

JAMES A. BRYANT)	
)	
Claimant-Respondent)	
)	
v.)	
)	
SMITH & KELLY COMPANY)	DATE ISSUED: _____
)	
and)	
)	
GEORGIA INSURERS)	
INSOLVENCY POOL)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order on Remand of John M. Vittone, Administrative Law Judge, United States Department of Labor.

Paul H. Felser (Portman & Felser), Savannah, Georgia, for claimant.

Edward T. Brennan (Brennan, Harris & Rominger), Savannah, Georgia, for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (87-LHC-2515) of Administrative Law Judge John M. Vittone 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1969); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time. On January 28, 1982, claimant, while working for employer as a longshoreman, injured his left shoulder, head, upper back, and left arm when he fell through the hole in the deck of a container ship. Claimant has not returned to work since the work accident. Employer paid claimant temporary total disability benefits from February 3, 1982, until the date of the hearing. In a Decision and Order dated June 19, 1989, the

administrative law judge found that claimant is permanently totally disabled as a result of his work-related injuries. The administrative law judge ordered that payment of permanent total disability benefits commence as of the date of service of his Decision and Order, but he did not make a determination as to when claimant's disability became permanent. The administrative law judge further determined that claimant is entitled to annual adjustments pursuant to Section 10(f), 33 U.S.C. §910(f), accruing from the date of injury pursuant to *Holliday v. Todd Shipyards, Corp.*, 654 F.2d 415, 416-17, 13 BRBS 741, 742 (5th Cir. 1981). The administrative law judge also denied employer Section 8(f), 33 U.S.C. §908(f), relief, found claimant entitled to reimbursement for the costs of physical therapy, and awarded claimant future medical benefits.

Claimant thereafter appealed the administrative law judge's decision to the Board. *See Bryant v. Smith & Kelly Co.*, BRB No. 89-3580 (May 30, 1991)(unpublished). The Board affirmed the administrative law judge's finding that claimant is entitled to cost-of-living adjustments during the period of his temporary total disability pursuant to Section 10(f), notwithstanding that *Holliday* was overruled by the United States Court of Appeals for the Fifth Circuit. *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*), *vacating in part* 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989). Despite the decision in *Phillips*, *Holliday* is binding precedent in the Eleventh Circuit, wherein the instant case arises, pursuant to that court's decision in *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989), *aff'g sub nom. Hamilton v. Crowder Construction Co.*, 22 BRBS 121 (1989). The Board, however, vacated the administrative law judge's finding that claimant's permanent total disability award should commence as of the date of service of the Decision and Order, and remanded the case to the administrative law judge for the determination of the date when claimant's total disability became permanent. *See Bryant*, slip opinion at 3.

In a Decision and Order on Remand dated April 14, 1992, the administrative law judge reconsidered the medical evidence of record and concluded that claimant reached maximum medical improvement, and thus permanency, on January 4, 1983. On appeal, employer challenges the administrative law judge's determination that claimant is entitled to cost-of-living adjustments pursuant to Section 10(f) during his period of temporary total disability, as well as the administrative law judge's determination as to the date claimant reached maximum medical improvement. Claimant responds, urging affirmance of the administrative law judge's decision.

Initially, we note that the issue of claimant's entitlement to cost-of-living adjustments was resolved by the Board in the prior appeal of this case. This issue was fully addressed and resolved in the Board's prior opinion in which the Board held that claimant is entitled to cost-of-living adjustments, pursuant to Section 10(f) of the Act, during the period of his temporary total disability. The Board's prior decision on this issue thus constitutes the law of the case, and we therefore decline to reconsider this issue. *See Bruce v. Bath Iron Works*

Corp., 25 BRBS 157 (1991); *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 22 BRBS 316 (1989).

Furthermore, we decline to address employer's contention that the administrative law judge erred in determining the date claimant reached maximum medical improvement since employer has not briefed this issue. *See generally Shoemaker v. Schiavone and Sons, Inc.*, 20 BRBS 214 (1988);

Carnegie v. C & P Telephone Co., 19 BRBS 57 (1986); 20 C.F.R. §802.211.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge