* 238 F.3d 413 (4th Cir. 2000).

In the present case, employer argues that claimant's only valid claim in this

case was filed in August 2000, well outside the one-year period. In support of its contention that the claim was untimely, employer asserts that the June 11, 1986 letter to employer from claimant's former counsel does not contain the information necessary to constitute a valid claim under the Act.[8] Employer's argument requires a determination as to whether the contents of that letter provide a sufficient basis for a reasonable person to conclude that an actual claim for additional compensation was being made. *See Greathouse,* 146 F.3d 224, 32 BRBS 102(CRT); *Pettus,* 73 F.3d 523, 30 BRBS 6(CRT).

Claimant's June 11, 1986 letter references her December 4, 1981, work-related left knee injury and states that claimant sustained a fall at home on April 28, 1986, causing her to be out of work since that date and to obtain medical treatment. The letter further asserts that claimant "should be receiving compensation for this natural progression of her shipyard injury." CX 4. Thus, the letter shows a clear intent to seek further compensation for a particular loss. *See Fireman's Fund Ins. Co. v. Bergeron,* 493 F.2d 545 (5th Cir. 1974); *Gilliam,* 35 BRBS at 74. The references to a specific incident, to the change in claimant's work status following this incident, and to claimant's medical treatment for the injuries incurred in this incident clearly evince a change in claimant's physical condition such that claimant had a legitimate claim for benefits "that would alert a reasonable person that the earlier compensation award might warrant modification." *Pettus,* 73 F.3d at 527, 30 BRBS at 9(CRT).[9] *Id.* Like the request for modification in *Gilliam,* claimant's letter in the case at bar specifically claims a deterioration in physical condition and indicates the commencement of an additional period of disability at the time the letter was filed. *See Gilliam,* 35 BRBS at 74. Additionally, the letter claims entitlement to compensation for the additional disability claimant had already sustained as a result of the April 28, 1986, incident which was asserted to be the natural result of the initial injury. Thus, claimant's letter in the instant case is considerably more definitive than those in *Pettus, Greathouse* and *Meekin*s.[10] We therefore reject employer's contention of error and hold that claimant's June 11, 1986 letter constitutes a valid claim under the Act. *See Gilliam,* 35 BRBS at 74. As the 1986 claim was not adjudicated, it remained open and pending. *See Intercounty Constr. Corp. v. Walter,* 422 U.S. 1, 2 BRBS 3 (1975). As claimant may amend a pending claim, the administrative law judge properly considered the disability ratings claimant received and the compensation she requested thereafter. *Gilliam*, 35 BRBS at 74. Thus, the administrative law judge's finding that claimant's claim was timely is affirmed.

Employer also contends that the administrative law judge erred in awarding ongoing compensation for claimant's scheduled permanent partial disability. A knee injury resulting in permanent partial disability is compensated pursuant to the schedule at Section 8(c)(2), 33 U.S.C. §908(c)(2), and compensation is limited to that set forth in the schedule. *McKnight v. Carolina Shipping Co.,* 32 BRBS 165, 170, *aff'd on recon. en banc,* 32 BRBS 251 (1998). Scheduled awards generally

commence on the date of maximum medical improvement and run for the proportionate number of weeks attributable to loss of use of the scheduled body part at the full compensation rate. *Id*. S*ee also Gilchrist v. Newport News Shipbuilding & Dry Dock Co.,* 135 F.3d 915, 32 BRBS 15(CRT)(4th Cir. 1998). Employer argues correctly that claimant cannot receive an ongoing permanent partial disability award in view of the fact that claimant's injury is to a scheduled member. *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980); *McKnight,* 32 BRBS at 170. Pursuant to *PEPCO*, any permanent partial disability award must be made under Section 8(c)(2), which provides for 288 weeks of compensation for a total loss of use of the leg. Employer does not contest the administrative law judge's finding that claimant has a 25 percent permanent partial impairment of the left lower extremity. As the administrative law judge's award of permanent partial disability benefits is ordered as a continuing award, the award must be vacated. Since claimant has a 25 percent disability, the award is modified to provide that she is entitled to receive two-thirds of her average weekly wage for 72 weeks (25 percent of 288). Employer is entitled to a credit for the actual amount of compensation paid under the schedule for the prior permanent partial disability to the left knee. *Brown v. Bethlehem Steel Corp*, 19 BRBS 200, *aff'd on recon.,* 20 BRBS 26 (1987), *aff'd in pert. part sub nom. Director, OWCP v. Bethlehem Steel Corp.,* 868 F.2d 759, 22 BRBS 47(CRT)(5th Cir. 1988).

Accordingly, the administrative law judge's determination that claimant timely filed a valid claim for additional compensation is affirmed. The administrative law judge's award of continuing permanent partial disability benefits is vacated, and the award is modified in accordance with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge