

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 24-0449

CAREY MACON, JR.

Claimant-Respondent

v.

MTC EAST d/b/a PORTS AMERICA,
INCORPORATED

and

PORTS INSURANCE COMPANY

Employer/Carrier-
Petitioners

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

Respondent

NOT-PUBLISHED

DATE ISSUED: 08/24/2026

DECISION and ORDER

Appeal of the Order Granting Claimant's Motion for Summary Decision of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for Claimant.

J. Jacob Nixon and Brian P. McElreath (Lueder, Larkin & Hunter, LLC), Mount Pleasant, South Carolina, for Employer and its Carrier.

Matthew W. Boyle (Jonathan Berry, Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; Olgamaris Fernandez, Acting Deputy Associate Solicitor and Counsel for Longshore; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: ROLFE, Acting Chief Administrative Appeals Judge, JONES, and ULMER, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jonathan C. Calianos's Order Granting Claimant's Motion for Summary Decision (2023-LHC-00830) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). The Benefits Review Board must affirm the ALJ's Order if it is rational, supported by substantial evidence, and in accordance with applicable law.¹ 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

The ALJ recognized that Employer and Claimant stipulated that Claimant sustained work-related injuries to his left ankle and back on September 13, 2019; Employer paid Claimant temporary total disability (TTD) benefits from September 14, 2019, to April 16, 2022, when Claimant's conditions reached maximum medical improvement (MMI); Claimant is entitled to permanent total disability (PTD) benefits beginning April 17, 2022; and Claimant is entitled to cost-of-living adjustments under Section 10(f) of the Act, 33 U.S.C. §910(f). Order at 2; Claimant's Mot. for Summ. Decision at 1-4; Employer's Resp. at 1. As these findings are unchallenged on appeal, we affirm them. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007); *Richardson v. Director, OWCP*, 94 F.3d 164, 167 (4th Cir. 1996) (a stipulation of fact that is fairly entered into is controlling on the parties).

The ALJ determined the only issue in dispute was the date the Section 10(f) adjustments should commence. Order at 2. He recognized this case is controlled by *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. Unit A Aug. 1981), which held

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because Claimant sustained his injuries in Georgia. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

that under Section 10(f), a claimant's cost-of-living adjustment includes all intervening adjustments that occurred during the period of his receipt of TTD benefits. *Holliday*, 654 F.2d at 417. The ALJ acknowledged Employer's argument that the United States Court of Appeals for the Fifth Circuit overturned *Holliday* and other circuit courts have overturned their decisions using the *Holliday* computational method. Order at 2. However, he noted the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, has not reconsidered *Holliday* en banc and is otherwise bound by "all decisions of the former Fifth Circuit rendered prior to October 1, 1981." *Id.* at 2 n.1 (citing *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)). Therefore, the ALJ found Claimant's entitlement to PTD benefits included "the intervening percentage increases that occurred during his period of [TTD]" benefits from September 14, 2019, to April 16, 2022, and he granted Claimant's motion for summary decision. *Id.* at 2.

On appeal, Employer contends *Holliday* should be overruled and Section 10(f) should apply to only Claimant's PTD benefits starting April 17, 2022, rather than also applying during his period of TTD from September 14, 2019. However, Employer concedes the Board must still apply *Holliday* and requests the Board recognize its argument for purposes of appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with Employer that *Holliday* is no longer good law in the Fifth Circuit, it has been repudiated by other circuit courts and the Board, and it remains binding in the Eleventh Circuit. The Director urges the Board to affirm the ALJ's findings so the issue may be raised before the Eleventh Circuit on appeal. Claimant filed a response urging the Board to affirm the ALJ's favorable Order.

The Act limits application of the Section 10(f) cost-of-living increases to PTD or death benefits. 33 U.S.C. §910(f). It is not applicable to TTD benefits. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130, 1138 (1981). However, the Fifth Circuit, without discussion, held the PTD compensation rate should include all intervening Section 10(f) adjustments occurring during the period of previous TTD. *Holliday*, 654 F.2d at 417. The Fifth Circuit subsequently overruled its decision in *Holliday* and held that Section 10(f) adjustments apply only to awards of PTD benefits.² *Phillips v. Marine Concrete*

² The United States Courts of Appeals for the Second and Ninth Circuits followed *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033 (5th Cir. 1990) (en banc), holding that Section 10(f) provides adjustments only for PTD benefits and that claimants cannot receive the benefit of intervening adjustments during prior periods of TTD. *Lozada v. Director, OWCP*, 903 F.2d 168, 170 (2d Cir. 1990); *Bowen v. Director, OWCP*, 912 F.2d 348, 351 (9th Cir. 1990). The United States Court of Appeals for the D.C. Circuit stated it would follow *Holliday* "at least until the precedent is overruled in the Fifth

Structures, Inc., 895 F.2d 1033, 1035 (5th Cir. 1990) (en banc). Because *Holliday* was issued prior to October 1, 1981, it remains binding precedent in the Eleventh Circuit; therefore, its holding pertaining to Section 10(f) must be applied in that circuit despite the Board's disagreement with it. *Hamilton v. Crowder Constr. Co.*, 22 BRBS 121, 123 (1989), *aff'd sub nom. Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989) (Mem.); *Pardee*, 13 BRBS at 1138.

Consistent with Eleventh Circuit precedent, the Board and the ALJ are bound by *Holliday*, and we affirm the ALJ's findings and Order. See *S.E. Mar. Co. v. Brown*, 121 F.3d 648, 649 (11th Cir. 1997); *Holliday*, 654 F.2d at 417. Accordingly, we affirm the ALJ's Order Granting Claimant's Motion for Summary Decision.

SO ORDERED.

JONATHAN ROLFE,
Acting Chief Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GLENN E. ULMER
Administrative Appeals Judge

Circuit.” *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 332 (D.C. Cir. 1986); see *Snowden v. Director, OWCP*, 253 F.3d 725, 731 (D.C. Cir. 2001), *cert. denied*, 535 U.S. 1090 (2002).