IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

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| ARTHUR WATERS, | : | |
| | : | C.A. No. 04A-03-001 WLW |
| Claimant-Appellant, | : | |
| | : | |
| v. | : | |
| | : | |
| STATEWIDE MAINTENANCE, | : | |
| | : | |
| Employer-Appellee. | : | |

Submitted: October 18, 2005
Decided: January 11, 2006

**ORDER**

Upon Appellant's Motion for Reargument.
Granted.

Walt F. Schmittinger, Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware; attorneys for Claimant-Appellant.

R. Stokes Nolte, Esquire of Nolte & Associates, Wilmington, Delaware; attorneys for Employer-Appellee.

WITHAM, R.J.

Arthur Waters ("Claimant") has filed a Motion for Reargument from the Court's decision dated April 21, 2005, which held that the Board's finding that Claimant was not a displaced worker was not supported by substantial evidence.[1] The Court reversed the Board's finding and remanded the case to the Board. Claimant argues that the case should not have been remanded because the labor market survey on which the Board would be basing its decision is no longer current.

After a careful review of this matter, this Court will reconsider its ruling and reverse the matter.

## DISCUSSION

Delaware courts routinely order remands where the Board has applied an incorrect legal rule or standard.[2] Where the Board, on remand, would have to reconsider the issue of whether the claimant was *prima facie* a displaced worker, however, remand may not be the most practical solution available.

The law is clear that, if a worker is displaced, the employer must show the availability of employment opportunities given the claimant's restrictions.[3] The Delaware Supreme Court originally remanded the issue of "displaced worker" status

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[1] The Court notes that it delayed deciding this case based on a letter dated June 6, 2005, from Mr. Nolte stating that the parties were close to resolving the matter. On October 17, 2005, the Court was subsequently advised that the matter could not be settled.

[2] *See, e.g., Clements v. Diamond State Port Corp.*, 831 A.2d 870 (Del. 2003); *Howell v. Supermarkets Gen. Corp.*, 340 A.2d 833 (del. 1975); *Franklin Fabricators v. Irwin*, 306 A.2d 734 (Del. 1973); *Ham v. Chrysler Corp.*, 231 A.2d 258 (Del. 1967).

[3] *See Ham*, 231 A.2d at 262 ("[W]e hold that Chrysler is obligated to show the availability of regular employment within Ham's capabilities.").

to the Board. For example, in *Ham v. Chrysler Corporation*,[4] in which the Delaware Supreme Court first referred to certain workers as "displaced,"[5] the Supreme Court remanded the case to the Board to determine whether the claimant was a displaced worker.[6] The Court held that, "Upon remand, Chrysler shall have the opportunity of going forward with evidence to show the availability of regular employment within Ham's capabilities."[7] In addition, in *Franklin Fabricators v. Irwin*,[8] the Delaware Supreme Court reversed the Superior Court's decision to simply reverse the case and ordered the Superior Court to afford the employer an opportunity, on remand, to show the availability of regular employment within the claimant's capabilities.[9]

The Delaware courts have followed this practice of remanding the issue of

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[4] 231 A.2d 258 (Del. 1967).

[5] 231 A.2d at 261 ("In lieu of the 'odd lot' or 'nondescript' terminology sometimes used in this connection, we choose to refer to such worker, hereinafter, as one "displaced" from the regular labor market.").

[6] *Id*. at 262.

[7] *Id*.

[8] 306 A.2d 734 (Del. 1973).

[9] *Id*. at 736-37 ("We are thus in agreement with the Superior Court's conclusion that this employee falls within the "displaced" worker category and that the employer had the *Ham* burden of proof. We are in disagreement, however, with the Superior Court's refusal to remand the case to the Board with instructions to afford to the employer the opportunity to sustain that burden of proof, as the employer had attempted to do by the tender of proof which was rejected by the Board. This Court has consistently afforded the employer that opportunity upon remand.").

displaced worker status until fairly recently.[10] In *Adams v. Shore Disposal, Inc.*[11] the Delaware Supreme Court held that the Board should have issued subpoenas as a matter of due process to help determine whether there was work available for the claimant.[12] The Supreme Court reversed the Board's decision, holding that it would be "inequitable to remand this matter for further proceedings on the basis of employment opportunities that are not current."[13] Likewise, in *ILC of Dover Industries, Inc. v. Kelley*, [14] the Delaware Supreme Court affirmed the Superior Court's decision to reverse the Board's finding and held that "[s]ince an application of the displaced worker doctrine relies upon the contemporaneous availability of employment, the Superior Court properly reversed the Board's decision rather than remanding this case for additional proceedings."[15]

The Delaware Supreme Court still, on occasion, remands the issue of displaced worker status to the Board. For example, the Supreme Court ordered a remand for the Board to reconsider a claimant's displaced worker status in *Clements v. Diamond*

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[10] *See generally San Del. Packing Co. v. Hamilton,* 414 A.2d 822 (Del. 1979); *Huda v. Continental Can Company, Inc.*, 265 A.2d 34 (Del. 1970); *Ham v. Chrysler Corp.*, 231 A.2d 258, 262 (Del. 1967).

[11] 720 A.2d 272 (Del. 1998).

[12] *Id*.

[13] *Id*. at 273.

[14] 716 A.2d 974 (Del. 1998).

[15] *Id*.

*State Port Corp.*[16] The issues to be decided by the Board on remand in *Clements*, however, centered around resolving the conflicting testimony of the medical experts concerning the claimant's physical status as disabled and would not have focused on the stale labor market survey.[17] In *Clements*, the Delaware Supreme Court remanded the issue of displaced worker status because the Board improperly held that the claimant was not displaced because he had not conducted a legitimate job search.[18] The Delaware Supreme Court held that, because the claimant's treating physician had issued a no-work order, the claimant had no duty to look for compatible employment until the Board had resolved the issue of the claimant's disability in favor of the employer.[19]

The Court also notes that, from a practical standpoint, reversing the Board's decision leaves the employer in a better position than if the case is remanded. To require the Board to make a finding on remand based on outdated market information would be inequitable because the Board must consider the "contemporaneous availability of employment."[20] Therefore, if the case were remanded, the employer would essentially be forced to conduct a current labor market survey. Simply

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[16] 831 A.2d 870 (Del. 2003).

[17] *Id*. at 880.

[18] *Id*. at 879.

[19] *Id*..

[20] *See Adams v. Shore Disposal, Inc.*, 720 A.2d 272, 273 (Del. 1998).

reversing the Board's decision affords the employer an opportunity to elect whether or not to refile another Petition to Terminate Benefits and then conduct a current labor market survey of its own volition. The Court overlooked these important factors in its original decision and feels it would be unjust to impose such a burden on the employer.

## CONCLUSION

Therefore, after reconsideration of this case, the Court finds that the Motion for Reargument should be granted. In light of Claimant's arguments and after a consideration of the applicable law, the Court now modified its opinion dated April 21, 2005, to reflect that there will be no remand to the Board for the employer to show the availability of work for Claimant. It would be inequitable to remand the case based on a now outdated labor market survey.[21] The Board's decision is ***reversed*** without prejudice to the employer's right to file another petition to terminate at a later time.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution

[21] *Id.*