BRB No. 99-0245

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<tr><td>FLORENCE SNOWDEN

Claimant-Respondent

v.

WASHINGTON HOSPITAL CENTER

and

AETNA CASUALTY & SURETY COMPANY (now known as TRAVELERS PROPERTY CASUALTY)

Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest</td><td>)
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DECISION and ORDER</td></tr>
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Appeal of the Supplementary Compensation Order Awarding 20 Percent Additional Compensation Pursuant to Section 14(f) of the Act of Charles L. Green, District Director, Office of Workers' Compensation Programs, United States Department of Labor.

Roger S. Mackey, Chantilly, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplementary Compensation Order Awarding 20 Percent Additional Compensation Pursuant to Section 14(f) of the Act (No. 40-134355) of District 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.* (1982)(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).

Claimant sustained a back injury while working as a psychiatric nurse for employer on September 7, 1978. On March 18, 1992, Administrative Law Judge Charles P. Rippey awarded claimant permanent total disability benefits from December 18, 1990, medical benefits, and interest, as well as any periodic increases to which claimant may be entitled under the Act.[1] The administrative law judge's

[1]The administrative law judge also granted employer's request for Section 8(f) relief, 33 U.S.C. §908(f). The Director, Office of Workers' Compensation Programs (the Director), appealed the administrative law judge's Section 8(f) determination, and employer cross-appealed the administrative law judge's award of permanent total disability benefits. In its decision dated June 28, 1994, the Board affirmed the award of permanent total disability benefits, vacated the finding that employer is entitled to Section 8(f) relief, and remanded for further consideration of that issue in accordance with the Administrative Procedure Act. S*nowden v. Washington Hospital Center*, BRB Nos. 92-1453/A (June 28, 1994)(unpub.). On remand, the administrative law judge denied employer's request for Section 8(f) relief. The

decision, however, did not set the compensation rate, and, in particular, did not order that cost-of-living adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f), be paid in accordance with the *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 18 BRBS 73 (CRT)(D.C. Cir. 1986), and *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), decisions.

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administrative law judge's denial of Section 8(f) relief was affirmed by the Board in a decision dated December 9, 1996. *Snowden v. Washington Hospital Center*, BRB No. 95-2125 (Dec. 9, 1996)(unpub.).

Acting on claimant's claim for an assessment of additional compensation pursuant to Section 14(f), 33 U.S.C. §914(f), the district director, by Order dated October 16, 1998, formally set out, for the first time, a determination that the compensation rate is to include annual adjustments pursuant to Section 10(f) in accordance with *Holliday*.[2] He therefore concluded, based on his finding that employer was not making disability payments at the proper rate, that employer was in default in the compensation owed claimant in the amount of $3,580.68. In addition, the district director held employer liable for a penalty of 20 percent of the amount in default ($716.14) pursuant to Section 14(f).[3]

Employer appeals, contending that, pursuant to the Board's decision in *Bailey v. Pepperidge Farm, Inc.*, 32 BRBS 76 (1998), the holdings in *Brandt* and *Holliday* are no longer controlling authority in cases arising under the D.C. Act. Neither claimant nor the Director has filed a response brief.

In *Bailey*, 32 BRBS at 76, the Board addressed the very issue raised by

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[2]In *Holliday*, the United States Court of Appeals for the Fifth Circuit 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.

[3]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 the district director determined that claimant should have received $7,802.20 from employer based on *Holliday* but only received $4,221.52, a difference of $3,580.68, the district director ordered employer to pay both the deficiency and a 20 percent penalty thereof.

employer in the instant case. Initially, the Board held that as 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, employer's appeal represented the earliest opportunity for employer to challenge the Section 10(f) calculation. *Bailey*, 32 BRBS at 76. The Board further noted that no party challenged the propriety of employer's appeal, which involved strictly a legal issue. Accordingly, the Board determined that it had jurisdiction to consider employer's appeal. The Board then held, after a review of the relevant case law issued since *Holliday*, that the district director erroneously ordered employer to pay annual adjustments pursuant to Section 10(f) in accordance with *Holliday*, as that decision no longer stands as valid precedent. *Bailey*, 32 BRBS at 77-79. Specifically, the Board held that as the United States Courts of Appeals for 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,*" *Brandt*, 785 F.2d at 332, 18 BRBS at 78 (CRT)(emphasis added), and that inasmuch as the Fifth Circuit, in *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*), overruled its decision in *Holliday* and adopted the new position of the Director that there shall be no Section 10(f) adjustments for periods of prior temporary total disability, *Holliday* no longer applies to cases arising under the D.C. Act. *Bailey*, 32 BRBS at 77-79.

For the reasons discussed in *Bailey*, due process requires that we decide the Section 10(f) issue raised by this appeal as this is employer's first opportunity to challenge the underlying basis for the imposition of the Section 14(f) penalty, *i.e.,* the Section 10(f) calculation pursuant to *Brandt/Holliday*. *Bailey,* 32 BRBS at 77-78. Moreover, in accordance with *Bailey*, we hold that 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. *Id.* at 78-79. The district director's order that employer pay compensation inclusive of annual adjustments pursuant to Section 10(f) in accordance with *Holliday* is therefore reversed.[4]

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[4]In the instant case, claimant subsequently applied to the district director for a supplementary compensation order, contending that although employer paid the compensation owed, it did not pay the Section 14(f) penalty. The district director investigated the claim, and thereafter issued an order declaring employer in default. As the Section 14(f) penalty has not been paid and a default order has issued, the Board lacks jurisdiction to address the propriety of the penalty. 33 U.S.C. §918(a); *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1 (CRT)(3d Cir. 1994), *aff'g* 27 BRBS 260 (1993); *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 1219, 18 BRBS 60, 62-63 (CRT)(5th Cir. 1985); *Providence Washington Insurance Co. v. Director, OWCP [Kain]*, 765 F.2d 1381, 1386, 17 BRBS 135, 139 (CRT)(9th Cir.

1985); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 129, 16 BRBS 10, 12-13 (CRT)(5th Cir. 1983).

Accordingly, the award of additional benefits in the District Director's Supplementary Compensation Order is reversed.[5]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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[5]We note that the district director is not free to disregard the Board's decision in *Bailey*. *See generally Northwest Forest Resource Council v. Dombeck,* 107 F.3d 897 (D.C. Cir. 1997)(discussing *stare decisis).*