BRB No. 97-1575

GEORGE HILL	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:_____
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order Granting Attorney's Fees of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

James F. Scott, Gretna, Louisiana, and Rodney P. Vincent (Gertler, Gertler, Vincent & Plotkin, L.L.P.), New Orleans, Louisiana, for claimant.

Joseph J. Lowenthal, Jr., Richard T. Gallagher, Jr., and Elizabeth Slatten Healy (Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Supplemental Decision and Order Granting Attorney's Fees (94-LHC-3367) of Administrative Law Judge Lee J. Romero, Jr., 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is

discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant testified that he fell and injured his back on October 1, 1980, during the course of his employment as a sandblaster. Employer voluntarily paid temporary total disability benefits from October 28 through November 2, 1980. Cl. Ex. 5. Claimant returned to his usual work until mid-November 1980 when he was transferred from sandblasting to crane hooking. Tr. at 227-228. He continued to work for employer until he was laid off for financial reasons in March 1983. On August 1, 1983, claimant experienced back pain and went to the emergency room. Dr. Fleming informed him that he had two bulging discs, and in late 1983, claimant underwent a lumbar discography and a disc injection. Cl. Ex. 23 at 289-290, 293-294; Cl. Ex. 26 at 709; Tr. at 241-243, 245-246. In 1995, claimant underwent a second surgery on his back. Cl. Ex. 24 at 432-435. Claimant filed a claim for compensation with the state of Louisiana on February 21, 1984, and he filed a claim for compensation under the Act on June 24, 1992. Cl. Exs. 8, 12.

The administrative law judge found that claimant was injured on October 1, 1980, during the course of his employment with employer. Decision and Order at 19-20. He also found that employer received timely notice of the injury under Section 12, 33 U.S.C. §912, and that employer filed a first report of injury on November 6, 1980. *Id.* at 21. However, the administrative law judge denied claimant benefits because the administrative law judge found that claimant had failed to file a timely claim for compensation pursuant to Section 13 of the Act, 33 U.S.C. §913. Specifically, the administrative law judge found that claimant had become aware of the full effect of his condition on August 23, 1983; therefore, he had one year from that date to file a claim under the Act. Decision and Order at 22; *see* 33 U.S.C. §913(a). The administrative law judge acknowledged claimant's state filing on February 21, 1984, but noted that such filing was "clearly untimely when filed."[1] *Id.* Nevertheless, he stated that under Section 13(d), the statute of limitations for filing a claim under the Act was tolled from February 21, 1984, until October 2, 1991, the period during which the administrative law judge found that the state claim was pending. Because claimant used six months of his one-year period before filing the state claim, his claim under the Act, which was filed eight and one-half months after the conclusion of the state claim on October 2, 1991, was untimely. *Id.* at 22-23 (citing *Ingalls Shipbuilding Div., Litton Systems, Inc. v. Hollinhead*, 571 F.2d 272, 8 BRBS 159 (5th Cir. 1978); *Calloway v. Zigler Shipyards, Inc.*, 16 BRBS 175 (1984)).

[1]Louisiana requires a workers' compensation claim to be filed, at the latest, within two years of the date of the accident. La. R.S. 23:1209; *see* discussion *infra*.

Despite citing *Calloway,* which states that the reasons for the dismissal of a claim filed within the meaning of Section 13(d) are irrelevant, the administrative law judge deemed the fact that claimant's state filing was untimely as "extremely germane" to this case. He stated:

> I find it illogical and absurd to permit the untimely filing of a state claim to suspend or toll the statute of limitations for a longshore claim. . . . In essence, to permit such a tolling in this case allows Claimant to bootstrap himself into an extension of the one-year statute of limitations.

Decision and Order at 23. Accordingly, the administrative law judge concluded that claimant's June 24, 1992, filing was untimely, and he denied disability benefits. *Id.* Because medical benefits are never time-barred, and because he concluded that claimant's back condition is related to the work injury, the administrative law judge awarded claimant medical benefits. Decision and Order at 24-25. Claimant appeals the administrative law judge's decision, and employer responds, urging affirmance.

In a supplemental decision, the administrative law judge awarded claimant's counsel an attorney's fee of $15,019.96, representing a reduction from the requested total of $80,306.19. Claimant appeals the reduction. Employer urges affirmance.

On appeal, claimant contends the administrative law judge erred in finding that his claim under the Act was untimely filed. Additionally, claimant argues that "evidence" attached to employer's response brief before the Board should not be considered, as it was not in the record before the administrative law judge. Employer argues that claimant also submitted additional "evidence" to the Board.

We shall first address the contentions concerning the attachments to the parties' briefs. On February 21, 1984, claimant filed a claim for benefits under the Louisiana workers' compensation law. The Louisiana statute on workers' compensation provides in pertinent part:

> In case of personal injury, including death resulting therefrom, all claims for payments shall be forever barred unless . . . within one year after the accident a formal claim has been filed as provided [by this Chapter]. * * * Also, when the injury does not result at the time of, or develop immediately after the accident, the limitation shall not take effect until expiration of one year from the time the injury develops, but in all such cases the claim for payment shall be forever barred unless the

proceedings have been begun within two years from the date of the accident.

La. R.S. 23:1209(A). Subsection B states in part:

> The filing of such claims shall be deemed timely when the claim is mailed on or before the prescription date of the claim.

La. R.S. 23:1209(B). In light of this rule, employer disputed the state claim by filing an exception of prescription, and the case came before the district court on May 1, 1991.[2] On June 26, 1991, the district court maintained the exception and dismissed the case. Emp. Opp. Brief at Exh. A.

The Louisiana Court of Appeal affirmed the district court's decision on February 25, 1992. *Id.* at Exh. B. In that decision, the court agreed with employer that claimant's right to bring a claim prescribed one year after his accident. Further, the court stated that employer did not "lull" claimant into a "false sense of security" so as to interrupt or suspend the period for filing. Thus, it held that claimant is not entitled to either disability or medical benefits under Louisiana law. *Id.* On October 2, 1992, the Supreme Court of Louisiana denied claimant's petition for a writ of *certiorari*, and on November 2, 1992, it denied the motion to reconsider its decision. *Id.* at Exh. C, D; *Hill v. Avondale Shipyards, Inc.*, 606 So. 2d 530, 604 So. 2d 1304 (La. 1992).

These documents, with the exception of the November 2, 1992, denial of reconsideration (Cl. Ex. 18), were not a part of the record before the administrative law judge. In his reply brief, claimant argues that the Board should disregard employer's attachments to its brief. In a further response, employer makes the same argument regarding the attachments to claimant's brief.[3]

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[2]There is no explanation for the delay.

[3]In a supplemental reply, claimant argues that employer's second response brief should not be considered because the briefing schedule had ended. Although, presuming the time for filing has not expired, the briefing schedule generally ends after the Board's receipt of the reply brief, the regulations permit the filing of

We reject the arguments pertaining to the parties' attachments to their briefs. The documents were submitted to demonstrate that the court's denial of reconsideration, which is a part of the record at Cl. Ex. 18, has a typographical error in it and, consequently, that the administrative law judge's decision has a mistake in it regarding when the Supreme Court of Louisiana took action on claimant's state claim. Not only does employer agree with the dates in claimant's recitation of the facts, but the denials were published, *see supra*, and are easily confirmed. Moreover, all the attachments are official court documents which are consistent with each other, and with which no party has a dispute. The parties' arguments that the Board should not consider the court documents because they were not a part of the record before the administrative law judge lack merit: the documents are relevant, are a matter of public record, and are properly the subject of judicial notice. *See generally Win-Tex Products Inc. v. U.S.*, 829 F. Supp. 1349 (Ct. Int'l Trade 1993). Therefore, we hereby take judicial notice of the court documents and the appropriate dates therein, and we deny the parties' motions to strike.

With regard to the Section 13, claimant contends the administrative law judge erred in finding his claim to have been filed in an untimely manner. Claimant specifically argues that his claim under the Act was filed during the pendency of the state claim, and not eight and one-half months afterwards as the administrative law judge stated, because the state claim came to a final resolution on November 6, 1992, the date the Louisiana Supreme Court denied reconsideration of its denial of *certiorari*. In response, employer agrees that the correct date on which the Louisiana Supreme Court denied claimant's appeal of the state claim was October 2, 1992, and that reconsideration was denied on November 6, 1992.

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additional briefs. 20 C.F.R. §802.815. As employer's second response brief and claimant's supplemental reply brief were filed within a reasonable time after the reply brief, we hereby accept them.

Section 13(a) of the Act permits a claimant one year after the date he becomes aware or should have been aware of the relationship between his injury and his employment to file a claim. 33 U.S.C. §913(a). In this case, the administrative law judge found that claimant's date of awareness was August 23, 1983, but his claim for benefits under the Act was not filed until 1992.[4] Section 13(d), however, provides:

> Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit.

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[4]In its opposition brief, employer challenges the date of awareness, submitting that, as it pertains to timeliness, the date found by the administrative law judge is incorrect and should have been a much earlier date. Claimant contends this issue was not properly raised on appeal. Employer's argument, however, which challenges a finding of the administrative law judge, is raised as an alternate avenue for reaching the same favorable judgment and shall be addressed. *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987); *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984). Nevertheless, the record supports the administrative law judge's finding that claimant became aware of the full extent of his disability on August 23, 1983, and not at an earlier time. Decision and Order at 12-13; Cl. Ex. 23. Therefore, we reject employer's argument that the date of awareness should have been the date of the accident. *See generally Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20 (1986).

33 U.S.C. §913(d). Section 702.222(b) of the regulations provides much the same, stating:

> Where a person brings a suit at law or in admiralty to recover damages in respect of an injury or death, or files a claim under a State workers' compensation act because such person is excluded from this Act's coverage by reason of section 2(3) or 3(d) of the Act [citations omitted], and recovery is denied because the person was an employee and defendant was an employer within the meaning of the Act, and such employer had secured compensation to such employee under the Act, the time limitation in §702.221 shall not begin to run until the date of the termination of such suit or proceeding.

20 C.F.R. §702.222(b). Thus, if the provisions of Section 13(d) apply, the one-year statute of limitations in Section 13(a) is tolled and the time does not begin to run until the completion of the other claim.

The Board has held that the filing of a claim under the Jones Act or the filing of a third-party suit for damages within one year of the date of injury is sufficient to toll the statute of limitations pursuant to Section 13(d) of the Act. *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994); *Calloway*, 16 BRBS at 175; *McCabe v. Ball Builders, Inc.*, 1 BRBS 290 (1975). This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has held that the filing of a state compensation claim tolls the one-year statute of limitations of Section 13(a) pursuant to Section 13(d). *Hollinhead*, 571 F.2d at 272, 8 BRBS at 159.[5] The *Hollinhead* court based its decision on the opinion in *Wilson v. Donovan*, 218 F.Supp. 944 (E.D. La. 1963) (holding that the filing of a state compensation claim tolls the statute of limitations under the Act because a state compensation claim is one for "damages" under that term's accepted legal definition), *aff'd per curiam sub nom. T. Smith & Son, Inc. v. Wilson*, 328 F.2d 313 (5th Cir.), *cert. denied*, 379 U.S. 816 (1964). The Board subsequently stated that the grounds upon which recovery in the claim for damages is denied are irrelevant because it is the filing of the action which tolls the time limits. *Calloway*, 16 BRBS at 177. The Board's holding was based on *Hollinhead*, wherein the court did not, and in fact was unable to, consider reasons for

[5]The United States Court of Appeals for the First Circuit, in *dicta*, expressed doubt as to whether a state workers' compensation claim meets the tolling requirements of Section 13(d). *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109 (CRT) (1st Cir. 1997); *but see* 20 C.F.R. §702.222(b) (relating to a state claim filed because of the Section 2(3) and Section 3(d) exceptions to coverage).

dismissal of the state claim due to the withdrawal of the claim, yet it proceeded to toll the time period for filing a claim under the Act. *Id.*; *see Hollinhead*, 571 F.2d at 272-274, 8 BRBS at 159-160.[6]

Because the parties do not dispute the dates on which the state courts took action in claimant's state claim, and because there is substantial evidence to demonstrate that the administrative law judge relied on the typographical error in Cl. Ex. 18, we hold that the administrative law judge erred in finding that claimant's state claim ended on October 2, 1991, and we modify the decision to reflect the correct date of the court's denial of *certiorari* as October 2, 1992. *Hill*, 604 So. 2d at 1304. Further, we hold that the state claim did not reach its final resolution until the date the court denied reconsideration on November 6, 1992. *Hill*, 606 So. 2d at 530. As claimant asserts, his claim under the Act was filed during the pendency of his state workers' compensation claim, and not over eight months after it was resolved. Moreover, given the language of both Section 13(d) and Section 702.222(b), it was inappropriate for the administrative law judge to have calculated claimant's one-year time period from the date of awareness and again from the date of the resolution of the state action and then to have added the durations together to conclude that claimant's year had expired. Rather, both the Act and the regulation provide that the time limitation does not begin to run until the other proceeding has terminated. 33 U.S.C. §913(d); 20 C.F.R. §702.222(b). Thus, the administrative law judge erred in finding claimant's claim untimely on this basis; if Section 13(d) applies to toll the time period of Section 13(a), then claimant's June 1992 claim is timely.

In this regard, claimant argues that, pursuant to *Calloway*, 16 BRBS at 175, the reason for the dismissal of the state claim is irrelevant, and the administrative law judge erred in disregarding this established precedent: that is, he erred in giving weight to the state's finding that the state claim was filed in an untimely manner. Claimant thus contends his filing of a claim under the Louisiana workers'

[6]The brief decision of the court in *Hollinhead* also adopted and reprinted the "well-reasoned" opinion of the administrative law judge in that case that the filing of a state claim tolls the statute of limitations pursuant to Section 13(d). The claimant's federal claim was filed seven months after the state claim was withdrawn. 571 F.2d at 272, 8 BRBS at 159.

compensation law tolled the statute of limitations for filing a claim under the Act because the state claim was filed within one year of the date of awareness under the Act. Employer responds, arguing that claimant's untimely filing of a state claim should not be permitted to toll the filing of a claim under the Act, particularly, because claimant, after October 1, 1982, two years after his October 1980 accident, did not have a legal right to assert a state workers' compensation claim.

Claimant filed a claim for benefits under the state law on February 21, 1984. The state denied claimant benefits because his claim was prescribed by law. Pursuant to subsection 1209(A) of the Louisiana workers' compensation law, the district court found that claimant's state claim is "forever barred" because proceedings did not begin within the allotted time after the date of the accident. Therefore, employer correctly asserts that claimant was barred from receiving payments under the Louisiana law because the claim was untimely filed. The question before the Board, however, is whether claimant's untimely state filing affects the statute of limitations under Section 13(d) of the Act.

In *Calloway*, the decedent died as a result of an explosion at work. One year later, several claimants filed suit, seeking benefits under the Jones Act and contending the employer was the owner *pro hac vice* of the barge. The district court dismissed the complaint on a motion for summary judgment, holding that the employer was not the owner *pro hac vice* and that the decedent was not a "seaman" under the Jones Act. While the admiralty claim was pending, the claimant filed a claim under the Act. The administrative law judge found that the claim under the Act was timely filed because Section 13(d) applied to the case. *Calloway*, 16 BRBS at 176-177. On appeal, the Board rejected employer's argument that Section 13(d) did not apply because the admiralty claim was not dismissed for the reasons explicitly stated in Section 13(d), *i.e.*, because the decedent was an employee and Zigler was an employer under the Act and because Zigler secured compensation for the decedent. Rather, the Board relied on *Hollinhead* wherein the Fifth Circuit found that the statute of limitations was tolled even though it did not consider the reasons for the termination of the state claim because the case had been withdrawn. Consequently, the Board held that, in the Fifth Circuit, "the grounds upon which recovery is denied in a suit brought at law or in admiralty are irrelevant because the filing of an action alone tolls the Section 13(a) statute of limitations." *Id.* at 177. Accordingly, the Board affirmed the administrative law judge's determination that the claimant's claim under the Act was timely.

We hold that the administrative law judge correctly distinguished this case from *Hollinhead* and *Calloway* based on the fact that the state claim was not timely filed as required by the state law, and that he rationally concluded it would be

illogical to permit an untimely state filing to toll the Act's statute of limitations. The general purpose of a statute of limitations is "to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend." 51 Am. Jur. 2d Limitation of Actions §17 (1970). More specifically, statutes of limitation are:

> designed to prevent undue delay in bringing suit on claims and to suppress fraudulent and stale claims from being asserted, to the surprise of the parties or their representative, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time or the defective memory or death or removal of witnesses. * * * [T]he purpose of a limitation upon the time within which an action may be commenced is to insure repose and to require that claims be advanced while the evidence to rebut them is still fresh.

Id. The Ninth Circuit recently stated that Section 13 of the Act "serves a purpose of repose ... it settles financial disputes within a specified period of time." *Jones Stevedoring Co. v. Director, OWCP,* 133 F.3d 683, 692, 31 BRBS 178, 185 (CRT) (9th Cir. 1997).

Given the purpose of the statute of limitations, *i.e.,* that of repose, employer's argument that an untimely filed state claim cannot toll the statute of limitations under the Act has merit. In defending itself against the state claim in this case, employer needed only to address the timeliness of the claim. Because it was filed over two years after the date of the accident, with no evidence of or cause for suspension, the state court held that the claim was prescribed. Had claimant filed a timely claim with the state, employer would have had to investigate the merits of the claim, which evidence could be used in a later longshore claim. Because the merits of the case were not at issue until 1992 when claimant filed his claim under the Act, 12 years after the date of the accident, employer could be at a substantial disadvantage in investigating and defending against the claim. *See generally Kashuba v. Legion Ins. Co.,* 139 F.3d 1273, 32 BRBS 62 (CRT) (9th Cir. 1998) (evidence that lack of timely notice under Section 12 impeded employer's investigation sufficient to show prejudice); *Jones Stevedoring,* 133 F.3d at 692, 31 BRBS at 185 (CRT).

We agree with the administrative law judge that it is illogical to allow an untimely filed state claim to toll the time for filing a claim under the Act. Consequently, we distinguish both *Hollinhead* and *Calloway* from the case at bar on the basis that timeliness of the initial claim was not an issue in those cases. As a result, those employers did not face the dilemma of defending against a stale claim,

which is what claimant asks us to require of employer.[7] To give full effect to the time limitations under both workers' compensation laws, we hold that a claim which is filed in an untimely manner under a state compensation law cannot toll the statute of limitations for filing a claim for benefits under the Act. To hold otherwise would not

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[7]Indeed, the decision of the administrative law judge in *Hollinhead,* adopted by the Fifth Circuit, states that

> Statutes of limitation generally proceed on the theory that a man forfeits his rights only when he inexcusably delays assertion of them. I hold that the filing and processing by claimant of his [state claim] is an adequate excuse under Section 13(d) of the [Longshore] Act within the year allowed by Section 13(a) of said Act, and that Claimant's claim is not barred by the time limitation provided in Section 13(a). There is no evidence that respondents suffered any prejudice due to the failure of claimant to file his claim within the statutory period. Section 13 was not intended to provide a technical device to release the employer and insurer from their obligations, but merely to prevent prejudice to them from the entertainment of stale claims.

Hollinhead, 571 F.2d at 274-275, 8 BRBS at 161. In the instant case, to allow an untimely state claim to toll the statute of limitations under the Longshore Act would prejudice employer.

only defeat the purpose for establishing statutes of limitation but would reward claimant for filing two delinquent claims, and this we decline to do. *Totty v. Dravo Corp.*, 413 So. 2d 684 (La. Ct. App. 1982); 51 Am. Jur. 2d Limitation of Actions §17. Therefore, we affirm the administrative law judge's conclusion that claimant's claim under the Act was not timely filed, and we affirm the denial of disability benefits.

Finally, claimant's counsel appeal the fee award contending the administrative law judge erred in awarding an attorney's fee which is substantially less than the fee requested. Based on the award of medical benefits, which are never time-barred, the administrative law judge awarded claimant's counsel an attorney's fee of just over $15,000, instead of the requested fee of over $80,000, and counsel contend this is erroneous.

The administrative law judge addressed each of employer's objections in his well-explained decision. He first agreed that all entries dated prior to the date the district director transferred the case to the Office of Administrative Law Judges were not properly before him, and he reduced the requested amount by 80.5 hours and the expenses by $195.40. With regard to the hourly rate, the administrative law judge determined that $125 per hour is a reasonable rate for each of the two attorneys working on claimant's case. Supp. Decision and Order at 3. He then reduced the requested time for some telephone calls and for one-page correspondence in accordance with the Fifth Circuit's mandates in *Ingalls Shipbuilding, Inc. v. Director (OWCP) [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished), and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990) (unpublished). Supp. Decision and Order at 3-4. The administrative law judge determined that claimant was only 25 percent successful in the prosecution of his claim; therefore, he reduced all charges which indicated "trial preparation" and "research" by 75 percent. He then denied all time spent preparing the fee petition, awarded all time requested for "wind-up" charges, denied some of the claimed costs because of a lack of success on the timeliness issue, and reduced all uncontested entries by 75 percent based on the degree of claimant's success. Supp. Decision and Order at 6-10. Therefore, the administrative law judge awarded a total of $851.25 for Attorney Vincent's services and $13,127.50 for Attorney Scott's services. *Id.* at 9-10.

Initially, inasmuch as we have affirmed the administrative law judge's finding that the claim was untimely filed, we reject counsel's contention that they are entitled to the full fee requested. Neither counsel nor employer contests the administrative law judge's application of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), to the attorney's fee issue. *See also George Hyman Construction Co. v.*

Brooks, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992).

Counsel also argue that the administrative law judge erred in disallowing a fee for 8.75 hours spent preparing the fee petition. Only the United States Court of Appeals for the Ninth Circuit has spoken on this issue, as it relates to claims under the Act, and it has held that time spent preparing a fee petition is compensable. *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67 (CRT) (9th Cir. 1996). The Board followed *Anderson* in a case which arose in the Ninth Circuit, *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996), and we shall follow it in this case. Because we held that the administrative law judge rationally determined that claimant was 25 percent successful in prosecuting his claim, we shall modify the attorney's fee and award counsel an additional $273.44, representing 2.19 hours (25% of 8.75 hours) at a rate of $125 per hour, for preparation of the fee petition. *Anderson*, 91 F.3d at 1322, 30 BRBS at 67 (CRT); *Price*, 31 BRBS at 95.

Additionally, counsel contend the administrative law judge erred in reducing the fee based on employer's unsupported assertions and due to the lack of specificity in the telephone call entries, as being more specific would violate the attorney-client privilege, and they argue they are entitled to a fee for three hours of work performed researching a medical issue on June 18, 1995. We reject these assertions, and we hold that the administrative law judge properly applied *Fairley* to reduce some of the specific entries, *see Bullock v. Ingalls Shipbuilding, Inc.*, 29 BRBS 131 (1995) (Decision on Remand) (*en banc*), and he reasonably reduced the requested time for research in preparation for a deposition.[8] As the fee award is

[8]Counsel stated that they needed to research "chymopapaine" ("an enzyme used to break down the mucopolysaccharide-protein complexes in the nucleus pulposus of [a] herniated intervertebral disk" *Dorland's Illustrated Medical Dictionary* (27th ed.)) in preparation for Dr. Fleming's second deposition in 1995. Because claimant's chymopapaine injection occurred in 1983 and because Dr. Fleming discussed this treatment in his first deposition in 1994, Cl. Ex. 23 at 15-16, 34, 91, the administrative law judge rationally concluded that additional research was unnecessary.

otherwise fully explained and reasonable in light of claimant's limited success, we affirm the remainder of the fee award. *See Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993).

Accordingly, the administrative law judge's Decision and Order is affirmed. The attorney's fee is modified to reflect counsel's entitlement to an additional $273.44, consistent with this opinion. In all other respects, the Supplemental Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge