BRB No. 91-1709

GEORGE B. JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	DATE ISSUED:
v.	)	
	)	
PORT ALLEN MARINE SERVICE, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Motion for Modification of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Douglas P. Matthews (Lemle & Kelleher), New Orleans, Louisiana, for self-insured employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying Motion for Modification (90-LHC-3084) of Administrative Law Judge A. A. Simpson 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 findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and

in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).[1]

Claimant, who sustained a work-related injury on February 6, 1980, was awarded temporary total disability compensation from February 7, 1980 through March 31, 1985, and permanent total disability compensation thereafter pursuant to a Compensation Order issued by District Director Pablo Villalobos on July 16, 1985. The district director further indicated that claimant was entitled to annual cost of living adjustments on the award of permanent total disability compensation under Section 10(f), 33 U.S.C. §910(f) consistent with *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981).[2] In *Holliday*, the Fifth Circuit held that claimants, upon becoming permanently totally disabled, are entitled to an increase in payments reflecting cost-of-living adjustments that accrued during any period of temporary total disability.

Subsequently, in *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc)*, the Fifth Circuit overruled its decision in *Holliday* and held that claimants are not entitled to Section 10(f) adjustments which accrue during a period of temporary total disability. Employer accordingly sought an "adjustment" of claimant's prospective benefits award based on *Phillips* before the district director.

Characterizing employer's request to adjust claimant's benefits as a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, the district director denied the request on the ground that modification cannot be granted based on a change in law. Thereafter, at employer's request, the case was referred to the Office of Administrative Law Judges. In a Decision and Order Denying Motion for Modification, Administrative Law Judge Simpson rejected employer's argument that its request to recalculate claimant's benefits did not constitute a request for modification under Section 22, stating that he could find no authority to support employer's theory. The administrative law judge further noted that he interpreted *Phillips* as being applicable only to those claimants whose cases are properly pending, and not to those whose claims are, as in the instant case, the subject of a final compensation order. The administrative law judge reasoned that since the district director's Compensation Order had become final, the only method to reopen the

---

[1]By Order dated November 15, 1993, the Board granted employer's request to consolidate its appeal in *Ryan v. Lane & Company*, BRBS , BRB No. 91-1697 (June 29, 1994), with the appeal in the present case, BRB No. 91-1709, for purposes of decision. As the decision in *Ryan* was issued separately by a Decision and Order dated June 29, 1994, we vacate our prior order consolidating these appeals and sever BRB No. 91-1709 from BRB No. 91-1697 for purposes of decision.

[2]Employer voluntarily paid temporary total disability compensation from February 7, 1980, through March 31, 1985, at the rate of $212.59 per week, for a total of $57,095.60, and permanent total disability compensation from April 1, 1985, through July 8, 1985, at the weekly rate of $212.59 for a total of $3,006.63. The district director determined that claimant was entitled to an additional $1,066.51 in permanent total disability benefits in accordance with *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981).

award was by way of a modification proceeding. As employer was not seeking modification based on a mistake in fact or change in condition, but rather based on a change in law, the administrative law judge determined that no valid basis existed for modification. Moreover, the administrative law judge determined that the need for finality in decision-making outweighed the interest of justice in reopening the case.

On appeal, employer argues that the administrative law judge erred in denying modification on the facts presented, as the Director, the representative of a federal agency, misdirected the Fifth Circuit into adopting *Holliday* and accordingly perpetrated a serious mistake in the application of the Act. Employer further asserts the district director's award of Section 10(f) adjustments based on *Holliday* involved a mistake in fact because it was directly contrary to the position taken by the Director before the Board in *Brandt v. Stidham Tire Co.*, 16 BRBS 277 (1984), and subsequently before the United States Court of Appeals for the D.C. Circuit in that case. *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 18 BRBS 73 (CRT)(D.C. Cir. 1986). In addition, employer argues that *Phillips* was intended to be retroactively applied to equitably address the problems caused by the Director's perpetration of *Holliday*. Employer alternately asserts that its request for recalculation of claimant's benefits was not a request for modification because this case does not involve a final award as the payments thereunder are subject to annual increases. Finally, employer contends that even if the rules for modification do apply, balancing the equities on the facts presented in the instant case mandates that the normal rule for refusing to allow modification based on a change in law be set aside.

Employer's arguments have been previously considered and rejected by the Board in *Ryan v. Lane & Co.*, BRBS , BRB No. 91-1697 (June 29, 1994). Accordingly, for the reasons stated in *Ryan*, we reject employer's arguments and affirm the administrative law judge's denial of modification in the present case.

Accordingly, the administrative law judge's Decision and Order Denying Motion for Modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge