

MAURICE DARMON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
TODD SHIPYARDS CORPORATION)	DATE ISSUED:
)	
and)	
)	
AETNA CASUALTY & SURETY)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

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

Maurice Darmon, Shepherdsville, Kentucky, *pro se*.

John M. Sartin, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for
employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Denying Motion for Modification (91-LHC-88) of
Administrative Law Judge James W. Kerr, 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 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).

Claimant sustained a work-related head injury and hip fracture while working for employer
on December 19, 1980. By Decision and Order issued May 16, 1986, the administrative law judge
awarded claimant temporary total disability benefits for various periods and permanent total
disability benefits commencing October 7, 1981. The administrative law judge also stated that
claimant is entitled to annual cost-of-living adjustments on the award of permanent total disability
compensation pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f), consistent with *Holliday v.*

Todd Shipyards Corp., 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981). In *Holliday*, the United States Court of Appeals for 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 periods of previous temporary total disability. The administrative law judge also awarded employer Section 8(f), 33 U.S.C. §908(f), relief from continuing compensation liability. The administrative law judge's Decision and Order was not appealed and accordingly became final 30 days after its February 14, 1992, filing. See *Yalowchuk v. General Dynamics Corp.*, 17 BRBS 131 (1985).

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 that occurred during previous periods of temporary total disability. Employer accordingly submitted to the administrative law judge a Motion to Modify Compensation Order, seeking an "adjustment" of claimant's award based on *Phillips* on behalf of the Special Fund.¹

In a Decision and Order Denying Motion for Modification, the administrative law judge rejected employer's argument that its request to recalculate claimant's benefits was not a request for modification under Section 22 of the Act, 33 U.S.C. §922, stating he could find no authority to support employer's theory. The administrative law judge further rejected employer's contention that *Phillips* mandates that its holding be retroactively applied, finding *Phillips* is applicable only to those claimants whose cases are properly pending and not to those whose claims are, as the instant case, the subject of a final compensation order. The administrative law judge reasoned that since his prior decision had become final, the only method to reopen the award is 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 exists for modification, and he denied employer's motion.

On appeal, employer reiterates the arguments made below as to why its request for modification should be granted. Employer specifically argues that the administrative law judge erred in concluding that *Phillips* should be applied only to claimants whose claims are pending. In addition, employer asserts that the administrative law judge erred in relying on *General Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982), and *McDonald v. Director, OWCP*, 897 F.2d 1510, 23 BRBS 56 (CRT) (9th Cir. 1990), cases decided by the United States Courts of Appeals for the First and Ninth Circuits, to conclude that on the facts presented, the need for finality in decision making is paramount over the need to render justice under the Act. Employer contends that the administrative law judge's reliance on these cases is misplaced given that the Fifth Circuit, in which this case arises, addressed this issue and held to the contrary in *Phillips*. Moreover, citing *Jourdan v. Equitable Equipment Co.*, 25 BRBS 317 (1992), employer contends that the calculation of claimant's compensation rate based on *Holiday* involves a mistake of fact

¹Pursuant to 33 U.S.C. §908(f)(2)(B) (1988) employer remains a party to the claim and retains all rights under the Act even after its liability shifts to the Special Fund pursuant to Section 8(f).

which should be corrected under Section 22 despite the fact that no new evidence was presented, because Section 22 is intended to render justice under the Act. Claimant, representing himself, responds, urging that the administrative law judge's Decision and Order be affirmed.

We reject employer's attempt to reopen a final award for retroactive application of *Phillips* for the reasons stated in *Ryan v. Lane & Co.*, 28 BRBS 132 (1994). In *Ryan*, the Board specifically considered the retroactivity argument based on *Phillips* which employer raises in this case,² and held that the administrative law judge reasonably 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. *Id.* at 135. The Board also considered and rejected the argument raised by employer in this appeal, that the administrative law judge erred in concluding that no valid basis exists for granting modification. In so concluding, the Board recognized that in attempting to decrease the benefits resulting from the inclusion of the Section 10(f) adjustments during claimant's periods of temporary total disability pursuant to *Phillips*, employer had not raised a mistake in fact or change in condition on which modification could properly be based; rather employer was seeking modification impermissibly based on a subsequent change in law. *Id.* at 135. The Board stated that Section 22 does not apply to an issue involving legal interpretation decided against a party; such an issue must be timely appealed under Section 21 of the Act, 33 U.S.C. §921, and reopening the case under Section 22 to permit employer to present a new theory of the case once it discovers a subsequent decision which may be favorable to its position does not serve the orderly administration of justice which depends in part upon finality of judicial determinations. *Id.* Inasmuch as the facts in the present case are indistinguishable from those in *Ryan*, we reject employer's argument that the administrative law judge erroneously relied on *McDonald*, 897 F.2d at 1510, 23 BRBS 56 (CRT) and *Woodberry*, 673 F.2d at 23, 14 BRBS at 636, cases recognizing that modification may not be granted based on a change in law, and we affirm the administrative law judge's determination that no valid basis exists for granting modification in this case. Moreover, for the reasons stated in *Ryan*, 28 BRBS at 135-136, we reject employer's argument that equitable considerations warrant the reopening of the case.

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

²Employer relies upon the following passage from *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*) in support of its retroactivity argument in the present case:

Thus, we direct that as to Phillips and other claimants in this circuit, future payments may be adjusted to the amount that would have been calculated absent the *Holliday* formula, although no refund of past excess payments made pursuant to *Holliday* shall be required. This treatment is fair especially in light of the fact that the excess payments in accordance with *Holliday* resulted from the Director's own position, now repudiated, as presented in *Holliday*.

Id., 895 F.2d at 1036, 23 BRBS at 39 (CRT).

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge