



BRB No. 24-0359

HENRY ANDRADE )

Claimant-Petitioner )

v. )

ELECTRIC BOAT CORPORATION )

Self-Insured )

Employer-Respondent )

**NOT-PUBLISHED**

DATE ISSUED: 05/08/2026

DECISION and ORDER

Appeal of the Order Denial of Attorney Fee Application of Theresa Magyar, District Director, United States Department of Labor.

Scott N. Roberts (The Law Office of Scott Roberts, LLC), Groton, Connecticut, for Claimant.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Denial of Attorney Fee Application of District Director Theresa Magyar (OWCP No. LS-1434586) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (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.<sup>1</sup> See *Tahara v. Matson Terminals, Inc.*, 511 F.3d

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<sup>1</sup> This case arises within the jurisdiction of the United States Court of Appeals for the First Circuit because Claimant sustained his injuries in Rhode Island. 33 U.S.C.

950, 952 (9th Cir. 2007); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272, 273 (1980).

Claimant injured both of his hands and arms due to the repetitive use of vibrating tools while working as a grinder for Employer. Claimant's Exhibit (CX) 2. On March 15, 2021, Claimant filed a claim seeking compensation for work-related hand and arm injuries. *Id.* Employer filed its Notice of Controversion (Form LS-207) on April 7, 2021, with the Office of Workers' Compensation Programs (OWCP). CX 3. At the request of Claimant's counsel, on April 21, 2021, Dr. Philo Willetts, Jr. examined Claimant and, in his March 30, 2022 report, opined Claimant has a 2% permanent partial impairment to both of his hands. CXs 5, 6 at 7. On June 15, 2022, Employer filed a Notice of Payments (Form LS-208) documenting a weekly payment of \$842.65 to Claimant beginning on May 30, 2022, based on Claimant's 2% permanent partial impairment to both of his hands and an average weekly wage of \$1,263.97. CXs 1, 13, 14.

On May 20, 2022, Claimant's counsel, Scott N. Roberts (Counsel), filed an itemized fee petition with the district director under Section 28(a) of the Act, 33 U.S.C. §928(a), for \$5,210.10 in legal services and \$0 in costs. Thereafter, noting the parties had agreed on the fee, Counsel submitted their fee agreement to the district director. June 9, 2022 Attorney Fee Approval Request; Fee Agreement. On June 14, 2022, the district director approved this agreement. June 14, 2022 Order Approving Attorney Fee (Fee Order). Pursuant to the agreement, Employer paid Counsel a total attorney's fee of \$4,150 for services and \$0 in costs. The district director's June 2022 Fee Order is final and is not the subject of Claimant's appeal.

On February 22, 2024, Counsel requested an informal conference with the district director regarding his request for a Section 28(d), 33 U.S.C. §928(d), reimbursement of \$750 for Dr. Willetts's 2021 examination and 2022 medical report, which he noted had not been included in his previous fee petition or the fee agreement. CX 6; *see also* April 2, 2024 Form LS-4, Attorney Fee Approval Request (Fee Request). On March 6, 2024, Counsel sent two letters to a claims examiner clarifying that he sought reimbursement for a litigation cost under Section 28(d) and not a medical expense under Section 7 of the Act, 33 U.S.C. §907, because Dr. Willetts was an examining physician and not an attending physician. CX 8. Employer objected to Counsel's request for this cost on two grounds: 1) the prior approved fee agreement and the related fee award, which included \$0 for costs, covered the matter, with no motion for reconsideration or appeal filed; and 2) \$750 for Dr.

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§921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

Willetts's initial medical evaluation was not "reasonable or necessary." Employer's June 12, 2024 Letter.

The district director found Dr. Willetts's fee was a medical expense and, because Claimant did not pay "out-of-pocket" and Counsel did not give Claimant the money to pay for Dr. Willetts's services, Counsel cannot recover this amount under Section 28(a). June 17, 2024 Order Denial of Attorney Fee Application (Fee Denial). Consequently, she denied Counsel's request. *Id.*

On appeal, Counsel contends the district director mischaracterized his request for legal costs under Section 28(d) as a request for medical expenses under Section 7 and a resulting fee under Section 28(a) and, therefore, erred in denying it. He asks the Benefits Review Board to vacate the district director's denial and find the cost is recoverable. Employer has not responded to this appeal.

Section 28(d) of the Act provides in relevant part:

*In cases where an attorney's fee is awarded against an employer or carrier there may be further assessed against such employer or carrier as costs, fees and mileage for necessary witnesses attending the hearing at the instance of claimant. Both the necessity for the witness and the reasonableness of the fees of expert witnesses must be approved by the hearing officer, the Board, or the court, as the case may be.*

33 U.S.C. §928(d) (emphasis added); *see Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 836-837 (1982). The cost of an expert witness's testimony or report offered in support of a claimant's claim may be awarded where the claimant prevails and the factfinder determines the cost is reasonable and necessary. *See Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194-195 (1984). However, a claimant's attorney cannot receive payment for the cost of the claimant's physical examination with a treating physician because this would, in effect, be a request for medical benefits. *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 668 (1982).

We agree with Counsel's assertion that the district director's order cannot be affirmed; however, we reject his request to award him the amount he seeks. The record is clear that Dr. Willetts examined Claimant at Counsel's behest, received payment for his services from Counsel on April 21, 2021, and prepared a medical report on March 30, 2022. CXs 4, 5, 6. Afterwards, on June 9, 2022, the parties settled the fee with no included costs, which the district director approved on June 14, 2022. Parties' Fee Agreement; Fee Order.

Depending on the circumstances, a physician's fee may be recovered from an employer either as a cost of litigation under Section 28(d) or as a medical expense under

Section 7. *Gott v. Nat'l Steel & Shipbuilding Co.*, 16 BRBS 188, 189 (1984); *see also Del Vacchio*, 16 BRBS at 194-195; *Swain*, 14 BRBS at 668 n.7. Here, the district director was asked to address what Counsel identified as a Section 28(d) litigation expense, but instead she addressed whether the expense was a medical expense under Section 7 and whether Counsel could instead get reimbursed as part of his fee under Section 28(a). As the district director did not address either the Section 28(d) issue presented or Employer's objections, we vacate her denial of the cost and remand this case to her for further consideration.<sup>2</sup>

On remand, the district director must determine whether Dr. Willetts's fee was a reasonable and necessary litigation expense (medical evaluation and report) under Section 28(d). 33 U.S.C. §928(d); *see Gott*, 16 BRBS at 189; *Del Vacchio*, 16 BRBS at 194-195; *Swain*, 14 BRBS at 668 n.7. If Dr. Willetts's fee is a recoverable legal expense under Section 28(d), the district director must then consider whether the parties' fee agreement, and her final order approving it, resolved Employer's liability and therefore Employer cannot be held liable for this cost. 33 U.S.C. §921(a); *Ballard v. Gen. Dynamics Corp.*, 12 BRBS 966, 968-969 (1980) (when a fee is settled, due consideration must be given to the fact that the parties agreed to the amount of the attorney's fee via arm's length negotiation); 20 C.F.R. §§702.132(a), 802.205, 802.206.<sup>3</sup>

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<sup>2</sup> Because Claimant succeeded in obtaining medical benefits following Employer's controversion of the claim, Section 28(a) authorized the parties' prior fee agreement. Therefore, the Section 28(a) criteria have already been met for this case. *See Frawley v. Savannah Shipyard Co.*, 22 BRBS 328, 331 (1989).

<sup>3</sup> We are not persuaded by Counsel's contention that the Department of Labor has an "institutional bias" against allowing costs to be recovered under Section 28(d) simply because Form LS-4, Attorney Fee Approval Request, does not have a specific space for requests under that provision. Cl. Br. at 5. Form LS-4 has a box for, and permits an attorney to request, an "Amount for Costs" alongside his request for an attorney's fee. Further, as discussed above, costs under Section 28(d) may be recovered only if the employer or carrier is held liable for an attorney's fee under Section 28(a) or (b), so the form adequately covers the matter. 33 U.S.C. §928(a), (b), (d).

Accordingly, we vacate the district director's Order Denial of Attorney Fee Application and remand this case for further consideration consistent with our opinion.

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge