BRB No. 99-0291

ANNE R. HUNTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARMY TIMES PUBLISHING COMPANY	)	DATE ISSUED: _____
	)	
and	)	
	)	
TRAVELERS PROPERTY CASUALTY CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Supplementary Compensation Order Awarding 20 Percent Additional Compensation Pursuant to Section 14(f) of Charles L. Green, District Director, United States Department of Labor.

James A. Cole, Greenbelt, Maryland, for claimant.

Patricia T. Hagerty (Law Offices of Roger S. Mackey), Chantilly, Virginia, for employer/carrier.

Joshua T. Gillelan, II (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative

Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Supplementary Compensation Order Awarding 20 Percent Additional Compensation Pursuant to Section 14(f) of District Director Charles L. Green 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.* (1982) (the Act), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (1973) (the D.C. Act). The determinations of the district director must be affirmed unless they are shown by the challenging party to be arbitrary, capricious, an abuse of discretion or contrary to law. *See, e.g., Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

Claimant was injured in a work-related incident in 1978. Employer voluntarily paid continuing temporary total disability compensation. 33 U.S.C. §908(b). On April 21, 1998, the district director issued a "Compensation Order Award of Permanent Total Disability Benefits" embodying the parties' agreement that claimant became permanently totally disabled as of July 4, 1982. This Order states that claimant will receive annual cost-of-living adjustments each October 1, beginning October 1, 1982, *see* 33 U.S.C. §910(f) (1982), and also that claimant's permanent total disability benefits are computed in accordance with the decision in *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981).[1]

[1]In fact, the district director's Order referred only to "*Holliday,*" without a citation. *See* discussion, *infra*. In *Holliday,* the United States Court of Appeals for the Fifth Circuit held that, upon becoming permanently totally disabled, a claimant is entitled to cost-of-living adjustments at a rate inclusive of adjustments that occurred during previous periods of temporary total disability. The United States Court of Appeals for the District of Columbia Circuit held in *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 18 BRBS 73(CRT) (D.C. Cir.

Employer did not appeal this decision.

1986), that it would follow *Holliday* until such time as it was overruled by the Fifth Circuit. In *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (*en banc*), the Fifth Circuit overruled *Holliday*, as contrary to the plain language of Section 10(f), 33 U.S.C. §910(f), which states it applies only to awards for permanent total disability or death. Based on the caveat in *Brandt*, the Board held in *Bailey v. Pepperidge Farm, Inc.*, 32 BRBS 76, 79 (1998), that *Holliday* was no longer controlling authority in cases arising under the D.C. Act.

In August 1998, apparently as a result of an inquiry, the district director's office sent carrier a chart detailing the payments due claimant, calculated pursuant to *Holliday*. Thereafter, employer filed a petition for modification, based on the Board's decision in *Bailey v. Pepperidge Farm, Inc.*, 32 BRBS 76 (1998), in which the Board held that *Holliday* was no longer controlling authority in cases arising under the D.C. Act. *See* n. 1, *supra*. By letter dated November 2, 1998, the district director denied employer's motion for modification, stating that a change in law is not a basis for modifying an existing award. Also on November 2, 1998, the district director issued a Supplementary Compensation Order, finding employer in arrears in its payments to claimant due to its failure to apply *Holliday* and therefore liable for a 20 percent penalty pursuant to Section 14(f) of the Act, 33 U.S.C. §914(f). Employer filed a timely appeal to the Board.[2]

On appeal, employer contends that its appeal should be construed as a timely appeal of the district director's April 21, 1998 Order, and that the Board should reverse the district director's application of *Holliday* in calculating claimant's benefits. Employer further contends that since *Holliday* is inapplicable, there is no basis for the Section 14(f) penalty imposed by the district director. Claimant responds, urging rejection of employer's contentions. The Director, Office of Workers' Compensation Programs, also responds, contending that employer failed to challenge the applicability of *Holliday* by way of a timely appeal to the Board, and that the facts herein are materially distinguishable from those in *Bailey*. The Director thus contends that the district director's assessment of a Section 14(f) penalty should be affirmed.[3]

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[2]By Order dated December 23, 1998, the Board dismissed employer's appeal as untimely filed. Upon employer's motion for reconsideration, the Board reinstated employer's appeal on February 19, 1999, noting that employer timely filed an appeal with the district director's office. 20 C.F.R. §802.207(a)(2).

[3]By Order dated February 8, 2000, the Board accepted the Director's response brief, which was filed out of time, as part of the record before the Board. 20 C.F.R. §802.217. Claimant and employer were given 20 days from receipt of the Board's Order in which

We reject employer's contention that its appeal should be construed as timely as to the district director's April 21, 1998, Order. Employer did not file any documents that could be construed as an appeal of that order within 30 days of its filing. *See* 33 U.S.C. §§919(e), 921(a), (b); 20 C.F.R. §§702.350, 802.205. Moreover, we reject employer's contention that the district director's April 21, 1998, order was "unclear," or made "obscure" references to the *Holliday* decision such that it was unable to appeal the applicability of *Holliday* until after the issuance of the November 1998 order. In this regard, it is useful to contrast the factual situation in *Bailey*, 32 BRBS at 76, with that presented in the instant case.

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to respond. Employer has filed a timely reply brief, which is accepted as part of the record before the Board.

In *Bailey*, the employer had voluntarily paid the claimant temporary total disability benefits since 1982, and paid the claimant permanent total disability benefits in accordance with an administrative law judge's 1992 award. In 1996, a dispute arose between the employer and the district director concerning Section 10(f) adjustments. After various correspondence over the next year, the district director ultimately issued an order holding employer liable for a Section 14(f) penalty for failure to pay claimant at a rate inclusive of Section 10(f) adjustments calculated pursuant to *Holliday*. Employer timely appealed this order to the Board. The Board held that due process required that it address the Section 10(f) issue raised by employer as employer's appeal presented its first opportunity to challenge the computation of the cost-of-living adjustment pursuant to *Holliday*. *Bailey*, 32 BRBS at 77.[4] The administrative law judge had not ordered that Section 10(f) adjustments be calculated pursuant to *Holliday*, and the district director had not issued any prior orders addressing the issue. The Board therefore addressed the merits of employer's argument concerning the continued validity of *Holliday* in cases arising under the D.C. Act. *See* n.1, *supra*.

In the instant case, however, the district director's April 1998 order was more than sufficient to put employer on notice that it was being held liable for Section 10(f) adjustments calculated pursuant to *Holliday*. The district director's order contains the following two statements: "The employer/carrier will now convert the claimant's temporary total disability benefits to permanent total disability benefits in accordance with the Holliday decision," and "The claimant's permanent total disability benefits were computed in accordance with the Holliday Decision." These statements are not "obscure" or "unclear" references that "tricked" employer, as they plainly set out the district director's method of calculating employer's liability. Moreover, the district director ordered employer to pay at a rate of $188 per week commencing from the July 4, 1982, date of permanency, despite the parties' agreement that claimant's compensation rate was $140 per week. This fact, along with the references to *Holliday*, should have alerted employer that the district director was incorporating into the compensation rate Section 10(f) adjustments that occurred during claimant's period of temporary total disability.

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[4]The Board noted that employer had paid the Section 14(f) penalty. 32 BRBS at 77 n.2. *See Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1 (CRT) (3d Cir. 1994); *Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 17 BRBS 135(CRT) (9th Cir. 1985); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 16 BRBS 10 (CRT) (5th Cir. 1983).

Thus, we are unpersuaded that employer's first opportunity to challenge the district director's calculation of Section 10(f) adjustments occurred after the issuance of the award of a Section 14(f) penalty. Unlike the situation in *Bailey*, the district director in the instant case issued an order setting forth a compensation rate inclusive of Section 10(f) adjustments calculated pursuant to *Holliday* prior to the time employer was held liable for a Section 14(f) penalty. This order was not so unclear as to absolve employer of the consequences of the failure to file a timely appeal of that order. That employer was represented by its carrier's claims examiner rather than by an attorney during these proceedings cannot overcome the jurisdictional requirement that an appeal be filed within 30 days of an order's filing. *See, e.g., Bolling v. Director, OWCP*, 823 F.2d 165 (6th Cir. 1987); *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997), *aff'd on recon.*, 32 BRBS56 (1998), *aff'd mem.*, 176 F.3d 484 (9th Cir. 1999) (table), *cert. denied*, 120 S.Ct. 593 (1999) (*pro se* claimants' failure to file a timely appeal). As employer failed to file a timely appeal of the April 28, 1998, order, we decline to overturn the district director's computation of the Section 10(f) adjustments.[5] Moreover, as employer's challenge to the award of a Section 14(f) penalty

[5]Thus, we need not address employer's contention that the time for appeal can be extended based on equitable considerations, as none are present in the instant case. *But see INA v. Gee*, 702 F.2d 411, 15 BRBS 107(CRT) (2d Cir. 1983). We note, moreover, that at the

rests solely on its contention that the compensation rate was calculated erroneously pursuant to *Holliday*, we similarly decline to address this issue.[6]

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time the district director entered the April 28,1998, order, the Board had not yet issued *Bailey*. Without having timely appealed the district director's order, employer's attempt to characterize the district director's action as "legal error" and as applying a method of calculating Section 10(f) adjustments that had been "overruled" is disingenuous. Finally, we observe that employer does not challenge the district director's denial of its motion for modification based on an alleged mistake in fact; we decline to address any issues in this regard. *See Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997); 20 C.F.R. §802.211(b); *see also Ryan v. Lane & Co.*, 28 BRBS 132 (1994) (once an award has become final, a party cannot invoke Section 22 to reopen a case based on a change in law concerning Section 10(f)).

[6]We note that the file does not contain evidence that employer paid the Section 14(f) penalty. Without such a demonstration, and absent circumstances such as those presented in *Bailey*, the Board does not have jurisdiction over an appeal of a Section 14(f) award. *See Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1 (CRT) (3d Cir. 1994); *Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 17 BRBS 135(CRT) (9th Cir. 1985); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 16 BRBS 10 (CRT) (5th Cir. 1983).

Accordingly, the district director's Supplementary Compensation Order Awarding 20 Percent Additional Compensation Pursuant to Section 14(f) is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge