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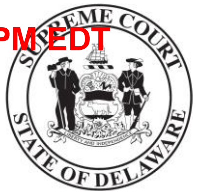

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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 OPENING BRIEF

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Dated: May 16, 2016

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NATURE AND STAGE OF THE PROCEEDINGS

On November 7, 2014, Appellant Below, Appellant, Roos Foods ("Roos") filed a Petition before the Industrial Accident Board ("Board") to review the total disability status of Appellee Below, Appellee, Magdalena Guardado's ("Guardado"). The Petition was based on the work releases of Dr. Richard DuShuttle and Dr. Eric Schwartz who opined that Guardado was capable of light duty work with limited use of her injured left arm. (A-15-16, 24-25, 36-38, 91).

A hearing regarding Roos' Petition was conducted before the Board on March 24, 2015. Guardado did not dispute that she was physically capable of working. (A-97, 100, 112). Rather, Guardado opposed Roos' Petition and sought continued entitlement to ongoing total disability benefits on the basis that she qualified as a *prima facie* displaced worker. (A-112-115).

The sole basis for Guardado's contention that she was displaced was the previously undisclosed fact that she is an undocumented worker. (A-112-115). Guardado did not contest Roos' evidence of job availability on any basis other than her status as an undocumented worker. (A-115).

The Board denied Roos' Petition by decision on April 7, 2015 on the basis that Guardado's undocumented legal status alone qualified her as a *prima facie* displaced worker and as such Roos' labor market survey could not prove regular employment opportunities for her. Guardado v. Roos Foods, I.A.B. Hearing No.

1405006, at 11-14 (April 7, 2015). In support of its holding the Board cited this Court's decision of Campos v. Daisy Constr. Co., 107 A.3d 570 (Del. 2014).

On May 4, 2015, Roos appealed the Board's decision to the Superior Court on the basis that (1) the Board erred in relying on Guardado's undocumented worker status to conclude *per se* that she is a *prima facie* displaced worker and (2) the Board erred in applying the Campos decision to the displaced worker analysis.

By Order dated January 26, 2016 the Superior Court affirmed the Board. The court below found that Guardado qualified as a displaced worker irrespective of her undocumented status. Roos Foods v. Guardado, C.A. No. S15A-05-002 ESB, at 6-7 (Del.Super. Jan. 26, 2016). However, the Board's holding was that Guardado "qualifies as a displaced worker based upon her undocumented legal status." Guardado, I.A.B. Hearing No. 1405006, at 11. Thus the court below affirmed the Board's decision finding Guardado displaced, but did so based on factual conclusions not reached by the Board; namely that Guardado would have been displaced whether or not she was an undocumented worker.

Guardado made an application for attorney fees on January 27, 2016, which was resolved and the Superior Court's final order was issued on March 4, 2016.

Roos filed a timely appeal with this Court on March 31, 2016.

This is Roos' Opening Brief and Appendix on Appeal.

SUMMARY OF ARGUMENT

1. The Superior Court exceeded the scope of its appellate review by making factual findings and reaching conclusions under the displaced worker analysis which were distinct from and beyond those reached by the Board in finding Guardado to be *prima facie* displaced.

2. The Board erred in not properly applying the displaced worker analysis and instead basing its finding that Guardado is a *prima facie* displaced worker solely on her undocumented status. Thus the Board expanded the displaced worker doctrine to cover all persons lacking legal eligibility to work regardless of their physical capabilities and vocational qualifications.

3. The Board erred in applying the Campos decision given this Court's indication that its decision did not implicate the displaced worker doctrine. Further, it subverts the Court's policy objective of treating undocumented and documented workers alike in terms of eligibility for workers' compensation benefits. It also contravenes the requirement that there be a causal connection between the disability and the work accident. Finally, it potentially serves to render an undocumented person totally disabled for life since the employer could never show availability of employment to someone legally ineligible to obtain it.

STATEMENT OF FACTS

Guardado was employed as a machine manager with Roos for approximately five years when she was involved in a work-related accident on June 22, 2010. (A-57, 95). As a result of the accident, Guardado injured her left wrist. (A-57-58).

Following the injury, Guardado was paid various periods of total disability. (A-58). Guardado then returned to work with Roos until undergoing surgery, consisting of a left wrist fusion, performed by Richard DuShuttle, M.D. on June 18, 2014. (A-13, 58). Less than two months following surgery, Dr. DuShuttle released her to light duty, one-handed work on August 7, 2014. (A-15-16). He placed no restrictions on her dominant right arm, but restricted her to simple activities with her injured left arm, such as grasping light objects and assisting her right hand. (A-91, 24-25). Upon being released to return to work by Dr. DuShuttle, Guardado initiated a job search in the open labor market. (A-97).

Guardado advised Dr. DuShuttle that she was "significantly better than before surgery." (A-19). Guardado testified that she now only experiences pain when maneuvering heavy items with her left hand. (A-99). Further, she was able to control her pain simply using Ibuprofen and was discharged from medical care. (A-19, 99).

Guardado confirmed this improvement to Dr. Eric Schwartz, noting that her symptoms were tolerable and she did not wish to undergo any further treatment.

(A-35). She also confirmed the ability to perform activities of daily living, despite some discomfort. (A-34-35). Guardado testified that she felt she could work and continued to look for jobs, "hoping in God that [she] will get one." (A-100).

Guardado is educated, having completed high school in her native country of El Salvador. (A-95). She can read and write in Spanish. (A-97-98). Guardado came to the United States in 2004 and was 38-years-old. (A-95-96).

During her testimony, Guardado disclosed, for the first time, that she is an undocumented worker. (A-96). While Guardado testified that she had been looking for work since August, 2014, (A-96-97) she acknowledged that her efforts were limited to completing applications for three of the eight employers listed on Roos' labor market survey. (A-95, 98, 100).[1] Guardado offered no evidence that her limited job search was unsuccessful due to her vocational qualifications or her physical restrictions. (A-100). Instead she simply relied on the Federal Statute which prohibits employers from legally hiring undocumented workers to support her contention that she is displaced. (A-117).

Roos' evidence of job availability was a labor market survey prepared by Ellen Lock, vocational case manager. (A-70-86). Ms. Lock presented a representative sample of employment opportunities vocationally appropriate for Guardado within her physical restrictions. (A-70). Ms. Lock targeted positions

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[1] Guardado applied to one of these jobs prior to receiving the labor market survey. (A-100).

that accommodated Spanish-speaking individuals and did not require a high school diploma even though Guardado completed high school in El Salvador. (A-73-78).

While Ms. Lock did agree, in light of the medical expert testimony, that two of the positions listed on the survey would not be best suited for Guardado's physical capabilities, (A-77) she confirmed that if Guardado conducted a job search in the area, she would be able to find positions within her physical restrictions at no wage loss. (A-78).

As Guardado did not disclose her undocumented status until the time of her testimony at the hearing, Ms. Lock did not inquire as to whether the prospective employers would hire an undocumented worker. (A-84). She did however confirm with each employer that Guardado was otherwise fully qualified for each of the positions identified. (A-74-75, 79).

The Board concluded that Guardado is physically capable of working. Guardado, I.A.B. Hearing No. 1405006, at 8. However, the Board determined that Guardado remained entitled to ongoing total disability compensation based solely on her status as an undocumented worker and that Roos' labor market survey could not sufficiently prove employers would hire an undocumented worker. Id. at 8-11.

ARGUMENT I

THE SUPERIOR COURT EXCEEDED THE SCOPE OF ITS APPELLATE REVIEW BY MAKING FACTUAL FINDINGS AND REACHING CONCLUSIONS UNDER THE DISPLACED WORKER ANALYSIS WHICH WERE DISTINCT FROM AND BEYOND THOSE REACHED BY THE BOARD IN FINDING GUARDADO TO BE *PRIMA FACIE* DISPLACED.

A. Question Presented

Whether the court below erred by affirming the Board's finding that Guardado is a *prima facie* displaced worker for reasons not cited and relied upon by the Board in support of its decision.[2]

B. Scope of Review

On appeal from decisions of the Industrial Accident Board, "[t]he [appellate court] does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own findings and conclusions." Johnson v. Chrysler Corp., 213 A.2d 64, 66 (Del. 1965)(as cited by Roos Foods v. Guardado, C.A.No. S15A-05-002, Bradley, J. at 3 (Del.Super. Jan. 26, 2016).[3] "In reviewing decisions of the Board, both the Superior Court and this Court are limited to determining whether the Board's findings are supported by substantial evidence and free from legal error." Avon Prods., Inc. v. Lamparski, 293 A.2d 559, 560

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[2] This question was not specifically preserved in the trial court below as it arises from the scope of review applied by the lower court in reviewing the Board's decision.

[3] Hereinafter "Roos Foods."

(Del. 1972); General Motors Corp. v. Jarrell, 493 A.2d 978, 980 (Del.Super. 1985). See also, General Motors Corp. v. Freeman, 164 A.2d 686, 688 (Del. 1960). Thus the appeal before this Court is limited to the findings and conclusions made by the Industrial Accident Board. 29 Del. C. §10142.

C. Merits

The court below determined that "[e]ven without Guardado's undocumented status, the evidence certainly supports the Board's finding that she fits into the *prima facie* displaced category." Roos Foods, at 6-7. To support this conclusion, the court cited that Guardado was "almost middle-aged and has no education beyond high school in El Salvador... has no real workplace training, very little work experience, does not speak English, is unskilled in the labor market, and has work restrictions that limit her to light-duty work with one hand." Id. at 7.

However, these conclusions are distinct from those relied upon by the Board in finding Guardado to be *prima facie* displaced. While the Board referenced these aspects of Guardado's testimony, it did not base its conclusion that she was displaced on them. Guardado, I.A.B. Hearing No. 1405006, at 10. The Board's conclusion was succinctly that, "[it] is satisfied that Claimant qualifies as a displaced worker based upon her undocumented legal status." Id. at 11. Thus the Board placed no reliance on the factors cited by the court below in support of its finding of displacement.

By affirming the Board's conclusion based on factors upon which it did not rely the court below appears to have run afoul of the mandate limiting the scope of appellate review as cited in Breeding v. Contractors-One-Inc., 549 A.2d 1102 (Del. 1988). In Breeding, this Court noted that the court below "in an understandable desire to end the litigation… made its own search of the record for 'sufficient evidence' to sustain the Board's finding." Id. at 1105. This Court concluded that in so doing "the [c]ourt below improperly substituted itself for the Board as a finder of fact… [and] thereby fell into the error of weighing the evidence, determining questions of credibility and making factual findings and conclusions." Id. at 1105-1106.

The Board made no finding that Guardado's age, mental capacity, education, work history, or physical restrictions rendered her *prima facie* displaced. Rather, the Board singularly found her to be a displaced worker "based upon her undocumented legal status" and that the employer's evidence of job availability failed solely because it did not show evidence of "regular employment opportunities within [c]laimant's capabilities as an undocumented injured worker." Guardado, I.A.B. Hearing No. 1405006, at 11.

While undoubtedly the "critical elements to be considered in finding prima facie displacement are a person's age, mental capacity, education and training" whether and to what extent these factors impact on the availability of work to

Guardado should be determined by the Board rather than for the court below to independently conclude that these facts "certainly portray a woman disqualified from regular employment in any well-known branch of the competitive labor market. Roos Foods, at 6-7.

Thus the court below should have limited its review to whether Guardado is a *prima facie* displaced worker for the reasons cited by the Board. If the court below concluded that the Board's finding that Guardado is displaced based on her undocumented status is legally sufficient then the court should have affirmed on that basis. If however the court deemed Guardado's undocumented status insufficient to constitute an independent basis for a finding of displacement then the court below should have remanded to the Board for consideration of whether the totality of the factors renders her prima facie displaced.

Thus the court below must be reversed in that it exceeded the scope of review by affirming the Board based on reasons other than those cited and relied upon by the Board in support of its decision.

ARGUMENT II

THE BOARD ERRED IN BASING ITS FINDING THAT GUARDADO IS A *PRIMA FACIE* DISPLACED WORKER SOLELY BECAUSE OF HER UNDOCUMENTED STATUS.

A. Question Presented

Whether the Board erred in finding "that [Guardado] qualifies as a displaced worker based upon her undocumented legal status." Guardado, I.A.B. Hearing No. 1405006, at 11. (A-138).

B. Scope of Review

"Where the issue raised on appeal from a Board decision involves exclusively a question of the proper application of the law, [this Court's] review is *de novo*." Vincent v. E. Shore Markets, 970 A.2d 160, 163 (Del. 2009). Further, "[a]s to questions of law, the Court's review is plenary." Lee v. UE&C Catalytic, Inc., C.A. No. 98A-06-001-FSS, Silverman, J. (Del.Super. Mar. 31, 1999).

C. Merits

The practical legal effect of the Board's decision is to create a new classification of displaced worker arising from the employee's disqualification to work legally within the United States. As the Board's decision makes unmistakably clear, it designated Guardado as a *prima facie* displaced worker based on her "undocumented legal status." Guardado, I.A.B. Hearing No. 1405006,

at 11. Thus under the Board's rationale she retains the right to receipt of total disability compensation indefinitely solely because she lacks the legal eligibility to work in the United States. Therefore Guardado has been awarded greater compensation than she potentially might have received as a legal resident.

Roos submits that such an expansive view of the displaced worker doctrine disserves its purpose which is to protect workers who, though physically able to work, cannot realistically do so due to age, education and limited work history. Unlike Guardado's illegal status, these factors upon which the displaced worker doctrine has been historically founded have been personal to the claimant and outside of her control.

1. The policies underlying the displaced worker doctrine

Generally, when an injured worker is physically capable of returning to work a finding is made that the worker is no longer entitled to total disability but is instead partially disabled. Ernest Di Sabatino & Sons, Inc. v. Apostolico, 269 A.2d 552, 553 (Del. 1970). The "displaced worker" doctrine is an exception to this general rule. Under this doctrine, an injured worker, though physically able to work, may nonetheless be entitled to receive total disability, if based on consideration of vocational factors in conjunction with the nature of the injury work is "not realistically within reach." Abex Corp. v. Brinkley, 252 A.2d 552, 553 (Del.Super. 1969).

In order to trigger application of the displaced worker doctrine, the claimant bears the burden of demonstrating she is "so handicapped by a compensable injury that [s]he will no longer be employed regularly in any well known branch of the competitive labor market and will require a specially-created [or "odd lot"] job[.]" Ham v. Chrysler Corp., 231 A.2d 258, 261 (Del. 1967). See also, Facciolo Paving & Construction Co. v. Harvey, 310 A.2d 643 (Del. 1973); Chrysler Corp. v. Duff, 314 A.2d 915, 917 (Del. 1973). The factors that have historically been considered in making this assessment are the worker's age, education, general background, occupational experience, and mental acuity in addition to the nature and availability of the work which the claimant can physically perform. Waddell v. Chrysler Corp., C.A. No. 82A-MY-4, Bifferato, J. (Del.Super. June 7, 1983)(citing, Ham, 231 A.2d, at 261). See also, Franklin Fabricators v. Irwin, 306 A.2d 734, 737 (Del. 1973); Chrysler Corp. v. Duff, 314 A.2d 915, 917 (Del. 1973); Ruddy v. I.D. Griffith & Co., 237 A.2d 700, 704 (Del. 1968); Chrysler Corp. v. Williams, 282 A.2d 629, 631 (Del.Super. 1971), aff'd, 293 A.2d 802 (Del. 1972).

As the cases cited above demonstrate, in creating the displaced worker doctrine this Court focused on whether the unique circumstances of an individual claimant are such that they rise to the level that she cannot reasonably anticipate being employable in the general labor market within her restrictions. Because it is a weighing process, no one factor is dispositive. Duff, 314 A.2d at 918. Thus, and

by definition, this requires careful inspection of factors specific to the individual's background and suitability of employment. Never before has the displaced worker doctrine been expanded in a general fashion to cover a range of persons such that regardless of their physical capabilities they are entitled to the protections of the displaced worker doctrine.

As the lower court acknowledged, application of the displaced worker doctrine requires attention to the claimant's "individual circumstances" as viewed in the context of the restrictions related to her work injury. Roos Foods, at 4. For this reason, the courts have resisted the invitation to perform this evaluation based upon comparisons between similarly situated claimants in an attempt to establish displacement by analogy. In the case of Rash v. Wilkinson Roofing and Siding, C.A. No. 95A-02-004 NAB, Barron, J. (Del.Super. Sept. 28, 1995), the Superior Court rejected the claimant's attempt to prove his status as a displaced worker vicariously, stressing that "the Board decides each displaced worker claim by examining factors unique to that individual. Thus, although two cases may appear to be analogous, one case is not determinative of the other." Id. at 4. The Rash court concluded that the Board properly weighed the factors unique to the claimant in determining he was not a displaced worker and would not reverse the Board's holding merely because the claimant share[d] some the of the same attributes as a

claimant who was found to be displaced." Id. at 3-4. See also, Downes v. State of Del., 1992 WL 423935, Graves, J. (Del.Super. Dec. 18, 1992).

Thus, it is clear that the focus of the displaced worker doctrine is on the individual claimant's suitability for employment based upon vocational considerations and the impact of her physical restrictions upon same. Therefore, and as exhibited by this jurisdiction's refusal to allow crossed based comparison analysis, arguments for status based displacement have been rejected.

Nevertheless, the Board's decision results in a more generalized application, such that regardless of any other circumstances, Guardado is *per se* disqualified from work solely because of her legal ineligibility to be employed in the United States. Guardado, I.A.B. Hearing No. 1405006, at 11. This would be a significant departure from and expansion of the application and purpose of the displaced worker doctrine.

2. The Board did not properly apply the displaced worker doctrine.

While the Board correctly recited the proper elements for determining whether Guardado is *prima facie* displaced, Guardado, I.A.B. Hearing No. 1405006, at 8, citing Duff, 314 A.2d at 916-17, its holding makes clear that its analysis began and ended with her undocumented status. Id. at 10-11. The Board cited no other factors in support of its decision finding her to be displaced. Id. This is at odds with the displaced worker doctrine which favors a weighing of various

factors in determining whether work is realistically within the reach of the injured worker or not. Thus and for the first time in the long history of the displaced worker doctrine, the Board applied it not by evaluating the personal circumstances of the claimant but *per se* as a matter of law based on status.

Had the Board properly engaged in the weighing process, the following would have been considered: The record reflects that Guardado sustained a work-related injury localized to her non-dominant left wrist. (A-40, 64). The experts agreed that Guardado can perform unrestricted work with her dominant right hand and is able to use her non-dominant left hand for simpler activities. (A-24-25). Furthermore, Guardado graduated high school in El Salvador, is capable of reading and writing in Spanish, and had a five-year history of working with Roos. (A-94-96).

As such, it is an open question as to whether she qualified as a *prima facie* displaced worker as the Board did not properly weigh the vocational factors unique to her, as it is required to do prior to reaching such a conclusion. Therefore, the Superior Court erred in its obligation to ensure that the Board performed the requisite analysis under the displaced worker doctrine and erred in affirming the Board's decision finding Guardado displaced solely due to her undocumented status.

ARGUMENT III

THE BOARD ERRED IN APPLYING THE CAMPOS DECISION TO A DISPLACED WORKER ANALYSIS.

A. Question Presented

Whether this Court's decision in Campos v. Daisy Construction requires that an undocumented worker be found *prima facie* displaced based on her status. (A-145)

B. Scope of Review

See Standard of Review from Argument II.

C. Merits

1. The Campos decision did not implicate the displaced worker doctrine.

In defense of the employer's Petition for Review, Guardado contended that the Campos decision mandated the result that she is *per se* displaced as a matter of law based on her status as an undocumented worker, irrespective of her physical restrictions and other vocational qualifications. Guardado argued "she's not legally employable. That makes her a prima facie displaced worker, full stop." (A-115). The Board accepted Guardado's position concluding that it was "satisfied that [Guardado] qualifies as a displaced worker based upon her undocumented legal status." Guardado, I.A.B. Hearing No. 1405006, at 11.

Fundamentally, this Court stated that "the displaced worker doctrine was not relevant to Campos' appeal" and that it was not even in issue, much less redefined

by its holding. Campos, 107 A.3d at 574, n. 7. Thus Campos does not stand for the broad-based proposition, as reached by the Board, that undocumented workers are displaced as a matter of law. Rather, Campos addressed the limited circumstance of whether an employer could rely upon its extension of a job offer to a claimant while withdrawing it based on his undocumented status. This Court deemed such a proposition to be illusory noting that the employer could not simultaneously maintain that it had communicated an offer of employment such that the claimant's entitlement to compensation should cease while maintaining that it was legally prevented from fulfilling that commitment. Id. at 575-576. In essence, the Court was unwilling to let the employer have it both ways by arguing its offer of employment defeated the claimant's entitlement to partial disability while claiming the legal impossibility of complying with the terms of that offer. Id.

Second, had the Court intended its ruling to be as broad as the Board applied it, such that an undocumented worker is *per se* displaced as a matter of law, the Court would not have "distinguished [its holding] from Torres v. Allen Family Foods, 672 A.2d 26 (Del. 1995), where the employer retained a vocational rehabilitation specialist, who... conducted a labor market survey in order to identity jobs that were available to someone with the employee's qualifications and limitations." Campos, 107 A.3d at 577, n. 23. Rather, the Court cited that "[b]y contrast, Daisy's only proof was its own testimony that jobs at Daisy were open to

Campos if he could find working papers" thus limiting its holding to the scenario of an employer seeking to cite only an illusory job offer as a basis to terminate compensation. Id.

The Court gave further evidence that undocumented status does not equate to automatic displacement by requiring employers to "pay[] partial disability benefits to undocumented employees." Id. at 584. Thus the Court clearly envisioned a circumstance whereby undocumented employees would be eligible for and hence would receive partial disability compensation from their employer. Had the Court deemed a claimant's undocumented status antithetical to partial disability status and the legal equivalent of displacement, as the Board held, there would have been no purpose to the Court specifically citing that partial disability is payable to an undocumented worker. Id. at 577.

2. The Board's decision violates this Court's concern that undocumented and documented workers be treated similarly for purposes of workers' compensation benefit entitlement.

This Court emphasized that its concern was "to ensur[e] that undocumented workers are given equal treatment under the Workers' Compensation Act." Campos, 107 A.3d at 578. The Court underscored that the import of its holding was to level the playing field such that an undocumented worker would not be

penalized by the loss of compensation to which she would otherwise be entitled if she were legally eligible for employment. Id. at 583, n. 44.

The Board's holding serves to do the opposite and affords an undocumented worker to greater entitlement to workers' compensation benefits than would be available to her were she legally eligible to work in this country. By way of example, under the Board's holding, an undocumented worker with a doctoral degree, who is fully fluent in English, and whose only restriction is against performing heavy duty work would nonetheless be displaced solely because she lacks eligibility for employment. Thus she would continue to receive total disability compensation as a displaced worker irrespective of her overwhelming qualifications and limited (if any) physical restrictions. Further, that employee would be essentially "legally immunized" from reconsideration of her entitlement to total disability compensation because her displacement arises from her undocumented status, not from her restrictions and vocational qualifications. Conversely, a high school educated worker on more stringent physical restrictions who is legally eligible for employment in this country may have her total disability status and entitlement to benefits challenged as she does not possess that same immunity since she is eligible for employment.

Thus the import of the Board's decision directly contradicts this Court's rationale favoring equal treatment of documented and undocumented workers alike

as the undocumented worker would be in a better position than a legally documented worker and entitled to compensation predicated solely upon her legal ineligibility to work. Thus the Court's aim of promoting equality is best served by affording the same rights to both documented and undocumented workers. This can only be achieved by not basing the displaced worker analysis on one's status as an undocumented worker.

This point is perhaps best illustrated by a case cited by Campos in support of its decision, Rivera v. United Masonry, Inc., 948 F.2d 774 (D.C. Cir. 1991). In Rivera the Court held that undocumented status is not "one of the elements of an employee's background that must be taken into account when determining whether the claimant is disabled because of his injury." Id. at 775. The Court reasoned that consideration of an undocumented worker's status as a legal basis for a finding of displacement would provide an inequitable benefit to the undocumented worker, citing that "many partially injured undocumented aliens who cannot work would receive total disability benefits - benefits that would not be available to injured, legal workers in the same position but for the legality of their status in the United States." Id. at 776.

Reliance on an undocumented worker's status as a basis for finding her *prima facie* displaced would defeat the Campos Court's aim of treating similarly situated workers the same, as it would place the rights of an undocumented worker

ahead of those of a worker in possession of documentation and legal eligibility for employment. Therefore, Guardado's contention that as an undocumented worker she is displaced as a matter of law and thus entitled to ongoing total disability benefits on that basis is contrary to the Campos decision's purpose and holding.

The issue of whether an injured worker's undocumented status automatically triggers the displaced worker doctrine is one of first impression within this jurisdiction. As such, this Court considers decisions of other jurisdictions which have wrestled with this issue. Lacy v. G.D. Searle & Co., 567 A.2d 398, 399 (Del. 1989).

In Ramroop v. Flexo-Craft Printing, Inc., the New York Court of Appeals expressed concern that declaring an illegal immigrant to be a displaced worker and thereby entitled to total disability benefits as a matter of law because of her legal ineligibility for employment would place her "in a more favorable position than claimants who must meet all statutory requirements." Ramroop v. Flexo-Craft Printing, Inc., 896 N.E.2d 69, 866 N.Y.S.2d 586, 589 (N.Y. Ct. App. 2008). The Court also noted that "[t]his would amount to our directing the Board to put its imprimatur on an 'additional compensation' award in contravention of its statutory mandate, a result which the law compels against." Id.

In Del Taco v. Workers Compensation Appeals Board, the Court of Appeal, Second District, Division 6 of California held that consideration of immigration

status as a basis for entitlement to benefits "would not be *equal* protection for an 'illegal worker.' It would be *more* protection for an 'illegal worker.'" Del Taco v. Workers' Comp. Appeals Bd., 94 Cal. Rptr. 2d 825, 829 (Cal. Ct. App. 2000)(emphasis in original). The Court reasoned that "[a] contrary determination would necessarily be predicated solely on illegal immigration status." Id. The court determined that this result therefore violated the equal protection clause of the United States Constitution. Id.

Therefore, the Campos Court's rational, favoring equal treatment of documented and undocumented workers alike, would be hindered by a result whereby an undocumented worker would be placed in a preferred status to a legally documented worker as she would be entitled to compensation predicated solely upon her legal ineligibility to work. Its aim of promoting equality is best served by affording the same rights to both documented and undocumented workers. This can only be achieved by not basing entitlement to compensation on one's status as an undocumented worker.

3. The Board's holding that an undocumented worker's status automatically qualifies her as a displaced worker contravenes the requirement that there be a causal connection between the disability and the work accident.

The Board's holding contravenes this Court's emphasis 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). This jurisdiction has always required that there be a causal nexus between the inability to secure employment and 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) ("[D]isability refers to the inability, **as the result of a work-connected injury,** to perform or obtain work suitable to the claimant's qualifications and training." The claimant "must demonstrate that this inability to perform the duties of a general laborer is **causally related to the accident in issue**.")(emphasis added). See also Ham, 231 A.2d at 261 ("inability to secure work, **if causally connected to the injury,** is as important a factor as the inability to work.")(emphasis added).

Here, the Board found Guardado displaced because of her undocumented status not her work injury. Guardado, I.A.B. Hearing No. 1405006, at 11. This holding is legally erroneous as standing alone her undocumented status constitutes a legal ineligibility to work. Guardado's legal ineligibility for employment was the same both before and after the work accident. Finding displacement based on her undocumented status results in the employer paying compensation for a wage loss

not causally connected to her physical injuries. This defeats the purpose of the workers' compensation act, which is to compensate an injured worker for a loss of earnings attributable to the work injury.

This jurisdiction has required that "[i]n order to be deemed a displaced worker, the Employee must be at least partially incapacitated for work by a compensable injury." Cappuccetti v. Leaseway Motorcars, C.A. No. 97A-12-005, Silverman, J. (Del.Super. Mar. 31, 1999). Under the Board's analysis, Guardado would still be a displaced worker even if she were released to full duty work. Thus the Board erred because it found Guardado displaced solely because of her undocumented status without consideration as to whether her disability was also related to her work injury.

Like Delaware, Florida law holds that an injured worker's right to receive workers' compensation benefits is not barred by their undocumented status. Delaware Valley Field Servs. v. Melgar-Ramirez, 61 A.3d 617 (Del. 2013). In Cenvill Development Corp. v. Candelo, the court held that "[i]llegal aliens indeed are entitled under the statute to workers' compensation benefits." 478 So.2d 1168, 1170 (Fla. Dist. Ct. App. 1985). Nevertheless, the court held that the status of an unauthorized alien was not relevant to the inquiry of entitlement to partial disability benefits[4], noting "entitlement to wage loss benefits is based on proof of a

[4] Denominated in Florida law as "wage loss benefits."

connection between the injury and the alleged wage loss." Id. The court emphasized that an undocumented worker could indeed state a claim of displacement, but that her undocumented status would not be a relevant consideration in making that assessment. Id.

An undocumented worker's disqualification from employment arises as a matter of law and therefore exists independently from whether her work injury and other vocational considerations would result in work being within her grasp. Thus this Court's concern that a causal relationship exist between the work accident and the disability can only be served by segregating the injured workers' documentation status from the displaced worker analysis. To do otherwise would potentially serve to entitle the undocumented worker to displaced worker status irrespective of the nature and extent of her injuries and irrespective of her vocational qualifications and their potential impact upon her earning capacity.

4. The Board's holding improperly required the employer to show job availability to someone lacking eligibility for employment as a matter of law.

Ordinarily, once the employer has made a satisfactory showing that the injured worker is physically capable of returning to work, she then bears the burden of showing that her job search failed because of her work injuries in order to claim entitlement to displaced worker status, unless she is a *prima facie* displaced worker. Ham v. Chrysler Corp., 231 A.2d 258, 261 (Del. 1967). See also,

Facciolo Paving & Construction Co. v. Harvey, 310 A.2d 643 (Del. 1973); Chrysler Corp. v. Duff, 314 A.2d 915, 917 (Del. 1973). The result of the Board's erroneous finding that Guardado is *prima facie* displaced because of her undocumented status is that it bypassed her obligation to show a job search that failed because of the work injury and instead shifted the obligation of showing job availability to the employer.

As previously discussed, the employer asserts that it was error for Guardado to be found *prima facie* displaced based on her undocumented status. However, even if the employer properly bears the burden of showing job availability it was not this Court's intention to place its ability to do so out of reach by requiring it to show job availability to someone lacking legal eligibility for employment.

The Campos Court reaffirmed that, even in the context of an undocumented injured worker, the employer's burden of proving job availability can be satisfied via a labor market survey which identifies employment opportunities commensurate with the claimant's vocational qualifications and physical restrictions. Campos, 107 A.3d at 577, n. 23.

Further, the Campos Court cited, with approval, Rivera v. United Masonry, Inc., 948 F.2d 774 (D.C. Cir. 1991). As here, claimant argued that the employer's labor "market study was inadequate because employers were not asked if they would hire someone who… is an undocumented alien." Id. at 775. Thus, the

claimant contended that the employer could not prove job availability to him as an undocumented worker and therefore his total disability compensation should continue. The Court held that the Board correctly noted that "claimant's status as an undocumented worker will prevent him from obtaining *any* job legally." Id.

The Court stated, "it is a legal fiction that an undocumented alien cannot get any jobs;" citing that "between applicant willingness to conceal, and employer inability or unwillingness to detect undocumented status, hirings occur." Id. at 776. However, the Court urged that "there is good reason for maintaining the legal fiction." Id. Otherwise, since "no one freely admits hiring undocumented aliens, the employer would have to employ testers or other ruses to make its 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 intended such results when it restricted alien employment." Id. citing, 8 U.S.C. § 1324a. Therefore, the Rivera Court concluded that undocumented status is not "one of the elements of an employee's background that must be taken into account when determining whether the claimant is disabled because of his injury." Id. at 775. The Campos Court's citation to Rivera strongly supports that it did not intend for an undocumented worker's status to be included among the factors considered when determining whether a claimant is displaced due to her injury.

Roos presented evidence from which the Board could have concluded it met its burden of proof. Roos relied on a labor market survey compiled by a vocational expert who "identif[ied] jobs that were available to someone with the employee's qualifications and limitations." Campos, 107 A.3d at 577, n. 23 (citing Torres, 672 A.2d at 29). To successfully demonstrate that an injured worker is capable of finding employment and is not displaced from the labor force, "the employer need *not* show that someone has actually agreed to hire the employee." Jennings v. Univ. of Delaware, C.A. No. 85A-MY-4, Taylor, J. (Del. Super. Feb. 27, 1986)(emphasis in original). Rather, it is sufficient to demonstrate jobs "generally exist within the claimant's specific restrictions." 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)(See also, Miranda v. DuPont, C.A. No. 99A-04-015 WCC, Carpenter, J. (Del. Super. Feb. 29, 2000)("The employer need not show that someone has actually agreed to hire the employee, but merely that regular employment opportunities exist.")

Had the Board not improperly rejected Roos' labor market survey solely on the basis that it could not guarantee that Guardado, as an undocumented worker, would be hired by the prospective employers, the Board could have determined that this evidence was sufficient to rebut Guardado's contention that she was displaced. Thus the Board erred not only in prematurely placing the burden of

proof on Roos to show job availability before Guardado properly established she was a displaced worker, but also erred in requiring Roos to prove that there were employment opportunities available for someone legally ineligible from working in this country. The Campos Court recognized that "it may be that the employer should continue to bear the burden of persuasion to show availability but that the claimant's status as an undocumented worker should be disregarded." The Court noted that this was an open question as yet unresolved. Campos, 107 A.3d at 21, 22.

Citing this Court's decision in Campos, the court below observed that any difficulty in securing job availability for Guardado should be appropriately borne by the employer.[5] Roos Foods at 9, citing Campos 107 A.3d at 572. However, this Court made clear that even if job availability cannot be shown (presumably because of the individual's undocumented status and legal ineligibility to work) that does not obligate the employer to pay total disability nor convert the claimant into a displaced worker. This Court stated that if the employer "cannot prove by reliable evidence that jobs are in fact available to [the claimant] as an injured undocumented worker, then [the employer] must continue to pay partial disability

[5] This appeal is controlled by the record below and that record is devoid of any evidence that Roos knew or had reason to know of Guardado's undocumented status, much less that it welcomed the hiring of undocumented laborers. 29 Del. C. §10142. The lower court's contention that Roos only has itself to blame for knowingly hiring undocumented workers is not supported by the record.

benefits until it shows that [the claimant] has been re-employed." Campos 107 A.3d at 577-578.

Indeed this Court envisioned that, with respect to undocumented workers, who are physically able to work, the receipt of partial disability benefits would be "unlikely to create perverse incentives for... undocumented workers" as these benefits are capped at 300 weeks and are therefore not able to sustain the claimant for the remainder or his/her life. Id. at 583, n. 44. Thus the Court did not intend for an undocumented worker's status to pave the way for potentially lifelong receipt of total disability despite being otherwise physically and vocationally able to work and only disqualified from doing so by their immigration status. To uphold the Board's decision awarding all undocumented workers an unqualified lifetime entitlement to total disability benefits solely because they are legally ineligible to work encourages undocumented workers to remain undocumented by affording them benefit entitlement not available to documented workers and establishes the very incentives this Court specifically sought to discourage.

This jurisdiction has not held that improper conduct of an employer, even when proven, should result in the claimant receiving benefits greater than those to which she would otherwise be entitled. In Betsy Ross Pizza v. Singleton, C.A. No. 00A-07-004, Witham, J. (Del. Super. Jan. 18, 2001), the Superior Court was confronted with the issue of calculating wages for an employee paid "under the

table." The court took note that the employer had failed to comply with federal tax law requirements. The claimant took the position that in so doing, the employer was able to "avoid higher premiums and withholding taxes." Id. at 2. However, the court held that while it did not condone the employer's conduct "[t]he basic purpose of workers' compensation is the efficient compensation of injured workers, not the enforcement of tax regulations and insurance law." Id. "The enforcement of statutes involving tax considerations and insurance fraud are beyond the general purposes behind the Workers' Compensation Act." Id.

The thrust of the Campos decision was to guard against employers taking advantage of an undocumented worker's status to deny her benefits which would otherwise be available to her. The Court sought to ensure an undocumented worker receives all of the available protections afforded by the Act *despite* her undocumented status. That policy is not furthered by the Board's holding that an undocumented worker is entitled to greater benefits *because* of her undocumented status. The interests of justice are best served by placing undocumented workers on the same footing as those legally eligible for employment. This can only be achieved by evaluating the injured worker's entitlement to compensation and affording them all of the protections under the Act without regard to documentation status.

CONCLUSION

The lower court exceeded its scope of review in affirming the Board's finding that Guardado is a *prima facie* displaced worker based on facts and analysis not relied on by the Board to reach its holding.

The Board's decision that an undocumented worker *per se* qualifies as a *prima facie* displaced worker solely based on her legal ineligibility to work in the United States is contrary to the historical application of the displaced worker doctrine, which is to evaluate specific factors unique to each individual injured worker to determine whether their impact on the worker's physical injury makes employment unrealistic. This jurisdiction has never before afforded displaced worker status to a class of workers based on analogous circumstances, nor has this Court found a worker to be displaced on any one dispositive factor alone.

Further, the Board's reliance on the Campos decision constituted an error of law as the Campos decision specifically distinguishes itself from the displaced worker analysis and warned against the unequal treatment of undocumented and documented workers, which is the exact result of the Board's decision.

It is Roos' contention that the displaced worker doctrine should not be expanded to permit an undocumented worker to rely solely upon her own legal ineligibility to work in order to gain greater access to compensation than would be

available to that worker as a legal resident. Accordingly, Roos respectively submits that this court should reverse and remand the Board's decision.

ELZUFON AUSTIN TARLOV
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Dated: May 16, 2016

BEFORE THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

MAGDALENA GUARDADO,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1405006
	)	
ROOS FOODS,	)	
	)	
Employer.	)	

DECISION ON PETITION TO TERMINATE BENEFITS

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on March 24, 2015, in the Hearing Room of the Board, in Milford, Delaware.

PRESENT:

MARY DANTZLER

PATRICIA MAULL

Heather Williams, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Walt Schmittinger, Attorney for the Employee

Andrew Carmine, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Magdalena Guardado ("Claimant") was injured in a compensable work accident on June 22, 2010, while she was working for Roos Foods ("Employer"). The injury has been accepted as compensable and Claimant has been receiving compensation for total disability at the compensation rate of $204.00 per week, based on an average weekly wage at the time of injury of $306.00.

On November 7, 2014, Employer filed a Petition for Review alleging that Claimant was no longer totally disabled and was physically able to return to work. Claimant disputes Employer's claim and alleges that she remains totally disabled; or, in the alternative, is a displaced worker. Disability benefits have been paid to Claimant by the Workers' Compensation Fund since November 12, 2014, pending a hearing and decision. A hearing was held on Employer's petition on March 24, 2015. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Eric Schwartz, a board certified orthopedic surgeon, testified by deposition on Employer's behalf. Dr. Schwartz had reviewed Claimant's pertinent medical records and had examined Claimant on December 16, 2014. Dr. Schwartz reported that Claimant had undergone a left wrist fusion by Dr. DuShuttle on June 18, 2014, as a result of her work injury. According to Dr. Schwartz, Dr. DuShuttle released Claimant to return to one-handed light duty work, effective August 7, 2014. Claimant reported to Dr. Schwartz that she was able to perform activities of daily living with some discomfort. Claimant could put dry clothes in the washer and take them out of the dryer, but could not remove wet clothes from the washer because of the weight. Claimant reported to Dr. Schwartz that her symptoms were tolerable and she did not wish to have any further medical treatment for her wrist injury.

Upon physical examination, Dr. Schwartz found Claimant to have: a well healed surgical scar across the dorsum of her wrist; a fixed flexion deformity of her small finger in the PIP joint, which predated the work injury; diffuse wrist pain both volarly and dorsally; no wrist swelling in flexion or extension; and a wrist fixed in an almost neutral position. Claimant was able to pronate, but was unable to supinate. Dr. Schwartz agreed with Dr. DuShuttle that Claimant could return to one-handed light duty work and that she was able to use the left hand as an assist hand. Dr. Schwartz confirmed that Claimant has a significant disability associated with the work injury and accompanying limitations. Dr. Schwartz explained that Claimant would have functional problems working because of her lack of any extension and the supination that she has.

Dr. Schwartz confirmed that he agreed with Dr. DuShuttle's recommendation that Claimant be restricted to one-handed light duty work since August, 2014. As for types of jobs that Claimant was capable of doing, Dr. Schwartz indicated that he believed Claimant could do desk work or any other type of light duty work that did not require manipulation with both her left and right hand. Finally, Dr. Schwartz confirmed that he believed the best jobs for Claimant from the Labor Market Survey were the Goodwill Industries, McDonald's and St. Francis Hospital positions.

Ellen Lock, a vocational case manager for Coventry, testified on Employer's behalf. Ms. Lock prepared a Labor Market Survey from November 2014 to February 2015. Ms. Lock's information was that Claimant had been employed as food operator and production, did not speak English, resided in Middletown and was 33 years old. Because Ms. Lock was unaware of Claimant's educational background, she assumed Claimant did not graduate from high school. Ms. Lock reported Claimant's transferrable skills were basically following directions and

production/ assembly work. From a physical standpoint, Ms. Lock understood that Dr. DuShuttle had relegated her to one handed duty as of August 2014 and Dr. Schwartz said she could use her left hand to assist. Based on the doctor's recommendations, Ms. Lock based the job search on Claimant's ability to use an assist hand.

Ms. Lock identified eight jobs for Claimant based on her ability to assist with one hand. Ms. Lock identified two car wash positions that entailed wiping down cars and cleaning windows on cars after they go through an automated car wash. The car wash jobs hire non-English speakers and there are Spanish speaking supervisors on site. The Goodwill Industries job would allow for the right hand assist and involves clothing sorting and pricing. The McDonald's and Taco Bell jobs are similar and involve light custodial type job duties and there are non-English speaking crew members present. The Uhaul and YMCA jobs involve sweeping and mopping, but Dr. Schwartz said these would not be suitable because Claimant would not be able to do those duties consistently. Ms. Lock believes the other jobs fit within Claimant's restrictions. Claimant's average weekly wage was $306.00 and each of these jobs exceeds that wage.

On cross examination, Ms. Lock testified that she discussed Claimant's specific restrictions, including that she had a left wrist injury and was non-English speaking to the Employers listed on the survey. She admitted that there would be a difference in jobs available in the general labor market and jobs available to this particular Claimant because of her language barrier. She testified that there were eight jobs available to her in a short time that were compatible with her physical restrictions and language barrier. Ms. Lock based her search on physical restriction, language barrier, geographical area and lack of high school diploma. Ms. Lock admitted that she was not aware if Claimant was legally allowed to work in the United

States. She testified that she did not ask whether the Employers listed on the survey would accept undocumented workers. Ms. Lock agreed that it would violate federal law for any employer to hire Claimant because she is an undocumented worker.

Dr. Richard DuShuttle, a board certified orthopedic surgeon, testified by deposition on Claimant's behalf. Claimant had been a patient of Dr. DuShuttle's since September 2013 and Dr. DuShuttle had performed wrist surgery on Claimant in June of 2014, as a result of the work injury. Dr. DuShuttle explained the surgery as a wrist fusion, which made it so that Claimant cannot move her wrist up and down because it is set in one position. The doctor described the surgery as "significant," causing patients to need at least three months to heal, followed up by physical therapy. After the surgery, Dr. DuShuttle saw Claimant for follow up treatment monthly and during those visits Claimant continued to complain of pain, but with improvements. Over the course of recovery, Dr. DuShuttle referred Claimant for physical therapy as well.

Dr. DuShuttle explained that he kept Claimant on one-handed light duty status through the fall of 2014. In October 2014, Claimant's physical examination revealed swelling, weakness compared to the unaffected right side and positive volar wrist pain and distal ulnar pain. To alleviate Claimant's pain, Dr. DuShuttle prescribed pain and anti-inflammatory medications. In November 2014, Dr. DuShuttle determined that Claimant had reached maximum medical improvement for purposes of the surgery, but would need periodic visits, medications and/or therapy. In addition, Dr. DuShuttle determined that Claimant would have a permanent impairment. Dr. DuShuttle explained that Claimant will continue to have weakness in her hand and fingers. In February 2015, when Dr. DuShuttle saw Claimant for the last time, Claimant reported a significant decrease in pain, but still had pain with lifting and a loss of moderate

supination. Dr. DuShuttle explained that Claimant's wrist is fused in extension, which means hers remains straight and does not move back for a proper "position of function."

Dr. DuShuttle testified that Claimant's light duty one-handed work restriction is permanent.

On cross examination, Dr. DuShuttle agreed that Claimant could perform some activities with her left hand, like grasping papers and other light objects, and could use her left hand as an assist hand regularly. Dr. DuShuttle believed Claimant could perform activities with her right hand without restrictions. Dr. DuShuttle confirmed that Claimant was right hand dominant.

Claimant testified that she is thirty-eight (38) years old and previously worked for Employer and was in charge of managing the machine for cream for about five (5) years. Prior to working for Employer, she had never worked before. She testified that she completed high school in El Salvador. She does not speak any English because in El Salvador they do not speak English and she cannot read or write in English. She came to the United States in 2004 and is not a United States citizen now. Claimant admitted that she does not have any documents that establish that she is legally able to work in this country. Despite the fact that she cannot legally work here, she has looked for work since she was released by Dr. DuShuttle. She has filled out applications, but has not been hired yet. Claimant reported that her physical restrictions at this time are no heavy lifting because her hand swells and is painful when she lifts.

On cross examination, Claimant testified that she is able to read and write in her native language. On a daily basis, Claimant reported that she normally stays home, but she goes out twice a week and looks for a job. On the days when she is at home, she will wash the dishes and sometimes cook, but she has to be careful with what she does. She reported that showering is

problematic because shampooing her hair and using bar soap is difficult for her. Claimant testified that she normally uses her right hand primarily because she cannot use her left hand to lift heavy things. Currently, she lives with her husband and a nephew. Before the surgery her pain was constant, but since the surgery she only has pain when she lifts heavy things. Dr. DuShuttle gave her ibuprofen to take for pain. Before surgery she was taking much more significant pain medications and she was working for Employer with the injured hand, doing the same job that she had been doing prior to the work injury.

Claimant indicated that she has applied to Taco Bell, Goodwill and McDonald's from the Labor Market Survey, but she never heard back from them. Claimant testified that she has been looking for work because she wants to return to work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Termination

Normally, in a total disability termination case, the employer is initially required to show that the claimant is not completely incapacitated (i.e., demonstrate "medical employability"). *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff*, 314 A.2d 915, 918n.1 (Del. 1973). Claimant is then required to rebut that showing, show that he or she is a *prima facie* displaced worker, or submit evidence of reasonable, yet unsuccessful, efforts to secure employment which have been unsuccessful because of the injury (i.e., actual displacement). As a rebuttal, the employer may present evidence showing regular employment opportunities within claimant's capabilities. *Howell*, 340 A.2d at 835; Duff, 314 A.2d at 918n.1. In this case, the Board finds that Employer has met its initial requirement that Claimant is medically employable; however, Claimant has rebutted that by providing reason to

believe she is displaced based upon her undocumented worker status. Therefore, Employer must present evidence of regular employment opportunities within all of Claimant's capabilities.

The first issue is whether Claimant is medically capable of working. Undeniably, Claimant has movement restrictions; however, the Board agrees with both doctors that Claimant is medically capable of working one-handed light duty jobs. While Claimant has some movement and lifting restrictions, she is not completely incapacitated. As both doctors and Ms. Lock indicated, there are jobs that allow for Claimant's physical restrictions, as listed in the Labor Market Survey. Claimant is capable of performing light duty tasks and of using her left hand as an assist to her right in performing tasks that require both hands. The Board agrees with both doctors that Claimant is physically capable of working a light duty job that allows for her one handed restriction.

Having found that Claimant is physically capable of working, the next issue is whether she qualifies as a displaced worker. An injured worker can be considered displaced either on a *prima facie* basis or through showing "actual" displacement. The employer can then rebut this showing by presenting evidence of the availability of regular employment within the claimant's capabilities. See *Howell*, 340 A.2d at 835; Duff, 314 A.2d at 918n.1. In this case, Claimant testified that she had only applied to a few jobs; however, she had not heard back from any of those. Based on this little evidence, there is no basis to find "actual" displacement. The sole question is whether she should be considered displaced on a *prima facie* basis.

With respect to the issue of *prima facie* displacement, the critical elements to be considered are claimant's degree of obvious physical impairment coupled with the claimant's mental capacity, education, training, and age. *Duff*, 314 A.2d at 916-17. Under normal circumstances, to qualify as a *prima facie* displaced worker, one must have only worked as an

unskilled laborer in the general labor field. *See Vasquez v. Abex Corp.*, Del. Supr., No. 49, 1992, at ¶ 9 (November 5, 1992); *Guy v. State*, Del. Super., C.A. No. 95A-08-012, Barron, J., 1996 WL 111116 at *6 (March 6, 1996); *Bailey v. Milford Memorial Hospital*, Del. Super., C.A. No. 94A-03-001, Graves, J., 1995 WL 790986 at * 7 (November 30, 1995).

"Federal restrictions that prevent employers from hiring undocumented workers may make it more difficult for [Employer] to prove job availability, but any difficulty is appropriately borne by it as the employer, who must take the employee [Claimant], as it hired him." *Campos v. Daisy Construction Co.*, 107 A.3d 570, 572 (Del. 2014). In *Campos*, Claimant was an undocumented worker who was injured on the job after working for Employer for over two years and the issue was whether the Board's denial of Claimant's partial disability benefits was consistent with the Workers' Compensation Act and supported by substantial evidence on the record below. *Campos* at 572, 575. After Employer filed a Petition to Terminate Claimant's partial disability benefits, Employer alleged that there were jobs available with Employer if Claimant could produce a valid social security card. *Id.* The Court determined that Employer's offer to rehire Claimant if not for his immigration status was insufficient to demonstrate job availability because the job was not, in fact, available for Claimant to take. *Campos* at 571-572.

"The employer who seeks to terminate benefits also bears the burden to prove that jobs are actually available – i.e., "within reach" – of the injured employee." *Campos* at 577. "We have previously found this type of "theoretically available" argument to be unavailing for employers seeking to meet their burden to terminate benefits under the Workers' Compensation Act." *Campos* at 576. The *Campos* Court did distinguish the case from *Torres v. Allen Family Foods*, 672 A.2d 26 (Del. 1995) wherein the employer retained a vocational rehabilitation specialist who provided the Claimant with unsuccessful job leads, and completed a Labor Market

Survey, which listed jobs available to someone with Claimant's qualifications and limitations. Ultimately, the *Campos* Court held that Employer must continue to pay partial disability benefits to Claimant, until or unless Employer can prove "by reliable evidence that jobs are in fact available to [Claimant] as an injured documented worker." *Campos* at 577-578. The *Campos* Court determined that requiring Employer to meet its statutory burden of proving Claimant had employment available to him was the outcome most consistent with the Workers' Compensation Act. *Campos* at 578, 580. In *Campos*, the Court also determined that the burden of proving job availability is best placed on employers of undocumented workers following a work injury and was most consistent with the federal Immigration Reform and Control Act ("IRCA.") *Campos* at 582. Finally, the *Campos* Court concluded that its holding was most consistent with the purposes of the Workers' Compensation Act, which was to "foster a workplace safe for all workers." *Campos* at 584.

In this case, Claimant testified she came to the United States in 2004, but she is not a United States citizen, nor does she have any documents that allow her to work in this country legally. Claimant reported that since coming to this country the only place she has ever been employed is for Employer for five years. Claimant explained that while she is capable of reading and writing in her native language (Spanish) and graduated from high school in El Salvador, she can neither read nor write in English. In fact, Claimant used an interpreter during the hearing.

Ms. Lock presented a Labor Market Survey; however, she admitted that she was unaware of Claimant's undocumented legal status when she prepared the Labor Market Survey. Furthermore, Ms. Lock admitted that she had not inquired as to availability for undocumented workers at the jobs listed on the Labor Market Survey. Ms. Lock reported that she had only

asked about availability for jobs for non-English speakers with Claimant's physical restrictions. The Board is satisfied that Claimant qualifies as a displaced worker based upon her undocumented legal status and Employer has failed to present a Labor Market Survey that shows regular employment opportunities within Claimant's capabilities as an undocumented injured worker. While Employer did prepare a Labor Market Survey of prospective jobs that could be available to Claimant with her physical restrictions, it did not address all of Claimant's restrictions; and therefore, cannot be considered reliable evidence of jobs actually available to Claimant. Because Ms. Lock was unaware of Claimant's undocumented legal status when she prepared the survey, the jobs on the Labor Market Survey cannot be considered reliable evidence of jobs that are actually "within reach" to Claimant as an undocumented injured worker as required by *Campos*. Therefore, Employer's Petition is denied.

ATTORNEY'S FEES AND MEDICAL WITNESS FEES

A claimant who is awarded compensation is generally entitled to payment of reasonable attorney's fees "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." DEL. CODE Ann. Tit. 19 § 2320. At the current time, the maximum amount based on Delaware's average weekly wage calculates to $9,983.50.

The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). Less than the maximum fee may be awarded and consideration of the Cox factors does not prevent the granting of a nominal or minimal fee in an appropriate case, so long as some fee is awarded. See *Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96-A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996). A "reasonable" fee does not generally mean

a generous fee. *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant bears the burden of proof and must provide adequate information to make the required calculation. By operation of law, the amount of attorney's fees awarded by the Board applies as an offset to fees that would otherwise be charged to Claimant under the fee agreement between Claimant and Claimant's counsel. DEL. CODE ANN. Tit. 19 § 2320(10)a.

In this case, Claimant is entitled to total disability payments. Claimant's counsel submitted an affidavit stating that he spent approximately 24 hours in preparation time for this hearing, which itself lasted approximately one and a half hours. Claimant's counsel has a great deal of experience in workers' compensation law, which is a specialized area of litigation. His firm's initial contact with Claimant was in August 2013, so he has represented Claimant for approximately a year and a half. This case was of average factual complexity and involved no unique or unusual legal issues. Counsel does not appear to have been subject to any unusual time limitations imposed by the circumstances of the case or Claimant, although he was unable to work on other matters simultaneously with this one. There is no evidence that counsel's handling of this case prevented him from being able to accept other cases, other than from the Employer and the carrier. The fee arrangement between counsel and Claimant is a one-third contingency basis. Counsel does not expect a fee from any other sources and there is no evidence of Employer's inability to pay counsel's fee.

When considering the fees customarily charged in this area for such services as were rendered by Claimant's counsel and the factors set forth above, the Board finds that a fee of $7,800.00 is reasonable in this case and is less than ten times the average weekly wage. This calculates to about $300.00 per hour for counsel's services, which is not excessive. In the Board's estimation, this amount is reasonable and does not exceed thirty percent of the value of

the award once the value of inchoate non-monetary benefits that may arise from this decision are taken into account. *See Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008).

Medical witness fees for testimony on behalf of Claimant are also awarded to Claimant, in accordance with title 19, section 2322(e) of the Delaware Code.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Employer's Petition for Review is Denied. Claimant's total disability status is continued and she shall be entitled to disability payments of $204.00 per week. Claimant shall be entitled to an attorney's fee and medical witness fees. Employer shall make appropriate reimbursement to the Worker's Compensation Fund.

IT IS SO ORDERED THIS 7th DAY OF APRIL, 2015.

INDUSTRIAL ACCIDENT BOARD

Mary Dantzler
MARY DANTZLER

John F. Brady for
PATRICIA MAULL

I, Heather Williams , Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Heather Williams
HEATHER WILLIAMS

Mailed Date: 4-9-15

Karen Neilly
OWC Staff

2016 WL 355002
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Re: Roos Foods
v.
Magdalena Guardado.

C.A. No.: S15A-05-002-ESB
|
January 26, 2016

Attorneys and Law Firms

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Opinion

E. SCOTT BRADLEY, JUDGE

***1** Dear Counsel:
This is my decision on Roos Foods' appeal of the Industrial Accident Board's denial of its Petition for Termination of Benefits for Magdelena Guardado. Guardado worked for Roos Foods for approximately five years. Guardado performed a variety of tasks for Roos Foods, but spent most of her time operating a machine that made cream. Guardado was involved in a compensable work-related accident on June 22, 2010. Guardado injured her left wrist when she slipped on the floor at work. Guardado was in and out of work until the summer of 2013 when she was placed on total disability. Dr. Richard P. DuShuttle surgically fused Guardado's wrist on June 18,2014. Dr. DuShuttle released Guardado to light-duty, one-handed work on August 7, 2014. Notwithstanding that, Guardado has not been able to find a job.

Guardado is 38–years–old. Guardado was born in El Salvador and came to the United States in 2004. Guardado earned the equivalent of a high school degree in El Salvador, but has no other skills or training and her work history consists of just the five years she spent at Roos Foods. Guardado only speaks Spanish and is not able to work legally in the United States.

Roos Foods filed a Petition for Termination of Benefits on November 7, 2014, arguing that Guardado was no longer totally disabled and was physically able to return to work. The Board held a hearing on March 24, 2015. The Board denied Roos Foods' Petition for Termination of Benefits on April 7, 2015, concluding that Guardado was a *prima facie* displaced worker and that Roos Foods had not shown that there was work available for Guardado given her capabilities and limitations. Roos Foods then filed this appeal. I have concluded that the Board's decision is supported by substantial evidence and free from legal error.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the Superior Court on appeal from a decision of the Industrial Accident Board is to

determine whether the agency's decision is supported by substantial evidence and whether the agency made any errors of law. [1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. [2] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings. [3] It merely determines if the evidence is legally adequate to support the agency's factual findings. [4] We review errors of law *de novo*. [5] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions. [6]

DISCUSSION

***2** Normally, in a total disability case, the employer is initially required to show that the claimant is not totally incapacitated (i.e., demonstrate "medical employability"). [7] The claimant is then required to rebut that showing, by showing that he or she is a *prima facie* displaced worker, or submit evidence of reasonable, yet unsuccessful, efforts to secure employment which have been unsuccessful because of the injury (i.e., "actual displacement"). [8] As a rebuttal, the employer may then present evidence showing that there are regular employment opportunities within the claimant's capabilities. [9]

The Workers' Compensation Act provides that employees who have suffered a loss in earning power following a workplace injury are entitled to benefits, and this inquiry requires consideration of the employee's individual circumstances. The Board made three findings in reaching its decision denying Roos Foods' Petition for Termination of Benefits. First, the Board found that Roos Foods met its initial burden by showing that Guardado was medically employable. Second, the Board found that Guardado rebutted that presumption by showing that she was *prima facie* displaced based upon her individual circumstances. Third, the Board found that Roos Foods did not present evidence showing that there were regular employment opportunities within Guardado's capabilities and limitations. Roos Foods argues that the Board erred 1) in relying on Guardado's undocumented worker status to conclude that she is *a prima facie* displaced worker, 2) in applying the *Campos* [10] decision to the *prima facie* displaced worker analysis, and 3) in not requiring Guardado's displacement to be casually related to her accident at work, but instead basing it on her citizenship status.

I. Medically Employable

The Board's finding that Guardado is medically employable is based upon substantial evidence and free from legal error. In a stipulation of facts, signed by the parties, both Dr. DuShuttle and Dr. Eric T. Schwartz concluded that Guardado is physically capable of returning to work with restrictions. Both doctors agree that Guardado can do one-handed light-duty work with her right hand and use her injured left hand as an "assistance hand." This evidence is uncontradicted and clearly established that Guardado is medically employable.

II. Displaced Worker

The Board's finding the Guardado is a *prima facie* displaced worker is based upon substantial evidence and free from legal error. "A worker is displaced if she is so handicapped by a compensable injury that [s]he will no longer be employed regularly in any well known branch of the competitive labor market and will require a specially-created job if [s]he is to be steadily employed." [11] An injured worker can be considered displaced either on a *prima facie* basis or through showing "actual" displacement. The Board found that because Guardado only applied for a few jobs there was no basis to find "actual" displacement. Therefore, the Board had to consider whether Guardado was displaced on a *prima facie* basis. The critical elements to be considered in finding *prima facie* displacement are a person's age, mental capacity, education, and training. [12] Under normal circumstances, to qualify as a *prima facie* displaced worker, one must have only worked as an unskilled laborer in the general labor field. [13] Guardado's job at Roos Foods was classified as an unskilled job in production assembly.

*3 The undisputed testimony before the Board established that Guardado 1) is 38–years–old, 2) is unskilled, 3) only speaks Spanish, 4) has the equivalent of a high school diploma from El Salvador, 5) can only use her right hand for light-duty work and left hand as an "assistance hand," 6) has only worked for five years, and 7) is an undocumented worker unable to work legally in the United States. The Board recited these facts in its written opinion with the primary focus being on the fact that Guardado was an undocumented worker. Even without Guardado's undocumented status, the evidence certainly supports the Board's finding that she fits into the *prima facie* displaced category. Guardado is almost middle-aged and has no education beyond high school in El Salvador. Guardado has no real workplace training, very little work experience, does not speak English, is unskilled in the labor market, and has work restrictions that limit her to light-duty work with one hand. These undisputed facts certainly portray a woman disqualified from regular employment in any well-known branch of the competitive labor market. When you add in the fact that she can not work legally in this country, then her difficulties in obtaining work become even greater. There is no doubt that Guardado, with her capabilities and limitations, is going to have a very difficult time finding a job.

III. Availability of Regular Employment

The Board's finding that Roos Foods failed to provide a labor market survey showing that there were jobs available to Guardado that took into consideration all of her capabilities and limitations is based upon substantial evidence and free from legal error. "If the evidence of degree of obvious physical impairment, coupled with other factors such as the injured employee's mental capacity, education, training, or age, places the employee prima facie in the "odd-lot" category, as defined in *Hartnett* and *Ham,* the burden is on the employer, seeking to terminate total disability compensation, to show the availability to the employee of regular employment with the employee's capabilities."– [14] As the Superior Court stated in *Abex,* "Common sense and everyday experience tells us that a person with given physical disabilities may be physically capable of performing certain "available" work, but because of [her] disability may be unacceptable to an employer and thus unable to secure such work ... Jobs must be realistically "within reach" of the disabled person ... A showing of physical ability to perform certain appropriate jobs and general availability of such jobs is ... an insufficient showing of the availability of said jobs to a particular claimant." [15]

Ellen Lock, a vocational rehabilitation witness for Roos Foods, performed a labor market survey. Lock testified that the survey was a representative sample of positions available to Guardado. Lock was aware of Guardado's job history, her inability to speak English, educational history, and her physical limitations. Lock identified eight potential positions in her labor market survey that she claimed were suitable for Guardado. Lock acknowledged that two of the jobs that Dr. Schwartz took issue with were probably not suitable for Guardado. Lock was not aware of Guardado's legal inability to work in the United States. Lock stated it would be relevant to employers, but she did not ask them if they would hire an undocumented worker. Therefore, there is no evidence in the record that there are jobs are available to Guardado with her qualifications and limitations.

The Board found that while Guardado was medically able to work with restrictions, she belonged in the "odd-lot" category because of her individual circumstances, thus shifting the burden to Roos Foods to show the availability of regular employment. The Board found that Roos Foods could not carry its burden to show that work was available to Guardado with her qualifications and limitations because Roos Foods' own witness could not testify that there was any work available for Guardado in light of her undocumented status.

Roos Foods argues that the Board's consideration of Guardado's immigration status was inappropriate and unrelated to her accident at work. The Delaware Supreme Court in *Campos,* a total disability case, addressed this, stating that federal restrictions that prevent employers from hiring undocumented workers may make it more difficult for an employer to prove job availability, but any difficulty is appropriately borne by the employer, who must take the employee as it hired [her]. [16] Guardado was an undocumented worker when she was hired by Roos Foods. Roos Foods could have prevented the problems it now complains of if it had only checked Guardado's immigration status before it hired her. Roos Foods, as the Supreme Court ruled in *Campos,* must take Guardado as it hired her. The fact that Guardado may have difficulty getting another job because of her age, low education level, lack of skills and work experience, physical limitations and immigration status is something that Roos Foods must accept.

CONCLUSION

*4 The Board's finding that 1) Guardado was medically able to work with restrictions, 2) was a *prima facie* displaced worker, and 3) Roos Foods did not establish that work was available to Guardado within her restrictions and qualifications is based upon substantial evidence in the record and free from legal error.

The Industrial Accident Board's decision is **AFFIRMED.**

IT IS SO ORDERED.

All Citations

Not Reported in A.3d, 2016 WL 355002

Footnotes

1 *General Motors v. McNemar,* 202 A.2d 803, 805 (Del.1964); *General Motors v. Freeman,* 164 A.2d 686 (Del.1960).

2 *Oceanport Ind. v. Wilmington Stevedores,* 636 A.2d 892, 899 (Del.1994); *Battista v. Chrysler Corp.,* 517 A.2d 295, 297 (Del.Super.1986), *app. dism.,* 515 A.2d 397 (Del.1986)(TABLE).

3 *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (Del.1965).

4 29 *Del.C.* § 10142(d).

5 *Person–Gaines v. Pepco Holdings Inc.,* 981 A.2d 1159, 1161 (Del.2009).

6 *Dallachiesa v. General Motors Corp.,* 140 A.2d 137 (Del.Super.1958).

7 *Howell v. Supermarkets General Corp.,* 340 A.2d 833, 835 (Del.1975).

8 *Id.*

9 *Id.*

10 *Campos v. Daisy Construction Company*, 107 A.3d 570 (Del.2014).

11 *Torres v. Allen Family Foods,* 672 A.2d 26, 30 (Del.1996) citing *Ham v. Chrsyler Corp.* 231 A.2d 258, 261 (Del.1967).

12 *Chrysler Corp., v. Duff,* 314 A.2d 915, 916 (Del.1973).

13 See *Vasquez v. Abex Corp.,* 618 A.2d 91 (Del.1992)(TABLE), 1992 WL 397454, at *2 (Del. Nov. 5, 1992).

14 *Chrysler Corporation v. Duff* 314 A.2d 915, 916–17 (Del.1973).

15 *Campos v. Daisy Construction Company,* 107 A.3d 570, 576 (Del.2014) citing *Abex v. Brinkley*, 252 A.2d 552, 553 (Del.Super.1969).

16 *Campos v. Daisy Construction Company,* 107 A.3d 570, 572 (Del.2014).

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