

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JAMES BLAIR, JR., :
 : C.A. No. K18A-08-001 WLW
 Claimant-Below, :
 Appellant, :
 :
 v. :
 :
 SMYRNA SCHOOL DISTRICT, :
 :
 Employer-Below, :
 Appellee. :

Submitted: July 30, 2019
Decided: October 7, 2019

ORDER

Upon Appellant's Application for Attorneys Fees
Denied Without Prejudice

Walt F. Schmittinger, Esquire and Candace E. Holmes, Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware; attorneys for Appellant.

William D. Rimmer, Esquire and Nicholas E. Bittner, Esquire of Heckler & Frabizzio, Wilmington, Delaware; attorneys for Appellee.

WITHAM, R.J.

INTRODUCTION

Presently before the Court, is Appellant James Blair, (hereinafter “Appellant”) and through his counsel, their application for attorneys’ fees pursuant to 19 *Del. C.* § 2350(f). This application stems from the Appellant’s appeal from the Industrial Accident Board, for which this Court reversed and remanded on April 5, 2019.¹

Upon consideration of the parties arguments, and the Court’s prior decision, it appears to the Court that:

FACTUAL AND PROCEDURAL HISTORY

1. The Court’s factual and procedural findings from its April 5, 2019 decision are incorporated hereto.²

2. As of July 30, 2019, the Court is unaware of any action taken by the Industrial Accident Board (hereinafter “IAB”) in regard to the Court’s April 5, 2019 remand.

3. On July 19, 2019, attorneys for the Appellant filed an application for attorneys fees pursuant to 19 *Del. C.* § 2350(f) requesting \$14,150.00 based on 35.7³ spent by Ms. Holmes at an hourly rate of \$250.00 per hour and 4.5 hours spent by Mr. Schmittinger at an hourly rate of \$375.00, plus an additional one third for the contingent nature of the litigation.⁴

¹ *James Blair v. Smyrna School District*, 2019 WL 1530127 (Del. Super. April 5, 2019).

² *See id.* at *1-2.

³ *See* Appellant Mot. at n.1 (Counsel for the Appellant claim that the 35.7 hours is actually an adjustment of over 12 hours because of Ms. Holmes inexperience.).

⁴ *See* Appellant Mot. at pg. 2.

4. Counsel for Smyrna School District (hereinafter “Appellee”) filed their response, in opposition, on July 26, 2019.

PARTIES CONTENTIONS

5. Counsel for the Appellant do not really offer an argument for their application, other than they are entitled to it under section 2350(f). However, they justify their sum based on its moderate complexity.⁵

6. Unsurprisingly, the Appellee opposes the application and offers the Court support in its opposition. First, the Appellee argues that the Appellant is not entitled to attorneys fees under section 2350(f) because this Court remanded the appeal on an issue that was not raised by the Appellant in his appeal. Second, the Appellee asserts that the Appellant’s own notice of appeal failed to raise the issue of sick day reimbursement, meaning that the Board, nor the Court, could properly consider the issue.

LEGAL STANDARD OF REVIEW

7. The 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 and from the Superior Court to the Supreme Court *where the claimant's position in the hearing before the Board is affirmed on appeal*. Such fee shall be taxed in the costs and *become a part of the final judgment in the cause* and may be recovered against the employer and the employer's insurance carrier as provided in this subchapter.⁶

⁵ *Id.* (Appellant’s further state that there is “scant” case law available regarding the issue on appeal.).

⁶ 19 *Del. C.* § 2350(f) (emphasis added).

DISCUSSION

8. This Court only has discretion to award attorneys fee in appeals from the IAB “where the claimant's position in the hearing before the Board is affirmed on appeal.”⁷ Thus, for this Court to exercise its discretion it must first be determined whether the remand sub judice constituted an affirmance on appeal of the claimant's position before the Board as contemplated by § 2350(f).

9. In this case, the remand of the case to the IAB cannot be viewed as an affirmance of Employee's position before the Board. First, the Court did not reach a decision on the merits of the Appellant’s review. The Court specifically stated:

Here, the Board's error of law served as a predicate for its decision to award the School District with a set off. By awarding Mr. Blair his sick days, the Board was able to award the School District with a set off. In other words, without the Board's award of sick days to Mr. Blair, there would have been no set off available to the School District.⁸

Because of this error of law, the Court was precluded from reaching a conclusion regarding the merits of the Appellant’s appeal.⁹

10. Here, the Appellant did not argue that the IAB’s action was impermissible or inappropriate, nor any other issue that was affirmed by the Court. And because the case has been remanded, the Court has not made a final determination on the merits of the appeal.

⁷ 19 *Del. C.* § 2350(f). See also *Murtha v. Continental Opticians, Inc.*, 729 A.2d 312, 315 (Del. Super. 1997) *aff'd*, 705 A.3d 244, 1998 WL 40223 (Del. 1998) (Table).

⁸ *Blair*, 2019 WL 1530127, at *4.

⁹ *Id.*

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11. This approach comports with the express language of § 2350(f) which states “[s]uch fee shall be taxed in the costs and become a part of the final judgment in the cause...” Arguably, the statute contemplates that fee applications and awards await resolution of the underlying issue. Until there is a final judgment in the case, a fee award would be premature. As the Delaware Supreme Court has noted “Superior Court orders of remand directed to decisions of administrative agencies, including the IAB, except remands for purely ministerial functions, are interlocutory, not final, orders.”¹⁰ Thus, an application for an award of an attorney's fee should not be filed simply because the Court remanded a case to the IAB. Waiting until the litigation of the underlying matter is completed will circumvent the possibility that attorney fee applications will become the focus of appeals from IAB’s rulings and avoid the possible fragmentation of litigation.

CONCLUSION

12. For the foregoing reasons, Appellant’s Petition for an Award of Attorney's Fees is hereby **DENIED without prejudice**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

¹⁰ *Pollard v. Placers, Inc.*, 692 A.2d 879, 879 (Del. 1997).