IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ALSIDE SUPPLY CENTER,	)	
	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	C.A. No. N19A-07-003 RRC
	)	
JEREMY BOTTOMLEY	)	
	)	
	)	
Defendant-Appellee.	)	

Submitted: September 12, 2019
Decided: November 5, 2019

On Defendant-Appellee Jeremy Bottomley's Motion to Dismiss.
GRANTED.

MEMORANDUM OPINION

Morgan A. Sack, Esquire, Cipriani & Werner, P.C., Wilmington, Delaware, Attorney for Appellant-Employer Alside Supply Center.

Nicholas M. Krayer, Esquire, Pratcher Krayer LLC, Wilmington, Delaware, Attorney for Appellee-Claimant Jeremy Bottomley.

COOCH, R.J.

I. INTRODUCTION

Before this Court is Appellee-Claimant Jeremy Bottomley's ("Employee") Motion to Dismiss Appellant-Employer Alside Supply Center's ("Employer") appeal from a June 19, 2019, decision of the Industrial Accident Board granting, in part, Employee's Petition to Determine Compensation Due ("Petition").[1] On August 27, 2018, the Employee filed the Petition and alleged "he suffered compensable work injuries as a result of being assaulted while at work on August 3, 2018."[2] The parties agreed to bifurcate the Petition to Determine Compensation Due by "initially conducting a hearing on the course and scope issue [... and] [t]hen, if the [Employee] prevailed on the course and scope issue, the parties would have a hearing to determine the nature and extent of the [Employee's] injuries and what benefits the [Employee] is entitled to receive as a result of his injuries."[3] After the Industrial Accident Board ("Board") determined that the injuries the Employee sustained occurred within the course and scope of his employment,[4] Employer filed an appeal with this Court.

In its appeal, Employer alleges the Board erred in finding that an industrial accident occurred within the course and scope of employment, that the incident arose out of Employee's employment, and that the Board's decision was not based on substantial and competent evidence.[5]

In response, Employee filed this Motion to Dismiss on the basis that the Employer's appeal of the June 19, 2019 decision is interlocutory.[6]

After review of the parties' contentions and the record, the Court concludes that the Employer's appeal of the June 19, 2019 decision is an unappealable interlocutory appeal. Accordingly, Employee's Motion to Dismiss is GRANTED.

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[1] The exact business name of Employer is unclear from the record.
[2] Employee's Mot. to Dismiss at § 1.
[3] *Id.* at § 3.
[4] Employee's Mot. to Dismiss, Ex. B (Industrial Accident Board's June 19, 2019 Decision).
[5] Employer's Notice of Appeal Pursuant to R. 72 at 1.
[6] Employee's Mot. to Dismiss at § 5.

II. FACTS AND PROCEDURAL HISTORY[7]

On August 27, 2018, Employee filed a Petition to Determine Compensation Due with the Industrial Accident Board ("Petition"). The parties agreed to bifurcate the Petition initially to determine whether Employee was in the course and scope of his employment with Employer at the time of the alleged incident before making any determinations about compensation, if appropriate.[8] The parties stipulated that the focus of the May 21, 2019 hearing was whether Employee was injured within the course and scope of his employment with Employer.[9] After the May 21, 2019 hearing, the Industrial Accident Board issued a decision finding that Employee's injuries occurred within the course and scope of his employment with Employer.[10] On June 10, 2019, Employer filed a Notice of Appeal Pursuant to Rule 72 in this Court. On August 1, 2019, Employee filed this Motion to Dismiss.

The following facts were jointly stipulated by the parties, pursuant to Industrial Accident Board Rule 14(A), for the IAB hearing held on May 21, 2019:

> The Claimant, Jeremy Bottomley, and the Employer, Alside Supply Center ("Alside"), hereby stipulate to the following facts, pursuant to Board Rule 14(A), for the May 21, 2019 hearing:
>
> 1. Mr. Bottomley filed a Petition to Determine Compensation Due on August 27, 2018 alleging he suffered compensable work injuries as a result of being assaulted while at work on August 3, 2018.
>
> 2. Alside disputes that the injuries occurred within the course and scope of Mr. Bottomley' s employment with Alside.
>
> 3. The parties agree that Mr. Bottomley was an employee of Alside on the date of the work accident.
>
> 4. The parties stipulate that the May 21, 2019 hearing will focus on whether Mr. Bottomley was injured within the course and scope of his employment with Alside.
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> 5. On the morning of August 3, 2018, Mr. Bottomley drove to work and

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[7] The parties had jointly stipulated to a statement of facts for their IAB hearing on May 21, 2019.
[8] Employee's Mot. to Dismiss at § 3; *see also* Employer's Resp. to Employee's Mot. to Dismiss at § 3.
[9] Employee's Mot. to Dismiss, Ex. A (Stipulation of Facts).
[10] Employee's Mot. to Dismiss, Ex. B (Industrial Accident Board's June 19, 2019 Decision).

parked in the parking lot alongside the building where Alside is located.

6. After getting out of his car in the parking lot and beginning to walk into Alside, Mr. Bottomley was assaulted by three males.

7. During the assault, Mr. Bottomley was assaulted with fists, feet, a baseball bat and other unidentified objects.

8. After assaulting Mr. Bottomley, the three males fled the scene in a silver van.

9. Master Corporal Shatley from the Delaware State Police investigated the assault but has been unable to verify the identities of the three males that assaulted Mr. Bottomley.

10. As a result of the assault, Mr. Bottomley has suffered serious injuries that have necessitated surgery and required extensive medical treatment.

III. PARTIES' CONTENTIONS

A. Employee's Contentions

Employee contends that "[t]his Court does not have the jurisdiction to consider an appeal for anything other than a final award of the Board[,]"[11] and asserts that "[t]he term 'award' has been interpreted to mean the Board's 'final determination in an action for compensation."[12]

Employee argues that, since the parties agreed to initially conduct a hearing on the course and scope issue and later have a hearing to determine the nature and extent of Employee's injuries, Employer's appeal at this point in the litigation of this matter is interlocutory.[13]

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[11] Employee's Mot. to Dismiss at § 5; *see also Christiana Care Health Servs. v. Luce,* 162 A.3d 102 (Del. 2017).
[12] *Christiana Care Health Servs*, 162 A.3d 102 (Del. 2017) (citing *Eastburn v. Newark School Dist.*, 324 A.2d 775 (Del. 1974).
[13] Employee's Mot. to Dismiss at § 6.

B. Employer's Contentions

In its Notice of Appeal, the Employer contends that (1) the Board erred in finding that an industrial accident occurred within the course and scope of employment, (2) that the incident arose out of Employee's employment, and (3) that the Board's decision was not based on substantial and competent evidence.[14] The Court is not required to reach these issues for purposes of Employee's Motion to Dismiss.

In their Response to Employee's Motion to Dismiss, Employer contends that this is not an unappealable interlocutory appeal because "[i]n the Board's Decision on Course and Scope of Employment [on June 19, 2019,] the Board provided a ruling on the merits of the case [and determined] that the alleged assault occurred during the course and scope of the [Employee's] employment."[15] Employer also argues that "[a] final determination was made as to the bifurcated issues presented to the Board [... and] the Board also awarded attorneys' fees to Employee's counsel in the amount of five thousand ($5,000.00) dollars."[16]

IV. STANDARD OF REVIEW

This Court's jurisdiction to review decisions of the Industrial Accident Board is defined by statute.[17] 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 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.[18]

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[14] Notice of Appeal Pursuant to Rule 72, dated July 10, 2019 (D.I. 1).
[15] Employer's Resp. to Employee's Mot. to Dismiss at § 4.
[16] *Id.*
[17] 19 *Del. C.* § 2349.
[18] *Id.*

By its terms, § 2349 stipulates that only an "award" which has "become final and conclusive" may be appealed to this Court. The Delaware Supreme Court has confirmed that interlocutory orders from the Board to this Court are not appealable; rather, only an "award" is appealable, and has held that "the word 'award' must be read as the final determination of the Board in the case."[19] 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.[20]

Similarly, this Court has explained that a Board order is "reviewable only at the point where it awards or denies compensation."[21]

Simply put, orders issued prior to the Board's final determination are interlocutory.[22] 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."[23]

V. DISCUSSION

Appellant's appeal is interlocutory.

The Court finds that Employer's appeal is interlocutory and must be dismissed pursuant to Delaware Superior Court Rule 72(i). The Delaware Supreme Court has held, pursuant to 19 Del. C. § 2349, "the Superior Court has appellate jurisdiction to

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[19] *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).

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

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

[22] *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).

[23] Del. Super. Ct. R. 72(i) ("Dismissal. — [...]. The Court may order an appeal dismissed, sua sponte, or upon a motion to dismiss by any party. Dismissal may be ordered for untimely filing of an appeal, **for appealing an unappealable interlocutory order**, for failure of a party diligently to prosecute the appeal, for failure to comply with any rule, statute, or order of the Court or for any other reason deemed by the Court to be appropriate." (emphasis added).

consider 'an award' of the Industrial Accident Board."[24] An 'award' of the Industrial Accident Board has been interpreted to mean, in an action for compensation, the Board's "final determination."[25] Accordingly, "the Superior Court has no jurisdiction, discretionary or otherwise, to consider an appeal from anything other than a final award of the Board."[26]

The parties agreed to bifurcate the issues of "scope and course of employment" and later determine, if appropriate, compensation as a result of the alleged assault. The Court agrees that, as Employee argues, "[s]ince the Board made no final determination as to what compensation Appellee/Claimaint is entitled to receive as a result of the assault, the Appellant/Employer's appeal must be dismissed as interlocutory."[27]

Although Employer argues that "[t]his [IAB] Order and Decision [addresses] the merits of the Employee's claim and ultimately create a ruling that fix the nature and scope of the Employee's injuries[,]" Employer completely ignores that the issue of compensation remains unresolved. In this case, the IAB has not yet determined the nature and scope of the Employee's injuries. This issue had been reserved by the parties for a later determination. Additionally, as to Appellant's assertion that attorney's fees have been awarded as an example that the IAB had made a final determination in this matter, the Supreme Court has held that "although an order awarding attorneys' fees on appeal from an IAB decision becomes a fixed entitlement as of the date of the order, the order itself is interlocutory and must await resolution of the underlying cause before it becomes part of a final judgment."[28]

In light of the parties' decision to bifurcate the issues, this is an unappealable interlocutory order until there is a determination on the compensation that Employee is due.

VI. CONCLUSION

For the foregoing reasons, Defendant-Appellee Jeremy Bottomley's Motion to Dismiss is **GRANTED**.

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[24] *Christiana Care Health Servs. v. Luce*, 162 A.3d 102 (Del. 2017).
[25] *Eastburn v. Newark School Dist.*, 324 A.2d 775 (Del. 1974) (holding that "interlocutory orders of the Industrial Accident Board are unappealable").
[26] *Christiana Care* at § 2 (citing to *Eastburn* at 776).
[27] Employee's Mot. to Dismiss at § 6.
[28] *Playtex Prod., Inc. v. Roland*, 841 A.2d 308, at *1 (Del. 2004) (citing *Pollard v. The Placers, Inc.*, 692 A.2d 879, 881 (Del. 1997) (quotations omitted).

Richard R. Cooch, R.J.

cc: Prothonotary
Industrial Accident Board