

EDWARD R. PHILLIPS)

Claimant)

v.)

MARINE CONCRETE STRUCTURES,)
INCORPORATED)

and)

UNITED STATES FIDELITY)
AND GUARANTY COMPANY)

Employer/Carrier-)
Respondents)

DATE ISSUED: _____

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

Petitioner)

DECISION and ORDER

Appeal of the Decision and Order on Remand, the Decision and Order on Motion for Reconsideration, and the Order on Motion to Reconsider an Order on Motion for Reconsideration of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer/carrier.

Joshua T. Gillelan II (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Remand, the Decision and Order on Motion for Reconsideration, and the Order on Motion to Reconsider an Order on Motion for Reconsideration (84-LHC-1038) of Administrative Law Judge Ben H. Walley 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his knee in 1977, and as a result of the proceedings before the administrative law judge, the Board, and the United States Court of Appeals for the Fifth Circuit, it was determined that he is entitled to temporary total disability benefits from September 1977 through November 1979 and permanent total disability benefits from November 1979 and continuing. 33 U.S.C. §908(a), (b). Further, it was established that employer is entitled to Section 8(f), 33 U.S.C. §908(f), relief and that the Special Fund established in Section 44, 33 U.S.C. §944, is liable for claimant's benefits beginning November 22, 1981. *See Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83 (CRT) (1989), *vacated in part on recon. en banc*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990). The primary questions before the adjudicatory bodies were the onset date of Section 10(f), 33 U.S.C. §910(f), cost-of-living adjustments and liability for reimbursing any overpayments of benefits.¹ *See id.*

Initially, the administrative law judge ordered the first Section 10(f) adjustment to be made on October 1, 1977, after the date of injury, and to continue each October 1 thereafter.² On appeal to

¹There are three different overpayments in this case: 1) due to the modification of the date of permanency; 2) due to the modification of the onset date of Section 10(f) adjustments; and 3) due to the application of *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981). Only the third overpayment is currently at issue. *See Phillips*, 895 F.2d at 1036, 23 BRBS at 39 (CRT); *Phillips*, 21 BRBS at 238-239.

²Section 10(f), 33 U.S.C. §910(f), states:

Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this chapter shall be increased by the lesser of--

(1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or

(2) 5 per centum.

the Board, employer and the Director agreed that Section 10(f) is not applicable during periods of temporary total disability but should commence only after permanent total disability begins and then adjustments should include those occurring during previous periods of temporary total disability pursuant to the holding in *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981). Because it was controlling law at the time of the appeal, the Board was compelled to apply *Holliday*; therefore, it held that Section 10(f) adjustments should have begun on October 1, 1980, after the date of permanency, and it awarded employer reimbursement of overpayments made during the periods of temporary total disability to be paid by the Special Fund by withholding increments from claimant's installments of benefits. *Phillips*, 21 BRBS at 239; *see also Flynn v. John T. Clark & Sons*, ___ BRBS ___, BRB No. 93-1011 (April 29, 1996), slip op. at 3 n.2.

A panel of the Fifth Circuit affirmed the applicability of *Holliday* and the Board's order regarding reimbursement. *Phillips*, 877 F.2d at 1231, 22 BRBS at 83 (CRT). In an *en banc* review, however, the Fifth Circuit overruled its decision in *Holliday* and applied its new decision retroactively.³ The court reinstated the panel decision to the extent it was not inconsistent with the *en banc* decision. *Phillips*, 895 F.2d at 1036, 23 BRBS at 39 (CRT).

On remand, the administrative law judge amended his decision, ordering Section 10(f) adjustments to start on October 1, 1980, at the rate in effect on that date. *See* 33 U.S.C. §906. Additionally, he ordered the Special Fund to reimburse employer for excess payments it made pursuant to *Holliday* by withholding \$25 from claimant's weekly installments of benefits.⁴ The Director moved for reconsideration, arguing that the court's *en banc* decision in *Phillips* does not require claimant to return the excess payments he received pursuant to *Holliday*. The administrative law judge then amended paragraph six of his order, deleting reference to withholding portions of installments of claimant's benefits.⁵ Thereafter, the Director filed a motion for further

³The Director waived his right to recoup overpayments from claimant, stating he would only adjust future benefits to the amount at which they would have been absent *Holliday*. *See Phillips*, 895 F.2d at 1035, 23 BRBS at 38 (CRT).

⁴Paragraph six of the administrative law judge's order on remand states:

The Director shall reimburse Employer/Carrier \$25.00 per week for all overpayments Employer/Carrier made before November 22, 1981 in reliance on previous orders, to the extent that such reimbursement has not already been paid. The \$25.00 per week shall be withheld from Claimant's periodic payments being made by the Director, so that it may be reimbursed to Employer/Carrier.

Decision and Order on Remand at 4.

⁵The revised paragraph provides:

The Director shall reimburse Employer/Carrier for all overpayments Employer/Carrier made before November 22, 1981 in reliance on previous orders, to the extent that such

reconsideration, arguing that *Phillips* requires no reimbursement of any overpayment. The administrative law judge denied the motion.⁶ The Director appeals the administrative law judge's decisions after remand, contending the Special Fund is not responsible for reimbursing employer for any overpayments occurring as a result of the application of *Holliday* and that the court specifically required no refunds due to excess payments made pursuant to the application of *Holliday*. Employer responds, asserting that the question is moot because no excess payments remain to be repaid. Alternatively, employer argues that the Special Fund should be held liable because the Director's waiver of reimbursement from claimant does not waive employer's right to reimbursement from the Special Fund.⁷

The Director contends there is no authority for making the Special Fund a guarantor for the recoupment of overpayments made when awards are modified or reversed. Specifically, the Director argues that the Special Fund should not have to repay money for which it is not liable. We agree with the Director. In its *en banc* decision, the Fifth Circuit stated:

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,

reimbursement has not already been paid.

Decision and Order on M/Recon. at 2.

⁶The administrative law judge relied in part on the court's affirmance of the Board's order for the Special Fund to reimburse employer for excess payments it made to claimant. However, that order concerned only overpayment made due to a change of the onset date of Section 10(f) adjustments and did not concern overpayment made due to the application of *Holliday*, as is at issue here. *See Phillips*, 21 BRBS at 238-239; *see also Flynn*, slip op. at 3-4.

⁷Employer also argues that the panel decision in *Phillips* affirmed employer's entitlement to be reimbursed for excess payments made. Employer has confused two different overpayments. *See* n.1, 6, *supra*.

although *no refund of past excess payments made pursuant to Holliday shall be required.*

Phillips, 895 F.2d at 1036, 23 BRBS at 39 (CRT) (emphasis added). It is not clear from this statement whether the court's statement encompasses the reimbursement at issue here. Pursuant to Section 8(f), in this case, however, employer is liable for permanent total disability benefits between November 1979 and November 1981, and the Special Fund is liable for continuing benefits thereafter. See 33 U.S.C. §908(f); see also 33 U.S.C. §944(i) (Section 44(i) regulates assessments against the Special Fund). The administrative law judge's order regarding reimbursement of overpayments due to Section 10(f) adjustments made pursuant to *Holliday* requires the Special Fund to repay employer out of its own coffers for payments employer made prior to November 22, 1981, during the period employer is liable for benefits. As the Special Fund is not liable for benefits prior to that date, the administrative law judge's order improperly increases the liability of the Special Fund. Therefore, we reverse the administrative law judge's order requiring the Special Fund to reimburse employer for *Holliday* overpayments, as it is contrary to law.⁸ See generally *Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993) (credit against Section 44 assessment as a way to reimburse an employer for overpayment of benefits would jeopardize the fiscal integrity of the Fund).

Accordingly, that portion of the administrative law judge's decisions after remand which requires the Special Fund to repay employer for excess payments made pursuant to the decision in *Holliday* is reversed. In all other respects, the decisions after remand are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY

⁸Moreover, we note that employer states that it made no excess payments of benefits prior to November 22, 1981, for which it now seeks reimbursement.

Administrative Appeals Judge