

U.S. Department of Labor

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



BRB No. 22-0313

CHARLES THOMPSON)
)
 Claimant)
)
 ERIC DUPREE)
 (Former attorney for Claimant))
)
 Petitioner)
 v.)
)
 RESOURCE CONSULTANTS)
)
 and)
)
 CONTINENTAL INSURANCE)
 COMPANY/CNA INTERNATIONAL)
)
 and)
)
 TRAVELERS CASUALTY INSURANCE)
 COMPANY)
)
 SERCO INCORPORATED)
)
 and)
)
 AIG CHARTIS INSURANCE COMPANY)
)
 Employers/Carriers-)
 Respondents)
)

DATE ISSUED: 8/15/2023

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Order Denying Request to Review Attorney Fees of Marco A. Adame II, District Director, United States Department of Labor.

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

Maryann C. Shirvell (Laughlin, Falbo, Levy & Moresi), San Diego, California, Patricia McKay Clotiaux (Waller & Associates), St. Paul, Minnesota, and Renee C. St. Clair and Barry W. Ponticello (England, Ponticello & St. Clair), San Diego, California, for Employers and Carriers.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant's former counsel, Eric Dupree of Dupree Law (Dupree or counsel), appeals District Director Marco A. Adame II's Order Denying Request to Review Attorney Fees (OWCP Nos. LS-15047204, LS-1809129, LS-18098104) rendered on claims 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). We must affirm the district director's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). This case has a long history before the Benefits Review Board.

Claimant was represented by three different attorneys during the course of his claims: Donald G. Cline from August 4, 2004, through March 24, 2011; Dupree from November 2010, through June 28, 2013; and Robert Walsh from June 29, 2013, forward. The issues before the Board arose after Claimant, then represented by Robert Walsh, reached settlements in November 2015 resolving multiple claims with Employer and its

Carriers.¹ Pursuant to the aggregate settlements, they agreed to pay Claimant a lump sum of \$275,000 and to pay a total attorney's fee of \$25,000. Administrative Law Judge (ALJ) Paul C. Johnson, Jr., approved the settlements, and in doing so, stated attorney's fees to Claimant's current and prior attorneys are to be satisfied from the \$25,000, and Employer's "liability for payment of any additional attorney fee beyond those provided for herein will be extinguished." Order Approving Settlements at 1 (Nov. 15, 2015). He also stated he would retain jurisdiction if any dispute arose between the attorneys. *Id.* at 1, 3.

In 2019, Dupree filed fee petitions with the ALJ, requesting a fee for his work on behalf of Claimant before the district director and the ALJ. Employer filed objections, and in an order dated November 8, 2019, the ALJ determined he did not have authority to award any additional employer-paid fees because the issue had been resolved in the 2015 settlement. Dupree appealed this denial to the Board. The Board affirmed the ALJ's findings that he could not re-open or modify the settlements and that Employer is not liable for any additional fees; however, it reversed his determination that he could not adjudicate the "dispute" between the attorneys over Dupree's entitlement to a portion of the \$25,000 fee provided in the settlements and remanded the case to the ALJ. *Thompson v. Resource Consultants, et al.*, BRB No. 20-0106 (Aug. 12, 2020), *appeal pending*, No. 22-70021 (9th Cir.).²

In an order dated July 14, 2021, the ALJ approved a settlement between Walsh and Dupree under which Walsh would pay Dupree \$18,750 of the \$25,000 fee settlement. Seeking additional fees, Dupree filed a fee petition for work performed before the district director. The district director issued a letter on April 22, 2021, declining to act on Dupree's fee request. Counsel appealed both the ALJ's order and the district director's letter to the Board. With regard to the order, Dupree sought only to reserve his right to raise fee liability as an issue and expedite an appeal to the United States Court of Appeals for the Ninth Circuit. The Board granted Dupree's request for summary affirmance of the ALJ's order. It also found the district director's letter is not an appealable order, dismissed that appeal,

¹At the time of Claimant's 2003 work injury overseas, Employer operated under the name Resource Consultants and was insured by Continental Insurance Company/CNA International. During Claimant's stateside work, Resource Consultants was insured by Travelers Casualty Insurance Company. While Claimant remained in its employ, Resource Consultants changed its name to SERCO Incorporated and its insurance carrier to AIG Chartis Insurance Company. Resource Consultants, SERCO, and its Carriers shall, whenever possible, be collectively referred to as Employer.

² The Board affirmed the ALJ's denial of a fee to Donald Cline, as he did not appeal the ALJ's fee order. *Thompson*, slip op. at 6 n.7 (Aug. 2020).

and remanded the case for the district director to issue an order reflecting his conclusions. *Thompson v. Resource Consultants, et al.*, BRB Nos. 21-0407 and 21-0573 (March 15, 2022), *appeal pending* for BRB No. 21-0573, No. 22-70046 (9th Cir.).³

On remand, the district director briefly summarized the proceedings above and declined to take action on Dupree's request for a fee for work before the Office of Workers' Compensation Programs because "the parties settled the case[.]" "the judge retained jurisdiction over attorney fees," and the "Board outlin[ed] the process for Mr. Dupree to have his attorney fee issue properly addressed." Order at 2. Dupree now appeals the district director's order. The Director, Office of Worker's Compensation Programs (Director) responds, urging the Board to affirm the order. Employer and its Carriers also respond, jointly, and urge the Board to affirm the district director's order and deny Dupree's request to remand the case for an award of an employer-paid fee.

Counsel contends the district director erred in denying him a fee for his work in this case. He acknowledges two appeals before the Ninth Circuit address whether the ALJ and Board erred in denying him an employer-paid fee beyond the amounts contemplated by the 2015 settlement agreements between Claimant and Employer, but he differentiates this appeal on the basis that the law of the case doctrine does not apply because the 2015 settlements addressed fees for work before the ALJ not the district director.⁴ He raises the following issues: 1) he did not represent Claimant at the time of the settlements; 2) his application for a fee was timely; 3) the settlements did not discharge his right to an employer-paid fee or costs; 4) if the settlement provisions meant to extinguish his right, they are void and unenforceable because he was not a party to the settlements; and 5) the ALJ has no authority to award or deny fees for work before the district director, therefore,

³ In an Order dated December 29, 2021, the Board denied the request for an employer-paid fee for work Norman Cole performed on behalf of Dupree, as it had already held Employer cannot be liable for any additional fees in this case, and it dismissed Employer from the case. *Thompson v. Resource Consultants, et al.*, BRB No. 20-0106 (Dec. 29, 2021).

⁴ Contrary to counsel's statement, the Order Approving Settlements does not differentiate between work performed before the ALJ and that performed before the district director. Rather it states: "the parties have stipulated to the amount of attorney's fees payable by the various employers and carriers. Those fees are approved.... [T]he liability of Employers and Carriers herein for payment of any additional attorney fees beyond those provided for herein will be extinguished." Order at 1-2.

the matter should be remanded for the district director to address the fee petition and award a fee.

Employer urges the Board to affirm because the matter of whether it can be held liable for fees in addition to those identified in the settlements has been decided in previous Board decisions – the Board held it cannot. *See Thompson*, slip op. at 5-8 (Aug. 2020); *Thompson*, slip op. at 3 (Dec. 2021). The Director states there is no need for the Board to address counsel’s arguments because it has already held the 2015 settlements between Claimant and Employer foreclosed any additional employer fee liability. Further, as the question of “Dupree’s failure to appeal the ALJ’s order approving the 2015 settlements foreclosed his entitlement to any additional fees not contemplated by those settlements” is the same here as it is before the Ninth Circuit, the Director urges the Board to affirm the order to allow for quick appeal and consolidation of the cases on appeal.

We reject Dupree’s arguments which boil down to whether he is entitled to an employer-paid attorney’s fee beyond those provided for in Claimant’s settlements with Employer because he was not a party to them and was not notified about them beforehand.⁵ The settlements became final in 2015, discharged all Employer liability, and cannot be modified. As the ALJ found in 2019, and we affirmed in 2020, Dupree requested approval for his withdrawal from the case and his removal from the service sheet, and he never filed an attorney’s fee lien before the settlements were approved. As such, we held neither the ALJ nor the parties had an obligation to protect any interest he may have had to an attorney’s fee beyond those the 2015 settlements fully resolved. *Thompson*, slip op. at 6, 8 (Aug. 2020).

As we fully addressed the issue in our prior decisions and held the 2015 settlements foreclosed any awards of additional employer-paid fees, we agree with the Director that we need not revisit the issue. *Schaubert v. Omega Services Indus.*, 32 BRBS 233 (1998). Therefore, we affirm the district director’s order declining to act on Dupree’s fee petition and denying his fee request. For the reasons set forth in our prior decisions in BRB No. 20-0106, we affirm the district director’s denial of a fee. *Thompson*, slip op. at 5-8 (Aug. 2020); *Thompson*, slip op. at 3 (Dec. 2021).

⁵ Dupree states: “[a]n issue raised ... is whether §928(a) allows the ALJ to approve a discharge with respect to attorneys who no longer represent the claimant, have no notice or knowledge of the proceedings, and were not by rule or order required to submit an application for attorney fees and costs before approval of the settlement agreement.” Dupree Brief at 19-20.

Accordingly, we affirm the district director's Order Denying Request to Review Attorney Fees.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge