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IN THE SUPREME COURT OF THE STATE OF DELAWARE

Magdalena Guardado,

Appellant Below-
Appellant,

v.

Roos Foods,

Appellee Below-
Appellee.

No. 116, 2018

Court Below: Superior Court
of the State of Delaware

C.A. No.: S17A-05-003-RFS

Opening Brief of the Appellant Below-Appellant

SCHMITTINGER AND RODRIGUEZ, P.A.

BY: Walt F. Schmittinger, Esquire
Candace E. Holmes, Esquire
414 South State Street
Post Office Box 497
Dover, Delaware 19903
Attorneys for Claimant Below-Appellant

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Nature of the Proceedings

This is an appeal of a Superior Court decision dated February 7, 2018, in the case of Magdalena Guardado v. Roos Foods, C.A. No. C.A. No. S17A-05-003 RFS (hereinafter "Guardado 2018").

On May 18, 2017, the Industrial Accident Board (hereinafter "I.A.B." or "Board") issued a decision in the case of Magdalena Guardado v. Roos Foods, IAB Hearing No. 1405006 (hereinafter "Guardado 2017"). The Board's decision granted the Employer's Petition for Review and ended the Claimant's ongoing total disability lost wage benefits. The Board's May 18, 2017, decision followed a prior decision in which the Board had denied the Employer's Petition for Review[1], which decision was appealed and ultimately reversed by the Delaware Supreme Court[2].

Thereafter, the Claimant below-Appellant filed an appeal to the Superior Court of the State of Delaware, in and for Kent County. The Superior Court affirmed the Board's decision. The Court below interpreted the Guardado Supreme decision as only requiring Employer to demonstrate to the Board "the availability of jobs available to Guardado and [that] the jobs are within the

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[1] Magdalena Guardado v. Roos Foods, IAB Hearing No. 1405006 (4/7/2015) (hereinafter "Guardado 2015").

[2] Roos Foods v. Guardado, No. 160, 2016 (Del. 11/29/2016) (hereinafter "Guardado Supreme").

categories of occupations and industries employing undocumented workers in Delaware."[3] The Court below concluded that Employer had "complied with the Supreme Court's directives."[4]

The Appellant below-Appellant filed a timely appeal with this Court on March 7, 2018. This is the Appellant below-Appellant's Opening Brief and Appendix.

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[3] Guardado v. Roos Foods, C.A. No. S17A-05-003 RFS (Del. Super. Feb. 7, 2018).

[4] *Id.*

Summary of Argument

1. The Board erred in concluding that the labor market survey coupled with Dr. Toohey's testimony was sufficient to establish that jobs were available to Claimant, specifically, within her capabilities and in interpreting Dr. Toohey's testimony and report regarding thousands of undocumented immigrants working in Delaware, in the occupations and industries listed in the labor market survey, to mean that thousands of jobs were *available* to undocumented workers in Delaware.
2. The Superior Court erred in finding that Employer had complied with this Court's directives and in concluding that the Board's decision was supported by substantial evidence where the record is devoid of actual jobs available to the Claimant.

Statement of Facts

The Appellant below-Appellant is Magdalena Guardado (hereinafter "Claimant"). The Appellee below-Appellee is Roos Foods (hereinafter "Employer").

Employer's petition before the IAB, dated November 7, 2014, sought to end Ms. Guardado's ongoing total disability benefits. Employer contended that the Claimant was medically able to work, albeit with restrictions, and that there was work available in the general labor market within the Claimant's restrictions and qualifications. Claimant acknowledged that she had been released to work with restrictions; however, Claimant contended that she was a displaced from the labor market, and thus continued to be entitled to total disability benefits, as a result of her restrictions, vocational history, education, and her status as an undocumented worker.

The Employer's petition was originally heard by the Board on March 24, 2015. At that time Claimant successfully argued that she was a displaced worker by virtue of her vocational status, work restrictions and status as an undocumented worker. The Board noted that Ms. Guardado was not a United States citizen and had no documents allowing her to work legally in this country; she had only ever had one job (the one at which she was injured) where she had worked for five years; that she could read and write in Spanish but could

neither read nor write in English; and she required the use of an intepreter in order to testify at the hearing. Guardado 2015 at 10. The Board noted that the Employer's Labor Market Survey did not show the availability of work to Ms. Guardado, as the Employer's labor market witness was unaware of Claimant's undocumented status and had not inquired as to whether the jobs identified on the Labor Market Survey were available to undocumented workers. Id. The Board therefore found the Claimant to be a displaced worker following the 2015 hearing and denied the carrier's petition. Id.

The Employer appealed the Board's decision to the Superior Court, contending that a claimant's status as an undocumented worker is irrelevant to the Displaced Worker Doctrine analysis. That appeal resulted in a decision dated January 16, 2016,[5] in which the Court found that Ms. Guardado's undocumented status was, in fact, relevant to the Displaced Worker Doctrine analysis, and further, that Ms. Guardado was displaced from the labor market. Guardado, Superior Court at *10. The Superior Court therefore affirmed the 2015 decision of the IAB. Id.

The Employer pursued a further appeal to the Supreme Court, which ultimately resulted in a decision dated November 29, 2016, in which the

[5] Roos Foods v. Guardado, C.A. No. S15A-05-002-ESB (Del.Super.Ct. 1/26/2016) (hereinafter cited "Guardado, Superior Court at __").

Supreme Court confirmed that the Claimant's undocumented status is relevant to the Displaced Worker Doctrine analysis, but is not a factor to be considered in whether a claimant is a *prima facie* displaced worker. Guardado Supreme at *2. The Supreme Court's decision reversed and remanded the matter back to the Board for re-hearing on the Employer's Petition for Review. Id.

In the remand hearing of 4/27/2017, the parties stipulated to the medical evidence previously submitted to the Board, based on which the Board found at the 2015 hearing "that Claimant is medically capable of working one-handed light duty jobs." Guardado 2015 at 8. The issue in dispute centered on whether the Claimant was a displaced worker, and thus whether she remained entitled to ongoing total disability benefits.

The Employer's case in chief at the 2017 hearing included the testimony of Desmond Toohey, an Assistant Professor of Economics at the University of Delaware. Trial transcript at 14, Appendix at A-19 (Hereinafter cited "TR-14; A-19"). Dr. Toohey testified that his field of study is labor economics, which is the study of labor markets and how workers and employers interact, and how they sort into jobs. TR-15; A-20. Dr. Toohey testified that he performed research at the request of Employer's counsel regarding job categories for which undocumented workers are being hired. TR-17; A-22. Dr. Toohey testified that the goal of his research was to try to figure out how many unauthorized

immigrants there are by counting the foreign born population and then estimating how many legal foreign born people there are in the State of Delaware. TR-19; A-24. The difference between those two figures is an estimate of the number of 'not legal' foreign born individuals in the State of Delaware. Id. Dr. Toohey then determined what kinds of jobs these undocumented workers hold. TR-26; A-31. He then came up with estimates for the total number of unauthorized immigrants for each of several broad categories of jobs: management, business, service occupations, and sales and office work. TR-26, 27; A-31,32. In particular, Dr. Toohey estimated that service occupations (including many food service or housekeeping occupations) employ some 5,000 unauthorized immigrants in the State of Delaware. TR-27; A-32. He further estimates that sales and office jobs (including retail positions, stock clerks, and cashiers) would include another 1,000 estimated unauthorized immigrants employed in those positions. Id. Dr. Toohey confirmed that those estimates are just that – estimates – and the figures are rounded. TR-28; A-33. He could not, however, accurately identify the margin for error in his estimates. TR-32; A-37. Dr. Toohey did note that one of the studies on which he relied identified a margin of error of 20%. TR-33; A-38. He described the margin for error in his report as 'bigger than usual' in relation to some of the other work that Dr. Toohey does. Id.

Dr. Toohey also reviewed the labor market survey in this case, and testified that he attempted to identify which industries and occupations each of the jobs fell into. TR-29, 30; A-34,35. For example, the job listed as a crew kitchen position at Margaritas fell within the food preparation worker classification, which was a service occupation which Dr. Toohey opined employed approximately 5,000 unauthorized workers in Delaware. TR-30; A-35. Similarly, the Embassy Suites housekeeping job fell within the hospitality classification, a service industry in which Dr. Toohey opined employed approximately 4,000 undocumented workers in Delaware. TR-31; A-36. Dr. Toohey's 'ultimate conclusion' was that his research found that "thousands of unauthorized immigrants are employed in Delaware in each of the occupations and industries ... in the [labor market] survey." Id.

Dr. Toohey could not say what percentage of the total number of workers that undocumented workers represented in each of the occupational categories he identified. TR-34; A-39. He did suggest that in some of the occupations the percentage of undocumented workers as a proportion of the total number of workers would be 'in the single digits', although in the construction industry for example he would expect the proportion of undocumented workers to be 'in the [low] double digits'. TR-35, 50; A-40, 55. Dr. Toohey indicated that, in the Delaware labor market in general there are approximately 500,000 to 600,000

workers overall, and the number of unauthorized immigrants employed in Delaware is "in the low 20 [thousands]." TR-51; A-56.

Dr. Toohey confirmed that he was expressing no opinion about Ms. Guardado in particular and her prospects for being employed; he opined merely that there are unauthorized workers working in the State of Delaware in the several industries identified. TR-34; A-39.

Dr. Toohey also confirmed that he did not generate any statistics on the prevalence of workers with disabilities in the general labor market, and he further did not generate any statistics on the number of unauthorized workers with disabilities employed in the labor market. Id. Dr. Toohey confirmed that the survey statistics upon which he relied contained such data, including data on workers with disabilities. TR-36, 37; A-41, 42. In particular, the Survey of Income and Program Participation on which Dr. Toohey relied contained information regarding education, language, nativity and citizenship, and disability, among other factors. TR-37; A-42. Claimant's counsel asked whether he could have reached conclusions about whether workers in these kinds of jobs have those characteristics (i.e., disability, language fluency, education, etc.); Dr. Toohey indicated that:

> A. I'm reluctant to further cut these occupation and industry categories too much at the level of Delaware, because we start to talk about smaller and smaller populations and the estimates and then all these

> margins of error we're talking about start to become even a greater concern than they might otherwise be.
>
> So probably those numbers, at the level of Delaware I would not be very comfortable with, because while we start to kind of cut the data too many times…
>
> Q. So if I'm understanding what you're telling me, if you … had looked at … unauthorized immigrant labor that has a disability[,] the numbers get so small in comparison to the margin of error that you're not comfortable [giving] an opinion that those jobs exist?
>
> A. Well, I'm not comfortable reaching any conclusion about how many of them there are.

TR-38, 39; A-43, 44. Dr. Toohey went on to say that the one thing that he felt he could generate reliable statistics on would be the prevalence of undocumented workers without English language fluency in the State of Delaware. TR-39, 40; A-44, 45. However, he could not reliably add any other factors because "at that point the kind of relationship between the number of people we see in the survey and the number of total people in the population becomes kind of too tenuous for me to be very confident in it." TR-40; A-45.

Dr. Toohey also confirmed that, of the estimated numbers of undocumented employees working in the several occupations he identified, some number of them would be fluent English speakers; however, he could not say what percentage or number of those would be. Id.

Dr. Toohey also noted that "if the question is if I were going to randomly

suggest that some worker try to get a job in some occupation … the percent of people who look like them in that occupation definitely seems like a very relevant thing." TR-54; A-59. Dr. Toohey also had the following exchange with the Board:

> Q. But if we're talking about actual availability and what industries are actually hiring the proportion of the undocumented – because you're talking about people who are actually working in these jobs.
>
> A. Yes.
>
> * * * * *
>
> Q. So the proportion of jobs that exist versus the people that are actually working would be a relevant conclusion that we would have to reach.
>
> A. I think probably the most relevant one and I agree that I don't currently have the answer to this question either would be the number of sort of frequent hires, you know, the number of available positions now, the number of recent hires in any of these would be something that that would be the most relevant thing to know and I – I certainly don't have the answer to that and if that's – I think that's a very reasonable way to think about it knowing the proportion would be useful for that as well.

TR-55, 56; A-60, 61.

The Employer also called Ellen Lock as its vocational witness, who testified regarding a labor market survey that she performed, identifying positions that she believed were vocationally appropriate for Ms. Guardado. TR-59; A-64. She understood that the Claimant graduated high school in her native El

Salvador; that she had been employed in food production at Roos Foods, and that she was not able to speak English, but that she could read and write in her native language. TR-60; A-65. Ms. Lock also understood the Claimant's physical restrictions to be for one-handed work with her right hand. Id. She identified 17 jobs that she contended were entry level, did not require that she communicate in English, did not require previous vocational experience and could be learned on the job, and she alleged would be physically appropriate for her work restrictions. TR-61; A-66. All of the jobs identified were minimum wage jobs. TR-68; A-73. She confirmed also that some of the jobs would require use of Ms. Guardado's left (i.e., injured) hand, for example in food prep which would require that she hold materials with her left hand while cutting. TR-68, 69; A-73, 74. Nevertheless, she was of the opinion that the jobs identified were appropriate for Ms. Guardado. TR-68; A-73.

Ms. Lock conceded that, with regard to the restaurant kitchen jobs she identified, employees would be dealing with commercial quantities of food; rather than one or two onions in one's own kitchen, employees would be dealing with a box full of onions. TR-69, 70; A-74, 75. Ms. Lock confirmed that a box of onions might be 'as big as this table', or two feet across, and a foot and a half deep, and would require two hands to lift. TR-70; A-75. Ms. Lock admitted that two hands would be required for other materials in a commercial kitchen,

such as meat or other trays of food. Id. Ms. Lock confirmed that "Ms. Guardado would be disadvantaged, less capable in that environment relative to other nonrestricted employees who might be working in that kitchen." Id. Ms. Lock confirmed that none of the employers she spoke to said that they would give Ms. Guardado a job. TR-71; A-76.

Ms. Lock also admitted that she did not discuss Ms. Guardado's undocumented status with the employers she spoke to on the labor market survey. TR-71, 74; A-76, 79. She also confirmed that she did not know if any of the employers that she identified on the labor market survey had any undocumented workers as employees. TR-74; A-79. She confirmed that she was specifically asked "not to address whether or not the claimant would be a candidate as an undocumented worker." TR-83, 84; A-88, 89.

Ms. Lock also identified jobs on the current survey in housekeeping and cleaning that had been previously rejected by the Employer's evaluating physician, Dr. Schwartz, as unsuitable for Ms. Guardado. TR-72; A-77. She testified nevertheless that she believed the jobs were suitable for Ms. Guardado. TR-72, 73; A-77, 78. She also confirmed that, in observing the kitchen, food prep job, she did not see anyone working in that kitchen doing prep work with only one hand. TR-74; A-79.

Ms. Lock also indicated that at the time of her testimony only eight of the 17

jobs on the survey remained available. TR-76; A-81. She could not say how many applications the employers had received for any of the open positions, and had made no assessment of the qualifications or suitability of the other applicants for the positions in question. TR-77; A-82. Ms. Lock also was able to provide no information about the applicants who were ultimately hired for the positions that had been filled. Id. Ms. Lock was unable to tell the Board anything about whether Ms. Guardado was a good, competitive candidate for any of the positions or whether she was in the bottom tier of the applicant pool and thus less likely to get hired for any of the positions. TR-77, 78; A-82, 83. Ultimately her testimony was merely that the jobs on the survey were available, and the employers would accept an application from Claimant. TR-78; A-83.

Ms. Lock also conceded that an employer is more likely to hire someone with experience for an open position than to hire someone without experience. TR-78, 79; A-83, 84. She confirmed that Ms. Guardado has no work experience in a restaurant kitchen. TR-79; A-84.

Ms. Lock had identified a job at Subway as a sandwich maker as an appropriate position for claimant. In connection with that testimony, Ms. Lock had the following colloquy with the Board:

> Q. ... I'm one that goes to Subway on occasion ... I just don't see people making sandwiches with one hand. I just don't see it. Everything they do it's like they need both hands.

A. Well, in fact they would as I said, the dominant hand would be doing most of the work, but the other hand would have to be used. Maybe to pick up pickles and put on to hold the sandwich and cut it.

Q. Okay. Did – did you understand the extent of even – even though those cleaning jobs aren't available, but did you understand the extent of Dr. Schartz talked about as far as her certain jobs?

A. Yes. I believe I understand.

TR-84, 85; A-89, 90.

Ms. Guardado also testified, with the aid of an interpreter. She confirmed that she still has no work papers or other credential allowing her to work legally in the United States. TR-90-91; A-95, 96. Her medical and work restrictions have not changed since her prior hearing, and she has been wearing a brace on her wrist due to inflammation. TR-91; A-96.

Ms. Guardado testified that she had looked for work within her restrictions. Id. She submitted, as an exhibit, notes that she had made about the jobs that she had applied for. TR-92; A-97. She had applied for some of the jobs on the labor market survey and some other jobs as well. TR-92, 93; A-97, 98. She testified that she disclosed her work restrictions when she inquired about jobs, and none of the employers that she contacted offered to hire her. TR-93; A-98.

She applied for a number of restaurant kitchen jobs, and was told by some of the employers that she could get the job, but there is difficulty with the

restrictions for her to be able to perform the job activities. Id. In particular, one manager told her it would be difficult for her to do with her restrictions because she would have to lift heavy objects; the manager told her that sometimes they can help, but not all the time. TR-94; A-99. The manager with whom she spoke did not offer her a job in her kitchen. Id. She also applied for a job cleaning tables in a restaurant; she was told by the manager that it would be very difficult to do that job. TR-98; A-103. She was told that they would call her, but they have not. Id.

Ms. Guardado confirmed that her wrist is fused, so she has no motion of it at all. TR-94; A-99. She has considerable difficulty doing daily activities even around her house, including cooking activities in her own kitchen. Id. She has difficulty placing a pot on the stove, peeling a potato or vegetable; she indicated that she can do it, but it will take her a long time. TR-95; A-100.

Ms. Guardado indicated that she knows other undocumented workers in her local community, some of whom are employed. Id. She indicated that none of them have jobs that are essentially one-handed. Id.

Following the hearing, the Board issued a decision granting the Employer's Petition for Review. The Board noted first that, while Claimant remained medically capable of working with restrictions, she was nevertheless a *prima facie* displaced worker "based on her limited education and minimal work

experience as an unskilled laborer with a one hand work restriction." Guardado 2017 at 12. The Board then went on to consider "whether the Employer can rebut that finding by showing that there are jobs available within the Claimant's work capabilities." Id. at 13.

The Board noted that the Employer offered evidence through the labor market survey of prospective jobs that could be available to Claimant within her phsyical restricitons. Id. The Board took note of Ms. Lock's testimony that she did not advise prospective employes of Claimant's undocumented status, but held that "it is unrealistic to have expected the listed employers to admit that they may illegally hire undocumented workers." Id. at 14. The Board went on to find that the labor market survey provides "reliable and sufficient information regarding actual jobs that are available within Claimant's capabilities." Id.

The Board further addressed Dr. Toohey's testimony by holding that it established "that there are thousands of jobs available in each of the occupations and industries listed available for undocumented workers in Delaware." Id.

The Board then concluded that the Employer "was successful in establishing the appropriate nexus betweeen actual jobs available on the labor market survey and the prevalence of undocumented workers in those job categories in Delaware..." Id. at 15. The Board deemed this evidence sufficient to rebut the Claimant's showing that she is *prima facie* displaced, and terminated her

benefits on that basis. Id.

Claimant appealed the Board's decision to the Superior Court which resulted in a decision dated February 7, 2018.

The Court below found that the labor market survey evidence, showing that eight out of seventeen jobs were still open, along with Dr. Toohey's statistical evidence, showing that there are undocumented workers employed throughout Delaware in occupations and industries that appeared in the labor market survey, was sufficient to comply with this Court's directives. Guardardo Supreme at 16.

This is Claimant's Opening Brief.

Argument I

The Board erred as a matter of law in terminating Claimant's total disability benefits where Employer failed to satisfy its burden of showing the availability of regular employment within Claimant's capabilities.

A. Question Presented

Whether Employer presented sufficient evidence of claimant's employability that, if accepted by the Board, would be sufficient to support a decision that the Employer had shown that there is work available to this particular claimant in the general labor market. Tr. of IAB Hr'g on Remand at 11, 114, 121 (A-16, 119, 126).

B. Scope of Review

In reviewing whether the Industrial Accident Board 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). Some evidence, or any evidence, may be insufficient to support the Board's factual findings; the evidence must be

substantial, and this 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).

C. Merits of Argument

The parties agree in this case that Claimant is medically employable, and the Board correctly so found. The Claimant contends, and the Employer disputes, that she is economically totally disabled, as she is a displaced worker, unable to be employed due to a combination of her injury and resulting work restrictions, educational level, limited vocational experience, language barrier, and her undocumented status. As such, her total disability benefits should continue and the IAB erred in terminating those benefits.

The Displaced Worker Doctrine.

The Displaced Worker Doctrine has been part of Delaware workers' compensation law for nearly fifty years. The Supreme 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 the 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.

Ham v. Chrysler, 231 A.2d 258, 261 (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. The Court in Ham went on to describe a displaced worker as one "who, while not completely incapacitated

for work, is so handicapped by a compensable injury that 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 he is to be steadily employed." Id. (emphasis added).

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," which requires more than just a mere showing that jobs exist which a claimant could physically perform and that openings in such jobs are generally available. Abex Corp., 252 A.2d 552, 553 (Del. Super. Ct. 1969).

The Claimant is a *Prima Facie* Displaced Worker.

Ms. Guardado argued below, and the Board correctly found, that she is a

prima facie displaced worker, even without consideration of her undocumented status. The critical elements to be considered in determining *prima facie* displacement are the claimant's degree of obvious physical impairment coupled with the cliamant's mental capacity, education, training, and age. Chrysler v. Duff, 314 A.3d 915, 916-17 (Del. 1973). Ms. Guardado does not speak English; she is an unskilled laborer who is medically restricted to one-handed light duty activities; she has no education beyond high school in El Salvador; she has very little workplace experience (Roos Foods being the only job she has ever had) and is no longer medically able to do that type of work; in the words of Judge Bradley in the 2015 Superior Court decision, "these undisputed facts certainly portray a woman disqualified from regular employment in any well-known branch of the competitive labor market." Guardado 2015 at 7.

This finding implicitly raises the question: what does it mean to be a *prima facie* displaced worker? While the finding certainly shifts the burden of proof from the Claimant to the Employer, it also at the same time defines that burden: the Employer must show that there is work available *to this claimant*, with all of her limitations and qualifications (including her undocumented status). *See*, Abex v. Brinkley, *supra;* Watson v. Wal-Mart, 30 A.3d 775 (Del. 2011); Guardado Supreme at 11. This is something more than simply identifying job openings that nominally fit Ms. Guardado's work restrictions and vocational

profile. If a displaced worker is one "so handicapped by a compensable injury … that she will require a specially created job if she is to be steadily employed,"[6] and if a *prima facie* determination is a presumptive determination of the Claimant's status as a displaced worker that must be rebutted by the Employer, then in order to rebut that presumption, the Employer must show more than just open positions – it must show that specially created job, available *to this claimant*, in order to demonstrate her employability. The Employer has not done so in this case.

The Employer's Burden of Proof with a *Prima Facie* Displaced Worker.

As Roos Foods did in this case, employers typically seek to satisfy their burden of proof under the Displaced Worker Doctrine by presenting a labor market survey identifying jobs that the claimant is allegedly qualified to perform. "But those surveys do not purport to establish that those jobs are available, only that they exist and were available at some point." Watson, *supra* at 779-780. The Employer's burden is to show that jobs are actually available to this employee, considering *all* of the elements impacting her employability, including but not limited to her status as an undocumented worker, her status as a non-English speaker, her status as an applicant with no real workplace training and experience only in unskilled labor, as an applicant with limited education,

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[6] Ham, *supra.*

and as an applicant with work restrictions limiting her to one-handed light duty. Ms. Guardado possesses all of these factors, not each one individually, and not merely a subset of them. "The employer must take the worker as she was hired,"[7] as a single composite applicant for work, in determining whether "jobs are actually available, *i.e.,* within reach of the injured employee." Id.

The Employer's proffered evidence fails entirely at meeting this burden.

The Employer's Evidence of Job Availability.

Consider the various factors impacting Claimant's employability in this case (her educational level, her vocational experience, her absence of English fluency, her lack of workplace training, her medical restrictions, and her undocumented status) each as a circle in a Venn diagram. In any individual circle (for example, her medical restrictions) there may be a subset of jobs in the general labor market that fit within that circle – jobs that exist in the general labor market. In fact, as to each individual circle, we might reasonably agree that there will be some jobs that exist in the general labor market that fall within that circle.[8] However, Ms. Guardado's vocational profile and prospects for

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[7] Guardado Supreme at 12.

[8] Indeed, even the 'undocumented worker' circle will contain some jobs, as evidenced by the fact that Ms. Guardado herself had obtained a job prior to her injury despite her undocumented status, as had Mr. Campos of Campos v. Daisy Construction and many others in the general labor market.

employment are not described by any single circle; Ms. Guardado lives at the intersection of all of those circles on the Venn diagram. She is not merely an applicant with one-handed light duty restrictions; she is not merely an applicant with no English language fluency; she is not merely an applicant who is undocumented. In order to become employed she must find a job that fits within all of those circles. Stated another way, for the Employer to rebut the *prima facie* displaced worker presumption, the Employer must show that there is work available that fits within the very center of the overlapping circles in that Venn diagram. (Perhaps more pointedly, the Employer must show that there is a point where all of those circles overlap.)

So what did the Employer's evidence show? The Employer presented Dr. Toohey's testimony as to the statistical prevalence of undocumented workers in specific classes of occupations in Delaware's labor market. TR-31. According to Dr. Toohey, there are 500,000 to 600,000 workers in Delaware, but only 20,000 to 25,000 of the total labor force in Delaware is comprised of undocumented workers (approximately four percent). Guardado 2017 at 7. Dr. Toohey confined his statistics to the prevalence of undocumented workers in Delaware (merely one of Ms. Guardado's Venn diagram circles), but he did not generate any statistics regarding the prevalence of workers with disabilities in the general labor market (a second of Ms. Guardado's Venn diagram circles),

nor did he generate any statistics on the number of undocumented workers *with disabilities* employed in the labor market (which would have been evidence of only two overlapping circles of Ms. Guardado's Venn diagram). TR-34; A-39.

Further, it is not merely that Dr. Toohey didn't generate those statistics; it's that the *statistics wouldn't support an opinion* that such jobs exist "because the numbers get so small in comparison to the margin of error…" TR-38, 39; A-43, 44.[9] This is tantamount to saying that those jobs don't exist; however, even giving the Employer the benefit of the doubt (i.e., Employer simply has not proved that they exist, rather than establishing that statistically those jobs don't exist), the Employer has the burden of proof and has failed to meet it.

So the Employer's best case evidence on the statistical prevalence of undocumented workers in Delaware's labor market is that they exist in service, housekeeping and other industries. Some of those jobs will be filled by undocumented workers who are non-English speakers (and some by undocumented workers who *do* speak English), although he did not opine as to how many or what proportion of each. And lastly, the data would not support an opinion that undocumented, non-English speaking, workers with disabilities

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[9] Dr. Toohey did believe that the statistics would support an opinion on the prevalence of undocumented workers with non-English language fluency (again, only two of Ms. Guardado's many overlapping circles). TR-40; A-45. This is still far less than all of the factors affecting Ms. Guardado's employment prospects.

(still only three circles) were employed in the Delaware labor market.

At best, Employer showed that undocumented workers are employed within the job categories included in the labor market survey (in general), not that undocumented workers with Claimant's limitations are employed in those categories.

The Employer must take Claimant as it finds her, with all of her limitations, qualifications and restrictions – each and every one of the circles of that Venn diagram, and the Employer must show that there is work available – realistically within reach – of this claimant. That work is available to undocumented immigrants (in general) is insufficent where *this* claimant is displaced and likely less desirable as a worker, given her disability, when compared to even another undocumented immigrant who has no disability or work restrictions. Thus, the Employer's statistical evidence of the prevalence of undocumented workers in the Delaware labor market falls woefully short of meeting the Employer's burden of proof as a matter of law.

The Employer's other bit of evidence attempting to show that there is work available in the general labor market for Claimant is the labor market survey. On its face, this survey (and Ms. Lock's testimony) establishes merely that there are job openings for unskilled non-English speakers. Mr. Lock did not dare to ask the prospective employers that she spoke to whether they would hire an

undocumented worker, nor did she ask if any of the employers had undocumented employees working there. TR-71, 74; A-76, 79. Indeed, she was specifically told not to address whether the claimant would be a candidate as an undocumented worker.[10] TR-83, 84; A-88, 89. While this Court expressed that there is no requirement for Employer to present an affidavit from employers confessing their willingess to hire undocumented workers, this Court's decision can hardly be interpreted as permitting Employer to avoid the issue altogether, shutting its eyes and hoping the matter will disappear. Employer's instruction to Ms. Lock essentially foreclosed any possiblility that Ms. Lock could obtain information by some other means about Claimant's chances for employment as an undocumented immigrant, perhaps by reaching out to the workers individually. Of note, Ms. Lock was forthcoming about Claimant's disability, having no reservation about whether she would receive reliable feedback from employers.

The labor market survey is even less reliable in that Ms. Lock identified jobs

[10] Indeed, Ms. Lock's testimony appears to be defective on its face due to this instruction alone. Under Jennings v. University of Delaware, a vocational witness must, after locating employers with jobs available, (1) visit those employers, (2) observe the conditions under which the claimant would work, and (3) discuss with the potential employers *the claimant's specific qualifications and limitations* in order for her opinion on the availability of work for this Claimant to be anything more than "mere speculation." Jennings, 1986 Del.Super. LEXIS 1088 (Del. Super. Ct. 2/27/1986) at *7.

in housekeeping and cleaning positions that had been previously rejected as unsuitable by Dr. Schwartz, the Employer's evaluating physician. DEP. TR-23, 24; A-156, 157. She identified jobs in a commercial kitchen and acknowledged that those jobs would require the use of both hands for various tasks (TR-69, 70; A-74, 75), and that she observed none of the employees doing kitchen prep work with only one hand. TR-74; A-79. The Board itself expressed disbelief that a job as a Subway sandwich maker was a suitable job for a claimant with Ms. Guardado's restrictions. TR-84, 85; A-89, 90. Ms. Lock also admitted that employers are more likely to hire someone with experience than someone without, and that Ms. Guardado was someone without experience. TR-78, 79; A-83, 84. Finally, Ms. Lock admitted that the jobs she identified were available, and that the employers would "accept" an application from the claimant. TR-78; A-83. It strains credulity to think that the jobs identified by Ms. Lock are available to this Claimant without accomodation or modifications, as they necessarily and by definition require the use of two hands, which is inconsistent with Ms. Guardado's work restrictions. These jobs arguably do not fit within even the medical restriction Venn diagram circle, let alone all of them.

Nobody in this case identified specific jobs that would hire undocumented, non-english speaking, unskilled workers with little experience and no real workplace training, with one-handed light duty restrictions. Certainly nobody

testified that such jobs are available *to this claimant*; to be "realistically within reach" of Ms. Guardado, she must possess a reasonable – realistic – chance of actually getting hired for those positions. See Guardado Supreme at 12. The only evidence regarding Ms. Guardado's competitiveness among the applicant pool for these positions is Ms. Lock's testimony that employers would prefer to hire employees with experience over those without, and Ms. Guardado is one of those without. The Employer "had to demonstrate that appropriate jobs actually were available[11], and that prospective employers would hire – not merely consider hiring – a person in [Claimant's] position." Watson, *supra* at 781 (footnote in original). Employer has entirely failed to demonstrate that jobs are realistically within reach of this claimant, with all of her restrictions, limitations and vocational attributes.

Furthermore, it is not logically possible for the Board to synthesize the testimonies of Dr. Toohey and Ms. Lock into a rational basis to conclude that there is even one, much less several, jobs that fit within the overlapping circles of Ms. Guardado's Venn diagram; indeed, Claimant contends that the opinions of the Employer's expert specifically preclude such a conclusion. Dr. Toohey

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[11] "A job opening that generates a long line of applicants the day that it is posted cannot reasonably be considered an available job. Common sense tells us that an employer is going to hire a person with no disabilities for an entry level unskilled job that is in demand."

says that statistics don't support the presence of undocumented, disabled, non-English speaking employees with Claimant's educational level in the Delaware labor market. TR-38, 39; A-43, 44. Ms. Lock didn't even attempt – indeed, was told not to – find jobs for undocumented workers[12], and her efforts at identifying jobs, even within the claimant's medical restrictions alone, contain substantial defects.

Perhaps most illustrative of the Employer's failure of proof in this case is Dr. Toohey's comment that "if I were going to randomly suggest that some worker try to get a job in some occupation … the percent of people who look like them in that occupation definitely seems like a very relevant thing." TR-54; A-59. Pointedly, neither Dr. Toohey nor Ms. Lock was able to provide evidence of *anyone*, much less a meaningful percentage or number of people, who look like Ms. Guardado and are employed in any occupations in the State of Delaware.

The Employer's evidence is insufficient to meet the Employer's burden of proof in rebutting Ms. Guardado's status as a *prima facie* displaced worker, particularly where a *prima facie* displaced worker will require a specially created job in order to be steadily employed and the Employer has entirely failed to demonstrate that such a job exists. The Board therefore erred as a matter of law and fact in terminating the Claimant's total disability benefits.

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[12] TR-83, 84.

The Claimant's Evidence of Job Availability.

Separate and part from the Employer's failure to meet its burden of proof once the Claimant was determined to be a *prima facie* displaced worker, it also bears noting that the labor market evidence is insufficient also because it is substantially rebutted by the Claimant's testimony regarding her efforts at looking for work. Ms. Guardado applied for eleven jobs, some of which were on the labor market survey and some which were not. Guardado 2017 at 12-13. She testified that two employers specifically told her that it would be difficult for her to do the jobs that were available without assistance. TR-92, 93, 94, 98; A-97, 98, 99, 103. None of the employers that Ms. Guardado contacted offered her work. "If the Claimant advises prospective employers that he has a physical limitation, and he does not get the job, there is an inference that the employer turned the claimant down because of the partial disability." Watson v. Wal-Mart, *supra* at 779, *citing* Keeler v. Metal Masters Foodservice Equipment Co., 712 A.2d 1004, 1005 (Del. 1998). The Board, however, found that "there was no other evidence that Claimant would not be hired because of her injury, work restrictions or her undocumented status." Guardado 2017 at 13. The Board describes the Claimant's job search as "minimal" (Id.) at 11 jobs, and yet finds that there was "some dispute" about the suitability of Employer's labor market survey jobs, and found that eight of them were suitable. Id. at 16-17. That

Claimant focused on finding jobs within the restaurant industry is of no consequence nor was the choice unduly restrictive, given Dr. Toohey's research showing that a large number (5,000) of undocumented immigrants are employed in service occupations, in comparison to other industries.[13] Given that the Employer's evidence was meaningfully less than the Claimant's evidence regarding potential positions, the Board's ruling rejecting the Claimant's 11 jobs as 'minimal' but accepting the employer's eight jobs as 'sufficient' is arbitrary and capricious. Further, this Court in Watson indicated that "if the claimant has applied for most of the jobs on the survey, without success, the labor market survey's evidentiary value is significantly diminished. Without more, such a survey establishes only that the claimant might be able to find work, not that appropriate jobs are actually available." Watson, *supra* at 780.[14]

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[13] See Guardado 2017 at 4. The number of undocumented workers in service occupations comes second to only production, transportation, and material moving occupations, which is an unlikely occupation choice for Claimant given her one-handed restriction. Id.

[14] Watson is an interesting case in comparison to Guardado, in that Watson was not a *prima facie* displaced worker. Mr. Watson therefore had the burden of proving that he was unable to find work in order to establish his status as a displaced worker, rather than, as here, where Claimant is *prima facie* displaced and it is the Employer's burden. In Watson, the Court noted that Mr. Watson had made a showing that he was unable to find work (placing him on the same footing as a *prima facie* displaced worker) and went on to find that the Employer's labor market survey was insufficient to overcome Mr. Watson's showing that he was displaced.

The Employer has failed to meet its burden to prove that the Claimant is not a *prima facie* displaced worker, as the evidence submitted fails as a matter of law to prove the availability of work to this claimant. The Board therefore erred in terminating Ms. Guardado's ongoing total disability benefits. The Board's decision must therefore be reversed.

Argument II

The Superior Court erried in finding that Employer had complied with this Court's directives and in concluding that the Board's decision was supported by substantial evidence where the record is devoid of evidence, statistical or otherwise, that there are actual jobs available to this Claimant.

A. Question Presented

Whether the Superior Court erred in affirming the Board's decision that testimony from Dr. Toohey, that undocumented immigrants, *in general*, are employed in Delaware, coupled with the labor market survey evidence, showing eight (out of the seventeen listed) open positions, sufficed to show that jobs were available to this Claimant andrebut the presumption that claimant is a *prima facie* displaced worker.[15]

B. Scope of Review

See Scope of Review from Argument I.

C. Merits of Argument

Claimant takes no issue with the Board's findings that Claimant is medically employable and that she is a *prima facie* displaced worker. Rather, Claimant contends that, as a result of her *prima facie* displaced worker status, Employer

[15] This question was not specifically preserved in the trial court below as it arises in the context of the lower court decision reviewing the Board's decision. Thus, the interests of justice exception to Rule 8 is applicable.

had the burden of proving that work was available to her specifically, considering all of her limitations (her education level, her vocational experience, her absence of English fluency, her lack of workplace training, her medical restrictions, and her undocumented status)—i.e., that jobs were 'within [her] reach,'[16] and that the Employer's evidence failed to meet that burden.

Employer's Statistical Evidence Presented Through Dr. Toohey is Insufficient to Establish Jobs Available to Claimant.

This Court directed Employer to satisfy that burden by presenting reliable market evidence that employment *within Claimant's capabilities* is available to undocumented workers. Id. at 15. Employer instead provided statistical evidence, through Dr. Toohey's testimony, which merely indicates that thousands of undocumented workers, *in general*, are employed in Delaware, in job industries which appeared on the labor market survey. The statistical evidence does **not** show that thousands of jobs are **available** to undocumented workers, which is what the Board (and the Superior Court) mistakenly deduced from the evidence. See Guardado 2017 at 15.[17] Further, this statistical evidence does not show, and in fact refutes, that jobs are available to undocumented

[16] See Guardado Supreme at 12.

[17] Indeed, Dr. Toohey testified that, although a relevant question, he did not have the answer as to the number of current available positions for undocumented immigrants. TR-55; A-60.

workers with no English language proficiency, who have disabilities, limited education, and no relevant vocational experience or training.

Dr. Toohey testified that there are approximately 500,000 to 600,000 workers in Delaware, but the total number of unauthorized immigrant workers is between 20,000 to 25,000. TR-51; A-56. Thus, the total work force in Delaware is only comprised of approximately four percent (4%) of unauthorized immigrants.

This data says nothing about how many positions are available at any given time for even undocumented workers, much less undocumeted workers with a disability, no vocational skills or training, limited education, and no English fluency.

Dr. Toohey admitted that his study does not purport to address Claimant in particular or her prospects for being employed. TR-35; A-40. The statistical evidence fails to even provide data regarding the employability of undocumented workers *with disabilities* in the labor market, one of many factors which pertain to Claimant, despite the fact that the survey statistics upon which he relied contain such data. TR-37; A-42. In fact, he was uncomfortable reaching any conclusions about even the number of unauthorized immigrants with disabilities who were actually employed. However, this factor was highly relevant and necessary to the determination of available jobs to Claimant. Claimant testified that she knew other undocumented works who are employed,

but none of them have jobs that are essentially one-handed. TR-95; A-100. Dr. Toohey was also reluctant to cut the occupation and industry categories "too much" at the level of Delaware because he was "not comfortable reaching any conclusion" about how many of them actually exist. TR-38,39; A-43, 44. In other words, there is no reliable statistical evidence that undocumented workers with disabilities, no English language skills, limited education, and no relevant vocational skills or training, are employed in Delaware. The Superior Court erred, as did this Board, in failing to give this undisputed testimony its proper (or even any) weight.

Total disability arises when an employee is "so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist." Abex Corp v. Brinkley, 252 A.2d at 553. Dr. Toohey's inability to provide evidence of the employability of undocumented workers with disabilities bolsters Claimant's argument that a reasonably stable market for them does not exist. All the other limitations applicable to this Claimant can only constrain the market for his services even further. The Employer has thus failed to provide reliable statistical evidence to support its case. The Superior Court erred in failing to recognize that the Employer's statistical evidence is not probative on the

question of this Claimant's prospects for work, and so combining that with the usual labor market survey evidence is still insufficient as a matter of law.

The statistics generated from Dr. Toohey's study failed to account for Claimant's work restrictions or *any* undocumented workers with disabilities. This Court's mandate for *more specific information* should have yielded from Employer information about undocumented workers with the same limitations as Claimant (limited education, language barrier, limited vocational experience, undocumented status, and work restrictions). If those factors were not considered, then there is no probative value to the statistical study because Dr. Toohey does not describe this particular claimant. Given these discrepancies, Dr. Toohey's study does not constitute substantial evidence in determining jobs available to *this* Claimant, and indeed affirmatively refutes that jobs in these categories are even statistically available to an injured, undocumented, untrained, non-English speaking Claimant with no vocational experience.

The Labor Market Survey is Insufficient to Estabish Jobs Available to Claimant.

Employer failed to satisfy this burden as well, and unfortunately the Superior Court makes no substantive analysis of the labor market survey evidence at all, and not even a mention of Claimant's efforts at finding work. Employer presented a labor market survey listing seventeen (17) jobs, although, at the time of the hearing, only eight (8) of the positions were still open and three (3) of

those positions were located outside of Delaware, in Pennsylvania. TR-76; A-81. Ms. Lock could not provide any specific information about the qualifications and suitability of other applicants for these positions in comparison to Claimant, nor could she provide information regarding the applicants who were ultimately hired for the nine (9) positions already filled. Id. Further, she agreed that there would be multiple applications for the positions still open. While Ms. Lock testified that the employers expressed a willingness to "accept" an application from Claimant,[18] no offer to hire was extended. However, Employer was required to show that there was some willingess to hire claimant with her physical disability to prove availability of work. Abex, 252 A. 2d at 554; See also, Watson, 30 A.3d at 781. Thus, the Employer's evidence is insufficient to establish available jobs to this Claimant, with all of her restrictions and limitations. Ms. Lock testified only that employers would "accept an application" from Claimant; in other words, no more than is required under the Americans with Disabilities Act, which prohibits Employers from discriminating against a qualified individual on the basis of disability in regard to (among other things) job application procedures. 42 U.S.C. § 12112(a) (2018). While Ms. Lock informed potential employers about

[18] TR-78.

Claimant's work restrictions, she did not question these employers about the employability/presence of undocumented workers. In fact, Ms. Lock was specifically instructed by Employer not to address Claimant's undocumented status with the employers from the labor market survey[19] apparently because Employer interpreted this Court's decision as absolving it of its duty to take into account Claimant's undocumented status when showing job availability within Claimant's capabilities.

Claimant is restricted to one-handed light duty. Yet, Ms. Lock confirmed that some of the jobs identified in the labor market survey required the use of Claimant's injured hand. She also conceded that some of the jobs identified required dealing with commercial quantities of food and that two hands would be required for handling materials in a commercial kitchen. TR-70; A-75. She admitted that she did not see anyone working with solely one hand in the food preparation jobs. TR-74; A-79. She further admitted that Claimant would be disadvantaged and less capable in that environment. TR-70; A-75. Still yet, the Baord found that the survey provided reliable and sufficient information regarding actual jobs available within Claimant's capabilities. Guardado 2017

[19] TR-83-84.

at 14. The Superior Court made no analysis of these defects in Ms. Lock's testimony or the Board's acceptance of same despite those defects.

There is more to proving the availability of jobs than just showing that undocumented immigrants are working in certain jobs. That is only one of the many factors impacting Claimant's employability in this case. The Claimant in this case has several substantial limitations and no general qualifications. Claimant presented evidence that she applied for eleven (11) jobs, some of which were on the labor market survey, but *none* of the employers that she contacted offered her work. Guardado 2017 at 12-13. That Claimant informed these employers (some of which were on the labor market survey) of her work restrictions, that Ms. Lock also disclosed Claimant's work restrictions to the employers on the labor market survey, and that Claimant did not receive one job offer, cannot be ignored. Keeler v. Metal Masters, 712 A.2d at 1005. Even a showing of physical ability to perform certain appropriate jobs and the general availability of such jobs is an insufficient showing of the availability of said jobs to a particular claimant. Abex, at 553.

Here, Employer has presented evidence only as to the general availability of jobs to undocumented workers. Thus, the labor market survey alone is insufficent evidence to satisfy Employer's burden of establishing job

availability,[20] and the statistical evidence similarly falls short as it does not even attempt to produce statistics on actual jobs available to undocumented workers similarly situated to the Claimant in *this* case. Yet, the Superior Court affirmed the Board's decision, without analysis, and thereby errs in failing to reverse the decision of the Industrial Accident Board.

[20] See Watson v. Wal-Mart Assoc., 30 A.3d at 778.

Conclusion

The Employer's case is unquestionably premised on trying to meet the technical requirement of proving what is certainly a very difficult case -- that Ms. Guardado, an undocumented worker with medical restrictions, no English-language facility, limited education, no vocational training or relevant experience, who is equipped only for unskilled labor -- is somehow "employable in any well-known branch of the competitive labor market." However, to focus narrowly on whether the Employer has met these technical requirements misses the purpose of the Displaced Worker Doctrine: whether jobs are 'realistically within reach' of the disabled person. A finding that the Claimant is prima facie displaced alone is unusual - and she reached that point before her undocumented status was taken into account. Does the record below simply does not demonstrate that Claimant is readily employable.

The Employer's statistical evidence is what is novel about this case, in the context of an undocumented worker, and the Employer sought to establish that undocumented workers are employed in Delaware in meaningful numbers. However, the Employer did not expect (and likely nor did this Court), evidence from Dr. Toohey that the statistical data does not support the presence of undocumented workers with disabilities, limited English language skills, and no relevant vocational skills or training. The only thing Dr. Toohey could reliably

determine was the prevalence of undocumented workers without English language fluency in Delaware. Beyond that, the numbers become "too tenuous".

Dr. Toohey himself says that "if I were going to ... suggest that some worker try to get a job in some occupation ... the percent of people who look like them in that occupation definitely seems like a very relevant thing." TR-54; A-59. We have no -- absolutely no -- data on people who look like Ms. Guardado. And we have Dr. Toohey saying that, statistically, the data will not support an opinion that a person who looks like Ms. Guardado is employed in Delaware.

Merely undocumented workers are employed in Delaware. We knew that before Dr. Toohey testified. What we still don't know is how many (if any) undocumented injured workers with disabilities and restrictions, no English language skills, no vocational skills, training or experience, and limited education are employed in the Delaware labor market. It cannot be said, based on this record, that Ms. Guardado has any reasonable prospects for employment in any well-known branch of the competitive labor market. The Board erred in terminating her total disability benefits, and the Superior Court erred in affirming that decision.

Respectfully submitted,

/s/ Walt F. Schmittinger

BY: _____

Walt F. Schmittinger, Esquire

/s/ Candace E. Holmes

BY: _____

Candace E. Holmes, Esquire

414 South State Street
Post Office Box 497
Dover, Delaware 19903-0497
Attorneys for Appellant

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