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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| **Roos Foods**,<br><br>Employer/Appellant Below, Appellant,<br><br>v.<br><br>**Magdalena Guardado**,<br><br>Claimant/Appellee Below, Appellee. | No. 160, 2016<br><br>Court Below: The Superior Court of the State of Delaware, C.A. No. S15A-05-002-ESB (1/26/16) |

# Answering Brief of the Claimant Below-Appellee

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## Nature of the Proceedings

This is an appeal of an Industrial Accident Board (hereinafter "I.A.B." or "Board") decision dated April 7, 2015 in the case of Magdalena Guardado v. Roos Foods, IAB Hearing No. 1405006 (4/7/2015). That decision denied the Employer's Petition for Review, which sought to end or reduce the Claimant's ongoing total disability lost wage benefits.

Following the Board's decision, the Employer below, Appellant appealed that decision to the Superior Court. Following briefing, the Superior Court issued a decision dated January 26, 2016 finding that the Board's decision was supported by substantial evidence and free from legal error. Thereafter, the Claimant below-Appellant filed the instant appeal to the Superior Court of the State of Delaware. Following briefing, the Superior Court issued a decision dated January 26, 2016 affirming the decision of the Industrial Accident Board. Roos Foods v. Guardado, C.A. No. S15A-05-002-ESB (Del.Super.Ct. 1/26/2016).

The Employer below-Appellant thereafter appealed the decision to this Court.

## Summary of Argument

1. Denied. The Superior Court properly reviewed the decision below, and analyzed the record evidence before the Board to determine that the Board's decision was supported by substantial evidence and free from legal error.

2. Denied. The Industrial Accident Board correctly determined that the Claimant is *prima facie* displaced. The Board identified the relevant considerations for determination of whether the Claimant was *prima facie* displaced, including that of her undocumented status. The Board properly determined that the Claimant's undocumented status warranted a finding that she was *prima facie* displaced; that is, that her physical impairment, coupled with other factors impacting her employability, create a presumption that she is displaced from the general labor market.

3. Denied. The Board properly applied the Campos decision, as it clearly addresses the relevance of an injured worker's undocumented status and resulting inability to legally obtain employment as impacting the claimant's ability to return to work following a work injury. Further, the Court in Campos clearly articulated the public policies underlying its determination that a claimant's undocumented status is clearly relevant to a claimant's prospects for returning to work, and the Employer's attempt to re-argue those public policy considerations here should be unavailing.

## Statement of Facts

The Claimant below-Appellee is Magdalena Guardado. The Employer below-Appellant is Roos Foods.

The relevant facts are straightforward; indeed, there are no material factual disputes that bear on the appeal. The parties' Trial Stipulation[1] identified certain relevant and agreed-upon facts, including that:

> The claimant suffered a compensable industrial accident on 6/22/2010, resulting in injuries to her left wrist.
>
> The claimant underwent surgery on 6/18/2014, consisting of a left wrist fusion, performed by Dr. Richard DuShuttle.
>
> The employer filed a Petition for Review on 11/7/2014, alleging the claimant's entitlement to ongoing total disability benefits has ended.
>
> Both Dr. DuShuttle and Dr. Schwartz (defense doctor) believe the claimant is physically capable of returning to work with restrictions.
>
> The issue before the Industrial Accident Board is whether there is work available to the claimant within her applicable restrictions and, if so, whether her restrictions result in a loss of earning capacity, entitling her to partial disability benefits. [2]

Aside from the medical testimony on Claimant's work restrictions, the Employer's case also included testimony from Ms. Ellen Lock, a vocational rehabilitation witness who had performed a labor market survey. Trial Transcript at 16, Employer's Appendix at A-70; (hereinafter cited "TR-__; A-__"). Ms. Lock testified that the

[1] As required by Board Rule 14(A).
[2] Trial Stipluation, Guardado v. Roos Foods (Appendix at B-____).

survey was a representative sample of positions available for Ms. Guardado. TR-16, 17; A-70, 71. She knew that the Claimant's job history included the job with Roos Foods as a food operator in production, and that the Claimant did not speak English. TR-17; A-71. Ms. Lock assumed that the Claimant did not have a high school education. Id. The Roos Foods job was an unskilled job in production and assembly. Id. Ms. Lock also assumed that the Claimant could do right-handed work with the use of the (affected) left hand only as an assist hand. TR-18; A-72. Ms. Lock identified eight potential jobs in her labor market survey that she contended were suitable to the Claimant's restrictions and qualifications. TR-18, 19; A-72, 73.

Ms. Lock acknowledged that there is a difference between jobs that are available in the labor market and jobs that are available to Ms. Guardado in particular. TR-26; A-80. Ms. Lock only considered that (1) Ms. Guardado needed a job that would hire a non-English speaking employee; (2) she needed a job consistent with her physical limitations resulting from her work injury; (3) she needed a job within a reasonable geographical radius of her home; and (4) she needed a job that did not require a high school diploma. TR-29; A-83.

Significantly, Ms. Lock was "not aware … one way or another" whether Ms. Guardado was legally authorized to work in the United States. TR-30; A-84. Ms. Lock did acknowledge that a claimant's legal ability to work in the US is relevant to a claimant's employability: "employers would want her to be a legal worker." Id. Ms.

Lock further acknowledged that employers are required under federal law to hire only legal, documented workers. Id. She confirmed that she did not ask any of the employers on the labor market survey if they would consider hiring an undocumented worker. Id. None of the employers otherwise told Ms. Lock that they would hire undocumented workers. Id. Finally, Ms. Lock admitted that, if the Claimant was undocumented, then Ms. Lock was unable able to say whether any of the jobs on the labor market survey would be available to Ms. Guardado. TR-31; A-85. She further admitted that it would be against federal law for any of the employers identified on the labor market survey to hire the Claimant if she is undocumented. Id.

The Claimant also testified before the Board.[3] She was 38 years old at the time of the hearing, and had worked for Roos Foods for about five years. TR-41; A-95. That was the only job she had ever held. Id. Ms. Guardado testified that she obtained the equivalent of a high school diploma in her native El Salvador. TR-41, 42; A-95, 96. She further confirmed that she does not speak or write English. TR-42; A-96.

Ms. Guardado came to the United States in 2004. Id. She is not a U.S. citizen, nor does she have any resident alien status, green gard, or any other credentials or documentation that would establish that she is legally able to work in this country. TR-42, 43; A-96, 97. Claimant also testified regarding having looked for work since having been given restrictions by Dr. DuShuttle, but not having been able to find a

[3] Claimant was able to testify via telephonic translation service utilized by the Department of Labor.

job. TR-43, 44; A-97, 98,

Following the hearing, the Board denied the Employer's petition for review, finding that the Claimant is medically employable, but that she provided reason to believe that she is displaced based upon her undocumented worker status. Guardado, *supra* at *7-8. The Board therefore shifted the burden to the Employer to present evidence of the availability of regular employment opportunities "within all of Claimant's capabilities." Id. at *8. The Board specifically found the Claimant to be a *prima facie* displaced worker, citing Campos v. Daisy Construction, 107 A.3d. 570 (Del. 2014). The Board therefore placed the burden of proving job availability to the Claimant on the Employer.

The Board went on to assess Ms. Lock's testimony, and found that her admission that she was unaware of the Claimant's undocumented status and her resulting failure to inquire as to availability of jobs for undocumented workers resulted in a labor market survey that did not show regular employment opportunities available to this Claimant. Guardado, *supra* at 10-11. The Board concluded "that Claimant qualifies as a displaced worker based upon her undocumented legal status and [that] Employer has failed to present a Labor Market Survey that shows regular employment opportunities within Claimant's capabilities as an undocumented injured worker." Id. at 11.

Following the IAB decision, the Employer filed an appeal to the Superior

Court. After briefing, the Superior Court affirmed the Board's decision. Roos Foods v. Guardado, C.A. No. S15A-05-002-ESB (Del.Super.Ct. 1/26/2016) ("Guardado Superior"). The Superior Court found the determination that Ms. Guardado is a *prima facie* displaced worker to be based upon substantial evidence and free from legal error. Guardado Superior at *5. The Court also found that the Board's finding that the Employer's labor market survey evidence failed to demonstrate the availability of such regular employment to Ms. Guardado was similarly supported by substantial evidence and free from legal error. Id. at *7. The Superior Court went on to specifically reject the Employer/Appellant's argument that the Claimant's immigration status was irrelevant to her employability and displaced worker status, relying on Campos v. Daisy Construction, 107 A.3d 570 (Del. 2014).

The Employer/Appellant thereafter filed the present appeal to this Court. The Employer/Appellant's Opening Brief having been filed, this is the Clamaint/Appellee's Answering Brief.

## Argument

ISSUE 1: The Industrial Accident Board correctly determined that the Claimant is a displaced worker.

**Question Presented**

The question of the Claimant's status as a displaced worker was an essential element of the Employer's Petition for Review and was addressed as early as opening statements on pages 5 and 6 of the hearing transcript (A-__), and thereafter thoroughly treated in closing arguments.

**Scope of Review**

In reviewing whether the IAB properly exercised its authority in applying the facts to the law, the role of the appellate court is to examine the record to determine whether substantial evidence exists to support the findings below. Hebb v. Swindell-Dressler, Inc., 394 A.2d 249 (Del. 1978); Histed v. A.I. duPont de Nemours & Co., 621 A.2d 340 (Del. 1993). "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Histed, *supra*, citing Olney v. Cooch, 425 A.2d 610, 614 (Del. 1981). The Court's duty is to weigh and evaluate the evidence for sufficiency to support the Board's findings. M.A. Hartnett, Inc. v. Coleman, 226 A.2d 910 (Del. 1967). This Court's review of questions of law is *de novo*. Duvall v. Charles Connell Roofing, 564 A.2d 1132 (Del. 1989).

**Merits of Argument**

The fundamental crux of the Employer's argument in this case is that Ms. Guardado's status as an undocumented worker should be irrelevant to the question of her employability. This Court has already ruled, as recently as November 2014 and in an *en banc* decision, that a claimant's status as an undocumented worker is very much relevant to the issue of whether there is employment available to an injured worker. Campos v. Daisy Construction, 107 A.3d 570 (Del. 2014). The Employer's appeal in this case seeks to re-argue this Court's decision in Campos and reach a different result.

The dispute before the Court is limited to this narrow issue – there is no material dispute about the Claimant's work restrictions as a result of her injury, nor about her vocational, educational and other qualifications. There is also no factual dispute concerning whether there is work available for an undocumented worker – the Employer's vocational witness testified that she was unable to say whether any of the jobs on the labor market survey would be available to Ms. Guardado as an undocumented worker. TR-31; A-85. Thus, if the Claimant's status as an undocumented worker is indeed relevant and a propoer consideration in evaluating the Claimant's employability under the Displaced Worker Doctrine, then the Board's decision was properly supported by the evidence and free from legal error and should therefore be affirmed.

## I. The History and and Policies Underlying the Displaced Worker Doctrine

The Displaced Worker Doctrine has been part of Delaware workers' compensation law for nearly fifty years. This Court in M.A. Hartnett, Inc. v. Coleman, 226 A.2d 910 (Del. 1967) first alluded to the concept, in holding "total disability" is not to be interpreted as "utter helplessness"; the Court went on to note "that the essence of the test of total disability is "the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps." Id. at 180. Even from those early beginnings in Delaware there has always been more to the notion of total disability than simply a medical release to work (with or without restrictions).

Hartnett was followed by Ham v. Chrysler, in which this Court further elucidated the doctrine:

> [T]he degree of compensable disability depends upon the degree of impairment of earning capacity. To be more specific, the determination of total disability requires a consideration and weighing of not only the medical and physical facts but also such factors as the employee's age, education, general background, occupational and general experience, emotional stability, the nature of the work performable under the physical impairment, and the availability of such work. The proper balancing of the medical and wage-loss factors is the essence of the problem…. [T]he finder of fact must take into consideration not only the medical testimony but also the facts and circumstances that may relate to the claimant as a 'unit of labor' in his handicapped condition. A workman may be totally disabled economically, and within the meaning of the

> Workmen's Compensation Law, although only partially disabled physically. In this connection, inability to secure work, if causally connected to the injury, is as important a factor as the inability to work.

Ham v. Chrysler, 231 A.2d 258 (1967) (citations omitted). The focus here is on the injured worker as a 'unit of labor' – not the work restrictions taken in isolation, but *all of the factors*, both related to the work injury and independent of it, that impact a claimant's ability to obtain work.

Ham was followed by Franklin Fabricators v. Irwin, in which the Court held that the employee's "physical impairment, coupled with other factors such as the injured employee's mental capacity, education, training or age" may constitute a *prima facie* showing that the employee is displaced. Franklin Fabricators v. Irwin, 306 A.2d 734, 737 (Del. 1973). Under the Displaced Worker Doctrine, one may be totally disabled economically despite being only partially disabled medically. Governor Bacon Health Center v. Noll, 315 A.2d 601 (Del.Super.Ct. 1974). Thus the displaced worker issue is not merely concerned with whether there are jobs available in the general labor market within a claimant's restrictions and qualifications; the Displaced Worker Doctrine must necessarily address whether any such jobs are "realistically 'within reach' of the disabled person". Abex Corp. v. Brinkley, 252 A.2d 552 (Del.Super.Ct. 1969).

These concepts cut to the heart of the instant case: Ms. Guardado is medically restricted to one-handed duty as a result of her work injury; what work is 'realistically

within [her] reach' at this time? Given the above caselaw, the Board cannot consider that question *without* addressing her age, her education, vocational experience, lack of English-language skills, and her status as an undocumented worker – all factors that bear on her ability to obtain work. The Employer acknowledges as much, noting that the Displaced Worker Doctrine "requires careful inspection of the factors specific to the individual's background and suitability [for] employment."[4] The essence of the Displaced Worker Doctrine analysis requires looking at the Claimant as a whole, with all of her limitations and qualifications, to evaluate her prospects for employment in the general labor market now that she is further impaired by the work injury and resulting medical restrictions.

## II. The Board's Decision Does Not Create a New Classification of Displaced Worker.

It is worth noting that the notion of a "displaced worker" is separate and apart from the concept of a "*prima facie*" displaced worker – the latter is merely the first step in evaluating the shifting burdens of proof that are part of the Board's analysis of the Displaced Worker Doctrine under Franklin Fabricators:

> 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 within the employee's capabilities. . . . If, on the other hand, the evidence of degree

[4] Employer's Opening Brief at *14.

> of physical impairment, coupled with the other specified factors, does not obviously place the employee *prima facie* in the "odd-lot" category, the primary burden is upon the employee to show that he has made reasonable efforts to secure suitable employment which have been unsuccessful because of the injury; upon such *prima facie* showing of "odd-lot" classification, the *Ham* burden of proof is imposed upon the employer, seeking to terminate total disability compensation, to show availability to the worker, thus "displaced", of regular employment within his capabilities.

Franklin Fabricators, *supra* at 757. Thus, a claimant can be determined to be a "*prima facie*" displaced worker on the way to the ultimate determination of whether a claimant is displaced, but such a finding is not necessary to the ultimate displaced worker determination. Whether a claimant is *prima facie* displaced or not *prima facie* displaced, there is always a further step in the analysis before the Board can conclude that a claimant is *actually* displaced.

The Employer/Appellant's argument that the Board has created a "new classification of displaced worker" in referencing Ms. Guardado's undocumented worker status in evaluating whether she is a *prima facie* displaced worker[5] is misplaced. The Board's decision simply recognizes that the longstanding concept of a displaced worker applies with equal force to Ms. Guardado, who who was engaged in the workforce prior to this injury and is no longer so engaged because her restrictions, combined with her vocational, educational, and other factors bearing on her employability, prevent her return to the workforce. There is no notion of 'per se'

[5] Employer's Opening Brief at *11.

displaced, or displaced 'as a matter of law' in the Displaced Worker Doctrine caselaw, and the Board has not created any sort of 'per se' doctrine in this case.

Further, Employer also misconstrues the Claimant's argument below in this case, when it alleges that Claimant contended that she was "*per se* disqualified from work solely because of her legal ineligibility to be employed in the United States…".[6] In fact, Claimant argued below that she was ***prima facie* displaced** – this is a term of art in Delaware workers' compensation law (as more fully described by Hartnett and Franklin Fabricators, *supra*) with a different meaning than "*per se.*"[7] The Claimant does not contend that the claimant's undocumented worker status *per se* disqualifies her from work – indeed, it is self-evident that she (and Mr. Campos, and many other undocumented workers) became employed previously notwithstanding her undocumented status. Claimant's contention, to be clear, is that her status as an undocumented worker is a factor that *must be considered* in the Displaced Worker Doctrine analysis, where it of necessity weighs heavily in favor of a finding that a claimant is *actually displaced* from the labor market.[8]

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[6] Employer's Opening Brief at *15.

[7] "Per se" is defined by Black's Law Dictionary as "By itself; taken alone; by means of itself; through itself; inherently; in isolation; unconnected with other matters; simply as such; in its own nature without reference to its relation." *Black's Law Dictionary*, Sixth Edition (West Publishing 1990).

[8] Further, Campos itself does not create a further category of 'per se' displaced worker – Campos explicitly recognizes that, despite undocumented status, such workers can, and do, return to the workforce. Thus, even in the case of an undocumented displaced worker, the Court recognizes that this is not a permanent condition, as the Employer's concept of a 'per se' displaced worker would suggest.

## III. The Campos Decision Explicitly Recognizes that a Claimant's Undocumented Status is Relevant to the Question of Employability.

This Court's 2014 *en banc* decision in Campos v. Daisy Construction, 107 A.3d 570 (Del. 2014), unequivocally established that a claimant's legal status to work in the United States is relevant to the question of an injured worker's employability. Campos dealt with a purported job offer by the Employer in that case (Daisy Construction), which was conditioned on the Claimant being able to provide a valid social security number (which Daisy knew the Claimant could not do). The Court determined that this "offer" did not demonstrate that there was work available to Mr. Campos, and reversed the Board's denial of benefits on that basis. Campos, *supra* at 576.

The Employer points out that this Court noted in Campos that the Displaced Worker Doctrine was not relevant to Campos' appeal in that case. The Employer intimates that it was the Court that determined the relevance of the Displaced Worker Doctrine in that case, but in fact it was the Claimant, Mr. Campos, who made that decision. Campos (Del. 11/13/2014) at *7 ("Campos does not claim that he is displaced from the labor market..."). That distinction stands in sharp contrast to the instant case, where both parties argued at length about the Claimant's status as a displaced worker before the Board.

Notwithstanding that the claimant in Campos did not argue that he was displaced, the concept of availability of employment that is inherent in the Displaced

Worker Doctrine was very much the issue in Campos, even though for unusual reasons related to how the issues were raised and argued on appeal the Court did not directly address the question of termination of total disability benefits. It is clear that Campos at its core addresses the questions of a claimant's employability following a work injury in light of his status as an undocumented worker. Campos unquestionably addressed the question of what it means for work to be "available to this claimant" in light of his restrictions, his age, education, experience and vocational qualifications, and specifically his or her status as an undocumented worker. This Court in Campos cites Ham v. Chrysler, *supra*, in noting that:

> "[i]n determining an employee's 'earning power' following an injury, Delaware courts are authorized to consider other relevant factors that are related to the claimant's injury, including the claimant's age, education, general background, occupational and general experience, the nature of the work that can be perofrmed by a worker with the physical impairment, and the availability of that work."

Campos at *8, *citing* Ham, *supra* at 262. It is critical to note that the above language cited from Ham does not arise in the context of a determination of temporary *partial* disability benefits; rather, this evaluation of a claimant's 'earning power' arises in Ham in the context of determining whether he is employable at all – whether he is a Displaced Worker and thus entitled to continuing *total disability* benefits.[9] These are

[9] Ham, *supra* at 260. Significantly, the above quote selected by the Court in Campos is preceded by the following: "To be more specific, the determination of total disability requires a consideration and weighing of not only the medical and physical facts but also such factors as the claimant's age, education, general background…" Id. at 261 (emphasis added).

the very same considerations underlying the question of whether a claimant is economically displaced from the labor market (and thus *totally* disabled) as well as whether there is work available to this claimant in the event that he is not totally disabled but suffers some *partial* disability (i.e., reduced earning capacity) following his injury. The ultimate question in either case is whether "the employee is actually able to obtain a job given his particular circumstances." Campos, *supra* at *8. Accordingly, to say that the Campos decision does not apply to the Displaced Worker Doctrine defies common sense when the very test applied by the Court is the same whether the issue is termination of total disability benefits under the Displaced Worker Doctrine or a claimant's residual earning capacity in which the same factors affecting that claimant's employability are considered.

Fundamentally, the question the Court addressed in Campos – and answered – was whether Campos was actually able to obtain a job given his particular circumstances, including his undocumented status (which was pivotal to this Court's decision in Campos). If work is unavailable to him due to his particular circumstances (including his work injury and residual limitations, combined with all of the other vocational, age, education and other factors, *including his legal ability to work*), then the Claimant is economically displaced from the labor market notwithstanding his actual physical release to limited duty work. Thus, the Campos decision confirms that the factors to be considered in determining whether there is work available for a

particular injured worker include the Claimant's legal status to work in this country, in addition to the factors previously eneumerated: age, education, general background, experience, etc.[10] These issues are directly relevant to the question of whether a claimant remains totally disabled econonomically as a displaced worker, which is how the Campos decision was (correctly) applied by the Board in the instant case.

Finally as to the relevance of Campos to the Displaced Worker Doctrine analysis, the Employer also contends that this case presents an issue of first impression to this Court – whether the claimant's status as an undocumented worker is a proper consideration as part of the Displaced Worker Doctrine.[11] (Employer's Opening Brief at *22). This is not a question of first impression in this Court. Campos deals squarely with the issue of whether a claimant's legal eligibility to work is relevant to the question of whether there is employment available to this claimant in the context of an Employer's petition seeking to end ongoing lost wage benefits. Further, before Campos this Court decided Delaware Valley Field Services v.

[10] It is notable that this list of factors was never articulated by the Court as a conclusive list; they were described in Ham as "such factors as…". Ham at 261. Similarly, in Franklin Fabricators v. Irwin, the Court described the burden as follows: "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…" Id. (emphasis added).

[11] Notably, the Employer mistakenly inverts the question by arguing that the issue is "whether an injured worker's undocumented status automaticlaly triggers the displaced worker doctrine…" (Employer's Opening Brief at *22). In fact, the Displaced Worker Doctrine is a necessary part of the analysis of *any* petition seeking to end ongoing total disability benefits where there are residual medical restrictions – the IAB would analyze the evidence in light of the displaced worker doctrine irrespective of the claimant's legal status.

Ramirez, 61 A.3d 617 (Del. 2013), a case holding that a claimant's status as an undocumented worker, and subsequent deportation from the United States, did not disqualify him from continued receipt of total disability benefits. The question of whether legal ability to work is relevant to a claimant's entitlement to workers' compensation lost wage benefits is not a question of first impression in this Court. As such, cases from other jurisdictions reaching contrary holdings are not sufficient basis to overcome this Court's express rulings and articulations of public policy as outlined in Ramirez and Campos.

## IV. The Board correctly applied the Campos decision to the Displaced Worker Analysis.

The threshold question in the displaced worker analysis is whether a claimant is a *prima facie* displaced worker. That decision controls whether it is the claimant or the employer who has the burden of proof in the further analysis of whether a claimant is actually displaced from the labor market and will be entitled to continued total disability benefits. As noted *supra*, the relevant considerations include, in addition to the work restrictions, the claimant's age, education, vocational experience, mental capacity, training and other factors, *including*, under Campos, the claimant's ability to work legally in this country. The Board identified the relevant factors in its decision (after first noting that the Claimant is medically capable of working one-

handed light duty jobs[12]):

> Claimant testified that she came to the United States in 2004, but that 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 county the only place she has ever been employed is for Emlpoyer for five years. Claimant explained that while she is capable of reading and writing in her native language (Spanish) and garduated from high school in El Salvador, she can neither read nor write in English.

Guardado, IAB decision at *10. After reviewing the deficiencies in the labor market survey evidence, the Board concluded that it "is satisfied that Claimant qualifies as a displaced worker based upon her undocumented legal status and [that] Employer has failed to present a Labor Market Survey that shows regular employment opportunities within the Claimant's capabilities as an undocumented injured worker." Id. at *11.

As noted *supra*, 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. The Employer, in fact, mis-cites the Board's decision in this regard – whereas the Employer contends that the Board ruled that Guardado "qualifies as a displaced worker based upon her undocumented legal status."[13], the Board's opinion actually reads that Guardado "qualifies as a displaced worker based upon her undocumented legal status *and Employer has failed to present a Labor*

[12] Guardado IAB Decision, *supra* at *8.
[13] Employer's Opening Brief at *17. The punctuation appears here as it does in the Employer's brief.

*Market Survey that shows regular employment opporutnities within Claimant's capabilities as an undocumented injured worker."*[14] It is clear and evident that the Board understood the distinction between the preliminary *prima facie* displaced worker finding and the ultimate determination of the Claimant's status as a displaced worker after evaluating the shifting burden of proof and the Employer's labor market survey evidence which failed to establish the availability to this claimant of work within her restrictions and qualifications.

The Employer also contends that the Board failed to consider all of the factors of the displaced worker doctrine in its decision, contending that it "should have" considered (1) work-related injury to left wrist; (2) work restrictions resulting from left wrist injury; (3) high school education in El Salvador; (4) Claimant can read and write in her native language (Spanish); and (5) a five year work history with Roos Foods.[15] Claimant submits that the Board did, in fact, consider these elements, as evidenced by the quoted language above. Further, while these factors are important to the displaced worker analysis, it is also essential to consider that (6) she has virtually no English language skills; and (7) that she is, in fact, not able to legally work in this country.[16]

Interestingly, the Employer's argument invites the question: if (as Campos

[14] Guardado, IAB decision at *11 (italics added).
[15] Employer's Opening Brief at *16.
[16] Again, these factors were expressly referenced by the Board in its decision.

indicates) the Claimant's undocumented status is enough to result in a presumption of displacement (the practical effect of a *prima facie* displaced worker determination), what is the further effect of considering these additional factors, all of which are obvious further obstacles and limitations on Claimant's ability to become employed? If, as Employer suggests, this one reason – her undocumented status – was enough for the Board to find her *prima facie* displaced, how are five (or six) additional reasons that make re-employment still harder somehow a basis to find the Board's decision unsupported by substantial evidence? In other words, even if the Court were to find that the Board failed to consider any one, or several, or all of these additional obstacles to the Claimant's employment, such failure would be harmless error, as the Board has reached the correct result even if it considered less than all of the seven factors adversely affecting Ms. Guardado's employability.

The Employer also mistakenly asserts that the Claimant's unavailability for employment is due *solely* to her status as an undocumented worker. In the first instance, this does not distinguish Ms. Guardado's case from the facts in Campos, where the claimant's status as an undocumented worker was not disqualifying. Furthermore, we know that both Mr. Campos and Ms. Guardado previously overcame the obstacle of being undocumented and obtained employment with Daisy Construction and Roos Foods, respectively – it cannot be said that their undocumented status is an absolute bar to employment, as they have demonstrated

otherwise as a matter of record in both cases.

Indeed, it is not only the claimant's undocumented status that limited her ability to become employed initially with Roos Foods – she also had all of her limitations and qualifications as they existed before her work injury (her language barrier, lack of vocational experience, and limited education in El Salvador, in addition to a lack of work papers). Despite all of that, she *did in fact secure employment* in this country prior to her work injury. Further, in the 'but-for' sense, the reason she lost the job she had at Roos' Foods was because of her injury and subsequent surgery (having worked after the injury but prior to her wrist fusion surgery). TR-45, A-99. The added restrictions and constraints of her resulting injury-related limitations add still more barriers to her ability to be employed now in the general labor market, but it cannot be said that her undocumented status is the sole barrier to work at this time.

The employer in this case, as in Campos, enjoyed the benefits of hiring undocumented labor in its workplace. It now seeks further advantage by imposing all of the consequences of that employment on the injured worker; this Court in Campos has already said that it will not allow employers the "template for abuse" that would result from permitting employers to cast aside undocumented injured workers. Accordingly, there is a public policy at work in this case – this Court has already announced that, as between the undocumented worker and the employer, it is the

employer who will bear the burden of the claimant's unemployability under these circumstances, as the Employer must take the Claimant as it hired her. Campos, *supra* at *12-23.

To complete the Displaced Worker Doctrine analysis, once the Board determines that a claimant is *prima facie* displaced, the burden shifts to the Employer to rebut that presumption of displacement by showing that there is work available to this claimant within her restrictions, qualifications and limitations. Thus, the determination that Ms. Guardado was a *prima facie* displaced worker is not itself dispositive, as the Employer then has the further opoprtunity to establish the actual availability of work, which it attempted to do via the labor market survey.[17] In this case, however, the Employer failed as an evidentiary matter to show that there was work available to *this claimant* with her particular restrictions, qualifications and limitations, as the jobs on the labor market survey were only 'theoretically available' to Ms. Guardado –the Employer's labor market witness indicated that she could not say that these employers would consider Ms. Guardado for a position if she were undocumented. This Court has noted that this 'theoretical availability' of employment is unavailing, and will not establish the availablility of work to this claimant with her

[17] There are effectively two ways for an employer to prove job availability in connection with a Petition for Review seeking to end total disability benefits: the actual offer of employment (the Employer's approach in Campos), or a labor market survey showing the availability of work to this claimant in the general labor market (the Employer's argument in the instant case). They are functionally equivalent, in that substantial evidence of either would support a finding that there is work available for a claimant within his or her restrictions.

present constellation of restrictions, qualifications and limitations for employment. Campos, *supra*, citing Johnson Controls v. Fields, 758 A.2d 506 (Del. 2000). The Board's ultimate finding in this case that Ms. Guardado was displaced was expressly because, while the Employer could demonstrate that she was medically cleared to work with restrictions, the Employer could not establish that there was work available to Ms. Guardado within her restrictions and qualifications. Abex v. Brinkley, *supra*. The Board thus determined that the Employer had not rebutted the presumption arising from Ms. Guardado's status as a *prima facie* displaced worker, and the Employer's Petition for Review was properly denied as a result.

It is not, as the Employer contends, an 'open question' whether the claimant is a *prima facie* displaced worker; indeed, it is quite clear that she is not only *prima facie* but also *actually displaced* in light of all of the factors outlined above. It may be that her status as an undocumented worker is the most important of the factors; however, the Board did not abuse its discretion in weighing the multiple factors in this case to determine whether there is employment regularly available in the labor market to this Claimant as a whole, considering all of her medical, educational, vocational and other qualifications and limitations, and then finding thereafter that the Employer's evidence failed to establish the actual availability of employment to this claimant, with all of her restrictions, qualificatons and limitations.

The Employer thus failed in its responsibility to establish both that the

Claimant was medically released to return to work and that there was work available to this claimant within her restrictions and qualifications. Campos, *supra* at 575, 576, *citing* Waddell v. Chrysler, 1983 WL 413321 (Del.Super.Ct. 6/7/1983). This is an essential, threshold requirement on the Employer's Petition for Review – the burden is on the Employer to establish these elements, irrespective of whether the Claimant is deemed a displaced worker (*prima facie* or otherwise), in order to obtain a termination of the Claimant's total disability benefits. Id.; Campos at *6-7. The Board therefore correctly denied the Employer's petition for review; the decision is well founded in both fact and law and therefore must be affirmed.

## VI. The Superior Court Did Not Exceed the Scope of Appellate Review and Properly Affirmed the Decision of the Industrial Accident Board.

The Employer argues that the Superior Court exceeded the scope of appellate review, and therefore should be reversed on that basis. While Claimant disagrees with the Employer's assertion, it is worth noting that this Court's role on appeal is to review the Board's decision directly; there is no deference to the Superior Court's decision as an intermediate appellate court. Flax v. State, No. 450, 2003 (Del. June 29, 2004) at *4. Accordingly, even if the Superior Court exceeded the scope of appellate review, this Court will still review the Board's decision and the record for any errors of law and to determine if the Board's decision was supported by substantial evidence.

The Employer's contention on this issue is that the Superior Court cited

Guardado's age, education, lack of workplace training and little experience, language barrier, unskilled labor experience, and work restrictions as supporting the Board's finding that Claimant was *prima facie* displaced. As noted *supra*, the Board did, in fact, reference those factors in its decision, and more specifically in its "Findings of Fact and Conclusions of Law" – not merely in the Summary of Evidence that preceded it in the decision. Guardado IAB decision at *10-11. The Superior Court did not make independent findings of fact – it merely identified the findings of the IAB in its decision.

Further, the Superior Court's obligation is to determine whether substantial evidence exists to support the Board's decision. The Court must necessarily review that evidence to perform that function. The Court noted not only that the evidence for a finding of displaced worker existed in consideration of the undocumented worker issue, but further, that even without that issue, the balance of the factors bearing on Ms. Guardado's employment "certainly portray a woman disqualified from regular employment in any well-known branch of the competitive labor market." Guardado Superior Court at *7. The Court further noted that "[w]hen 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 ot have a very difficult time finding a job." Id. That is to say, the Court found substantial evidence in the record to support the Board's conclusions.

## VII. The Public Policy Concerns Outlined in Campos are Served by the Board's Denial of the Employer's Petition for Review.

The Employer's opening brief also makes a lengthy policy argument against this Court's ruling in Campos. The Employer argues that this Court's stated objective of equal treatment of undocumented workers (articulated in Campos) is itself undermined by Campos. As a rather circular argument, it is perhaps enough to say that this Court has already decided in Campos that the public policy of ensuring such equal treatment is served by the Court's ruling in that case. Indeed, the Campos decision is remarkable in the extent to which the Court articulates the numerous public policy bases in support of its conclusion -- even on a superficial level, it is notable that pages 12 to 23 of a 24 page opinion relate exclusively to the public policy concerns that undergird the Court's decision, including an extensive survey of cases from other jurisdictions.

The Employer's contention that an injured worker who is possessed of documents authorizing him to work in this country is somehow disadvantaged or inequitably treated by the Campos decision is remarkable in its willingness to ignore the fundamental distinction – that the injured worker who is authorized to work in this country is, in fact, legally employable. Whatever he is physically capable of doing, should he find an employer willing to hire him, he can properly fill out an I-9 form and satisfy the Employer's required 'e-verification' of his legal ability to work. That distinction inherently places him in an *advantaged* state, over an injured worker

with the same qualifications and physical restrictions who is *not* able to work legally. That undocumented worker, should she find an employer willing to hire her with her restrictions and qualifications, is by definition unable to legitimately complete an I-9 form and have her legal ability to work verified by the federal government. The Employer would have you discard Campos and find that these two hypothetical workers are on an equal footing as a 'unit of labor' in the general labor market, when it is patently clear that they are not.

The Employer also makes an argument that a hypothetical highly educated, minimally-injured worker would similarly be entitled to a finding of displacement. The Employer, however, widely oversteps the bounds of the Displaced Worker Doctrine, which by definition applies to unskilled workers who are so handicapped by a compensable injury that they are effectively unemployable. Guardado Superior at *6, *citing* Vasquez v. Abex Corp., 618 A.2d 91 (Del. 1992) (TABLE). Further, while the Court noted in Campos that it "need not decide today what result would pertain in a different factual scenario…"[18], Claimant submits that the hypothetical doctor who is fully fluent in English and can do all but the heaviest work is hypothetically most likely to be working in a STEM field – in Silicon Valley, or as an engineer, medical doctor or PhD scientist – and whose hypothetical employer actively recruits foreign STEM talent and secures H1-B Visas to permit those

[18] Campos at 583.

workers to legally bring their talents to this country. In short, these hypothetical workers are not the problem the Displaced Worker Doctrine (or Campos) seeks to address.

Employer also argues that the caselaw requires a causal nexus between the inability to secure employment and that disability 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.[19] Indeed, Claimant agrees that the injured worker must have a disability or restriction related to the work injury in order to be entitled to lost wage benefits, either total or partial. Claimant has such a disability in the instant case – she has a fused wrist, and two doctors who agree that the Claimant may only do one-handed work.

Employer, however, seeks to extend this concept by arguing that *each and every element affecting the claimant's employability must result from the work injury*. In other words, the Claimant's undocumented status is not relevant because it does not result from the work injury itself. Were that the rule, however, we would have no need of the Displaced Worker Doctrine at all, as none of the additional factors considered under the Displaced Worker Doctrine (beyond the work restrictions) emanate from the work injury: The claimant's age is personal to her, having nothing to do with her accident; so too with her education, vocational background,

[19] Employer's Opening Brief at *24, *citing* Burton Transportation v. Willoughby, 265 A.2d 22 (Del. 1970) and Hensley v. Artic Roofing, Inc., 369 A.2d 678 (Del. 1976).

occupational and general experience, emotional stability, mental capacity, and training – all factors relevant under Ham, Franklin Fabricators, Abex, and their progeny. They are relevant and essential to the Displaced Worker Doctrine; that the Claimant's status as an undocumented worker is similarly personal to her does not disqualify it as a valid consideration on the question of her employability, any more than her language barrier, age, or vocational experience do.

Similarly, the Employer's argument that the Claimant's disqualification from employment arises independently of the work injury misses the point – she *had a job* before this work injury, notwithstanding her undocumented status. This Employer hired her – presumably knowingly or with wilful ignorance of her status, in light of the federal requirement that employers verify their employees' legal status for work under the Immigration Reform Control Act ("IRCA"), 8 U.S.C. § 1324a. She now no longer has that job *because of* the work injury. That's the causal nexus that results in the application of the Displaced Worker Doctrine to determine whether she is employable with her restrictions, coupled with *all of* her other qualifications and limitations.

The Employer also obliquely attempts to argue that Campos is distinguished from the instant case because this case involves a labor market survey, whereas Campos involved a purported offer of employment by the Employer in that case. In doing so, Employer' cites a footnote to the Campos decision which refers to Torres v.

Allen Family Foods, 672 A.2d 26 (Del 1995), which the Campos court distinguished. However, in doing so the Employer misses critical differences, namely that (1) Torres did not involve an undocumented worker; and (2) the Board accepted the labor market survey evidence in Torres as evidencing work available to that claimant, whereas the Board rejected the labor market survey evidence in this case as inapplicable to Ms. Guardado. In particular, the testimony in this case differs dramatically from Torres, in which the vocational rehabilitation testimony identified "jobs that were available to someone with the employee's qualifications and limitations." Campos, *supra* at *11, n.23. Standing in stark contrast to that testimony in Torres is the vocational witness' testimony in the instant case, wherein Ms. Lock *could not say* that the jobs identified would be available to someone with Ms. Guardado's restrictions, qualifications and limitations. More precisely, she could not say that any of the employers identified on the labor market survey would accept undocumented workers, and she conceded that it would violate Federal law for any of the identified employers to hire an undocumented worker. TR-31; A-85; Guardado, *supra* at *5. The Board *properly* rejected the labor market survey because it "failed … to show[] regular employment opportunities within the Claimant's capabilities as an undocumented injured worker." Guardado, *supra* at *11. The Board further noted that the labor market survey "did not address all of Claimant's restrictions; and therefore, cannot be considered reliable evidence of jobs actually available to

Claimant." Id. The Board's ruling is well founded in fact and law – there is no evidence in the record below that there is work available *to this claimant*, with her restrictions, limitations and qualifications for employment (which necessarily includes her status as an undocumented worker) – and thus properly denied the Employer's Petition for Review. Abex v. Brinkley, 252 A.2d 552, 553 (Del.Super.Ct. 1969).

Thus, Torres is distinguishable on its facts, as Roos Foods *did not* establish via a labor market survey the availablility of work *to this claimant* within the general labor market. Employer's labor market witness did not testify that any of the jobs identified would be available to an undocumented worker. Notably, the Supreme Court in Campos anticipated this possibility, when it commented that:

> [Employer] may find it difficult to demonstrate job availability, as a labor market survey or some other form of proof may not identify jobs that are actually available to Campos. **But any difficulty in proving job availability is properly borne by the employer, who must take the worker as it hired him.**

Campos, *supra* at *11-12. It is important that this Court has taken note of the very difficulty of which the Employer in the instant case complains, and having so noted, the Court has gone ahead and ruled as it has. It is similarly noteworthy that the Court takes the next twelve (extensively researched, annotated and footnoted) pages of the opinion (which is fully half of the Court's 24 page opinion) to explain the policy justifications and rationale behind its decision.

At the end of the day, the Employer's appeal at its core seeks a reversal of Campos, a ruling from this Court that Campos does not mean what it so clearly says. More specifically, the Employer would like for this Court to rule that a claimant's status as an undocumented worker (as hired by the employer) is irrelevant to the question of whether the Claimant can now return to the workforce with further physical limitations as a result of a work injury, in addition to that claimant's baseline vocational, educational and other relevant limitations and qualifications bearing on her relative value as a 'unit of labor' in the workforce. The Court held in Campos that "[Employer]'s statement that it would re-hire Campos if not for his immigration issues was insufficient to demonstrate job availability because the job was not in fact available for Campos to take." Id. at 572. The statement applies with equal force in this case when modified to fit the instant facts: "Employer's statement that there would be work available for Guardado in the labor market based on the labor market survey if not for her immigration issues was insufficient to demonstrate job availability because the jobs were not in fact available to Guardado to take."

## Conclusion

WHEREFORE, based on the foregoing, the Claimant Below Appellee, Magdalena Guardado, by and through her attorneys, Schmittinger & Rodgriguez, P.A., hereby respectfully requests that the Court affirm the decision of the Superior Court, which affirmed the decision of the Industrial Accident Board, consistent with the statutes and case law referenced above.

Respectfully submitted,

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