

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB No. 20-0106

CHARLES THOMPSON )

Claimant-Respondent )

ERIC DUPREE )  
(Former attorney for Claimant) )

Petitioner )

v. )

RESOURCE CONSULTANTS )

and )

CONTINENTAL INSURANCE )  
COMPANY/CNA INTERNATIONAL )

and )

TRAVELERS CASUALTY INSURANCE )  
COMPANY )

Employer/Carriers- )  
Respondents )

SERCO INCORPORATED )

and )

AIG CHARTIS INSURANCE COMPANY )

Employer/Carrier- )  
Respondents )

DATE ISSUED: 08/12/2020

DECISION and ORDER

Appeal of the Order Denying Petitions for Additional Attorney Fees of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter Mills, L.L.P.), Norfolk, Virginia, for Claimant.

Norman Cole (Brownstein Rask LLP), Portland, Oregon, for Dupree Law.

Maryann C. Shirvell (Laughlin, Falbo, Levy & Moresi, LLP), San Diego, California, for Resource Consultants, Incorporated, and Continental Insurance/CNA International.

Patricia Mackay Clotiaux, St. Paul, Minnesota, for Resource Consultants, Incorporated, and Travelers Casualty Insurance Company.

Barry W. Ponticello and Renee C. St. Clair (England Ponticello & St. Clair), San Diego, California, for SERCO Incorporated and AIG Chartis Insurance Company.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant's former counsel, Eric Dupree, appeals Administrative Law Judge Paul C. Johnson, Jr.'s Order Denying Petitions for Additional Attorney Fees (2013-LDA-00061, 00062, 00063) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (Act). 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, based on an abuse of discretion, or not in accordance with law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant sustained a lower back injury while working for Employer as a shipfitter in Sasebo, Japan, on October 20, 2003.<sup>1</sup> He returned to work with Employer in California as a ship surveyor and alleged this work resulted in additional cumulative

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<sup>1</sup>Employer paid Claimant temporary total disability from October 22, 2003 through January 27, 2004.

trauma and/or aggravations of his 2003 injury.<sup>2</sup> Claimant filed claims seeking benefits for the totality of his work injuries. Claimant was represented by three different attorneys at various stages: Donald G. Cline from August 4, 2004 through March 24, 2011; Dupree Law from November 2010 through June 28, 2013; and Robert Walsh from June 29, 2013, forward. Employer controverted the consolidated claims. The claims were transferred to the Office of Administrative Law Judges (OALJ) on October 18, 2012.

In November 2015, Employer and Claimant, represented by Walsh, entered into three Section 8(i) settlement agreements, 33 U.S.C. §908(i), one with each Carrier. Pursuant to the aggregate settlements, Employer and its Carriers agreed to pay Claimant a lump sum of \$275,000 to discharge their liability under the Act and to a total of \$25,000 in attorney's fees.<sup>3</sup> In two of the settlements, the parties further agreed that Walsh, Claimant's current counsel, would satisfy the fees of Dupree. The third settlement is silent on this issue.

In his Order dated November 17, 2015, the administrative law judge approved the settlements, including the \$25,000 attorney's fee. He stated:

The parties agree that any attorney's fees due to Claimant's prior counsel will be satisfied by his current counsel. That provision is specifically approved, and the liability of Employers and Carriers herein for payment of any additional attorney fees beyond those provided for herein will be extinguished. I will, however, retain jurisdiction over any dispute that may arise between Claimant's current and former counsel regarding the amount of fees due to former counsel.

Order Approving Settlements at 1 (Nov. 15, 2015). He reiterated:

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<sup>2</sup>At the time of Claimant's 2003 work injury, Employer operated under the name Resource Consultants and was insured by Continental Insurance Company/CNA International (RC/CNA). During Claimant's stateside work, Resource Consultants was insured by Travelers Casualty Insurance Company (RC/TC). While Claimant remained in its employ, Resource Consultants changed its name to SERCO Incorporated and its insurance carrier to AIG Chartis Insurance Company (SERCO/Chartis). Resource Consultants, SERCO, and its Carriers shall, whenever possible, be collectively referred to as Employer.

<sup>3</sup>Claimant entered into settlement agreements with RC/CNA (\$103,750 to Claimant and \$8,333 in attorney's fees), RC/TC (\$67,500 to Claimant and \$8,334 in attorney's fees), and SERCO/Chartis (\$103,750 to Claimant and \$8,333 in attorney's fees).

Attorney fees due to Claimant's prior counsel shall be satisfied by Claimant's current counsel; provided, however, that I will retain jurisdiction over any dispute that may arise regarding the amount that is due to Claimant's prior counsel.

*Id.* at 3.

Three and a half years later, on May 28, 2019, Cline filed a letter with the administrative law judge alleging he had not received any payment of an attorney's fee. The administrative law judge, in his May 31, 2019 Order Regarding Attorney Fees, provided Cline 30 days to file a fully-supported fee petition for work he may have performed between October 21, 2009 and December 3, 2010, while the case was pending before the OALJ. On July 1, 2019, Cline and Dupree Law each filed fee petitions with the administrative law judge. On October 2, 2019, Dupree Law filed an amended fee petition seeking a total of \$71,802.31 in attorney's fees and costs for the entirety of work he performed in this case.<sup>4</sup> Employer filed objections to the fee petitions.

In his November 8, 2019 Order, the administrative law judge concluded he did not have the authority to award any additional attorney's fees to either Cline or Dupree Law as Employer's liability for all fees associated with Claimant's claims had been finally resolved by the 2015 approved settlements. He also denied Cline's fee petition because all his claimed work was performed at the district director level and Dupree Law's fee petition because any dispute in terms of Walsh's failure to obtain its consent to the settlement agreement and/or execute the payment of the attorney's fee provision are outside his authority. Accordingly, the administrative law judge denied both fee petitions.

On appeal, Dupree Law (Counsel) contends the administrative law judge erroneously refused to award him an attorney's fee. Claimant and Employer, separately filing a brief with each of its Carriers, respond, urging affirmance of the administrative law

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<sup>4</sup>Dupree Law's requested fees for legal services rendered from October 18, 2012 to June 28, 2019, before the OALJ total \$53,644.36, which represents fees of \$45,330.00 and costs of \$8,314.36. Exhibit 16. Its requested fees for legal services rendered before the district director total \$18,157.95, which represents fees of \$17,162.50, and costs of \$195.45. Exhibit 17.

judge's denial of a fee award for counsel.<sup>5</sup> Counsel has filed reply briefs to Claimant's and Employer's responses.

Counsel contends Employer is liable to him for an attorney's fee because he was not a party or subject to the terms of the settlement agreements or the 2015 order approving them. He also asserts the administrative law judge's delegation of responsibility for payment of attorney's fees to Walsh is prohibited by Section 28(e) of the Act, 33 U.S.C. §928(e), and thus, is void and unenforceable. Counsel avers the Section 8(i) settlement agreements and the Order Approving Settlement are further flawed in that they do not discuss how he should be reimbursed for costs.

Employer responds that the Board lacks jurisdiction to review or alter the terms of the settlement agreements as approved by the administrative law judge in 2015 because they became final and binding on the parties as no party appealed the approval order. Employer states Counsel has no standing to object to the terms and conditions of the settlements which fully discharged its liability for Claimant's attorney's fees because he withdrew from the claim in 2014 and failed to file any petition or lien for an attorney's fee at that time. Employer states the administrative law judge had the authority under the Act to approve the parties' settlement agreements and did not assign his duty to determine attorney's fees to Claimant's current counsel as he awarded an attorney's fee totaling \$25,000.

Claimant's present counsel, Walsh, states Counsel is not entitled to a fee because his actions in withdrawing from the case, including his asking to be removed from the service list, amount to his effectively abandoning all involvement in the claim by 2014, including its eventual resolution in 2015. Walsh also states there is nothing to suggest Counsel established his entitlement to any fee up through the time he voluntarily withdrew from representation because his work did not result in any additional benefits to Claimant or a successful prosecution of the claim.<sup>6</sup>

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<sup>5</sup>We accept the response brief of each Employer/Carrier, which were filed before the Board acted on their motions for extensions of time. 20 C.F.R. §§802.212, 802.217.

<sup>6</sup>Walsh further stated he "is open" to addressing a request by Counsel for a "reasonably proportionate share of the attorney fee awarded" if Counsel "believes that the work performed prior to [his] withdrawal was of some benefit of value to the Claimant in regard to the settlement eventually negotiated and the attorney fee paid by the Employer." Claimant's Response Brief at 4.

In his 2015 Order Approving Settlements, the administrative law judge approved the stipulated “amount of attorney’s fees payable by the various Employers and Carriers,” finding them “reasonably commensurate with the necessary work performed by counsel on behalf of Claimant.” Order Approving Settlements at 2-3 (Nov. 15, 2015). He further stated “[t]he parties agree that any attorney’s fees due to Claimant’s prior counsel will be satisfied by his current counsel.” *Id.* Accordingly, the administrative law judge concluded “the liability of Employers and Carriers herein for payment of any additional attorney’s fees beyond those provided [in the approved settlements] will be extinguished.” *Id.* He nevertheless retained “jurisdiction over any dispute that may arise between Claimant’s current and former counsel regarding the amount of fees due to former counsel.” *Id.*

In his May 2019 preliminary order, the administrative law judge stated his 2015 Order Approving Settlements “specified payment of \$25,000 to counsel for Claimant, Rutter Mills LLP” and “further required that out of that payment, Rutter Mills would satisfy a claim for attorney fees for Claimant’s previous counsel.” Order Regarding Attorney Fees at 1-2 (May 31, 2019). He reiterated he retained jurisdiction for the purpose of resolving any disputes between the attorneys on this issue. *Id.*

In his November 2019 Order, the administrative law judge reviewed the attorney’s fee provisions of the approved 2015 Section 8(i) settlements and the subsequent actions taken by Cline and Counsel to secure their alleged portions of the approved attorney’s fee. Citing *Losacano v. Electric Boat Corp.*, 48 BRBS 49 (2014), the administrative law judge stated he did not have the authority to award any further fees in this case because Employer’s liability for, and the amount of, Claimant’s attorney’s fee was fully resolved via the settlement agreement. He also stated he lacks jurisdiction to award fees for Cline’s work because all of it occurred before the district director.<sup>7</sup>

The administrative law judge found Counsel was not officially notified of the settlements and/or the proceedings to approve them because he had explicitly requested to be removed from the service sheet by letter dated August 27, 2014.<sup>8</sup> He also found it significant that Counsel never filed an attorney’s fee lien at any point before the settlement was approved. The administrative law judge stated he “reasonably believed” at the time he issued his 2015 Order Approving Settlements that Walsh had obtained Counsel’s agreement on the attorney’s fee provisions. He stated even if Walsh did not obtain

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<sup>7</sup>We affirm the administrative law judge’s denial of an attorney’s fee to Cline as he has not appealed the Order. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

<sup>8</sup>The administrative law judge inadvertently stated Counsel’s letter was dated April 27, 2014.

Counsel's agreement, or pay the latter any fees, that does not enable him to change the terms of the 2015 approved settlements. The administrative law judge stated that while Counsel may have a cause of action as a third-party beneficiary to the settlement agreement, he does not have the authority to adjudicate that dispute. Thus, he declined to address Counsel's fee petition.

For the following reasons, we affirm the administrative law judge's determinations he cannot reopen the 2015 settlement agreements and Employer is not liable for additional fees in this claim, but reverse his finding he does not have authority to adjudicate Counsel's entitlement to a portion of the Employer-paid fees provided by the settlement agreements.

Where a claimant seeks to terminate his compensation claim for a sum of money, the Section 8(i) settlement procedures, as delineated in the Act's implementing regulations, must be followed.<sup>9</sup> See, e.g., *Henson v. Arcwel Corp.*, 27 BRBS 212 (1993); 20 C.F.R. §§702.241-702.243. The regulations require the settlement application to contain "[a] full description of the terms of the settlement which clearly indicates, where appropriate, the amounts to be paid for compensation, medical benefits, survivor benefits and representative's fees which shall be itemized as required by §702.132." 20 C.F.R. §702.242(b)(1).<sup>10</sup> The parties, therefore, may include a fee for the claimant's attorney in their settlement agreement, and any fee agreement in the settlement is deemed approved upon approval of the settlement. 20 C.F.R. §702.132(c).

A settlement must be approved or disapproved in its entirety unless the parties have included a severability clause permitting portions to be approved independently. *Losacano*, 48 BRBS 49; 20 C.F.R. §702.243(e). Once approved, the effect of a Section 8(i) settlement is to completely discharge the employer's liability for the claimant's injuries that are the subject of the settlement. 33 U.S.C. §908(i)(3); 20 C.F.R.

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<sup>9</sup>Section 8(i), 33 U.S.C. §908(i), is the only means for compromising an employer's obligation to pay benefits under the Act, creating an exception to Section 15(b), 33 U.S.C. §915(b) ("No agreement by an employee to waive his right to compensation under this chapter shall be valid"), and to Section 16, 33 U.S.C. §916 (no assignment, release, or commutation of compensation or benefits is valid except as provided in the Act).

<sup>10</sup>Additionally, Section 702.241(e), 20 C.F.R. §702.241(e), states:

A fee for representation which is included in an agreement that is approved in the manner described in paragraph (d) of this section, shall also be considered approved within the meaning of Section 28(e) of the of the Act, 33 U.S.C. §928(e).

§702.243(b); *see, e.g., Diggles v. Bethlehem Steel Corp.*, 32 BRBS 79 (1998). An administrative law judge is not authorized to modify the terms of the parties' settlement agreement, whether deliberately or inadvertently. *Losacano*, 48 BRBS 49. Employer's liability for an attorney's fee is satisfied when the settlement agreement explicitly states so. *See* 20 C.F.R. §§702.242(b)(1); 702.132(c); *see generally Losacano*, 48 BRBS 49.

The administrative law judge properly found he did not have authority to modify the terms of the parties' 2015 approved settlement agreements, including the attorney's fee portion of those documents.<sup>11</sup> 33 U.S.C. §908(i)(3); 20 C.F.R. §702.243(b); *Losacano*, 48 BRBS at 51-52. Additionally, the Board lacks jurisdiction to review the merits of the 2015 decision approving the settlement as no appeal to the Board was filed within 30 days of the date the decision was filed.<sup>12</sup> *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997), *aff'd on recon.*, 32 BRBS 56 (1998), *aff'd sub nom. Porter v. Director, OWCP*, 176 F.3d 484 (9th Cir. 1999)(table), *cert. denied*, 528 U.S. 1052 (1999); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997). Thus, as Employer correctly states, its liability for Claimant's attorney's fees in this case was completely discharged as a result of the 2015 settlement agreement. Counsel, therefore, is subject to the Section 8(i) settlements to the extent he cannot now seek additional attorney's fees payable by Employer in this case beyond that already provided in the settlements.<sup>13</sup> 33 U.S.C. §908(i)(3).

We therefore affirm the administrative law judge's denial of an Employer-paid attorney's fee to Counsel. Because Counsel did not file a lien prior to withdrawing from

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<sup>11</sup>Contrary to Counsel's contention, the administrative law judge did not have any statutory duty to him in terms of approving the Section 8(i) settlements in this case; he removed himself from the case without filing a fee petition or lien documents.

<sup>12</sup>Moreover, settlements are not subject to the Act's modification provisions. 33 U.S.C. §922; *Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36(CRT) (5th Cir. 1986); *Diggles v. Bethlehem Steel Corp.*, 32 BRBS 79 (1998); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

<sup>13</sup>Contrary to Counsel's contentions, the 2015 settlement agreements adequately address the issue of "costs" in terms of Employer's liability. All three settlement agreements state "attorney fees" are fully resolved, with two of the three also including statements regarding a complete resolution of Employer's liability for "attorney fees and costs." Moreover, as Employer cannot be liable for Counsel's attorney's fee, it cannot be liable for costs under Section 28(d), 33 U.S.C. §928(d). Consequently, we reject Counsel's contention that he is entitled to now have the administrative law judge separately consider Employer's liability for those costs.

the case or at any time prior to the claim's resolution, no party to the settlements had an obligation to protect any interest he may have had. Moreover, pursuant to the approved settlement, Walsh agreed to be liable to Counsel for any fee to which he is entitled,<sup>14</sup> such that Counsel cannot seek a fee payable by Claimant under Section 28(c), 33 U.S.C. §928(c).

Nevertheless, the settlement agreements and the administrative law judge's orders recognize Counsel's potential entitlement to attorney's fees for work he performed on behalf of Claimant in this case.

Two of the three settlement agreements, those involving RC/TC and SERCO/Chartis, contain the following language:

Claimant is currently represented by attorney Robert E. Walsh who has agreed to accept a partial attorney fee from Employer/Carrier in the amount of \$8,334.00 (for a total, with contribution from Continental Insurance Company/CNA International and AIG of \$25,000.00).<sup>15</sup> Claimant was previously represented by attorney, Eric Dupree. ***Mr. Walsh has agreed to be Responsible for any attorney fees due to Mr. Dupree.***

Exhibits 1, 3 (Emphasis Added). The third settlement, involving RC/CNA, states:

Legal Fees: An attorney's fee will be paid as awarded by the U.S. Department of Labor under this settlement. The parties anticipate a fee of \$8,333.00 being awarded.

Exhibit 2. As previously discussed, the settlement agreements clearly and completely discharge Employer and its Carriers from any further liability for Claimant's attorney's fees and costs (this includes a fee for work performed before the district director, contrary to Counsel's contention). The plain language of two of the agreements states Walsh is

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<sup>14</sup>The administrative law judge's approval of the settlements necessarily included approval of the attorney's fee provisions, 20 C.F.R. §702.242(b)(1), such that the award of attorney's fees does not violate 33 U.S.C. §928(e) of the Act. 20 C.F.R. §702.241(e). Additionally, in approving the settlement, the administrative law judge did not delegate his authority to award Counsel an attorney's fee because he retained jurisdiction to resolve any disputes regarding that issue.

<sup>15</sup>The settlements involving SERCO/Chartis and RC/TC are virtually identical with the exception of the dollar figures, with the former agreeing to pay \$8,333 and the latter agreeing to pay \$8,334, and acknowledgment of the other contributors to the total fee.

responsible for any attorney's fee due Dupree, an interpretation echoed by the administrative law judge in his 2015 Order Approving Settlements ("Attorney fees due to Claimant's prior counsel shall be satisfied by Claimant's current counsel."). Additionally, the administrative law judge explicitly retained "jurisdiction over any dispute that may arise regarding the amount that is due to Claimant's prior counsel." In his May 2019 Order, he also stated any fee for Claimant's prior counsel would be satisfied from the \$25,000 Employer-paid attorney's fee received by Walsh pursuant to the approved settlement agreements.

Despite retaining "jurisdiction over any dispute that may arise regarding the amount" possibly due to Counsel, the administrative law judge ultimately determined he lacks jurisdiction to address Counsel's attorney's fee petition for reasons not clearly explained. *See* Order Denying Petitions For Additional Attorney Fees at 2. The administrative law judge retains jurisdiction to address a fee petition after the issuance of a decision, *see generally Zaradnik v. The Dutra Group*, 52 BRBS 23 (2018), *appeal dismissed*, 792 F. App'x 518 (9th Cir. 2020), though he has the discretion to deny it if, after weighing the competing equities, he determines it was egregiously late. *See generally Iopa v. Saltchuk-Young Bros., Ltd.*, 916 F.3d 1290, 53 BRBS 17(CRT) (9th Cir. 2019). Because the total amount of the fee is limited to the amount Employer paid to settle its fee liability under Section 8(i), we reverse the administrative law judge's finding he did not have jurisdiction to consider Counsel's fee petition and remand the case for him to address Counsel's fee petition within the framework of the approved settlement agreement.

On remand, the administrative law judge should determine whether Counsel is entitled to have his fee petition considered. *Iopa*, 916 F.3d at 1301, 53 BRBS at 18(CRT). In the event he is, the administrative law judge must determine whether Counsel's work before the OALJ contributed to Claimant's success and award Counsel a reasonable fee for any such compensable work out of the \$25,000 total attorney's fees and costs paid to Walsh. *See generally Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983) (the administrative law judge should consider whether the success obtained by the claimant through settlement of his claim was proportional to the efforts expended by his counsel).

Accordingly, we affirm the administrative law judge's denial of an Employer-paid attorney's fee to Counsel, reverse his finding he lacks jurisdiction to address Counsel's fee petition, and remand the case for him to address Counsel's request for an attorney's fee in accordance with the terms delineated in the 2015 settlement agreements.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge