BRB No. 93-1496

HESS CARVER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fee of N. Sandra Ramsey, District Director, United States Department of Labor.

John F. Dillon (Maples and Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney's Fee (Case No. 6-68849) of District Director N. Sandra Ramsey 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). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant filed a claim for benefits based on his occupational disease, silicosis, which allegedly arose during the course of his employment with Ingalls. In his Decision and Order, Administrative Law Judge Parlen L. McKenna (the administrative law judge) held that Ingalls was not the responsible employer because it was not the last covered employer to expose claimant to harmful stimuli prior to November 6, 1970, the date on which the administrative law judge found that claimant became aware or should have been aware that he was suffering from an occupational disease. Additionally, the administrative law judge determined that since claimant had not filed a claim against the putative responsible employer, Avondale Shipyards, for whom claimant worked from 1968 until 1970, within two years of his date of awareness, his claim for compensation was time-barred. Accordingly, benefits were denied. Prior to the manifestation of the silicosis, claimant sought and was awarded temporary total disability compensation under the Act from February 28, 1980 through February 14, 1982 and permanent total disability compensation thereafter for the work-related neck injury he sustained on January 30, 1979.

Employer and the Director, Office of Workers' Compensation Programs (the Director), both appealed the administrative law judge's decision. The Board initially held that Ingalls is liable as the responsible employer as a matter of law since claimant worked for Ingalls from 1974 to 1980 and the record establishes that claimant was not aware of the relationship between his silicosis, disability and employment prior to October 1981. *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991). The Board next affirmed the administrative law judge's denial of all disability compensation because the record contains no evidence rating claimant's impairment prior to the onset of total disability in 1980. *Id.* Moreover, the Board noted that as claimant was already receiving total disability benefits for his pre-existing neck injury, he cannot receive additional benefits. *Id.* The Board, however, held that Ingalls remains liable for medical expenses, and, thus, remanded the case for consideration of claimant's entitlement to medical benefits pursuant to 33 U.S.C. §907. *Id.*

On remand, the administrative law judge found that employer was not liable for any past medical expenses incurred by claimant. The administrative law judge, however, ordered employer to pay all future reasonable and necessary medical expenses causally related to claimant's silicosis. Thereafter, claimant's counsel submitted a petition for an attorney's fee for work performed before the district director, requesting a fee of $1,289.50, representing 10.75 hours at $100 per hour, plus expenses of $214.50. In her Compensation Order Award of Attorney's Fee, the district director awarded claimant's counsel a fee of $1,037.50, for 8.375 hours performed after employer received formal notice of the claim on June 23, 1982 at $100 per hour, plus $200.00 in expenses.[1]

On appeal, employer challenges the district director's award of an attorney's fee. Claimant responds, urging affirmance of the fee award. Employer initially contends that inasmuch as claimant was denied compensation benefits and awarded only future medical expenses, he was completely unsuccessful in his claim. Employer thus maintains that it cannot be liable for an attorney's fee in this case. We disagree. In the instant case, since claimant prevailed on the issue of causation, entitling him to future medical benefits, there was a successful prosecution of the claim. *Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993)(Brown, J., dissenting), *aff'd mem. sub. nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995). Claimant's counsel is therefore entitled to an attorney's fee payable by employer under Section 28 of the Act, 33 U.S.C. §928.[2] *Id.*

[1]The district director properly found that employer cannot be held liable for services rendered prior to its receipt of formal notice of the claim, but she declined to assess the 1.75 hours against claimant in view of his minimal recovery. 33 U.S.C. §928(a), (c); 20 C.F.R. §702.132(a).

[2]We also reject employer's argument in the alternative that the attorney's fee awarded in the instant case should be comensurate with the limited success achieved by claimant, since this issue was not raised before the district director. *See Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon.*

Employer further contends that the $100 hourly rate awarded to claimant's counsel is excessive. The district director determined that the hourly rate of $100 sought by claimant's counsel was reasonable and appropriate considering the nature of the case, the work performed and the quality of the representation. As employer's mere assertion that the awarded rate does not conform to the reasonable and customary charges in the area where this claim arose is insufficient to meet its burden of proving that the rate is excessive, we affirm the hourly rate awarded by the administrative law judge to counsel. *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Accordingly, the district director's Compensation Order Award of Attorney's Fee is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

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en banc, 28 BRBS 102 (1994), *aff'd mem. sub. nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). In any event, inasmuch as employer did not challenge claimant's entitlement to future medical benefits, the instant case is distinguishable from the case relied upon by employer in forwarding this argument, notably *Ingalls Shipbuilding, Inc. v. Director, OWCP, [Baker]* , 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). *Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993)(Brown, J., dissenting), *aff'd mem. sub. nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995).

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge