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

MICHAEL FALCONI,	)	
	)	
Claimant-Below/	)	
Appellant,	)	
	)	
	)	
v.	)	C.A. No. 04A-07-007(CHT)
	)	
	)	
COOMBS & COOMBS, INC.,	)	
d/b/a/ CERTIFIED AUTO,	)	
	)	
Employer-Below/	)	
Appellee.	)	
	)	

OPINION AND ORDER

ON CLAIMANT-BELOW/APPELLANT'S APPLICATION FOR ATTORNEY'S FEES

Submitted: September 20, 2006
Decided: November 21, 2006

Perry F. Goldlust, Esquire, ABER GOLDLUST BAKER & OVER, First Federal Plaza, Suite 600, 702 King Street, P.O. Box 1675, Wilmington, DE 19899-1675, Attorney for Claimaint-Below/Appellant

Susan A. List, Esquire, TYBOUT REDFEARN & PELL, P.O. Box 2092, 750 S. Madison Street, Suite 400, Wimington, DE 19801, Attorney for Employer-Below/Appellee

Toliver, Judge

Before the Court is the application for attorneys' fees filed by the attorney for Michael Falconi, the claimant, pursuant to 19 *Del. C.* § 2350(f). Employer, Certified Auto, opposes the application, arguing generally that it is premature. That which follows is the court's response to the issues so presented.

STATEMENT OF FACTS AND PROCEDURAL POSTURE

The facts upon which the Board relied are not complicated and set forth in an abbreviated manner here given the nature of the issues presently before the Court.[1]

Joseph and Carol Coombs owned Certified Auto, an automotive service station in Wilmington, Delaware. Micheal Falconi began working at Certified Auto as an auto repairman in September 2003. Certified Auto listed Falconi as "contracted labor" on its tax forms and did

[1] However, a more complete description of that information is contained in the opinions of this Court as well as the Delaware Supreme Court in the proceedings referenced below. Where appropriate, those opinions will be cited in that regard. *See Falconi v. Coombs*, C.A. No. 04A-07-007, Toliver, J. (August 5, 2005) (Mem. Op.); *Falconi v. Coombs*, 902 A.2d 1094 (Del. 2006).

not withhold payroll taxes; opting instead to send Falconi a Form 1099 for 2003.[2] While employed, Falconi used his own tools and set his own work schedule. However, Certified provided Falconi a uniform with a Certified Auto logo, just as it did for others performing automotive services at the establishment. Falconi repaired cars as assigned by Coombs and was occasionally sent on errands for Certified Auto to get parts for repairs. His wages were fixed by the days he worked and paid routinely, rather than as a lump sum for work completed. Further, a mechanic's use of his own tools under similar circumstances was established as the industry custom.

Falconi's alleged workplace related injury took place on January 28, 2004, after which he did not return to work at Certified Auto. He subsequently filed a petition to determine compensation due with the Board on March 4, 2004, and a hearing was held on June 10, 2004, during

[2] "A form 1099-MISC is used to report payments made in the course of a trade or business to another person or business who is not an employee." *12.2 Small Business/Self-Employed/Other business: Form 1099-MISC & Independent Contractors*, at http://www.irs.gov/faqs/faq12-2.html.

which both Coombs and Falconi testified. The two issues for resolution in Falconi's petition were whether Falconi was an employee as contemplated by the worker's compensation statue[3] and entitled to compensation as a result.

By opinion dated July 12, 2004, the Board concluded that under the circumstances, Falconi failed to show by a preponderance of the evidence that he was an employee of Certified Auto rather than an independent contractor. The Court affirmed that decision on August 5, 2005. However, the Supreme Court in its July 11, 2006 opinion adopted a position akin to that argued by Falconi.[4] That Court's reasoning was as follows:

> Certified Auto was a business engaged in automotive service that hired Falconi to fix cars for an undefined period at a single location. Falconi was not hired to complete a finite number of tasks before leaving for another position with someone else. Falconi did not hold himself out as the owner of a distinct business. Falconi never submitted an invoice seeking payment for services rendered and had no

[3] 19 *Del. C.* § 2304.

[4] *Falconi,* 902 A.2d 1094.

> written contract. Falconi was not responsible for any unfinished work after the relationship ended. Simply put, Falconi's only livelihood was his job to fix cars at Certified Auto . . . .
>
> While Coombs believed Falconi was an independent contractor, "[i]t is not determinative that the parties believe or disbelieve that the relation of master and servant exists, except insofar as such belief indicates an assumption of control by the one and submission to control by the other...." Notwithstanding Coombs' belief, Falconi submitted to control by Certified Auto.[5]

The Supreme Court concluded therefore that the Board erred as a matter of law when it declared Falconi ineligible for workers' compensation and directed that the case be returned for further proceedings consistent with the Supreme Court's decision. This Court then remanded the case to the Board where it awaits resolution.

On August 22, 2006, Falconi's counsel filed the instant application for attorneys' fees pursuant to 19 *Del. C.* § 2350(f). Reduced to its essence, counsel for Falconi argues that the application can be ruled on now

[5] *Id.* at 1102.

because the claimant was successful in reversing the Board as a matter of law. Waiting on the Board to opine on the merits is therefore not necessary. In support of that proposition, counsel cites *Bythway v. Super Fresh Food Markets, Inc.* In *Bythway*, the court in dicta referenced a "rule of thumb" that:

> [W]here the appellate court reverses the Board's decision due to legal error and where the reversal is in the claimant's favor, then an application for attorneys' fees may be filed after the determination of the legal error occurs.[6]

Here, the fee applied for is $28,800 based on ninety-six hours of work by counsel at an hourly rate of $300 plus costs of $253.19. Counsel also requests that a one-third multiplier be added to reflect the difficulty of the issue involved, bringing the total request to

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[6] 1999 Del. Super. LEXIS 621, at *8. Counsel for claimant also cites *Pollard v. The Placers Inc.*, 703 A.2d 1211, 1212 (Del. 1997)(holding that "the statute is intended to relieve one of the burdens of civil litigation by providing a mechanism for the payment of a successful employee's attorneys' fees."); *Woodall v. Playtex Products, Inc.*, 2002 Del. Super. LEXIS 524(noting that the amendment to 19 *Del. C.* § 2350(f) in 1994 broadened the circumstances under which attorney's fees may be awarded to include circumstances in which the claimant's position before the Board was affirmed on appeal); *Vincent v. Gordy's Lumber Mill*, 2004 Del. Super. LEXIS 294 (similar); *Smith v. the Delaware State Housing Authority*, 2006 WL 1148764 (Del. Super.)(similar).

$38,652.23. According to counsel, the application satisfies the factors set forth in *General Motors v. Cox*[7] and are therefore reasonable.

The Coombs oppose the motion as premature. In support of this proposition they cite *Thomason v. Temp Control*[8] and *Murtha v Continental Opticians, Inc.,*[9] which concluded that § 2350(f) contemplates that fee applications and awards await resolution of the underlying issue. Until there is a final judgment in the case, a fee award therefore would be premature. The Coombs further contend that the fees are not reasonable under *Cox* where one of the factors, the employer's ability to pay, is not satisfied. It is unreasonable according to the Coombs to direct them to pay fees where the dissolving corporation has no assets nor worker's compensation insurance. Lastly, even if the Court were to conclude that fees were appropriate, they argue that the one-third multiplier is not warranted since the

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[7] 304 A.2d 55 (Del. 1973).

[8] 2002 Del. Super. LEXIS 423, at *4.

[9] 729 A.2d 312, 320 (Del. 1997).

issues involved were neither novel nor complex.[10]

DISCUSSION

The award of attorney's fees for a claimant on appeal from a Board decision favoring the claimaint is controlled by 19 *Del. C.* § 2350(f). That subsection provides:

> 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 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.[11]

In 1994, the Delaware General Assembly amended § 2350(f) to read as it does currently. The purpose of § 2350(f) is "to prevent depleting a claimant's compensation award

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[10] *Meadows v. Linton*, 2000 WL 33114379 (Del. Super.) and *Quality Car Wash v. Cox*, 1983 WL 476625 (Del. Super.) are cited in support of this position.

[11] 19 *Del. C.* § 2350(f).

through attorneys' fees incurred where a claimant successfully resists and defends an employer's meritless appeal."[12]

For this Court to exercise its discretion in awarding fees to counsel for Falconi, it must first determine whether the Supreme Court on appeal affirmed Falconi's position before the Board as contemplated by § 2350(f). Otherwise the application for fees made by counsel is premature. A host of similar cases demonstrate that settling the instant question requires that each case be examined on its own facts.[13]

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[12] *Resource Technologies Services v. Hedden*, 1999 Del. Super. LEXIS 1, at *7 (citing *Digiacomo v. Board of Public Education in Wilmington*, 507 A.2d 542, 546 (Del. 1986); *Aetna Cas. & Sur. Co. v. Rodriguez*, 399 A.2d 1289, 1292 (Del. 1979).

[13] *See Woodall,* 2002 Del. Super. LEXIS 524, at *8 (holding that the decision on appeal affirmed the claimant's position before the Board where a remand was ordered for the Board's failure to give adequate consideration to the *Cox* factors); *Bythway*, 1999 Del. Super. LEXIS 621, at *8 (stating in dicta that an application for attorneys' fees is not premature where the appellate court finds in claimant's favor that the Board committed legal error); *Thomason*,2002 Del. Super. LEXIS 423, at *4 (holding that a reversal of the decision was not in claimant's favor where it remained to be seen whether a final judgment would result in an increase in the original award of attorneys' fees); *Lucas v. Leaseway Motorcar Transportation,* 1999 Del. Super. LEXIS 312, at *10 (holding that the claimant's position before the Board was not affirmed where a remand simply sought clarification of a Board decision); *Veid v. Bensalem Steel Erectors*, 2000 Del. Super. LEXIS 398, *8 (holding that the claimant's position was affirmed where the appellate court concluded that the Board had considered improper facts).

In this regard, relevant guidance can be taken from *Bythway*. In that case, claimant's total disability claim was rejected by the Board, affirmed by the Superior Court, then remanded by the Supreme Court. Claimant's counsel sought attorneys' fees under § 2350(f) while the case remained pending before the Board. Although the Supreme Court classified the Board's refusal to subpoena witnesses to impeach the testimony of employer's expert witness as "harmless error," the Superior Court held that the error rendered claimant eligible for attorneys fees.

There are apparent similarities between *Bythway* and the matter *sub judice* which warrant a similar outcome. Here, the Supreme Court found that the Board committed legal error when it decided that Falconi was not an employee of Certified Auto and declared him ineligible for worker's compensation benefits as a result. Based on precedent, the remand constituted an affirmance on appeal of Falconi's position before the Board. The logical conclusion as a result is that fees may be awarded under § 2350(f).

Having found that the application for fees is appropriate, the Court is now required to make a determination as to the reasonableness of the fees requested. An award of counsel fees under § 2350 requires an exercise of judicial discretion in light of the factors set forth in *Cox*.[14] These eight factors are listed in what is now Delaware Lawyers' Rule of Professional Conduct 1.5(a).[15] Also, the Court must take into account the employer's ability to pay and whether the attorney will receive any fees and expenses from any source other than the Board's award.[16] As stated, Falconi's counsel initially seeks $28,800 based on ninety-six hours of work at an hourly rate of $300 plus costs of $253.19. He seeks to increase that amount by

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[14] *Cox*, 304 A.2d 55.

[15] The factors to be considered are: (a) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (b) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (c) the fees customarily charged in the locality for similar legal services; (d) the amount involved and the results obtained; (e) the time limitations imposed by the client or by the circumstances; (f) the nature and length of the professional relationship with the client; (g) the experience, reputation and ability of the lawyer or lawyers performing the services; (h) whether the fee is fixed or contingent.

[16] *Cox*, 304 A.2d at 57.

application of a one-third multiplier, for a total of $38,652.23.

The Coombs raise little in the way of argument in connection with the application of the *Cox* factors to Mr. Goldlust's application. In any event, I find that Mr. Goldlust has been a member of the Delaware Bar for over twenty-five years and committed much of that time to worker's compensation cases. I further find that under the circumstances the time expended briefing and arguing Mr. Falconi's case as well as the $300 hourly rate are reasonable given the nature of the case, counsel's experience and community custom.[17] In addition, counsel agreed to represent Falconi on a contingency basis and expects payment from the fees awarded by the Court and no other source.

The only contention raised by the Coombs in this regard is that the requested fees are unreasonable given their inability to pay them. They point to their lack of assets and worker's compensation insurance in support of

[17] The reasonableness of the hourly rate charged by Mr. Goldlust is not being contested by the Coombs.

that position. However, they have not supplied any evidence of that alleged poverty beyond counsel's assertions in that regard.[18] Under the circumstances, awarding reasonable attorneys' fees is warranted.

As noted above, Mr. Falconi also seeks to have the Court increase the sum representing the hourly rate times the number of hours expended on his behalf by Mr. Goldlust, by a multiplier of one-third. That increase, he argues, is based on the complexity of the issue involved. The Court concludes however, that the application of such a multiplier is not justified under the circumstances of this case.

The issue before the Board considered was whether Falconi was an employee of Certified Auto as contemplated by the worker's compensation statute. If the issue involved was complex at all, it was factually and not legally complex. The decision of the Delaware Supreme Court turned on an interpretation of the facts and the

[18] Apparently the business is no longer in operation, but it is unclear as to why or whether it has been resumed in another form or with another identity. Nor is there any indication that the principals are otherwise without the ability to pay any award of attorneys fees this Court might render. The Court must assume, without more, that there is the ability to pay such an award.

application of those facts to the existing law. The fact that the Supreme Court reversed the decisions of the Board and this Court along with the fact that multiple oral arguments were held is not determinative of whether the issue was either novel or complex. Indeed the issue involved fit into neither category.

After examining the record to date in this case against the factors upon which an award of attorneys fees may be granted as are set out in 19 *Del. C.* § 2350(f), the Court finds Mr. Falconi is entitled to an award of $29,053.19 against Certified Auto. That award is based upon the hourly rate charged by Mr. Goldlust, $300, multiplied by the amount of time he worked on this matter, ninety-six hours, plus costs of $253.19. There is no basis to increase or decrease that amount in the record before this Court.

CONCLUSION

In light of the foregoing, the Court concludes that counsel for Falconi is entitled to an award of attorney's fees pursuant to 19 *Del. C.* § 2350(f) in the amount of $29,053.19.

IT IS SO ORDERED.

TOLIVER, JUDGE