

ESSIE STEMBRIDGE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOWLAND HOOK CONTAINER	)	DATE ISSUED:
TERMINAL, INCORPORATED	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Michael E. Glazer (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

John F. Karpousis (Freehill, Hogan & Mahar), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (98-LHC-0926) of Administrative Law Judge Ralph A. Romano 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. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a lane checker, fell in a hole on December 2, 1996, and sustained an injury

to her left knee. Claimant thereafter alleged she hurt her back, neck and wrists in this fall. The parties stipulated that claimant is entitled to temporary total disability benefits from December 3, 1996, through January 13, 1997. Claimant, however, sought additional benefits for underpayment of temporary total disability during this period, and also sought temporary total disability benefits from January 14, 1997, through February 4, 1997. Additionally, claimant sought permanent partial disability benefits for impairments to her knee and wrists under the schedule at Section 8(c) of the Act, 33 U.S.C. §908(c), and unpaid medical bills. The administrative law judge found that claimant failed to produce sufficient evidence to establish entitlement to further disability payments after January 13, 1997, but that employer had underpaid claimant compensation for the period between December 3, 1996 and January 13, 1997, by \$186.20 per week. The administrative law judge also found that no medical benefits were payable after January 13, 1997.<sup>1</sup>

On appeal, claimant challenges the administrative law judge's denial of additional disability benefits and an attorney's fee. Employer responds, urging affirmance.

To establish a *prima facie* case of total disability, claimant must establish that she is unable to perform her usual employment due to her work-related injury. *Lombardi v. Universal Maritime Service Corp.*, 32 BRBS 83 (1998); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In the instant case, the administrative law judge acted within his discretion in relying upon the opinion of Dr. Gallick that claimant could return to her usual work as of January 7, 1997, as the administrative law judge found the doctor's opinion well-reasoned and documented. EXS 5, 10. Moreover, the administrative law judge found that even claimant's treating physician, Dr. Stein, was unable to consider claimant disabled up to the date she actually returned to work, February 4, 1997, and advised that claimant could have returned to work as of January 3, 1997, unless she informed the doctor to the contrary, which she did not. CX 1. See *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Contrary to claimant's contention, the administrative law judge provided a sufficient rationale for his finding that claimant failed to establish her inability to perform her usual work after January 13, 1997, as required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). As this finding is supported by substantial evidence, it is affirmed. *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v.*

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<sup>1</sup>We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is not entitled to medical benefits after January 13, 1997. See generally 33 U.S.C. §907; *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

*Director, OWCP*, 909 F.2d 1488 (9<sup>th</sup> Cir. 1990).

Next, we reject claimant's contention that the administrative law judge erred in failing to find her entitled to an award under the schedule at Section 8(c) for impairments to her knee and wrists. In this regard, the administrative law judge rationally found that Dr. Post's opinion,<sup>2</sup> CX 5a, regarding impairment ratings to both wrists and the left knee, was refuted by the opinions of Drs. Gallick and Stein that claimant has no permanent impairment to these members.<sup>3</sup> EXS 5, 10 at 29-32; CX 8 at 70. As substantial evidence in the record supports the administrative law judge's decision that claimant did not sustain a permanent impairment to her knee and wrists, we affirm the administrative law judge's denial of permanent disability benefits under the schedule.<sup>4</sup>

Finally, we decline to address claimant's contention that the administrative law judge erred by denying claimant's counsel attorney's fee award. The administrative law judge's decision is silent on this issue, and the record before us does not indicate that counsel submitted a fee petition to the administrative law judge. Claimant's counsel must first file a fee petition with the administrative law judge, itemizing work reasonably performed on the issues successfully pursued, *see* 33 U.S.C. §928; 20 C.F.R. §§702.131-134, and the award or denial of the requested fee can then be appealed.

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<sup>2</sup>Dr. Post stated that claimant sustained a 10 percent impairment to the right wrist, a 7½ percent impairment to the left wrist, and a 15 percent impairment to the left knee.

<sup>3</sup> Dr. Gallick, a board-certified orthopaedic surgeon, specifically refuted the foundation of Dr. Post's opinion point by point. EXS 5, 10 at 29-32. Dr. Stein stated that claimant's knee and wrist complaints resolved without permanent impairment. CX 8 at 70.

<sup>4</sup>Any error in the administrative law judge's evaluation of claimant's credibility thus is harmless, given the administrative law judge's rational reliance on the medical evidence of record.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge