BRB No. 02-0227

QUENTIN L. JONES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Oct. 18, 2002
	)	
	)	
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 of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Breit, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

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

Peter B. Silvain, Jr. (Eugene Scalia, Solicitor of Labor; John F. Depenbrock, Jr., Associate Solicitor; Burke Wong, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (2001-LHC-832) of Administrative Law Judge Fletcher E. Campbell, 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). The Board heard oral argument in this case on August 20, 2002, in Newport News, Virginia.

On August 11, 1997, claimant injured his left elbow and left knee during the course of his employment. Employer voluntarily paid claimant medical benefits, temporary total disability benefits from November 13, 1997, through March 2, 1998, 33 U.S.C. §908(b), and permanent partial disability benefits for a 20 percent impairment to claimant's left knee, 33 U.S.C. §908(c)(2), and for a three percent impairment to claimant's left elbow, 33 U.S.C. §908(c)(1), making its last payment on October 26, 1998. Cl. Ex. 1. Following an informal conference, the district director issued a compensation order awarding claimant the benefits employer had already paid, pursuant to the parties' stipulations. On August 11, 1999, within one year of the last payment of benefits, claimant sent a letter to the Office of Workers' Compensation Programs (OWCP) requesting "minimal ongoing compensation" pursuant to *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Cl. Ex. 17. On October 13, 2000, and on November 2, 2000, claimant's attorney sent letters to OWCP requesting an informal conference on the issue of permanent total disability following employer's decision to pass claimant out of work. Cl. Ex. 3; Emp. Ex. 14. Following an informal conference, the district director transferred the case to the Office of Administrative Law Judges (OALJ) for a formal hearing.

The primary issue before the administrative law judge was whether claimant filed a timely motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922.[1] He found that claimant's claim for permanent total disability benefits, made in October and November 2000, was timely because claimant's August 11, 1999, request for nominal benefits constituted a valid and timely filed motion for modification which remained pending as it had not been adjudicated or withdrawn. Decision and Order at 8. In determining that the 1999 filing was a valid motion for modification, the administrative law judge rejected employer's arguments that the petition was inadequate because claimant did not show with specificity a significant possibility of future wage loss the claim was frivolous, and claimant cannot obtain a

[1]The administrative law judge properly rejected claimant's assertion that, had his benefits been paid over a period of time instead of in a lump-sum payment, his October 13, 2000 motion for modification would have been timely filed. *House v. Southern Stevedoring Co.*, 703 F.2d 87, 15 BRBS 114(CRT) (4th Cir. 1983), *aff'g* 14 BRBS 979 (1982); *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989).

nominal award as he had already been paid for his injuries under the schedule. He reasoned that because claimant developed a new injury to his hip, a body part not covered by the schedule, as a result of his work injury, and as employer accepted liability for the hip injury, the claim filed in 1999 was not a frivolous attempt to forestall closure of the case. Decision and Order at 9. Consequently, the administrative law judge considered the merits of claimant's claim and found that claimant is entitled to temporary total and temporary partial disability benefits for his hip injury beginning on October 9, 2000, and continuing until April 29, 2001, the date claimant returned to work for employer. *Id.* at 12-13. Employer appeals the decision, and claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance.[2]

Employer contends the administrative law judge erred in finding that claimant filed a timely motion for modification and, thus, in awarding benefits. It avers that the 1999 filing was insufficient to toll the statute of limitations because the purpose of a *de minimis* award is to extend the Section 22 filing period, and there was no award of nominal benefits here. Further, employer asserts that the letter did not constitute a valid motion for modification because it is a prohibited anticipatory filing. Alternatively, employer argues that even if the letter did constitute a valid petition for modification, claimant abandoned the 1999 claim by inaction and the amended claims filed in 2000 did not relate back to the original filing pursuant to Rule 15(c) of the Federal Rules of Civil Procedure (FRCP), Fed. R. Civ. P. 15(c). Accordingly, employer contends the amended motions filed in October and November 2000 are barred by the Section 22 statute of limitations. We affirm the administrative law judge's decision for the following reasons.

Nominal Awards and Section 22 in General

Nominal or *de minimis* awards are benefits to which an injured employee may be entitled if he has no current loss of wage-earning capacity as a result of his injury but has established a significant possibility that the injury will cause future economic harm. *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT). The claimant bears the burden of proving by a preponderance of the evidence that "the odds are significant that his wage-earning capacity will fall below his pre-injury wages at some point in the future." *Rambo II*, 521 U.S. at 139, 31 BRBS at 61(CRT); *see Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001). Section 22 of the Act permits the modification of a final award if the party seeking to alter the award can establish either a change in conditions or a mistake in a determination of fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Under Section 22, an application to reopen a claim need not meet any formal criteria. Rather, it need only be a writing such that a reasonable person would conclude that a modification request has been made. *I.T.O. Corp. of Virginia*

[2]On August 20, 2002, employer filed a reply to the Director's response brief. That pleading is hereby accepted into the record. 20 C.F.R. §§802.213, 802.217.

v. Pettus, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974); *Gilliam*, 35 BRBS 69; *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has stated that the modification application "must manifest an *actual* intention to seek compensation for a particular loss, and filings anticipating future losses are not sufficient to initiate § 922 review." *Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 226, 32 BRBS 102, 103(CRT) (4th Cir. 1998) (emphasis in original); *see also Gilliam*, 35 BRBS 69; *Meekins v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 5, *aff'd mem.*, 238 F.3d 413 (4th Cir. 2000). The Fourth Circuit further explained that the "validity" of a motion for modification must come from the "content and context of the [request for modification] itself. . . ." *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 181, 21 BLR 2-545, 2-557 (4th Cir. 1999). To be considered timely, a request for modification must be made prior to one year after the last payment of compensation or the denial of the claim. *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

In this case, claimant was awarded benefits under the schedule for his work-related injury. On August 11, 1999, ten months after final payment of benefits, but *after* the development of his hip condition, claimant sent a letter to OWCP requesting nominal benefits. The letter stated:

> [Claimant] has a condition which is likely to deteriorate further in the future. He therefore requests a minimal ongoing compensation award for purposes of keeping his claim open in the future. He will require additional medical attention and may lose additional time from work in the future. Therefore in accordance with the United States Supreme Court's decision in Rambo II, he should receive a minimal ongoing compensation award. Kindly note this letter as a request for that.

Cl. Ex. 17. The administrative law judge found this letter sufficient to constitute a valid and timely motion for modification, Decision and Order at 8, and it is undisputed that this letter was filed within one year of the date claimant was last paid benefits.

Employer initially argues that claimant's request for a *de minimis* award is not sufficient under Section 22 as an actual *Rambo II* award is required in order to toll the statute of limitations and as the letter is a prohibited anticipatory filing which does not allege a change of condition or a mistake of fact. Claimant and the Director disagree with employer; they assert the 1999 letter tolled the statute of limitations because it expressed an actual intent to seek a particular type of benefits for a particular type of loss. Moreover, the Director argues that because the Supreme Court held in *Rambo II* that an injured employee without an actual quantifiable loss of wage-earning capacity may have a present right to nominal benefits, the letter seeking a *de minimis* award constitutes an assertion of a present right to compensation based on a change in claimant's condition. The Director also states that *Rambo II* overrules that portion of the *Pettus* holding prohibiting anticipatory

filings, Dir. Brief at 9 n.2; *see also Pool Co. v. Cooper*, 274 F.3d 173,180-181, 35 BRBS 109, 115(CRT) (5th Cir. 2001),[3] and he posits that as *Rambo II* permits *de minimis* awards, it follows that it permits modification based on such requests. No cases have specifically addressed this point.

The first two issues raised by employer rest on the theory that a request for a nominal award cannot constitute a valid request for modification as a matter of law, either because only an actual nominal award may serve to keep the claim open or because such a request violates the Fourth Circuit's case law holding that valid requests for modification under Section 22 cannot be anticipatory in nature. Resolution of this issue turns on interpretation of the Fourth Circuit's decisions in *Pettus, Greathouse* and *Borda* in the context of the Supreme Court's decision in *Rambo II.*

In *Pettus*, the claimant injured his knee, and the employer made its last payment of benefits on August 28, 1989, in accordance with the district director's compensation orders. One week later, Pettus sent a letter to OWCP seeking "any and all benefits" to which he may be entitled. No action was taken on the motion, but one month later Pettus sustained an additional period of temporary total disability due to his knee injury. In December 1989, Pettus sent another letter to OWCP, similar to the first, omitting reference to the new period of temporary total disability. In January 1999, Pettus sent to OWCP a doctor's note and a claim for various periods of temporary total disability. The Fourth Circuit held that the two 1989 letters were not valid motions for modification because they did not alert a reasonable person that modification was warranted, they did not show Pettus's intent to seek compensation for a particular loss, and the September 1989 letter was a prohibited anticipatory filing because it was filed before there was any change in claimant's condition. *Pettus*, 73 F.3d at 527, 30 BRBS at 9(CRT).

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[3]The United States Court of Appeals for the Fifth Circuit stated:

> To the extent that *Pettus* does stand for the proposition that a claim may only seek compensation for an antecedent period of disability, it is in direct conflict with the Supreme Court's holding in *Metropolitan Stevedore* [*Rambo II*], and we must disregard it.

Pool Co. v. Cooper, 274 F.3d 173,180-181, 35 BRBS 109, 115(CRT) (5th Cir. 2001).

In *Greathouse*, the claimant injured his leg in 1978, and he was paid temporary total and permanent partial disability benefits until 1987. In 1991, he filed a claim for additional benefits based on the worsening of his leg condition.[4] Because this claim for additional benefits was not timely as to the last payment of compensation, Greathouse argued that a doctor's note, filed within the Section 22 time limit, constituted a timely claim. The court disagreed, stating that the doctor's note did not establish Greathouse's intent to request modification or establish a change in a condition. Further, the court stated, even if the doctor anticipated a 20 percent disability in the future, Greathouse had already been paid benefits for a 20 percent disability and *Pettus* prohibits anticipatory filings. *Greathouse*, 146 F.3d at 226, 32 BRBS at 103-104(CRT); *see also Meekins*, 34 BRBS 5 (request for all types of benefits followed by request that an informal conference not be scheduled held to be an invalid request for modification); *cf. Gilliam*, 35 BRBS 69 (request for specific benefits for specific periods of time in letter also stating it was a motion for modification held to be valid motion).

Contrary to employer's contention, these cases do not mandate a conclusion that a claim seeking nominal benefits is a prohibited anticipatory filing. *Greathouse,* which was decided after *Rambo II*, does not discuss claims for nominal benefits, as the claimant sought an increased award under the schedule. Moreover, subsequent to *Greathouse*, the Fourth Circuit stated in *Borda*, 171 F.3d 175, 21 BLR 2-545, that the content and context of a filing are important factors in assessing whether a filing is a valid petition for modification. Thus, to determine whether a filing constitutes a valid motion for modification, consideration must be given to the circumstances surrounding the filing, as well as to the content of the actual filing itself. *Id.*; *Greathouse*, 146 F.3d at 226, 32 BRBS at 104(CRT).

[4]The Department of Labor had sent him a letter stating that he must file any motion for modification by October 1988.

In *Rambo II*, the Supreme Court stated clearly that a claimant who has no current loss of wage-earning capacity due to his injury, but who has shown a significant possibility of a future wage loss, has a *present* disability, and that such a claimant is entitled to a nominal award. *Rambo II*, 521 U.S. at 135, 31 BRBS at 60(CRT). The Court's conclusion rests on the language of Section 8(h) of the Act, 33 U.S.C. §908(h), and the interplay between that subsection and Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21).[5] Since Section 8(h) includes "the effect of disability as it may naturally extend into the future," 33 U.S.C. §908(h), as a relevant factor for determining an injured employee's wage-earning capacity, the Court concluded there must be "a cognizable category of disability that is potentially substantial, but presently nominal in character" so as to account for the future effects of a disability. *Rambo II*, 521 U.S. at 131-132, 31 BRBS at 58(CRT);[6] *Hodges v. Caliper, Inc.*, 36 BRBS 73 (2002). The Supreme Court, therefore, concluded that a nominal award is permitted under Section 8(c)(21) of the Act.

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[5]Section 8(c)(21) provides for awards of permanent partial disability in cases involving injuries to parts of the body not covered by the schedule, 33 U.S.C. §908(c)(1)-(20). Section 8(c)(21) awards are based on a claimant's loss in wage-earning capacity, and this loss is determined under Section 8(h). Section 8(h) provides:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. §908(h).

[6]The Court stated:

> If the future were ignored and compensation altogether denied whenever present earning capacity had not (yet) declined, §22 would bar modification in response to future changes in condition after one year. To implement the mandate of §8(h) in this class of cases, then, "disability" must be read broadly enough to cover loss of capacity not just as a product of the worker=s injury and present market conditions, but as a potential product of injury and market opportunities in the future.

Rambo II, 521 U.S. at 131-132, 31 BRBS at 58(CRT).

Although in *Rambo II* the Supreme Court was not presented with the precise issue of whether a motion for modification may be based on a request for nominal benefits, it follows from the Court's analysis that if a nominal award is a present award under Section 8(c)(21), (h), then a *claim* for nominal benefits is a viable, present claim for benefits under Section 8(c)(21), (h). Because a compensation order may be reopened pursuant to Section 22 based on a claim of increased disability, the ability to reopen a case necessarily includes the filing of claims for nominal awards under Section 8(c)(21).[7] This analysis is implicit in *Rambo II* because the Court held that a *de minimis* award is appropriate relief to be issued in modification proceedings. It would be irrational to hold, in accordance with employer's argument, that the relief was appropriate in modification proceedings but a request for the appropriate relief was insufficient to initiate modification proceedings. Thus, we reject employer's argument that a petition for a nominal award cannot hold open a claim. Moreover, as a claim for a nominal award is a present claim which gives rise to a present ongoing award if the claimant ultimately proves his case, a claim for a nominal award is not a prohibited anticipatory claim under *Pettus* and *Greathouse*. Accordingly, a motion for modification requesting nominal benefits is not an invalid anticipatory filing as a matter of law.[8] Rather, a claimant's motion seeking a *de minimis* award could be valid or invalid depending on the facts of the case. Therefore, we reject employer's assertion that a claim for nominal benefits is, as a matter of law, insufficient to invoke Section 22 of the Act.

Content and Context of the 1999 Claim

We now address the specific content and context of the 1999 letter to ascertain whether claimant exhibited the actual intent to file a claim for benefits at the time the letter was filed. With regard to content, employer contends claimant's 1999 letter did not identify a change in condition or a mistake in the determination of a fact and that the request for nominal benefits was only in anticipation of a change of condition, thereby making the letter, on its face, insufficient as a petition for modification. We reject employer's argument. On its face, the 1999 letter requests a specific type of compensation which claimant would be immediately able to receive if he could prove entitlement, as we have just discussed.

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[7]To the extent employer argues that claimant must make a valid motion *and* receive an award, all within the one-year period, employer is mistaken. Further, to the extent employer argues that claimant's request for nominal benefits is not a valid motion for modification because claimant cannot prove he is entitled to such an award, this argument must also be rejected as it goes to the merits of the claim and not to the procedural aspect of whether the writing is a valid request for modification. *See Craig v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (*en banc*), *aff'd on recon. en banc*, 36 BRBS 65 (2002).

[8]We need not address the ancillary question of whether it was permissible at the outset for claimant to file a claim for nominal benefits for an injury covered by the schedule, as claimant herein developed hip complications from his work-related knee injury, and a partial disability to the hip is compensated under Section 8(c)(21). *Compare* this case *with Porter v. Newport News Shipbuilding & Dry Dock Co.*, __ BRBS __, BRB Nos. 02-0287/A (Oct. 18, 2002).

With regard to context, employer contends claimant did not have the requisite intent to pursue an actual claim for benefits; rather, it argues, this claim is anticipatory and was filed for the sole purpose of attempting to keep claimant's claim open. Further, employer argues that claimant did not follow through with his claim, thereby proving this lack of intent. As we have stated, under *Pettus* and *Greathouse*, in general, anticipatory claims are not permitted; thus, the context of the filing must indicate that claimant intended at the time of the filing to actually seek an award. *See Meekins,* 34 BRBS 5. If the purpose of claimant's 1999 request was merely to hold open the claim until some future time when he became disabled, then the 1999 claim would not be a valid modification request.

In the present case, claimant sustained a work-related knee injury. The record reveals that, as of January 1999, claimant was having hip problems related to that injury, making him potentially eligible for an award under Section 8(c)(21), including a nominal award. *See* Cl. Ex. 6. The letter he filed in August 1999 was filed within one year of the date of the last payment of benefits for the knee injury, and it was filed after the hip problems began. Under these circumstances, the administrative law judge reasonably found that the 1999 letter was not anticipatory, but, rather, was filed for the purpose of seeking additional benefits for a sequela of the work-related injury. As claimant continued to work until October 2000, it was appropriate for him to file for modification requesting a *de minimis* award prior to the time he ceased working. Although the 1999 letter did not mention the hip condition, it did refer to a condition that was "likely to deteriorate further in the future." The administrative law judge rationally found that this phrasing indicated a change of condition because, in contrast with employer's argument that this letter failed to state a viable claim for nominal benefits because it failed to plead a wage loss, the courts have recognized that evidence of a likely future physical deterioration can establish economic harm. *See Barbera*, 245 F.3d 282, 35 BRBS 27(CRT); *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989). Thus, in accord with *Borda*, the context surrounding the 1999 letter establishes the claim was not anticipatory because, as the administrative law judge found, claimant had a legitimate, non-frivolous, claim for benefits for a hip condition at the time he filed the letter.[9]

Employer next argues that claimant failed to pursue his claim for nominal benefits, thereby establishing a lack of intent. Alternatively, it argues that if the 1999 letter was a timely, valid motion for modification, then claimant's failure to pursue his claim for nominal benefits amounted to abandonment of the claim. Employer relies on the fact that claimant took no action until October 2000, nearly two years after he

[9]Although statements from counsel at the oral argument reveal that identical letters may have been filed in this and other cases, employer's argument that claimant's counsel was simply seeking language to avoid the effects of *Pettus* while holding the claim open in the event claimant's condition deteriorates in the future is insufficient to disturb the administrative law judge's finding that claimant's claim is valid in this case. Because there is no additional evidence demonstrating claimant's lack of intent to pursue his *de minimis* claim, the fact that similar wording may have been used in other cases is an insufficient basis for overturning the administrative law judge's findings.

received the last payment for his knee injury and over one year after he filed the 1999 motion, and when he did act, the action had nothing to do with the claim for nominal benefits, but, instead, involved a claim for permanent total disability benefits. The administrative law judge rejected employer's argument. He relied on the Board's decision in *Madrid,* 22 BRBS 148, and found that the claim was still open because it had not been adjudicated or withdrawn. Decision and Order at 8. In a footnote, he stated that "claimant's inertia" does not prevent the claim from being considered because the Act does not "put the onus on the claimant to move forward with a case once a claim has been made. . . ." Decision and Order at 8 n.3. Citing the regulations, the administrative law judge stated that the burden is on the district director to schedule an informal conference. *Id.*; *see* 20 C.F.R. §§702.311 *et seq.*

The Director, who represents the district directors, agrees with this conclusion. He avers that once a party files a petition with the OWCP, it is incumbent upon the district director to set the informal conference and begin the process for deciding a claim.[10] 33 U.S.C. §§919, 922; 20 C.F.R. §§702.311-702.312, 702.373. He also asserts that the district director's failure to take action is not determinative of the issue, citing *Borda*, 171 F.3d 175, 21 BLR 2-545 (holding that the Director's inaction on a claim for modification does not necessarily establish invalidity of the claim). The Director's reasonable interpretation of the regulations is owed due deference. *National Metal & Steel Corp. v. Reich*, 55 F.3d 967, 29 BRBS 97(CRT) (4th Cir. 1995). Because the district director is obliged to take action following the filing of a claim, we affirm the administrative law judge's conclusion that claimant's actions were not controlling as to his intent with regard to the 1999 claim. Accordingly, we reject employer's argument that claimant's inaction established a lack of intent to pursue his claim, and we hold that the administrative law judge correctly concluded that claimant's 1999 letter was a valid motion for modification. *Gilliam*, 35 BRBS at 74; *compare with Porter v. Newport News Shipbuilding & Dry Dock Co.*, __ BRBS __, BRB Nos. 02-0287/A (Oct. 18, 2002).

Having determined that the 1999 letter constitutes a valid petition for modification, we now address employer's assertion that claimant nonetheless abandoned his claim. If a claim is timely filed under Section 13 of the Act, 33 U.S.C. §913, and it has not been adjudicated or withdrawn, it remains pending. *Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975). The same is true of a motion for modification. *Gilliam*, 35 BRBS at 74; *Madrid*, 22 BRBS at 152. As we have held that the 1999 letter was a valid motion for modification, we conclude that the administrative law judge correctly found that the claim remained open, as it had not been adjudicated or withdrawn. *See* 20 C.F.R. §702.255. As the 1999 letter, therefore, satisfied the Section 22 limitations period, it held claimant's claim open, potentially allowing recovery for any subsequent disability arising from his work injury. *Pool Co.*, 274 F.3d 173, 35 BRBS 109(CRT); *Gilliam*, 35 BRBS at 74; *Madrid*, 22 BRBS at 152; *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd*

[10] The same procedures for deciding a claim under the Act in the first instance apply with respect to claims for modification under Section 22. 20 C.F.R. §702.373.

in pert. part on recon., 22 BRBS 430 (1989); *Lewis v. Norfolk Shipbuilding & Dry Dock Corp.*, 20 BRBS 126 (1987). Consequently, we reject employer's assertion that claimant abandoned his claim.

FRCP 15(c) and the Amended Claim

Finally, employer contends the administrative law judge erred in considering the letters filed in 2000 to be amendments of the letter filed in 1999 because they do not "relate back," as is required of an amended pleading under FRCP 15(c).[11] Employer avers the modified requests filed in 2000 asserted a claim for permanent total disability benefits based on different facts from those which prompted the claim for a *de minimis* award in 1999. The administrative law judge found that the claim remained open because the 1999 letter was a valid Section 22 motion which tolled the statute of limitations, with the result that the 2000 motion for modification was also timely. Decision and Order at 8. We affirm the administrative law judge's finding that claimant's October 2000 letter was a timely motion for modification, amending the pending motion to request permanent total disability benefits.

As stated above, the Supreme Court has held that a timely claim remains open until it is adjudicated, *Intercounty Constr.*, 422 U.S. 1, 2 BRBS 3, and the Board has applied this rule to motions for modification, *Gilliam*, 35 BRBS at 74; *Madrid*, 22 BRBS at 152. More recently, in a case involving amended claims in the context of Section 13 and the partial withdrawal of a claim, the United States Court of Appeals for the Fifth Circuit permitted informal modification of open claims, stating "employees remain free to modify the dates or categories of disability encompassed in their claim when they seek compensation for a single injury, arising out of a single incident. . . ." *Pool Co.*, 274 F.3d 173, 184, 35 BRBS 109, 117(CRT). The Board also has held that a claimant may amend his pending Section 22 claim. *Gilliam*, 35 BRBS at 74, citing *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982) (considerable liberality is generally shown in allowing amendments of pleadings in workers' compensation claims because the process is more simplified than civil litigation).[12]

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[11]FRCP 15(c) states in pertinent part:

> An amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set for or attempted to be set forth in the original pleading. . . .

[12]We note that employer was not unduly prejudiced or surprised by the amendment of claimant's petition for modification. Employer was well aware that claimant was working at its facility in a light duty capacity until he was passed out of work on October 9, 2000, due to the unavailability of work within his restrictions. *See U.S. Industries*, 455 U.S. at 613 n.7, 14 BRBS at 633 n.7; *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100, 104-105 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

With regard to employer's specific argument regarding FRCP 15(c), Section 23(a) of the Act, 33 U.S.C. §923(a), provides that the administrative law judge is not bound by "technical or formal rules of procedure, except as provided by this [Act]." Thus, administrative law judges in general are not bound by the Federal Rules of Civil Procedure, but must conduct hearings in a manner which best ascertains the rights of the parties. 20 C.F.R. §702.339. The Board has held that an administrative law judge may rely on the FRCP where those rules do not conflict with the Act or its regulations. *See, e.g., Twigg v. Maryland Shipbuilding & Dry Dock Co.,* 23 BRBS 118 (1989). This holding is consistent with the general regulations governing hearing procedures before the OALJ, which apply to proceedings herein to the extent they are not inconsistent with the Act or its regulations, 20 C.F.R. Parts 701, 702, and which permit application of the FRCP to any situation not provided for specifically by the regulations, or by statute or other regulation. In this regard, however, the OALJ regulations specifically address the amendment of a pleading, allowing the amendment if it is reasonably within the scope of the original complaint. 29 C.F.R. §18.5(e). As the Act and its implementing regulations do not specifically address the amendment of pleadings, this regulation is applicable in this case. Moreover, as the OALJ regulations address the amendment of pleadings, it is unnecessary to resort to the FRCP in deciding this issue. Thus, we hold that FRCP 15(c) does not control this case.[13]

In summary, we reject employer's arguments, and we hold that claimant's 1999 letter constituted a valid motion for modification. As this motion had not been adjudicated or withdrawn, his modification claim was open for the amendments he made in his filings in 2000. As employer does not challenge either the administrative law judge's findings on suitable alternate employment or on wage-earning capacity, we affirm the award of benefits.

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[13]Even were we to hold that FRCP 15(c) generally applies to cases under the Act, we would still reject employer's arguments, as the plain language of FRCP 15(c)(2) establishes that application of the relation back theory is proper when the later claim arises out of the conduct, transaction or occurrence set forth in the original pleading. Fed. R. Civ. P. 15(c)(2); *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002). Although events transpired between the dates of the claim for nominal benefits and the claim for total disability benefits, causing claimant to modify the type of benefits he requested, the work injury on which his claims were based did not change. *See Pool Co.*, 274 F.3d at 183-184, 35 BRBS at 116-117(CRT); *compare Davis v. Virginia Commonwealth University*, 180 F.3d 626 (4th Cir. 1999) (pleadings based on same occurrences), *with Painter v. Mohawk Rubber Co.*, 636 F.Supp. 453 (W.D. Va. 1986) (original complaint alleged bias against an arbitrator but, based on different facts, transactions and occurrences, amended complaint alleged bad faith by the union and breach of contract by the employer). Thus, if FRCP 15(c) were to apply to claims under the Act, then the relation back theory could apply here because the later claim arose out of the original work injury.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge