

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

CRB No. 10-117

**SABRINA RICHARDSON,
Claimant-Respondent,
v.**

**DISTRICT OF COLUMBIA OFFICE OF UNIFIED COMMUNICATIONS,
Self-Insured Employer-Petitioner.**

Appeal from an April 8, 2010 Order Awarding Attorney Fees By
Administrative Law Judge Gerald D. Roberson
AHD PBL 06-008A, DCP No. 761048-0001-2002-0001

Kirk D. Williams, Esquire, for the Claimant
Andrea Comentale, Esquire, for the Self-Insured Employer

Before LAWRENCE D. TARR, *Chief Administrative Appeals Judge* with JEFFREY P. RUSSELL and
HEATHER C. LESLIE, *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER VACATING ORDER AWARDING ATTORNEY'S FEE

On May 18, 2009, an ALJ determined that the claimant had suffered an accidental injury on July 21, 2005, and awarded her temporary total disability compensation from July 21, 2005 to February 28, 2006 and causally related medical expenses. On August 31, 2009, the CRB dismissed the employer's Application for Review. Thereafter, claimant's counsel petitioned the ALJ for an award of an attorney's fee to be assessed against the employer.

On April 10, 2010, the ALJ entered an Order that awarded claimant's counsel \$4,256.60. It is from this Order that the employer timely appealed. We VACATE.

BACKGROUND AND FACTS OF RECORD

The claimant, Sabrina Richardson, worked for this employer as a 911 and 311 operator. In 2001, she sustained an injury at work that was accepted by the employer's Disability Compensation Program (DCP). On July 21, 2005, claimant developed numbness in her legs and back pain while at work and she was not able to work from July 21, 2005 to February 28, 2006. On November 6, 2005, DCP issued to the claimant a Notice of Determination advising her that her current claim was denied.

The claimant challenged this decision by filing for an Application for Hearing and was awarded benefits. *Richardson v. District of Columbia Office of Unified Communications*, AHD No. PBL 06-008A, DCP No. 761048-0001-2002-0001 (May 18, 2009).

After the employer's appeal to the CRB was dismissed, claimant's attorney petitioned the ALJ for an award of attorney's fees to be assessed against the employer. On April 8, 2010, the ALJ issued an Order awarding claimant's attorney \$4,256.60 in attorney's fees and further ordered that the fee was to be paid by the employer.

The employer timely filed an Application for Review of the ALJ's April 8, 2010, Order.

THE STANDARD OF REVIEW

Where, as here, the decision appealed to the CRB originates from a decision for which no record was produced, the CRB must affirm the decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See, 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW § 51.03 (2001).

DISCUSSION AND ANALYSIS

The employer argues that the ALJ's fee award is contrary to law because there was no authority to award fees. We agree.

Authority for awarding attorney's fees against the employer is found in D.C. Code §1-623.27(b)(2):

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 action, award, order, or decision, 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.

This effective date of the amendments to this statute that permitted an assessment against the government-employer was March 30, 2007. In *Rice v. D.C. Dep't of Motor Vehicles*, CRB No. 08-027, AHD No. PBL 06-104, PBL/DCP Nos. 761019-0003-2004-0002 (December 20, 2007), the CRB held that the amendments are not to be applied retroactively:

Thus, we hold that the amendment to the Act permitting an assessment against employer of an attorney's fee in D.C. Code § 1-623.27 (b)(2) is prospective only, and is to be applied only where the services of an attorney are retained to prosecute a claim under the [sic] in which the denial of benefits decision, or the decision to award benefits at a given rate is challenged as being insufficient under the Act, including therein the decision to reduce or terminate benefits previously

awarded, was made on or after March 30, 2007, the effective date of the amendments.

In *Dixon-Cherry v. DCPS*, CRB No. 12-138(A) (January 23, 2013), relying on *Rice*, the CRB held that we look to a “necessary first event” (a denial of benefits outright, or an initial award followed by a reduction or termination of benefits) for determining whether D.C. Code § 1-623.27(b) (2) applies:

In *Rice*, the CRB analyzed whether § 1-623.02(b) (2) [now § 1-623.27(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*.

In the case under review, the necessary first event that led to the successful prosecution was DCP's November 6, 2005 Notice of Determination. The Notice was issued before the effective date of the amendments permitting an assessment of fees against the employer. Accordingly, there was no statutory authority on November 6, 2005, that would allow for the award of an attorney's fee to be assessed against the employer.

CONCLUSION AND ORDER

The Order of April 8, 2010 assessing an attorney's fee against the employer is not in accordance with the law and is VACATED.

FOR THE COMPENSATION REVIEW BOARD:

/s/ *Lawrence D. Tarr*

LAWRENCE D. TARR

Chief Administrative Appeals Judge

August 20, 2013

DATE