SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: Fritzgerald Kenol v. Johnny Janosik, Inc.
C.A. No. N10A-05-015 RRC

Submitted: January 31, 2011
Decided: March 15, 2011

On Appellee Johnny Janosik, Inc.'s Motion to Dismiss Appeal.
GRANTED.

Dear Counsel:

INTRODUCTION

Appellee Johnny Janosik, Inc.'s ("Employer") motion requires a determination of whether an order of the Industrial Accident Board (the "Board") requiring Appellant Fritzgerald Kenol ("Employee") to sign a receipt for payments made by Employer constitutes an appealable final award

or an unappealable interlocutory order.[1] This Court holds that an order of the IAB directing Employee to sign a receipt for disability benefit payments received or refund such payments is not an award of the IAB. It follows that Employee has appealed an interlocutory order. Accordingly, Employer's Motion to Dismiss Appeal is **GRANTED.**

FACTS AND PROCEDURAL HISTORY

This case arises from an October 17, 2008 work accident in which Employee injured his knee.[2] As a result of this injury, Employee was awarded total temporary disability payments of $379.70 per week for the period of November 3, 2008 to April 27, 2009.[3]

In June 2009, Employer's worker's compensation carrier generated a receipt for the total disability payments received from November 3, 2008 through April 27, 2009; the payments totaled $9,492.50.[4] Employee refused to sign this receipt, and a hearing was held on April 21, 2010 before the Industrial Accident Board.[5] At this hearing, Employer stated its position that Employee must either sign the receipt or repay the worker's compensation

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[1] The parties' dispute originally centered on whether Employee's appeal was filed in the correct county and, if not, whether the appeal could be transferred to the appropriate county. During oral argument, it was revealed that Employee sustained the instant injury in New Castle County; consequently, this Court entered an order striking the previously submitted briefs and directing the parties to file briefs limited to the issue contained in the instant motion to dismiss. *Fritzgerald Kenol v. Johnny Janosik, Inc.*, Del. Super., I.D. No. 10A-05-015, Cooch, R.J. (Sept. 15, 2010) (ORDER) ("Given new evidence that the injury sustained by employee occurred in New Castle County, employer withdrew any opposition to Employee's motion to transfer. . . .All previous briefs and responses relating to the Motion to Dismiss and the Motion to Transfer are stricken. The only motion before the Court is Employer's Motion to Dismiss."). Thereafter, Employee filed a motion to strike Employer's opening brief, alleging that certain exhibits to Employer's brief were not contained within the record of Board proceedings and consequently could not be considered by this Court on appeal. By order dated December 6, 2010, this Court granted Employee's motion in part and denied Employee's motion in part; those exhibits which this Court found were not contained within the record of proceedings below were stricken, while the remainder of Employer's brief was not. *Fritzgerald Kenol v. Johnny Janosik, Inc.,* Del. Super., N10A-05-015, Cooch, R.J. (Dec. 6, 2010) (ORDER).

[2] Transcript of Administrative Hearing of Apr. 21, 2010 at 4 [hereinafter "Tr. at __"].

[3] *Id.* at 5.

[4] *Id.* at 6.

[5] *Id.*

carrier for the temporary total disability payments.[6] Counsel for Employee stated that Employee would be seeking further partial disability payments, and it was his firm's policy "not to sign a final receipt if there's an ongoing entitlement to partial [disability payments]."[7] Employee's counsel asserted that the receipt "purports to be a final receipt in and of itself" and he "[did not] think it's fair that [Employee] should have to file a new petition that will take six months" to pursue any additional alleged partial disability entitlement.[8]

The Board rejected Employee's contentions and entered an order dated April 21, 2010, directing Employee to sign the receipt for compensation paid between November 3, 2008 and April 27, 2009. The IAB's order required Employee to sign the receipt by May 5, 2010. This order is the subject of the instant appeal.

CONTENTIONS OF THE PARTIES

Employer argues that under Superior Court Civil Rule 72(i), which permits the Court to dismiss an unappealable interlocutory order, the instant appeal should be dismissed as interlocutory.[9] Employer notes that only "awards" of the Board are appealable, and that "award" is defined in Delaware case law.[10] Employer contends that, since the case law defines an "award" as a final determination of the board that awards or denies compensation, an order that merely requires Employee to sign a receipt for compensation received is not final but interlocutory.[11]Employer notes that, in the Board's order, "there were no additional awards given, no denial of compensation due, nor was there any ruling on the merits of the case."[12] It is Employer's position that, to the extent Employee contends that he is entitled to an additional partial disability claim based on "a different time period and

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[6] *Id.*
[7] *Id.* at 7. Employee's alleged entitlement to ongoing partial disability payments was due to the fact that Employer reassigned Employee to light duty, causing Employee to incur an $80 per week wage loss. *Id.*
[8] *Id.* at 8. Employer's counsel responded to this by stating: "just because it's not convenient to file a petition that's really not an argument for why the receipt should not be signed." *Id.* at 9.
[9] Appellee's Opening Br. at 7.
[10] *Id.*
[11] *Id.* at 7-8.
[12] *Id.* at 9.

possibly different body parts. . . .the proper procedure is to file a new petition, schedule and depose expert witnesses, and present evidence in front of the Board."[13] Put another way, Employer asserts that "[t]o argue Claimant won't acknowledge and/or sign the final receipt for the total compensation he received in the past simply because he might be entitled to compensation in the future is in essence, holding the final receipt hostage."[14] Indeed, Employer states that the instant order "does not prohibit Claimant in any way from filing for additional benefits."[15] Employer argues that, contrary to Employee's characterization of the order, the order "imposed or created no rulings whatsoever. [It] simply states that Claimant entered into an agreement with the Employer for a closed date of compensation between November 3, 2008 and April 27, 2009." Thus, Employer contends that this order was entirely within the Board's authority and discretion, and does not constitute an appealable final award.[16]

Employee responds that Employer's motion to dismiss the appeal must be viewed as a motion for summary judgment, and that all reasonable facts and inferences must be drawn in favor of Employee, as the non-moving party.[17] Employee argues that the instant Board order is a *de facto* final order because his attempts to file a new petition for his alleged ongoing partial disability "will be met by Employer's assertion that the statute of limitations has run as to any aggravation, recurrence of his back injury or new injury to same. . . ."[18] Employee contends that this Order "created a denial of hearing on the merits, properly brought by Claimant, and that constitutes a denial of temporary partial benefits;" Employee submits that such a denial "constitutes an 'award' and allows [an] appeal via 19 Del. C. §§ 2349 and 2350."[19]

It is Employee's position that Industrial Accident Board Rule 19 governs the effect of signing the instant receipt; as relevant to Employee's contentions, Rule 19 provides:

> In the case of an award by the Board which is not appealed or if the appeal is sustained by the Court of last appeal the insurance

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[13] *Id.*
[14] *Id.*
[15] Appellee's Reply Br. at 4.
[16] *Id.* at 6.
[17] Appellant's Answ. Br. at 3.
[18] *Id.* at 9.
[19] *Id.* at 4.

> carrier or self-insurer shall make payments pursuant to and in compliance with the provisions of said award. An award of the Board shall be considered as self-executing. Nevertheless, for administrative purposes, an agreement reflecting the provisions of an award of the Board shall be entered into between the parties and filed with the Department. A final receipt shall be filed with the Department when the agreement is paid in full.[20]

Employee asserts that a previously sustained a compensable back injury is related to the instant knee injury: "While not a physician, claimant implores this Court to recognize that an injury consisting of significant trauma to the knee in a lift and carry situation, resulting in an acknowledged period of temporary total disability, can aggravate an existing back injury in a significant way or possibly result in a new injury to the back."[21] It is Employee's position that the instant order "creates rulings that fix the nature and scope of [Employee's] injuries and constitutes a binding ruling that all benefits due [Employee] for the period preceding its inception are paid in full."[22] Thus, Employee contends that signing the receipt would "foreclose[] his right to litigate his entitlement in any subsequently filed petition" based on the statute of limitations, thereby rendering the Board's order a final order.[23] Consequently, Employee requests that this Court reverse the IAB's order and remand the case "with the proviso that Employer cannot withdraw said Petition absent Claimant's consent."[24]

STANDARD OF REVIEW

This Court's jurisdiction to review decisions of the Industrial Accident Board is defined by statute.[25] Among other things, 19 Del. C. § 2349, provides:

> Whenever an award shall become final and conclusive pursuant to this section, the prevailing party, at any time after the running of all appeal periods, may, if a proper appeal has not been filed, file with the Prothonotary's office, for the county having jurisdiction over the matter, the amount of the award and the date of the award. From the time of such filing, the amount set forth in the award

[20] Industrial Accident Board Rule 19(a).
[21] Appellant's Answ. Br. at 10.
[22] *Id.* at 11.
[23] *Id.*
[24] *Id.*
[25] 19 Del. C. § 2349.

> shall thereupon be and constitute a judgment of record in such court with like force and effect as any other judgment of the court, except that the renewal provisions of § 4711 of Title 10 shall not be applicable, and a judgment obtained under this section shall automatically continue for a period of 20 years from the date of the award. The Prothonotary shall enter all such certificates in the regular judgment docket and index them as soon as they are filed by the prevailing party.[26]

By its terms, § 2349 stipulates that only an "award" which has "become final and conclusive" may be appealed to this Court. The Supreme Court of Delaware has confirmed that interlocutory orders from the Board to this Court are not appealable; rather, only an "award" is appealable, and "the word 'award' must be read as the final determination of the Board in the case."[27] This Court has previously held that an appeal from a Board order in which there was "no award or denial of compensation, nor was there any ruling on the merits of the case" was an unappealable interlocutory appeal.[28] Similarly, this Court has explained that a Board order is "reviewable only at the point where it awards or denies compensation."[29]

Simply put, orders issued prior to the Board's final determination are interlocutory.[30] In turn, Superior Court Civil Rule 72(i) provides that this Court may dismiss an appeal *sua sponte* or on motion by a party "for appealing an unappealable interlocutory order."

DISCUSSION

The sole inquiry for this Court is whether the instant Board order is an unappealable interlocutory order, as defined by 19 Del. C. § 2349 and the

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[26] *Id.*

[27] *Eastburn v. Newark Sch. Dist.*, 324 A.2d 775, 776 (Del. 1974); *see also Tyson Foods v. Hudson*, 2006 WL 708570, *1 (Del. Super. Ct. 2006) ("In this regard, Our Supreme Court has held, and it has been well settled in Delaware for over three decades, "that interlocutory orders of the Industrial Accident Board are unappealable.") (quoting *Eastburn*, 324 A.2d at 776).

[28] *Standard Distrib., Inc. v. Hall*, 2007 WL 1748644, *2 (Del. Super. Ct. 2007).

[29] *Id.* (quoting 8 Arthur Larson & Lex K. Larson, Larson's Workers Compensation Law § 130.02 (2004)).

[30] *Clendaniel v. McDaniel Constr., Inc.*, 787 A.2d 100 (Del. 2001) ("Because [Claimant's] appeal to the Superior Court was from orders issued prior to the IAB's final determination, the appeal was interlocutory and was properly dismissed.") (citations omitted).

relevant case law. If so, then this Court must grant Employer's motion and dismiss the appeal.

The Board hearing which precipitated the instant order was addressed exclusively to Employee's refusal to sign the receipt for compensation received from November 3, 2008 through April 27, 2008.[31] The order itself reads as follows:

> WHEREAS, the Claimant, Fritzgerald Kenol, was injured in a compensable industrial accident on October 17, 2008 while in the employ of Johnny Janosik, Inc.
>
> WHEREAS, the Claimant entered into an agreement with the Carrier/Employer for a closed date of compensation due between November 3, 2008 and April 27, 2009.
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> WHEREAS, the Carrier/Employer's prepared an Agreement and Receipt, and duly paid Claimant per said Agreement.
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> WHEREAS, Claimant signed the Agreement and submitted it to the Carrier/Employer.
>
> WHEREAS, Claimant has to date refused to execute the Receipt.
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> WHEREAS, Claimant has returned to work.
>
> WHEREAS, Claimant has an obligation to sign said Receipt, or refund all payments made by Carrier, Employer.
>
> THEREFORE, IT IS SO ORDERED, this 21 day of April, 2010, that Claimant is to sign the Receipt by May 5, 2010.[32]

The instant order is not "the final determination of the Board in the case."[33] Likewise, in no way does this order "award[] or den[y]

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[31] Tr. at 5-10.

[32] Order of the Industrial Accident Board of Apr. 21, 2010.

[33] *Eastburn v. Newark Sch. Dist.*, 324 A.2d 775, 776 (Del. 1974); *see also Tyson Foods v. Hudson*, 2006 WL 708570, *1 (Del. Super. Ct. 2006) ("In this regard, our Supreme Court has held, and it has been well settled in Delaware for over three decades, "that interlocutory orders of the Industrial Accident Board are unappealable.") (quoting *Eastburn*, 324 A.2d at 776).

compensation."[34] The order simply requires Employee to sign a receipt for payments received pursuant to a preexisting agreement for a closed period of disability. It does not address the merits of Employee's claim, much less "create[] rulings that fix the nature and scope of [Employee's] injuries . . . ."[35] Thus, it is inescapable that the instant order is not an "award" within the meaning of § 2349.

To the extent Employee relies on Industrial Accident Board Rule 19 to support the contention that this order is *de facto* final, such reliance is misplaced. As noted, Rule 19(a) provides:

> In the case of an award by the Board which is not appealed or if the appeal is sustained by the Court of last appeal the insurance carrier or self-insurer shall make payments pursuant to and in compliance with the provisions of said award. An award of the Board shall be considered as self-executing. Nevertheless, for administrative purposes, an agreement reflecting the provisions of an award of the Board shall be entered into between the parties and filed with the Department. A final receipt shall be filed with the Department when the agreement is paid in full.[36]

Further, Rule 19(b) provides that "[a] final receipt signed by the injured employee will be accepted by the Board as *prima facia* evidence that the disability of such injured employee has ceased." In turn, Employee asserts that, under Rule 19, the Board's order is effectively final for purposes of Superior Court review. However, it remains that the Industrial Accident Board Rules apply to proceedings before the Industrial Accident Board, and not this Court's standard of review on the instant appeal. That is, under Rule 19, the fact that a final receipt is "prima facie evidence" that the Employee's disability has ceased may be relevant to the Board when reaching its conclusions on Employee's claim, but it is not a factor to be considered by this Court when determining if the instant order is an "award." To the contrary, while such "prima facie evidence" may be persuasive to the Board in reaching its award, it is irrelevant to this Court's determination of whether an order directing Employee to sign the instant receipt is appealable.[37]

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[34] *Standard Distrib., Inc. v. Hall*, 2007 WL 1748644, *2 (Del. Super. Ct. 2007) (citations omitted).
[35] Appellee's Answ. Br. at 11.
[36] Industrial Accident Board Rule 19(a).
[37] Similarly, Employee's contentions that he cannot file a new petition for alleged aggravation and reoccurrence of his injuries because Employer will invoke the defense of

CONCLUSION

The order from which Employee has taken this appeal is not an "award" within the meaning of 19 Del. C. § 2349. Consequently, the instant appeal is interlocutory and must be dismissed. Accordingly, for all the reasons stated above, the Employer's Motion to Dismiss Appeal is **GRANTED**.

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Richard R. Cooch, R. J.

oc: Prothonotary
cc: Industrial Accident Board

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the statute of limitations is relevant only to the Board in reaching its "final and conclusive" award; this issue has no effect on the longstanding definition of "award" for purposes of 19 Del. C. § 2349.