BRB Nos. 96-0798
and 96-1273

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

Appeals of the Decision and Order - Awarding Benefits, Order Denying Employer's Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney's Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor, and of the Compensation Order Award of Attorney's Fee of Jeana J. Jackson, District Director, United States Department of Labor.

Ronald T. Russell (Franke, Rainey & Salloum, P.L.C.C.), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits, Order Denying Employer's Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney's Fees (94-LHC-2186) of Administrative Law Judge Richard D. Mills, and the Compensation Order Award of Attorney's Fee (6-151503) of District Director Jeana F. Jackson 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and will not be set aside unless 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, who worked for employer as a cable puller, was injured on January 26, 1993, when she slipped on a bulkhead. Employer voluntarily paid claimant temporary total disability

compensation from February 6, 1993 until August 6, 1993. Claimant sought permanent total disability benefits under the Act. In his Decision and Order - Awarding Benefits, the administrative law judge denied the claim for permanent total disability benefits, finding that while claimant was unable to return to her usual work with employer, employer had established the availability of suitable alternate employment through the testimony of its vocational expert, Thomas Stuart. The administrative law judge further found that claimant did not make a diligent effort to procure alternate employment. Accordingly, he awarded claimant temporary total disability benefits from February 6, 1993 to December 22, 1994, and permanent partial disability benefits thereafter, based on the difference between claimant's stipulated average weekly wage of $315.74 and her post-injury wage-earning capacity of $170 per week.[1] The administrative law judge also concluded that employer was liable for claimant's medical expenses for her work-related injuries, including the cost of chiropractic treatment provided by Dr. Weilip. By Order dated February 12, 1996 the administrative law judge summarily denied employer's motion for reconsideration of his determination that claimant is unable to perform her usual work.

Thereafter, claimant's counsel sought an attorney's fee of $2,900, representing 23.2 hours at $125 per hour for work performed before the administrative law judge. In a Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge awarded counsel a fee of $2,446.88 for 19.575 hours of work performed at an hourly rate of $125.

Claimant's counsel also sought an attorney's fee award of $1,937.50 from the district director, representing 15.5 hours of work at the hourly rate of $125. In a Compensation Order Award of Attorney's Fee, the district director awarded counsel a fee of $1,812.50, for 14.5 hours of work at the rate of $125 per hour.

On appeal, employer challenges the administrative law judge's award of permanent partial disability compensation, arguing that the administrative law judge erred in concluding that claimant was unable to perform her usual employment. In addition, employer maintains that the administrative law judge erred in finding that the chiropractic treatment provided by Dr. Weilip is compensable. Moreover, employer appeals the administrative law judge's fee award on various grounds. BRB No. 96-0798. Employer also appeals the district director's fee award, incorporating the objections it made below into its appellate brief. BRB No. 96-1273. Claimant has not responded to either appeal.

We initially reject employer's argument that administrative law judge erred in finding that claimant established a *prima facie* case of total disability. In determining that claimant is unable to perform her usual work as a cable puller, the administrative law judge credited claimant's testimony that she is in constant pain and is unable to climb stairs or ladders, stoop or bend, or sit for a period longer than twenty to twenty-five minutes. Decision and Order at 4, Tr. at 23- 26. In addition, he

[1]In his initial Decision and Order, the administrative law judge erroneously referred to claimant's post-injury wage-earning capacity of $170 as her loss in wage-earning capacity. This error was corrected in an Order Granting Employer's Motion to Amend Order issued on February 12, 1996.

noted that the medical opinions of Drs. Drake and McCloskey corroborated claimant's testimony; while both physicians found no objective signs of permanent injury which would preclude claimant from performing her prior work duties, Dr. Drake stated that claimant was unable to return to her regular employment based on her subjective complaints, EX-10 at 3, and Dr. McCloskey concluded that claimant seemed greatly incapacitated. EX-8 at 3. A claimant's credible complaints of pain may constitute substantial evidence to meet her burden of establishing her *prima facie* of total disability. *Thompson v. Northwest Enviro Services*, 26 BRBS 53 (1992). Moreover, the administrative law judge's decision to credit claimant's testimony, despite the lack of corroborating objective medical evidence, was, contrary to employer's assertions, within his discretionary authority. *See generally Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). Because the administrative law judge's finding that claimant is unable to perform her usual work is supported by substantial evidence and employer has failed to raise any reversible error made by the administrative law judge, we affirm this determination. *See Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995).

Employer next argues that the administrative law judge erred in holding it liable for Dr. Weilip's chiropractic treatment. Section 7 of the Act, 33 U.S.C. §907, describes an employer's duty to provide medical services necessitated by its employee's work-related injuries. Relevant to the present appeal, Section 702.404 of the regulations provides that chiropractors are included in the definition of the term "physician" within the meaning of Section 7, subject to the limitation that their services are reimbursable only for "treatment consisting of manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings." 20 C.F.R. §702.404.

On appeal, employer contends that the treatment provided by Dr. Weilip is not compensable under Section 702.404 because there is no evidence that the spinal manipulation services Dr. Weilip performed were intended to correct a subluxation, which employer defines as an incomplete or partial dislocation. In holding employer liable for Dr. Weilep's chiropractic treatment, the administrative law judge noted the applicability of Section 702.404 and summarily concluded that the services Dr. Weilip provided were the type of chiropractic services covered under the Act. Inasmuch as the administrative law judge found that Dr. Weilip's services were compensable under Section 702.404 without discussing subluxation or providing any explanation, we vacate the award of medical expenses for Dr. Weilip's chiropractic treatment and remand the case for the administrative law judge to reconsider this issue and identify the evidentiary basis for any conclusion he reaches consistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A).[2] *See, e.g., Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989).

[2]Our review of the record reveals that Dr. Weilip's medical bills contain diagnoses of intervertebral disc syndrome, cervicobrachial syndrome, thoracic segment dysfunction, and thoracic and lumbar myofascitis. CX-3. Moreover, in his May 9, 1993, and August 2, 1993, reports, Dr. Weilip described the spinal manipulation treatment he performed as "careful, specific correction of the interosseous disrelations, to reduce fixations, improve range of motion, free articular anatomy for the reduction and or removal of neurological dysfunction." CX-4, 9.

We next address employer's appeals of the fee awards of the administrative law judge and district director. We initially reject employer's argument that both fee awards are premature because the substantive claim is pending on appeal. It is well-established that to foster the goal of administrative efficiency, a fee award may be made during the pendency of an appeal; such an award, however, does not become effective and is thus not enforceable until all appeals are exhausted. *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987); *Bruce v. Atlantic Marine, Inc.*, 12 BRBS 65 (1980), *aff'd*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

With regard to both fee awards, employer also contends that any fee awarded must be tailored to the degree of success obtained in accordance with *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532 (D.C. Cir. 1992). In making the fee award in this case, the district director specifically recognized that the fee award should reflect the amount of benefits awarded, and accounted for this factor in determining that the requested $125 hourly rate was reasonable and appropriate. While the administrative law judge did not address the reasonableness of the fee request in light of the benefits obtained, our review of the record reveals that employer voluntarily paid a total of $5,472.74 in temporary total disability compensation for the period from February 6, 1993 through August 6, 1993, but controverted its liability for any additional compensation thereafter. As a result of counsel's efforts before the administrative law judge, claimant was awarded additional temporary total disability benefits through December 22, 1994, and continuing permanent partial disability benefits of $97.06 per week thereafter, pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), and the awards have now been affirmed.[3] While claimant was not successful in establishing her right to total disability compensation, in light of the substantial success which claimant's counsel did achieve, employer has failed to meet its burden of establishing that the fee awards made by the administrative law judge and the district director of $2,446.88 and $1,937.50, respectively, are unreasonable. *See generally Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. 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). Employer's argument that any fee awarded must be based solely on the difference between the amount initially paid and the amount that was ultimately awarded is also rejected as the Board has held that a fee larger than this amount may be reasonable in a given case.[4] *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994)(McGranery, J., dissenting)(decision on recon.); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989).

[3]We note that the administrative law judge also awarded claimant $5,000 in disputed medical expenses for Dr. Weilep's chiropractic treatment, although this award remains non-final in view of our remand.

[4]In any event, less than one year's payments of the permanent partial disability award alone will exceed the fee awards.

Finally, regarding the district director's fee, we address employer's arguments raised below which it has incorporated into its appellate brief. Employer objects to counsel's method of billing in minimum increments of one-quarter hour. Consistent with the decisions of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990) (unpublished) and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995) (table), we reduce the second March 8, 1994, entry from one-half to one-quarter hour. After considering employer's remaining objections to the number of hours awarded, and to the hourly rate, we reject these contentions, as it has not shown that the district director abused her discretion in this regard. *See Ross*, 29 BRBS at 42; *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Employer's contentions which were not raised below will not be addressed for the first time on appeal. *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993); *Clophus v. Amoco Production Co.*, 21 BRBS 201 (1988).

Accordingly, the administrative law judge's award of medical expenses for Dr. Weilip's chiropractic treatment is vacated, and the case is remanded for further consideration consistent with this decision. The administrative law judge's Decision and Order - Awarding Benefits is in all other respects affirmed. The administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is also affirmed. BRB No. 96-0798. The Compensation Order Award of Attorney's Fee of the district director is modified as stated herein, and is otherwise affirmed. BRB No. 96-1273.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge