

HENRY F. BRIGHAM)	
)	
Claimant-Respondent)	
)	
v.)	
)	
SMITH AND KELLY COMPANY)	
)	
and)	
)	
RELIANCE RISK MANAGEMENT,)	DATE ISSUED:
INCORPORATED)	
)	
Employer/Carrier-)	
Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Order Granting Claimant's and Employer's Motion for Reconsideration and Award of Attorney Fee of Robert J. Shea, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Janet R. Dunlop (Judith E. Kramer, Acting Solicitor of Labor; Carol A. De Deo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Order Granting Claimant's and Employer's Motion for Reconsideration and Award of Attorney Fee (88-LHC-2583) of Administrative Law Judge Robert J. Shea 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 the conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1969); 33 U.S.C. §921(b)(3).

Claimant, on May 21, 1986, sustained an injury to his back while working as a longshoreman for employer. Employer, on May 29, 1986, voluntarily commenced payment of temporary total disability benefits to claimant. 33 U.S.C. §908(b). Claimant subsequently filed a claim for permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge awarded claimant temporary total disability benefits from May 29, 1986 to October 9, 1986, and permanent total disability benefits thereafter. 33 U.S.C. §908(a), (b). The administrative law judge, noting that the United States Court of Appeals for the Fifth Circuit's decision in *Holliday v. Todd Shipyard Corp.*, 654 F.2d 415 (5th Cir. 1981), had been overruled by that court in *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033 (5th Cir. 1990)(*en banc*), *vacating* 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989), further denied claimant's request for the Section 10(f) adjustment accruing during his period of temporary total disability to be applied to his award of permanent total disability compensation. 33 U.S.C. §910(f). Lastly, the administrative law judge awarded medical benefits to claimant and relief pursuant to 33 U.S.C. §908(f) to employer.

Thereafter, in an Order Granting Claimant's and Employer's Motion for Reconsideration and Award of Attorney Fee dated December 6, 1990, the administrative law judge, citing *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989), amended his initial decision to reflect claimant's entitlement to adjustments of his permanent total disability award commencing October 1, 1986 and thereafter pursuant to Section 10(f); finally, claimant's counsel was awarded an attorney's fee, payable by employer, for services rendered.

On appeal, the Director challenges only the administrative law judge's application of Section 10(f) to the instant case.¹ Claimant responds, urging affirmance of the administrative law judge's determination that he is entitled to a Section 10(f) adjustment for the period of his temporary total disability. Employer has not responded to this appeal.

The Director contends that the administrative law judge erred in relying upon the United States Court of Appeals for the Eleventh Circuit's decision in *Hamilton*, 890 F.2d at 1143, since that court's decision adopted the Fifth Circuit's decision in *Holliday*, 654 F.2d at 415, which has subsequently been overruled by the Fifth Circuit in *Phillips*, 895 F.2d at 1033. In *Holliday*, 654 F.2d at 415, the United States Court of Appeals for the Fifth Circuit held, without discussion, that the permanent total disability rate accorded an employee should include all intervening Section 10(f) adjustments which occurred during the employee's previous period of temporary total disability. Subsequently, in *Hamilton*, 890 F.2d at 1143, the United States Court of Appeals for the Eleventh Circuit specifically accepted as binding precedent the Fifth Circuit's decision in *Holliday*.² The court further stated that *Holliday* would apply until the court, sitting *en banc*, overruled it.

¹ Section 10(f) of the 1972 Act provided:

Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after the enactment of this subsection shall be increased by a percentage equal to the percentage (if any) by which the applicable national average weekly wage for the period beginning on such October 1, as determined under section 6(b), exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

33 U.S.C. §910(f)(1982).

The Longshore and Harbor Workers' Compensation Act Amendments of 1984 limit Section 10(f) adjustments to the lesser of a Section 6(b), 33 U.S.C. §906(b), calculation or 5 percent. 33 U.S.C. §910(f)(1988).

² In so doing, the court noted that, in *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(*en banc*), it had adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

After *Hamilton*, in *Phillips*, 895 F.2d at 1033, the Fifth Circuit sitting *en banc* overruled its decision in *Holliday*, and held that adjustments pursuant to Section 10(f) of the Act were not to include those accruing during periods of temporary total disability.³ While the Board has previously expressed its disagreement with the Fifth Circuit's holding in *Holliday*, see *Scott v. Lockheed Shipbuilding & Construction Co.*, 18 BRBS 246 (1986), we are compelled nonetheless to apply *Hamilton* to the payments of permanent total disability compensation in this case because it arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, and that court has not overruled *Hamilton*. We therefore hold that the administrative law judge committed no reversible error in awarding claimant Section 10(f) adjustments to his permanent total disability compensation commencing on October 1, 1986.⁴

Accordingly, the administrative law judge's Order Granting Claimant's and Employer's Motion for Reconsideration and Award of Attorney Fee is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

³Other U.S. Courts of Appeals to consider the issue have reached the same result as *Phillips*. See *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). Cf. *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 18 BRBS 73 (CRT)(D.C. Cir. 1986)(holding court would follow *Holliday* until overruled by the Fifth Circuit).

⁴We note that the Board's decision in *Stanfield v. Fortis Corp.*, 23 BRBS 230 (1990), does not mandate a different result in this case, since that decision was issued prior to the Board's receipt of the Eleventh Circuit's decision in *Hamilton*.