BRB No. 97-1156

SUZIN R. BAILEY	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
PEPPERIDGE FARM, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Supplementary Compensation Order Awarding 20 Percent Additional Compensation of Charles L. Green, Associate Director, Office of Workers' Compensation Programs, United States Department of Labor.

Donald P. Maiberger (Anderson & Quinn), Rockville, Maryland, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplementary Compensation Order Awarding 20 Percent Additional Compensation (No. 40-170387) of Associate Director Charles L. Green 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), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501-502 (1973)(the D.C. Act). We must affirm the findings of the district director unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting).

On November 7, 1981, claimant injured her back and leg while working for employer as a manager of a Godiva chocolate store. The work-related injuries caused additional problems to her neck and shoulder, as well as psychiatric problems. On August 14, 1992, Administrative Law Judge Robert S. Amery awarded claimant permanent total disability benefits from December 5, 1989, medical benefits, an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), and interest. Additionally, the administrative law judge awarded claimant statutory adjustments to her award. Employer had voluntarily paid claimant temporary total disability benefits since approximately April 1982.

In calculating the amount to be paid pursuant to this decision, a dispute arose between employer and the district director in 1996 concerning whether cost-of-living adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f), should be paid in accordance with *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 18 BRBS 73 (CRT)(D.C. Cir. 1986) (adopting the holding in *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981) that the rate paid for permanent total disability should include all intervening Section 10(f) adjustments occurring during periods of prior temporary total disability). On April 1, 1996, the district director advised employer to pay Section 10(f) annual adjustments for claimant's permanent total disability benefits effective October 1, 1994, and October 1, 1995. These annual adjustments were computed in accordance with *Holliday*. In August 1996, a claims examiner informed employer's attorney by letter that *Holliday* is applicable in cases arising under the D. C. Act and that employer accordingly should adjust claimant's compensation rate to reflect the holding in *Holliday*. If employer did not agree with the district director's position, it was advised to contact Joseph Olimpio, Director of the Longshore and Harbor Workers' Compensation Division of the United States Department of Labor. On September 5, 1996, employer contacted Mr. Olimpio by letter and requested that the Office of Workers' Compensation Programs no longer follow the *Holliday* decision because it had been overruled by the Fifth Circuit. *See Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc)*. Mr. Olimpio responded to employer's letter on February 12, 1997, advising employer that the Office of Workers' Compensation Programs would continue to follow the *Holliday* formula in cases arising under the D.C. Act until the United States Court of Appeals for the District of Columbia Circuit overruled *Brandt*. Subsequently, on June 2, 1997, a claims examiner advised employer by letter that as employer failed to pay the correct amount based on

Holliday, an assessment pursuant to Section 14(f) of the Act, 33 U.S.C. §914(f), would be entered.

On June 3, 1997, the district director issued a supplementary order awarding a 20 percent assessment pursuant to Section 14(f) as employer failed to pay claimant her annual adjustments pursuant to Section 10(f) in accordance with *Holliday*.[1] The district director denied employer's motion for reconsideration in which employer asserted that the district director should not follow *Holliday* as it had been overruled by *Phillips*.

On appeal, employer challenges the district director's Supplementary Compensation Order awarding a Section 14(f) assessment on the ground that the Section 10(f) computations are incorrect as a matter of law.[2] Neither claimant nor

---

[1]Section 14(f) provides that compensation payable under the terms of an award must be paid within 10 days after it is due; if it is not timely paid employer is liable for an assessment in the amount of 20 percent of the unpaid compensation. As claimant should have received $143,340.05 from employer based on *Holliday* but only received $120,379.61, a difference of $22,960.44, the district director ordered employer to pay the 20 percent Section 14(f) assessment in the amount of $4,592.08.

[2]By Order dated July 7, 1997, employer's motion for a stay of payments was denied, and employer was directed to notify the Board whether it had paid the amount due under the terms of the district director's order. Employer notified the Board by letter dated July 31, 1997, that it has paid the assessment pursuant to Section 14(f) in accordance with the district director's order. As employer paid claimant the amount owed under the terms of the district director's order, the Board has jurisdiction to review the imposition of the Section 14(f)

the Director, Office of Workers' Compensation Programs (the Director), has filed a response brief.

Initially, we hold that due process requires that we decide the Section 10(f) issue raised by this appeal. Ordinarily, an employer may not collaterally attack an underlying compensation award through an appeal of a Section 14 penalty. *See, e.g., Abbott v. Louisiana Ins. Guaranty Ass'n*, 889 F.2d 626, 23 BRBS 3 (CRT)(5th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990) (enforcement proceeding under Section 18(a) limited to lawfulness of the supplemental order of default and does not include the substantive correctness of the underlying compensation order); *Brown,* 30 BRBS at 29 (dealing with timeliness of employer's payment). After our review of the procedural history of this case, however, it is apparent that employer had no earlier opportunity to challenge the basis underlying the district director's Section 14(f) assessment, *i.e.,* the computation of the Section 10(f) adjustment pursuant to *Holliday*. *See generally Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341 (5th Cir. 1981) (Board has jurisdiction to hear appeal raising issue of underlying law or fact where district director finds default inappropriate order); *Kelley v. Bureau of National Affairs*, 20 BRBS 169 (1988). The administrative law judge did not specifically order the calculation of Section 10(f) adjustments pursuant to *Brandt/Holliday*, and the district director did not issue any compensation orders concerning Section 10(f) prior to the assessment of the Section 14(f) penalty. Thus, this appeal presents the earliest opportunity for employer to challenge the Section 10(f) calculation. Moreover, no party challenges the propriety of employer's appeal, which involves strictly a legal issue. *See Brown*, 30 BRBS at 29.

---

assessment. *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1 (CRT)(3d Cir. 1994), *aff'g* 27 BRBS 260 (1993); *see also Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 17 BRBS 135 (CRT)(9th Cir. 1985); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 16 BRBS 10 (CRT)(5th Cir. 1983).

Next, we address employer's contention that the district director erred in awarding the Section 14(f) assessment because employer failed to pay claimant's Section 10(f) annual adjustments to claimant's permanent total disability benefits in accordance with *Holliday*.[3] Employer contends that the United States Court of Appeals for the District of Columbia Circuit only conditionally accepted *Holliday* in its decision in *Brandt,* and as *Holliday* was overruled by *Phillips* in the Fifth Circuit, the district director should no longer apply *Holliday* to cases arising under the D.C. Act.

Section 10(f) provides in relevant part:

> Effective October 1 of each year, the compensation . . . payable for permanent total disability . . . arising out of injuries sustained after October 27, 1972, shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under Section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

[3]Despite employer's contention to the contrary, the district director had authority to award a Section 14(f) assessment in this case involving no dispute as to the facts but only a legal dispute concerning the applicability of *Holliday* to this case. *Patterson v. Tidelands Marine Service,* 15 BRBS 65 (1982), *rev'd on other grounds sub nom. Tidelands Marine Service v. Patterson,* 719 F.2d 126, 16 BRBS 10 (CRT)(5th Cir. 1983).

33 U.S.C. §910(f)(1982).[4] In *Holliday*, the Fifth Circuit adopted the Director's method for computing permanent total disability benefits and held that claimants, upon becoming permanently totally disabled, are entitled to intervening percentage increases reflecting annual cost-of-living adjustments pursuant to Section 10(f) that accrued during any earlier period of temporary total disability. *Holliday*, 654 F.2d at 417, 421-423, 13 BRBS at 741-742, 746-747. The District of Columbia Circuit in *Brandt* accepted the *Holliday* ruling as the proper reading of the statute in that circuit "*at least until the precedent is overruled in the Fifth Circuit*, or the Director publicly announces that, prospectively, he will seek to apply this current interpretation evenhandedly to all similarly disabled claimants in all circuits." *Brandt*, 785 F.2d at 332, 18 BRBS at 78 (CRT)(emphasis added). The court in *Brandt* was reluctant to reject *Holliday* and therefore create a split in the circuits. *Id.*, 785 F.2d at 332, 18 BRBS at 77 (CRT). Moreover, in *Brandt*, the court was displeased with the way the Director was challenging the holding in *Holliday* in every circuit except the Fifth Circuit, the circuit in which the Director had tendered his "allegedly incorrect interpretation." *Id.,* 785 F.2d at 332, 18 BRBS at 77 (CRT).

[4]In 1984, Section 10(f) was amended to add a five percent cap on annual adjustments. The five percent cap is inapplicable to this case as the 1984 amendments to the Act do not apply to cases arising under the 1928 District of Columbia Act. *See Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

Subsequently, in *Phillips*, 895 F.2d at 1033, 23 BRBS at 36 (CRT), the Fifth Circuit, sitting *en banc,* overruled its decision in *Holliday* and held that claimants are not entitled to Section 10(f) annual adjustments during previous periods of temporary total disability. In overruling *Holliday*, the Fifth Circuit in *Phillips* concluded that the language of Section 10(f) is plain and unambiguous that the annual adjustments are to be paid only to permanent total disability benefits. *Phillips*, 895 F.2d at 1035, 23 BRBS at 38 (CRT). Moreover, although the court stated that resort to legislative history is unnecessary "where the statute is so lucid," it nonetheless noted that, with regard to Section 10(f), Congress intended to provide for upgrading benefits in future years in cases of permanent total disability and had rejected a version of Section 10(f) providing for annual adjustments to all compensation, whether partial or total, temporary or permanent. *Phillips*, 895 F.2d at 1035 n. 3, 23 BRBS at 38 n. 3 (CRT). Consequently, the court overruled *Holliday* and adopted the new position of the Director that there shall be no Section 10(f) adjustments for periods of temporary total disability, adding that this position was the posture taken by the Board, except in cases arising in the Fifth and District of Columbia Circuits.[5] *Phillips*, 895 F.2d at 1035, 23 BRBS at 38 (CRT); *see, e.g., Scott v. Lockheed Shipbuilding & Const. Co.,* 18 BRBS 246 (1986). The United States Courts of Appeals for the Second and Ninth Circuits have subsequently adopted the holding in *Phillips.*[6] *Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9 (CRT)(9th Cir. 1990)*; Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT)(2d Cir. 1990).

After a review of the relevant case law since *Holliday* as set out above, we agree with employer that the district director erred in awarding a Section 14(f) assessment based on employer's failure to pay claimant annual adjustments pursuant to Section 10(f) in accordance with *Holliday.* In *Brandt*, the District of

[5]In fairness to the *Holliday* court, the court in *Phillips* noted that the construction of Section 10(f) was not presented by the parties in an adversarial context but as a settlement and that Director acknowledged that his attorney erred in representing the Director's purported position to the court. *Phillips*, 895 F.2d at 1035 n. 4, 23 BRBS at 38 n. 4 (CRT).

[6]The Eleventh Circuit still adheres to *Holliday*. In *Director, OWCP v. Hamilton,* 890 F.2d 1143 (11th Cir. 1989), the court stated it is bound by all decisions issued by the Fifth Circuit prior to October 1, 1981, when the Eleventh Circuit was created, unless the Eleventh Circuit, in an *en banc* decision, overrules the precedent. Recently, the Eleventh Circuit reaffirmed this position, and declined to grant rehearing *en banc* on this issue. *Southeastern Maritime Co. v. Brown*, 121 F.3d 648, 31 BRBS 140 (CRT)(11th Cir. 1997), *pet. for cert. filed*, U.S.L.W. (U.S. Feb. 24, 1998)(No. 97-1394).

Columbia Circuit stated, "In sum, we accept the Holliday ruling as the proper reading of the statute in this circuit *at least until the precedent is overruled in the Fifth Circuit, ..." Brandt*, 785 F.2d at 332, 18 BRBS at 78 (CRT)(emphasis added). Contrary to the district director's order, the *Brandt* court did not state that it would follow *Holliday* until the District of Columbia Circuit overruled it. Rather, the court stated that it would follow *Holliday* until it was overruled by the Fifth Circuit. As *Holliday* has been overruled by *Phillips* in the Fifth Circuit, the condition precedent set by the court has been satisfied. Therefore, *Holliday* no longer applies to cases arising under the D.C. Act. Claimant is entitled to annual adjustments pursuant to Section 10(f) at a rate including only those adjustments occurring after she became permanently totally disabled. Consequently, the district director's order of a Section 14(f) assessment based on employer's failure to pay annual adjustments pursuant to Section 10(f) in accordance with *Holliday* is reversed.

Accordingly, the Associate Director's Supplementary Compensation Order Awarding 20 Percent Additional Compensation is reversed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge