

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

SAMUEL ELLIOTT,	)	
	)	
Claimant-Appellant,	)	
	)	
v.	)	Superior Court
	)	C.A. No. N11A-08-008 DCS
STATE OF DELAWARE,	)	
	)	
Employer-Appellee.	)	

Submitted: September 13, 2012  
Decided: December 24, 2012

*Appellant's Motion for Attorneys Fees*  
**MOTION GRANTED**

**MEMORANDUM OPINION**

*Appearances:*

Ronald Stoner, Esquire, Newark, Delaware  
Attorney for Appellant

John J. Klusman, Jr., Esquire, Wilmington, Delaware  
Attorney for Appellee

**DIANE CLARKE STREETT**  
**JUDGE**

## **Factual and Procedural Background**

Appellant Samuel Elliott, (“Mr. Elliott”), a law enforcement officer for the State of Delaware, (the “Employer”), suffered injuries after a compensable work-related accident and was placed on total disability.

Mr. Elliott filed a Petition to Determine Additional Compensation Due with the Industrial Accident Board, (the “Board”), alleging a permanent impairment to multiple body parts as a result of the accident. The Employer filed a separate petition to terminate Mr. Elliott’s benefits alleging that Mr. Elliott was no longer totally disabled as a result of the accident.

After a hearing, the Board terminated Mr. Elliott’s total disability and awarded him partial disability finding that he failed to demonstrate by a preponderance of the evidence that he sustained a permanent impairment to his brain, smell, taste or balance and that he failed to support contentions of permanency ratings to his spinal regions in excess of seven percent.

Mr. Elliott appealed this decision. He asserted that the Board lacked substantial evidence and erred in finding that he did not suffer from brain, smell, taste and balance impairments and in finding that he was no longer totally disabled.

This Court affirmed the Board’s decisions as to Mr. Elliott’s spine, smell, and taste impairments. The Court reversed and remanded the Board’s findings regarding a brain impairment, balance problems and the disability related thereto.

The Court held that the Board erred by failing to provide specific, relevant reasons for its preference of Employer's expert over Mr. Elliott's expert, failing to provide a basis for its credibility determinations as to various witnesses, and failing to resolve conflicts in the testimony of various experts regarding evidence of permanent brain injury and the related balance problems. Thus, the Board's determination as to brain impairment, being deficient and not supportive of a termination of benefits, as well as the Board's associated determinations as to a balance impairment and total disability, were reversed and remanded back to the Board for further proceedings.

Upon this Court's decisions, Mr. Elliott moved for attorneys fees pursuant to 19 *Del. C.* § 2350.

### **Contentions of the Parties**

Mr. Elliott asserts that he is entitled to attorneys fees under Delaware statute because this Court's reversal of the Board's determination affirmed his position as to brain and balance impairment. Employer argues that Mr. Elliott's position was not affirmed on appeal and that this Court did not reverse the Board's decision but merely asked the Board to clarify its decision.

### **Discussion**

“The Superior Court may at its discretion allow a reasonable fee to claimant's attorney for services on an appeal from the Board to the Superior Court .

. . . where the claimant's position in the hearing before the Board is affirmed on appeal.”<sup>1</sup> The legislative intent behind the statute creates a right for a successful claimant to obtain attorneys fees for the time spent preparing the appeal of an unfavorable Board decision.<sup>2</sup>

“Affirmed on appeal” under § 2350(f) requires a claimant to have pursued the particular position argued on appeal first at the Board hearing.<sup>3</sup> In so doing, claimants must “thoroughly present their case before the Board including discussing all relevant evidence and positing all legal arguments.”<sup>4</sup> It is this Court’s affirming of a claimant’s position before the Board that determines whether the Court will grant attorneys fees. The particular action taken by the Court on appeal, whether it is remanding, reversing or requesting clarification, is not the determining factor.<sup>5</sup>

In addition, where the Court finds in favor of a claimant due to the Board’s legal error and reverses the Board’s decision, the claimant may seek attorneys' fees without waiting until the final outcome of the case.<sup>6</sup> In *Bythway v. Super Fresh*, the Court determined that legal error had occurred and awarded attorneys’ fees to

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<sup>1</sup> 19 *Del. C.* § 2350(f).

<sup>2</sup> *Murtha v. Cont'l Opticians, Inc.*, 729 A.2d 312, 317 (Del. Super. 1997).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 318.

<sup>5</sup> *Green v. ConAgra Poultry Co.*, 2007 WL 2319146, \*7 (Del. Super. July 11, 2007) *aff'd sub nom. Conagra/Pilgrim's Pride, Inc. v. Green*, 954 A.2d 909 (Del. 2008); *Bythway v. Super Fresh Food Markets, Inc.*, 1999 WL 1568615, \*3 (Del. Super. Nov. 30, 1999) (stating that a variety of factual scenarios come into play in deciding whether claimant should be awarded attorneys' fees).

<sup>6</sup> *Bythway* at 3; *see also Pollard v. The Placers, Inc.*, 703 A.2d 1211, 1212-13 (Del. 1997) (finding that “although issue allocation may sometimes prove to be an appropriate factor for measuring compensability . . . . The touchstone for an award of counsel fees on appeal is success).

claimant upon reversal and remand.<sup>7</sup> The award of attorneys' fees, in that matter, was not considered premature just because the matter had been remanded for further proceedings.<sup>8</sup> Therefore, even though a Board's decision might eventually remain unchanged subsequent to remand, a claimant's position is not precluded from being deemed affirmed for purposes of an award of attorneys fees.<sup>9</sup>

In this matter, Mr. Elliott argued the substantive and complex matters of his position regarding a diagnosis of post-concussive syndrome and permanent brain injury, balance impairment, spine impairment, and taste and smell impairment by presenting various witnesses, experts and voluminous medical records before the Board. The Board, however, preferred the Employer's experts and found that Mr. Elliott did not provide sufficient evidence demonstrating that he had sustained permanent impairment to his brain, smell, taste, or balance, or increased impairment to his spine.

The Court, on the other hand, found that the Board erred as to its findings regarding brain and balance impairments because it did not articulate a specific reason for the rejection of Mr. Elliott's experts, provide a basis for its credibility determinations as to other witnesses, or resolve conflicts in the testimony of various experts regarding evidence of permanent brain injury. Specifically, the Court found that "[t]he Board made no determination as to which of these two

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<sup>7</sup> *Bythway* at \*3-4.

<sup>8</sup> *Id.*

<sup>9</sup> *See Falconi v. Coombs & Coombs, Inc.*, 2006 WL 3393489, \*3 (Del. Super. Nov. 21, 2006).

opinions regarding reflexes it found credible and why. Furthermore, the Board did not resolve the conflict regarding whether the hyperreflexia and clonus in the reflexes, found by both experts, was indicative of permanent brain injury.”<sup>10</sup> This error by the Board invalidated its determination as to whether Mr. Elliott suffered from permanent brain injury and balance impairment.

The Employer cites to *Murtha v. Continental Opticians*<sup>11</sup> to support its position that the Court remanded the matter only for clarification. In *Murtha*, where the claimant asserted that the Board had failed to appropriately compute a disfigurement award, the Court remanded the matter back to the Board on that issue—clarification of the computation.<sup>12</sup> The *Murtha* Court did not award attorneys’ fees to the claimant because the Board’s improper computation was not the position that the claimant had argued before the Board—the claimant had argued that the award was inadequate, not incorrectly computed.<sup>13</sup>

The facts, here, do not mirror those in *Murtha*. In this matter, Mr. Elliott argued before the Board that he suffered from brain impairment, and he presented the same position on appeal to this Court. The Board’s decision was *reversed* and remanded for a *determination* “as to whether the evidence from [the two experts] regarding Mr. Elliott’s reflexes indicate a continuing permanent brain impairment

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<sup>10</sup> *Elliott v. State*, 2012 WL 2553327 (Del. Super. Jun. 29, 2012).

<sup>11</sup> 729 A.2d 312.

<sup>12</sup> *Murtha* at 314.

<sup>13</sup> *Id.* at 320.

and, if not, the specific reasons for rejecting the experts' testimony regarding reflexes.”<sup>14</sup> The decision was not remanded for clarification but was reversed and remanded for a new determination based on the seemingly ignored evidence regarding reflexes and for appropriate credibility findings regarding the witnesses.

Therefore, since Mr. Elliott's position before the Board—that he continues to suffer from post-concussive syndrome and brain injury as well as balance problems—was affirmed through this Court's rejection of the Board's incomplete findings and the Board's unsupported determination that Mr. Elliott did not so suffer, Mr. Elliott's request for attorneys' fees is valid. The Court found error in the Board's decision. Moreover, while a possibility exists that the Board, upon remand, might reach its same determination regarding Mr. Elliott's impairment, such a scenario does not preclude an award of attorney's fees.

**ACCORDINGLY**, Mr. Elliott's motion for attorneys' fees in the amount of \$9,300.00 is **GRANTED**.<sup>15</sup>

**IT IS SO ORDERED.**

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Diane Clarke Streett  
Judge

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<sup>14</sup> *Elliott at* \*11.

<sup>15</sup> The Employer did not object to or provide argument regarding the amount of attorneys' fees requested by Mr. Elliott.