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RE: *Haines Fabrication & Machine v. Ralph G. Burkovich*  
C.A. No. S13A-10-004 (THG)

Date Submitted: March 28, 2014  
Date Decided: June 20, 2014

*On Appeal from Decision of the Industrial Accident Board:*  
**AFFIRMED IN PART AND REMANDED IN PART.**

Dear Counsel:

This is the Court's decision on Employer Haines Fabrication & Machine's ("Haines") appeal of the Industrial Accident Board's ("the Board") decision dated October 2, 2013, which denied Haines' Petition for Review of Termination ("Petition for Review"). The Board determined that although Claimant Ralph G. Burkovich ("Burkovich") was medically capable of working in a sedentary capacity, he was a *prima facie* displaced worker, and thus, entitled to total disability benefits. The Board's decision is **AFFIRMED in part** and **REMANDED in part** for the reasons set forth below.

## STATEMENT OF THE CASE

### A. Factual & Procedural Background

On September 1, 2010, while working for Haines, Burkovich injured his lower back in a compensable industrial accident. As a result, Burkovich has received certain workers' compensation benefits including compensation for total disability.

On March 1, 2013, Haines filed a Petition for Review, alleging Burkovich was no longer totally medically disabled, and therefore, should have his total disability benefits either terminated or reduced. Burkovich, however, maintained he was still totally medically disabled and entitled to total disability compensation. A hearing on the merits was held before the Board on September 25, 2013. The Board issued a decision on October 2, 2013, denying Haines' Petition for Review and awarding total disability benefits to Burkovich. The Board also awarded Burkovich attorneys' fees in the amount of \$5,600.00 and payment of medical witness fees.

Haines filed an appeal of the Board's decision with the Superior Court on October 30, 2013. Briefing is complete and the matter is ripe for decision.

## DISCUSSION

### A. Standard of Review

The review of the Board's decision is confined to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board's findings of fact.<sup>1</sup> The Supreme Court and this Court have emphasized the limited appellate review of an agency's findings of fact. The reviewing Court must determine whether the administrative decision

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<sup>1</sup> *Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

is supported by substantial evidence.<sup>2</sup> Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>3</sup> The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.<sup>4</sup> Questions of law are reviewed *de novo*.<sup>5</sup>

**B. The Board Hearing**

At the hearing, both Christopher Galuardi, M.D. (“Dr. Galuardi”), board-certified in anesthesiology and chronic pain management and Burkovich’s treating physician, and Lawrence Piccioni, M.D. (“Dr. Piccioni”), board-certified in orthopedic surgery and Haines’ expert medical witness, testified via deposition. Ellen Locke (“Locke”) from Coventry Work Services testified regarding the labor market survey she conducted in connection with this matter. Burkovich testified on his own behalf.

Burkovich testified that he had been a welder and metal fabricator since he was twelve (12) years of age, noting that this is the only work he has ever done. As an employee for Haines he performed specialty welding and fabricating services in both a commercial and residential context. He stated that on September 1, 2010, while employed by Haines, he suffered injury to his back when he was electrocuted by 350 amps and thrown across the room.

Burkovich sought medical care from Dr. Galuardi for the work injury and continues to see

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<sup>2</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

<sup>3</sup> *Oceanport Ind. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994).

<sup>4</sup> *Johnson*, 312 A.2d at 66.

<sup>5</sup> *Delhaize America, Inc. v. Baker*, 2002 WL 31667611, at \*2 (Del. Super. Sept. 18, 2002).

him for management of his pain. Dr. Galuardi prescribed Oxycodone and Hydrocodone to help control and reduce his pain. Burkovich continues to take such pain medications as needed. In November 2011, he sought relief in the form of surgery with Ronald Sabbagh, M.D. ("Dr. Sabbagh"), board-certified in orthopedic surgery.

Burkovich's back and right leg continue to cause him discomfort. At the Board hearing, he rated his pain on a scale of one to ten as a four, with pain medication. Simple activities cause him pain and the pain medications he is prescribed do not fully relieve his suffering.

Dr. Piccioni testified via deposition on behalf of Haines. He indicated that he visited with Burkovich on two occasions; the first of the visits was six (6) months post surgery on June 26, 2012. A physical examination of the lumbar spine showed he was sensitive to touch on the paralumbar areas, both the right and the left. He described pain in his L5 dermatome and pain off of the top of the right foot and towards the great toe. Dr. Piccioni noticed no atrophy in Burkovich's calf or quadriceps suggesting that he was using the leg. Burkovich's supine straight-leg raising test produced some back pain but no true sciatic tension signs.

After this first visit Dr. Piccioni diagnosed Burkovich with post hemilaminectomy and discectomy at L5-S1 and posterior spinal fusion at the same level. He felt it was possible that Burkovich was physically capable of performing some sedentary duty.

Dr. Piccioni saw Burkovich for the second time on April 12, 2013. He testified that Burkovich's complaints at the second visit were essentially the same as he had expressed at the initial visit, primarily right leg symptoms. During the visit, Dr. Piccioni conducted a physical examination and did not find any objective signs of true radiculopathy despite Burkovich's right leg symptoms. While the S1 nerve was shown to be in trouble through diagnostic study, Dr. Piccioni

found no clinical evidence of an S1 radiculopathy.

Dr. Piccioni testified that he was concerned that Burkovich's subjective presentation was out of proportion to his objective findings, noting that Burkovich had been out of work for some time and receiving treatment, yet there was no improvement. He noted that none of Burkovich's studies provided a reason as to why he is still having leg pain. His clinical examination failed to show any significant nerve damage or radiculopathy. Following this second visit, Dr. Piccioni opined that Burkovich could return to full-time work in a light-duty capacity; an increase from his opinion following his first visit with Burkovich.

Dr. Piccioni also testified regarding the findings of the Functional Capacity Evaluation ("FCE") which was conducted on Burkovich in November 2012. The FCE found Burkovich capable of full-time sedentary work, *not* light-duty work. However, Dr. Piccioni testified that he found the study less than valid. He opined that in such testing, the failure of an individual to raise his baseline heart rate by at least 25 percent suggests submaximal effort. In Burkovich's case his heart rate never elevated to the suggested 25 percent, implying that he did not give his all in the performance. Once again, Dr. Piccioni testified that he believes Burkovich is actually capable of something more than sedentary work and could likely perform at light duty levels. Yet, he indicated that he did allow for additional restrictions on Burkovich. He believed Burkovich should not sit or stand more than two hours at a time, lift more than twenty (20) pounds, and/or bend, squat, kneel, or climb on anything more than on an occasional basis.

On cross examination Dr. Piccioni stated that he documented that Burkovich's hamstrings were tight with topliteal angle of 45 degrees on the right and 30 degrees on the left. He explained that people with back problems often cheat with their legs and particularly their hamstrings.

Therefore, tight hamstrings could be indicative of someone with back pain.

Dr. Piccioni confirmed that Burkovich's February 14, 2012 and March 30, 2012 MRIs indicate that the lordosis, the reverse "C" curve of Burkovich's spine, is straightened. He confirmed that this could be caused by muscle spasms. The MRIs also noted edema-like signal intensity in the soft tissue around Burkovich's operative site, as well as a bulging disc at L4-5 causing mild lateral recess stenosis on each side, and greater abnormality of the disc at L5-S1 which may be responsible for compression of the right L5 nerve root within the neuroforamina. Furthermore, the March 2012 MRI, performed with contrast, showed scar tissue surrounding the L5 nerve root. However, Dr. Piccioni cautioned that such diagnostics are not always accurate; and the March 2012 MRI may not be the best study because of the hardware previously installed in Burkovich's back.

Next, Locke testified on behalf of Haines. She is a certified Disability Management Specialist and is currently employed by Coventry Health Services as a vocational case manager. Her duties include performing labor market surveys and vocational evaluations and assessments for a variety of cases.

In the case of Burkovich, Locke performed a hypothetical vocational assessment and labor market survey in February 2013. She created a survey which featured eleven (11) jobs, and corresponding job analysis forms, all of which would be available in the local labor market and appropriate for Burkovich. The average weekly wage would be \$454.90, with the low average being \$446.95 and the high being \$462.85. Locke testified that each position required Burkovich to have minimal computer skills. Furthermore, each position offered on the job training to new hires.

Locke noted that she took into consideration that Burkovich was a high school graduate and had attended trade school to be a welder fabricator. Locke also relied on Dr. Piccioni's medical

restrictions which included sedentary work only, lifting no more than ten (10) pounds and avoiding bending, twisting, kneeling and squatting.

On cross examination Locke confirmed that she had not met with Burkovich prior to performing the vocational assessment and labor market survey. She also did not review Burkovich's resume nor his driving record. She testified that she did not inform the potential employers about the pain medications that Burkovich is currently taking.

During questioning by the Board, Locke testified that she assessed Burkovich to have a number of transferable skills from his educational background and time as a welder to include attention to detail, knowledge of specialized tools and equipment, the ability to follow safety rules and procedures, reading comprehension, mathematical and mechanical knowledge.

Dr. Galuardi testified by deposition on behalf of Burkovich. Dr. Galuardi has been Burkovich's treating physician since February 4, 2011 for the injuries he sustained in his September 2010 work accident. According to Dr. Galuardi, Burkovich's initial complaints were of back pain radiating into his right leg and numbness from both elbows down to his fingers. He conducted an initial physical examination of Burkovich which showed that when he bent at the waist the motion caused pain in his right leg and while twisting to the right caused pain in the right hip. Furthermore, straight-leg raising was positive on the right for radiculopathy. Dr. Galuardi testified that, together, this was indicative of nerve compression on the right.

Dr. Galuardi testified regarding the results of the December 2010 MRI. The MRI showed the disc hernia on the right at L5-S1 with an extruded component going into the later recess affecting the right S1 nerve root, ligament hypertrophy causing severe right-sided foraminal stenosis impinging the right L5 root, as well as mild to moderate disc bulging at L4-5. Dr. Galuardi

determined, in light of his own clinical assessments, that Burkovich had a lumbar disc herniation on the right at L5-S1, spine joint arthritis, some degenerative disc disease and a right lumbar radiculopathy. Burkovich was prescribed Gabapentin and his prescription for five (5) milligrams Hydrocodone was upped to seven-and-half (7.5) milligrams. Dr. Galuardi suggested Burkovich undergo epidural injections in his spine in order to alleviate the pain.

Although Burkovich underwent epidural injections in the spine, he only received temporary improvement of his symptoms. As a result, he submitted to surgery on November 8, 2011 with Dr. Sabbagh. Dr. Sabbagh performed a right-sided hemilaminectomy, right-sided facetectomy, foraminotomy and a posterior spinal fusion at L5-S1 with a nonsegmental fixation device and bone grafting at L5-S1. Post surgery, Burkovich was able to return to work. However, Haines refused to adhere to a thirty (30) pound lifting restriction placed upon Burkovich. Dr. Galuardi wrote to Haines advising that failure to adhere would result in Burkovich's removal from work. Subsequently, Dr. Galuardi placed Burkovich on total temporary disability.

Dr. Galuardi testified that after Burkovich's surgery he continued to treat him, as Burkovich continued to experience back and right leg pain. A second MRI was conducted in February 2012. This MRI revealed the presence of a fixation device that Dr. Galuardi had not been expecting and with which he was not familiar. Dr. Galuardi prescribed Lamictal, a nerve pain medication, and Lidoderm patches to help the symptoms.

A third MRI was conducted in March 2012, this one with contrast. The MRI revealed scar tissue posterior to the S1 endplate as well as residual bulging disc material. The disc material extends into the right neural foramen and is compressing the right L5 nerve root within the neural foramen; a condition that should have been taken care of with Burkovich's 2011 surgery. Dr.



Galuardi testified that these findings are consistent with the symptoms reported by Burkovich.

In February 2013 a CT myelogram was performed. The scan revealed a bulging disc at L5-S1, central canal narrowing within the spine, bony narrowing of the foramina, joint arthritis and swelling of the ligament. Ultimately, the findings were similar to the MRI performed with contrast.

Dr. Galuardi testified that he wanted a second opinion to determine if a revision of the surgery performed by Dr. Sabbagh would help alleviate some of Burkovich's right leg symptoms. Burkovich was later seen by Kennedy Yalamanchili, M.D. ("Dr. Yalamanchili"), board-certified in neurosurgery, on August 28, 2013. Dr. Yalamanchili opined that a surgical revision would help alleviate his right leg pain. Dr. Galuardi noted that it was his belief that there is a 60 to 70 percent chance that surgical revision could be successful in relieving Burkovich's pain.

Dr. Galuardi has maintained Burkovich on total disability since his failed November 2011 back surgery. He justified his restrictions noting that Burkovich has a very hard time with prolonged weight-bearing on his right leg as well as with bending, lifting, twisting, and/or extending his spine. Dr. Galuardi has diagnosed Burkovich with ongoing right L5 lumbar radiculopathy, a right L5-S1 disc herniation, epidural scarring at the right of L5-S1, failed back surgery syndrome, degenerative disc disease and spondylosis at L4-5. Dr. Galuardi related the L5-S1 findings to the 2010 work accident and the others to a degenerative process.

He maintains that Burkovich has never expressed any sign of symptom magnification, and his complaints have been consistent with the diagnostic studies performed. Burkovich's reported pain while off and on the medications did not vary from his initial assessment in February 2011.

Dr. Galuardi disagreed with Dr. Piccioni's opinion that Burkovich is capable of working in a sedentary to light-duty capacity. He opined that while Burkovich is physically capable of working

in such capacity, his interactions with and observations of Burkovich do not support his employability in that regard. Dr. Galuardi testified that Burkovich also could not perform any of the jobs listed on the Labor Market Survey. Burkovich lacks phone skills and knowledge of proper phone etiquette. He also has no computer skills. Dr. Galuardi noted that he did try to get Burkovich to use his computer at one of the visits but he would not touch it. Additionally, Burkovich does not have any specific vocational rehabilitation training, and is not suitable for any kind of interaction with customers.

Dr. Galuardi confirmed that if Burkovich were forced to attempt sedentary work it would not be unreasonable to start him off in a limited capacity and titrate that up. He maintained, however, that Burkovich would still be headed towards a second back surgery in the near future.

### C. Questions Presented

(A.) *Was the Board's conclusion that Burkovich is no longer medically, totally disabled free from legal error and supported by substantial evidence?*

When an employer files a petition to terminate the claimant's benefits, the employer bears the burden of demonstrating the claimant is no longer totally incapacitated for the purpose of working.<sup>6</sup>

In the present case, Dr. Piccioni, on behalf of Haines, testified that Burkovich was actually capable of something more than sedentary work and could likely perform at light duty levels with restrictions.<sup>7</sup> Dr. Galuardi, Burkovich's treating physician, acknowledged in his testimony that

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<sup>6</sup> *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995) citing *Governor Bacon Health Center v. Noll*, 315 A.2d 601, 603 (Del. Super. 1974).

<sup>7</sup> Piccioni Dep. at 19:19-22.

Burkovich was likely capable of sitting at a desk and working in some sedentary capacity.<sup>8</sup> Dr. Galuardi's opinion was also consistent with the FCE. The FCE found Burkovich capable of full-time sedentary work. Therefore, the Board found no dispute that Burkovich was physically capable of working in some capacity and was therefore no longer medically, totally disabled.

Accordingly, the Court affirms the Board's determination that Burkovich is no longer medically, totally disabled because such decision is supported by substantial evidence in the record.

(B.) *Did the Board commit legal error in determining Burkovich's displaced worker status?*

It is Haines' contention that the Board's determination that Burkovich was a *prima facie* displaced worker was erroneous and improper because there was never any allegation by Burkovich that he was a displaced worker.<sup>9</sup> Haines alleges "the Board completely ignore[d] the scope of the matter before their considerations".<sup>10</sup> The issue before the Board was solely one of whether or not Burkovich was totally, medically disabled from employment.<sup>11</sup> If Burkovich intended to rely on the displaced worker doctrine, then it should have been raised or explored prior to the Board hearing.<sup>12</sup> Therefore, "[t]he Board's *sua sponte* determination that Burkovich was a *prima facie* displaced worker was overreach and was not an issue alleged or properly before the Board."<sup>13</sup>

On the other hand, Burkovich argues the displaced worker doctrine was properly before the

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<sup>8</sup> Galuardi Dep. at 44:21-23.

<sup>9</sup> See Haines' Opening Br. on Appeal at 9.

<sup>10</sup> *Id.* at 10.

<sup>11</sup> *Id.* at 12.

<sup>12</sup> *Id.* at 11.

<sup>13</sup> *Id.* at 12.

Board because Haines indicated in their portion of the Pretrial Memorandum that the doctrine did not apply as a defense.<sup>14</sup> Furthermore, the majority of the evidence presented at the Board hearing related to Burkovich's "age, education, general background, and his occupational and general experience. . ." – all factors taken into consideration by the Board when determining an individual's displaced worker status.<sup>15</sup> Haines' failure to object to the evidence presented regarding the displaced worker doctrine amounts to a waiver of that issue.<sup>16</sup>

In *Peuchen, Inc. v. Heluck* the Delaware Superior Court noted the confusion that exists as to the procedure to be followed in applying the displaced worker doctrine.<sup>17</sup> However, the Court noted that "fairness would indicate that an employer should be entitled to some advance notice that employee is relying on that doctrine."<sup>18</sup> In remanding the case to the Board for further proceeding, the *Peuchen* Court stated:

The question of whether a case may fall within the displaced worker doctrine is a matter which properly should be explored at a stage *prior* to the hearing. In this way both sides can be aware of the proof which they must present both direct and rebuttal. Here, it appears the matter was not raised or explored prior to the hearing and that no argument involving that doctrine was made even at the close of the hearing.<sup>19</sup>

Prior to the Board hearing there was never any allegation by Burkovich that he was in fact a displaced worker. Burkovich did not raise that he was actually displaced nor did he claim he was

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<sup>14</sup> Burkovich's Answering Br. at 8.

<sup>15</sup> *Id.* at 10.

<sup>16</sup> *Id.*

<sup>17</sup> 391 A.2d 220, 223 (Del. Super. Aug. 8, 1978).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 224 (emphasis added).

a *prima facie* displaced worker in the Pretrial Memorandum or the Joint Stipulation of Facts, two important documents utilized by the Board to streamline the parties' issues prior to the hearing.

For example, in the Pretrial Memorandum, dated February 28, 2013, Haines indicated that the "Displaced Worker Doctrine does not apply" as a defense.<sup>20</sup> In response to the allegations set forth in Haines' portion of the Pretrial Memorandum, Burkovich responded by stating that "Claimant is partially disabled, if not totally disabled as a result of this Industrial Accident."<sup>21</sup>

Haines' pretrial election represents its contention that the displaced worker status of Burkovich was inapplicable to its Petition for Review. Burkovich had ample opportunity to challenge such contention but instead proceeded forward on the contention that he remained totally disabled pursuant to Dr. Galuardi's opinion.

Additionally, prior to the Board hearing the parties submitted a Joint Stipulation of Facts ("the Stipulation"). The Stipulation states, in relevant part:

4. On March 1, 2013, Employer filed a Petition for Review alleging that Claimant was no longer totally disabled [and] physically able to return to work.
5. Employer contends that its petition is supported by the testimony of its medical expert, Dr. Lawrence Piccioni, who concluded that Claimant is able to return to work in a full-time light duty capacity.
6. Claimant opposes employer's petition. Claimant contends that he is still totally disabled and that this contention is supported by the testimony of Claimant's medical expert, Dr. Christopher Galuardi.
7. A labor market survey was completed in connection with Employer's Petition by vocational rehabilitation specialist Ellen Locke at the Employer's request. Employer contends the labor market survey demonstrates work within

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<sup>20</sup> Pretrial Memorandum at 3.

<sup>21</sup> *Id.*

Claimant's restrictions at with an average weekly wage between \$446.94 (low) and \$462.85 (high). Claimant contests Employer's contentions in this regard.<sup>22</sup>

Despite the holding in *Peuchen*, Burkovich relies on *Wallace v. Mountaire Farms, Inc.* for the proposition that even if an issue is not raised prior to trial, the issue can still be addressed by the Board;<sup>23</sup> therefore, the displaced worker doctrine was not waived when Burkovich failed to raise it before trial. In the case of *Wallace* the Employer failed to disclose the forfeiture issue in the pre-trial memorandum.<sup>24</sup> The Employer also failed to provide notice to opposing counsel of the forfeiture defense until two (2) days prior to the Board hearing.<sup>25</sup> Yet, this Court held that the Employer did not waive the forfeiture issue because "the Employer had raised the issue in his opening statement, developed the issues during cross-examination, and argued the issue in his closing statement".<sup>26</sup>

Burkovich is mistaken; that is not the case here. Unlike the Employer in *Wallace*, Burkovich did not raise the displaced worker issue at any time pre-trial nor did he raise the issue in his opening statements, closing statements, or develop the theory during the Board hearing.

During opening statements before the Board, counsel for Haines stated ". . .this is *solely* a matter of whether Mr. Burkovich is currently totally disabled from employment. . .".<sup>27</sup> Counsel for

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<sup>22</sup> Joint Stipulation of Facts.

<sup>23</sup> 2002 WL 31558080 (Del. Super. Oct. 1, 2002), *aff'd* 817 A.2d 805 (Table) (Del. 2003).

<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Hearing Trans. at 5:17-18 (emphasis added).

Burkovich responded by stating:

It is [Dr. Galuardi's] opinion that the claimant is actually totally disabled. He also does and will testify as to some of his concerns with the jobs that are actually listed in the labor market survey and his observations of Mr. Burkovich as to his idea of the skill sets that he ultimately has in his observations in treating Mr. Burkovich over the years.<sup>28</sup>

Burkovich did not argue before the Board that he was a displaced worker. Although there was some testimony that may have proven relevant to a displaced worker inquiry, that testimony was elicited in response to the labor market survey conducted by Locke. Locke testified as to Burkovich's transferable skills based upon his vocational and educational history. Specifically, she testified that Burkovich was qualified for 11 jobs. In response, Burkovich claimed he was only ineligible for the courier and dispatcher positions. This would leave Burkovich with nine other potential employment options.

Finally, during closing statements counsel for Haines stated, in relevant part:

I submit that the issue we are concerned with today is the current medical status of [f] Mr. Burkovich and whether he is totally disabled. It is our burden to prove that he is no longer totally disabled.<sup>29</sup> The Claimant's belief that he can't do another job is not in control here. So I would suggest that the earnings loss associated with the work injury is reflective of the average weekly wages that Ms. Locke testified to.<sup>30</sup>

Counsel for Burkovich stated, in relevant part:

I do want to highlight first that it is the employer's burden in this case. He's actually looking at the jobs that are listed in the labor market survey. . . . Assuming the board finds that he is not totally disabled I would call into the question the dispatcher position and also the courier position that are listed in the 11 jobs as two positions that Mr. Burkovich ultimately could never would be able to be hired for based on the

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<sup>28</sup> *Id.* at 5:23-25, 6:1-4.

<sup>29</sup> *Id.* at 67:16-19.

<sup>30</sup> *Id.* at 69:24-25, 70:1-3.

skills that he actually does have and the skill sets that the employer has presented.<sup>31</sup>

Ultimately Doctor Galuardi and Doctor Piccioni agreed that Burkovich was physically capable of working in some capacity and was therefore no longer medically, totally disabled. Therefore, Haines satisfied its burden of proof.<sup>32</sup>

Burkovich not only waived the displaced worker doctrine when he failed to raise the issue prior to trial, but also failed to develop such issue during the Board hearing. Nonetheless, the Board, *sua sponte*, applied the displaced worker doctrine to evaluate Burkovich's claim. As a result, neither party was afforded a fair opportunity to develop the displaced worker theory. The Court believes fairness considerations require a remand for further proceedings so the parties can fully develop this theory.

(C.) *Was the Board's conclusion that Burkovich is a prima facie displaced worker free from legal error and supported by substantial evidence?*

Based upon the Court's ruling that it was legal error for the Board to determine Burkovich's displaced worker status, the Court at this time will not address whether such determination was supported by substantial evidence.

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<sup>31</sup> *Id.* at 70:10-11, 71:8-9, 71:21-25.

<sup>32</sup> *Torres*, 672 A.2d at 30 (Del. 1995). Where an employer seeks to terminate a claimant's disability benefits, the employer must prove that the claimant is no longer totally incapacitated for the purposes of working.

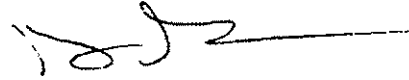


**CONCLUSION**

Based on the foregoing, the Board's finding that Burkovich is no longer medically, totally disabled is **AFFIRMED**. The Board's decision, however, is **REMANDED** in part for further proceedings in accordance with this Order.

**IT IS SO ORDERED.**

Very truly yours,



T. Henley Graves

oc: Prothonotary  
cc: Industrial Accident Board

FILED PROTHONOTARY  
SUSSEX COUNTY  
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