



IN THE SUPREME COURT OF THE STATE OF DELAWARE

Magdalena Guardado,)	
)	
Claimant Below-)	No. 116, 2018
Appellant,)	
)	
v.)	Court Below: Superior Court
)	of the State of Delaware
)	
Roos Foods,)	C.A. No.: S17A-05-003-RFS
)	
)	
Employer Below-)	
Appellee.)	

APPELLEE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

Employer Below, Appellee, Roos Foods (“Roos”) filed a Petition before the Industrial Accident Board (“Board”) on November 7, 2014, on the basis that Claimant Below, Appellant, Magdalena Guardado (“Guardado”) was released to return to work by her treating doctor, Dr. Richard DuShuttle and the defense doctor, Dr. Eric Schwartz.¹

This Petition originally came before the Board on March 24, 2015. At the original hearing on the merits, Roos presented medical and vocational expert testimony, including a labor market survey supporting its contention that Guardado was physically capable of working with certain restrictions and that work was available to her, within her vocational qualifications and physical restrictions.² Guardado did not dispute that she was physically capable of working.³ Rather, Guardado opposed Roos’ Petition on the basis that she qualified as a *prima facie* displaced worker because she was an undocumented claimant.⁴

The Board issued a decision on April 7, 2015, denying Roos’ Petition for Review on the basis that Guardado’s undocumented legal status alone qualified her

¹ Magdalena Guardado v. Roos Foods, IAB Hearing No. 1405006 (April 7, 2015) at 1-3 (hereinafter “Guardado, 2015, at ___”).

² Id. at 3-4.

³ Guardado has conceded that she is physically capable of returning to work throughout this litigation and the parties have stipulated to claimant’s physical capabilities for the purposes of the Petition for Review. 2015 TR-58; B-59

⁴ 2015 TR-57-61; B-58-62.

as a *prima facie* displaced worker and Roos' labor market survey could not prove regular employment opportunities for an undocumented worker.⁵

Roos appealed the Board's decision and this Court issued a decision on November 29, 2016 reversing and remanding the Board's decision.⁶ This Court ruled "that the Board's finding that the claimant is a *prima facie* displaced worker on the basis of her undocumented status alone is legal error."⁷ This Court ruled that "claimant's status as an undocumented worker is not relevant to a determination of whether the claimant is a *prima facie* displaced worker."⁸

This Court further stated that "[i]f a claimant is successful in establishing that she is a displaced worker, the employer's burden of showing availability to the claimant of regular employment within her capabilities must take into account her status as an undocumented worker,"⁹ but "there should be no barrier to employers in presenting evidence regarding the prevalence of undocumented workers in certain types of jobs in certain regions, and combining that with more specific information about actual jobs in those categories" in order to meet this burden of proof.¹⁰

⁵ Guardado, 2015 at 11, 14.

⁶ Roos Foods v. Guardado, 152 A.3d 114 (Del. 11/29/2016) (hereinafter cited "Guardado, Supreme Ct. at ___").

⁷ Id. at 122.

⁸ Id.

⁹ Id.

¹⁰ Id. at 121.

A remand hearing was conducted on April 27, 2017. Roos presented Ms. Ellen Lock, a vocational expert, whose testimony and Labor Market Survey provided “reliable and sufficient information regarding actual jobs that are available within Claimant’s capabilities” and Dr. Desmond Toohey, a labor economic expert whose testimony and report “presented evidence of the prevalence of undocumented workers in the categories where the labor market survey show[ed] the availability of specific jobs.”¹¹

Following the instruction of this Court’s 2016 ruling, the Board issued a decision on May 18, 2017 granting Roos’ Petition for Review on the basis that Roos was “successful in establishing the appropriate nexus between actual jobs on the labor market survey and the prevalence of undocumented workers in those job categories in Delaware.”¹²

Guardado appealed this decision, contending that Roos failed to meet its burden of proof as the evidence of Dr. Toohey “failed to account for Claimant’s work restrictions”¹³ and Ms. Lock did not “ask the prospective employers... whether they would hire an undocumented worker.”¹⁴

¹¹ Magdalena Guardado v. Roos Foods, IAB Hearing No. 1405006 (May 18, 2017) at 14 (hereinafter cited “Guardado, 2017 at ___”).

¹² Guardado, 2017 at 15.

¹³ Op. Brief at 40.

¹⁴ Op. Brief at 28-29.

The Superior Court issued a February 7, 2018 decision affirming the Board’s decision on the basis that it was “supported by substantial evidence and free from legal error.”¹⁵ The court determined that Roos “complied with the Supreme Court’s directives on presenting ‘reliable market evidence that employment within the worker’s capabilities is available to undocumented workers.’”¹⁶

Guardado appealed the Superior Court’s decision to this Court on March 6, 2018 and filed an Opening Brief on April 26, 2018.

This is Roos’ Answering Brief.

¹⁵ Guardado v. Roos Foods, Inc., No. CV S17A-05-003 RFS, 2018 WL 776422, at *1 (Del. Super. Ct. Feb. 7, 2018) (hereinafter cited “Guardado, Super. Ct. 2018 at _____”)

¹⁶ Id. at 16

SUMMARY OF ARGUMENT

1. Denied - The Board's decision to grant Roos' Petition is supported by substantial evidence, free of legal error, and properly adhered to this Court's specific instructions on remand.
2. Denied - The Superior Court's affirming decision correctly applied this Court's previous ruling regarding Roos' burden of proof in determining that Roos successfully established work is available to Guardado within her physical restrictions, vocational qualifications, and undocumented status.
3. Guardado's argument contradicts this Court's prior ruling and ignores this Court's specific instructions in contending that Roos was required to present statistical evidence of other undocumented claimants with Guardado's specific physical and vocational limitations employed in Delaware and was required to present evidence that prospective Delaware employers would hire an undocumented worker.

STATEMENT OF FACTS

Guardado was employed with Roos for approximately five years when she was involved in a work-related accident on June 22, 2010, while working as a machine manager.¹⁷ As a result of the accident, Guardado suffered an injury to her left wrist.¹⁸

Following the injury, Guardado was placed out of work by her doctor for approximately one month.¹⁹ Guardado then returned to work with Roos as a machine operator for approximately one year.²⁰ Thereafter, Guardado again returned to work at her pre-accident position with Roos until the summer of 2013, when she was once again placed on total disability status.²¹

Ultimately, Guardado underwent surgery, consisting of a left wrist fusion, which was performed by Richard DuShuttle, M.D. on June 18, 2014.²² Less than two months following surgery, Dr. DuShuttle released Guardado to light duty, one-handed work on August 7, 2014.²³ Dr. DuShuttle placed no restrictions on Guardado's dominant right upper extremity, but believed she was only capable of

¹⁷ 2015 TR-3, 41; B-4, 42.

¹⁸ 2015 TR-3-4; B-4-5.

¹⁹ 2015 TR-4; B-5; Guardado, 2015 at 2.

²⁰ 2015 TR-4; B-5.

²¹ 2015 TR-2; B-3; Guardado, 2015 at 2.

²² DuShuttle 4-5; B-75-76.

²³ DuShuttle 6-7; B-77-78.

simple activities with her injured left upper extremity, such as grasping light objects and regularly assisting her right hand.²⁴

Guardado benefited significantly from surgery, as evidenced by her reduced pain symptoms and lack of treatment and use of medications.²⁵ Following the procedure Guardado's pain only presented when maneuvering heavy items with her left hand.²⁶ Further, she was able to control her pain simply using Ibuprofen.²⁷

At the time of the December 16, 2014 medical evaluation with Dr. Eric Schwartz, Guardado reported tolerable symptoms and advised that she did not wish to undergo any further treatment for the left wrist injury.²⁸ Further, she confirmed with Dr. Schwartz the ability to perform activities of daily living, with some discomfort.²⁹ At the time of the March 24, 2015 Board hearing, Guardado testified that she felt she could work and continued to look for jobs, "hoping in God that [she] will get one."³⁰

Guardado is educated, having completed the equivalent of high school in her native country of El Salvador.³¹ She can read and write in her native language of

²⁴ 2015 TR-37; B-38; DuShuttle 15-16; B-86-87.

²⁵ DuShuttle 10; B-81.

²⁶ 2015 TR-45; B-46.

²⁷ 2015 TR-45; B-46.

²⁸ Schwartz 7; B-98.

²⁹ Schwartz 6-7; B-97-98.

³⁰ 2015 TR-46; B-47.

³¹ 2015 TR-41; B-42.

Spanish.³² Guardado came to the United States in 2004 and was 38-years-old at the time of the 2015 hearing.³³

At the 2015 hearing, Guardado disclosed, for the first time, that she was not a U.S. citizen and did not possess any “credentials or documentation” such as resident alien status or a green card.³⁴ Nevertheless, Guardado testified to looking for jobs since being released to work by Dr. DuShuttle in August of 2014.³⁵ Guardado’s efforts to find a job consisted of completing applications for three employers, all of which were listed on Roos’ labor market survey.³⁶ Guardado presented no demonstrative evidence of a failed job search, but instead simply relied on the Federal Statute which prohibits employers from legally hiring undocumented workers to support her contention that she is displaced.³⁷

Guardado’s argument to the Board in support of her contention that she remained entitled to total disability benefits despite having been released to work was “that she’s not legally employable...” and “[t]hat makes her a *prima facie* displaced worker, full stop.”³⁸ Further, Guardado argued that “without any evidence that an employer is willing to explicitly violate [federal law], there isn’t

³² 2015 TR-43-44; B-44-45.

³³ 2015 TR-41-42; B-42-43.

³⁴ 2015 TR-42; B-43.

³⁵ 2015 TR-42-43; B-43-44.

³⁶ 2015 TR-41, 44, 46; B-42, 45, 47.

³⁷ 2015 TR-63; B-64.

³⁸ 2015 TR-61; B-62.

any legal basis for [the Board] to find that there's employment available for this Claimant."³⁹

Following the March 24, 2015 hearing, the Board issued an April 7, 2015 decision denying Roos' Petition for Review.⁴⁰ The Board concluded that Guardado is physically capable of working.⁴¹ However, the Board determined that Guardado remained entitled to ongoing total disability compensation based solely on her status as an undocumented worker and that Roos' labor market survey could not sufficiently prove employers would hire an undocumented worker.⁴²

Roos appealed the Board's decision and ultimately this Court issued an opinion reversing the Board's findings and invalidating Guardado's contentions that her undocumented status alone rendered her a *prima facie* displaced worker and that Roos could only prove job availability for her using evidence that employers would willingly violate the law to hire undocumented claimants.⁴³ In reversing and remanding the Board decision, this Court made clear that "[a] claimant's status as an undocumented worker is not relevant to a determination of whether the claimant is a *prima facie* displaced worker" and therefore "the Board's

³⁹ 2015 TR-63; B-64.

⁴⁰ Guardado, 2015.

⁴¹ Id at 8.

⁴² Id at 8-11.

⁴³ Guardado, Supreme Court at 121-122.

finding that the claimant is a *prima facie* displaced worker on the basis of her undocumented status alone [was] legal error.”⁴⁴

This Court was equally as direct that while a showing of available work to Guardado within her capabilities “must take into account her status as an undocumented worker... there should be no barrier to employers in presenting evidence regarding the prevalence of undocumented workers in certain types of jobs in certain regions, and combining that with more specific information about actual jobs in those categories.”⁴⁵ This Court dismissed the theory that Roos’s burden of proof to show job availability to an undocumented worker was impossible to meet, first noting that “there are large numbers of undocumented workers in our midst”⁴⁶ The Court cited a 2014 Pew Research study which estimated 20,000 undocumented immigrants working or looking for work in Delaware in 2012.⁴⁷

This Court next abolished the contention that Roos could only meet its burden of proof by “presenting affidavits from employers willing to say that they flout the law and knowingly employ undocumented workers.”⁴⁸ This Court specifically addressed the argument that Roos must “demonstrate that specific

⁴⁴ Id. at 122.

⁴⁵ Id. at 121-122.

⁴⁶ Id. at 121.

⁴⁷ Id. (footnote 31).

⁴⁸ Id.

employers exist who hire undocumented workers and have jobs within claimant's ability that are open" stating "**that no such requirement exists.**"⁴⁹

Most notably, this Court set forth Roos' burden of proof and provided distinct instructions on what evidence an employer must use to show job availability to an undocumented claimant who has established that she is *prima facie* displaced. This Court instructed Roos to use "reliable social science methods" to "present[] evidence regarding the prevalence of undocumented workers in certain types of jobs in certain regions, and combine[] that with more specific information about actual jobs in those categories."⁵⁰ This Court even provided an example of evidence that would satisfy this burden of proof, citing to a second Pew Research Study that utilized data from the Census Bureau's American Community Survey and Current Population Survey in establishing the occupations employing the most undocumented immigrants in Delaware. The Court advised that "[u]sing **this type of data**, employers can map job openings in their region against the prevalence of undocumented workers in that region by sector."⁵¹

At the April 27, 2017 hearing before the Board on remand, Roos complied with this Court's explicit instruction and presented evidence of occupations employing the most undocumented immigrants in Delaware and combined that

⁴⁹ Id. at 121 (emphasis added).

⁵⁰ Id.

⁵¹ Id. at footnote 32. (emphasis added).

evidence with more specific evidence of actual jobs available to Guardado within those previously identified occupations.

To satisfy the burden of proof expressly set forth by this Court, Roos presented the vocational expert testimony of Ellen Lock, CDMS, who identified jobs available to Guardado in the open labor market.⁵² Ms. Lock was fully aware of Guardado's vocational qualifications, noting that she was "a high school graduate in her native country..." "had been employed in food production," is "[n]on-English speaking," and "38 years old" at the time Roos' Petition was filed.⁵³ Ms. Lock also understood Guardado's physical capabilities based on the testimony of the medical experts, citing that she could perform unrestricted one-handed work with her dominant, uninjured right hand, and use her non-dominant, injured left hand "as an assist or guide."⁵⁴

Based on Guardado's vocational qualifications and physical restrictions, Ms. Lock "identified positions where she would not have to communicate in the English language,... [p]ositions that are entry level in nature, that she could learn on the job, that did not require previous vocational experience, and that would be physically appropriate for her given her limitation."⁵⁵ The survey identified seventeen available jobs that Ms. Lock confirmed were within Guardado's physical

⁵² 2017 TR-58-59; Appellant's Appendix A-63-64.

⁵³ 2017 TR-60; Appellant's Appendix A-65.

⁵⁴ 2017 TR-60-61; Appellant's Appendix A-65-66.

⁵⁵ 2017 TR-61; Appellant's Appendix A-66.

restrictions and vocational qualifications by personally viewing each position and by speaking directly to each employer.⁵⁶ Ms. Lock confirmed that none of the jobs would require lifting or heavy maneuvering with Guardado's injured left hand.⁵⁷ Rather, "[t]hat could all be done with the dominant [unrestricted] hand."⁵⁸ Ms. Lock ultimately concluded that the representative sample of jobs identified on the survey proved within a reasonable degree of vocational probability that if Guardado conducted a job search, she could "find work within her physical restrictions and vocational qualifications," earning \$330.00 per week, which is minimum wage.⁵⁹

Ms. Lock specifically rebutted Guardado's contention that she was a displaced worker, citing that she was 38 years-old, a high school graduate in her native country, and that there are employers who prefer non-English speaking workers because they are doing business in their own community and their clients are Hispanic.⁶⁰ Ms. Lock also rebutted Guardado's contention that she had performed a reasonable job search, citing to Guardado finding only six prospective employers on February 13, 2017 and five prospective employers in the month of

⁵⁶ 2017 TR-63-64; Appellant's Appendix A-68-69.

⁵⁷ 2017 TR-69; Appellant's Appendix A-74.

⁵⁸ 2017 TR-69; Appellant's Appendix A-74.

⁵⁹ 2017 TR-65, 68; Appellant's Appendix A-70, 73.

⁶⁰ 2017 TR-66; Appellant's Appendix A-71.

April for a total of eleven jobs identified.⁶¹ Ms. Lock testified that in her work in job placement, the “rule of thumb” is applying to ten jobs per week.⁶²

In keeping with the instructions from this Court, Ms. Lock specifically did not advise the prospective employers she identified for the survey that Guardado was undocumented.⁶³ Rather, she identified available jobs within Guardado’s physical restrictions and vocational qualifications in the region. Roos was then charged with “presenting evidence regarding the prevalence of undocumented workers in” those various job categories.⁶⁴

In order to accomplish this Court’s second instruction, Roos presented the expert testimony and report of Desmond J. Toohey, Ph.d. Dr. Toohey, an assistant professor of economics in the Alfred Lerner College of Business and Economics at the University of Delaware, conducted independent research to establish “how many unauthorized immigrants are in Delaware and... in what kind of jobs they’re employed.”⁶⁵ Dr. Toohey used not only the reports relied on by the Pew Research study cited by this Court,⁶⁶ but also “a number of other reports put out by the Department of Homeland Security and... reported on by those researchers at Pew

⁶¹ 2017 TR-66-67; Appellant’s Appendix A-71-72.

⁶² 2017 TR-67; Appellant’s Appendix A-72.

⁶³ 2017 TR-73-74, 84; Appellant’s Appendix A-78-79, 89.

⁶⁴ Guardado, Supreme Ct. at 121.

⁶⁵ 2017 TR-19; Appellant’s Appendix A-24.

⁶⁶ Guardado, Supreme Ct. at 121

Hispanic Center in front of Congress.”⁶⁷ This research established that there are between 20,000 and 25,000 undocumented immigrants working in Delaware.⁶⁸

Next, Dr. Toohey determined what kind of jobs the Delaware unauthorized immigrants were working.⁶⁹ He categorized employment in Delaware into two classifications, “occupations” and “industry.”⁷⁰ Occupation is “the kind of tasks and work that people perform in their jobs” and industry is “what business your employer is in.”⁷¹ This categorization allowed Dr. Toohey to present statistical evidence to the Board of the number of undocumented immigrants working in certain occupations and industries in Delaware. For example, “service occupations... which includes food service or housekeeping occupation employs some 5,000 unauthorized immigrants” and “some 4,000 unauthorized immigrants work for construction firms in Delaware.”⁷²

The third step in Dr. Toohey’s analysis applied these findings to the specific labor market survey presented by Ellen Lock.⁷³ Dr. Toohey examined the jobs identified by Ms. Lock and categorized each by industry and occupation.⁷⁴ This allowed Dr. Toohey to determine the number of undocumented immigrants

⁶⁷ 2017 TR-19; Appellant’s Appendix A-24.

⁶⁸ 2017 TR-46, 52; Appellant’s Appendix A-51, 57.

⁶⁹ 2017 TR-26; Appellant’s Appendix A-31.

⁷⁰ 2017 TR-26-27; Appellant’s Appendix A-31-32.

⁷¹ 2017 TR-26-27; Appellant’s Appendix A-31-32.

⁷² 2017 TR-27; Appellant’s Appendix A-32.

⁷³ 2017 TR-29-31; Appellant’s Appendix A-34-36.

⁷⁴ 2017 TR-29; Appellant’s Appendix A-34.

working in each category of job identified on the labor market survey.⁷⁵ Dr. Toohey provided the Board with an example of this methodology using the Embassy Suites job identified on the labor market survey:

So looking at the labor market survey again, it includes details of the kinds of tasks that will be performed on the job so I again, mapped that to descriptions of tasks from U.S. Department of Labor occupation descriptions and found that that very clearly closely matched housekeeping occupations and which again is actually part of the broader service occupation category and the industry there is then the broader one that includes hospitality because Embassy Suites would be a hotel chain and so they employ some 4,000 estimated unauthorized immigrants in Delaware.⁷⁶

Ultimately, Dr. Toohey's research concluded that "thousands of unauthorized immigrants are employed in Delaware in each of the occupations and industries that appear in the survey" and that "the undocumented worker labor force... is well represented by this survey."⁷⁷

At the hearing on remand, Guardado testified that she has looked for work within her physical restrictions in 2017.⁷⁸ She submitted to the Board documentation displaying eleven employers, four of which were directly from Roos' labor market survey.⁷⁹ When asked whether she could perform the activities

⁷⁵ 2017 TR-29-30; Appellant's Appendix A-34-35; Report of Desmond Toohey, Ph.d.; B-126-130.

⁷⁶ 2017 TR-31; Appellant's Appendix A-36.

⁷⁷ 2017 TR-31; Appellant's Appendix A-36.

⁷⁸ 2017 TR-91; Appellant's Appendix A-96.

⁷⁹ 2017 TR-91-92; Appellant's Appendix A-96-97; Guardado's Trial Exhibit 1; B-161-165.

in a restaurant kitchen for a full eight hours per day, Guardado replied “I will try to work, because... I want to work.”⁸⁰ She also advised that she had personal contacts at some of the restaurants where she applied and that “[s]ome people said that I could get the job, but if there is difficult with restrictions for me to perform the activity.”⁸¹

Since the prior hearing before the Industrial Accident Board in 2015, Guardado had enrolled in a school to learn English.⁸² She also is learning to use a computer, and does use the internet, managing her Facebook account from her smart phone.⁸³ Guardado confirmed that she drives and had driven as far as Newark, Delaware from her new home in Crumpton, Maryland⁸⁴ to apply for a job.⁸⁵

Despite these efforts to assimilate to the United States culture, Guardado confirmed that she had made no efforts in the thirteen years that she has been in this country to become an authorized worker and she has no intention to do so.⁸⁶

⁸⁰ 2017 TR-95; Appellant’s Appendix A-100.

⁸¹ 2017 TR-93; Appellant’s Appendix A-98.

⁸² 2017 TR-90; Appellant’s Appendix A-95.

⁸³ 2017 TR-97-98; Appellant’s Appendix A-102-103.

⁸⁴ Guardado relocated to Crumpton, Maryland without notice to Roos. As such, the Board did not consider that fact when assessing the labor market survey, noting that “[a] claimant cannot invalidate an otherwise proper labor market survey by changing his or her residential address shortly before the hearing, particularly when no notice was provided to the employer.” Guardado, 2017 at 13, footnote 5.

⁸⁵ 2017 TR-99; Appellant’s Appendix A-104.

⁸⁶ 2017 TR-100; Appellant’s Appendix A-105.

Following the remand hearing, the Board concluded that Roos' "updated labor market survey provide[d] reliable and sufficient information regarding actual jobs that are available within Claimant's capabilities" and that Roos "has presented evidence of the prevalence of undocumented workers in the categories where the labor market survey shows the availability of specific jobs."⁸⁷

The Board rejected Guardado's purported job search as "minimal" and "insufficient to warrant a finding of actual displacement."⁸⁸ Despite Guardado's progress in her education (began an English course and use of a smart phone), the Board did determine that she "continues to be a *prima facie* displaced worker based on her limited education and minimal work experience as an unskilled laborer with a one hand work restriction."⁸⁹

However, the Board found that Roos "successfully rebutted Guardado's showing that she is a *prima facie* displaced worker by presenting evidence of availability of jobs within her capabilities."⁹⁰ The Board specifically cited and relied on this Court's prior ruling on employers' burden of proof and concluded that Roos "was successful in establishing the appropriate nexus between actual

⁸⁷ Guardado, 2017 at 14.

⁸⁸ Id. at 13; The Board reached this conclusion after the 3/24/2015 hearing as well, ruling that Guardado "had only applied to a few jobs" and "there [was] no basis to find 'actual' displacement." Guardado, 2015 at 8.

⁸⁹ Guardado, 2017 at 12.

⁹⁰ Id. at 15.

jobs available on the labor market survey and the prevalence of undocumented workers in those job categories in Delaware.”⁹¹

As such, the Board granted Roos’ Petition for Review. Guardado appealed that decision to the Superior Court. The Honorable Richard F. Stokes affirmed the Board’s decision on February 7, 2018, “conclud[ing] that the Board’s decision is supported by substantial evidence and free from legal error.”⁹² In finding for Roos, Judge Stokes specifically referred to this Court’s 2016 decision as “provid[ing] a framework for the Board to” determine whether Roos met its burden of proof to show “(1) the availability of jobs available to Guardado and (2) the jobs are within the categories of occupations and industries employing undocumented workers in Delaware.”⁹³

Judge Stokes referenced this Court’s recognition of “the obvious challenges of gathering evidence on the existence of work available to undocumented workers”⁹⁴ and cited this Court’s 2016 ruling that “[n]othing... suggests that employers must present affidavits from employers confessing to their willingness to knowingly violate the law by employing undocumented workers.”⁹⁵ “Rather, what is required is that an employer who has the burden of showing that jobs are

⁹¹ Id.

⁹² Guardado, Super. Ct. 2018 at 9.

⁹³ Id. at 14

⁹⁴ Id. at 13.

⁹⁵ Id., citing Guardado, Supreme Ct. at 122.

actually available for an undocumented worker address that reality by presenting reliable market evidence that employment within the worker's capabilities is available to undocumented workers.”⁹⁶

Judge Stokes concluded that Roos “complied with the Supreme Court’s directives” and “successfully established work was available to Guardado within her restrictions and qualifications.”⁹⁷

Guardado appealed the Superior Court’s decision to this honorable Court.

⁹⁶ Id. at 13-14, citing Guardado, Supreme Ct. at 122.

⁹⁷ Id. at 16

ARGUMENT I

The Board's decision to grant Roos's Petition is supported by substantial evidence, free of legal error, and properly adheres to this Court's specific instructions on remand.

A. Question Presented

Whether the Board's decision that Roos succeeded on remand in presenting sufficient evidence, in accordance with the precise orders of this Court, to prove jobs are available to Guardado within her physical restrictions, vocational qualifications, and status as an undocumented claimant is supported by substantial evidence and free of legal error?

B. Scope and Standard of Review

This Honorable Court's review is limited; the Court reviews the decision of the Board solely to determine whether there is substantial competent evidence in the record to support the Board's findings and whether its decision is free from legal error.⁹⁸ Substantial evidence is evidence that affords a substantial basis of fact upon which the fact in question may be reasonably inferred.⁹⁹ It is also

⁹⁸ Johnson v. Chrysler Corp., 213 A.2d 64, 66 (Del. 1965); General Motors Corp. v. Freeman, 164 A.2d 686, 688 (Del. 1960); General Motors Corp. v. Jarrell, 493 A.2d 978, 980 (Del. Super. 1985).

⁹⁹ Delaware Alcoholic Beverage Control Commission v. Alfred I. DuPont School District, 385 A.2d 1123 (Del. 1978).

defined as more than a scintilla but less than a preponderance of evidence.¹⁰⁰ In reviewing the record for substantial evidence, the Court must consider the record in the light most favorable to the party prevailing below.¹⁰¹

In its capacity as a trier of fact, the Board must resolve the conflicts in the evidence that are presented to it.¹⁰² On appeal, this Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.¹⁰³

Deference is given to the decision of the Board.¹⁰⁴ When deciding issues of fact on review, the Court “shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted.”¹⁰⁵ A discretionary ruling of the Board will not be disturbed on appeal unless it is based clearly on unreasonable or capricious grounds.¹⁰⁶

Absent error of law, the standard of review for a Board's decision is abuse of discretion.¹⁰⁷ The Board has abused its discretion only when its decision has “exceeded the bounds of reason in view of the circumstances.”¹⁰⁸

¹⁰⁰ Breeding v. Contractors-One, Inc., 549 A.2d 1102, 1104 (Del. 1988).

¹⁰¹ Benson v. Phoenix Steele, C.A. No. 90-A-01-1, Herlihy, J. (Del. Super. November 6, 1992).

¹⁰² General Motors Corp. v. McNemar, 202 A.2d 803, 807 (Del. 1964).

¹⁰³ ¹⁰³ Johnson v. Chrysler Corp., at 67.

¹⁰⁴ Lisa Broadbent Ins. Co. v. Makowski, No. CIV.A. 10A-07007 CLS, 2011 WL 1938514, at *4 (Del. Super. Ct. Apr. 20, 2011)

¹⁰⁵ 29 Del. C. §10142.

¹⁰⁶ Seaford Feed Co. v. Moore, C.A. No. 85A-AP-3, Ridgely, J. (Del. Super., July 2, 1987) (ORDER).

¹⁰⁷ Digiacommo v. Bd. of Pub. Educ., 507 A.2d 542, 546 (Del.1986).

C. Merits of Argument

Prima Facie Displaced Worker

The first issue pending before the Board at the April 27, 2017 remand hearing was whether Guardado qualified as a *prima facie* displaced worker without consideration for her status as an undocumented immigrant. The Board had previously determined that Guardado “qualified as a displaced worker based on her undocumented legal status” alone.¹⁰⁹ On appeal, this Court ruled that “claimant’s status as an undocumented worker is not relevant to a determination of whether the claimant is a *prima facie* displaced worker” and therefore, the Board’s finding constituted legal error.¹¹⁰

On remand, the Board correctly applied this Court’s ruling and did not include Guardado’s undocumented status in its analysis of whether she is a *prima facie* displaced worker.¹¹¹ The Board concluded that despite Guardado’s “progress in her education (began an English course and use of a smart phone) since the last hearing, [she] continues to be a *prima facie* displaced worker based on her limited education and minimal work experience.”¹¹² The Board then properly cited the next step in the displaced worker doctrine analysis, which establishes the

¹⁰⁸ Pers.-Gaines v. Pepco Holdings, Inc., 981 A.2d 1159, 1161 (Del. 2009)

¹⁰⁹ Guardado, 2015 at 11.

¹¹⁰ Id.

¹¹¹ Guardado, 2017 at 11-12.

¹¹² Guardado, 2017 at 12

employer's right to rebut this finding of *prima facie* displacement "by presenting evidence of the availability of regular employment within the claimant's capabilities."¹¹³

This Court's Instruction on Roos' Burden of Proof

The second issue on remand was whether Roos presented sufficient evidence to prove that jobs are available to Guardado "with [her] undocumented status being taken into account as a factor."¹¹⁴ On this issue this Court previously penned multiple pages and a lengthy footnote establishing an employer's burden of proof and providing directions to the Board on the specific evidence sufficient to establish work is available to an undocumented claimant.¹¹⁵

This Court determined that an employer can meet its burden of proof that work is available to an undocumented claimant. This Court referenced "that there are large numbers of undocumented workers in our midst," citing to a 2014 study which identified 20,000 undocumented immigrants working or looking for work in Delaware.¹¹⁶ Given the reality of undocumented workers present in our region, this Court held that "[u]sing reliable social science methods, there should be no barrier to employers in presenting evidence regarding the prevalence of

¹¹³ *Id.* at 11, citing Howell v. Supermarkets Gen. Corp., 340 A.2d 833 (Del. 1975) and Chrysler Corp. v. Duff, 314 A.2d 915, 918 (Del. 1973) footnote 1.

¹¹⁴ Guardado, Supreme Ct. at 121.

¹¹⁵ *Id.* at 121-122.

¹¹⁶ *Id.* at 121, footnote 31

undocumented workers in certain types of jobs in certain regions, and combining that with more specific information about actual jobs in those categories.”¹¹⁷

This Court not only confirmed an employer can prove job availability for an undocumented claimant, this Court further prescribed the specific evidence sufficient to meet this burden of proof before the Board. This Court first abrogated Roos’ own fear that this burden of proof would require affidavits or testimony from prospective employers that they would “willingly violate the law by employing undocumented workers.”¹¹⁸ This Court confirmed that nothing in the previous appellate court decisions regarding undocumented workers suggests that Roos must present evidence of employers “confessing” that they have or will illegally hire an undocumented immigrant.¹¹⁹ This Court made clear that Roos is not required to “demonstrate specific employers exist who hire undocumented workers and have jobs within the claimant’s ability that are open.”¹²⁰

This Court understood that this implicit reality that Delaware employers are hiring thousands of undocumented workers is a concealed truth that is not provable through affidavits or testimony. Rather, proving that jobs are available to undocumented claimants requires a combination of evidence showing (1) “the prevalence of undocumented workers in certain types of jobs” with (2) “more

¹¹⁷ Guardado, Supreme Ct. at 121, footnote 32.

¹¹⁸ Id. at 122.

¹¹⁹ Id.

¹²⁰ Id.

specific information about actual jobs in those categories.”¹²¹ This Court again cited to a specific 2015 labor study identifying the top occupations for undocumented workers in Delaware and held that [u]sing this type of data, employers can map job openings in their region against the prevalence of undocumented workers in that region by sector.”¹²² If the employer presents this evidence, “the Board has to give it weight in making the ultimate determination whether an injured worker has employment available to her.”¹²³

This Court made clear that a labor market survey cannot identify jobs available to undocumented workers and that reliable data regarding the undocumented labor force cannot identify specific jobs available to a particular claimant. Rather, to conclude that jobs are available to an undocumented claimant (unlike a documented claimant) requires the combination of data showing the categories of jobs employing undocumented workers and a labor market survey identifying the availability of jobs within the specific claimant’s physical and vocational qualifications within those categories.

This combination of evidence is exactly what Roos presented to the Board at the remand hearing and as such constitutes sufficient evidence to support the Board’s 2018 decision according to this Court’s previous holding.

¹²¹ Id. at 121.

¹²² Id. at footnote 32.

¹²³ Id. at 121-122.

Evidence of Undocumented Workers in Certain Types of Jobs

While this Court's decision suggested that Roos' use of the 2014 and 2015 Pew Research studies would serve as sufficient evidence to prove the prevalence of undocumented immigrants working in certain occupations in Delaware, Roos went further and retained its own expert in the field of labor economics and economic demography, Dr. Desmond J. Toohey.¹²⁴ Dr. Toohey provided a March 27, 2017 report entitled, *The Distribution of Unauthorized Immigrants Across Jobs in the Delaware Labor Market*, which provided estimates of unauthorized immigrants across different occupations and industries in Delaware.¹²⁵ Using the same methodology¹²⁶ relied upon by government agencies such as the Census Bureau and the Department of Homeland Security, Dr. Toohey concluded that between 20,000 and 25,000 unauthorized immigrants are working in Delaware.¹²⁷

Further, Dr. Toohey provided the distribution of unauthorized immigrants across certain job types.¹²⁸ For example, Dr. Toohey's research established that approximately 5,000 unauthorized immigrants are working in service occupations in Delaware, 4,000 unauthorized immigrants are working in the retail trade

¹²⁴ 2017 TR-15; Appellant's Appendix A-20.

¹²⁵ Report of Desmond Toohey, Ph.d.; B-119-125.

¹²⁶ Guardado is not challenging Dr. Toohey's methodology on appeal.

¹²⁷ 2017 TR-52; Appellant's Appendix A-57.

¹²⁸ Report of Desmond Toohey, Ph.d.; B-124-126.

industry, and another 4,000 are working in construction.¹²⁹ Dr. Toohey’s research, report, and testimony provided the Board with the exact evidence the Supreme Court called for – “evidence regarding the prevalence of undocumented workers in certain types of jobs in certain regions...”¹³⁰

Evidence of Specific Jobs Available to Guardado

In accordance with this Court’s previous instructions, Roos also presented the vocational expert testimony of Ms. Ellen Lock. Ms. Lock identified specific jobs available in the open labor market within Guardado’s distinct physical restrictions and unique vocational qualifications.¹³¹ Ms. Lock prepared a labor market survey, which displayed a representative sample of seventeen actual positions available to Guardado specifically. These available jobs did not require a high school diploma (despite the fact that Guardado was a high school graduate in her native country), did not require prior experience, preferred Spanish-speaking candidates, and would allow for Guardado to use her injured, non-dominant left hand as an assist or guide (in accordance with the medical restrictions set forth by Guardado’s treating doctor and Roos’ medical expert).¹³²

¹²⁹ 2017 TR-27-28, 50; Appellant’s Appendix A-32-33, 55; Report of Desmond Toohey, Ph.d.; B-132.

¹³⁰ Guardado, Supreme Ct. at 121.

¹³¹ 2017 TR-59-62; Appellant’s Appendix A-64-67; Labor Market Survey; B-136-160.

¹³² 2017 TR-59-64; Appellant’s Appendix A-64-69.

Ms. Lock personally spoke to each prospective employer to confirm that a candidate with Guardado's work history, experience, education, and dialect would qualify for the position.¹³³ Ms. Lock also personally viewed each of the jobs identified on the survey, and witnessed employees performing the job duties which would be required by Guardado, to confirm she can physically perform same.¹³⁴

Guardado's argument that the jobs identified on the survey do not fit within her medical restriction as they "by definition require the use of two hands," mischaracterizes the survey and inaccurately describes Guardado's physical capabilities.¹³⁵ Guardado argues that Ms. Lock "identified jobs in a commercial kitchen and acknowledged that those jobs would require the use of both hands for various tasks."¹³⁶ Guardado also references that Ms. Lock "observed none of the employees doing kitchen prep work with only one hand."¹³⁷ However, no medical expert has limited Guardado to only using one hand. The record is clear that Dr. DuShuttle placed no restrictions on Guardado's dominant right upper extremity. He did place restrictions on her non-dominant, injured left extremity, but believed

¹³³ 2017 TR-64; Appellant's Appendix A-69.

¹³⁴ 2017 TR-63-65, 69, 81; Appellant's Appendix A-68-70, 74, 86.

¹³⁵ Opening Brief at 30.

¹³⁶ Opening Brief at 30.

¹³⁷ Opening Brief at 30.

she could use that left hand for simple activities, such as grasping light objects and regularly assisting her right hand.¹³⁸

Guardado's argument that she requires a purely one-hand job is also inconsistent with her own testimony before the Board. At the 2015 Board hearing, Guardado testified that "she normally uses her right hand primarily because she cannot use her left hand to lift heavy things."¹³⁹ At the 2017 hearing, she testified that she cleans, washes, and cooks at home and she drives.¹⁴⁰ Further, at both the 2015 and 2017 hearings, Guardado testified that she applied to jobs specifically identified on the labor market survey all of which required use of her dominant hand for essential functions and her non-dominant hand as a guide.¹⁴¹ In 2015 she applied to jobs at Taco Bell, Goodwill, and McDonalds¹⁴² and in 2017 she applied to Margaritas Restaurant, El Mercadito Convenience Store, La Consentida Grocery Store, and Mi Ranchito Mexican Food and Grocery.¹⁴³

The Board's decision confirms its understanding of Guardado's actual work restrictions as they ultimately determined that the jobs identified on the labor market survey would "require limited use of her left hand, but no lifting or heavy

¹³⁸ 2015 TR-37; Appellant's Appendix A-42; DuShuttle 15-16; B-86-87.

¹³⁹ Guardado, 2015 at 7.

¹⁴⁰ 2017 TR-97, 99; Appellant's Appendix A-102, 104.

¹⁴¹ Guardado, 2015 at 7.

¹⁴² Id.

¹⁴³ Guardado's Trial Exhibit 1; B-161-165.

maneuvering” and therefore “provides reliable and sufficient information regarding actual jobs that are available within Claimant’s capabilities.”¹⁴⁴

The Board’s 2018 decision granting Roos’ Petition for Review specifically followed the precise instructions of this Court in requiring Roos to use “reliable social sciences methods” to show “the prevalence of undocumented workers in certain types of jobs in certain regions” through the testimony of Dr. Toohey and to “combin[e] that with more specific information about actual jobs in those categories,” through the testimony of Ms. Lock.¹⁴⁵

As such, the Board’s 2018 decision is free from legal error and is supported by substantial evidence.

¹⁴⁴ Guardado, 2017 at 7, 14.

¹⁴⁵ Guardado, Supreme Ct. at 121.

ARGUMENT II

The Superior Court's affirming decision correctly applied this Court's previous ruling regarding Roos' burden of proof in finding that Roos successfully established work is available to Guardado within her physical restrictions, vocational qualifications, and status as an undocumented claimant.

A. Questions Presented

Whether the Superior Court erred in finding that Roos complied with this Court's instruction on remand and presented sufficient evidence to meet its burden of proof to show job availability for Guardado?

B. Scope and Standard of Review

See Scope and Standard of Review for Argument I.

C. Merits of Argument

In determining whether the Board's decision was supported by sufficient evidence and free of legal error, the Superior Court utilized the specific language of this Court's 2016 opinion as the design for an employer meeting its burden of proof to show that employment is available to a prima facie displaced undocumented claimant.

The Superior Court first determined that the labor market survey and testimony of Ms. Lock "provided reliable and sufficient information regarding actual jobs that were available to Guardado within her capabilities and

limitations.”¹⁴⁶ The court cited this Court’s prior ruling that Roos was not required to present evidence that prospective employers “were willing to violate the law and hire undocumented workers.”¹⁴⁷ The court ruled that Ms. Lock was correct to “not inform prospective employers about Guardado’s undocumented status because it would be unrealistic to have employers admit that they may illegally hire undocumented workers.”¹⁴⁸

Rather, Ms. Lock provided a labor market survey which reliably identified 17 available jobs (8 still available at the time of the hearing) that accounted for Guardado’s lack of work experience, inability to speak English, education history, and physical limitations on her non-dominant left upper extremity.¹⁴⁹ This was sufficient evidence of job availability for Guardado, not taking into account her undocumented status.

Next, the Court found that “Dr. Toohey presented statistical evidence that showed that undocumented workers are employed throughout Delaware in occupations and industries that appeared in the labor market survey.”¹⁵⁰ The court ruled that Dr. Toohey’s testimony and report satisfied the exact requirement set forth by this Court’s 2016 decision: for Roos to use “reliable social sciences

¹⁴⁶ Guardado, Superior Ct. 2018 at 14

¹⁴⁷ Id. at 16.

¹⁴⁸ Id. at 14.

¹⁴⁹ Id.

¹⁵⁰ Id. at 16.

methods” to “present[] evidence regarding the prevalence of undocumented workers in certain types of jobs in certain regions...”¹⁵¹

By combing the evidence presented by Dr. Toohey and Ms. Lock, just as this Court instructed, Roos succeeded in complying “with [this] Court’s directives on presenting ‘reliable market evidence that employment within the worker’s capabilities is available to undocumented workers.’”¹⁵²

The Superior Court’s strict application of this Court’s instructions on remand confirms its affirmation of the Board decision is free from legal error and supported by substantial evidence.

¹⁵¹ Id. at 13, citing Guardado, Supreme Ct. 2016 at 122.

¹⁵² Id. at 16, citing Guardado, Supreme Ct. 2016 at 122.

ARGUMENT III

Guardado's argument contradicts this Court's prior ruling and ignores this Court's specific remand instructions in contending that Roos was required to present statistical evidence of other undocumented claimants with Guardado's specific physical and vocational limitations employed in Delaware and was required to present evidence that prospective Delaware employers would hire an undocumented worker.

A. Questions Presented

Whether Roos was required on remand to show statistical evidence of undocumented workers with Guardado's exact physical limitations and vocational qualifications working in Delaware and show actual evidence that prospective employers would hire an undocumented worker?

B. Scope and Standard of Review

See Scope and Standard of Review for Argument I.

C. Merits of Argument

This Court's instructions on remand were unambiguous. Roos can show job availability for Guardado by "presenting evidence regarding the prevalence of undocumented workers in certain types of jobs in certain regions, and **combining that** with more specific information about actual jobs in those categories."¹⁵³

¹⁵³ Guardado, Supreme Ct. 2016 at 121.

Guardado's arguments ignore these instructions entirely. First, Guardado contends that Dr. Toohey's "statistical evidence of the prevalence of undocumented workers in the Delaware labor market falls woefully short" of Roos' burden of proof because Dr. Toohey "failed to account for Claimant's work restrictions or any undocumented workers with disabilities."¹⁵⁴ However, Dr. Toohey was not charged with identifying jobs available to Guardado or jobs that could accommodate Guardado's physical and vocational restrictions. That is the purpose and function of the labor market survey. Dr. Toohey was called on to present reliable "evidence regarding the prevalence of undocumented workers" in the region.¹⁵⁵ Guardado concedes that Dr. Toohey "presented evidence only as to the general availability of jobs to undocumented workers."¹⁵⁶ That is what he was required to show and as such, there is no argument that Roos has met the initial burden of proof set forth in this Court's prior decision.

Next, Guardado contends that the labor market survey fails to identify jobs for Guardado, because "M[s]. Lock did not dare ask the prospective employers that she spoke to whether they would hire an undocumented worker."¹⁵⁷ Again, this point ignores this Court's prior instructions that Roos is not required to present

¹⁵⁴ Opening Brief at 28, 40.

¹⁵⁵ Guardado, Supreme Ct. at 121.

¹⁵⁶ Opening Brief at 43. *See also*, Opening Brief at 28 "Employer showed that undocumented workers are employed within the job categories included in the labor market survey..."

¹⁵⁷ Opening Brief at 28.

“affidavits from employers willing to say that they flout the law and knowingly employ undocumented workers”¹⁵⁸ or “affidavits from employers confessing to their willingness to knowingly violate the law by employing undocumented workers.”¹⁵⁹ Rather, Ms. Lock was charged with identifying jobs available to Guardado taking into account her physical and vocational limitations, without consideration of her undocumented status. Proving the jobs on the labor market survey are available to undocumented claimants is the purpose and function of Dr. Toohey’s statistical evidence.

Guardado contends that Ms. Lock not confirming that employers would hire an undocumented claimant is Roos’ way of “avoiding this issue altogether, shutting its eyes and hoping the matter will disappear.”¹⁶⁰ On the contrary, Roos instructed Ms. Lock not to confirm with the prospective employers whether they would violate the law by hiring an undocumented worker in order to fully comply with this Court’s specific instructions on remand.

Guardado’s disregard for this Court’s prior decision is most evident in her consistent argument that neither the labor market survey or Dr. Toohey’s statistical evidence **alone** can satisfy Roos’ burden of proof to show job availability to

¹⁵⁸ Guardado, Supreme Ct. at 121

¹⁵⁹ Id. at 122.

¹⁶⁰ Opening Brief at 29.

Guardado.¹⁶¹ As the Board and Superior Court correctly state, this Court never contemplated that either of these forms of evidence could **alone** satisfy Roos' burden. Rather, this Court specifically instructed Roos to **combine** the statistical evidence of occupations employing undocumented workers with market evidence of jobs available to Guardado within those previously identified occupations. This inherently requires the Board to consider both the evidence presented by Dr. Toohey together with the evidence presented by Ms. Lock.

This Court understood that Ms. Lock cannot present a labor market survey that confirms jobs available to undocumented workers. That is why the labor market survey must be joined with the labor statistics regarding undocumented immigrants working in the region. Similarly, this Court did not require Roos to present evidence of other injured undocumented claimants with the same exact characteristics of Guardado working in the region. This Court instructed Roos to present "market evidence regarding employment of undocumented workers in specific categories within the specific geographic areas" so that those categories can be matched with the specific jobs on the labor market survey tailored for Guardado's own unique characteristics." There is no precedent in this case or others to support Guardado's contention that Roos must present evidence of other

¹⁶¹ Opening Brief at 28, 30-32, 30-40, 43-44. (emphasis added)

injured claimants with identical characteristics to the claimant working in order to prove that work is available to Guardado.¹⁶²

In effect, Guardado is arguing the issue that was present before this Court on the prior appeal in this case; whether an undocumented claimant's status automatically qualifies her as a displaced worker or whether an employer can meet its burden of proof that jobs exist for an undocumented claimant within Delaware's labor market. That issue was decided by this Court, which determined that employers can meet their burden of proof with evidence showing both the types of industries and occupations employing undocumented workers and jobs available to a specific claimant within those industries and occupations.¹⁶³ This Court emphasized that "using reliable social science methods, there should be no barrier to employers in presenting evidence regarding the prevalence of undocumented workers in certain types of jobs in certain regions, and combining that with more specific information about actual jobs in those categories."¹⁶⁴ Therefore, Guardado's argument that "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

¹⁶² Opening Brief at 32.

¹⁶³ Guardado, Supreme Ct. at 121-122.

¹⁶⁴ Id. at 121

there are jobs available to her contradicts this Court's decision and specific instructions on remand.¹⁶⁵

Guardado's final contention, that she successfully rebutted Roo's labor market survey with an independent job search, has no merit and is wholly inconsistent with Watson v. Wal-Mart, 30 A.3d 775 (Del. 2011); this Court's seminal case on the issue of what constitutes sufficient evidence for a claimant to establish "actual" displacement.¹⁶⁶ There is substantial evidence supporting the Board's decision to reject Guardado's job search in both the 2015 decision and the 2017 decision as insufficient to establish she is an "actual" displaced worker per Watson.¹⁶⁷ The claimant in Watson was a 56-year-old Wal-Mart employee who applied for twenty-eight jobs, including six of the nine jobs identified on the employer's labor market survey.¹⁶⁸ Wal-Mart (one the of country's largest employers) also could not accommodate his work restrictions within their own company.¹⁶⁹ Based on this evidence, the Court concluded that Watson had completed a reasonable job search and because his efforts were unsuccessful, he qualified as a displaced worker.¹⁷⁰

¹⁶⁵ Opening Brief at 31.

¹⁶⁶ Opening Brief at 33.

¹⁶⁷ Guardado, 2015 at 8; Guardado, 2017 at 13.

¹⁶⁸ Watson v. Wal-Mart, 30 A.3d 775 (Del. 2011) at 780.

¹⁶⁹ Id.

¹⁷⁰ Id. at 780-781.

In contrast, Guardado presented no demonstrative evidence of a job search at the 2015 hearing, testifying only that she had “been filling out applications.”¹⁷¹ At the 2017 hearing on remand, Guardado offered documentation of six employers she contacted on February 13, 2017 and five additional employers that she identified in the month of April.¹⁷² Unlike Watson who applied to the majority of the jobs identified on the employer’s labor market survey,¹⁷³ Guardado contacted only four of the seventeen jobs identified on Roos’ survey.¹⁷⁴ Lastly, Roos is a small local business that closed its doors permanently in 2016 and therefore cannot be expected to rehire/accommodate prior employees to the extent Wal-Mart is.

As such, the Board’s conclusions that Guardado’s job searches have been minimal and insufficient to establish “actual” displacement are supported by substantial evidence and consistent with the precedent set by this Court.¹⁷⁵ The record lacks sufficient evidence to support Guardado’s contention that she conducted a reasonable job search sufficient to rebut Roos’ labor market survey and the expert testimony of Ms. Lock.

¹⁷¹ 2015 TR-43; B-44.

¹⁷² 2017 TR-66-67; Appellant’s Appendix A-71-72; Guardado Trial Exhibit 1; B-161-165.

¹⁷³ Watson, at 780.

¹⁷⁴ Guardado Trial Exhibit 1; B-161-165.

¹⁷⁵ Guardado, 2015 at 8; Guardado, 2017 at 13.

CONCLUSION

The Board properly exercised its discretion and duties as finder of fact in determining that Guardado's total disability benefit entitlement has terminated.

The Board followed this Court's 2016 remand instructions in requiring Roos to present evidence regarding the prevalence of undocumented workers in certain types of jobs and combine that with evidence of actual jobs available to Guardado specifically within those previously defined categories.

Because the Board strictly adhered to this Court's instructions, its decision, that the combination of evidence presented by Dr. Toohey and Ms. Lock is sufficient to successfully establish the appropriate nexus between actual jobs available on the labor market survey and the prevalence of undocumented workers in those job categories in Delaware, is supported by substantial evidence and free from legal error.

Accordingly, Roos respectfully submits that this Court should affirm the decisions of the Superior Court and Board below.

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