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Case Number 160,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROOS FOODS,	)	
	)	
Appellant Below-Appellant,	)	
	)	No. 160, 2016
v.	)	
	)	On Appeal from the 1/26/2016
	)	Decision of the Superior Court
MAGDALENA GUARDADO,	)	
	)	
Appellee Below-Appellee.	)	

APPELLANT'S REPLY BRIEF

ELZUFON AUSTIN TARLOV
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Dated: June 30, 2016

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ARGUMENT I

THE COURT BELOW EXCEEDED ITS SCOPE OF REVIEW IN AFFIRMING THE BOARD'S DECISION BASED ON FACTORS REFERENCED BUT NOT RELIED ON IN FINDING GUARDADO PRIMA FACIE DISPLACED.

Guardado contends that the Superior Court did not make independent findings of fact in reaching the conclusion that her age, education and inability to communicate in English supported a finding of *prima facie* displacement. Rather she argues that the court below "merely identified the findings of the IAB in its decision." (Ans. Brief at 27).

While it is correct that in addition to her ineligibility to work in the United States the Board also referenced her age, education, employment history, and that she cannot communicate in English, it did not rest its finding that Guardado is *prima facie* displaced on any basis other than her undocumented status. The Board made clear it was "satisfied that Claimant qualifie[d] as a displaced worker based on her undocumented legal status." Guardado v. Roos Foods, I.A.B. Hearing No. 1405006, at 11 (April 7, 2015).

In so doing, the Board followed Guardado's lead in arguing that, regardless of any other factors, she qualified as a prima facie displaced worker because she is not legally eligible for employment in the United States. Guardado stated plainly that her undocumented status meant "that she's not legally employable" and "that

makes her a prima facie displaced worker, full stop. That's the end of the analysis." (A-155).

The Superior Court's singular role was to decide whether the Board's decision that Ms. Guardado "qualifie[d] as a displaced worker based upon her undocumented legal status" is legally correct. Instead, the court affirmed the Board's decision by citing factors that the Board referenced but did not rely upon in finding Guardado *prima facie* displaced. In so doing, the court exceeded its limited scope of review by making an independent determination that Guardado would qualify as a displaced worker regardless of the legal correctness of the Board's determination that she is prima facie displaced because of her undocumented status.

It is the role of the Board and not the court to determine whether the factors cited by the court to include her restrictions, age, education, and inability to communicate in English would have rendered Guardado displaced. It was the role of the court to determine whether the Board's basis for finding her displaced based solely on her undocumented status was free of legal error. Because the court exceeded its scope of review its decision must be reversed.

ARGUMENT II

THE BOARD CREATES A NEW CATEGORY OF DISPLACED WORKER IN HOLDING THAT GUARDADO'S UNDOCUMENTED STATUS CONSTITUTES A LEGAL BASIS SUPPORTING THAT FINDING.

Guardado makes the point that there is no categorization of "per se" displacement. (Ans. Brief at 13-14). Roos could not agree more. However, the practical effect of Guardado's argument is that an undocumented claimant, as someone ineligible for employment, is displaced for that reason alone. Guardado made the point unequivocally before the Board "that she's not legally employable" and "that makes her a *prima facie* displaced worker, full stop. That's the end of the analysis." (A-155).

Guardado now more meekly argues on appeal that she is not contending that her undocumented status renders her a displaced worker "per se." Rather she contends that it is simply a factor bearing upon the issues of (1) whether she is a *prima facie* displaced worker and (2) if so whether Roos can show there is work available to her as an "undocumented worker" within her restrictions. (Ans. Brief at 14). However, the more muted characterization of her argument does not change its practical effect.

As to the question of the impact of her undocumented status on whether she is *prima facie* displaced, Guardado contended before the Board that because "she is not legally employable… that makes her a prima facie displaced worker." (A-115).

She now argues that her "status as an undocumented worker is [simply] a factor that must be considered in the Displaced Worker Doctrine analysis." (Ans. Brief at 14)(italics omitted). Thus her shift in rhetoric from whether her undocumented status is "the end of the analysis"[1] or instead a factor which "of necessity weighs heavily in favor of a finding that [she] is *actually displaced* from the labor market"[2] does not change the fact that Guardado's point and its practical effect remains the same – that an undocumented individual is *prima facie* displaced because of her undocumented status and irrespective of any other factors.

The practical effect of Guardado's argument is that a claimant's age, education, work history, and physical restrictions no longer are relevant to the inquiry because the individual is unable to obtain work because they are legally ineligible to hold employment. The ineligibility to hold employment is not merely a factor, but the cause for the undocumented claimant's inability to obtain work. Thus consideration of this "factor" in the Displaced Worker Analysis will always and only lead to the conclusion that work is not available to someone legally barred from working. Therefore, consideration of this "factor" theoretically and practically results in *per se* displacement as every undocumented claimant, irrespective of age, education, work history, etc., is not able to work as a matter of law.

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[1] A-115

[2] Ans. Brief at 14 (emphasis in original)

Guardado next charitably contends that even if her undocumented status requires a finding that she is *prima facie* displaced, "there is always a further step of the analysis before the Board can conclude that a claimant is *actually* displaced;" namely that the employer has the opportunity to show that there is work available to her within her restrictions as an "undocumented worker." (Ans. Brief at 13)(emphasis in original). As the argument runs, "a claimant's status as a *prima facie* displaced worker shifts the burden of proof to the Employer to show the availability of employment; it does not conclusively and unrebuttably establish that the Claimant is entitled to continuing total disability benefits." (Ans. Brief at 20)(emphasis in original). However, Guardado's own assertions confirm that she contends that this "further step" is illusory. Guardado notes that "it would be against federal law for any of the employers identified on [Roos'] labor market survey to hire the Claimant if she is undocumented." (Ans. Brief at 5).

Guardado blithely notes that the Board cited "*deficiencies* in the labor market survey" in support of its conclusion that she "qualifies as a displaced worker based upon her undocumented legal status and [that] Employer has failed to present a Labor Markey Survey that shows regular employment opportunities within the Claimant's capabilities as an undocumented injured worker." (Ans. Brief at 20)(italics added)(citing Guardado at 11). However, the "deficiency" to

which Guardado refers is that Roos Foods cannot show the availability of employment to a person legally ineligible to be employed.

Thus the import of Guardado's argument is squarely that all undocumented claimants who sustain any type of work injury that is disabling for any period of time would be entitled to the designation of a displaced worker and potentially entitled to indefinite receipt of total disability benefits regardless of their restrictions or other vocational considerations, since there is no functional possibility of demonstrating that work is available to them.

It was precisely for this reason that the court in Rivera v. United Masonry, Inc.,[3] in a decision cited with approval by this Court in Campos v. Daisy Construction,[4] held that an injured worker's undocumented status should not be considered in "determining whether the claimant is disabled because of his injury." Rivera, 948 F.2d at 775. The Rivera court observed that consideration of this factor would require an employer to meet its burden of proof by showing a willingness of prospective employers to violate federal immigration law. Since "no one freely admits hiring undocumented aliens, the employer would have to employ testers or ruses to make a showing... moreover employers who prove the availability of 'suitable' illegal jobs would, by showing their availability, facilitate further violation of the immigration laws. We doubt that Congress could have

[3] Rivera v. United Masonry, Inc., 948 F.2d 774 (D.C. Cir. 1991)
[4] Campos v. Daisy Constr. Co., 107 A.3d 570 (Del. 2014)

intended such results when it restricted alien employment." Id. at 776 citing, 8 U.S.C. §1324a.

In point of fact, consideration of whether work is available to a person who is legally ineligible to work makes their undocumented status not merely relevant to, but dispositive of the issue of displacement. Thus Roos submits that the policies underlying the displaced worker doctrine are best maintained by following the reasoning of the Rivera court and those courts which have addressed this issue and concluded that an injured workers' undocumented status is not a factor to be considered in determining whether that individual is displaced. See Also, Cenvill Development Corp. v. Candelo, 478 So.2d 1168 (Fla. Dist. Ct. App. 1985); Del Taco v. Workers' Comp. Appeals Bd., 94 Cal. Rptr. 2d 825 (Cal. Ct. App. 2000); Ramroop v. Flexo-Craft Printing, Inc., 896 N.E.2d 69, 866 N.Y.S.2d 586 (N.Y. Ct. App. 2008).

While Guardado disclaims the notion of "per se displacement," her contention and the Board's holding make manifest that the application of her position and the Board's rationale produce precisely that result. Any undocumented claimant would be found displaced, without work available to her, solely by virtue of her legal ineligibility for hire. This vastly expands the displaced worker doctrine and dilutes its focus on determining whether the injured worker's

physical limitations stemming from the work accident are disabling when coupled with her vocational qualifications.

The distinction between the factors traditionally held applicable in a displaced worker analysis and undocumented status is that the latter constitutes a legal disqualification from employment. Conversely, the traditional factors do not inherently disqualify an individual from employment and only serve to modify whether work is available to the injured worker within her restrictions when said factors are considered. As such the Board's expansion of the displaced worker doctrine to encompass all undocumented claimants and find them disabled based on that status constitutes *per se* displacement. As such its decision must be reversed as a matter of law.

ARGUMENT III

THIS COURT'S HOLDING IN CAMPOS v. DAISY CONSTRUCTION DID NOT ADDRESS THE DISPLACED WORKER DOCTRINE MUCH LESS REQUIRE A HOLDING THAT AN UNDOCUMENTED CLAIMANT IS A DISPLACED WORKER.

Guardado acknowledges that this Court distinguished the displaced worker doctrine in its decision in Campos v. Daisy Construction[5] and specifically indicated that it "was not relevant to Campos' appeal." (Ans. Brief at 15). Since the Court confirmed that its decision did not implicate the displaced worker doctrine, by definition the issue of whether an injured worker's undocumented status does entitle her to a finding that she a displaced worker is a matter of first impression. Therefore, Guardado's point that it was not relevant to Campos' appeal because he did not raise it is beside the point. It is inconsequential why the issue was not relevant to the Court's holding in Campos. What is consequential is that the issue was not before the Court and therefore not adjudicated.

Guardado argues however that the Court's holding in Campos nonetheless requires the result that she be found a displaced worker because of her undocumented status. In making this contention, Guardado argues that "legal eligibility to work is relevant to a claimant's entitlement to workers' compensation lost wage benefits." (Ans. Brief at 19). Initially it must be recalled that the issue presented to the Court in Campos was whether an undocumented claimant could

[5] Campos, 107 A.3d at 574, n. 7

receive partial disability compensation when his employer cited his undocumented status as its basis for not returning him to work. Id. at 582.

The Court held that the employer's statement that it would have brought Campos back to work if he were not undocumented was insufficient to show job availability as a matter of law. Id. at 576. However, citing its prior decision in Torres v. Allen Family Foods,[6] the Court held that the employer may be able to make this showing via a labor market survey. Id. at 577, n. 23. Guardado argues that an employer is required to show job availability to someone legally ineligible to be hired. Implicit in Guardado's argument is the impossibility of meeting that burden since by definition an undocumented individual is disqualified from being employed. Thus Guardado's contention suggests that the Court's citation to Torres and the employer's opportunity to show job availability via a labor market survey is meaningless.

Fundamentally, it must be recalled that the Court cited Torres in the context of showing job availability to an undocumented claimant such as Campos. There would have been no purpose to the Court discussing this holding which addresses the employer's ability to make this showing via a labor market survey if a labor market survey was inapplicable to undocumented claimants. The labor market survey serves to identify employment opportunities in the open labor market to the

[6] Torres v. Allen Family Foods, 672 A.2d 26 (Del. 1995).

injured worker within her restrictions and vocational qualifications. If the Court intended to hold that the employer's labor market survey must show jobs for which an "undocumented worker" can be hired there would have been no reason for the Court to cite Torres in this context.

This would also constitute a departure from the line of cases holding that the employer's burden of proof is not to show that an employer would actually hire the claimant, but rather that there are jobs available within the claimant's restrictions for which she is vocationally qualified. Jennings v. Univ. of Delaware, C.A. No. 85A-MY-4, Taylor, J. (Del. Super. Feb. 27, 1986)(emphasis in original)(See also, Guffey v. Perdue Farms, Inc., C.A. No. 94A-09-004, Graves, J. (Del. Super. Apr. 18, 1995) aff'd, 670 A.2d 1338 (Del. 1995)(Miranda v. DuPont, C.A. No. 99A-04-015 WCC, Carpenter, J. (Del. Super. Feb. 29, 2000).

However, even accepting Guardado's argument at face value, that an employer is in the catch-22 of having an opportunity to show job availability, but that such opportunity is illusory since the undocumented claimant is legally ineligible for employment, the Court did not hold that the required remedy is that the undocumented claimant be deemed a displaced worker entitled to total disability simply based on her undocumented status. What the Court held was that "if [the employer] cannot prove by reliable evidence that jobs are in fact available to... an injured undocumented worker, then [it] must continue to pay **partial**

disability benefits until it shows that [she] has been reemployed." Campos, 107 A.3d at 577-578(emphasis added).[7]

Assuming arguendo that Roos is required to show job availability to someone ineligible to obtain employment, Guardado's contention that she is entitled to ongoing total disability compensation as a displaced worker is contradicted by the Campos holding. Guardado cites to no portion of the Court's decision that holds that an undocumented claimant is entitled to total disability compensation based on her legal ineligibility to work. Indeed the Court noted that in addition to not communicating a job offer to Campos, the employer "did [not] provide any evidence that Campos is able to find work elsewhere." Id. at 577.

Guardado's contention seeks expansion of this Court's holding in Campos, affording partial disability to that undocumented claimant who has not been reemployed and for whom the employer has not shown the ability to be rehired, to instead entitle that undocumented claimant to receipt of total disability indefinitely as a displaced worker. The Board contravened this Court's decision in Campos in finding that Guardado is a displaced worker because she is undocumented and as such its decision must be reversed as an error of law.

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[7] Guardado "presumes" that Roos knew or was willfully ignorant of her undocumented status at the point of hire. (Ans. Brief at 31). There is nothing in the record supporting that Roos knew or had reason to know that Guardado was undocumented. Appeals to this Court are limited to the record below. Therefore, facts not contained in the record, let alone presumptions engendered by one party may not be considered on appeal to this Court.

ARGUMENT IV

THE BOARD'S HOLDING ESTABLISHES A RIGHT TO DISPLACED WORKER STATUS IRRESPECTIVE OF THE UNDOCUMENTED CLAIMANT'S PHYSICAL INJURIES OR RESTRICTIONS AND ENTITLES UNDOCUMENTED CLAIMANTS TO AFFIRMATIVELY ASSERT THAT STATUS IN SUPPORT OF A FINDING OF DISPLACEMENT.

A. A finding of displacement based on undocumented status has no causal relationship to the injured worker's physical restrictions or vocational qualifications.

Guardado contends that her undocumented status is relevant to whether work is available to her alongside factors such as age, education, work history, etc. (Ans. Brief at 30). What distinguishes these traditional factors of the displaced worker analysis from immigration status is that immigration status is dispositive of whether work is available to an individual. The traditional displaced worker factors are not dispositive of someone's eligibility to work, but rather address whether or not work is available to the injured worker within her restrictions. Conversely ineligibility for employment constitutes a disqualification from work regardless of any other factors or injury-related restrictions.

Guardado incorrectly contends that Roos' position is that her undocumented status should not be considered in the displaced worker analysis because it did not directly result from the work injury. The point of distinction is not that the factors affecting the availability of work must be the direct result of the work injury. Clearly an injured worker does not become old, have reduced education, or a

limited work history *because* they sustained a work accident. However, these factors weigh on the question of whether the injured worker can find work within her physical restrictions. Thus, in the context of the traditional factors, the restrictions lead the inquiry with the factors serving to confirm whether work is within reach of someone with those restrictions. Conversely, in the context of undocumented status this factor not only leads, but ends the inquiry of whether work is available to her.

Thus the employer is not contending that only factors *caused by* the work accident are ripe for consideration in the displaced worker analysis[8], but rather the factors must have a causal nexus to the physical injury in order for the displaced worker doctrine to be triggered. Burton Transp. Center, Inc. v. Willoughby, 265 A.2d 22, 24 (Del. 1970) (citing 2 Larson Workmen's Compensation Law, § 57.10), See also Hensley v. Artic Roofing, Inc., 369 A.2d 678, 679 (Del. 1976); Ham v. Chrysler Corp., 231 A.2d 258, 261 (Del. 1967). Thus the key point of connection is that the factors bearing on displacement must be related to the disability stemming from the physical restrictions not that they must be related to the injury itself.

An undocumented individual is ineligible for work due to legal disqualification that exists separately and apart from any other consideration,

[8] Ans. Brief at 30-31

including her physical restrictions. Thus and by definition there is no causal relationship between an undocumented claimant's disqualification from employment and her work restrictions. She is disqualified from employment not because of her work injuries but because of her status. Indeed that disqualification would continue even if she carried no restrictions.

This is amply illustrated by the Board's decision below. The Board did not conclude that Guardado was displaced because of her wrist fusion. The Board found Guardado displaced because of her immigration status. Guardado, at 11. No other factor or contributing cause was named in support of that finding, including her work injury and resulting restrictions. Thus and contrary to Guardado's assertion that it "cannot be said that her undocumented status is the sole barrier to work at this time"[9] it was the only barrier cited as relevant to the Board in finding her to be displaced. Id.

This result is in derogation of this Court's recent holding in Watson that "[t]he purpose of the displaced worker doctrine is to provide full workers' compensation benefits for those who are partially disabled but unable to find work **because of the disability**." Watson v. Wal-Mart Associates, 30 A.3d 775, 781 (Del. 2011)(emphasis added), See also Hensley, 369 A.2d at 679; Ham, 231 A.2d at 261. Now and for the first time the Board has found a claimant displaced

[9] Ans. Brief at 23

because of a "factor" not "because of the disability." Watson, 30 A.3d at 781. Such displacement exists irrespective of any physical disability or any restrictions. It is for this reason that it is not causally related to the disability.

Therefore, the only way to serve this Court's requirement that an injured worker's disability be causally related to her work accident is to segregate her documentation status from the displaced worker analysis. Per the Board's holding its consideration is dispositive and ends the analysis thereby entitling her to indefinite total disability benefits as a displaced worker irrespective of her physical injuries.

B. The Board's holding is inconsistent with this Court's focus in Campos to provide equal entitlement to workers compensation benefits for documented and undocumented claimants alike.

In Campos the Court's focus was ensuring that undocumented claimants are not disadvantaged by their status in terms of qualification for benefits under the Workers' Compensation Act. Guardado argues that an undocumented individual's status entitles her to more favorable treatment in that she can argue that status affirmatively in support of a finding of displacement whereas a person legally eligible for employment could not. (Ans. Brief at 29).

Guardado attempts to deflect the point by asserting that a highly qualified undocumented individual may be able to obtain legal status via an H1-B Visa.[10]

[10] Ans. Brief at 29-30

However, at that point, such an individual is no longer undocumented. Thus Guardado's argument is merely that highly skilled individuals have a better opportunity of becoming documented workers. This does not change the central point that an undocumented claimant, skilled or unskilled – restricted or unrestricted, is ineligible for employment and therefore, under her rationale, entitled to displaced worker status so long as she remains undocumented. Thus so long as an undocumented claimant remains undocumented, she is perpetually shielded from any consideration of her displaced worker status, a benefit that a documented worker can never assert.

Guardado is fundamentally incorrect in arguing that a policy whereby undocumented and documented claimants are treated equally in terms of entitlement to state a claim for workers' compensation benefits undermines this Court's ruling in Campos. (Ans. Brief at 29). Indeed this was precisely the objective the Court sought to reach. Thus this Court's remedy in Campos of allowing an undocumented claimant to state a claim for partial disability when he is able to return to work but for his undocumented status serves the stated objective of treating documented and undocumented claimants equally. That objective is disrupted by the Board's holding and Guardado's contention that undocumented status can be used affirmatively to independently support a claim for displaced

worker status. As such, the Board's holding is not compatible with the policies established by this Court in Campos as a matter of law and it must be reversed.

To be clear, it is not Roos' position that a claimant's undocumented status is irrelevant for all purposes. It is that it should not be considered in addressing displaced worker status because it serves to render the claimant ineligible for work as a matter of law regardless of her injuries and vocational qualifications. This is the inverse of the displaced worker doctrine which is to determine whether the injuries are disabling.

This Court's objective in ensuring that there is equal footing between documented and undocumented claimants is to hold that undocumented status should not be considered in the displaced worker analysis. A contrary holding would entitle an undocumented claimant to dispositively assert her immigration status to mandate a finding that she is *prima facie* displaced. Second, requiring an employer to make the legally impossible showing of work available to someone ineligible for employment would thereby entitle her to an absolute finding as a displaced worker. This Court's holding in Campos could not have intended to render every undocumented claimant with the unassailable status of displaced worker. However, this is precisely the result that would follow if the Board's rationale and holding is affirmed.

CONCLUSION

The court below exceeded its scope of review in affirming the Board's decision based on factors not relied upon by the Board instead of determining whether the Board's finding, that Guardado qualified as a *prima facie* displaced worker based on her undocumented status, was legally correct.

The Board's decision expands the historical application of the displaced worker doctrine and creates a new category of displaced worker based solely on a claimant's immigration status and not on factors that are relevant to whether work is available to the claimant based on her restrictions caused by the work accident.

The Board's holding that Campos requires a finding that Guardado qualifies as a *prima facie* displaced worker because she is undocumented constitutes an error of law as the displaced worker doctrine was not relevant to the issues in Campos. Further, the Court in Campos held that an undocumented claimant for whom the employer is unable to show job availability, either with a job offer or work opportunities in the open labor market, is entitled to partial disability, not total disability.

Moreover, the Board's decision contradicts this Court's objective in Campos, to apply the workers' compensation statute equally to both documented and undocumented claimants, as it affords an undocumented claimant the ability to claim displaced worker status based solely on her legal eligibility to work in this

country. This is contrary to the burden placed on a documented claimant which requires a causal relationship between the claimant's disability status and the work injury as the claimant must show that factors, such as age, education, work history, etc., when combined with her physical injuries make her ability to find work unrealistic.

Roos contends that the displaced worker analysis should not be expanded so that undocumented claimant's are permitted to rely on their immigration status independently to claim displacement. Rather the claimant's documentation status should be segregated from the analysis of whether there is work available to the claimant within her physical restrictions and vocational qualifications.

Roos respectfully request that this Court reverse and remand the Board's decision.

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