VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-138 (A)

In Re: Application for Approval of an Attorney's Fee Assessment

DONNA DIXON-CHERRY,

Claimant

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Employer.

Frank McDougald, Esquire for the Employer
Harold L. Levi, Esquire for the Claimant

Before HEATHER C. LESLIE,[1] MELISSA LIN JONES, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the December 13, 2012, application for an attorney's fee. Claimant's attorney filed an application for an attorney's fee, requesting the Compensation Review Board (CRB) assess against the employer an attorney's fee totaling three thousand three hundred sixty dollars ($3,360.00) for 14 hours of work, billed at $240.00 per hour that was asserted to have been performed by claimant's counsel in this appeal before the Compensation Review Board.

On December 20, 2012, the Employer filed an opposition to the Claimant's fee application, arguing that there was no statutory authority to award an attorney's fee in the case at bar.

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[1] Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant was a social worker for the Employer providing counseling for special education students. In the fall of 2009, the Claimant worked at Spingarn High School, whose principal was Blanca Reyes. The Claimant alleges that Principal Reyes began a pattern of harassment which affected the Claimant's ability to perform her counseling duties. The Claimant began to miss work due to stress and anxiety.

Pertinent to the fee petition, on July 6, 2011, ORM issued a Notice of Determination (NOD) denying the Claimant's claim under D.C. Code § 1-623.02(b). After a Formal Hearing, a Compensation Order (CO) was issued on July 19, 2012 awarding the Claimant's claim for relief in part.

The Employer timely appealed the CO to the CRB with the Claimant filing and opposition and a cross appeal. On November 27, 2012, the CRB issued a Decision and Order affirming the CO.

On December 13, 2012, the Claimant filed with the CRB a fee petition requesting the CRB assess against the employer an attorney's fee totaling three thousand three hundred sixty dollars ($3,360.00). The Employer opposed this request on December 20, 2012 with the Claimant responding to the Employer's opposition on December 26, 2012.

DISCUSSION AND ANALYSIS

In opposing the Claimant's request for an attorney's fee, the Employer argues the fee requested is not statutorily authorized. The Employer points out that for a period of time, between September 24, 2010 and September 11, 2011, § 1-623.02(b)(2), authorizing the assessment of an attorney fee against an employer was repealed. . Thus, because the NOD was issued on July 6, 2011, before the effective date of the second amendment reinstating the fee assessment provisions of § 1-623.02(b)(2), a successful prosecution had not occurred pursuant to the CRB's rationale in *Rice v. DC Dept. of Motor Vehicles*, CRB No. 08-027, AHD No. PBL 06-104 (December 20, 2007).

§ 1-623.02(b)(2) states,

> If a person utilizes the services of an attorney-at-law in the *successful prosecution* of his or her claim under § 1-623.24(b) or before any court for review of any actions, award, order, or decisions, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee, not to exceed 20% of the actual benefit secured, which fee award shall be paid directly by the Mayor or his or her designee to the attorney for the claimant in a lump sum within 30 days after the date of the compensation order. (Emphasis added.)

In *Rice*, the CRB analyzed whether § 1-623.02(b)(2) was meant to apply retroactively or prospectively and what the term "successful prosecution" encompassed. The CRB held in order for a successful prosecution to have occurred,

> There must first have been a denial of benefits outright, or an initial award followed by a reduction or termination thereof, which is in fact the case before us.

Such a decision to terminate Petitioner's benefits was the necessary first event which led to the adjudication that was ultimately successfully prosecuted. That inciting event predated the effective date of the amendment and, therefore, if we were to interpret the new provision to have applicability in this case, we would be giving it retroactive effect under Lloyd.[2]

In the case at bar, the NOD issued on July 6, 2011 predated the effective date of the amendment which reinstated § 1-623.02(b)(2) into the act on September 14, 2011. Stated another way,

We interpret the statute in conformance with the general rule, to be prospective only, meaning that it shall have applicability only to cases in which the termination or reduction decision, or the initial determination or award which is successfully challenged for inadequacy, occurs on or after....the effective date of the legislation.

Rice, supra.

Thus, in the case at bar, there was no statutory authority on July 6, 2011 which would allow for an award of an attorney's fee to be assessed against the Employer. While we sympathize with the Claimant regarding the "brief regrettable period of time in which claimants who successfully prosecute claims for public sector workers' compensation benefits are still denied the right to have their legal fees borne by the District of Columbia,[3]" that is an issue for the legislature to address, not the CRB.

CONCLUSION AND ORDER

The request for attorney's fees to be assessed against the Employer is **DENIED.**

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

January 23, 2013_____
DATE

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[2] *Lloyd v. DOES*, 934 A.2d 921 (2007).

[3] Claimant's reply brief at 3.