

WILLIAM BOWDEN)
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 Claimant-Petitioner)
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 v.)
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 MARINE TERMINALS CORPORATION) DATE ISSUED: May 20, 2003
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 and)
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 MAJESTIC INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Steven M. Birnbaum and George P. Surmaitis (Law Offices of Steven M. Birnbaum), San Francisco, California, for claimant.

B. James Finnegan (Finnegan, Marks & Hampton), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-LHC-2045, 2046) of Administrative Law Judge Alexander Karst 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 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 (1965); 33 U.S.C. '921(b)(3).

Claimant, a top picker driver for employer, developed bilateral epicondylitis of

his elbows, commonly known as “tennis elbow.” Claimant alleged that his conditions were due to the cumulative trauma that he experienced while working for employer. EX 3 at 99. Dr. Wu, a plastic surgeon specializing in hand surgery, performed bilateral elbow surgery on claimant in May 1999 and October 1999. Dr. Wu subsequently released claimant to return to work without restrictions in January 2000, and determined that claimant reached maximum medical improvement on February 7, 2000. Employer paid claimant temporary total disability benefits for various periods of time, and covered the cost of claimant=s medical care related to his elbow conditions. See 33 U.S.C. §§908(b), 907. Additionally, employer agreed to pay claimant permanent partial disability compensation under the schedule based on Dr. Wu=s assessment of a 10 percent impairment to each upper extremity. See 33 U.S.C. '908(c)(1). Claimant sought compensation for a 27 percent impairment to his upper extremities based on the opinion of Dr. Atkin.

In his Decision and Order, the administrative law judge, citing, *inter alia*, *Potomac Electric Power Co. [PEPCO] v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), initially rejected claimant's contention that pain and the economic effects of the loss of use of his hands should be utilized in the calculation of his impairment for compensation purposes under the Act. The administrative law judge then awarded claimant permanent partial disability compensation under the schedule for a ten percent loss of use of each upper extremity, based on the opinion of Dr. Wu. 33 U.S.C. '908(c)(1), (19).

On appeal, claimant challenges the administrative law judge=s calculation of the extent of his compensable disability; specifically, claimant alleges that the administrative law judge erred in failing to consider claimant=s age and the difficulty of his job, and erroneously relied on the opinion of Dr. Wu in assessing claimant=s impairment rating because Dr. Wu=s opinion is based solely on grip strength measurements and the rote application of Table 34 of the American Medical Association *Guides to the Evaluation of Permanent Impairment*. Employer responds, urging affirmance. Claimant has filed a reply brief.

It is well-established that the claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. See *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). In the instant case, the administrative law judge awarded claimant compensation based upon a ten percent impairment rating to each upper extremity, after crediting the opinion of Dr. Wu over that of Dr. Atkin, because Dr. Wu is claimant=s treating

physician, while Dr. Atkin examined claimant on only one occasion.¹ The administrative law judge further noted that Dr. Wu is a specialist with over 20 years of experience, that he had a better opportunity to observe and test claimant=s grip strength repeatedly over a three-year period, and that Dr. Wu=s testing of claimant=s grip strength obtained consistent results.²

Initially, our review of the record reveals that the administrative law judge committed no error in relying upon the opinion of Dr. Wu, rather than that of Dr. Atkin, in determining the extent of claimant=s upper extremity impairments.

¹In a report dated May 2, 2000, Dr. Wu declared claimant to be permanent and stationary and assessed his impairment rating at 20 percent for both arms, in accordance with Table 34 of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) based on grip strength readings obtained on October 12, 1999, December 6, 1999, January 8, 2000, and February 7, 2000. EX 1 at 4; Decision and Order at 5 n.2. Based on an examination conducted on October 4, 2000, Dr. Atkin assessed claimant=s impairment for each extremity at 20 percent and added two percent for pain and five percent for age and work strain to each extremity, for a total disability rating of 27 percent for each extremity.

² Contrary to claimant=s contention on appeal, the administrative law judge did not ignore the “differences” among Dr. Wu=s test results when finding that physician=s opinion to be most persuasive. Rather, the administrative law judge set forth Dr. Wu=s multiple findings at length, as well as Dr. Wu=s method of calculating claimant=s impairment, prior to rendering his credibility determinations. See Decision and Order at 4-5.

Determinations regarding the weight accorded to medical evidence are the province of the administrative law judge. See *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Thus, in adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, see *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001), and he is not bound to accept the opinion or theory of any particular witness. See *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge fully evaluated the respective medical opinions relied upon by the parties, and ultimately relied upon the opinion of Dr. Wu, based upon his expertise and ability to observe and test claimant's condition over a three-year period as claimant's treating physician, to conclude that claimant sustained a ten percent impairment to each upper extremity. As the administrative law judge's finding is both supported by substantial evidence and is in accordance with law, it is affirmed. See *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999).

Claimant next avers that the administrative law judge erred by failing to base claimant's scheduled award on his pain, as well as the economic effects of his work injury, in addition to his medical impairment. Specifically, claimant contends that the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) mandate a disability approach to calculating a claimant's physical rating and that, accordingly, claimant's age and the difficulty of his work should be considered in compensating him for a scheduled injury. Initially, we note that while both Dr. Wu and Dr. Atkin utilized the AMA *Guides* when considering claimant's condition, the Act does not require ratings based on medical opinions using the AMA *Guides* except in cases involving compensation for hearing loss and voluntary retirees. See 33 U.S.C. "908(13), 902(10); *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154, 159 n.4 (1993). Thus, an administrative law judge is not bound by any particular standard or formula in determining the extent of disability sustained by claimant; rather, the administrative law judge may consider a variety of medical opinions and observations in assessing the extent of a claimant's disability under the schedule. Moreover, the schedule is the exclusive remedy for permanent partial disability to the members listed therein. See *PEPCO*, 449 U.S. at 268, 14 BRBS at 363. Awards under the schedule are based on medical impairment and economic

³In *PEPCO*, the claimant suffered a physical impairment of five to 20 percent loss of the use of one leg, but the resulting impairment of his earning capacity was apparently in excess of 40 percent. As claimant's injury was to his leg, it was covered by the schedule provisions contained in Section 8(c) of the Act; claimant, however, sought a larger award by way of Section 8(c)(21) of the Act, 33 U.S.C.

loss is not considered in determining a disability rating under the schedule. See *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT)(4th Cir. 1998). In this regard the Supreme Court stated in *PEPCO* that where an injury results in a partial loss of use of a scheduled member, Section 8(c)(19) of the Act provides that compensation is to be calculated as a proportionate loss of use of that member. See *PEPCO*, 449 U.S. at 272 n.4, 14 BRBS at 364 n.4.

Accordingly, as the administrative law judge=s decision to credit the opinion of Dr. Wu is rational, we affirm his award of permanent partial disability compensation for a ten percent loss of use of each of claimant=s upper extremities pursuant to Section 8(c)(1) of the Act.

Accordingly, the administrative law judge=s Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

'908(c)(21). The United States Supreme Court held that the plain language of the Act provided a compensation schedule for 20 different specific injuries, and that Section 8(c)(21) applied only to injuries not included within the list of specific injuries and was not intended to provide an alternative method of compensation for the cases covered under the schedule. The Court held that these provisions were mutually exclusive and that the injuries covered under the schedule award could not be pursued instead through Section 8(c)(21) in an effort to obtain a higher award

based on economic loss even if the scheme produced anomalous results.