COMPENSATION REVIEW BOARD

CRB No. 13-020

CHRISTINE E. HARRIS,
Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Self-Insured Employer - Respondent

Appeal from a January 31, 2013 Order by
Administrative Law Judge Jeffrey P. Russell
AHD No. PBL 10-090, DCP No. 30100304266

Matthew Peffer, Esquire, for the Claimant/Petitioner
Shermineh Jones, Esquire, for the Employer/Respondent

Before: HENRY W. MCCOY, MELISSA LIN JONES, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant, while working as a bus aide, was injured on February 25, 2010 when the school bus in which she was riding was struck by a truck. Employer accepted a claim for benefits and voluntarily paid temporary total disability until those benefits were terminated on or about October 10, 2010 based on a medical report that Claimant's injuries had resolved and she could return to work. Claimant filed for restoration of her disability benefits and following a formal hearing, a March 10, 2011 Compensation Order (CO) issued granting her claim for restoration of temporary total disability benefits.

With no appeal taken and the CO becoming final, Claimant, on or about October 6, 2011, filed a petition to assess an attorney's fee against Employer pursuant to D.C. Code § 1-623.27, to which Employer filed an opposition on November 8, 2011. When no action was taken on the initial petition, Claimant filed a further request on January 9, 2013 whereupon an administrative law judge (ALJ) issued an order to show cause why the petition should not be granted. Employer again filed an opposition to the petition on January 29, 2013, with the reasoning therein accepted by the ALJ who denied the fee petition on January 31, 2013. Claimant has timely appealed with Employer filing in opposition.

On appeal, Claimant argues the ALJ committed error by not applying the law on attorneys' fees in effect at the time of her work-related injury to decide the fee petition. In the alternative, Claimant argues that if the applicable statutory provision is the one in effect at the time benefits were terminated, the petition should have been approved because the date of termination was actually before the repeal of the statutory provision in question became effective. After reviewing the record and the competing arguments, we AFFIRM.

STANDARD OF REVIEW

Because the Order on review is not one based on an evidentiary record produced at a formal hearing, the applicable standard of review is whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 7 DCMR § 266.3; see also 6 Stein, Mitchell & Mezines, *Administrative Law*, § 51-03 (2001).

ANALYSIS

In the instant matter, there is no dispute as to the relevant actions taken by the respective parties and the dates of those actions that factor into the resolution of the matter under review. Claimant sustained a work-related injury on February 25, 2010. Employer voluntarily paid temporary total disability benefits until they were terminated on October 10, 2010. Claimant filed a claim to have those benefits reinstated and following a formal hearing, that relief was granted in a March 10, 2011 CO. With no appeal taken, the CO became final and Claimant filed a petition for an attorney's fee pursuant to D.C. Code § 1-623.27.

Claimant argues that at the time of her work injury, the applicable statutory provision, § 1-623.27(b)(2) provided

> "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."

As this provision was in effect at the time of her injury, Claimant argues it should have been applied by the ALJ and her fee petition should have been granted and that it was error to apply the law which temporarily repealed the above-quoted provision. Employer counters that the

determinative date for the assessment of an attorney's fee is the date on which the decision to terminate benefits was issued, not the date of injury. We agree with Employer.

At the time Claimant successfully prosecuted her claim for benefits, the above-quoted provision of the Comprehensive Merit Personnel Act (the Act), allowed for the award of an attorney's fee to be assessed against the employer. However, effective September 24, 2010, the Council of the District of Columbia amended the Act repealing that provision.[1] Subsequently, the Act was amended again, on or about September 11, 2011, to return this provision to the Act so as to again allow for the assessment of an attorney's fee against the employer.[2] Claimant received her Notice of Intent to Terminate on October 20, 2010, with benefits terminated as of October 10, 2010. As to either date, there was no authority for the assessment of an attorney's fee against Employer.

The sequence of events in the instant case mirror those in the recent case of *Dixon-Cherry v. DCPS*[3] decided by the CRB where the claimant filed a fee petition requesting the CRB assess an attorney's fee against the employer, and that request was denied. In *Dixon-Cherry*, as here, the claimant was issued a notice of determination before the effective date of the second amendment reinstating the fee assessment provision. In *Dixon-Cherry*, the CRB relied on its prior rationale in the matter of *Rice v. D.C. Dept. of Motor Vehicles*[4], by reasoning

> 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,
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> > [T]here 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*.[5]

In the case under review, the Notice of Intent to Terminate issued on October 20, 2010 predated the effective date of the amendment, § 1-623.27(b)(2), which reinstated the authority to assess an attorney's fee against Employer effective October 1, 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

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[1] D.C. Law 18-223, § 1062(b)(15), 57 DCR 6242, effective October 1, 2010.

[2] D.C. Law 19-21, § 1092, 58 DCR 6226, effective October 1, 2011.

[3] *Dixon-Cherry v. DCPS*, CRB No. 12-138(A) (January 23, 2013).

[4] *Rice v. D.C. Dept. of Motor Vehicles*, CRB No. 08-027, AHD No. PBL 06-104 (December 20, 2007).

[5] *Dixon-Cherry, supra*, quoting *Rice, supra*.

> 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.[6]

Accordingly, there was no statutory authority on October 20, 2010 which would allow for the award of an attorney's fee to be assessed against Employer. In addition, Claimant's argument in the alternative also fails because although Employer based its termination on an August 16, 2010 medical report, when the law for the assessment against Employer was in effect, the actual notice was not issued until October 20, 2010, at which time the repeal of that provision had taken effect.

CONCLUSION AND ORDER

The Order of January 31, 2013 denying the assessment of an attorney's fee against Employer is supported by substantial evidence and is in accordance with the law. The Order is therefore AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

May 22, 2013
DATE

[6] *Id.*