

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

THOMAS MACLARY,	)	
	)	
Claimant-Below / Appellant,	)	
	)	C.A. No. N24A-07-002 DJB
v.	)	
	)	
JAMES MALIN PLUMBING,	)	
Employer-Below / Appellee.	)	

Date Submitted: July 8, 2026
Date Decided: October 12, 2026

ORDER

On Appellant’s Motion for Reargument – PREVIOUSLY GRANTED
On Renewed Motion for Attorney’s Fees – GRANTED

On this 12th day of October, 2026, having considered Appellant Thomas McClary’s initial “Motion for Award of Attorney’s Fee for Successful Appeal of Industrial Accident Board Decision” (hereinafter “Motion for Fees”) the opposition of Appellee, Appellant’s Motion for Reargument, Appellee’s opposition, oral arguments of counsel and the record in this matter, it appears to the Court that:

1. Thomas Maclary (hereinafter “Claimant”) requests attorney’s fees pursuant to 19 *Del. C.* § 2350(f) after the final decision of the Industrial Accident Board (hereinafter “IAB” or “the Board”) upon remand from this Court.¹

¹ *Thomas Maclary v. James Malin Plumbing*, N24A-07-002 DJB, Superior Court Civil Docket Items (“D.I.”) 27, 31-32, 42.

2. On March 25, 2026, following motion practice and oral argument on the Motion for Costs, the Court granted in part and denied in part, Claimant's motion.² In its Order, the Court limited recovery to the single issue Claimant successfully raised on appeal and declined to award fees for successfully defending the Employer's issue raised.³

3. Claimant filed a timely Motion for Reargument on March 27, 2026. In it, Claimant argues the Court committed legal error by excluding the successful defense of the issues raised in Employer's Cross-Appeal.⁴ Employer filed their Response on March 30, 2026.⁵ Pending before the Court is Claimant's Motion for Reargument Pursuant to Superior Court Civil Rule 59.⁶

4. Oral argument was held on the Motion for Reargument on June 30, 2026.⁷ At the hearing, the Court requested Claimant's counsel to submit an amended time sheet.⁸

5. This Court has discretion to award attorney's fees following a successful appeal of an IAB decision initially contrary to a claimant's position.⁹

² D.I. 37.

³ *Id.*

⁴ D.I. 38.

⁵ D.I. 39.

⁶ D.I. 38.

⁷ D.I. 41.

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⁹ 9 Del. C. § 2350(f).

Pursuant to 19 *Del. C.* § 2350(f), reasonable attorney’s fees may be awarded “for the time spent preparing for the appeal from an unfavorable [IAB] decision.”¹⁰ If awarded, the fee is “taxed in the costs against the employer.”¹¹

8. In its original Order, the Court stated:

The Court’s determination of attorney’s fees under Section 2350(f) requires a two-step analysis. First, the Court must determine whether the “claimant’s position before the IAB was affirmed on appeal.” Second, after a finding that claimant’s position was affirmed on appeal, the Court must make a reasonable fee determination. If a Claimant’s position was affirmed on appeal and the Court exercises its discretion in awarding fees, the amount of fees is guided by the following factors:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fees customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.

¹⁰ *Foraker v. Amazon.com, Inc.*, 2021 WL 99584, at *1 (Del. Super. Ct. Jan. 12, 2021) (citing *Elliott v. State*, 2012 WL 7760033, at *1 (Del. Super. Dec. 24, 2012)).

¹¹ *Zenith Prods. Corp. v. Rodriguez*, 2006 WL 1520192, at *1 (Del. Super. Ct. June 5, 2006).

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

...

Claimant moves the Court for a complete and total recovery of attorney's fees under § 2350(f) because Claimant contends [he was] successful on appeal and [has] met the threshold determination for recovery. In response, Employer argues that Claimant's recovery should be reduced by 42.86% to reflect the fact that Claimant unsuccessfully appealed two of three issues Claimant raised and one of four issues raised by Employer.

Delaware courts have determined that recovery under Section 2350(f) does not require a claimant to be successful on all claims asserted on appeal. Where a claimant is successful on some, but not all claims, the courts have implemented an issue-based analysis in determining award recovery.¹² In such instances, a claimant may recover attorney's fees, but their recovery may be reduced in proportion to the claims that they ultimately appealed unsuccessfully. **Further, only issues raised by a claimant may be factored into an issue-based analysis used to reduce recovery for attorney's fees.**

On appeal, Claimant challenged the Board's findings as to the denial of compensation for injuries to his lumbar spine and left elbow, as well as the Board's determination that Claimant's post-concussion symptoms had resolved. Employer challenged the Board's finding of total disability for Claimant, and its award of compensation for injuries to Claimant's neck, right shoulder, and right foot.

As noted previously, this Court affirmed the Board's decisions as to Claimant's left elbow. In so doing, this Court found the Board

¹² *Pollard v. The Placers, Inc.*, 692 A.2d 879, 880 (Del. 1997).

had a sufficient basis for excluding those injuries from Claimant's compensation. Additionally, the Board's decision finding Claimant's concussion symptoms had resolved was similarly affirmed. The only issue reversed and remanded to the Board that was raised by Claimant was the Board's exclusion of lumbar spine injuries from compensation. The remand regarding the injury to Claimant's right foot was raised by Employer. **Though Claimant was successful in defending this issue raised by Employer, that outcome reached is not factored into the calculation for fees.** Therefore, Claimant's requested recovery must be reduced to reflect the one issue upon which he raised and was successful on appeal.¹³

16. Claimant's Motion for Reargument argues the Court's Order misapprehended the controlling law of both 19 *Del. C.* § 2350 and *DiGiacomo v. Board of Public Education in Wilmington*,¹⁴ by excluding recovery of attorney fees for the time spent successfully defending an appellate issue raised by Employer on cross-appeal.¹⁵ Claimant argues the Court was obligated to include fees for his attorneys work in the "...successful upholding of the right foot, neck, shoulder and total disability awards [in] the fee recovery" and failing to do so directly contradicts the Supreme Court's holding in *DiGiacomo*.¹⁶ Claimant further argues the failure to award such fees contradicts the intent of 19 *Del. C.* § 2350(f), "that an employee pursuing a meritorious claim for workmen's compensation not be required to pay

¹³ D.I. 37 (emphasis on the now challenged portion of the Order).

¹⁴ *DiGiacomo v. Board of Public Education in Wilmington*, 507 A.2d 542 (Del 1986).

¹⁵ D.I. 38.

¹⁶ *Id.*

counsel fees from the proceeds of the award.”¹⁷ Employer disagrees and argues the Court acted within its discretion and appropriately awarded costs.¹⁸

17. Under Superior Court Civil Rule 59, a motion for reargument may be granted where the Court has “overlooked a controlling precedent or legal principles, or the court has misapprehended the law or facts such as would have changed the outcome of the underlying decision.”¹⁹

18. In *DiGiacomo*, the Supreme Court discussed the grant of attorney’s fees where an employee defended an award of compensation on appeal. In *DiGiacomo* the Supreme Court of Delaware reviewed the issue-based award approach of a fee award, and found that in the situation presented given the “unusual facts of [the] case [before it],” that an issue-based award was not appropriate.²⁰ In its ruling, the Supreme Court stated, “if, however, it is necessary for the employee to defend the award on appeal, § 2350 authorizes the award of an additional fee, to be taxed against the employer, for services on appeal if the employee is successful in sustaining the

¹⁷ D.I. 38 at 2 (quoting *DiGiacomo v. Bd. of Pub. Educ. in Wilmington*, 507 A.2d 542 (Del. 1986) (citing then-19 *Del. C.* § 2350(f)).

¹⁸ D.I. 39.

¹⁹ *In re Hurley*, 2019 WL 3241602, at *1 (Del. Super. July 18, 2019) (citing *Radius Servs., LLC v. Jack Corrozi Const., Inc.*, 2010 WL 703051, at *1 (Del. Super. Feb. 26, 2010)).

²⁰ *DiGiacomo*, 507 A.2d at 547.

award.”²¹ Claimant is correct that *DiGiacomo* calls for an award of fees when defending a Board award on appeal.

19. Following *DiGiacomo*, 19 Del. C. § 2350 was amended. The Superior Court examined the effect of the amendment in *Murtha v. Continental Opticians, Inc.*²² In *Murtha*, the Superior Court noted:

On June 25, 1959, the Delaware General Assembly enacted the provision allowing for an attorney's fee for services on an appeal from a Board decision. The provision allowed a reasonable attorney's fee “where the claimant has prevailed in his hearing before the Industrial Accident Board and is affirmed on appeal....” Under this version of the statute, in order for a claimant to be eligible for an attorney's fee, the claimant must have prevailed before the Board and then successfully defended against an appeal from an employer before the Superior Court or the Supreme Court. The purpose of the statute was threefold. First, it protected a claimant from having his wholly intact, Board awarded recovery depleted by attorney's fees that were generated by defending the award at the appellate level against the unsuccessful employer. Additionally, the statute encouraged employers to pay the award ordered by the Board and also dissuaded employers from pursuing meritless appeals.

...

The Delaware General Assembly amended § 2350(f) effective with appeals filed after May 10, 1994. The new provision allows a reasonable attorney's fee “where the claimant's position in the hearing before the Board is affirmed on appeal.” Unlike the rule under the pre-amended provision, a claimant may now initiate an appeal of an unfavorable Board decision and if successful, may petition the Court for an attorney's fee. The clear legislative intent of the amendment is to create a right for a claimant to seek an attorney's fee for the time expended at the appellate level when a claimant appeals an unfavorable

²¹ *DiGiacomo*, 507 A.2d at 545-546.

²² *Murtha v. Continental Opticians, Inc.*, 729 A.2d 312, 317 (Del. Super. Aug. 14, 1997).

or erroneous Board decision and claimant's position before the Board is affirmed on appeal. What is less clear is what constitutes an affirmance of the claimant's position before the Board.²³

Ultimately, *Murtha*, dealing with a different issue than the one before the Court now, interpreted the amended § 2350's language of "where the claimant has prevailed...and is affirmed on appeal" to include the scenario where a claimant is defending an award on appeal.²⁴

20. Therefore, in reassessing both *DiGiacomo* and *Murtha*, the Court's March 25, 2026, Order, which stated, "[f]urther, only issues raised by a claimant may be factored into an issue-based analysis used to reduce recovery for attorney's fees" misapprehended existing precedent and the will be amended accordingly. The grant of fees is amended to include time spent successfully defending claims raised by Employer on cross-appeal. Because a claimant does not dictate the issues an employer decides to challenge, and is required to defend those challenges, to deny costs for successfully those issues is contrary to the intended purpose of § 2350; this result is consistent with the *Murtha* holding.

21. This decision does not change the Court's initial determination that an issue-based analysis is the appropriate review for an award in this case.

²³ *Id.* at 316 (internal citations omitted).

²⁴ *Id.*

22. In his initial appeal, Claimant challenged the Board's denial of compensation for injuries to his lumbar spine, left elbow and the determination that his concussion symptoms had resolved. On cross-appeal, Employer challenged the Board's total disability finding, as well as the Board's compensation for injuries to Claimant's neck, shoulder and right foot. This Court remanded this case to the Board to determine whether there was sufficient evidence to award compensation for injuries to Claimant's lumbar spine and right foot. Ultimately, the Board concluded there was, and awarded compensation accordingly.

23. Claimant is entitled to attorney fees for those positions he successfully presented to the Board, as well as the issues he successfully defended on appeal. In including the successfully defended claims into the analysis previously undertaken in the Court's initial Order, fees should be awarded. The reasonableness of those fees, however, remain in dispute.

24. In its initial Order, counsel was directed to meet and confer regarding the reasonableness of the time claimed to have been spent by counsel. Naturally, the motion for reargument altered the Court's intended meeting. Following argument, and per the Court's instruction, counsel for Claimant filed updated time sheets for the Court's review on July 8, 2026. Claimant also filed his renewed Motion for Attorney's Fees.²⁵ Employer was not asked to respond, but given this ruling, the

²⁵ D.I. 42.

Court once again would like counsel to meet and confer with this clarification. The Court notes the reductions in time by Claimant's counsel on the submitted forms and without a position from Employer, prefers for counsel to discuss before further ruling. Once again, counsel has thirty (30) days to meet and confer. If a resolution cannot be reached between parties, counsel will attend an in-person conference with the Court within thirty (30) days and final numbers will be decided.

25. Claimant's Motion for Reargument was **GRANTED** at the time of the hearing, and the renewed application for attorney's fees is now **GRANTED** to include time spent by counsel defending the cross-appeal.

IT IS SO ORDERED.



Danielle J. Brennan, Judge

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