

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
INTERIM DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB 13-130**

**TERRI ABBOTT,  
Claimant-Respondent,**

**V.**

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS,  
Self-Insured Employer-Petitioner.**

Appeal of a September 26, 2013 Order issued by  
Administrative Law Judge Anand K. Verma  
AHD No. PBL 07-065B, DCP No. A984800 0667-0001

Andrea G. Comentale for Petitioner  
Krista N. DeSmyter for Respondent

Before: LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, 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 AWARD OF ATTORNEY'S FEE**

On August 3, 2012 an Administrative Law Judge (ALJ) issued a Compensation Order (CO) on Remand that awarded reinstatement of temporary total disability benefits from August 27, 2008, to the present and continuing and authorized arthroscopic surgery. The Compensation Review Board (CRB) affirmed this decision on June 4, 2013. No further appeal was taken.

Thereafter, Claimant's counsel on September 18, 2014 filed a petition with the ALJ for an award of an attorney's fee to be assessed against Employer. Employer did not file any opposition to the petition. On September 26, 2013, the ALJ issued an Order Awarding Attorney's Fee against Employer. It is from this Order that Employer timely appealed.

## DISCUSSION AND ANALYSIS

The significant events relating to this claim are:

- August 27, 2008- Date of work accident;
- January 26, 2010- ALJ issued CO awarding temporary total disability benefits and surgery;
- July 14, 2011- Employer issued Notice of Intent (to terminate benefits);
- August 5, 2011- Claimant filed Application for Formal Hearing;
- August 17, 2011- Employer terminated benefits;
- December 6, 2011- Formal hearing;
- January 17, 2012- ALJ issued CO reinstating benefits;
- August 15, 2012- CRB issued Decision and Remand Order;
- August 23, 2012- ALJ issued Compensation Order on Remand;
- June 4, 2013- CRB issued Decision and Order.

Authority for awarding attorney's fees against the government-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.

The significant dates relating to D.C. Code § 1-623.27(b)(2) are:

- March 8 2007- Effective date of amendment for fee assessment against employer;
- September 24, 2010- Effective date of amendment eliminating fee assessment;
- September 14, 2011- Effective date of amendment restoring fee assessment.

The issue before the CRB is whether there is authority to award a fee assessment against Employer. In light of the changes to Code § 1-623.27(b)(2), resolution of this issue requires determining the critical date for determining the applicable Code section.

Employer asserts that the critical date for determining whether there is authority to award a fee assessment is July 14, 2011, the date it issued the Notice of Intent. Therefore, Employer argues, the ALJ lacked the authority to assess an attorney's fee because on July 14, 2011, the statute did not authorize a fee assessment:

In the instant matter, the termination of benefits decision was made in a Notice of Intent to Terminate ("NOI") dated July 14, 2011. The July 14, 2011 NOI was issued before the effective date of the Amendment. Thus, in accordance with the decisions in *Rice* and *Donna Dixon-Cherry* attorney's fees for services related to

the July 14, 2011 NOI cannot be awarded against Employer-Petitioner because the termination decision was issued **before** the effective date of the Amendment, September 14, 2011. (Emphasis in original, internal citations omitted).

Employer's memorandum at 5.

Claimant argues that the critical date is the date of the work accident. Claimant asserts there is authority to award a fee assessment against Employer because on the date of the work accident the Code authorized a fee assessment:

[I]t is reasonable to conclude that the law at the time of Ms. Abbott's injury is the law that is applicable to her claim. As such, although the law was subsequently amended in October of 2010 to eliminate the right to collect attorney's fees and costs from the Employer and again in October of 2011 to revive the right, the applicable law is the law that was in force on August 27, 2008 when Ms. Abbott sustained her work injury.

Claimant's memorandum at 4.

Claimant and Employer both agree that D.C. Code §1-623.27(b)(2) cannot be applied retroactively. This is consistent with the CRB's decision 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).

In *Dixon-Cherry v. D.C. Public Schools*, CRB No. 12-138(A), AHD No. PBL 12-173 (January 23, 2013) the CRB held that the critical event for determining the applicable Code section is the "necessary first event" that led to the adjudication:

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.

In this case, the action taken by Employer for which the claim was filed, i.e. the necessary first event, that led to the present adjudication was the issuing of the July 14, 2011 Notice of Intent. Therefore, the law in effect on July 14, 2011 applies. On that date, the Code did not authorize a fee assessment.

Although Claimant's argument that the date of accident controls for all purposes is not unreasonable and has been adopted in some jurisdictions, it is incompatible with the structure of the Public Sector Workers' Compensation Act (PSWCA).

Under the PSWCA, a claimant's right to file a claim that can be heard by the Department of Employment Services (DOES) does not vest on the date of accident. DOES does not acquire jurisdiction to hear a claim unless and until the government-employer issues a Notice of Determination or, as in this case, a Notice of Intent. *Sisney v. DCPS*, CRB No. 08-200, OHA No. PBL08-066, DCP No. DCP007970 (July 2, 2012). Stated another way, the event giving rise to the claimed government liability that resulted in the successful prosecution was the decision by Employer ending Claimant's benefits. That event took place on August 5, 2011.

### CONCLUSION

The September 26, 2013 Order is not in accordance with the law. In light of this decision, we will not discuss whether the fact that the ALJ awarded fees under D.C. Code §32-1530, which applies to only the private sector, is an independent grounds for remand or reversal.

Because there is but one action our decision would permit, we exercise the authority granted us by 7 DCMR § 267.5 and vacate the Award and dismisses this matter without remanding it.<sup>1</sup>

### ORDER

The ALJ's September 26, 2013 Order that awarded an attorney's fee assessment is VACATED and the September 13 2013, petition for an attorney's fee is DISMISSED.

FOR THE COMPENSATION REVIEW BOARD:

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LAWRENCE D. TARR  
*Chief Administrative Appeals Judge*

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February 10, 2014

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DATE

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<sup>1</sup> 7 DCMR § 267.5 provides "The Review Panel shall only issue an amended compensation order where a remand to the Administrative Hearings Division or the Office of Workers' Compensation would be unnecessary (e.g. where there is but one action that the Review Panel decision would permit), and thus remand would be superfluous."